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Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making

R. Randall Kelso*

I. INTRODUCTION

During the past decade, the Supreme Court has decided six major separation of powers cases: *INS v. Chadha*,¹ *Bowsher v. Synar*,² *Morrison v. Olson*,³ *Mistretta v. United States*,⁴ *Public Citizen v. United States Department of Justice*,⁵ and *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*⁶ Commentators have referred to these cases as "an incoherent muddle,"⁷

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1. 462 U.S. 919 (1983).

2. 478 U.S. 714 (1986).

3. 487 U.S. 654 (1988).

4. 488 U.S. 361 (1989).

5. 491 U.S. 440 (1989).

6. 111 S. Ct. 2298 (1991). This listing includes the past decade's major separation of powers cases involving legislative versus executive power. In-depth discussion of cases dealing with aspects of separation of powers directly involving the judiciary, such as Congress' ability to create non-III courts, *see, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), constitutional requirements for standing, *see, e.g.*, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), or legislative or executive immunity from judicial processes, *see, e.g.*, *Gravel v. United States*, 408 U.S. 606 (1972) (legislative immunity); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (executive immunity), is beyond the scope of this Article. However, the author comments on these cases at the end of this Article. *See infra* note 479. The comments suggest a consistency in the Supreme Court's approach in judicial separation of powers cases and the legislative versus executive power cases discussed in the text.

7. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

"a paradox without a principle,"⁸ and "evinc[ing] something of a split personality."⁹

Despite these characterizations, careful examination of the six cases reveals an underlying order. The apparent confusion results from the fact that four different approaches to the separation of powers doctrine can be observed among the Justices of the Court. These four approaches track the four major approaches to judicial decision-making adopted by judges at various points in our legal history. A close examination reveals that the approach adopted by each Justice towards the separation of powers doctrine in each case is remarkably consistent. The cases only appear to be confused because different combinations of four decision-making approaches appear in the majority and the dissenting opinions in each case.

Part I of this Article describes these four major approaches to judicial decision-making. Part II discusses the separation of powers doctrine from the perspective of these four styles. Part III relates these approaches to the modern Supreme Court and suggests which Justices appear to follow which decision-making style. Part IV then discusses the six recent separation of powers cases in light of the four styles. Part V provides a brief conclusion. It is hoped that this discussion will not only illuminate recent separation of powers doctrine, but also help provide a framework within which to consider other aspects of Supreme Court decision-making.¹⁰

II. THE DEVELOPMENT OF AMERICAN LAW: FOUR STYLES OF JUDICIAL DECISION-MAKING

In 1977, Professor Grant Gilmore published his classic statement of the development of American law, *The Ages of American Law*.¹¹

8. Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1083 (1987).

9. Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991).

10. A companion piece to this Article dealing with modern Supreme Court decision-making and statutory interpretation is in the process of being written. See R. Randall Kelso, *Statutory Interpretation, the Modern Supreme Court, and the Four Judicial Decision-making Styles* (1993) [hereinafter Kelso, *Interpretation*]. A related piece providing a framework for considering constitutional review of legislation under the Due Process Clause, Equal Protection Clause, First Amendment, and other provisions of the Constitution, appears in R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and *Budrens Reconsidered**, 33 S. TEX. L. REV. 493 (1992).

11. GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977).

Professor Gilmore, building on earlier writings by Karl Llewellyn, divided American legal history into three distinct stages: a pre-Civil War Golden Age, a post-Civil War to World War I formalist or conceptualist age, and a modern period which harkens back to the Golden Age of the pre-Civil War period.¹² Commentators have called this modern period or approach to law "instrumentalism."¹³

As described by Gilmore and Llewellyn, the formalist or conceptualist style of decision-making is based upon the assumption that law is composed of a system of rationally related rules and that the judge's sole function is to apply those rules mechanically to the case at hand. It is a system of pure logical categorization and deduction. Judges need not inquire into the particular consequences of applying the rule to the case before them. The judge's sole duty is to apply the rule (or rules) applicable to the case at hand. The premise of this system is that change should come, if at all, from the legislative or executive branch. Judges should not make new rules; rather, they should merely apply existing law.¹⁴

12. *Id.* at 11-13.

13. See, e.g., Robert S. Summers, *Pragmatic Instrumentalism in Twentieth-Century American Legal Thought—A Synthesis and Critique of our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981) [hereinafter Summers, *Pragmatic Instrumentalism*]; David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949 (1981); Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984); Robert S. Summers, *On Identifying and Reconstructing a General Legal Theory—Some Thoughts Prompted by Professor Moore's Critique*, 69 CORNELL L. REV. 1014 (1984) [hereinafter Summers, *Reconstructing*].

14. See GILMORE, *supra* note 11, at 60-64; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 38-45 (1960). As Gilmore states:

The post-Civil War Judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been Change can only be legislative and even legislative change will be treated with a wary and hostile distrust.

GILMORE, *supra* note 11, at 62. For the classic account of formalism, see Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). For more modern discussions, see Summers, *Pragmatic Instrumentalists*, *supra* note 13, at 866-69; Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA, 1780-1940* (L. Stone & G. Geison eds., 1983); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-15 (1983). See also R. RANDALL KELSO & CHARLES D. KELSO, *STUDYING LAW: AN INTRO-*

The instrumentalist approach, according to Gilmore and Llewellyn, casts the judge in quite a different role. Under this approach, the judge must test the formulation and application of each rule by its purpose or policy. Where the reason for the rule stops, there stops the rule. Rules are not tested merely by internal logical symmetry, as they might be by a formalist. Rather, they should be tested by the social ends to which they are the means. Because the consequences of a rule are critical in making this determination, an instrumentalist judge tends to be result-oriented. Of course, judges must follow the law and cannot make law whimsically. But, for an instrumentalist judge, the act of interpreting a constitution, statute, or prior common law decision will often require consideration of sound social policy to resolve leeways in the law. Furthermore, there may be cases where the law does not command a particular result because no law exactly covers the situation or two conflicting rules arguably apply. In each such case, a judge can and must make law to help achieve sound social policy.¹⁵

DUCTION 113-23, 278-82, 388-405 (1984) (discussing formalism as a judicial decision-making style in common law, statutory interpretation, and constitutional law cases).

15. See GILMORE, *supra* note 11, at 91-98; LLEWELLYN, *supra* note 14, at 213-35. See also KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 217 (1962). Llewellyn states:

I call it our Grand Style . . . [A]s overt marks of the Grand Style: 'precedent' is carefully regarded, but if it does not make sense it is ordinarily re-explored; 'policy' is explicitly inquired into; alleged 'principle' must make for wisdom as well as for order if it is to qualify as such, but when so qualified it acquires peculiar status. On the side both of case-law and of statutes, where the reason stops there stops the rule; and in working with statutes it is the normal business of the court not only to read the statute but also to implement that statute in accordance with purpose and reason.

Id.

For an in-depth discussion of instrumentalism, see Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 863-96, 908-23. As Summers states,

The theory is instrumentalist in four related yet distinguishable ways. First, it views law not as a set of general axioms or conceptions from which legal personnel may formally derive particular decisions, but as a body of practical tools for serving specific substantive goals. Second, it conceives law not as an autonomous and self-sufficient system, but as merely a means to achieve external goals that are derived from sources outside the law, including the dictates of democratic processes and the "policy sciences." Third, it assumes that a particular use of law cannot be a self-justifying "end in itself." Uses of law can be justified only by reference to whatever values they fulfill. Finally, the law is considered to serve generally instrumental values rather than intrinsic ones. That is, law's function is to satisfy democratically expressed wants and interests, whatever they may be (within constitutional limits) . . . Furthermore, the theory treats the law "in action." It is concerned not only with the general nature of law as social means but also with law as it is actually used, and with the practical differences that law's uses make. This

The differences between formalism and instrumentalism can be better understood by noting that formalism and instrumentalism disagree on two basic propositions about law. The first concerns whether legal decision-making is separable from moral or social value considerations (in the sense of law being solely a body of principles about which predictions can be made—the positivist assumption, or law as science),¹⁶ or

focus extends beyond law's external effects to the workings of its internal processes—the operation of its complex implementive technology. Thus, the theory necessarily addresses official legal personnel, their roles as "social engineers," and the technical skill they must deploy in those roles. More than any other theory of law, pragmatic instrumentalism is concerned with the effectiveness of legal action.

Id. at 863-64. See also KELSO & KELSO, *supra* note 14, at 113-23, 191-95, 286-91, 388-405 (discussing instrumentalism as a judicial decision-making style in common law, statutory interpretation, and constitutional law cases).

For a classic account of an instrumental judicial decision-making style, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). As Cardozo stated therein:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence Logic and history and custom have their place. We will shape the law to conform to them when we may, but only within bounds. The end which the law serves will dominate them all.

Id. at 10, 66. For a general discussion of Cardozo's decision-making style as it relates to instrumentalism, see KELSO & KELSO, *supra* note 14, at 145-61.

16. On positivism generally in legal philosophy and its relation to "law as science" and the separation of law and morals, see EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 91-109 (rev. ed. 1974); LORD LLOYD OF HAMPSTEAD, *INTRODUCTION TO JURISPRUDENCE* 170-343 (4th ed. 1979). See also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 10-25 (1973) (discussing Langdell's view of law as science and Holmes' prediction theory of law). For a classic statement on positivism and the separation of law and morals, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

whether law is a body of rules testable by reference to some external standard of rightness (some social or moral value—law as normative or prescriptive, not descriptive).¹⁷ The second disagreement concerns whether law is to be represented as a set of logically consistent universal rules (what can be called the analytic, or conceptualist, assumption),¹⁸ or whether rules are ultimately to be judged as a means to some social end (a functional, or pragmatic, approach).¹⁹

With respect to these two propositions, formalists believe that legal decision-making and morals are separable (that is, law is a science), and that laws are ideally formulated as logically consistent universal rules.²⁰ Based on this reasoning, formalists view law as a closed system

17. On rejecting positivism as a jurisprudential approach to law and instead embracing a normative, or prescriptive, legal philosophy, see BODENHEIMER, *supra* note 16, at 134-68 (discussing natural law); LLOYD, *supra* note 16, at 79-169 (same); Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 874-81 (discussing "value theory" and instrumentalism). For Professor Fuller's classic rebuttal to H.L.A. Hart's article, see Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

18. See BODENHEIMER, *supra* note 16, at 95-99 (discussing analytic positivism); LLOYD, *supra* note 16, at 170-98 (same); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950-66, 1000-16 (1988). As Weinrib notes:

The second consequence of the connection between law and the immanent intelligibility of form is that legal form is inherently non-instrumental For formalism, legal ordering is not the collective pursuit of a desirable purpose. Instead, it is the specification of the norms and principles immanent to juridically intelligible relationships. Formalism repudiates analysis that conceives of legal justification in terms of some goal that is independent of the conceptual structure of the legal arrangement in question.

Id. at 964-65.

19. See BODENHEIMER, *supra* note 16, at 111-33 (discussing sociological jurisprudence and legal realism); LLOYD, *supra* note 16, at 344-564 (sociological jurisprudence and American legal realism discussed); Weinrib, *supra* note 18, at 955. As Weinrib notes:

The dominant tendency *today* is to look upon the content of law from the standpoint of some external ideal that the law is to enforce or make authoritative. Implicit in contemporary scholarship is the idea that the law embodies or should embody some goal (e.g., wealth maximization, market deterrence, liberty, utility, solidarity) that can be specified apart from law and can serve as the standard by which law is to be assessed. Thus law is regarded as an instrument for forwarding some independently desirable purpose given to it from the outside.

Id. (emphasis added) (footnotes omitted).

For a classic statement of the functional approach to law, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821-49 (1935). See also Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 882-89 (discussing means-end reasoning and instrumentalism).

20. See generally *supra* note 14 and accompanying text. See also Grey, *supra* note

of related rules to be logically or mechanically applied.²¹ In contrast, instrumentalists think that law is always testable by reference to some external standard,²² and they view law in functional terms as a means

14, at 11-12. Grey states:

In the terms of the analytic scheme just sketched, the heart of classic theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles. When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case.

The system was doubly formal. First, the specific rules were framed in such terms that decisions followed from them uncontroversially when they were applied to readily ascertainable facts. Thus, the classic orthodoxy sought objective tests, and avoided vague standards, or rules that required determinations of state of mind. Second, at the next level up one could derive the rules themselves analytically from the principles.

Id. See also TWINING, *supra* note 16, at 10-11. Twining notes:

In so far as legal realism was in the first instance a reaction against an approach to law that was characterized as 'formalism,' Langdell can be treated as a leading representative of this approach

[Langdell] explained the basis of his approach as follows: [It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books.'

Id. (citations omitted); see also Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 867-68 n.4 (listing 12 differences between a formalist and a non-formalist approach to law).

21. See Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 889-90 ("Formalists generally viewed the law as a relatively closed system of conceptions and axioms from which judges and others could deduce resolutions of almost any issue."); Lloyd, *supra* note 16, at 344 ("[Under sociological jurisprudence, there is] a rejection of a 'jurisprudence of concepts,' the view of law as a closed logical order. The shortcomings of formal, logical analysis were noticed as the twentieth century produced new problems for which existing law did not provide solutions."). See generally *supra* notes 14, 20 and accompanying text.

22. See, e.g., Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 875. Summers states:

A general theory of law that does not address issues of value is, in my opinion, fundamentally incomplete. The law is not merely a formal receptacle. It includes substantive content

[M]ost of the leading instrumentalists . . . followed . . . the American pragmatist philosophers in subscribing to a theory of value that may be char-

to the end of that standard.²³

The existence of two relevant dimensions, however, means that there must be at least four possible modes of legal analysis, not merely the two on which Llewellyn and Gilmore focus the brunt of their attention. These two additional modes of legal analysis are included in the Table below.

TABLE 1
Styles of Judicial Decision-Making

| | | |
|---|--|--|
| | Positivism: Judges as Scientists | Prescriptivism: Judges as Normative Actors |
| Law as Logical, Analytic, or Conceptualist Attitude | Formalism | Natural Law |
| Law as Means to Ends, Functional, or Pragmatic Approach | Holmesian | Instrumentalism |

As this table suggests,²⁴ one of the two additional modes of legal

acterized as utilitarian, quantitative, conventionalist, and majoritarian

Most pragmatic instrumentalists believed that values in general and the goals of rules and other legal precepts in particular must derive from prevailing wants and interests.

Id. See generally Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 874-81 (discussing instrumentalism and value theory); see also *supra* note 15 and accompanying text.

23. See Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 882 ("That law is, in essence, a means, and only a means, to goals derived from sources outside the law, was perhaps the most characteristic tenet of pragmatic instrumentalism."); see generally *id.* at 882-89 (discussing means and goals in an instrumentalist approach to law); see also *supra* note 19 and accompanying text.

24. It should be noted that this taxonomy of four decision-making styles is not intended to represent an exhaustive list of possible jurisprudential approaches to deciding cases. Such a complete taxonomy of judicial decision-making styles is beyond the scope of this Article. Nevertheless, a few words are appropriate concerning how such a taxonomy would be developed consistent with the two basic questions concerning decision-making styles (positivist versus normative, and analytic versus functional) which frame Table 1.

First, one can imagine jurisprudential approaches which can be represented as a compromise between two of these four basic judicial decision-making styles. For

example, one way to view the American legal realist movement of the 1920s and 1930s is that it represents a transition between the Holmesian and instrumentalist judicial decision-making styles, with the more moderate American legal realists being closer to Holmes and the more radical legal realists being closer to modern instrumentalism. See KELSO & KELSO, *supra* note 14, at 191-95; KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 269-71 (1989). On the legal realist movement generally, see Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1930); John H. Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979); John H. Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980). Similarly, the sociological jurisprudence movement of Roscoe Pound can be viewed as a transition between Holmes and the moderate American legal realists. See KELSO & KELSO, *supra* note 14, at 191-95; BODENHEIMER, *supra* note 16, at 124-28 ("The realist movement in American jurisprudence may be characterized as a radical wing of the sociological school of law."); HALL, *supra*, at 269-71. On Pound's sociological jurisprudence approach generally, see Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1930); BODENHEIMER, *supra* note 16, at 118-20. On Holmes, Pound, and American legal realism generally, see Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL ED. 441 (1986).

Second, even within a particular judicial decision-making tradition, a complete taxonomy of decision-making styles reveals the existence of subdivisions. For example, there are a number of versions of natural law theory which a complete taxonomy would have to address. See *infra* note 42.

Third, there are a number of approaches to judicial decision-making which require three-dimensional treatment that are not within Table 1's two-dimensional approach. This three-dimensional treatment asks whether the theory is utopian or non-utopian. For discussion of some of these alternatives to non-utopian natural law, formalism, Holmesianism, and instrumentalism, see KELSO & KELSO, *supra* note 14, at 523-30 (discussing Plato, Hegelianism, Marxism, and nihilism).

Fourth, it is possible to adopt an approach towards deciding cases that follows one decision-making approach in some circumstances, and another approach in other circumstances. For example, the jurisprudential approach represented by H.L.A. Hart appears to be poised between formalism and instrumentalism. Where the law is clear, Hart pushes for a formalist approach to law; where leeways exist in the law, Hart pushes for an instrumentalist response. See generally H.L.A. HART, *THE CONCEPT OF LAW* Ch. VII (1961).

Finally, it must be noted that Professor Summers identifies, as does this Article, four main jurisprudential decision-making styles. Summers, *Pragmatic Instrumentalism*, *supra* note 13, at 862-63. See also ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 19 (1982). These styles track, but are not perfectly consistent with, the styles identified in this article. Professor Summers' four styles are analytic positivism, natural law, historical jurisprudence, and pragmatic instrumentalism. Analytic positivism is synonymous with the formalist theory of law, as reflected in Table 1. This theory adopts analytic and positivist premises; natural

analysis agrees with the instrumental premise that one should conceive law as a means to the end of some social standard, and not analytically as a system of logically related rules. However, this mode also agrees with the formalist view that judicial decision-making ideally should be separated from moral discourse. Because of Oliver Wendell Holmes' great influence in advocating this theory of law, this theory is denominated in Table 1 and in this article as the Holmesian approach to legal decision-making.

law is obviously synonymous with natural law. On the other hand, pragmatic instrumentalism, as used by Professor Summers, combines both the positivist pragmatism of Holmes and the instrumental pragmatism of modern-day instrumentalism. *See id.* at 22-34, 116-35 (listing Holmes and Pound as instrumentalists and stating that the positivist "prediction theory of law" forms part of the pragmatic instrumentalist approach, while at the same time critiquing the positivist prediction theory as failing to take into account the normative/prescriptive, instrumentalist dimensions of the law). It seems better to separate Holmes' pragmatic positivist jurisprudence from modern-day instrumentalism, thereby separating a positivist prediction theory of law from the more normative, or prescriptive, instrumental account of judicial decision-making. *See infra* text accompanying notes 25-41. Given this separation, the four major American judicial decision-making styles then become analytic positivism or formalism; natural law; and the two kinds of pragmatism, Holmesian jurisprudence and instrumentalism. Summers' final style of jurisprudence, the historical school, is best characterized as a transition from analytic positivism to Holmes' pragmatic focus on a rule's history. It has been noted that the historical school represented a break from analytic positivism in its recognition that "law is not an abstract set of rules simply imposed on society, but is an integral part of that society, having deep roots in the social and economic habits and attitudes of its past and present members." LLOYD, *supra* note 16, at 634. This follows Holmes' insight that the life of the law has not been logic, but experience. *See infra* text accompanying notes 25-26, 35-36. However, Holmes did not fully embrace a historicist approach, but rather used history in the context of determining the "de facto supreme power in the community" to whom the judge is to defer. Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 734-37 (1982). *See infra* text accompanying notes 31-33 (discussing Holmesian deference to the dominant forces in society). This transition in Anglo-American jurisprudence from Austin's analytic positivism through Maine and Maitland's historicism to Holmes is not included in Table 1 and is not discussed any further in this Article, because the historical school was mostly a European phenomenon which was never adopted as a main judicial decision-making style in the United States. *See* BODENHEIMER, *supra* note 16, at ch. 5. *But see* Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 (arguing that the judicial decision-making style in post-Civil War America is better described as "historism," which is a variation of the historical school, and not "formalism," as it has been typically described; Professor Siegel thus proposes that the ages of American law involved a transition from the pre-Civil War natural law style, to post-Civil war historicism, to early 20th-century Holmesian jurisprudence). A more thorough discussion of Professor Siegel's thesis is beyond the scope of this Article, except to note that as described by Professor Siegel, historicism and formalism are closely related to one another, *see id.* at 1450 n.81; both are related to Hegelianism, *see id.* at 1443 n.49; and, in another context, I have described Hegelism as a utopian version of formalism. *See* KELSO & KELSO, *supra* note 14, at 525-27.

As his famous aphorism states, Holmes thought that the life of the law was not the logic of the formalists, but rather experience.²⁵ Therefore, he concluded, law must be responsive to social conditions as a pragmatic means to that end.²⁶ However, Holmes also believed that judicial decision-making was separate from moral discourse and that certainty and predictability were important virtues of law.²⁷ Holmes'

25. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Belknap/Harvard Univ. Press ed., 1963, orig. ed. 1881). Holmes stated:

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

Id.

26. *Id.* Holmes stated:

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

Id. See also JAMES WILLARD HURST, *JUSTICE HOLMES ON LEGAL HISTORY* 3-8 (1964). Hurst notes:

What is "the law," the life of which we would study? . . . For a man steeped in history there exists no timeless, placeless, essential legal order; on the record, law has been man-made, or at least grown out of men's social experience, and hence is found always bearing the stamp of particular situations . . . Moreover, men use law to help order their relationships; by reason of its functions, therefore, law is found enmeshed in particular contexts of circumstance, purpose, and attitude.

Id. See also KELSO & KELSO, *supra* note 14, at 114 ("Holmes, as we have noted, thought that the life of the law was not logic, but experience, and that law therefore must be responsive to social conditions, as a means to that end."). See generally Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787 (1989); Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 *S. ILL. U.L.J.* 427 (1990).

27. See Kelley, *supra* note 26, at 456. Kelley notes:

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

concern with certainty and predictability led him to postulate that law should be guided by external and objective standards, as opposed to internal and subjective standards. Holmes believed that if the law were based on internal or subjective standards, disagreement would be more likely, thereby leading to uncertainty and unpredictability in the application of the law.²⁸

Later instrumentalists, wishing to view Holmes as a forerunner of instrumentalism, sometimes discount Holmes' belief that law and morals should be separable.²⁹ This view attempts to collapse Holmes' views into instrumentalism by implanting into Holmes a particular social value science.³⁰ Holmes, however, was ultimately skeptical of the validity of any moral system.³¹ In Holmes' view, the role of the law

Id. See also MARK D. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 196-97* (1963) ("The acceptance of the objective standard for liability in tort and crime would, in his eyes, accelerate certainty, for it would permit and encourage judges to apply a known standard with foreseeable regularity [T]he tendency of the law must always be to narrow the field of uncertainty.").

28. Oliver Wendell Holmes, *A Theory of Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899) ("[W]e ask not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."). See also Kelley, *supra* note 26, at 461 ("[Holmes'] analysis in *The Common Law*, for example, called for the adoption of wholly external standards of liability in tort and criminal law Holmes as a judge never hesitated to adopt external or objective liability standards in tort and criminal law."); KELSO & KELSO, *supra* note 14, at 291, 323 ("Holmes, consistent with his emphasis on objective, external standards, and his denigration of subjective, internal standards, always spoke of searching for the objective meaning of words used in a statute, and not for the legislature's subjective judgment.").

29. See, e.g., Grey, *supra* note 26, at 847-48 ("Holmes believed that adjudication should and must be result-oriented, fundamentally legislative Sound legislative judgment was thus a primary judicial qualification.").

30. See, e.g., Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 929 (1951). Hart states:

While Holmes speaks of existing law as "the witness and external deposit of our moral life," he is careful when he comes to describe what lawyers should be doing and hereafter to avoid any words as soft as "moral" or "ethical." It is only by reading in our own utilitarian concept of these words that we can understand him as Professor Howe does.

Id. See also Patrick J. Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189, 189 (1985) ("Professor Pohlman's thesis is that the central core of Holmes' substantive jurisprudence and philosophical methodology arose from the premises of utilitarian jurisprudence.").

31. See Mark D. Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 537, 546 (1951). Howe states:

If this interpretation of Holmes' intellectual development is accepted, it means that when he began the study of law in the fall of 1864 he had passed through two decisive phases of his growth. First, he had shaken off the religious faith on which so many assumptions of the world around him were

was to accommodate the desires of the dominant group in society.³² Thus, Holmes believed that legislatures, as representatives of the majority in our democratic society, are the proper balancers of public policy.³³ In this sense, Holmes agreed with the formalist view that judges should not test their decisions by an external standard of moral rightness. As did the formalists, Holmes believed in the jurisprudential tenets of positivism.³⁴

based, and second, he had learned from the War that personal taste in morals does not establish universal or objective truth in ethics. Skeptic in faith and skeptic in morals . . . We would do better to stand by Holmes' faith and his skepticism than to repudiate both.

Id.

32. See HOLMES, *supra* note 25, at 36 ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."); see also GILMORE, *supra* note 11, at 49-50 (describing Holmes' philosophy as holding that "if the dominant majority desires to persecute blacks or Jews or communists or atheists the law, if it is to be 'sound,' must arrange for the persecution to be carried out with, as we might say, due process"); G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 667 (1982). White states:

During Holmes' tenure judicial deference resulted in legislation that helped alleviate some of the inequalities of rampant industrialization; in the 1950s and 1960s a similar version of deference would have perpetuated malapportioned legislatures, racially segregated facilities, the absence of legal representation for impoverished persons, and restrictions on the use and dispensation of birth control devices.

Id.

33. See White, *supra* note 32, at 655. White notes:

Holmes' job at the Supreme Court consisted of, in many instances, reviewing the constitutionality of actions of a legislature. In such cases Holmes forged his famous attitude of deference, which was seen as humility and "self-restraint" by admirers and has the added advantage of sustaining "progressive" legislation about which a number of early 20th-century intellectuals were enthusiastic. Deference to legislative policymaking was consistent with the view Holmes had developed on the Massachusetts [Supreme] court.

Id.

34. See Gordon, *supra* note 24, at 722-29. Gordon believes that

we have to start somewhere else—specifically with positivism—in order to understand *The Common Law*. In particular, I am referring to the scientific positivism of such authors as Clifford and Spencer, two of the most aggressive supporters of the tendency "to treat the world as a hard object gradually being discovered by means of the suppression of human subjectivity."

Id. See also Hart, *supra* note 30, at 932; FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 40-41 (1960). Biddle wrote:

Holmes disagreed with the formalists, however, over whether ideally legal rules should be organized into a system of logically consistent, symmetrically related rules. In contrast to the formalist view, Holmes felt that law should be more responsive to the "felt necessities of the times" than to "logic" or "symmetry."³⁵ With respect to the common law, Holmes noted that it is never purely logical because it is always in a constant process of change, discarding rules at one end and adopting new rules at the other end.³⁶ With respect to constitutional or statutory interpretation, Holmes also criticized a purely formalist, or literal, approach.³⁷ For Holmes, laws have underlying purposes; a statute or a constitution is merely a vehicle for achieving those purposes.³⁸ Thus, an enlightened judge in interpreting a statute or a constitution must

"There is a tendency to think of judges," Holmes wrote Laski in 1926, "as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that gives them their authority" And that is precisely how [Holmes] thought of natural law—a mystic overlaw, not law in any true sense, theology or morals if you like, but not law. The demand for the superlative that we find in all men was at the bottom of the philosopher's effort to prove that truth was absolute, and of the jurist's search for criteria of universal validity which he collects under the head of natural law. That is why the jurists who believed in natural law seemed to [Holmes] to be "in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."

Id.

35. See *supra* text accompanying notes 25-26.

36. HOLMES, *supra* note 25, at 32.

37. See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899). He stated:

A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook.

Id. See generally *Usattore v. The Victoria*, 172 F.2d 434 (2d Cir. 1949). Holmesian Judge Learned Hand's opinion for the court stated:

One school says that the judge must follow the letter of the law absolutely. I call this the dictionary school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did.

Id. at 441-42 n.16.

38. See, e.g., *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J., for the Court) ("[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.") (citing *Georgia Railroad v. Smith*, 128 U.S. 174, 181 (1888)). See also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-44 (1947) (discussing statutory interpretation theories of Holmes and Cardozo under the headings "Proliferation of Purpose" and "Search for Purpose").

focus on both clearly stated text³⁹ and on clear inferences drawn from purpose.⁴⁰ In sum, Holmes' distinctive style was to combine positivism with a pragmatic approach to the law, and thus, reject the pure logic or symmetry of the formalist decision-making style.⁴¹

39. See Frankfurter, *supra* note 38, at 535-38 (discussing interpretation of the text of statutes and constitutions under the heading "The Process of Construction" and the subheadings "The Text" and "The Context"). Judge Friendly reports that Justice Frankfurter, a devout follower of Holmes, as a Harvard professor often reminded his students that there is a threefold injunction in interpreting a statute: (1) read the statute; (2) Read the Statute; (3) READ THE STATUTE. HENRY FRIENDLY, BENCHMARKS 202 (1967).

40. Frankfurter, *supra* note 38, at 539. Frankfurter stated:

[T]he purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.

Id. Furthermore, he found that "[e]veryone has his own way of phrasing the task confronting judges when the meaning of a statute is in controversy. Judge Learned Hand speaks of the art of interpretation as 'the proliferation of purpose.'" *Id.* at 529.

Under the Holmesian approach to statutory interpretation, resort may be had to legislative history materials to help determine the legislature's purpose in passing a statute. See *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"). Thus, this approach rejects a plain meaning rule limitation on resort to legislative history materials. See generally KELSO & KELSO, *supra* note 14, at 282-86, 310-15. For a discussion of various versions of the plain meaning rule, see *infra* notes 222-27, 241-44 and accompanying text.

Of course, under the Holmesian approach judges must be careful to use legislative history only to advance the intent of the legislature, not to enlarge or narrow it. As Frankfurter stated:

Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment.

Frankfurter, *supra* note 38, at 543-44. For reference to the modern Supreme Court debate over the use of legislative history, see *infra* notes 241-44 and accompanying text. For an argument that Judge Learned Hand, a famous Holmesian-style judge, would no longer consult legislative history given its spurious use over the last generation, see Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

41. For an account of Holmes focusing on the pragmatic side of his judicial decision-making philosophy, see Grey, *supra* note 26, at 789. For an account of Holmes

The fourth mode of legal analysis listed in Table 1 is natural law.⁴² Natural law theory agrees with the formalist proposition that law can ultimately be expressed as a system of logically related, universally

focusing more on the positivist side, see Kelley, *supra* note 26, at 453-54.

Professor Grey properly notes that Holmes' judicial decision-making style was a blend of positivism and pragmatism. As Grey states:

Holmes was certainly one of the important American exponents of English analytical positivism, and his prediction theory [of law] is a significant elaboration of that approach to law. But if this were all there were to Holmes, we would add little by calling him a pragmatist. My suggestion is that we can understand the distinctively pragmatist cast to Holmes' legal thought if we take account of the recent revival and reinterpretation of pragmatism.

Grey, *supra* note 26, at 789.

However, Professor Grey also attributes instrumental, result-oriented reasoning to Holmes' pragmatism. See *supra* note 29. Professor Grey then criticizes Holmes for not always following through on this mode of judicial decision-making. In response, Professor Kelley properly criticizes Grey for forgetting Holmes' positivism:

A pragmatic judge, Grey suggests, ought to embody in his opinions a synthesis of the instrumental and the contextual. He ought to exercise sound legislative judgment, based upon 'considerations of social advantage.' . . . Grey then judges Holmes's performance as a judge failed to live up to these pragmatic guidelines . . . But what was it, exactly, that Holmes preached . . . If we add back in what Grey leaves out—Holmes's progressive positivist historicism and his thoroughly reductive theory of judicial decision—we can understand Holmes's theory of judging, too, as a coherent positivist theory.

See Kelley, *supra* note 26, at 453-54.

In short, not every pragmatist is an instrumentalist, and, of course, not every positivist is a formalist. As Table 1 indicates, the Holmesian judicial decision-making style represents a pragmatic positivism, rejecting both formalism and instrumentalism.

42. As used in this Article, the term "natural law" includes both the religious or theological natural law tradition and the more secular natural rights tradition. No attempt is made in this article to discuss separately these two related approaches. For a discussion of these two related traditions, see BODENHEIMER, *supra* note 16, at 21-35; LLOYD, *supra* note 16, at 79-81, 105-07. In addition, no attempt is made in this Article to discuss separately the classical natural law tradition of Plato, Aristotle, and the Stoics, including Cicero; the medieval natural law tradition of Thomas Aquinas and others; the Renaissance natural law tradition of Grotius, Puffendorf, and Vattel; the Enlightenment natural law tradition of the French, English, and Scottish Enlightenment; or various versions of modern twentieth century natural law. For a summary of these various natural law theories, see BODENHEIMER, *supra* note 16, at 3-59, 134-68; LLOYD, *supra* note 16, at 79-169. Such a complete taxonomy of natural law theories is beyond the scope of this Article. Rather, the intent here is only (1) to describe the general features which unite natural law theories and which distinguish them from formalist, Holmesian, and instrumentalist theories, see *infra* text accompanying notes 43-54; and (2) to discuss the separation of powers natural law theory which was the foundation of the doctrine adopted by the framers of our Constitution. See *infra* text accompanying notes 102-31. Despite this limited intent, a few comments have been included concerning versions of natural law judicial decision-making and their relation to the framing and ratification of our Constitution. See *infra* notes 49-50, 101.

valid rules. Thus, law is not just a means to the end of some social value, regardless of what that does to the symmetry of rules.⁴³ On the other hand, natural law theorists disagree with the formalist conclusion that law and morals are separable, believing instead that law can be tested by an external standard of rightness, the standard of natural law.⁴⁴ This approach rejects positivism in favor of a natural law base to judicial decision-making.⁴⁵

Of course, the natural law approach does not mean that societies should not have positive legal enactments—constitutions, statutes, or a record of prior common law decisions—or that in deciding cases judges may ignore them. Natural law is not a justification for unbridled judicial activism.⁴⁶ It does mean, however, that natural law thinkers are likely

43. See Weinrib, *supra* note 18, at 951-57. Weinrib states:

Formalism postulates that law is intelligible as an internally coherent phenomenon Formalism can accordingly be summed up as proffering the possibility of an "inmanent moral rationality" The description reflects legal formalism both as it has been understood in the philosophic tradition of natural law and natural right and as it is presupposed in the ideal of coherence to which sophisticated legal systems aspire.

Id. at 951, 953-54.

44. See, e.g., Weinrib, *supra* note 18, at 954 n.14 (distinguishing the natural law and natural rights tradition "from the thinner formalism of positivism, which . . . makes the notion of law as such indifferent to the law's content"). It must be noted that in his article Professor Weinrib uses the term "formalism" to describe any analytic non-functional approach to law. Thus, for Professor Weinrib, there are two basic kinds of formalist theories, the "thinner formalism" of analytic positivism and the formalism of the natural law and natural rights tradition. *Id.* In contrast, and more in keeping with common use, this Article uses "formalism" to describe only the analytic, positivist approach to law, while the term "natural law" is used to describe the separate normative, analytic jurisprudential approach of the natural law and natural rights tradition.

45. See, e.g., BODENHEIMER, *supra* note 16, at 105-06. Bodenheimer states:

Behind all these attempts to find a place for a higher law may be discerned a feeling of discontent with justice based on positive law alone, and a strenuous desire to demonstrate that there are objective moral values which can be given a positive content and expressed in normative form.

Id. See also Deryck Beyleveld & Roger Brownsword, *Law as a Moral Judgment vs. Law as the Rules of the Powerful*, 28 AM. J. JURIS. 79, 81 (1983) ("For Natural Law Theory the idea of morally legitimate power constitutes a real definition of law; for Positivism the rival real definition is contained in a morally neutral concept of socially organized power.").

46. Indeed, the basic premise of a natural law decision-making style is that the judge does not have unbridled discretion, but rather is disciplined by the natural law theory. See, e.g., Michael S. Moore, *The Constitution as Hard Law*, 6 CONST. COMM.

to include natural law principles in drafting a constitution⁴⁷ and would likely take natural law principles into account in passing statutes.⁴⁸ It also means that a judge following natural law presuppositions should interpret the words which the society had used in its constitution and statutes in light of natural law principles to the extent that the words were chosen to incorporate a natural law philosophy. If the words were not chosen to incorporate a natural law philosophy, then the judge should give the words their ordinary, plain meaning.⁴⁹ Furthermore,

51 (1989). An additional aspect of the natural law decision-making style dominant at the time of the framing of our Constitution is the traditional English common law tradition, which emphasizes fidelity to precedent, deciding cases on narrower grounds where possible, and reasoned elaboration of the law. This aspect of natural law also limits judicial discretion. *See generally infra* note 50 and accompanying text.

47. *See, e.g.*, ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 17 (1938) ("In studying the formative era of American law we are concerned immediately with the eighteenth-century natural law which became embodied for us in the Declaration of Independence and is behind our bill of rights."); HALL, *supra* note 24, at 58. Hall states:

Beginning in the 1760s, Americans separated ideas about the principles of government from the product of its actions; the law. They did so by tying 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 generally* DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 3-21, 219-21, 253-73 (1990); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law I, III*, 42 *HARV. L. REV.* 149, 365 (1928-29).

48. *See, e.g.*, POUND, *supra* note 47, at 27. Pound writes:

[T]he believers in eighteenth-century natural law did great things in the development of American law because the theory gave faith that they could do them. Application of reason to the details of the received common law was what made the work of the legislative reform movement of enduring worth. Some of its best achievements were in formulating authoritatively what men had reasoned out in the era of the school of the law of nature in the seventeenth and eighteenth centuries.

Id.

49. This proposition is not as uncontroversial as it first appears. At least three recent natural law approaches can be identified concerning the Constitution. One approach takes the view that, whether or not the framers and ratifiers of the Constitution intended each Clause to embody natural law principles, judges should take that view today. In such a case, judges should always read the Constitution's words against the backdrop of a natural law interpretation style. This would typically require that judges pay great respect to the ordinary meanings of words, but would always permit judges to resort to natural law philosophy in the final instance. For a description of such an approach to constitutional interpretation, see Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 *S. CAL. L. REV.* 277 (1985) [hereinafter Moore, *Interpretation*].

A second natural law approach holds that even if judges should not interpret

consistent with the approach to judicial decision-making dominant during the framing and ratifying of our Constitution, judges wishing to follow the natural law judicial decision-making style of the framers and ratifiers of our Constitution would need to pay great attention to the grand traditions of the Anglo-American common law system, which includes such principles as fidelity to precedent, using reasoned elaboration of the law, and deciding cases on narrower grounds where possible.⁵⁰

each clause of the Constitution to embody natural law principles, nonetheless the framers and ratifiers of the Constitution intended judges to resort to fundamental natural law principles outside the written text of the Constitution to supplement it. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

A third, and more modest, natural law approach would be to hold that judges should resort to natural law in interpreting the Constitution only to the extent that particular clauses were drafted with natural law principles in mind. Justice Thomas stated this type of natural law approach during his conformation hearings in the fall of 1991. See Jeff Rosen, *Thomas's Promise*, THE NEW REPUBLIC 18-21 (Sept. 9, 1991); *infra* text accompanying notes 248-49. Professor Michael Moore has also recently defended his approach towards natural law interpretation on such original intent grounds. See Michael S. Moore, *Do We Have An Unwritten Constitution*, 63 S. CAL. L. REV. 107, 133-37 (1989) [hereinafter Moore, *Unwritten Constitution*].

For purposes of this Article, no choice has to be made among these three natural law interpretation styles. In the separation of powers area, it is clear that the framers and ratifiers of the Constitution believed in a natural law separation of powers philosophy which they intended to, and did, insert into the text and structure of the Constitution itself. See *infra* text accompanying notes 102-31. Thus, the separation of powers natural law philosophy inserted into the Constitution's text and structure should guide judicial decision-making on separation of powers issues under any of the three natural law decision-making styles described in this footnote.

50. For a general discussion of these and other aspects of traditional Anglo-American common law decision-making which formed part of the framers' and ratifiers' understanding of the natural law decision-making style, see RUPERT CROSS, PRECEDENT IN ENGLISH LAW (3d ed. 1977); see also LLEWELLYN, *supra* note 14, at 19-61, 178-235; Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38-49 (1981); Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 450-63 (1975).

At least three major approaches in contemporary legal scholarship concern how to relate a natural law decision-making style to constitutional interpretation. See *supra* note 49. Detailed discussion of these approaches, or other ways to relate any particular vision of natural law to the task of judicial decision-making, is beyond the scope of this Article. For purposes of this Article, further discussion is not necessary because the separation of powers natural law philosophy which the Constitution's framers and ratifiers adopted and incorporated into the Constitution's text and structure should guide judicial decision-making on separation of powers issues under any reasonable version of a natural law decision-making style. Nevertheless, a few observations are perhaps in order.

The first question a judge must ask himself or herself before deciding cases is metaethical. That is, the judge must decide whether the judge feels free to adopt his or her own favored interpretive style (and then decide what that style is), or whether the judge feels compelled to adopt the style of the framers and ratifiers of the document in question (an original intent approach). At this metaethical level, an approach where the judge feels free to adopt his or her own interpretive style would represent a normative approach and an original intent approach would reflect a positivist approach to the judicial decision-making task.

Once this decision is made, the judge would then have to determine the implications of this metaethical choice for the actual deciding of cases. For example, a normative judge at the metaethical level might decide to adopt a normative decision-making style, like instrumentalism, as a way to resolve cases. That same judge, however, who follows a normative approach at the metaethical level might decide to adopt an analytic positivist (i.e., formalist) judicial decision-making style when actually resolving cases because the judge thinks, for whatever reasons, that such a formalist style is normatively best.

Similarly, a positivist, or original intent, judge at the metaethical level might not adopt an analytic positivist (i.e., formalist) or pragmatic positivist (i.e., Holmesian) style of decision-making when actually resolving cases. Instead, such an original intent positivist at the metaethical level might conclude that the framers and ratifiers of our Constitution favored a natural law judicial decision-making style. Therefore, to be faithful to the original intent of the framers and ratifiers, the judge would need to adopt a natural law judicial decision-making style today.

Under such an approach, the judge would not have to decide which theory is best among the various versions of natural law theory. See *supra* note 42. Nor would the judge have to decide which theory of the three major contenders, see *supra* note 49, is the best way to relate natural law theory to the judicial decision-making task. Instead, as a metaethical positivist, the judge would merely follow the natural law theory, as well as the mode of natural law judicial decision-making, in which the framers and ratifiers believed. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-924 (1985) (discussing early approaches to constitutional interpretation). See also *infra* note 101.

Of course, determining the specific details of that theory may not be completely uncontroversial. For example, in recent years there have been debates over whether the framers and ratifiers of our Constitution were influenced more by classic Lockean or classic Republican natural law ideology. See, e.g., Frank I. Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-55 (1986); see also *Symposium on Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 3 (1990) (collection of articles); Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679. There have also been debates over the influence on the framers and ratifiers of the Scottish versus the English Enlightenment traditions. See, e.g., GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981); GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978). And no doubt there could be debates over the influence of Adam Smith or Immanuel Kant during the pre-Civil War period leading up to the framing and ratifying of the 13th and Fourteenth Amendments. On the influence of Adam Smith during the first half of the nineteenth century, see generally *infra* note 59. On the influence of Kant, see Oliver Wendell Holmes, *The Path of the Law*, Address at Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 458 (1897) ("To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas Read the works of great German

Admittedly, argumentation under a natural law or a positivist regime appear to be superficially similar. In both cases, the judge gives consideration to the constitution, statutes, and prior judicial decisions and gives great respect to their meanings. Indeed, where words used in a constitution or statute do not reflect a sound natural law position, as in the case of slavery under the United States Constitution before the Thirteenth Amendment,⁵¹ even under a natural law approach to judicial decision-making the judge's role, and at least under the natural law theory, which served as the framework of our representative democracy, is to follow a constitution or statute until the natural law position is properly added to the document.⁵² However, as discussed in Parts II

jurists, and see how much more the world is governed today by Kant than by Bonaparte.”).

Nonetheless, some aspects of the framers' and ratifiers' natural law tradition, like their views on separation of powers, are relatively clear. See *infra* text accompanying notes 102-31. Similarly, it is clear that under our Constitution, the framers and ratifiers expected judges to remain faithful to the Anglo-American common law decision-making tradition, including adherence to precedent, reasoned elaboration of the law, and the determination of cases on narrower grounds where possible. See generally Jones, *supra*, at 452-54 (describing how American lawyers remained faithful to “common-law modes of reasoning from precedent”). Thus, under a metaethical positivist approach to judicial decision-making, judges must pay great attention to these grand traditions because that is what the framers and ratifiers of the Constitution expected judges to do. For further reference in this Article to aspects of our natural law decision-making tradition, see *infra* text accompanying notes 51-52, 101, 205-44. See also *Symposium: Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992).

51. See, e.g., Peter J. Riga, *The American Crisis over Slavery: An Example of the Relationship Between Legality and Morality*, 26 AM. J. JURIS. 80 (1981).

52. See, e.g., Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969) (“Judicial objectivity was the approach evolved by the Marshall Court in slavery cases to resolve this conflict between the Justices' individual opposition to slavery and their concern for . . . the institutional position of the Court.”); Kent Newmyer, *On Assessing the Court in History: Some Comments on the Roper and Burke Articles*, 21 STAN. L. REV. 540, 544 (1969). Newmyer states:

But there are occasions when the Court is limited in what it can do
[I]f the Marshall Court did not have substantial lawmaking discretion in the slavery cases, it would be misleading to say that it “legitimated” slavery. That odious accomplishment was the work of colonial and state law (as Mr. Roper himself noted) and, as the Abolitionists claimed, the Constitution of the United States.

Id.

Of course, to say that judges, as judges, are limited to following clear constitutional commands under such an approach does not mean that citizens should not press for constitutional reform consistent with a natural law vision. See, e.g., Riga, *supra*

and III below,⁵³ interpreting words that carry a backdrop of natural law meaning is a very different enterprise than interpreting words which are thought only to have a literal, positivist meaning devoid of any natural law roots. In addition, in deciding common law cases where leeways exist in the common law, a natural law judge would decide the case in a way to advance, rather than retard, natural law beliefs.⁵⁴

This addition of Holmesian and natural law jurisprudence to Gilmore's discussion of formalism and instrumentalism helps to clarify the ages of American law that Gilmore discusses. Formalism is unquestionably the post-Civil War style, and instrumentalism, at least until quite recently, has been the dominant style in the modern era.⁵⁵ However, in the formative era of American law, the pre-Civil War period, the dominant mode of legal analysis is better characterized not as Gilmore's earlier instrumentalist Golden Age, but rather as a reflection of natural law presuppositions. In this period, while judges were sensitive to the consequences of adopting a particular rule,⁵⁶ and

note 51, at 109. As Riga notes:

Repressive and unjust laws have too often seen birth in the Halls of Congress (e.g., the Fugitive Slave Acts of 1793 and 1850) and have too often been given the *imprimatur* of the Supreme Court. The only way out of this difficulty is to recognize that some connection must exist between law and enduring moral norms, in function of which the performance of government officials can be judged.

Id. Furthermore, one can imagine natural law theories of judicial decision-making where conformity with a particular natural law vision would trump, or at least supplement, commands of the Constitution. For discussion of such natural law theories, see *supra* note 49.

53. See *infra* text accompanying notes 102-50, 205-44.

54. See, e.g., Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW (Laurence Goldstein ed., 1987). The classic example of this in American legal history is the judicial transformation of contract, tort, property, and other aspects of the common law during the first half of the 19th century based upon the economic natural law theories of Adam Smith and John Locke. See *infra* notes 56-59 and accompanying text.

55. See HALL, *supra* note 24, at 211, 284. Hall states:

From the Civil War to about 1900 the trend favored the formalistic and conservative judicial approach The Great Depression was the catalyst of liberal legalism . . . [which] fused the social reformist impulse of Progressivism, the relativism and instrumentalism of legal realism and sociological jurisprudence, and the regulatory responsibility of the state associated with the New Deal.

Id. See also *supra* notes 14-23 (citing articles concerning formalism and instrumentalism).

56. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 2 (1977) ("During the last fifteen years of the eighteenth century, one can identify a gradual shift in the underlying assumptions about common law rules. For the first time, lawyers and judges can be found with some regularity to reason about the

recognized the need to make law that reflected a particular social value system⁵⁷ (propositions that are consistent with both the instrumentalist and natural law theories), both lawyers in their argumentation and judges in their opinions grounded the underlying legitimacy of their enterprise in a notion of natural law. For them, law could be organized and systematized around rational principles: the natural law analytic premise, not the instrumentalist functional premise.⁵⁸ As Gilmore himself notes in *The Ages of American Law*, "[t]he post-Revolutionary generation of American lawyers approached the problem of providing a new law for a new land as convinced eighteenth-century rationalists."⁵⁹

social consequences of particular legal rules.").

57. As Horwitz writes:

What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. Especially during the period before the Civil War, the common law performed at least as great a role as legislation in underwriting and channelling economic development As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies.

Id. at 1-2. For a brief summary on the nature of the changes in property, contract, and tort law which Professor Horwitz says occurred during the first half of the nineteenth century, see Stephen B. Presser, *Revising the Conservative Tradition: Towards a New American Legal History*, 52 N.Y.U. L. REV. 700 (1977) (reviewing MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977)).

58. As Roscoe Pound noted:

A mode of thought [natural law] which produced and developed the classical international law, which modernized the civil law so that it could go round the world, which had much influence on the development of equity and the law merchant—the liberalizing agencies in the Anglo-American common law—which was the theoretical basis of much of the best work of Lord Mansfield, of the Declaration of Independence and [B]ill of [R]ights, and of the legislation, judicial decision, and doctrinal writing of the formative era of American law, is not to be rated as nothing in legal history.

POUND, *supra* note 47, at 29-30.

59. GILMORE, *supra* note 11, at 10. It must be noted that this characterization is not inconsistent with Gilmore's or Llewellyn's account of judicial decision-making during the pre-Civil War era. Gilmore, Llewellyn, and others are right that judges during this period shared the instrumentalist premise that judges could, and needed, to make law to advance particular social ends, and that this fact distinguished the pre-Civil War judicial decision-making style from the post-Civil War style of formalism. See generally *supra* notes 56-57 and accompanying text. To the extent Gilmore and Llewellyn were focused on a single dichotomy, formalism versus instrumentalism, the

pre-Civil War style is certainly closer to instrumentalism than formalism.

However, once attention is drawn to the two different kinds of normative or prescriptive judicial decision-making theories listed in Table 1, natural law versus instrumentalism, the natural law character of the pre-Civil War judicial decision-making style clearly emerges. The ends that judges advanced during this period were defined not in purely functional terms but rather in terms of rationally and systematically advancing the dominant natural law vision in America at the time—Adam Smith's theory of competition and economic growth and John Locke's theory of property rights. From the perspective of the terminology used in this Article, therefore, this pre-Civil War period is best termed natural law because most of the change which occurred in the law during this period, particularly change in the common law, was based primarily upon economic natural law theories.

Even writers who have used the term instrumentalism to distinguish the pre-Civil War period from the post-Civil War formalist period agree that judges routinely resorted to economic natural law arguments to alter the common law during the pre-Civil War period. See, e.g., HORWITZ, *supra* note 56, at 3. As Horwitz noted:

This increasing preoccupation with using law as an instrument of policy is everywhere apparent in the early years of the nineteenth century. Two decades earlier it would have been impossible to find an American judge ready to analyze a private law question by agreeing 'with Professor Smith, in his "Wealth of Nations," . . . that distributing the burthen of losses, among the greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the general prosperity of commerce.'

Id. See also HALL, *supra* note 24, at 109, 221. Hall states:

The ethical yardstick employed by colonial courts was replaced by a new measure that asked judges to consider how legal rules encouraged economic growth, individual risk taking, and the accumulation of capital . . . [Instrumentalism's] heyday was in the antebellum era. Instrumentalists argued that law should be applied as a tool to promote economic activity without resort to legislation. Judges engaged in instrumental activity by using their common law authority to fashion doctrines that expedited and enhanced private business activity and entrepreneurship generally.

Id.

As legal historians have observed, this focus on changing the common law to promote economic growth differed from the colonial period courts' focus on stability in the law to promote the moral and religious notions of the community. See HORWITZ, *supra* note 56, at 1-9; HALL, *supra* note 24, at 12-17, 28-48 (describing the social institutions of colonial America and how law was used to impact society and the economy); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* 36-63 (1975). As Roscoe Pound has indicated, this change is best conceived as a change from an ethical natural law focus to an economic natural law focus. See POUND, *supra* note 47, at 22-23. Pound states:

In the nineteenth century, the stabilizing and conserving natural law takes on three forms: ethical, political and economic. The ethical form, in which moral precepts dictated by reason are the ideal, is the oldest, coming from the seventeenth century, where it connects with the theological natural law of the Middle Ages. It is replaced in early nineteenth-century America by the political form in which an ideal of "the nature of American institutions" or the "nature of free institutions" or the "nature of free government" is the starting

The Holmesian style of judicial decision-making helps clarify the transition between the formalist approach of the post-Civil War period and the modern instrumentalist approach. The breakdown of the formalist approach occurred initially as a result of increasing acceptance after 1900 of Holmes' insight that law should serve particular social ends, unlike the formalist's insistence on mechanical rule application and logic or symmetry.⁶⁰ This acceptance began first with respect to the common law and theories of statutory interpretation in the 1910s and 1920s,⁶¹ and finally in 1937 the "switch in time" was adopted by the United States Supreme Court as the mode of constitutional law analysis.⁶² However, this breakdown did not immediately lead to instrumentalism because, following Holmes, the dominant judicial decision-making style of that time emphasized that judges should not take into account their own social justice or public policy perspective, but rather should decide cases to reflect the social ends as

point. Later, as the stabilizing side of natural law comes to be the one stressed chiefly, an economic ideal of a society ordered by the principles of the classical political economy prevails.

Id.

As Pound indicates, the focus on economic natural law arguments still remains a version of natural law. As with the other subdivisions within the natural law tradition, *see supra* note 42, discussion of these subcategories of natural law (theological, ethical, political, and economic) is outside the scope of this Article. *See generally* KELSO & KELSO, *supra* note 14, at 388-90, 398-401, 504-12 (discussing ethical, political, and economic natural law arguments in the context of the Constitution and the development of the common law); *infra* notes 84-95 (citations to economic, political, and ethical versions of natural law theory today).

60. *See, e.g.*, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), *cited in* KELSO & KELSO, *supra* note 14, at 117; HALL, *supra* note 24, at 211 ("From the Civil War to about 1900 the trend favored the formalistic and conservative judicial approach, but from then through World War I sociological jurisprudence and liberalism gained credibility.").

61. *See, e.g.*, CARDOZO, *supra* note 15 (discussing the nature of the judicial process in common-law cases); HALL, *supra* note 24, at 269-77 (discussing legal realism's impact on common law and legislation); Frankfurter, *supra* note 38, at 542-43 (discussing the "gradual" change in statutory interpretation led by Justice Holmes during the 1910s and 1920s with increasing resort to statutory purposes and legislative history as a supplement to "pure logic").

62. *See generally* HALL, *supra* note 24, at 277-83 (discussing the New Deal, constitutional law, the Court-packing plan of 1937, and Justice Roberts' switch in time, and how those events eventually resulted in the Court rejecting the *Lochner*-era formalism of Justices Sutherland, McReynolds, Van Devanter, and Butler, and replacing it with Holmes' posture of deference to Congress, which after 1937 upheld New Deal-style regulations).

defined by the dominant groups in society, which, in our democracy, is the outcome of the legislative process.⁶³ After World War II, however, as judges became more activist in using the leeways in the law to advance particular public policy perspectives, the dominant judicial decision-making style in all areas—common law, statutory law, and constitutional law—increasingly moved towards an instrumentalist approach.⁶⁴ This approach is still the dominant approach today, though, as discussed below, the dynamics that motivated instrumentalism have lost most of their force, and instrumentalism has come under increasing attack.⁶⁵

A second table, building on the earlier one, may help clarify these relationships. Under the modified version of Gilmore's views discussed above, modes of judicial decision-making in American legal history have followed a counterclockwise pattern, from the formative era of natural law, to the post-Civil War era of formalism, to the early twentieth-century transition to Holmesian jurisprudence, and, finally, to the instrumentalism which has been the dominant theory for the last fifty years. The dates listed in Table 2 for each era of decision-making overlap in each case by twenty years in order to underscore the point that there was not a sudden transformation in judicial style, and that in any event it is more appropriate to speak in terms of trends and tendencies of judges than in terms of a single approach adopted by all judges during any particular time period.⁶⁶

63. *Id.* at 282-84 (discussing judicial restraint and the Supreme Court's acceptance after 1937 of regulatory measures in the areas of administration and social welfare).

64. *See id.* at 291-300 (discussing the consequences of modern liberal legalism for the common law areas of property, contracts, and torts, with its focus on new "property" rights, increased use in contract law of doctrines like reliance and unconscionability, and shifted emphasis in tort law from fault and blameworthiness towards providing compensation to injured parties); *id.* at 303-08 (discussing modern developments concerning legislation and the administrative state, particularly in the public interest areas of consumer rights and environmentalism); *id.* at 309-32 (describing modern developments with respect to constitutional law, particularly in the form of increased Court protection in cases involving civil rights and liberties, race and gender issues, and rights of the accused). *See generally* G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

65. *See infra* text accompanying notes 78-101.

66. Gilmore himself observed:

All generalizations are oversimplifications. It is not true that, during a given fifty-year period, all the lawyers and all the judges are lighthearted innovators, joyful anarchists, and adepts of Llewellyn's Grand Style—only to be converted en masse during the next fifty-year period to formalism or conceptualism. There are formalists during innovative periods and innovators during formalistic periods—just as there are frustrated classicists during romantic periods and frustrated romantics during classical periods. When we reconstruct the past, we think we see that in one period the innovative impulse

TABLE 2
Styles of Judicial Decision-Making

| | | |
|---|--|--|
| | Positivism: Judges as Scientists | Prescriptivism: Judges as Normative Actors |
| Law as Logical, Analytic, or Conceptualist Attitude | Formalism (1850-1920, except in constitutional law until 1937) | Natural Law (1700-1870) |
| Law as Means to Ends, Functional, or Pragmatic Approach | Holmesian (1900-1950) | Instrumentalism (1930-Today) |

Because this summary of the ages of American law incorporates the generally accepted account of formalism, Holmes, and modern instrumentalism, this summary should not be particularly controversial. Indeed, at the level of generality discussed here, this account of the ages of American law parallels exactly a critical legal studies version of American legal history. As described by Professor Elizabeth Mensch in *The History of Mainstream Legal Thought*,⁶⁷ initially the United States was in a period of pre-classical legal consciousness, the period identified in this Article as natural law. As Professor Mensch describes this period:

In a flowery vocabulary drawn largely from the natural-law tradition, late-eighteenth- and early-nineteenth-century legal speakers made extravagant claims about the role of law and lawyers. They described law as reflecting here on earth the universal principles of divine justice, which, in their purest form, reigned in the Celestial City. For example, the single most popular legal quotation, for rhetorical purposes, was taken from the Anglican theologian Hooker: "Of law no less can be acknowledged, than that her seat is the bosom of God; her voice

was dominant and that in another period the formalistic impulse was dominant. We are talking about temporary swings in a continuing struggle of evenly matched forces.

GILMORE, *supra* note 11, at 16-17.

67. Elizabeth Mensch, *The History of Mainstream Legal Thought*, reprinted in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 13 (David Kairys ed., rev. ed. 1990).

harmony of the world."⁶⁸

Following this time, says Mensch, there arose a period of classical legal consciousness, what Gilmore and others have called formalism. As Mensch writes: "By the 'rule of law' classical jurists meant quite specifically a structure of positivised, objective, formally defined rights."⁶⁹ Reason, in such an age, is no longer considered as it was by natural law thinkers. Rather, reason is "now conceived, not as embodying universal moral principles and knowledge of the public good [as it was by natural law thinkers], but strictly as the application of objective methodology to the task of defining the scope of legal rights."⁷⁰ The goal was to produce "a grandly integrated conceptual scheme that seemed, for a fleeting moment in history, to bring coherence to the whole structure of American law."⁷¹

This vision of a grandly integrated conceptual scheme motored by an objective methodology to the task of defining the scope of legal rights—the formalist dream—broke down, notes Mensch, under the onslaught of those who argued that logic was not enough to resolve legal disputes.⁷² As Holmes stated:

[W]henever a doubtful case arises, with certain analogies on one side and other analogies on the other, . . . what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is strongest at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice.⁷³

Mensch reflects this Holmesian insight in her discussion of the Realist Movement, of which Holmes can be seen as the founding father:

The realists pointed out that no two cases are ever exactly alike. There will always be some difference in the multitude of facts surrounding them. Thus, the "rule" of a former case can never simply be applied to a new case; rather, the judge must *choose* whether or not the ruling in the former case should be extended to include the new case. That choice is essentially a choice about the relevancy of facts, and those choices can never be logically compelled. Given shared social assumptions, some facts might seem obviously irrelevant (e.g., the color of socks worn by the offeree should not influence the enforceability of a contract), but decisions about the relevance of other distinguishing facts are more obviously

68. *Id.* at 14.

69. *Id.* at 18.

70. *Id.* at 18-19.

71. *Id.* at 18.

72. *Id.* at 21-22.

73. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460-61 (1899).

value-laden and dependent on the historical context (e.g., the relative wealth of the parties) [For the realists, t]here was *no such thing* as an objective legal methodology behind which judges could hide in order to evade legal responsibility for the social consequences of legal decision making. Every decision they made was a moral and political choice.⁷⁴

This realist legacy led into the fourth period of American law, which Mensch describes as attempts at modern reconstruction.⁷⁵ The focus during this period, as Mensch states, is the instrumental focus on law as a functional policy science with judges taking a more active role in making explicit policy calculations.⁷⁶ As Mensch describes this modern period:

During the 1940s, Laswell and McDougal at Yale followed out the implications of realism by announcing that since law students were destined to be the policymakers of the future, Yale should simply abandon the traditional law school curriculum and teach students how to make and implement policy decisions What were once perceived as deep and unsettling logical flaws [were] translated into the strengths of a progressive legal system. For example, the indeterminacy [sic] of rules has become the *flexibility* required for sensible, policy-oriented decision making; and the collapse of rights into contradiction has been recast as "competing interests," which are inevitable in a complex world and which obviously require an enlightened judicial *balancing*. In other words, we justify as legal sophistication what the classics would have viewed as the obvious abandonment of legality.⁷⁷

Consistent with the modified version of Gilmore's discussion of the ages of American law presented above, Mensch indicates that this attempt at modern reconstruction, while dominating legal discourse since World War II, has lost much of its force and is under increasing attack today.⁷⁸ This attack has occurred both at the federal level with respect to constitutional and statutory interpretation,⁷⁹ and at the state level with respect to constitutional, statutory, and common-law decision-making.⁸⁰

74. Mensch, *supra* note 67, at 22. On Holmes' relationship to legal realism generally, see *supra* note 24.

75. See Mensch, *supra* note 67, at 24-31.

76. *Id.* at 25.

77. *Id.* at 24 (footnote omitted).

78. *Id.* at 31-33 (discussing attacks by "natural-law" theories, "representation-reinforcing" theories, "critical legal studies," "law and economics," "libertarianism," and "outsider" jurisprudence by women and persons of color).

79. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (constitutional critique); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (statutory interpretation critique); see also *infra* notes 81-96 and accompanying text.

80. See generally RICHARD NEELY, *HOW COURTS GOVERN AMERICA* (1981); see also

These attacks against instrumentalism have come both from those who would prefer judges to be less activist, strict constructionists in the formalist⁸¹ or Holmesian⁸² tradition, as well as by commentators who urge either revival of a classic natural law approach,⁸³ or emergence of some modern version of natural law. This modern natural law reemergence has taken many forms, including economic natural law, as in the law and economics movement;⁸⁴ political natural law,⁸⁵ with variations as diverse as critical legal studies,⁸⁶ some versions of feminist theory or critical race theory;⁸⁷ Ronald Dworkin's interpretation theory of *Law's*

infra notes 84-95 and accompanying text.

81. See, e.g., Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986).

82. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1986); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. J. 455 (1986).

83. See, e.g., Milner S. Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787 (1981); Harold Berman, *The Interaction of Law and Religion*, 31 MERCER L. REV. 405 (1980); Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539 (1989).

84. See Edmund W. Kitch, *The Intellectual Foundations of "Law and Economics"*, 33 J. LEGAL EDUC. 184 (1983); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981). For a discussion of this categorization of modern law and economics as a version of economic natural law, rather than a conservative kind of instrumentalism, see *infra* note 97.

85. The term "political natural law" is used to refer to those theories whose natural law roots focus on political arrangements and the connection of law to politics, rather than developing from a natural law base some ethical or economic principles to guide society.

86. Critical legal studies can be categorized as a modern political natural law theory because of its central insight that law is not autonomous from politics, but part and parcel of it. On the critical legal studies movement generally, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983) (discussing the critique of objectivism and formalism in critical legal studies and posing an alternative of "transformative ideals and political realism").

87. The feminist legal theory which best exemplifies modern political natural law is that which shares with the critical legal studies movement the "[p]ost-modern and post-structural traditions that have influenced left legal critics [to] presuppose the social construction of knowledge." Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990). As discussed by Professor Rhode, this includes most feminist legal theory. See *id.* at 619-26. The critical race theory which would be included in this category would similarly involve those approaches adopting "critical or modernist approaches." See Richard Delgado, *Mindset and Metaphor*, 103 HARV. L.

Empire;⁸⁸ or even Lon Fuller's *The Morality of Law*;⁸⁹ and ethical natural law,⁹⁰ with theories as diverse as John Rawls,⁹¹ Robert Nozick,⁹² John Finnis,⁹³ Bruce Ackerman,⁹⁴ and some versions of feminist theory or critical race theory.⁹⁵ In the realm of constitutional law, this reemer-

REV. 1872, 1873 (1990).

88. RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986) (stating that "propositions of law are true if they figure in, or follow from, the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice," i.e., the best political theory that explains the current legal order).

89. LON L. FULLER, *THE MORALITY OF LAW* 38-41 (2d ed. 1969) (noting that a legal order is properly characterized as being legitimate only to the extent that certain procedural arrangements are followed by the sovereign which give that sovereign political legitimacy). As Professor Fuller states:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.

Id. at 39.

90. The term "ethical natural law" is used to refer to those theories who claim to have developed through some kind of rational argumentation a set of ethical principles or a set of conditions for ethical dialogue which determine ethical values for society.

91. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

92. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

93. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

94. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

95. Included in this category would be that feminist legal theory which rejects the modern political natural law theoretical foundation of post-modern and post-structuralist thought, see *supra* notes 85-87, in favor of some "moral realist" version of our capacity through rational dialogue to develop ethical principles capable of rational defense. See Rhode, *supra* note 87, at 636.

[A] standard critical strategy is to specify conditions under which answers would be generated. Habermas' ideal speech situation has been perhaps the most influential example. Under his theory, beliefs would be accepted as legitimate only if they could have been acquired through full uncoerced discussion in which all members of society participate. Some critical feminists, including Drucilla Cornell and Seyla Benhabib, draw on similar conversational constructs.

Id. Critical race theory which adopts what Richard Delgado has called "conventional, quasi-scientific analysis", Delgado, *supra* note 87, at 1872-74, would similarly fall into this classification. See Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844, 1848-53 (1990) (describing Randall Kennedy's work as an example of this phenomenon).

gence of natural law has also taken the form of advising judges to look back to the natural law philosophy of the framers and ratifiers of the Constitution and to interpret the Constitution consistent with this natural law philosophy.⁹⁶

Given this analysis, one possible way to view the current Supreme Court is to note that with the retirement of Justices Brennan and Marshall putting liberal instrumentalism on the wane,⁹⁷ the debate on the

96. See *infra* note 101.

97. For a discussion of Justices Brennan and Marshall's liberal instrumentalism, see *infra* text accompanying notes 182-91. For a discussion of Justices Blackmun and Stevens carrying on the liberal instrumentalist tradition, at least to a moderate extent, see *infra* text accompanying notes 252-56.

It is logically possible, of course, to imagine a version of conservative instrumentalism. Under such an approach, a judge would use leeways in the law to advance a particular conservative agenda. Indeed, one might classify the law and economics movement as a version of conservative instrumentalism. See Richard Posner, *Law and Economics is Moral*, 24 VAL. U.L. REV. 163, 165-66 (1990). "I consider myself to be a pragmatic economic libertarian I do not derive my economic libertarianism views from a foundational moral philosophy." *Id.* However, it seems better to classify today's law and economics movement as a modern economic natural law approach, rather than a conservative version of instrumentalism. See *supra* note 59 (giving reasons for such classification with reference to the early 19th-century focus on law and economics). It is so classified above. See *supra* note 84 and accompanying text. The rejection, cited above, by Judge Posner of foundational moral philosophy as a basis for law and economics may reflect only Posner's reaction to the critiques in the early 1980s of his attempt to ground law and economics in some foundational moral philosophy. See, e.g., Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105, 1112-31 (1982); Warren J. Samuels, *Maximization of Wealth as Justice: An Essay on Posnerian Law and Economics Policy Analysis*, 60 TEX. L. REV. 147, 168-72 (1981).

In addition, it is certainly possible for a judge to be a conservative instrumentalist at the metaethical level, but not at the level of deciding cases. Such a judge might decide that the best way to advance the conservative agenda would be to adopt a formalist or Holmesian judicial decision-making style. This judge would not adopt such a style because of an underlying belief that the formalist or Holmesian style represents a more defensible mode of judicial decision-making than instrumentalism or natural law, but rather would adopt the style because in the political and social climate in which the judge was deciding cases such a style would typically lead to a more conservative result in society at large.

Because such a judge would "mouth" the formalist or Holmesian "line" in deciding cases, the only way to determine if such a judge were a true formalist or Holmesian, rather than a conservative metaethical instrumentalist, would be to examine those cases in which a formalist or Holmesian approach led to a liberal instrumentalist result; then, one would determine whether the judge remained faithful to the formalist or Holmesian approach when deciding that case. Of course, a conservative metaethical instrumentalist might still follow the formalist or Holmesian line in a few of these cases, and thus allow a liberal instrumentalist result to take place. This would help preserve the illusion that the judge is a committed formalist or Holmesian, thereby preserving the judge's ability to argue forcefully that the court

Court among the conservatives may concern the three remaining approaches to judicial decision-making. As discussed in Parts II and III, some of the conservatives on the Court appear to be classic Holmesians,⁹⁸ others classic formalists,⁹⁹ and some, perhaps, may be consciously or unconsciously part of a reemergence of natural law.¹⁰⁰ Though development of the idea is outside the scope of this Article, given the account of American legal history stated above, it may be that those Justices who consciously or unconsciously follow a natural law approach to judicial decision-making are more faithful to the original intent of the framers and ratifiers of the Constitution, who believed in natural law, than those Justices who appear to follow a formalist or Holmesian approach.¹⁰¹

ought to adopt such an approach for every case coming before it. In other words, a conservative metaethical instrumentalist might conclude that seeming to remain a formalist or Holmesian purist was more important to the conservative cause than the result in any one case. In any event, because such a judge would typically follow a formalist or Holmesian approach when deciding most cases, that judge would properly be placed in the formalist or Holmesian category in Table 1.

98. See *infra* text accompanying notes 167-72, 191-98 (discussing Holmesian posture of Chief Justice Rehnquist and Justice White).

99. See *infra* text accompanying notes 147-50, 210-13 (discussing formalist posture of Justice Scalia).

100. See *infra* text accompanying notes 114-26, 215-50 (discussing judicial decision-making philosophies of Justices O'Connor, Kennedy, Souter, and Thomas).

101. For citations to articles which discuss the original intent of the framers from the perspective of the 18th and 19th century natural law tradition, see *supra* notes 47, 49-50 and accompanying text. In particular, Jefferson Powell's article, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), has sparked a lively debate. See, e.g., Raoul Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987); Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1989); Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Raoul Berger, "Original Intent": A Response to Hans Baade, 70 TEX. L. REV. 1535 (1992). See also INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990); Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275 (1986); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights*, 69 N.C. L. REV. 421 (1991); Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709 (1992). A sequence of articles by Professor Michael Moore are also intriguing for their elaboration of a natural law approach towards constitutional and statutory interpretation. See Moore, *supra* note 46; Moore, *Interpretation*, *supra* note 49; Moore, *Unwritten Constitution*, *supra* note 49.

III. THE FOUR APPROACHES AND SEPARATION OF POWERS DOCTRINE

In this Section, the four approaches to judicial decision-making will be discussed as they relate to separation of powers doctrine.

A. *The Natural Law Approach*

In his 1833 work, *Commentaries on the Constitution of the United States*,¹⁰² Justice Joseph Story of the Supreme Court discussed the prevalent rules of interpretation in the late eighteenth and early nineteenth century. He wrote:

Sec. 400. I. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intentions of the parties. Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequences, or the reason and spirit of the law. He goes on to justify the remark by stating, that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use; that if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter, with reference to which expressions are used; that the effect and consequence of a particular construction is to be examined, because if a literal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason and spirit of the law, or the causes which led to its enactment, are often the best exponents of the words, and limit their application.

.....

Sec. 405. II. In construing the [C]onstitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts.¹⁰³

Writing more than a century later, Professor William Crosskey of the

102. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Little, Brown & Co. eds., 3d ed. 1858).

For a commentary on Justice Story and his place in the natural law tradition of the 18th and 19th centuries, see James McClellan, *Joseph Story and the American Constitution* (orig. ed. 1971, reissued ed. 1990). As Professor McClellan states:

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

Id. at 65. See also H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285 (1985).

103. STORY, *supra* note 102, at 283-85.

University of Chicago underscored this mode of interpretation as follows:

The rules of interpretation ordinarily followed in the eighteenth century, and, likewise, the modes of draftsmanship then in use, were in certain important particulars, different from those in common use today. Thus, the eighteenth-century draftsman felt no obligation to spell out every last detail in the documents he drew. This was sometimes done; and when it was done, the results, in point of verbosity and opacity, were about what they are in such efforts today. But, in the eighteenth century, there was a well-recognized alternative to this now familiar technique, another and simpler method, which seems quite generally to have been preferred in documents addressed to public comprehension. Under this simpler method, the over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules of interpretation customarily followed by the courts. The rules that were followed were partly a result, and partly the cause, of this method of drafting. Justified by the fact that no draftsman is possessed of an infinite prescience, they were calculated to give a just and well-rounded interpretation to every document, in the light of its declared general purpose; or, if its purpose is not declared, then, in the light of its apparent purpose, so far as this could be discovered.

.....

"The fairest and most rational method of interpreting the will of the legislator, is," says Blackstone, "by exploring his intentions as at the time when the law was made, by *signs* the most natural and probable." "Those signs," he then goes on to explain, "are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law." As for the last of these—that is, "the reason and spirit of [a law]; or the cause which moved the legislator to enact it,"—it is, says Blackstone, "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious."¹⁰⁴

104. WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION* 363-66 (Univ. of Chicago Press 1953). Though certain aspects of Professor Crosskey's overall constitutional critique were controversial at the time of publication, and remain so today, see Raoul Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 492-95 (1983), Professor Crosskey's summary of the general nature of the natural law style of interpretation is not particularly controversial. For a modern phrasing of a natural law approach to constitutional and statutory interpretation, see Moore, *supra* note 46, at 51. Moore states:

We should interpret . . . (1) by the ordinary meaning of the words that appear within them, (2) as modified by the technical legal meanings . . . or prior court interpretations, (3) so as to check both ordinary and technical meaning by the purpose a rule of this kind ought to serve in a just society, and (4) so as to check meaning and purpose by an all-things-considered value judgment that acts as a safety-valve against wildly absurd or unjust results.

Id. For an elaboration of this approach, see Moore, *Interpretation*, *supra* note 49. For further discussion of the natural law interpretation style, see *infra* notes 205-44 and accompanying text. On early interpretation theories generally, see *supra* note 101 and

This regard for the "cause" or "reason" for a law is stated most famously in *Heydon's Case*¹⁰⁶ in 1584. The "Rule of Heydon's Case," as stated by Lord Coke, provides:

[F]or the sure and true . . . interpretation of all statutes in general (be they penal . . . or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: . . . 1st. What was the common law before the making of the act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason for the remedy; and then the office of all Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the act.¹⁰⁶

With regard to the separation of powers doctrine specifically, the clear "mischief to be remedied," as identified by the framers and ratifiers of the Constitution, was the prevention of tyranny.¹⁰⁷ As Justice Story not-

sources cited therein.

105. 76 Eng. Rptr. 637 (1584).

106. *Id.* at 638 (citations omitted). For a theory that James Madison's view of constitutional interpretation took into account this Rule of Heydon's Case, and also rejected a purely literalist, or formalist, approach, see David M. O'Brien, *The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 CONST. COM. 119, 145 (1991). O'Brien notes:

"[A]mong the obvious and just guides applicable to [interpreting] the Const[itutio]n," Madison listed: 1. The evils and defects for 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. These same points concerning Madison's theory of constitutional interpretation are made in DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 74-76, 78-80 (1989).

107. *See, e.g.,* Brown, *supra* note 7, at 1515-16, 1533-34. Brown states:

[T]he Madisonian goal of avoiding tyranny through the preservation of separated powers should inform the Supreme Court's analysis in cases raising constitutional issues involving the structure of government There was perhaps a secondary concern for greater efficiency in government, but clearly "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." In general, then, separation of powers aimed at the interconnected goals of preventing tyranny and protecting liberty.

Id. (citations omitted). *See also* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among the three

ed in 1833:

Sec. 520. In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen

Sec. 521. Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value "When," says he, "the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again; there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of every thing, were the same man, or the same body, whether of the nobles, or of the people, to exercise these three powers, that of enacting laws, that of executing public resolutions, and of trying the causes of individuals."

Sec. 522. The same reasoning is adopted by Mr. Justice Blackstone, in his Commentaries. "In all tyrannical governments," says he, "the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and whenever these two powers are united together, there can be no public liberty."¹⁰⁸

With regard to whether the separation of powers philosophy of the framers anticipated a strict separation of powers approach with three totally separate branches of government,¹⁰⁹ or instead a sharing of powers and checks-and-balances approach,¹¹⁰ most commentators, and most Su-

departments, to save the people from autocracy.

Id. (Brandeis, J., dissenting).

108. STORY, *supra* note 102, at 364-66.

109. See Brown, *supra* note 7, at 1523-24 (discussing an approach to separation of powers based upon "strong substantive separations between the branches of government," and "a belief that legislative, executive, and judicial powers are inherently distinguishable as well as separable from one another"); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984).

[Under one version of] "separation of powers," . . . Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function. These three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.

Id.

110. See Strauss, *supra* note 109, at 578: "[T]he checks and balances idea does not

preme Court Justices, have concluded that it was the sharing of powers, checks-and-balances philosophy of Montesquieu and Blackstone which motivated Madison, Adams, and most of the framers.¹¹¹ This is to be

suppose a radical division of government into three parts, with particular functions neatly parceled out among them. Rather, the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue." Brown, *supra* note 7, at 1527-29 (this "separation-of-powers tradition . . . stresses not the independence, but the interdependence of the branches"); Harold J. Kent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1261, 1272 (1988). Kent states:

[A]n effective system of separated powers [cannot] be maintained merely by separating the branches, nor even by inserting "external" checks, such as the power of impeachment or the power of judicial review The goal of the constitutional scheme was therefore to "contriv[e] the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." . . . In sum, our system of separated powers reflects interests in balance and in accountability.

Id.

111. For the views of commentators, see, e.g., DAAN BRAVEMAN ET AL., *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* 47 (2d ed. 1991) ("Thus, it appears that by the late 1780s separation had lost ground as an idea to checks and balances. The text of the Constitution promotes sharing."); Brown, *supra* note 7, at 1531-40 (discussing the separation of powers political philosophy of Montesquieu and Madison); Kent, *supra* note 110, at 1259 ("The focus in the Constitution is not so much on keeping the branches separate as on constructing a scheme of checks and balances The framers made the branches interdependent, and the system of checks and balances evinces the intent to make each branch accountable to the other."); Strauss, *supra* note 109, at 602. Strauss notes:

[T]he governmental structure [the framers] created embodies both separated powers and interlocking responsibilities; the purpose was to prevent both majoritarian rashness and the governmental tyranny that could result from the conjoining of power in a single source. Maintaining conditions that would sustain the resulting tension between executive and legislature was to be the central constraint on any proposed structure of government.

Id. But see Redish & Cisar, *supra* note 9, at 452-53, 456-65, 474-78 (though rejecting an "original intent" approach towards separation of powers, Redish and Cisar strongly suggest that their strict separation of powers "pragmatic formalist" approach is consistent with the intent of the framers and ratifiers of the Constitution).

For the views of Supreme Court Justices, see *Mistretta v. United States*, 488 U.S. 361, 362-412 (1989) (Blackmun, J., joined by all Justices of the Court except Scalia, J.).

In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others," *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.

distinguished from the seventeenth century's more strict separation of powers political philosophy.¹¹² As stated by Justice Story in 1833:

Sec. 525. But when we speak of a separation of the three great departments of government, and maintain, that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist. It was obviously the view taken of the subject by Montesquieu and Blackstone in their Commentaries;

Sec. 530. It is proper to presume, that it is agreed on all sides, that the powers belonging to one department ought not to be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.

. . . .
Sec. 540 Upon thorough examination of the subject, it will be found, that [preventing tyranny] can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence and constitutional independence of each are fully provided for

Sec. 541. There seems to be no adequate method of producing this result but by a partial participation of each in the powers of the other; and by introducing into

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

Id. at 380-81. *See also* Public Citizen v. United States Dep't of Justice, 491 U.S. 400, 487 (1989) (Kennedy, J., concurring, joined by Rehnquist, C.J., and O'Connor, J.) ("This is not to say that each of the three Branches must be entirely separate and distinct, for that is not the governmental structure of checks and balances established by the Framers."). *But see* Morrison v. Olson, 487 U.S. 654, 733-34 (1988) (Scalia, J., dissenting). Scalia stated:

[The majority's opinion] is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.

Id. (Scalia, J., dissenting).

112. *See infra* text accompanying notes 127-29.

every operation of the government in all its branches, a system of checks and balances, on which the safety of free institutions has even been found essentially to depend.¹¹³

Given this natural law view of interpretation and separation of powers political philosophy, a natural law judge committed to the political philosophy of the framers and ratifiers of the Constitution would first ask in considering a separation of powers problem whether the Constitution uses words “understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use”¹¹⁴ that resolve the issue on point. If so, then the specific choice by the framers and ratifiers, reflected by those words, would be followed. Such specific choices made in the separation of powers context include the detailed provisions in the Constitution concerning bicameralism, presentment, and presidential veto authority regarding the passage of legislation;¹¹⁵ specific exceptions to bicameralism for impeachment processes, senatorial power of advice and consent, and senatorial power to ratify treaties;¹¹⁶ the presidential pardoning power;¹¹⁷ prohibitions on members of Congress holding appointed offices;¹¹⁸ prohibitions on Congress passing a bill of attainder;¹¹⁹ and prohibitions on Congress reducing the compensation of the President or members of the federal judiciary.¹²⁰

On many separation of powers issues, however, the Constitution does not provide specific resolution to separation of powers questions. Issues like those involved in some 1980s cases, such as Congress’ power to create commissions,¹²¹ congressional power to remove executive officials,¹²² or aspects of inferior officer appointments,¹²³ do not have clear textual resolutions. Rather, the Constitution provides only the general structure of three governmental branches and an understanding of the purposes behind that structure. In such cases, a natural law judge would resort, as Justice Story stated, to “the context, the subject-matter, the

113. STORY, *supra* note 102, at 368, 371, 378. For a short summary of the history of separation theory’s influence on the framers, and the roles of James Madison, John Adams, and others in American separation of powers theory of that time, see BRAVEMAN et al., *supra* note 111, at 40-49.

114. STORY, *supra* note 102, at 283.

115. U.S. CONST. art. I, § 7, cl. 2-3.

116. *Id.* art. I, § 2, cl. 2, 5; § 3, cl. 6.

117. *Id.* art. I, § 6, cl. 1.

118. *Id.* art. I, § 6, cl. 2.

119. *Id.* art. I, § 9, cl. 3.

120. *Id.* art. I, § 1, cl. 7; art. III, § 1.

121. *See infra* text accompanying notes 407-08.

122. *See infra* text accompanying notes 348-53.

123. *See infra* text accompanying notes 386-92.

effects and consequences, or the reason and spirit of the law."¹²⁴ In particular, this would involve resort to the sharing of powers checks-and-balances philosophy which guided the Constitution's framers. Such a philosophy would focus, for example, on Justice Story's admonition that no branch of government "ought to possess directly or indirectly, an overruling influence in the administration" of another branch of government.¹²⁵ As discussed below, without stating that the approach is a natural law approach, this is the approach towards separation of powers which Justice Kennedy adopted in his concurrence in *Public Citizen v. United States Department of Justice*.¹²⁶

It is possible, though not terribly plausible, to adopt the view that the framers' natural law political philosophy was motivated more by the seventeenth-century's relatively strict separation of powers theories,¹²⁷ rather than by the eighteenth-century sharing of powers, checks-and-balances approach of Montesquieu, Blackstone, Madison and Adams.¹²⁸ A judge who reads history in this way would adopt a strict separation of powers approach in cases where the Constitution does not clearly spell out the respective powers. This approach would be adopted not for the formalist reasons discussed below,¹²⁹ but rather because the judge truly believed, however misguidedly, that a strict separation of

124. STORY, *supra* note 102, at 283.

125. See *supra* text accompanying note 113.

126. 491 U.S. 440, 486 (1989) (Kennedy, J., concurring). See *infra* text accompanying notes 432-43.

127. See Redish & Cisar, *supra* note 9, at 456-60 (discussing 17th-century separation of powers political philosophy, including that of John Locke); BRAVEMAN et al., *supra* note 111, at 43.

Montesquieu theorized that a separation of powers can be maintained only if there is also a system of checks and balances Indeed, this emphasis on the relationship between separation and balancing constitutes Montesquieu's real contribution to both This shift in emphasis was the primary change from the seventeenth to the eighteenth century political philosophies concerning separation.

Id.

128. See BRAVEMAN ET AL., *supra* note 111, at 40-49 (discussing the movement during the 18th century in America away from the 17th century's stricter separation of powers philosophy to Blackstone, Montesquieu, Madison, and Adams' sharing of powers, checks-and-balances approach); Brown, *supra* note 7, at 1531-40 (discussing the separation of powers philosophy of Montesquieu and Madison); Redish & Cisar, *supra* note 9, at 461-65 (same); see also W.B. GWYN, THE MEANING OF SEPARATION OF POWERS (1965). On this sharing-of-powers, checks-and-balances approach, see *supra* notes 110-13 and accompanying text.

129. See *infra* text accompanying notes 131-34, 144-50.

powers approach was the natural law political philosophy—the reason and spirit—that motivated the framers and ratifiers of the Constitution.¹³⁰ As discussed in Part III, Justice Thomas might take this approach when he begins to consider separation of powers cases.¹³¹

B. *The Formalist Approach*

In general, a formalist judge follows a positivist approach to judicial decision-making.¹³² This means a formalist sees the judge as a scientist who attempts to decide cases in light of existing positive law.¹³³ Such a judge would naturally tout the virtues of an original intent approach to the Constitution or statutes under consideration.¹³⁴

At the same time, the formalist's general preference for logic and symmetry would mean that a formalist approach to separation of powers doctrine would prefer doctrinal development in which the judge's sole function would be to apply rules mechanically to the case at hand¹³⁵ regardless of the original intent of the framers. A formalist would have a preference for clear, bright-line rules, organized into a system of pure logical categorization and deduction. Under such an approach, judges would not be required to engage in a flexible balancing inquiry to resolve the case or to inquire into the particular consequences of applying the rule in the case before them. The judge's sole duty would be to apply the

130. It should be noted that sometimes the argument for the framers adopting a strict separation of powers approach is that a number of state constitutions were drafted in strict separation of powers terms at the time. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Quoting from the Massachusetts Constitution, Justice Scalia wrote as follows:

"In the government of this Commonwealth, the legislative department shall neither exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either or them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Id. (Scalia, J., dissenting). Remember, however, that the first Congress specifically rejected the inclusion of such a strict separation of powers amendment in the original Bill of Rights. *See Brown, supra* note 7, at 1539 (noting that the House passed an amendment tracking the language of the Massachusetts Constitution, but the Senate rejected the proposed amendment).

131. *See infra* text accompanying notes 248-52.

132. *See supra* text accompanying notes 20-21.

133. *See supra* text accompanying notes 16, 20.

134. *See supra* note 14 and accompanying text (discussing the formalist assumption that judges should not make law, and that changes in the law should come only from the legislative branch). For an example of such an approach in the separation of powers area, see *infra* notes 147-49 and accompanying text.

135. *See supra* text accompanying note 14.

rule (or rules) applicable to the case at hand.¹³⁶

One example of this tension between a formalist doctrinal desire for mechanical rule application and a formalist desire for original intent jurisprudence is the formalist approach applied to the Commerce Clause between 1888 and 1937. During this period, the formalist approach was to read the phrase "commerce among the states" mechanically, requiring a clear, bright-line distinction between interstate commerce and intra-state commerce.¹³⁷ Under this approach, federal power under the Commerce Clause was reserved exclusively for commerce which had a direct effect on interstate commerce, such as the use of interstate mails; however, an indirect effect, such as the effect of in-state wages and prices on nationwide supply and demand, would be beyond the scope of federal power.¹³⁸ The Court said that this approach was consistent with the original intent of the framers and ratifiers of the Constitution,¹³⁹ though cas-

136. See *supra* text accompanying notes 14, 20-21. For examples of this approach's application to the separation of powers doctrine, see *infra* notes 144, 379 and accompanying text.

137. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 143-45 (4th ed. 1991); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 307-08 (2d ed. 1988).

138. See generally *Carter v. Carter Coal Co.*, 298 U.S. 238, 307-08 (1936). In *Carter*, the Court stated:

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, . . . or indirect The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but upon the manner in which the effect has been brought about.

Id. See also *Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918). In *Hammer*, the Court stated:

In each of these instances [including use of the interstate mails to promote an illegal lottery,] the use of interstate transportation was necessary to the accomplishment of harmful results This element is wanting in the present case. The thing to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states.

Id.

139. See *Carter*, 298 U.S. at 295 ("The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government

es initially interpreting the Commerce Clause suggest that the framers and ratifiers had a less mechanical intent in mind.

For example, Chief Justice Marshall stated in 1824, “[T]he genius and character of the whole government seem to be, that its action is to be applied to all external concerns of the nation, and to those internal concerns which affect the states generally.”¹⁴⁰ Under this approach, the Court decided what “affects the states generally” without regard to a mechanical distinction between direct or indirect effects, and instead considered whether the commerce empirically affected other states in any way.¹⁴¹ Chief Justice Marshall resolved this issue of empirical effects by stating that federal power would not extend to those aspects of commerce

which are completely within a particular state, which do not affect other states, and which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.¹⁴²

However, all other commerce that affected other states, whether directly or indirectly, was fit for federal regulation.¹⁴³

With respect to separation of powers, the same tension is present. Because of a desire for clear, bright-line rules, a formalist approach to separation of powers would prefer a strict separation of powers approach, with three completely separate spheres of governmental authority.¹⁴⁴ In such a case, the judge would not have to decide whether a par-

in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations.”); *see also Hammer*, 247 U.S. at 276.

This [C]ourt has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

Id.

140. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

141. *See generally* NOWAK & ROTUNDA, *supra* note 137, at 139 (“[In *Gibbons*] the federal power extended to commerce wherever it was present, and thus, ‘the power of Congress may be exercised within a state.’”); TRIBE, *supra* note 137, at 307-08 (“In place of the empirical test suggested in *Gibbons*, [from 1887 to 1937] the Court substituted a formal classification of economic activity far more restrictive of congressional power.”).

142. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

143. TRIBE, *supra* note 137, at 306 (“Marshall indicated [in *Gibbons*] that, in his view, congressional power to regulate ‘commercial intercourse’ extended to all activity having any interstate impact—however indirect.”); NOWAK & ROTUNDA, *supra* note 137, at 139 (“Marshall thus described the ‘internal commerce of a state’ as beyond the reach of federal power but simultaneously created a standard under which few commercial activities could be found to meet the definition of internal commerce.”).

144. *See, e.g.,* BRAVEMAN et. al., *supra* note 111, at 52-53.

ticular sharing of power constituted, in Justice Story's natural law words, "an overruling influence in the administration of their respective powers."¹⁴⁵ This balancing need not be done if there are three strictly separate branches of government.¹⁴⁶

Justice Scalia's approach to the separation of powers doctrine as indicated in his dissents in *Morrison v. Olson*¹⁴⁷ and *Mistretta v. United States*¹⁴⁸ are well-reasoned examples of this formalist preference for bright-line rules and mechanical rule application. Justice Scalia claims, as would any formalist, that this approach is the only approach that is faithful to the original intent of the Constitution.¹⁴⁹ Of course, a balancing of interests done in the context of a sharing of powers, checks-and-balances

At times, the doctrine of separation of powers has been construed to mean a simplistic and complete formal separation of governmental functions that precludes one branch from performing tasks that bear resemblance to the obligations of another branch The formal analytic approach to separation . . . views separation as a unitary concept, unburdened by internal or external complications such as checks and balances. Under a formal approach to a separation of powers dispute, then, the single focus of the courts' inquiry becomes whether one branch has transgressed the literal bounds of constitutional text by invading the territory of another branch, or by acting without express constitutional authorization in a sphere where another branch appear literally to be the proper constitutional actor.

Id. See also Brown, *supra* note 7, at 1523-27 ("The formalist approach is committed to strong substantive separations between the branches of government Moreover, formalism, at least as promoted by Justice Scalia, appears to be concerned . . . with forcing the Court to adhere to bright-line rules to foster predictability and restraint in judging."); *supra* notes 109, 127-30 (discussing a strict separation of powers approach); *infra* notes 381-82, 406 and accompanying text (discussing Justice Scalia's formalistic dissents in *Morrison v. Olson* and *Mistretta v. United States*).

145. STORY, *supra* note 102, at 371.

146. See Redish & Cisar, *supra* note 9, at 474-91 (discussing this fact as one of the main virtues of their "pragmatic formalist" approach towards separation of powers).

147. 487 U.S. 654, 697-733 (1988) (Scalia, J., dissenting). See *infra* text accompanying notes 379-80.

148. 488 U.S. 361, 413-427 (1989) (Scalia, J., dissenting). See *infra* text accompanying note 406.

149. See, e.g., *Morrison*, 487 U.S. at 733-34 (Scalia, J., dissenting):

[The Court's majority] fails to explain why it is not true that— as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed— all purely executive power must be under the control of the President I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.

Id. (Scalia, J., dissenting).

natural law philosophy may be exactly what the framers and ratifiers of the Constitution had in mind in cases where they did not provide clear constitutional text on point.¹⁵⁰

C. *The Holmesian Approach*

As a positivist theory of law, the Holmesian approach to separation of powers shares with the formalist approach a strong belief that the judge must follow the specific commands of the Constitution where such specific commands exist.¹⁵¹ However, because this is a functional approach to judicial decision-making, rather than an analytical approach, the Holmesian judge does not have a predisposed preference for mechanically applied rules.¹⁵² Rather, in the absence of clear, specific commands on point, either clearly stated text or clear inferences from the purpose of the Constitutional text, the Holmesian view counsels judicial deference to the dominant forces in society.¹⁵³ Under this view, legislators, as the elected representatives in our democratic society, are the proper balancers of public policy in society, not the courts.¹⁵⁴

This difference between a formalist approach and a Holmesian approach in interpreting the Constitution is best reflected by the differing approaches to "liberty of contract" and "Commerce Clause" questions between 1888 and 1937. During this period, the formalists on the Court used the term "liberty" in the Fourteenth Amendment to create the *Lochner* era approach to liberty of contract, a relatively mechanical approach to determine which types of economic activity the government could regulate constitutionally.¹⁵⁵ Under this approach, the government could regulate the economy with regard to health and safety, morals, public municipal corporations or with regard to limiting the negative economic impact of monopolies.¹⁵⁶ Other kinds of economic regulations

150. See generally *supra* text accompanying notes 101-31.

151. See *supra* notes 33-34, 39-41 and accompanying text.

152. See *supra* text accompanying notes 35-40.

153. See *supra* text accompanying notes 31-34, 37-40.

154. See *supra* text accompanying note 33.

155. See generally NOWAK & ROTUNDA, *supra* note 137, at 362-67.

156. See *Lochner v. New York*, 198 U.S. 45, 53 (1905).

The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth] [A]mendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.

Id. During this period, the phrase "general welfare of the public" was typically read to

were held to be unconstitutional, however, because they interfered with an individual's liberty of contract, which was grounded in the market mechanism and the economic theory of laissez-faire.¹⁵⁷

In contrast, Holmes stated that our Constitution was

not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether the statutes embodying them conflict with the Constitution of the United States.¹⁵⁸

Thus, since the Constitution did not clearly command a reading of "liberty of contract" consistent with the formalist understanding, Holmes argued that the Court should defer to the legislatures and allow the economic regulations at issue in the *Lochner* era cases to stand.¹⁵⁹

Similarly, between 1888 and 1937 the formalists took the phrase "commerce among the states" in the Commerce Clause and constructed from this a conceptual and analytical approach to federal power based on the distinction between direct and indirect effects.¹⁶⁰ According to this approach, Congress could regulate direct effects on interstate commerce, such as the use of interstate mails. Conversely, Congress could not regulate indirect effects on interstate commerce, such as the effects of in-state wages and prices on nationwide supply and demand, if the activi-

encompass only regulation of municipal corporations, including public utilities, or monopolies. *See id.* at 55 ("The *Atkin* case was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality."); *Munn v. Illinois*, 94 U.S. 113, 126-32 (1877) (businesses regulated in *Munn* were clearly "affected with the public interest" because they had a "virtual monopoly").

157. *See generally* NOWAK & ROTUNDA, *supra* note 137, at 362. Nowak states:

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

Id.

158. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

159. *See* GEOFFREY STONE et. al., CONSTITUTIONAL LAW 802-03 (2d ed. 1991) ("Justice Holmes . . . dissented regularly from the Court's invalidation of economic regulations.").

160. *See supra* text accompanying notes 137-39.

ties, such as manufacturing, mining, or agriculture, took place physically (analytically or logically) within a state's borders.¹⁶¹

In contrast, Holmes focused functionally, or pragmatically, on the actual effects of regulation.¹⁶² Holmes concluded that as long as the subject under regulation had some effect on interstate commerce, that subject was fit for congressional regulation.¹⁶³ This was true for Holmes even if the effects on interstate commerce were only indirect, such as the effects of in-state wages and prices on nationwide supply and demand.¹⁶⁴ Such an approach focused functionally on the fact that effects on interstate commerce are equally effects whether direct or indirect. Thus, Holmes counseled deference to Congress and concluded that Congress, as the dominant balancer of public policy in our democratic society, "may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."¹⁶⁵

161. See *supra* note 138 and accompanying text.

162. In legal theory terms, Holmes thus adopted a realist approach to Commerce Clause cases, and rejected a formal approach. See STONE ET AL., *supra* note 159, at 152.

The cases invoke two general approaches. Under the *formal* approach, the Court examines the statute and the regulated activity to determine whether certain objective criteria are satisfied. For example, upholding regulations triggered by the fact that goods cross state lines is a formal approach that ignores actual economic effects and actual legislative motivation. In contrast, the *realist* approach attempts to determine the actual economic impact of the regulation or the actual motivation of Congress.

Id. On the relationship between Holmes and the American legal realist movement generally, see *supra* note 24.

163. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting). Holmes states:

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms.

Id. (Holmes, J., dissenting).

164. *Id.* at 281 (Holmes, J., dissenting). Holmes wrote:

But if an act is within the powers specifically conferred by Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line [thus affecting interstate supply of goods] they are no longer within their rights Under the Constitution such commerce belongs not to the States but to Congress to regulate.

Id. at 277, 281 (Holmes, J., dissenting).

165. *Id.* at 281 (Holmes, J., dissenting). See generally STONE ET AL., *supra* note 159,

By the same token, with regard to separation of powers, unless the Constitution's command is clear, either reflected in clearly stated language or clear inferences of purpose, a Holmesian judge would likely defer to arrangements set out by Congress.¹⁶⁶ Indeed, an extreme Holmesian might look for ways to avoid holding that the specific language of the Constitution requires a finding that the statute is unconstitutional and thus defer to Congress. As discussed below, Justice White's dissents in *INS v. Chadha*¹⁶⁷ and *Bowsher v. Synar*¹⁶⁸ may represent such an extreme Holmesian view, while Chief Justice Rehnquist's dissent in *Chadha*,¹⁶⁹ but joining the majority in *Bowsher*,¹⁷⁰ may represent the more moderate Holmesian approach. As is discussed below, Justice White's dissent in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*,¹⁷¹ joined by Chief Justice Rehnquist, and Chief Justice Rehnquist's opinion in *Morrison v. Olson*,¹⁷² also represent a Holmesian approach towards separation of powers.

D. The Instrumentalist Approach

The instrumentalist approach to separation of powers requires a clear focus on how the purposes of separation of powers are either advanced or retarded in the context of a particular case.¹⁷³ As Gilmore indicated,

at 189 (discussing the eventual adoption of Holmes' realist approach by the Supreme Court after 1937, with the slight caveat that this "economic' or 'pragmatic' approach to determining whether an activity affects interstate commerce . . . turns on whether the activity it regulates has a 'substantial effect on interstate commerce.'"). No congressional regulation since 1937, however, has failed to meet this test of establishing that the activity regulated has such a substantial effect. See Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 118 (1966) ("Logically, Congress can regulate every detail of almost every commercial transaction . . .").

166. On Holmesian deference generally, see *supra* notes 29-41 and accompanying text.

167. 462 U.S. 919, 967 (1983) (White, J., dissenting). See *infra* text accompanying notes 312-22.

168. 478 U.S. 714, 759 (1986) (White, J., dissenting). See *infra* text accompanying notes 358-62.

169. *Chadha*, 462 U.S. at 1013 (Rehnquist, J., dissenting). See *infra* text accompanying notes 340-43.

170. *Bowsher*, 478 U.S. at 714. See *infra* text accompanying notes 344-55.

171. 111 S. Ct. 2298, 2312 (White, J., dissenting). See *infra* text accompanying notes 464-79.

172. 487 U.S. 654 (1988). See *infra* text accompanying notes 383-403.

173. On the connection between instrumentalism and the purposes to be advanced

for an instrumentalist judge, the act of interpreting a constitution, statute, or prior common law decision will often call for consideration of sound social policy to resolve leeways in the law.¹⁷⁴ Furthermore, there may be cases where the law does not command a particular result because no law exactly covers the situation or because each of two conflicting rules arguably applies. In such cases, a judge can and must make law that achieves a sound social policy result.¹⁷⁵

With respect to separation of powers cases, such an approach counsels careful attention to the checks and balances function of separation of powers to help avoid tyranny by either the legislative or executive branch.¹⁷⁶ Examples of attempts to short-circuit checks and balances would thus be viewed with great disfavor.¹⁷⁷ One such example is *Chadha*, where the legislature attempted to avoid the structural protections of bicameralism and presentment by delegating legislative power to a sub-part of the legislature, with a one-house veto provision.¹⁷⁸ Another example is *Bowsher*, where the legislature delegated appropriation power to a sub-part of itself, the rationale given by Justice Stevens and Marshall for their finding the Gramm-Rudman Act unconstitutional.¹⁷⁹ On the other hand, judges following an instrumentalist approach would greatly favor attempts to strengthen a checks-and-balances system, such as requiring judicial appointment of independent prosecutors to investigate executive official wrongdoing as in *Morrison*.¹⁸⁰

by a particular doctrinal result, see *supra* note 15 and accompanying text.

174. See GILMORE, *supra* note 11, at 91-98; see also *supra* note 15 and accompanying text.

175. See GILMORE, *supra* note 11, at 91-98; see also *supra* note 15 and accompanying text.

176. Justice Stevens explained, "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." *Bowsher v. Synar*, 478 U.S. 714, 748 (1986) (Stevens, J., concurring, joined by Marshall, J.) (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)). On preventing tyranny as the core focus of separation of powers doctrine, see *supra* notes 107-08 and accompanying text.

177. See *Bowsher*, 478 U.S. at 755 (Stevens, J., concurring). Justice Stevens wrote:

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.' . . . Even scholars who would have sustained the one-House veto appear to agree with this ultimate conclusion.

Id. (Stevens, J., concurring) (citations omitted).

178. See *infra* text accompanying notes 304, 310, 316-17.

179. See *infra* text accompanying notes 363-67.

180. See *infra* text accompanying notes 384-85. Of course, instrumentalist judges would also want to balance against these benefits the possible drawbacks of an independent prosecutor law. See *infra* text accompanying notes 396-403.

III. THE FOUR APPROACHES TO JUDICIAL DECISION-MAKING AND THE SUPREME COURT GENERALLY

Prior to discussing the post-1980 separation of powers cases, it is useful to illustrate the approach to judicial decision-making taken by the Supreme Court Justices since 1980. This is not to say that the Justices have self-consciously adopted one of these four decision-making styles in deciding cases. Rather, once these styles are described, the decision-making styles of the Justices seem to be reflected more in one style than the other. Of course, no judge is a perfect model of consistency, particularly since the claim is not being made that the current Justices have decided cases self-consciously against the backdrop of the styles presented here. Nevertheless, the four decision-making approaches can help to clarify what appear to be systematic differences among the Justices in decision-making style.¹⁸¹

The instrumentalists on the Court are the easiest to recognize. This is the legacy of the Warren Court's activism.¹⁸² During the 1980s, Justices Brennan and Marshall were the strongest protagonists of this view.¹⁸³ Probably the clearest example of their willingness to read constitutional provisions in light of their view of sound, social policy is their position that the death penalty violates the Eighth Amendment.¹⁸⁴ While on the Court, Justices Brennan and Marshall have maintained this view despite acknowledging that it differed from the views of the framers and ratifiers of the Constitution and contemporary community values.¹⁸⁵ Justice

181. For a table summarizing differences among the current Justices on the Supreme Court from the perspective of the four decision-making styles discussed in this Article, see *infra* note 266 and accompanying text.

182. On Warren Court activism generally, see ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); JOHN DENTON CARTER, *THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM* (1973).

183. Other members of the Warren Court who would clearly count as instrumentalists were Justices Douglas, Goldberg, Fortas, and Chief Justice Warren. See generally KELSO & KELSO, *supra* note 14, at 417-19.

184. See *Gregg v. Georgia*, 428 U.S. 153, 227-28 (1976) (Brennan, J., dissenting); *id.* at 231-32 (Marshall, J., dissenting).

185. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 444 (1986) ("This is an interpretation [the death penalty is always unconstitutional] to which a majority of my fellow Justices—not to mention, it would seem, a majority of my fellow countrymen—does not subscribe.") *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting). Marshall states:

Brennan has written, "On this issue, the death penalty, I hope to embody a community, *although perhaps not yet arrived*, striving for human dignity for all."¹⁸⁶

In other noteworthy cases, an instrumentalist approach would counsel for an expansive reading of the right to privacy, and thus would support the *Roe v. Wade*¹⁸⁷ right to choose an abortion if the judge decided that would be good social policy.¹⁸⁸ From a liberal instrumentalist perspective, concerns about an individual's right to protest would dictate that the Court recognize a First Amendment right to burn the American flag, as in *Texas v. Johnson*.¹⁸⁹ When dealing with corporations, as opposed to individuals, a liberal instrumentalist would likely hold that corporations have a weaker First Amendment claim to spend money acquired in commercial transactions for political purposes than individuals, because the threat of distortion of the political process that unlimited corporate spending poses is greater than the threat that individuals pose; this was the result in *Austin v. Michigan Chamber of Commerce*.¹⁹⁰ Justices

But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable.

Id. (Marshall, J., dissenting).

186. Brennan, *supra* note 185, at 444 (emphasis added).

187. 410 U.S. 113 (1973).

188. For arguments that such a right would advance sound social policy, *see id.* at 153.

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

Id.

189. 491 U.S. 397, 414 (1989). The Court stated:

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.

Id.

190. 110 S. Ct. 1391, 1402 (1990). The Court stated:

Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the political pro-

Brennan and Marshall adopted each of these liberal instrumentalist positions.¹⁹¹

For a Holmesian judge, judicial consideration of sound social policy is an anathema.¹⁹² A judge's role is not to impose a particular vision on the Constitution.¹⁹³ For a statute to violate the Constitution, the violation must appear in clearly stated constitutional language or from a clear inference shown from the purpose of a constitutional provision.¹⁹⁴ For Justice Holmes, a deferential approach would apply to cases involving individual rights as well as economic rights.¹⁹⁵ In most cases, therefore, the government is likely to prevail. Thus, for example, this approach would counsel against an expansive reading of the right to privacy and thus against finding the right to choose an abortion recognized in *Roe v.*

cess, and it has implemented a narrowly tailored solution to that problem. By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections.

Id.

191. See *Roe*, 410 U.S. at 115; *Johnson*, 491 U.S. at 414; *Austin*, 110 S. Ct. at 1395, 1402.

192. See *supra* text accompanying notes 29-34.

193. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

Id. (Holmes, J., dissenting).

194. See *supra* text accompanying notes 37-40, 153-54, 166; KELSO & KELSO, *supra* note 14, at 392.

[I]f the Constitution specifically mandated the protection of particular rights, Holmes would faithfully interpret the Constitution to protect those rights. In First Amendment cases, for example, Holmes is known for his view that the text and history of the First Amendment required protection of speech which did not constitute a "clear and present danger."

Id.

195. See, e.g., Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 254, 307-08 (1962-63) (between 1908 and 1928, in 25 non-unanimous civil rights cases, Holmes was only once on the side of what in the 1960s would be called protecting civil liberties; in all other cases he deferred to the political processes).

Wade.¹⁹⁶ Similarly, it would counsel against finding the First Amendment right to burn the American flag recognized in *Texas v. Johnson*,¹⁹⁷ or against finding that corporations, as statutory creations of the state, have the same First Amendment rights as individuals to spend money acquired in commercial transactions for political purposes, which was the result in *Austin v. Michigan Chamber of Commerce*.¹⁹⁸ Chief Justice Rehnquist and Justice White are consistent Holmesian Justices in each of these cases.¹⁹⁹

Separate considerations apply when considering judges who approach judicial decision-making from a more analytical perspective. Such judges will be driven more by application of legal categories, without regard to the sound social policy of the instrumentalists, or the strong deference to government posture of the Holmesians.²⁰⁰ Thus, such an approach

196. 410 U.S. 113 (1973). See *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting, joined by Rehnquist, J., dissenting). The dissent stated:

I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

Id. (White, J., dissenting). The dissent further stated that "[t]he decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one . . . partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

197. 491 U.S. 397, 421-22 (1989) (Rehnquist, C.J., dissenting). Rehnquist stated:

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

Id. (Rehnquist, J., dissenting) (citations omitted).

198. 110 S. Ct. 1391, 1397 (1990). The Court stated:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace" . . . We therefore have recognized that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form."

Id. (citations omitted).

199. See *Roe*, 410 U.S. at 171, 221 (White, J., dissenting); *Johnson*, 491 U.S. at 421-22 (Rehnquist, C.J., dissenting); *Austin*, 110 S. Ct. at 1394-95.

200. For a discussion of sound social policy and instrumentalism, see *supra* text ac-

would counsel that standard First Amendment protection for free speech should apply even in an emotionally charged case such as the flag burning issue considered in *Texas v. Johnson*.²⁰¹ It would also suggest that standard First Amendment rights should apply to corporations spending money acquired in commercial transactions for political purposes, as in *Austin v. Michigan Chamber of Commerce*.²⁰² Thus, this approach would agree with the instrumentalists in protecting free speech in *Texas v. Johnson*,²⁰³ but disagree with both instrumentalists and Holmesians in *Austin v. Michigan Chamber of Commerce*.²⁰⁴

From both formalist and natural law perspectives, one would also expect a judicial push for greater consistency in legal categories, more clearly defined tests, and dislike of functional balancing approaches where they can be avoided.²⁰⁵ However, there is this difference between

companying notes 15, 173-80. For a discussion of deference towards the government and Holmesianism, see *supra* text accompanying notes 31-34, 153-66.

201. 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring).

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Id. (Kennedy, J., concurring).

202. 110 S. Ct. 1391, 1426 (1990) (Kennedy, J., joined by O'Connor, J., and Scalia, J., dissenting). The dissent wrote:

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

Id. (Kennedy, J., dissenting).

203. 491 U.S. 397 (1989). See *supra* text accompanying note 189.

204. 110 S. Ct. 1391 (1990). See *supra* text accompanying notes 190, 198.

205. See, e.g., Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 637-49 (1991) (discussing examples of Justice Scalia's concern with making the law more certain and predictable, and eschewing balancing tests whenever possible); Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 752 (1990) ("Justice Scalia seems to be claiming that the absence of a bright-line absolute, and reliance instead on case-by-case adjudication for the resolution of separation of powers issues, represents

the formalist and natural law approaches. A natural law approach would acknowledge that sometimes there is a need for practical balancing against a backdrop of natural law principles, as in the context of balancing whether a sharing of powers creates "an overruling influence in the administration of their respective powers."²⁰⁶ Indeed, no natural law philosophy has ever developed a mechanized, formalist list of detailed, rule-oriented doctrine to guide resolution of every case.²⁰⁷ This lack of detailed, rule-oriented doctrine would frustrate the formalist judge.²⁰⁸

intolerable arbitrariness."); Justice Anthony M. Kennedy, Reason, Rhetoric, and Respect, Commencement Address at University of the Pacific, McGeorge School of Law (May 21, 1988) ("[I]f there is one common premise that all lawyers share in the national common language that we speak to each other, it is the idea of reason [T]he tradition of American law is based on the rule of law"); Jay M. Feinman, *The Jurisprudence of Classifications*, 41 STAN. L. REV. 661, 676 (1989). Feinman states:

More modest versions of analytic classifications are widespread in the judicial and scholarly literature. These versions view abstraction, order, and system as necessary and desirable elements of the legal process, even though instrumental objectives must be balanced against the urge toward doctrinal purity. Despite the demise of classical formalism, law's claim to authority still rests in part on logic, order, and consistency. Consistency in particular entails the internal consistency of treating like cases alike and different cases differently, and the external consistency of justifying results according to some general, positive, public principle.

Id.

206. See *supra* text accompanying notes 121-25.

207. See Fried, *supra* note 50, at 37, 54. Fried notes:

[A] priori moral reflection on rights seems inadequate to yield the necessary richness of our legal system Political philosophy can tell us that a just regime, a regime of liberty, is one in which persons have rights Philosophy may be able to tell us in a general way what some of these rights should be Yet philosophy cannot possibly determine the exact shape and extent of such rights [I]t is preposterous to imagine that philosophy can tell us whether there should be a right to privacy in a public telephone booth or in a department store dressing room, or whether the imperative that property rights be respected includes the right of ancient lights or the use of percolating waters.

Id. (footnotes omitted); see also Lloyd, *supra* note 16, at 106-07. Lloyd states:

But it is difficult to avoid the reflection that even if a universally acknowledged set of values could be established, so that in this qualified sense it could be said that such a [natural law] code "exists" as a *fact*, its content would be likely to be so vague and subject to so much qualification, as to be vacuous.

Id. (footnote omitted).

208. Of course, the fact that no existing natural law doctrine has developed a methodology to generate the kind of detailed, rule-oriented doctrine that would satisfy a formalist does not mean that it cannot be done. It does mean, however, that the burden is on the natural law theorist to show that it can be done.

To date, no Justice on the current Supreme Court has clearly adopted a natural law approach. However, among the more analytically minded Justices, Justice Scalia is the only consistent formalist. In many areas of law, Justice Scalia has pushed strongly for a formalist approach.²⁰⁹ For example, only Justice Scalia has taken a consistently formalist, strict separation of powers approach.²¹⁰ So, too, in the area of statutory interpretation, Justice Scalia has pushed most strongly for a rigidly formalistic, literal approach to statutory interpretation.²¹¹ In terms of giving con-

It might be possible, for example, to develop a natural law theory that does specify results at the precise level of "whether there should be a right to privacy in a public telephone booth," Fried, *supra* note 50, at 54, but which does not depend upon rule-oriented doctrine. Such an approach might rely instead upon principles applied empirically to specific fact situations, or rational dialogue about specific fact situations. See JURGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION* (T. McCarthy trans., 1984) (discussing the general possibility of creating a natural law theory around principals of rational dialogue in situations of uncoerced communication); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967) (discussing the difference between the rules and principles in this context).

Again, however, the burden is on the natural law theorist to develop a theory capable of withstanding rational critique. Recent attempts at such modern ethical natural law theories, like those of Rawls, Nozick, Ackerman, and Finnis, seem not to have succeeded in withstanding rational critique. See *supra* notes 91-95 for citations to these works. See generally *READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE* (Norman Daniels ed. 1975); *READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA* (J. Paul ed., 1982); Larry Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816 (1981) (book review of BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE*); William H. Wilcox, *Book Review: Natural Law and Natural Rights by John Finnis*, 68 CORNELL L. REV. 408 (1983).

Of course, if a judge is relying on natural law only to the extent that a particular natural law theory was embedded in a document under review, the question for such a judge is not whether that natural law theory is capable of perfect rational defense, but rather what was the natural law theory in which the framers and ratifiers of the document believed. For further discussion of this point, see *supra* note 50.

209. See *infra* text accompanying notes 210-14. See also Brock, *supra* note 205, at 637-49 (discussing Justice Scalia's analytic positivist approach); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). It should be noted that, like Professor Summers, see *supra* note 24, Mr. Brock identifies four major schools of jurisprudence—analytic positivism, history, natural law, and pragmatism—and Mr. Brock uses the term "analytic positivism" to refer to the judicial decision-making style described in this Article as formalism, that is, the approach to law described in Table 1 as a combination of analytic logic and positivist premises. See Brock, *supra* note 205, at 627-34. As indicated in *supra* note 24, the terms "analytic positivism" and "formalism" describe the same decision-making style.

210. See *infra* text accompanying notes 379-80, 406.

211. See generally Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New*

ment to substantive due process rights, Justice Scalia is most closely identified with restricting such rights to those mechanically describable by reference to tradition as reflected in prior legislative enactments, and then giving that tradition a specific, or narrow, reading.²¹² Similarly, with respect to interpreting the contours of the Eighth Amendment prohibition against cruel and unusual punishment, Justice Scalia has advocated a narrow, literalist interpretation of that provision.²¹³

Each of these conclusions would be troubling to a Justice approaching constitutional or statutory interpretation from the perspective of natural law. As indicated in Part II, a natural law approach does not call for an exclusively literalist approach to interpretation.²¹⁴ Under a natural law approach, the purpose behind the law, the "mischief to be remedied,"²¹⁵ may be a better sign of the framers' intent than "grammatical propriety."²¹⁶ Of course, the words used are primary. A judge cannot substitute his or her views for those of the framers. However, understanding the limits of human capacity to express intent perfectly in the literal words used, under a natural law approach to interpretation, the purpose behind the words used is critical even in the initial stage of determining the words' plain meaning.²¹⁷ As stated by Justice Story in 1833, "the rea-

Legal Process, 12 CARDOZO L. REV. 1597, 1597-99 (1991); see also William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992).

212. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (In determining substantive due process rights, consider "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."); *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989). In *Stanford*, an Eighth Amendment case applied to the states through the Fourteenth Amendment, Justice Scalia noted that to determine the evolving American tradition on what constitutes cruel and unusual punishment, judges may consider only legislative enactments and their application, not "public opinions polls, the views of interest groups and the positions adopted by various professional associations A revised national consensus . . . must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.* See generally Bethany A. Cook & Lisa C. Kahn, *Justice Scalia's Due Process Model: A History Lesson in Constitutional Interpretation*, 6 ST. JOHN'S J. LEG. COMMENT 263 (1991); Timothy L. Raschke Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992).

213. See, e.g., *Hudson v. McMillan*, 112 S. Ct. 995, 1004-1011 (1992) (Thomas, J., joined by Scalia, J., dissenting); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684-701 (1991) (Scalia, J., joined by Rehnquist, C.J.).

214. See *supra* text accompanying notes 102-06.

215. *Heydon's Case*, 76 Eng. Rptr. 637, 638 (1584). See also *supra* text accompanying notes 105-06 (discussing *Heydon's Case*).

216. STORY, *supra* note 102, at 283.

217. See Moore, *Interpretation*, *supra* note 49, at 383-84. Moore notes:

Once a judge determines the ordinary meanings of the words that make up a text and modifies that ordinary meaning with any statutory definitions or

son and spirit of the law, or the causes which led to its enactment, are often the best exponents of the words, and limit their application.²¹⁸ Furthermore, as Justice Story indicated, if the words used are "dubious" (i.e., ambiguous), the judge must examine the context and subject-matter of the words under consideration, and if the words used lead to a "manifest absurdity," the judge must consider the words' effects and consequences.²¹⁹

Given this approach towards interpretation, a natural law judge would differ with a formalist judge on each of the interpretation questions discussed above. With respect to separation of powers, a natural law approach would recognize that the natural law political philosophy which motivated the framers was a sharing of powers, checks-and-balances approach, not a strict separation of powers theory.²²⁰ This willingness to embrace a sharing of powers approach where constitutional text is not clear, even if that means a reduction in the clear, bright-line rules of a strict separation of powers approach, distinguishes a faithful natural law approach from a formalist view.²²¹

With respect to statutory interpretation issues, the same line distinguishing a formalist approach from a natural law approach can be made. While both a formalist and a natural law approach pay great attention to the words used by the framers of a document,²²² and eschew reading arguments of sound social policy into a document if the words do not carry that meaning,²²³ in the first instance of deciding what the words

case law developments, there is still at least one more task. A judge must check the provisional interpretation reached from these ingredients with an idea how well such an interpretation serves the purpose of the rule in question. The necessity for asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart.

Id.

218. STORY, *supra* note 102, at 283.

219. *Id.* at 284.

220. See *supra* text accompanying notes 109-13, 120-31.

221. See *supra* text accompanying notes 109-30, 144-50.

222. See Moore, *Interpretation*, *supra* note 49, at 320 (noting that under both a natural law approach to interpretation and a formalist approach to plain meaning, "ordinary meanings of the words used are the place to start in constructing the meaning of a legal text [P]rima facie, the meaning of a legal text is its ordinary meaning").

223. See *id.* at 314-18 (discussing under a natural law approach six basic values that "justify the judge in accepting a humbler, more constrained mode of decision-making" based in part on the separation of powers observation that "[b]ecause legislatures represent the majority's wishes better than courts do, democracies' legisla-

of a statute mean, a natural law approach will interpret the statute in light of its evident purpose, rather than resort only to literal meaning devoid of purpose.²²⁴ Thus, while the formalist would follow what is called in England the Golden Rule of statutory interpretation (purposes may not be considered in determining a statute's plain meaning),²²⁵ and a rigid formalist might even follow the Literal Rule (the statute's literal meaning should be followed even if it leads to an absurd result),²²⁶ it would be consistent with a natural law approach to follow the American Plain Meaning Rule, which permits judges to resort to both statutory purposes and effects of a statute as part of determining the plain meaning of a statute if its plain meaning appears to lead to an absurd result.²²⁷

tures should have their wishes carried out by a judge even if that judge disagrees with the wisdom of such wishes").

224. See *supra* text accompanying notes 214-19.

225. See, e.g., *Hamilton v. Rathbone*, 175 U.S. 414, 417-21 (1899). In *Rathbone*, the Court stated:

The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.

Id. at 419. The Court concluded that "[t]he whole doctrine may be summed up in the single observation that prior acts may be resorted to to *solve*, but not to *create*, an ambiguity." *Id.* at 421. For an English statement of the rule, see *Grey v. Pearson*, H.L. Cas. 61, 106 (1857). In *Grey* the court held:

[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency but no further.

Id. See generally *KELSO & KELSO*, *supra* note 14, at 280-82 (discussing *Hamilton* and *Grey*).

226. See, e.g., *Regina v. City of London Court Judge*, 1 Q.B. 273, 290 (1892) ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity."); see generally *KELSO & KELSO*, *supra* note 14, at 280 (discussing the Literal Rule of statutory interpretation).

227. The most famous American statement of the plain meaning rule during the pre-Civil war natural law period was in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819), in which Justice Marshall stated the following:

Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of the words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other

A similar line can be drawn that distinguishes a natural law approach from a formalist approach with respect to substantive due process rights. While Justice Scalia has argued that courts should give the "history and tradition" prong of Fourteenth Amendment due process analysis a specific, narrowly literal reading,²²⁸ a natural law approach would not be willing to fully embrace that approach. Instead, a faithful natural law approach would counsel that interpreting "tradition" as part of the Fourteenth Amendment should take into account the background concept of liberty that the framers and ratifiers of the Fourteenth Amendment placed into the Constitution, as elaborated by the traditional Anglo-American respect for precedent and reasoned interpretation of the law.²²⁹

provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

Id.

As phrased, this plain meaning rule would not constrain a court from considering purposes stated on the face of the statute when determining the meaning of particular language. As Justice Marshall's phrasing of the plain meaning rule indicates, courts may consult "any other provision of the same instrument" including statements of purpose, to determine a statute's meaning. *Id.* In contrast, the Court's statement of the Golden Rule of statutory interpretation indicates that courts cannot consider "the purpose intended to be accomplished" by the statute and the "mischief to be remedied" as creating an ambiguity, even if that purpose is stated in the statute itself. See generally KELSO & KELSO, *supra* note 14, at 281-82 (discussing use of purpose in determining a statute's plain meaning under the Literal, Golden, and Plain Meaning Rules).

228. See *supra* text accompanying note 212.

229. For a summary of this natural law interpretation style, see *supra* text accompanying notes 46-50. For the most recent example of this approach, which specifically rejected Justice Scalia's formalist interpretation of the term "liberty" in the Fourteenth Amendment, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). In *Planned Parenthood*, the Court stated:

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight [A]mendments to the Constitution. But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter

The inescapable fact is that adjudication of substantive due process

claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 2804-05, 2806, 2807 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

At a jurisprudential level, one can perhaps understand better the differences among the formalist, Holmesian, and natural law approaches towards interpreting a term like "liberty" by resort to Ronald Dworkin's distinction between "concepts" and "conceptions." As used by Professor Dworkin, conceptions are the specific "discrete ideas" or examples held by individuals, while concepts are the broader, more abstract, idea reflected in the conceptions. See RONALD DWORKIN, *LAW'S EMPIRE* 71 (1986).

From this perspective, the formalist focus on interpreting traditions of liberty in light of the most specific level at which the tradition can be identified, see *supra* note 212 and accompanying text, involves asking what were the specific conceptions of the framers about the contours of the constitutional provision in question. In the context of *Roe v. Wade*, 410 U.S. 113 (1973), such an approach would likely counsel that the specific conceptions of the framers of the Fourteenth Amendment did not include the right of privacy recognized in *Roe*. See *Planned Parenthood*, 112 S. Ct. at 2874 n.1 (Scalia, J., concurring and dissenting) ("The enterprise launched in *Roe* . . . sought to *establish*—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text."); *id.* at 2859 (Rehnquist, J., concurring and dissenting) ("At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace."). Of course, as noted by the majority in *Planned Parenthood*, strict application of this approach suggests that the Court wrongly decided *Loving v. Virginia*, 388 U.S. 1 (1967), in which it held that a law banning interracial marriages was unconstitutional under the Due Process Clause, *id.* at 12, because state statutes banning interracial marriages were commonplace in 1868. *Planned Parenthood*, 112 S. Ct. at 2805. It might also suggest that the Court wrongly decided *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held unconstitutional a law banning access to contraceptives. *Id.* at 485-86. By the same token, strict application of this approach to the Equal Protection Clause would suggest that the Court also wrongly decided *Brown v. Board of Education*, 347 U.S. 483 (1954), because segregated schools were commonplace in 1868. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 244-45 (1977).

In response to such concerns, Justice Scalia indicated in his opinion in *Planned Parenthood* that, consistent with a formalist approach, his "specific level" test concerning tradition cannot be used to override clear textual commands. Thus, for example, he indicated that the Court properly decided *Loving*, and presumably *Brown*, based upon the clear text of the Equal Protection Clause and its commitment to equality without regard to the specific conceptions of the framers on particular issues. *Planned Parenthood*, 112 S. Ct. at 2874 n.1 (Scalia, J., concurring and dissenting). Justice Scalia left unanswered whether the liberty component of the Due Process Clause, as opposed to the Equal Protection Clause, has such a clear textual component that it would override specific traditions.

In contrast to the formalist perspective, the pragmatic or functional Holmesian perspective would be willing to consider the framers' concept of liberty or equality, not just their particular conceptions, and to give their concept a pragmatic or functional

Finally, under the Eighth Amendment, a natural law approach would

reading today. However, because of the strong deference to government posture of the Holmesian position, a Holmesian judge would not be willing to interpret the concept of liberty or equality to hold unconstitutional governmental action unless the clear meaning of the concept, or the clear purpose behind it, would require such a finding. See *supra* text accompanying notes 37-40, 153-54, 166. Such clear meaning or purpose is present when considering the meaning of equality as applied to education today. Thus, under this approach, *Brown* was properly decided. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971). Bork stated:

[T]he men who put the [Fourteenth A]mendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the [A]mendment The Court cannot conceivably know how these long-dead men would have resolved [specific] issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws. But one thing the Court does know: [the Equal Protection Clause] was intended to enforce a core idea of black equality against governmental discrimination.

Id. *Loving* and *Griswold* would also likely be viewed as properly decided today. Note that in each case, Holmesian Justice White was in the majority. See *Loving*, 388 U.S. at 2 (White, J., joining the majority opinion of the Court); *Griswold*, 381 U.S. at 502 (White, J., concurring). But see BORK, *supra* note 82, at 257-59 (criticizing the Court's decision in *Griswold*). However, it would be difficult to conclude that the clear meaning of the concept of liberty or the clear purpose behind it would support the right of privacy recognized in *Roe*. See *Roe*, 410 U.S. at 221-22 (White, J., joined by Rehnquist, J., dissenting); *supra* note 196 (discussing the difficulty in recognizing the right to privacy in *Roe* under this approach).

Finally, under a natural law approach faithful to the framers and ratifiers of the Constitution, the concept of liberty or equality must be elaborated consistent with the framers' and ratifiers' understanding of the traditions of that concept. This would include any natural law philosophy inherent in the concept of liberty or equality, as elaborated by the traditional Anglo-American respect for precedent and reasoned interpretation of the law, in which the framers and ratifiers believed. This is the underlying approach of *Planned Parenthood* and *Lee*. See *infra* text accompanying notes 286-92 (discussing *Lee*). Of course, an alternative natural law approach would suggest that today, judges should interpret the concept of liberty or equality in light of our understanding of natural law philosophy, not that of the framers and ratifiers of the Constitution; that is either because the framers and ratifiers expected us to do so, or merely because we should interpret the concept of liberty or equality without regard to whether today's natural law understanding reflects that of the framers and ratifiers. For discussion of such an approach, see Moore, *Interpretation*, *supra* note 49, at 393-96. For a later argument by Professor Moore that the framers and ratifiers believed in what he calls a "moral realist" natural law approach, thereby indicating that his "moral realist" approach is consistent with the framers' and ratifiers' original intent, see Moore, *Unwritten Constitution*, *supra* note 49, at 133-37.

reject a narrow, formalistic reading of the phrase "cruel and unusual punishment," such as that proposed by Justice Scalia,²³⁰ and instead favor an approach faithful to the background concerns of the framers. Such a natural law approach would likely include the natural law principle of proportionality of punishment.²³¹ Justice Scalia has indicated a reluctance to interpret the Eighth Amendment in light of that principle.²³²

With respect to these issues, Justices Kennedy and O'Connor have indicated some trouble with Justice Scalia's approach and some receptiveness toward the positions stated above as reflecting a natural law position. For example, as discussed in Part IV of this Article, Justices Kennedy and O'Connor have consistently rejected Justice Scalia's strict separation of powers approach in cases such as *Morrison v. Olson*²³³ and *Mistretta v. United States*,²³⁴ and have adopted what appears to be a faithful natural law approach to separation of powers in *Public Citizen v. United States Department of Justice*.²³⁵ In *Michael H. v. Gerald D.*,²³⁶ Justices Kennedy and O'Connor were unwilling to "foreclose the unanticipated" by embracing Justice Scalia's formalist approach toward history and tradition under the Fourteenth Amendment Due Process Clause, which they acknowledged was "somewhat inconsistent with our past decisions in this area."²³⁷ In *Harmelin v. Michigan*²³⁸ and *Hudson*

230. See *supra* text accompanying note 213.

231. See *Solem v. Helm*, 463 U.S. 277, 284-85 (1983). The Court stated:

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicts." Although the precise scope of this provision is uncertain, it at least incorporated "the long-standing principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged."

Id. (quoting English Bill of Rights, 1689, 1 W. & M., ch. 2 (Eng.)).

232. See *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684-701 (1991) (Scalia, J., joined by Rehnquist, C.J.).

233. 487 U.S. 654 (1988).

234. 488 U.S. 361 (1989).

235. 491 U.S. 440 (1989). See *infra* text accompanying notes 436-43.

236. 491 U.S. 110 (1989).

237. *Id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring). Justice O'Connor stated:

I concur in all but footnote 6 of Justice Scalia's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion this Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' avail-

v. McMillian,²³⁹ Justices O'Connor and Kennedy, along with other members of the Court, rejected Justice Scalia's narrower approach to the Eighth Amendment and remained faithful to the natural law principle of proportionality of punishment.²⁴⁰

With respect to statutory interpretation, the possible differences among Justices Scalia, Kennedy, and O'Connor are not yet clear because the Court has not explicitly struggled in recent years with the difference between a Golden Rule approach to statutory interpretation and the Plain Meaning Rule.²⁴¹ Rather, the struggle in recent years has concerned moving away from an instrumentalist use of legislative history (which permits resort to legislative history to help support an interpretation of the statute which advances sound social policy, at least where leeway exists in the statute)²⁴² to a more judicially restrained use of legislative

able. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

Id. (O'Connor, J., concurring) (citations omitted). Along with Justice Souter, Justices Kennedy and O'Connor recently rejected Justice Scalia's formalist approach to the Liberty Clause of the Fourteenth Amendment in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). See *supra* note 229 (discussing this rejection of Scalia's approach to the Fourteenth Amendment Liberty Clause).

238. 111 S. Ct. 2680 (1991).

239. 112 S. Ct. 995 (1992).

240. *Hudson*, 112 S. Ct. at 997-1002; *Harmelin*, 111 S. Ct. at 2702-05 (Kennedy, J., joined by O'Connor, J., and Souter, J., concurring in part and concurring in the judgment); *id.* at 2709-19 (White, J., joined by Blackmun, J., and Stevens, J., dissenting); *id.* at 2719 (Marshall, J., dissenting).

241. For a discussion of the differences between the Golden Rule and Plain Meaning Rule approaches to statutory interpretation, see *supra* text accompanying notes 225-27.

242. See, e.g., John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 356-57 (1976). Kernochan writes:

Some statutes, by virtue of their generality, or otherwise, clearly contemplate judicial creativity Resort to purpose will resolve many [problems, but] there is often leeway in defining purposes Where such leeway remains, legislative choices must be made by the courts The considerations beyond [legislative] intent to be weighed in . . . [interpretation] we may label "policy" or "public policy."

Id. See Zeppos, *supra* note 211, at 1619. Zeppos notes:

The textualist critique of the Brennan opinion in *Weber* is obvious. It disregards the clear text, followed by a selective reading of the legislative history to produce a result compatible with the Court's view of social policy. Once text is abandoned, answers to statutory cases are found not in the "law" but the judge's own views of justice, fairness, or social welfare.

history.²⁴³ This is a move with which Holmesian, formalist, and natural law judges would all agree.²⁴⁴

Justices Souter and Thomas have not been on the Court long enough to predict accurately their decision-making style. Nevertheless, some observations can be made. With respect to many issues which have come before the Court, Justice Souter has joined most often with Justices Kennedy and O'Connor in their positions.²⁴⁵ It is thus likely that Justice

Id. See also *West Winds, Inc. v. M.V. Resolute*, 720 F.2d 1097, 1101 (9th Cir. 1983). The court stated:

[A] court interpreting a statute should: "ask itself not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of present day society. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature."

Id. (quoting Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950)).

243. Compare *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443 (1989) (Brennan, J., for the Court) (quoting *Boston Sand and Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J., for the Court) (stating that it would be proper for the court to look beyond the words of the statute "when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists'") with *id.* at 473 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring in the judgment).

Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.

Id. (Kennedy, J., concurring).

244. See, e.g., *Frankfurter*, *supra* note 38, at 529 (citation omitted) (under the Holmesian approach, use of legislative history should not be seen as an opportunity "to use [the statute's] words as 'empty vessels into which [the judge] can pour anything he will'—his caprices, fixed notions, even statesmanlike beliefs in a particular policy."); *supra* notes 222-27 (discussing under a formalist or natural law approach a judicially restrained version of statutory interpretation). See generally *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (O'Connor, J., joined by every member of the Court deciding the case except instrumentalists Blackmun, J., and Stevens, J.) (citations omitted) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed."). For further discussion of these and other related points concerning statutory interpretation and the four judicial decision-making styles, see *Kelso*, *Interpretation*, *supra* note 10.

245. For example, in his first year on the Court, Justice Souter was aligned most often with Justice O'Connor (88.9%), closely followed by Justice Kennedy (83.8%). See *The Supreme Court, 1990 Term: The Statistics*, 105 HARV. L. REV. 77, 420 (1991)

Souter will be part of that group on the Court that appears to approach cases from what is described in this Article as the framers' and ratifiers' original natural law approach.²⁴⁶ As indicated above, that approach permits a balancing of factors against a backdrop of natural law principles in cases where those natural law principles were incorporated into the Constitution and the Constitution does not contain specific contrary text on point.²⁴⁷

In his confirmation hearings, Justice Thomas also indicated some predisposition for a natural law decision-making style.²⁴⁸ His pre-confirmation praise of Justice Scalia's lone dissent in *Morrison v. Olson*,²⁴⁹ however, and his siding with Justice Scalia in most cases since joining the Court,²⁵⁰ including their two-Justice dissent in the Eighth Amendment

[hereinafter *1990 Term Statistics*]. During the 1991 Term, Justice Souter continued to be aligned most often with Justices Kennedy and O'Connor. See, e.g., 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 of the Court 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.")

246. For the discussion of this approach generally, see *supra* notes 46-50, 205-44 and accompanying text. For the discussion of the natural law approach as it relates to separation of powers issues, see *supra* text accompanying notes 102-50. See also Greenhouse, *supra* note 245 (noting that Justices O'Connor, Kennedy, and Souter are generally cautious when deciding cases, are hesitant "to overturn precedent and [have] a distaste for aggressive arguments, whether" made by lawyers or other Justices).

247. See *supra* text accompanying notes 109-25, 205-08, 214-32.

248. See, e.g., David Margolick, *The Thomas Hearings: Sizing Up the Talk of "Natural Law": Many Ideologies Discover a Precept*, N.Y. TIMES, Sept. 12, 1991, at A22; see also Scott D. Gerberg, Note, *The Jurisprudence of Clarence Thomas*, 8 J.L. & Pol. 107 (1991).

249. 487 U.S. 654 (1988). See Linda Greenhouse, *Questions About Thomas, the Man, Obscured Clues About Thomas, the Jurist*, N.Y. TIMES, Oct. 27, 1991, § 4, at 1 (discussing an exchange between Senator Joe Biden and Judge Thomas in which Thomas' pre-confirmation praise of Justice Scalia's dissent in *Morrison* was discussed).

250. See Paul M. Barrett, *Justice Thomas Confirms Fears of His Critics*, WALL ST. J., July 1, 1992, at B6 [hereinafter Barrett, *Confirms*] (observing that Justices Thomas and Scalia voted for the same results 87% of the time); Paul M. Barrett, *Despite Expectations, Scalia Fails to Unify Conservatives on the Court*, WALL ST. J., Apr. 28, 1992, at A6 [hereinafter Barrett, *Scalia*] ("[T]his term Justice Scalia might have found his first true ally in Clarence Thomas."); Claire Cooper, *High Court Disappoints Conservatives: Three Factions Make Rulings by Coalition*, SACRAMENTO BEE, July 1, 1992,

case of *Hudson v. McMillian*,²⁵¹ suggests that Justice Thomas may read the natural law background of the Constitution differently from Justices Kennedy, O'Connor, and Souter, and in ways to reach results similar to those of Justice Scalia, that is, results consistent with a formalist approach.²⁵²

The remaining two Justices on the Court to discuss are Justices Blackmun and Stevens. Although both often sided with Justices Marshall and Brennan,²⁵³ and observers perceive both as part of the liberal, instrumental wing of the Court,²⁵⁴ neither are consistent instrumentalists. For example, neither agrees with Justices Brennan and Marshall on their death penalty rationale.²⁵⁵ However, in many cases, these two Justices have seemed to adopt an instrumental, sound social policy approach.²⁵⁶

at A20 ("Clarence Thomas' soul has been captured by Justice Scalia," said former Reagan administration lawyer Bruce Fein.).

251. 112 S. Ct. 995, 1004-1011 (1992) (Thomas, J., joined by Scalia, J., dissenting). For examples of other cases during the 1991 Term where Justices Scalia and Thomas wrote separately from the rest of the Court, see *Riggins v. Nevada*, 112 S. Ct. 1810, 1821 (1992) (Thomas, J., joined by Scalia, J., dissenting); *White v. Illinois*, 112 S. Ct. 736, 744 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2632 (1992) (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part).

252. See Christopher Cox, *The Sad Career of Reagan Justices*, WALL ST. J., July 1, 1992, at A14.

The flurry of important decisions issued by the [C]ourt in its final days shows that Justice Clarence Thomas has vindicated the hopes of judicial conservatives. They supported his nomination hoping that he would, like Justice Antonin Scalia, interpret both the Constitution and legislative enactments in accordance with their apparent meaning.

Id. See also Barrett, *Confirms*, *supra* note 250, at B6 ("[Justice Thomas] has signed on with Justice Scalia's continuing—and largely unsuccessful—effort to simplify and narrow the court's interpretation of the Constitution and to curb the authority of the judiciary.").

253. For example, during the 1989 Term of the Court, the last term that both Justices Brennan and Marshall served on the Court, Justice Blackmun sided most with Justice Brennan (73.4%) and second most with Justice Marshall (69.8%). *The Supreme Court, 1989 Term: The Statistics*, 104 HARV. L. REV. 40, 360 (1990) [hereinafter *1989 Term Statistics*]. Similarly, during the 1989 Term, Justice Stevens sided most with Justice Brennan (65.5%) and second most with Justice Marshall (64.0%). *Id.*

254. See, e.g., Cooper, *supra* note 250, at A20 ("On the left were Justices Harry Blackmun and John Paul Stevens."); Laura McCoy, *High Court Disappoints Conservatives: Kennedy Irks His Backers on Abortion and Religion*, SACRAMENTO BEE, July 1, 1992, at A20 ("[T]he court's two remaining liberals [are] Justices Harry Blackmun and John Paul Stevens.").

255. See *Gregg v. Georgia*, 428 U.S. 153, 158 (1976) (opinion by Stewart, J., Powell, J., and Stevens, J.); *id.* at 227 (Blackmun, J., concurring).

256. This approach counsels for an expansive reading of the right to privacy and thus a reading favoring finding the right to choose an abortion, which the Court recognized in *Roe v. Wade*, 410 U.S. 113 (1973). Similarly, it counsels finding that

With the retirements of Justices Brennan and Marshall, Justices Blackmun and Stevens remain the two Justices on the Court most faithful to the instrumentalist tradition of the Warren Court.²⁵⁷ Thus, observers best describe them as moderate instrumentalists.

This summary of the judicial decision-making styles yields the following tentative categorization of the current Justices on the Supreme Court: one formalist (Justice Scalia); two Holmesians (Chief Justice Rehnquist and Justice White); two moderate instrumentalists (Justices Blackmun and Stevens); and four Justices who, to varying extents, appear to approach cases most closely from the framers and ratifiers' original natural law approach (Justices O'Connor, Kennedy, Souter, and Thomas). A number of caveats are in order, however, concerning this tentative categorization.

First, as indicated at the beginning of Part III, the author is not claiming that any of the Justices have self-consciously adopted one of the four decision-making styles described in this Article.²⁵⁸ Rather, the author only claims that the decision-making styles of the Justices reflect themselves more in one style than another.

Second, given its cursory nature, the intent of this discussion is not to establish conclusively the placement of the current Supreme Court Justices in light of the four judicial decision-making styles. Such a discussion is beyond the scope of this Article. Rather, this discussion suggests possible groupings of Justices and indicates the methodology that led to their respective placement. This discussion should help preface the subsequent discussion of the six separation of powers cases in Part IV.

there are compelling governmental interests which override corporate rights to spend money acquired in commercial transactions for political purposes, which was the result in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

257. This shows itself most clearly in those cases decided during the 1991 Term of the Court in which Justices Blackmun and Stevens were alone in dissent. Typically, these cases involved overruling or limiting some modern line of precedent which had been supported by Justices Brennan and Marshall. *See, e.g., Suter v. Artist M.*, 112 S. Ct. 1360, 1377 (1992) (Blackmun, J., joined by Stevens, J., dissenting); *Ardestani v. INS*, 112 S. Ct. 515, 527 (1991) (Blackmun, J., joined by Stevens, J., dissenting); *Zatco v. California*, 112 S. Ct. 355, 357 (1991) (Stevens, J., joined by Blackmun, J., dissenting).

Overall, during the 1991 Term, Justices Stevens and Blackmun were the most consistent allies on the Court, voting together 87% of the time, a few tenths of a percent higher than Justices Scalia and Thomas, who were the next most consistent Court allies. *See Barrett, Confirms*, *supra* note 250, at B6.

258. *See supra* text accompanying note 181.

Third, and perhaps most importantly, the claim is not being made that any individual Justice represents a pure example of any of the four decision-making styles.²⁵⁹ Particularly because the author is not claiming that any Justice has self-consciously chosen one of these decision-making styles, one can expect some departures from the "ideal" or "pure" decision-making. Such departures, however, when they occur, do appear to have an order about which some observations can be made.

As stated above, while Justice Thomas might be predisposed to adopt a natural law style of judicial decision-making, since joining the Court, he has voted with Justice Scalia most often.²⁶⁰ Thus, on a spectrum between a formalist style and a natural law style, it would be appropriate to place Justice Thomas closer to Justice Scalia than any other natural law Justice based upon Justice Thomas' early performance on the Court. Indeed, in a few cases, Justices Scalia and Thomas have decided the case differently from all seven other Justices on the Court.²⁶¹ Incorporating this fact, a table of judicial decision-making styles would thus place Justice Thomas very close to Justice Scalia near the formalist decision-making style.

Among the three other Supreme Court Justices who appear to follow most closely the framers' and ratifiers' original natural law approach, Justice Kennedy has been more willing to depart from Justices O'Connor or Souter and join Justices Scalia and Thomas in formalist-sounding opinions.²⁶² A table incorporating this fact would thus place Justice Kennedy slightly closer to a formalist decision-making style than Justices O'Connor or Souter.

259. Indeed, given the idiosyncracies that each judge brings to the task of judicial decision-making, it would be rare for any judge to represent a pure example of any decision-making style. Further, "the separation of judicial decision-making styles into 'four' ideal types . . . should not obscure the fact that in most cases judges resort to a mixed blend of justificatory arguments To repeat, what differentiates judges of the various decision-making styles are largely matters of degree and emphasis, not rigid categorical differences." KELSO & KELSO, *supra* note 14, at 119.

260. See *supra* text accompanying notes 248-52.

261. See *supra* note 251 and accompanying text.

262. See, e.g., Barrett, *Scalia*, *supra* note 250, at A6 (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"); Zeppos, *supra* note 211, at 1598-99 (observing that "Justice Kennedy has expressed some sympathy for [Scalia's] textualist rejection of legislative history"). Throughout the 1990 Term, Justice Kennedy sided with Justice Scalia 72.4% of the time, slightly more often than did Justice Souter (71.0%) or Justice O'Connor (68.9%). 1990 Term Statistics, *supra* note 245, at 420; see also *United States v. R.I.C.*, 112 S. Ct. 1329, 1339 (1992) (Scalia, J., joined by Kennedy, J., and Thomas, J., concurring in part and concurring in the judgment). Justice Scalia argued, "[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." *Id.*

Similarly, among the two Holmesian Justices on the Court, it has been Chief Justice Rehnquist who has more often departed from the Holmesian line to join Justices Scalia and Thomas in formalist-sounding opinions.²⁶³ *Evans v. United States*²⁶⁴ and *Franklin v. Gwinnett County Public Schools*²⁶⁵ are two recent examples of this phenomenon. A table incorporating this fact would thus place Chief Justice Rehnquist closer to a formalist decision-making style than Justice White. Table 3 below attempts to capture each of these aspects of judicial decision-making style.

263. See *Wright v. West*, 112 S. Ct. 2482 (1992) (opinion by Thomas, J., joined by Rehnquist, C.J., and Scalia, J.); *Morgan v. Illinois*, 112 S. Ct. 2222, 2235 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting); *McCarthy v. Madigan*, 112 S. Ct. 1081, 1092-93 (1992) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., concurring in the judgment); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 804 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting); see also *infra* text accompanying notes 264-65.

As a general matter, Chief Justice Rehnquist has sided with Justice Scalia much more often than has Justice White. See, e.g., *1990 Term Statistics*, *supra* note 245, at 420 (noting that Rehnquist sided with Scalia 73.1% of the time, while White sided with Scalia 62.2%); *1989 Term Statistics*, *supra* note 253, at 360 (noting that Rehnquist sided with Scalia 81.3% of the time, while White sided with Scalia 70.5%); see also *infra* text accompanying notes 272-76 (discussing Justice Rehnquist's slightly more formalist approach to statutory interpretation than Justice White's more pure Holmesian approach).

264. 112 S. Ct. 1881, 1899, 1903 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Justice Thomas stated:

As serious as the Court's disregard for history is its disregard for well-established principles of statutory construction . . . I have no doubt that today's opinion is motivated by noble aims. Political corruption at any level of government is a serious evil, and, from a policy perspective, perhaps one well suited for federal law enforcement. But federal judges are not free to devise new crimes to meet the occasion.

Id. (Thomas, J., dissenting).

265. 112 S. Ct. 1028, 1039 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring) ("Although we have abandoned the expansive rights-creating approach exemplified by *Cannon*—and perhaps ought to abandon the notion of implied causes of action entirely—causes of action that came into existence under the *ancien régime* should be limited by the same logic which gave them birth.").

TABLE 3
Styles of Judicial Decision-Making

| | | |
|----------------------|----------------|-------------------------|
| | Positivism: | Prescriptivism: |
| | Judges as | Judges as |
| | Scientists | Normative Actors |
| Law as Logical, | Formalism | Natural Law |
| Analytic, or | SCALIA THOMAS | |
| Conceptualist | KENNEDY Powell | |
| Attitude | Burger SOUTER | |
| | O'CONNOR | |
| | REHNQUIST | BLACKMUN |
| | STEVENS | |
| Law as Means to | Holmesian | Instrumentalism |
| Ends, Functional, or | WHITE | Brennan |
| Pragmatic Approach | | Marshall ²⁶⁶ |

266. It should be noted that this Table is an updated version of a similar Table of Justices of the Supreme Court which was prepared in 1984. See KELSO & KELSO, *supra* note 14, at 423. For Justices who were on the Court then and today, the following updates should be noted.

First, Table 3 places Chief Justice Rehnquist and Justice White slightly differently than the 1984 Table. The 1984 Table defined both as Holmesian Justices, and both remain so today. However, the 1984 Table placed Chief Justice Rehnquist as a pure Holmesian Justice, not, as indicated in Table 3, a Holmesian judge with slight formalist leanings. As a consistent advocate for formalism has emerged on the Court (Justice Scalia), see *supra* notes 209-13 and accompanying text, and as a second Justice routinely supported that approach last term (Justice Thomas), see *supra* notes 249-52 and accompanying text, Chief Justice Rehnquist's occasional willingness to join a formalist argument has become increasingly clear. See *supra* notes 263-65 and accompanying text. Thus, Table 3 places him leaning slightly in a formalist direction today. However, as underscored by the separation of power cases, see *supra* text accompanying notes 169-72, and other cases where a Holmesian and formalist would disagree, see *supra* text accompanying notes 192-204, Chief Justice Rehnquist's basic decision-making style remains Holmesian.

Similarly, Justice White's basic decision-making style today remains Holmesian, as it was in 1984. However, the 1984 Table placed Justice White leaning slightly more in an instrumentalist direction than does Table 3 today. While Justice White still occasionally joins the two remaining instrumentalists on the Court in separate concurrences or dissents, see *infra* note 271 and accompanying text, he is less likely to do so today than in 1984. For example, during the 1983 and 1984 terms, Justice White joined Justice Blackmun 77.8% and 77.0% of the time, while, during the 1989 and 1990 terms, Justice White joined Justice Blackmun only 61.0% and 64.2% of the time. See *1990 Term Statistics*, *supra* note 245, at 420; *1989 Term Statistics*, *supra* note 253, at 360; *The Supreme Court, 1984 Term: The Statistics*, 99 HARV. L. REV. 323 (1985) [hereinafter *1984 Term Statistics*]; *The Supreme Court, 1983 Term: The Statistics*, 98 HARV. L. REV. 308 (1984) [hereinafter *1983 Term Statistics*]. Thus, it seems

appropriate to recognize that over the past decade Justice White has moved from a slightly instrumentalist Holmesian posture to a more pure Holmesian judicial restraint posture.

Justice O'Connor's decision-making style also has gone through a slight evolution since 1984. For example, during the 1983 and 1984 terms, Justice O'Connor joined Justice Rehnquist 91.9% and 90.5% of the time and Justice White 84.5% and 84.2% of the time. *See id.*; 1984 Term Statistics, *supra*, at 323. Thus, it was appropriate in 1984 to place her within the Holmesian camp. Furthermore, because during the 1983 and 1984 terms Justice O'Connor joined Justice Powell 84.9% and 85.7% of the time, *see 1983 Term Statistics, supra*, at 308; 1984 Term Statistics, *supra*, at 323, it was also appropriate to place Justice O'Connor leaning slightly in a natural law direction, that is, away from Justice Rehnquist and toward Justice Powell. *See infra* note 278 (discussing Justice Powell's adoption of a natural law approach).

By the 1989 and 1990 terms of the Court, however, Justice O'Connor joined Justices Rehnquist and White less often (81.9% and 80.0% for Chief Justice Rehnquist and 74.6% and 71.7% for Justice White, respectively), while joining most often Justices Kennedy and Souter (83.2% and 84.6% for Justice Kennedy, respectively, and 88.9% for Justice Souter during his first Term on the Court). *See 1989 Term Statistics, supra* note 253, at 360; 1990 Term Statistics, *supra* note 245, at 420. Thus, while acknowledging that among Justices Kennedy, Souter, and O'Connor, Justice O'Connor's decision-making style is slightly more toward the Holmesian or instrumentalist functional/pragmatic side of Table 3, *see Brock, supra* note 205, at 629-30 (discussing generally Justice O'Connor's pragmatism), and while acknowledging that in some cases, therefore, Justice O'Connor may be more likely than Justices Kennedy or Souter to join a Holmesian or instrumentalist opinion, *see, e.g., Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Justice O'Connor joining with Chief Justice Rehnquist and Justice White to uphold the flag-burning statute in a Holmesian-sounding opinion), discussed *supra* note 197, *infra* note 277 (Justice O'Connor joining Justices Blackmun and Stevens in instrumentalist-sounding opinions), it seems better to place Justice O'Connor principally among a Kennedy-Souter-O'Connor natural law decision-making style, *see supra* notes 233-47 and accompanying text, rather than principally a Holmesian judge, only as leaning in a natural law direction.

For a critique of Justice O'Connor's opinion in *City of Richmond v. Croson*, 488 U.S. 469 (1989), alleging that her opinion represented a flawed natural law approach and was inconsistent with John Finnis's modern version of natural law, *see David Barnhizer, Natural Law as Practical Methodology: A Finnisian Analysis of City of Richmond v. J.A. Croson, Co.*, 38 CLEV. ST. L. REV. 15, 19 (1990).

Finally, in 1984, Justice Blackmun's decision-making style was characterized as a blend of instrumentalist and natural law rhetoric, but with the natural law roots in the ascendancy. *See KELSO & KELSO, supra* note 14, at 420, 422, 429. In Table 3, Justice Blackmun is likewise characterized as being somewhere between instrumentalism and natural law. However, with the emergence of the Kennedy-Souter-O'Connor wing of the Court, which seems even more faithful to the framers' and ratifiers' original natural law decision-making style, *see supra* text accompanying notes 46-50, 101, 233-47, and with Justice Blackmun joining Justice Stevens most often today, *see supra* note 257, it seems best to place Justice Blackmun a little closer to the instrumentalist decision-making style than in 1984, and to call him principally a moderate instru-

With respect to the instrumentalist style of decision-making, Table 3 attempts to capture the fact that, as noted above, Justices Brennan and Marshall were core instrumentalists during their tenure on the Court, while Justices Blackmun and Stevens are better described as moderate instrumentalists.²⁶⁷ Thus, Table 3 does not place Justices Blackmun and Stevens directly under the instrumentalism heading, unlike Justices Brennan and Marshall, the core instrumentalists of the modern court era.

Table 3 also places Justice Stevens leaning slightly in a Holmesian direction because Justice Stevens has shown a greater willingness than Justice Blackmun to break with an instrumentalist approach and adopt Holmesian-style reasoning.²⁶⁸ Indeed, Justice Stevens' particular emphasis on the realities of the legislative process suggests a pragmatic, functional approach somewhere between Holmesian and instrumentalist decision-making styles. Justice Stevens has shown some willingness to defer to the legislature in those cases in which the political process appears to operate properly.²⁶⁹ However, Justice Stevens appears to acknowledge that Holmesian deference is not proper when concerns arise about the political process, and that in such cases, instrumental concerns about insuring a sound social policy result come to the fore.²⁷⁰

mentalist, with some natural law tendencies. That adjustment is made in Table 3.

267. *See supra* text accompanying notes 253-57.

268. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 435 (Stevens, J., dissenting).

269. *See, e.g.*, *Metro Broadcasting Co. v. F.C.C.*, 110 S. Ct. 2997, 3028 (1990) (Stevens, J., concurring).

I remain convinced . . . that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." The Court's opinions explain how both elements of that standard are satisfied.

Id. *See also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (arguing "that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty").

270. *See, e.g.*, *Croson*, 488 U.S. at 513 (Stevens, J., concurring in part and concurring in the judgment) (arguing that "instead of carefully identifying the characteristics of the two classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council ha[d] merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause"); *Fullilove v. Klutznick*, 448 U.S. 448, 550-51 (1980) (Stevens, J., dissenting). Stevens states:

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law [I]t seems to me that judicial review should include a consideration of [whether] . . . the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a

Similarly, Table 3 attempts to reflect the fact that among the Holmesian Justices, Justice White, rather than Chief Justice Rehnquist, has generally been more willing to join Justices Stevens and Blackmun.²⁷¹ This has been particularly true in cases of statutory interpretation, in which Chief Justice Rehnquist has often appeared to adopt a more formalist or literal style of statutory interpretation and thus eschewing the classic Holmesian pragmatic or functional approach to interpretation issues.²⁷² Under the classic pragmatic or functional approach, a judge can properly look not only to the clear text of the statute, but also to clear inferences of statutory purpose, both as revealed in the statute itself and in the statute's legislative history.²⁷³ The classic Holmesian or instrumentalist style of statutory interpretation thus rejects the plain meaning rule's legislative history limitation.²⁷⁴ A Holmesian judge would feel it appropriate to resort to legislative history in every case, but only to effectuate the "in fact" intent of the legislature. However, a Holmesian judge would not attempt to justify a particular sound social policy inter-

statement of legislative purpose.

Id. (Stevens, J., dissenting).

271. As a general matter, Justice White has routinely sided with Justices Blackmun and Stevens more often than Chief Justice Rehnquist. *See, e.g., 1990 Term Statistics, supra* note 245, at 420 (noting that White sided with Blackmun 64.2% of the time and with Stevens 59.2%, while Rehnquist sided with Blackmun only 52.5% of the time and with Stevens 49.2%); *1989 Term Statistics, supra* note 253, at 360 (noting that White sided with Blackmun 61.0% of the time and with Stevens 53.2%, while Rehnquist sided with Blackmun only 54.7% of the time and with Stevens 48.2%).

For examples of cases during the 1991 term in which Justices White, Blackmun, and Stevens joined in separate opinions, see *New York v. United States*, 112 S. Ct. 2408, 2446 (1992) (White, J., joined by Blackmun, J., and Stevens, J., concurring and dissenting); *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1640 (1992) (White, J., joined by Blackmun, J., and Stevens, J., concurring and dissenting); *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 832 (1992) (Stevens, J., joined by White, J., and Blackmun, J., dissenting). There were no cases during the 1991 term where Chief Justice Rehnquist joined with Justices Blackmun and Stevens in a separate opinion.

272. For a suggestion of Chief Justice Rehnquist's flirtation with Justice Scalia's formalism, *see, e.g., Zeppos, supra* note 210, at 1599 ("Justice Rehnquist . . . has embraced [Scalia's] textualism on occasion.") For a discussion of the pragmatic or functional nature of the Holmesian approach to statutory interpretation, *see supra* note 37-40 and accompanying text.

273. *See supra* note 40 and accompanying text.

274. *See supra* notes 37-40, 241-44 and accompanying text. On use of legislative history generally in formalist, natural law, Holmesian, and instrumentalist judicial decision-making styles generally, *see* KELSO & KELSO, *supra* note 14, at 262-64, 275-93, 310-15; Kelso, *Interpretation, supra* note 10.

pretation of a statute through resort to isolated bits of legislative history, as might an extreme instrumentalist.²⁷⁵ Thus, Table 3 reflects the fact that on matters such as statutory interpretation, Justice White is basically a consistent Holmesian judge, while Chief Justice Rehnquist's style of interpretation points in a formalist direction.²⁷⁶

Table 3 also reflects that Justice O'Connor, rather than Justices Souter or Kennedy, has been more willing to join Justices Blackmun and Stevens in those few cases where Justices Kennedy, Souter, and O'Connor separate and one joins with Justices Blackmun and Stevens.²⁷⁷

Finally, based upon their tenure on the Court, Table 3 tentatively places former Chief Justice Burger between a formalist and a Holmesian, and former Justice Powell as a natural law judge.²⁷⁸

275. See *supra* notes 40, 242-44 and accompanying text.

276. In making this statement, it should be noted that Justice Robert Jackson, for whom Chief Justice Rehnquist clerked, also had a similar aversion to legislative history, even though Justice Jackson would also typically be considered a practitioner of the Holmesian judicial decision-making style. On Justice Jackson's aversion to legislative history, see *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring).

277. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992) (Blackmun, J., joined by Stevens, J., and O'Connor, J., concurring); *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2197 (1992) (Stevens, J., joined by Blackmun, J., and O'Connor, J., dissenting); *United States v. Williams*, 112 S. Ct. 1735, 1746 (1992) (Stevens, J., joined by Blackmun, J., and O'Connor, J., as to Part I, dissenting); *Freeman v. Pitts*, 112 S. Ct. 1430, 1455 (1992) (Blackmun, J., joined by Stevens, J., and O'Connor, J., concurring); *INS v. Elias-Zacarias*, 112 S. Ct. 812, 817 (1992) (Stevens, J., joined by Blackmun, J., and O'Connor, J., dissenting).

As a general matter, during the 1990 Term, Justice O'Connor sided with Justices Blackmun and Stevens slightly more often than Justices Kennedy and Souter. See *1990 Term Statistics*, *supra* note 245, at 420 (observing that O'Connor sided with Blackmun 60.0% of the time and with Stevens 54.2%, and Souter sided with Blackmun 59.3% of the time and with Stevens 55.6%, and Kennedy sided with Blackmun 54.7% of the time and with Stevens 52.1%).

278. Chief Justice Burger is placed between a formalist and a Holmesian mode of decision-making because sometimes his opinions pointed in a formalist direction and sometimes they pointed in the Holmesian direction. For examples of Chief Justice Burger's formalism in the separation of powers area, see *infra* notes 308, 354 and accompanying text. For examples of Chief Justice Burger's Holmesianism, see *KELSO & KELSO*, *supra* note 14, at 313-14, 421-29 (citing statutory interpretation and constitutional law examples). Although Table 3 places Justice Powell as leaning in a natural law direction with the other "natural law" Justices on the Court, this does not mean that Justice Powell consciously adopted or relied upon natural law rhetoric in deciding cases. Rather, the argument is that the positions Justice Powell took in deciding cases can best be understood in natural law terms. See generally *KELSO & KELSO*, *supra* note 14, at 420-29. See also *Greenhouse*, *supra* note 245, at A8 (comparing Justice Powell to Justices Kennedy and Souter); *infra* text accompanying notes 323-35 (discussing Justice Powell's natural law approach in *INS v. Chadha*, 462 U.S. 919 (1983)).

A final caveat: The author does not claim that Table 3 will predict the groupings of Justices in every case coming before the Supreme Court. Judges are too complex, and facts of each case are too distinctive, to be captured completely in a two-dimensional Table.²⁷⁹ However, such an analysis can help indicate basic judicial tendencies, and thus can provide what in another context Karl Llewellyn termed a "horse-sense":²⁸⁰ an idea of what the Justices' initial instincts are likely to be before the equities of a particular case begin to bite.

Two recent cases support Part III's main thesis that among the conservatives on the Court, different judicial decision-making philosophies may yield quite different results in certain situations. In *Lee v. Weisman*,²⁸¹ a majority of the Court held that allowing clerical members to offer prayers at a public high school graduation ceremony violates the Establishment Clause of the First Amendment.²⁸² The majority opinion by Justice Kennedy was based upon an elaboration of the basic concept that freedom of religion lies at the heart of the Establishment Clause: an approach consistent with a natural law interpretation of the Constitution.²⁸³ As phrased by Justice Kennedy:

[T]he lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.²⁸⁴

From a formalist or Holmesian perspective, however, the Court would decide *Lee* quite differently. For a strict formalist, the relevant question would be whether this specific practice of prayer in schools was under-

279. Thus, a number of cases each Term are decided where Justices who usually do not join one another end up on the same side of some particular issue. From the 1991 Term, see *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2054 (1992) (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting); *Wyatt v. Cole*, 112 S. Ct. 1827, 1829 (1992) (O'Connor, J., joined by White, J., Blackmun, J., Stevens, J., Scalia, J., and Kennedy, J.); *National R.R. Passenger Corp. v. Boston and Maine Co.*, 112 S. Ct. 1394, 1405 (1992) (White, J., joined by Blackmun, J., and Thomas, J., dissenting); *INS v. Doherty*, 112 S. Ct. 719, 728 (1992) (Scalia, J., joined by Stevens, J., and Souter, J., concurring in the judgment and dissenting in part).

280. LLEWELLYN, *supra* note 14, at 121-22, 359-60.

281. 112 S. Ct. 2649 (1992).

282. *Id.* at 2658.

283. See *supra* note 229 and accompanying text (discussing the natural law resort to the concept embedded in a particular natural law principle, as opposed to the formalist reliance on particular historical conceptions).

284. *Lee*, 112 S. Ct. at 2658.

stood to be unconstitutional by the framers at the time the Establishment Clause was ratified.²⁸⁵ Absent clear constitutional text regarding the issue of prayer in schools, a Holmesian would be more flexible than a strict formalist and would ask what the framers and ratifiers might have concluded about a contemporary problem given the purpose of the constitutional provision under scrutiny. However, a Holmesian would likely defer to the governmental body unless the clear purpose of the clause were to ban such activity.²⁸⁶ As Chief Justice Rehnquist noted in *Wallace v. Jaffree*,²⁸⁷ the clear purpose of the Establishment Clause was to prevent the formal establishment of an official national religion, and to prevent government from preferring one religion over another, not to ban reasonable accommodation between church and state.²⁸⁸ Thus, under a formalist or Holmesian decision-making style, the prayer at the graduation ceremony in *Lee* would probably be upheld.²⁸⁹

An analogous argument can be made regarding *Planned Parenthood v. Casey*,²⁹⁰ in which the two most formalist and two most Holmesian Justices were in dissent.²⁹¹

IV. THE SIX MAJOR SEPARATION OF POWERS CASES DECIDED SINCE 1980 AS ANALYZED FROM THE FOUR APPROACHES TO JUDICIAL DECISION-MAKING

In this section, the six major separation of powers cases since 1980 will be discussed in light of the four approaches to judicial decision-making.

285. For elaboration of the strict formalist approach to constitutional text, which focuses on the framers' specific conceptions regarding a constitutional provision, see *supra* note 229.

286. See generally *supra* notes 34-41, 153-54, 229 and accompanying text.

287. 472 U.S. 38 (1985).

288. *Id.* at 93-107 (Rehnquist, J., dissenting).

289. See *Lee v. Weisman*, 112 S. Ct. 2149, 2678-79 (1992) (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., dissenting) (citations omitted) (noting "that the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings' . . . [and that] prayer has been a prominent part of governmental ceremonies and proclamations [since our nation's origin]").

290. 112 S. Ct. 2791 (1992).

291. In *Planned Parenthood*, Justices Kennedy, Souter, and O'Connor voted with the moderate instrumentalists, Justices Blackmun and Stevens, to uphold the right of privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973), at least in a limited form. For the reasons supporting their conclusion that the term "liberty," as used in the Fourteenth Amendment, includes protection against undue burdens on a woman's right to have an abortion, see *supra* note 229. For reasons supporting the dissent by Chief Justice Rehnquist, and Justices White, Scalia, and Thomas, see *supra* note 229.

A. *INS v. Chadha*

INS v. Chadha,²⁹² a 1983 case, considered whether the one-house veto provision of the Immigration and Naturalization Act²⁹³ was constitutional. Chadha, a Kenyan-born East Indian with a British passport, was initially held deportable for overstaying his visa.²⁹⁴ Pursuant to an exception in the Act, an immigration law judge suspended Chadha's deportation.²⁹⁵ A House of Representatives' subcommittee then reviewed 340 cases of deportation suspension, and decided in six cases (Chadha's and five others) that the suspension was not warranted.²⁹⁶ Pursuant to the one-house veto provision, the House then passed a resolution vetoing the suspension by the immigration law judge in these six cases.²⁹⁷ Chadha then brought suit alleging that the House action vetoing his deportation suspension was unconstitutional.²⁹⁸ The Bicameralism and Presentment Clauses of the Constitution provide that no law can take effect without the concurrence of both houses of Congress and presidential approval; in the event of a presidential veto, the law can take effect only if Congress overrides that veto by a two-thirds majority.²⁹⁹ These two clauses are among the more detailed and specific parts of the Constitution.³⁰⁰ The

292. 462 U.S. 919 (1983).

293. See 8 U.S.C. § 1254 (c) (1988).

294. *Chadha*, 462 U.S. at 923.

295. *Id.* at 923-25.

296. *Id.* at 925-26.

297. *Id.* at 926-27.

298. *Id.* at 928.

299. Article I, section one, of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Article I, section seven, provides in pertinent part: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States." *Id.* § 7, cl. 2. Article I, section seven, further provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Id. § 7, cl. 3.

300. Professor Crosskey noted that typically the framers included details in the

framers did not hesitate to make specific exceptions to the detailed scheme of bicameralism and presentment. As Chief Justice Burger indicated in his majority opinion in *Chadha*, the Constitution lists four specific exceptions that allow one house of Congress to act without presentment to the President: (1) the House of Representatives' power to initiate impeachment proceedings; (2) the Senate's power to conduct impeachment trials; (3) the Senate's power to approve or disapprove presidential appointments; and (4) the Senate's power to ratify treaties.³⁰¹

Given these facts, a formalist, instrumentalist, or natural law judge would likely hold that the a one-house veto provision in *Chadha* is unconstitutional. From a formalist perspective, Congress failed to follow the specific language of the Constitution, which lays out a clear, bright-line procedure for passing legislative enactments. In *Chadha*, the specific text of the Constitution *is* consistent with a bright-line mechanical approach—the formalist's dream.³⁰² From a natural law perspective, the one-house veto is also unconstitutional because specific language in the Constitution clearly commands that result. As indicated earlier, where the framers and ratifiers made a clear choice in specific constitutional text, the natural law approach requires that choice to be followed.³⁰³ An instrumentalist judge would be concerned about a legislative attempt to short-circuit checks and balances through delegation of legislative power to one house, and would, therefore, also support a holding that the one-house veto provision in *Chadha* is unconstitutional. In *Chadha*, not only are the constitutional provisions detailed and specific, but the purposes underlying the separation of powers also support the same result.³⁰⁴

Indeed, given the Constitution's relative clarity on the point, perhaps only an extreme Holmesian judge, adopting an approach deferential to the legislative branch, could find ways around the textual language of the Constitution to support the legislative action in this case.³⁰⁵ Even a moderate Holmesian judge, committed to following clearly stated language or clear inferences of purpose in the Constitution,³⁰⁶ would find the statute unconstitutional.

Constitution only where they seemed required, leaving the rest to judicial interpretation. *See supra* text accompanying note 104.

301. *Chadha*, 462 U.S. at 955-56.

302. *See supra* text accompanying notes 132-50.

303. *See supra* text accompanying notes 114-25.

304. For a discussion regarding the instrumentalist concern with the purposes behind the separation of powers, particularly a concern with the legislature delegating to one part of itself, see *supra* text accompanying notes 173-80.

305. On extreme Holmesian deference to the legislature, see *supra* text accompanying notes 166-70.

306. *See supra* text accompanying notes 37-40, 153-54, 166, 229.

Given this fact, it should be no surprise that a strong majority of the Court found that the one-house veto provision in *Chadha* was unconstitutional.³⁰⁷ Chief Justice Burger's opinion was driven by an analytic, almost formalist, concern for the clear literal language of the Bicameralism and Presentment Clauses, and by a preference for clear, bright-line rules.³⁰⁸ However, Chief Justice Burger also included language in his opinion reflecting the natural law concern of the framers' and ratifiers' purposes behind the separation of powers³⁰⁹ and the instrumental concern of short-changing the legislative process.³¹⁰ Perhaps language reflecting these concerns made it easier for six of the nine Justices on the Court to join Chief Justice Burger's opinion.³¹¹

Only one Justice dissented from the majority's conclusion that the

307. Indeed, only one Justice dissented from the Court's conclusion on this point. See *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting).

308. See *id.* at 951, 957-59; Chemerinsky, *supra* note 8, at 1088 (stating that "Chief Justice Burger's opinion for the majority of the Court was a paradigm example of originalism and formalism"); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 514 (1989) (noting that the Supreme Court used an "exceedingly literal and legalistic mode of analysis").

309. See *Chadha*, 462 U.S. at 947, 949. The Court stated:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.

Id.

310. See *id.* Justice Burger wrote:

In the Constitutional Convention debates on the need for a bicameral legislature, James Wilson, later to become a Justice of this Court, commented: "Despotism comes on mankind in different shapes . . . [T]he Legislative authority . . . can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it."

Id. (citation omitted).

311. Justice Powell filed a separate concurrence. *Id.* at 959-67 (Powell, J., concurring). See *infra* text accompanying notes 323-35. Justice White dissented on the merits. *Chadha*, 462 U.S. at 967-1003 (White, J., dissenting). See *infra* text accompanying notes 312-22. Justice Rehnquist dissented only on the severability issue. *Chadha*, 462 U.S. at 1013-16 (Rehnquist, J., dissenting). See *infra* text accompanying notes 340-43.

one-house veto was unconstitutional.³¹² In his dissent, Justice White struggled to avoid the clear implications of the constitutional text. Both houses of Congress had passed and the President had signed the statute that initially set up the one-house veto provision.³¹³ Justice White suggested that because the authorizing Act satisfied the Bicameralism and Presentment Clauses, later legislative acts pursuant to that Act need not satisfy those clauses.³¹⁴ However, neither the specific language nor specific purposes of the Bicameralism and Presentment Clauses suggest that the Constitution provides a mechanism for delegating the bicameralism and presentment requirements for later enactments. Indeed, the presence of specific exceptions to bicameralism and presentment in the Constitution³¹⁵ suggests that the framers and ratifiers intended no further exceptions. Furthermore, Justice White was unlikely to receive much support from instrumentalist judges who, in other cases, might be willing to deviate from the original intent of the Constitution.³¹⁶ Instrumentalist concerns about the legislature's authority to delegate their joint power to one house would likely preclude instrumentalists like Justices Brennan, Marshall, Blackmun, or Stevens from accepting a strained argument to uphold the one-house veto provision.³¹⁷

Perhaps more forcefully, Justice White argued that bicameralism and presentment were at least functionally satisfied.³¹⁸ He noted that once Mr. Chadha was declared deportable, the only way to suspend deportation was for the INS judge to authorize suspension (an executive act perhaps the functional equivalent of presentment to the President) and for both houses of Congress not to veto that decision (perhaps the functional equivalent of bicameralism).³¹⁹ In such a case, both houses of Congress and a representative of the President (the INS judge acting pursuant to authority delegated from the President to the Attorney General to the INS judge) must agree.³²⁰ From a purely functional perspective, Justice White might be correct. However, as the majority opinion indicated, the procedure in *Chadha* does not satisfy what the Bicameralism and Presentment Clauses analytically require: formal approval by both houses and then presentment to the President.³²¹ The

312. *Chadha*, 462 U.S. at 967 (White, J., dissenting).

313. *Id.* at 993 (White, J., dissenting).

314. *Id.* at 982 (White, J., dissenting).

315. *See supra* text accompanying note 301.

316. On instrumentalist willingness to be flexible with original intent where sound social policy so counsels, see *supra* text accompanying notes 174-76, 182-91.

317. On instrumentalist concerns regarding legislative delegation of power to one house, see *supra* text accompanying notes 304, 310.

318. *Chadha*, 462 U.S. at 996 (White, J., dissenting).

319. *Id.* at 994-96 (White, J., dissenting).

320. *Id.* (White, J., dissenting).

321. *See id.* at 958 n.23 ("To allow Congress to evade the strictures of the Consti-

procedure in *Chadha* included action by a presidential surrogate, followed by congressional inaction through failure to veto. Furthermore, as the majority opinion stated, even on a functional level, there is a great deal of difference between an actual vote on a bill and a decision not to veto.³²² Thus, only an extreme Holmesian judge, actively searching for ways to uphold the statute, could feel comfortable with this functional argument.

Justice Powell's concurrence³²³ is also interesting from the perspective of the four decision-making styles discussed in this Article. In his separate opinion, Justice Powell took a less positivist and more natural law view. He noted that one problem in *Chadha* was that the congressional act was narrow, aimed at a few named individuals, rather than general, aimed at a class of people.³²⁴ Under our system of separation of powers, judges, not legislators, act on individual cases.³²⁵ Referring to the Bill of Attainder Clause as one example of this principle,³²⁶ Justice Powell stated that the philosophy behind that clause, as well as the nature of eighteenth-century separation of powers philosophy generally, demands that attention be paid to the differing institutional responsibilities of the legislature (to pass laws), the executive (to enforce laws), and the judiciary (to decide cases).³²⁷ Basically, the one-house veto in *Chadha* allowed the legislature to perform the judicial act of deciding individual cases.³²⁸

Therefore, this particular legislative veto scheme is flawed from a natural law perspective regardless of the Bicameralism and Presentment Clauses.³²⁹ Other one- or two-house veto schemes that authorize vetoes

tution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.”)

322. *See id.*

323. *Id.* at 959-67 (Powell, J., concurring).

324. *Id.* at 964-65 (Powell, J., concurring) (“The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria.”).

325. *Id.* at 965 (Powell, J., concurring) (noting that the House assumed a function ordinarily entrusted to the federal courts).

326. *Id.* at 962 (Powell, J., concurring).

327. *Id.* (Powell, J., concurring) (citations omitted) (observing that “the Bill of Attainder Clause was intended . . . [as] a general safeguard against legislative exercise of the judicial function, [i.e.,] . . . trial by legislature,’ [and that both the Clause] . . . and the separation-of-powers doctrine generally, reflect the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power”).

328. *Id.* at 964-65 (Powell, J., concurring). *See supra* notes 324-25.

329. *See Chadha*, 462 U.S. at 959 (Powell, J., concurring) (“The Court’s decision,

of regulations which administrative agencies pass pursuant to their delegated powers would not constitute legislative action taken on individual cases.³³⁰ Justice Powell's opinion, therefore, represents a narrower holding grounded on general separation of powers political philosophy.³³¹ His opinion represents a natural law decision-making style in two important respects. First, it accepted as a base the framers' notions of natural law political philosophy and read the words of the Constitution accordingly.³³² Second, it followed the Anglo-American judicial tradition of deciding cases on narrower grounds whenever possible.³³³ It is interesting to note that Justice Kennedy, who displayed a natural law decision-making style in *Public Citizen v. Department of Justice*,³³⁴ wrote the Ninth Circuit's opinion in *Chadha v. INS*,³³⁵ and opted for much the same rationale that Justice Powell used later in the Supreme Court decision.

A final point to note about *Chadha*. In addition to the basic question

based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause.”).

330. See *id.* at 967 (Powell, J., concurring). Powell stated:

Chief Justice Marshall observed: “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules [to individuals in society] would seem to be the duty of other departments.” In my view, when Congress undertook to apply its rules to *Chadha*, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

Id. (Powell, J., concurring) (citation omitted).

331. See *id.* at 960 (Powell, J., concurring) (arguing that the Court should have adopted the narrow holding that the legislative consideration of individual cases violated the principle of separation of powers).

332. See *id.* at 960-62, 967 (Powell, J., concurring) (observing that the framers' concern was that the legislature should not be allowed to make unilateral judicial determinations).

333. For discussion of the traditional Anglo-American principle of deciding cases on narrower grounds, see *supra* note 50 and accompanying text.

334. 491 U.S. 440 (1989). See *infra* text accompanying notes 428-43.

335. 634 F.2d 408, 430-35 (9th Cir. 1980). Kennedy stated:

Here, the Legislative branch has disrupted or severed the Judiciary's relation to the alien in a substantial way The Judiciary's duty to decide cases now becomes subject to review by the Legislature, thus undermining the integrity of the third branch We are of the view that this departure from the separation of powers norm is not necessary. Although the practicality of alternatives to legislative disapproval in other situations raises difficult questions, we are not here faced with . . . the broad scope and complexity of the subject matter of an agency's rulemaking authority Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.

Id.

of the constitutionality of the one-house veto, there was also the question of whether, given the unconstitutionality of the statute, the Court could sever the one-house veto provision from the Act and enforce the rest of the Act as written.³³⁶ The literal language of the statute clearly provided for severability. The Act stated, "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."³³⁷ Therefore, formalist and natural law judges looking analytically at the statute would likely hold that the one-house veto provision was severable.³³⁸ Instrumental judges, concerned with legislative delegation of power to one house, would likely argue that severing the one-house veto provision would solve the separation of powers problem, and that the statutory scheme remains workable even without that provision.³³⁹

Justices approaching the problem from a Holmesian perspective, however, would focus on deference to legislative intent in light of a functional or pragmatic understanding.³⁴⁰ In this case, there was clear evidence in the statute's legislative history that the legislature wanted to deny the executive branch the power to suspend deportations without congressional checks.³⁴¹ Thus, Justices who are aware of the functional importance of the one-house veto in the overall legislative scheme would likely decide that the one-house veto provision was so critical that, should they

336. *Chadha*, 462 U.S. at 931.

337. *Id.* at 932 (citing the Immigration and Naturalization Act, 8 U.S.C. § 1101 (1988)).

338. *Id.* ("[T]he language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act . . . to depend upon whether the veto clause . . . was invalid.")

339. *Id.* at 934 (citation omitted) ("[A] provision is further presumed severable if what remains after severance 'is fully operative as a law.' There can be no doubt that § 244 is 'fully operative' and workable administrative machinery without the veto provision of § 244(c)(2).") In addition to the clear language regarding severability, and the argument concerning administrative workability, an instrumental judge would also consult legislative history to determine the meaning of the severability provision. On this point, the Court noted that the "legislative history is not sufficient to rebut the presumption of severability raised by [the statute]." *Id.*

340. For Holmesian deference to the legislature in the context of statutory interpretation, see generally *supra* notes 37-40, 242-44 and accompanying text.

341. *Chadha*, 462 U.S. at 1013-15 (Rehnquist, J., dissenting) ("Congress has always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated that it would be willing to permit suspensions of deportation unless it could retain some sort of veto.")

declare it unconstitutional, the entire Act should fall.³⁴² Justices Rehnquist and White refused to find severability in this case.³⁴³

B. *Bowsher v. Synar*

Bowsher v. Synar,³⁴⁴ a 1986 case, addressed whether Congress could give the Comptroller General, Charles Bowsher, the power to make government spending cuts if Congress failed to meet Gramm-Rudman deficit reduction targets while, at the same time, exercising its power to remove Bowsher from office.

The majority of the Court found that Bowsher's power to determine which spending cuts to make under the Gramm-Rudman Law was an executive power.³⁴⁵ Logically and analytically, this is so. It is the essence of executive power to implement laws passed by Congress,³⁴⁶ and Charles Bowsher would be doing exactly that by deciding which funds to sequester as required under the Gramm-Rudman Law.³⁴⁷ The question in *Bowsher* then becomes whether it is constitutional for Congress to exercise removal power over an executive official.

Unlike *Chadha*, there is no specific text in the Constitution dealing with Congress' removal power of executive officials.³⁴⁸ From either a

342. *Id.* at 1016 (Rehnquist, J., dissenting). Rehnquist noted:

Congress' continued insistence on retaining control of the suspension process indicates that it has never been disposed to give the Executive Branch a free hand. By severing § 244(c)(2), the Court has "confounded" Congress' "intention" to permit suspensions of deportation "with their power to carry that intention into effect." Because I do not believe that § 244(c)(2) is severable, I would reverse the judgment of the Court of Appeals.

Id. (citation omitted).

343. *Id.* at 1013 (Rehnquist, J., dissenting).

344. 478 U.S. 714 (1986).

345. *Id.* at 732-33 (stating that "the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical[, but actually] entail[] execution of the law in constitutional terms").

346. *Id.* at 733.

347. *Id.* at 732. As the Court stated:

The primary responsibility of the Comptroller General under the instant Act is the preparation of a 'report.' This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year [T]he Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimate.

Id.

348. See NOWAK & ROTUNDA, *supra* note 137, at 264 ("There is no express Constitutional grant of a removal power (other than Congress' removal power in connection with impeachments).").

formalist or natural law approach, however, the case is still relatively easy. For a formalist judge, preference for a strict separation of powers approach would mean that any legislative power to limit the President's ability to remove executive officials from office would be an anathema.³⁴⁹ Under the formalist approach, such sharing or intermingling of powers should not be permitted unless specifically authorized by clear constitutional text.³⁵⁰

Even under a natural law approach, general separation of powers political philosophy would suggest that interbranch removal power should be impermissible. If one branch of government had the power to remove officials from another branch, this would lead to the kind of "overruling influence" of one branch over another that Justice Story identified as one of the framers' core concerns in separation of powers political philosophy.³⁵¹ The rejection of interbranch removal power is underscored by constitutional provisions regarding impeachment power.³⁵² When the framers were willing to permit one branch to remove members of another branch, as in impeachment proceedings, the framers set out specific and detailed provisions to govern that activity.³⁵³

Thus, either a formalist or natural law approach judge should find the law in *Bowsher* unconstitutional. This is exactly what Chief Justice Burger's majority opinion held. As in *Chadha*, Chief Justice Burger's opinion adopted formalist sounding rhetoric,³⁵⁴ but included references

349. See *Bowsher*, 478 U.S. at 723 (noting that while Congress may remove executive officers "only upon impeachment by the House of Representatives and conviction by the Senate" any other congressional attempt to remove executive officers would not be consistent with separation of powers).

350. The impeachment power of the House and Senate would be an example of such clear constitutional text on point. See U.S. CONST. art. II, § 4.

351. See *supra* text accompanying notes 124-25.

352. *Bowsher*, 478 U.S. at 723 (observing that "the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate").

353. *Id.* See also U.S. CONST. art. II, § 4. In the First Congress of 1789,

James Madison urged rejection of a congressional role in the removal of Executive Branch Officers, other than by impeachment Madison's position ultimately prevailed, and a congressional role in the removal process was rejected. This "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning since many members of the First Congress "had taken part in framing that instrument."

Bowsher, 478 U.S. at 723-24 (citations omitted).

354. See *id.* at 722-23.

The Constitution does not contemplate an active role for Congress in the

to the "overruling influence" argument, perhaps to gain support from Justices interested in that kind of reasoning.³⁵⁵

The four Justices who refused to join the majority opinion were Justices Marshall, Stevens, and Blackmun (all instrumentalists), and Justice White, the extreme Holmesian.³⁵⁶ These are the Justices who most often reject the analytic presuppositions of formalist or natural law reasoning.³⁵⁷

As in *Chadha*, Justice White concluded that absent a specific constitutional provision denying Congress the power to structure governmental relations in a particular way, the functionally attractive choice made by the Congress in the Gramm-Rudman law should withstand constitutional scrutiny.³⁵⁸ If Congress concluded that the Comptroller General was the best person to implement the required Gramm-Rudman cuts, then the Court should uphold that decision.³⁵⁹ This is particularly so, Justice White argued, because, as a practical matter, Congress would probably not exercise the removal power.³⁶⁰ For a functional Holmesian, the constitutionality of the Gramm-Rudman Act should not turn on the slight possibility that Congress might exercise its removal power.³⁶¹ Further,

supervision of officers charged with the execution of the laws it enacts
A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one [the impeachment power] is inconsistent with separation of powers.

Id. See also *id.* at 759 (White, J., dissenting) (criticizing the majority's "willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives"); Chemerinsky, *supra* note 8, at 1090 (recognizing that Chief Burger's opinion "is pure originalism and formalism").

355. See *Bowsher*, 478 U.S. at 721-23.

356. See *id.* at 759 (White, J., dissenting); *id.* at 736 (Stevens, J., concurring) (Justice Marshall joined in Justice Stevens' concurring opinion); *id.* at 776 (Blackmun, J., dissenting). For a summary of the judicial decision-making styles of the Justices who have served on the Rehnquist Court, see Table 3, at *supra* note 266 and accompanying text.

357. See generally *supra* text accompanying notes 14-66. For an overview of formalist versus functionalist approaches to *Bowsher*, see Romney B. Cullers, *The Appointment of the Comptroller General: Formal and Functional Perspectives*, 6 ADMIN. L.J. AM. U. 235 (1992).

358. *Bowsher*, 478 U.S. at 759 (White, J., dissenting).

359. *Id.* (White, J., dissenting) ("Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates; that is a matter for the Congress and the Executive, both of which expressed their assent to the statute barely half a year ago.").

360. *Id.* (White, J., dissenting).

361. *Id.* at 759-60 (White, J., dissenting). Justice White commented:

In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has in the past been recognized as a fundamental principle governing consideration of disputes over separation of powers: "The actual art of governing under our Constitution does not and cannot conform

Justice White noted that the separation of powers principles expressed by the majority in *Chadha* did not apply in *Bowsher* because the Gramm-Rudman Act provides that Congress may remove the Comptroller only by a resolution which both houses of Congress pass and the President signs; hence, both Bicameralism and Presentment Clauses were satisfied.³⁶²

Justices Marshall and Stevens concurred with the majority's result in *Bowsher*, but not with the majority's reasoning.³⁶³ They rejected the majority's argument that Bowsher was performing an executive function and, thus, that Congress's power to remove him from office created the constitutional problem.³⁶⁴ Instead, they noted that the real problem in *Bowsher* was that Congress had delegated to the Comptroller General, typically thought to be a member of the legislative branch,³⁶⁵ the responsibility of making decisions regarding appropriating money.³⁶⁶ Justices Stevens' and Marshall's finding of unconstitutionality was based on this functionally grounded instrumental concern with congressional self-delegation, rather than on an analytically grounded argument concerning removal.³⁶⁷

to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

Id. (White, J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

362. *Id.* at 767 (White, J., dissenting).

363. *Id.* at 736 (Stevens, J., concurring) (Justice Marshall joined in Justice Stevens' concurring opinion).

364. *Id.* at 737 (Stevens, J., concurring).

365. Both the majority and concurring opinions in *Bowsher* agreed with this characterization of the Comptroller General. *See id.* at 731 (Burger, C.J., for the Court) ("It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch."); *id.* at 737 (Stevens, J., concurring) ("I am convinced that the Comptroller General must be characterized as an agent of Congress.")

366. *Id.* (Stevens, J., concurring) (arguing that "Congress may not exercise its fundamental power to formulate national policy by delegating that power . . . to an individual agent of Congress").

367. *Id.* at 757-59 (Stevens, J., concurring). Stevens wrote:

In short, even though it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power, when it elects to exercise such power itself, it may not authorize a lesser representative of the Legislative Branch to act on its behalf Rather than turning the task over to its agent, if the Legislative Branch decides to act with conclusive effect, it must do so through a process akin to that specified in the fallback provision—through

Finally, Justice Blackmun's separate opinion directly attacked the removal provision because Congress was not likely to use it, and it lacked any real functional importance to Congress.³⁶⁸ Blackmun's acknowledgment that the removal provision caused an analytical problem³⁶⁹ revealed his tendency to move slightly away from functionalism and lean in an analytic direction.³⁷⁰ Justice Blackmun's typically pragmatic response, however, was to strike the removal provision from the law while leaving the remaining portion of the Gramm-Rudman Act intact.³⁷¹ Why strike down a major piece of legislation, asked Justice Blackmun, in order to preserve a never-used removal provision?³⁷² However, Justice Blackmun's instrumentally based pragmatic response did not carry the day; from an analytic perspective, it is Congress' decision to repass the Act without the removal provision, not the Court's decision to pre-judge what Congress might do by severing the removal provision itself.³⁷³ The value of this approach is exemplified by Congress' action after *Bowsher*. Following the Court's decision in *Bowsher*, Congress did repass the Gramm-Rudman Act.³⁷⁴ However, instead of striking the analytically unsound and functionally unimportant removal provision, Congress instead transferred the problematic executive functions from the Comptroller General to the Director of the Office of Management and Budget

enactment by both Houses and presentment to the President.

Id. (Stevens, J., concurring).

368. *Id.* at 777 (Blackmun, J., dissenting) ("I agree with Justice White that any such claim [that the removal power Congress has over the Comptroller General renders him subservient to Congress] is unrealistic.")

369. *Id.* (Blackmun, J., dissenting) ("But it seems to me that an attempt by Congress to participate *directly* in the removal of an executive officer—other than through the constitutionally prescribed procedure of impeachment—might well violate the principle of separation of powers.")

370. *See supra* text accompanying note 266 (Table 3). For a discussion of Justice Blackmun's decision-making style as poised between instrumentalism and natural law, *see supra* note 266.

371. *Bowsher*, 478 U.S. at 777 (Blackmun, J., dissenting).

372. *Id.* at 778 (Blackmun, J., dissenting) ("I cannot see the sense of invalidating legislation of this magnitude in order to preserve a cumbersome, 65-year-old removal power that has never been exercised and appears to have been all but forgotten until this litigation.")

373. *See id.* at 735.

[T]his matter must be resolved on the basis of congressional intent . . . [not ad hoc] weighing of the importance Congress attached to the removal provisions in the Budget and Accounting Act of 1921 as well as in other subsequent enactments against the importance it placed on the Balanced Budget and Emergency Deficit Control Act of 1985.

Id.

374. *See* Pub. L. No. 100-119, 101 Stat. 754 (1987) (codified as amended at 2 U.S.C. § 901(a)(1)(B) (1988)).

(OMB).³⁷⁶ This transfer solved the constitutional problem identified in *Bowsher* because Congress has no removal power over the Director of the OMB.³⁷⁶

In addition to the specific opinions in the case, *Bowsher* is important for another reason. The split in reasoning among the Justices on the Court clearly reveals that the Court did not have a monolithic view with respect to separation of powers. The separate opinions in *Bowsher* made it clear that a number of the Justices had slightly different perspectives on separation of powers questions and that although a majority of the Court joined Chief Justice Burger's opinions in *Chadha* and *Bowsher*, the analytic, bordering on formalist, rhetoric in his opinions would not necessarily carry the day in every case.

C. Morrison v. Olson

Morrison v. Olson,³⁷⁷ decided in 1988, involved the constitutionality of the Independent Prosecutor Law. The specific question in *Morrison* was whether it was constitutional for Congress to give a special three-judge panel of the Judicial Division the power to appoint a special prosecutor to investigate cases against certain executive branch officials.³⁷⁸

Naturally, from a strict separation of powers approach, such inter-branch appointments (a member of the judiciary appointing an executive official, the independent prosecutor) would be unconstitutional absent clear constitutional authorization.³⁷⁹ Absent such authorization, a strict separation of powers approach would call for appointments to be made only intrabranch. Thus, a formalist judge following a strict separation of powers approach would find this scheme of interbranch appointments unconstitutional.³⁸⁰ Given Chief Justice Burger's majority opinions in *Chadha* and *Bowsher*, which both reflect formalist rhetoric,³⁸¹ one might have expected a majority of Justices to reach a similar formalist conclusion in *Morrison*. However, only Justice Scalia adopted a formalist

375. 2 U.S.C. § 901(a)(1) (West 1992).

376. For discussion of the practical import of this action, see Alfange, *supra* note 205, at 741 n.457.

377. 487 U.S. 654 (1988).

378. *Id.* at 659-61.

379. *See id.* at 715-23 (Scalia, J., dissenting) (arguing that congressional delegation of the power to appoint executive officials was unconstitutional).

380. *See id.* at 697, 705-06 (Scalia, J., dissenting).

381. *See supra* text accompanying notes 308, 354.

approach.³⁸² Justice Scalia's lone dissent in *Morrison* is peppered with comments concerning the benefits of clear, bright-line rules and a strict separation of powers approach.³⁸³ As such, it is an example of a formalist approach to separation of powers issues.

For Justices approaching the *Morrison* case from natural law, Holmesian, or instrumentalist perspectives, however, the statute's unconstitutionality is not so clear. From a purely functional or pragmatic perspective, the statute provides a mechanism to solve what otherwise would be a clear problem: the conflict of interest that arises from allowing a high-ranking executive department official to pick its own prosecutor to investigate another high-ranking executive department official.³⁸⁴ Delegating the power of appointment to a presumably neutral three-judge panel creates a less conflict-ridden checks and balances scheme.³⁸⁵ From a natural law perspective, the separation of powers political philosophy which our framers adopted countenances sharing of powers and checks-and-balances schemes as long as they advance the fundamental purposes of separation of powers and are not expressly prohibited by the Constitution.³⁸⁶

Therefore, under all three non-formalist approaches, a judge would likely uphold the statute absent clear constitutional text prohibiting the arrangement. The specific language of the Appointments Clause of the Constitution provides:

[The President] shall nominate, and by and with the Advice and Consent of Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may be Law vest the Appointment of such inferior Officers, as they

382. See *Morrison*, 487 U.S. at 697-99, 703-15 (Scalia, J., dissenting).

383. See, e.g., *id.* at 705 (Scalia, J., dissenting) (emphasis added) ("To repeat, Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' As I described at the outset of this opinion, this does not mean *some* of the executive power, but *all* of the executive power."), *id.* at 709 (Scalia, J., dissenting) ("It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are."); *id.* at 711 (Scalia, J., dissenting) ("The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a 'balancing test.' What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much."); see also Alfange, *supra* note 205, at 752 ("At bottom, Justice Scalia seems to be claiming that the absence of a bright-line absolute, and reliance instead on case-by-case adjudication for the resolution of separation of powers issues, represents intolerable arbitrariness.").

384. See Alfange, *supra* note 205, at 742.

385. See *id.* at 745.

386. See *supra* text accompanying notes 109-25.

think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.³⁸⁷

Under this provision, the "courts of law" may appoint "inferior officers."³⁸⁸ A judge following the strict separation of powers approach, who is looking for bright-line rules and mechanical application of the law, might read the Clause as providing that the "President" or "Heads of Departments" are to appoint inferior executive officers only, while the "Courts of Law" may only appoint inferior judicial officers, that is, employees within their own branch of government. This was the approach that the appellees in *Morrison* took.³⁸⁹ However, the express language of the provision does not mandate this approach.³⁹⁰ Furthermore, as indicated above, a strict separation of powers approach is neither consistent with the framers' natural law political philosophy,³⁹¹ nor functionally or pragmatically sound. Viewed functionally or pragmatically government needs some flexibility to accommodate the realities of political practice.³⁹²

387. U.S. CONST. art. II, § 2, cl. 2.

388. *Id.*

389. See *Morrison v. Olson*, 487 U.S. 654, 673 (1988) ("[Appellees] contend that the Clause does not contemplate congressional authorization of 'interbranch appointments,' in which an officer of one branch is appointed by officers of another branch.").

390. See *id.* at 673-74. The Court noted:

On its face, the language of this "excepting clause" admits of no limitation on interbranch appointments. Indeed, the inclusion of "as they think proper" seems clearly to give to Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." We recognized as much in one of our few decisions in this area, *Ex Parte Siebold*, where we stated: "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress."

Id. (citations omitted).

391. See *supra* text accompanying notes 109-25. See also *Morrison*, 487 U.S. at 674-75.

We also note that the history of the Clause provides no support for appellees' position [T]here was little or no debate on the question whether the Clause empowers Congress to provide for interbranch appointments, and there is nothing to suggest that the Framers intended to prevent Congress from having that power.

Id.

392. See, e.g., Alfange, *supra* note 205, at 753. Alfange states:

If independent prosecutors are considered inferior officers, then there is no specific language in the Constitution that prohibits the courts from appointing them. As Chief Justice Rehnquist stated in his opinion, because independent prosecutors have limited duties, limited tenure, limited jurisdiction, and are subject to removal by a higher executive branch official, it is appropriate to categorize independent prosecutors as non-inferior officers.³⁹³ This conclusion is buttressed by comparing independent prosecutors to those officers listed in the Appointments Clause as inferior officials: Ambassadors, other public Ministers and Consuls, and Justices of the Supreme Court;³⁹⁴ independent prosecutors are clearly not in the same rank of employee as these individuals. Thus, the decision that independent prosecutors are best categorized as inferior officials makes sense from either an analytic or functional perspective.³⁹⁵

Despite this initial view that the Independent Prosecutor Law is constitutional, there are some considerations on the other side of the scale.

Bright-line rules promote certainty, but at the cost of eliminating the flexibility that the government may need in order to adapt to changing conditions in changing times or to meet newly emerging problems resulting from shifts in the relative strengths or capacities of the branches The independent counsel provisions offer an important example of this "needed and innovative action." They were devised as a remedy for the problem of excesses within the executive branch that seemed to be serious and recurring.

Id.

393. *Morrison*, 487 U.S. at 671-72.

394. U.S. CONST. art. II, § 2, cl. 2.

395. In dissent, Justice Scalia argued "that the independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch (indeed, not even to the President)." *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting) (emphasis added). Scalia also noted that "the Act specifically grants her the 'full power and *independent* authority to exercise *all* investigative and prosecutorial functions of the Department of Justice,' and makes her removable only for 'good cause,' a limitation specifically intended to ensure that she be *independent* of, not *subordinate* to, the President and the Attorney General." *Id.* at 719-23 (Scalia, J., dissenting) (citations omitted) (emphasis added).

However, as Professor Alfange remarks:

[I]f "good cause" is shown, the independent counsel is subject to removal by the Attorney General; the Attorney General is not subject to removal by the independent counsel no matter how good the cause, which would certainly suggest that the independent counsel is not on the same hierarchical level as the Attorney General But Justice Scalia insisted that one is not an inferior officer unless one is removable *at will* by someone else, a puzzling notion that would make a principal officer of every federal appointee who has some statutory protection against arbitrary dismissal.

Alfange, *supra* note 205, at 744 (emphasis added). In addition, as Professor Alfange notes, in *United States v. Nixon*, 418 U.S. 683, 694 (1974), the Supreme Court had described the Watergate Special Prosecutor as a "subordinate officer." *Id.* The same characterization should apply to the independent prosecutor in this case.

First, excessive intrusion by the legislature or the judiciary into executive prerogatives would tip the pragmatic or functional checks-and-balances scheme wrought by the Independent Prosecutor Law in a negative direction.³⁹⁶ Second, and equally important, excessive intrusion by the judiciary might represent the kind of "overruling influence" in the administration of a coequal branch, which would be of great concern to a natural law judge.³⁹⁷ All three non-formalist approaches, therefore, would be concerned that the judiciary not unduly interfere with executive prerogatives. Similarly, each approach would want to ensure that the judicial act is neither incongruous with judicial responsibilities nor compromising of judicial independence. Such occurrences would not advance the checks-and-balances function of the framers' natural law separation of powers philosophy, and would not be functionally wise or pragmatic.³⁹⁸ Given this analysis, the case becomes relatively easy. As Chief Justice Rehnquist indicated in his opinion, while the Court must be concerned about (1) undue interference or intrusion or (2) incongruous or independence-compromising activities, none of these concerns were present in this case.³⁹⁹ Of course, the exact line where activity crosses over into "undue" interference or "incongruous" action requires a sensitive

396. See *Morrison*, 487 U.S. at 694-95 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch Similarly, we do not think that the Act works any judicial usurpation of properly executive functions.").

397. See *supra* text accompanying notes 114-25.

398. See *Morrison*, 487 U.S. at 675-76. The Court stated:

We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, *Siebold* itself suggested that Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint.

Id. The Court further stated:

[T]he Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III Nor do we believe, as appellee's contend, that the Special Division's exercise of the various powers specifically granted to it under the Act poses any threat to the "impartial and independent federal adjudication of claims within the judicial power of the United States."

Id. at 683 (citations omitted).

399. *Id.* at 675-77, 683.

balancing of considerations. This call for judicial temperament is required under any functional approach, either Holmesian or instrumentalist, and under a natural law balance concerned with "overruling influence." While the line might be drawn slightly differently by the three judicial decision-making styles—a Holmesian more willing to defer to Congress,⁴⁰⁰ an instrumentalist more willing to rely on whether the result is sound or not,⁴⁰¹ and a natural law judge more focused on the kinds of separation of powers and checks and balances principles advocated by the framers⁴⁰²—in this case the result is clearly the same. Because the Constitution does not clearly prevent such an arrangement and there are no meaningful concerns of (1) undue interference or intrusion or (2) incongruous or independence-compromising activities in this case, the Court held that the legislation was constitutional.⁴⁰³

D. *Mistretta v. United States*

From the perspective of the four decision-making styles discussed in this Article, the next major separation of powers case decided by the Supreme Court, *Mistretta v. United States*,⁴⁰⁴ is easy to describe. It is *Morrison v. Olson* revisited.

The particular issue in *Mistretta* was whether judges could sit on a sentencing commission to help develop sentencing guidelines for use in the federal criminal justice system.⁴⁰⁵ From a formalist, strict separation of powers approach, such participation would be unconstitutional because judges sitting on the Commission would have delegated legislative power to help create legislation which they then would apply as judges.⁴⁰⁶ However, the Constitution does not contain specific language

400. See *supra* text accompanying notes 151-67.

401. See *supra* text accompanying notes 174-81.

402. See *supra* text accompanying notes 109-25.

403. *Morrison*, 487 U.S. at 696-97 (all Justices joined in this conclusion except Justice Kennedy, who did not participate in the case, and Justice Scalia, who dissented).

404. 488 U.S. 361 (1989).

405. *Id.* at 362-71.

406. See *id.* at 419-20 (Scalia, J., dissenting). Justice Scalia stated:

Strictly speaking, there is no acceptable delegation of legislative power. As John Locke put it almost three hundred years ago, "[t]he power of the legislative being derived from the people by a positive voluntary grant . . . , the legislative can have no power to transfer their authority of making laws, and place it in other hands." . . . In the present case, however, a pure delegation of legislative power is precisely what we have before us.

Id. (Scalia, J., dissenting) (citations omitted) (emphasis added). See also *id.* at 425 (Scalia, J., dissenting) ("[J]udicial and legislative powers have never been thought delegable [H]ere we have an anomaly beyond equal: an independent agency [the Sentencing Commission] exercising governmental power on behalf of a Branch [the

discussing how commissions can be created or whether judges can sit on them.⁴⁰⁷ Thus, as in *Morrison*,⁴⁰⁸ no clear textual language prevented the arrangement in *Mistretta*.

Given this fact, the issue for non-formalist judges would be whether the arrangement raises sufficient concerns of (1) undue interference or intrusion or (2) incongruous or independence-compromising activities.⁴⁰⁹ Given the facts of the case, this decision is relatively easy. Since the Commission only had the power to make recommendations, which the legislature would decide whether to adopt, there was no undue interference or intrusion.⁴¹⁰ Additionally, because judges are familiar with sentencing, there was no incongruity with using their expertise in this area.⁴¹¹ Finally, because the judges were acting on the Commission in an advisory capacity unrelated to pending cases, there was no real concern regarding judicial independence⁴¹² or impartiality.⁴¹³

The fact that judges sat on various commissions from the beginning of the republic confirms that such judicial service on commissions is consistent with the framers' views of separation of powers.⁴¹⁴ The historical

Judicial Branch] where all governmental power is supposed to be exercised personally by the judges of courts.”).

407. *Id.* at 397-98 (Blackmun, J., for the Court) (“The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act. The Constitution does include an Incompatibility Clause applicable to national legislators No comparable restriction applies to judges . . .”).

408. *See supra* text accompanying notes 348-53.

409. *See supra* text accompanying notes 396-403.

410. *Mistretta*, 488 U.S. at 393-94 (citations omitted) (noting that “the Commission [was] fully accountable to Congress, which can revoke or amend any or all of the Guidelines . . . within the 180-day waiting period”).

411. *Id.* at 395 (arguing that “[p]rior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances”).

412. *Id.* at 406 (concluding that absent a more specific threat to judicial independence, the fact that Congress had included federal judges on the Commission did not itself threaten the integrity of the judicial branch).

413. *Id.* at 403-08.

414. *Id.* at 398-99.

The first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England, . . . Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France; and] . . . [w]hile he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt.

evidence that judicial service on commissions is consistent with the separation of powers political philosophy of the framers is important from a natural law perspective.⁴¹⁵ The fact that permitting such service by judges involves deference to congressional will in the absence of clear constitutional text is important to a Holmesian judge.⁴¹⁶ An instrumentalist judge would find that the presence of judicial expertise on the commission advances sound social policy.⁴¹⁷ It is thus no surprise that the Court found that the Commission was constitutional by an eight-to-one margin, with only the consistent formalist, Justice Scalia, in dissent.⁴¹⁸

E. *Public Citizen v. United States Department of Justice*⁴¹⁹

By 1989, after the opinions in *Chadha*, *Bowsher*, *Morrison*, and *Mistretta*, a number of observations had emerged concerning modern Supreme Court doctrine on the separation of powers. Despite the suggestions from *Chadha* and *Bowsher* that a majority of the Court had adopted a formalist approach to separation of powers issues, only one consistent formalist Justice emerged on the Court: Chief Justice Burger in *Chadha* and *Bowsher*, and Justice Scalia, who replaced Burger, in *Morrison* and *Mistretta*.⁴²⁰ Justice White emerged as the only consistent extreme Holmesian.⁴²¹ Justice Rehnquist's concurrence with Justice White in *Chadha* on the severability issue and Chief Justice Rehnquist's opinion in *Morrison* suggested a moderate Holmesian decision-making style.⁴²² Justices Stevens' and Marshall's concurrence in *Bowsher* strongly suggested an instrumentalist approach,⁴²³ as did Justice Blackmun's dissent in that case.⁴²⁴

As this summary indicates, relatively clear statements of formalist, Holmesian, and instrumentalist perspectives on separation of powers issues emerged in *Chadha*, *Bowsher*, *Morrison*, and *Mistretta*. The case of *Public Citizen v. United States Department of Justice* provided a

Id.

415. See *supra* text accompanying notes 109-25.

416. See *supra* text accompanying notes 151-66.

417. See *supra* text accompanying notes 174-81.

418. See *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting).

419. 491 U.S. 440 (1989).

420. For an example of Chief Justice Burger's formalism, see *supra* text accompanying notes 308 and 354; see *supra* text accompanying notes 381-82, 406 for an example of Justice Scalia's formalism.

421. See *supra* text accompanying notes 312-22, 340-42, 360-62, (Justice White's Holmesianism).

422. See *supra* text accompanying notes 340-42, 383-403 (Chief Justice Rehnquist's Holmesianism).

423. See *supra* text accompanying notes 363-67.

424. See *supra* text accompanying notes 368-75.

similar opportunity for a natural law approach.

Public Citizen raised two basic questions: (1) whether the Federal Advisory Committee Act (FACA), which requires committees under its jurisdiction to conduct their procedures in certain ways, applied to the ABA Committee that makes pronouncements on nominees to the Supreme Court, and more broadly the federal judiciary; and (2) if FACA did apply, would that violate the separation of powers principle of the Constitution.⁴²⁵

A majority of the Court held that the Act did not apply to the ABA Committee, and thus did not reach the constitutional issue.⁴²⁶ This decision is consistent with a functional or pragmatic approach to statutory interpretation. As the functional opinion for a majority of the Court indicated, "[A] literalistic reading of . . . [FACA] would bring the Justice Department's advisory relationship with the ABA Committee within FACA's terms A literalistic reading, however, would catch far more groups and consulting arrangements than Congress could conceivably have intended."⁴²⁷

For Justices who approach statutory interpretation from an analytic perspective, however, the plain meaning of the statute did seem to include the ABA advisory committee within its ambit.⁴²⁸ For these Justices, therefore, the issue of the constitutionality of the statute was not

425. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443 (1989).

426. *Id.*

427. *Id.* at 463-64. As the functional majority opinion stated:

Where the literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope. "The circumstances of the enactment of particular legislation," for example, "may persuade a court that Congress did not intend words of common meaning to have their literal effect." Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Id. at 454-55 (citations omitted).

428. *Id.* at 471 (Kennedy, J., dissenting) (citations omitted) (noting that the Court disregarded the statute's plain meaning "not because its application would be patently absurd, but rather because, on the basis of its view of the legislative history, the Court is 'fairly confident' that 'FACA should [not] be construed to apply to the ABA Committee'").

moot.

It would clearly be impermissible under a formalist, strict separation of powers approach to permit the legislature to pass guidelines restricting a President's ability to obtain information in making a Supreme Court appointment—a clear presidential right.⁴²⁹

From a natural law perspective, FACA is also unconstitutional because the Appointments Clause clearly states that the President shall nominate Justices to the Supreme Court.⁴³⁰ The nomination power rests squarely in the hands of the President, unfettered by any other source. No separation of powers balancing test is needed to resolve this case because the Constitution clearly allocates the power to the executive. From a natural law perspective, this fact distinguishes the case from *Morrison* and *Mistretta*.⁴³¹

Under a natural law view, the majority opinion in all four of the previous separation of powers cases can be embraced. The natural law view embraces *Chadha* and *Bowsher* because in *Chadha* the constitutional text concerning bicameralism and presentment was clear,⁴³² and in *Bowsher* the legislative power to remove an official exercising executive power crossed the line into “overruling influence” of one branch in the administration of another.⁴³³ Similarly, the natural law view embraces *Morrison* and *Mistretta* because, in each case, no clear constitutional text prevented the legislative arrangement and no “overruling influence,” “undue influence,” “impermissible intruding,” “incongruity,” or “compromise of independence” existed.⁴³⁴ Indeed, in *Morrison*, having a presumably neutral judicial panel appoint the special prosecutor, rather than one high-ranking executive official select a prosecutor to investigate another high-ranking executive official, is supported by the checks and balances political philosophy which motivated the framers on separation of powers issues.⁴³⁵

This natural law explanation for each of these four cases is exactly what appears in Justice Kennedy's separation of powers opinion in *Public Citizen*. As Justice Kennedy stated, “Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance has already been struck by the Constitution it-

429. Unfortunately, the formalist, strict separation of powers cite to Justice Scalia is not possible in this case, because Justice Scalia took no part in the consideration or decision of *Public Citizen*. See *id.* at 442.

430. U.S. CONST. art. II, § 2, cl. 2.

431. See *supra* text accompanying notes 387-92, 405-08 (stating that no clear constitutional text governs the issues involved in *Morrison* and *Mistretta*).

432. See *supra* text accompanying notes 299-306.

433. See *supra* text accompanying notes 348-53.

434. See *supra* text accompanying notes 396-403, 409-18.

435. See *supra* text accompanying notes 384-86.

self."⁴³⁶ Citing *Chadha*, Justice Kennedy stated that "[i]t is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution."⁴³⁷

On the other hand, citing *Mistretta*, Justice Kennedy noted, "This is not to say that each of the three Branches must be entirely separate and distinct, for that is not the governmental structure of checks and balances established by the Framers."⁴³⁸ Further, citing *Morrison*, Justice Kennedy remarked, "[When] the power at issue was not explicitly assigned by the text of the Constitution," then the Court has "employed something of a balancing approach."⁴³⁹ In the context of presidential power, this balancing approach asks "whether the statute at issue prevents the President 'from accomplishing [his] constitutionally assigned functions,' and whether the extent of the intrusion on the President's powers 'is justified by an overriding need to promote objectives within the constitutional authority of Congress.'"⁴⁴⁰ This balance tracks Justice Story's concern expressed in 1833 with whether or not an "overruling influence" is present.⁴⁴¹

It is interesting to note that, of the four judicial decision-making styles, only one, the natural law approach, was unreservedly in the majority in each of the four separation of powers cases prior to *Public Citizen*.⁴⁴² Aside from Justice Kennedy, the only other Justice to be in the majority in each case was Justice O'Connor.⁴⁴³

Given the clear constitutional text on point, a Holmesian judge (analytic enough to read FACA to apply to nomination questions) would likely have agreed that FACA would be unconstitutional if applied to the question of presidential nomination. It should thus be no surprise that Justice Rehnquist joined Justice Kennedy and O'Connor in deciding the separation of powers case that way.⁴⁴⁴ Indeed, given the relatively clear consti-

436. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989).

437. *Id.* (citations omitted).

438. *Id.*

439. *Id.* at 487 (citing *Morrison v. Olson*, 487 U.S. 654, 695 (1989)).

440. *Id.* (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

441. See *supra* text accompanying notes 113, 125.

442. See *supra* text accompanying notes 432-35.

443. See *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983). Justice Kennedy was in the majority only in *Mistretta*, the only case of the four he heard. *Id.*

444. *Public Citizen*, 491 U.S. at 486. For discussion of Chief Justice Rehnquist's analytic posture, particularly in dealing with cases of statutory interpretation, see

tutional text on point, the instrumentalists and extreme Holmesian Justice White might also have agreed on the separation of powers issue had they faced it. They did not address the issue, however, because, as indicated above, they decided that the Act did not apply to the ABA Committee on statutory interpretation grounds.⁴⁴⁵ It is possible, of course, to argue that the Constitution only provides that the President shall nominate Justices, but that Congress can place some procedural limits on the way in which recommendations are made to the President, as long as those limitations do not unduly interfere with the President's job. Such limitations would not necessarily be inconsistent with the President having the sole prerogative of nominating. Perhaps Justice White, as an extreme Holmesian looking for ways to defer to Congress,⁴⁴⁶ would have taken that tack had he reached the separation of powers issue in the case.

F. Metropolitan Washington Airports Authority v. Citizens for Abatement

Metropolitan Washington Airports Authority v. Citizens for Abatement,⁴⁴⁷ the last of the six major separation of powers cases decided in the past decade, provides the best example of the split between a Holmesian functional approach and the other approaches to separation of powers.

The case involved whether Congress could set up a special Review Board to oversee regulations regarding the operation of National Airport in Washington, D.C.⁴⁴⁸ Congress could make all rules and regulations regarding the operation of the airport if Congress so wished.⁴⁴⁹ Responsive to home rule and neighboring states' concerns, however, Congress passed a law establishing a Maryland-Virginia-District of Columbia Airports Authority, while still maintaining some oversight.⁴⁵⁰ Because a one- or two-house veto was unconstitutional after *Chadha*, Congress set up a Review Board as an alternative.⁴⁵¹ This Review Board would be composed of legislators with the responsibility to oversee transportation at the airport.⁴⁵²

According to a majority of the Court, this case was similar to either

supra text accompanying notes 263-65, 272-76.

445. See *supra* text accompanying notes 426-27.

446. See *supra* text accompanying notes 305-06, 312-22, 356-62.

447. 111 S. Ct. 2298 (1991).

448. *Id.* at 2301.

449. *Id.*

450. *Id.* at 2302.

451. *Id.* at 2302-03.

452. *Id.* at 2303-04.

Chadha or *Bowsher*.⁴⁵³ If the Court viewed the Review Board's power as the equivalent of a legislative veto, then the case would directly resemble *Chadha*.⁴⁵⁴ Under *Chadha*, a one- or two-house legislative veto is unconstitutional.⁴⁵⁵ On the other hand, if the Court viewed the Review Board's power as an exercise of an executive veto, then the case would resemble *Bowsher*.⁴⁵⁶ In both *Bowsher* and *Metropolitan*, an agent of the legislative branch (the Comptroller General and the Review Board, respectively), would be exercising executive power.⁴⁵⁷ As stated in *Metropolitan*, "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."⁴⁵⁸

For this reason, the majority concluded that under either characterization, the Review Board was unconstitutional.⁴⁵⁹ The same conclusion could have been reached under a formalist approach,⁴⁶⁰ a natural law approach concerned with the clear textual implications of *Chadha* and the overruling influence of legislative control over executive action in *Bowsher*,⁴⁶¹ or an instrumental approach concerned with congressional

453. *Id.* at 2311.

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

459. *Id.* at 2312.

460. *See id.* at 2311. The Court stated:

To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.

Id. (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)).

461. *Id.* at 2310-11. The Court stated:

The abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive. But, as James Madison recognized, the representatives of the majority in a democratic society, if unconstrained, may pose a similar threat The first constraint is illustrated by the Court's holding in . . . *Bowsher v. Synar* The second constraint is illustrated by our decision in *Chadha*.

Id. (citations omitted) (exemplifying natural law rhetoric embracing the framers' separation of powers political philosophy).

delegation to a legislative Review Board.⁴⁶² All three approaches found their way into Justice Stevens' opinion, in which a majority of the Court joined.⁴⁶³

Justice White again dissented, as in *Chadha* and *Bowsher*.⁴⁶⁴ Justice White's dissent is a classic example of a functional, pragmatic approach, and reveals his frustration with the majority's more analytical approach.⁴⁶⁵

Unlike *Chadha* and *Bowsher*, however, two Justices joined Justice White's dissent: Chief Justice Rehnquist and Justice Marshall.⁴⁶⁶ As long as the constitutional text does not clearly indicate a contrary intent, Justice White's functional approach would naturally attract a moderate Holmesian, such as Chief Justice Rehnquist.⁴⁶⁷ In this case, the constitutional text was not clear. As Justice White indicated, the majority's opinion was particularly troubling because *Metropolitan* was not clearly a separation of powers case.⁴⁶⁸ The case revolved around the relationship between the federal government and the Metropolitan Washington Airports Authority, a state commission.⁴⁶⁹ Thus, the case was really a federalism case, and, under current doctrine, there is no Tenth Amendment bar to the congressional action.⁴⁷⁰

462. *Id.* at 2312 ("Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy."). This demonstrates an instrumentalist concern with Congress delegating power to itself.

463. See *supra* notes 460-62 and accompanying text.

464. *Metropolitan*, 111 S. Ct. at 2312 (White, J., dissenting). For Justice White's dissent in *Chadha*, see *supra* text accompanying notes 312-22. For Justice White's dissent in *Bowsher*, see *supra* text accompanying notes 358-62.

465. *Metropolitan*, 111 S. Ct. at 2312-13 (White, J., dissenting) ("Today the Court strikes down yet another innovative and otherwise lawful governmental experiment in the name of separation of powers.").

466. *Id.* at 2312 (White, J., dissenting).

467. For a summary discussion of Chief Justice Rehnquist's Holmesianism, see *supra* note 266.

468. See *Metropolitan*, 111 S. Ct. at 2313 (White, J., dissenting).

469. *Id.* (White, J., dissenting).

470. *Id.* (White, J., dissenting). For an argument that the Tenth Amendment is not a bar to Congress' power under the Commerce Clause, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985) ("In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."). The lack of a meaningful Tenth Amendment challenge in *Metropolitan* would likely be the same even under *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 409 U.S. 528 (1985). Under the *National League test*, the Court would ask whether the "[s]tates' compliance with the federal law would directly impair their ability . . . [to perform] traditional governmental functions." *Transportation Union v. Long Island R.R.*, 455 U.S. 678, 684 (1982).

The functional analysis in Justice White's opinion would also appeal to an extremely functional, pragmatic instrumentalist like Justice Marshall. Justice White noted that even if the case involved separation of powers principles, this should not cause concern from a functional, pragmatic perspective.⁴⁷¹ Noting that neither Congress nor the Executive argued that the arrangement was unconstitutional, Justice White stated:

[N]ever before has the Court struck down a body on separation-of-powers grounds that neither Congress nor the Executive oppose. It is absurd to suggest that the Board's power represents the type of "legislative usurpation . . . which, by assembling all power in the same hands . . . must lead to the same tyranny," that concerned the Framers.⁴⁷²

Justice White also provided an alternative characterization of the congressional arrangement in order to rebut the majority's reasoning. With respect to the specific analogy to *Bowsher*, Justice White noted that unlike *Bowsher*, in this case Congress was not granting executive power to an officer "under its control."⁴⁷³ In *Bowsher*, congressional power to remove the Comptroller General established such control. However, no such congressional removal power existed in *Metropolitan*.⁴⁷⁴ Nor was *Metropolitan* a case where Congress exercised improper control over the Review Board through the appointment process. Though directors of the Review Board had to choose all of the Board's members from congressional lists, Justice White noted that "[a] fair reading of the [appointment] requirement shows only that the Board may not be chosen from outside the lists. It is perfectly plausible to infer that the Directors are free to reject any and all candidates on the lists until acceptable names are submitted."⁴⁷⁵ Thus, Justice White concluded, "Congress has neither expressly nor substantively vested appointment power in itself or appropriated appointment power properly lodged with the President."⁴⁷⁶

Justice White distinguished *Chadha* by observing that the power exercised in that case was legislative, whereas the Review Board's power was

471. *Metropolitan*, 111 S. Ct. at 2317 (White, J., dissenting).

472. *Id.* (White, J., dissenting).

473. *Id.* at 2317-18 (White, J., dissenting).

474. *Id.* at 2318 (White, J., dissenting).

475. *Id.* at 2319 (White, J., dissenting).

476. *Id.* (White, J., dissenting). The majority rebutted this assertion by noting that in fact "membership on the Board of Review is limited to federal officials, specifically members of congressional committees charged with authority over air transportation," *Id.* at 2307. Although members of Congress "nominally serve 'in their individual capacities,' [the structure of the Board and its responsibilities] belie the *ipse dixit* that the Board members will act 'in their individual capacities.'" *Id.* (citation omitted).

executive.⁴⁷⁷ As Justice White indicated:

Before their transfer to the Airports Authority, National and Dulles were managed by the Federal Aviation Administration, which in turn succeeded the Civil Aeronautics Agency. There is no question that these two agencies exercised paradigmatic executive power or that the transfer of the airports in no way altered that power, which is now in the hands of the Authority.⁴⁷⁸

Returning to the basic Holmesian position that the Court ought to defer to Congress absent clear constitutional text or purpose to the contrary, Justice White closed his opinion as follows:

Since the "compelling constitutional reasons" on which we have relied in our past separation-of-powers decisions are insufficient to strike down the Board, the Court has had to inflate those reasons needlessly to defend today's decision. I cannot follow along this course. The Board violates none of the principles set forth in our cases. Still less does it provide a "blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role." This view utterly ignores the Executive's ability to protect itself through, among other things, the ample power of the veto. Should Congress ever undertake such improbable projects as transferring national parklands to the States on the condition that its agents control their oversight, there is little doubt that the President would be equal to the task of safeguarding his or her interests. Least of all, finally, can it be said that the Board reflects "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments," that the Framers feared.⁴⁷⁹

477. *Id.* at 2319-20 (White, J., dissenting).

478. *Id.* at 2320 (White, J., dissenting).

479. *Id.* at 2320-21 (White, J., dissenting) (citations omitted). An in-depth discussion of cases dealing with those aspects of separation of powers directly involving the judiciary, such as Congress' ability to create non-Article III courts or constitutional requirements of standing, is beyond the scope of this Article. *See supra* note 6. Nevertheless, a few comments are in order, particularly because some commentators have stated that the Court has been inconsistent on how these cases have been decided versus the separation of powers cases discussed in the text. *See, e.g.,* Krent, *supra* note 110, at 1255 n.10.

With regard to Congress' ability to create non-Article III courts, one can predict that instrumentalist judges would be hesitant to find that Congress has such power, given the extra protection afforded individuals when a case is heard in an Article III court before judges with life tenure. Instrumentalist judges would thus want to keep such power to a minimum and affirm it only where countervailing factors, like the needs of military discipline, are strongest. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), Justice Brennan stated that

[t]he Court has . . . recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts, courts-martial, and courts that adjudicate certain disputes concerning public rights. Unlike the Court, I would limit the judicial authority of non-Article III federal tribunals to these few, long-established exceptions and would countenance no further erosion of Article III's mandate.

Id. at 859 (Brennan, J., dissenting) (Justice Marshall joined in Justice Brennan's dissenting opinion).

On the other hand, because there is no clear constitutional text prohibiting Con-

gress from creating non-Article III courts, judges approaching the problem from the Holmesian perspective would counsel deference to Congress, and judges approaching the problem from a natural law perspective would examine whether creation of a particular non-Article III court does violence to our sharing-of-powers, checks-and-balances scheme. This is exactly the approach adopted by the Holmesian and natural law majority in *Schor*. See *id.* at 854-57. Justice O'Connor, writing for the majority, stated:

In [these] circumstances, separation of powers concerns are diminished [T]he magnitude of any intrusion on the Judicial Branch can only be termed *de minimis* [W]e have, consistent with *Bowsher*, looked to a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles under the circumstances presented, but have found no genuine threat to those principles to be present in this litigation. In so doing, we have also been faithful to our Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquires.

Id. at 856-57.

Because of the majority's rejection of "bright-line" rules in *Schor*, a formalist judge might be hesitant to join the majority opinion. As commentators have noted, Justice Brennan's instrumentally inspired dissent in the case adopts classic formalist rhetoric. See Krent, *supra* note 110, at 1255 n.10. Unfortunately, Justice Scalia was not yet on the Court at the time *Schor* was decided, so there is no recent formalist Supreme Court opinion on this issue.

With respect to the issue of the constitutional requirements for standing, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), provides the most recent Supreme Court decision on point. On matters of standing, one can predict that, because of their preference for three strictly separate branches of government and for clear bright-line rules, formalists would push for a clearly delineated requirement of "injury in fact." This requirement would protect executive independence by not allowing Congress much leeway to expand the class of actions which qualify as constitutional cases or controversies for which the executive branch could be sued. Holmesians, while concerned about certainty and predictability in the law, see *supra* text accompanying notes 27-28, would be more willing than formalists to defer to Congress in the creation of rights vindicable in federal courts in cases in which constitutional text does not clearly prohibit it. Each of these formalist and Holmesian arguments found their way into Justice Scalia's opinion in *Defenders of Wildlife*, which was joined unreservedly only by the two most Holmesian Justices on the Court, Chief Justice Rehnquist and Justice White, and by the more formalist Justice Thomas. Justice Scalia, writing for the Court, stated:

If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." . . . Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."

Id. at 2145 (citations omitted).

For their part, natural law judges would be sensitive to the natural law principle that "where there is a wrong, there must be a remedy." As phrased by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), and cited by Justices Blackmun and O'Connor in their dissent in *Defenders of Wildlife*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Defenders of Wildlife*, 112 S. Ct. at 2160 (Blackmun, J., dissenting) (Justice O'Connor joined in Justice Blackmun's dissenting opinion). On the other hand, natural law judges would also be sensitive to the fact that not every natural law principle was incorporated into the Constitution, see *supra* text accompanying notes 51-52, that Article III's "case or controversy" requirement and congressional control over Supreme Court jurisdiction represent textual limitations on this principle, and that, where possible, it is better to have clearly defined tests and consistency in legal categories. See *supra* text accompanying note 205. Resolving these competing tendencies, a natural law approach would thus likely be receptive to arguments concerning Congress' ability to provide for judicial remedies and for finding that "injuries in fact" exist sufficient to meet the "case or controversy" requirement, as long as the definition of "injury in fact" remains clearly defined and the constitutional minimum of "case or controversy" is met.

All of these concerns were present in Justice Kennedy's concurrence in *Defenders of Wildlife*. As Justice Kennedy stated:

The component of the standing inquiry is not satisfied unless "[p]laintiffs . . . demonstrate a 'personal stake in the outcome.'" . . . While it may seem trivial to require that Mss. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis [I]n different circumstances a nexus theory similar to those proffered here might support such a claim As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Defenders of Wildlife, 112 S. Ct. at 2146-47 (Kennedy, J., concurring in part and concurring in the judgment) (Justice Souter joined in Justice Kennedy's opinion).

Of course, an instrumentalist approach would be much more willing to find standing than any other approach in order to permit individuals to vindicate their rights in court. In his concurrence in *Defenders of Wildlife*, Justice Stevens wrote: "In my opinion a person who has visited the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction." *Id.* at 2147 (Stevens, J., concurring). Indeed, an extreme instrumentalist approach might support standing without regard to a particularized finding of injury, as long as the litigant was able to be a vigorous advocate and thus ensure sufficient "concrete adversariness" to sharpen the issue for court resolution. See Mark Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 688-90 (1977).

The separation of powers cases dealing with legislative or executive immunity from judicial processes can be analyzed similarly. For example, in *Gravel v. United States*, 408 U.S. 606 (1972), an instrumentalist dissent was willing to read the Speech

V. CONCLUSION

This Article has suggested that four main approaches to judicial decision-making have existed in American legal history. These four approach-

or Debate Clause more broadly than would a formalist or a Holmesian, who would pragmatically apply the Clause not only to House and Senate members, but also to their staffs. The instrumentalist dissent would also have extended Speech or Debate protection to statements made by members of Congress in public to advance the sound, social policy of "informing the public." *Id.* at 652 (Brennan, J., dissenting) (Justices Douglas and Marshall joined in Justice Brennan's dissenting opinion).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a formalist dissent by Chief Justice Burger called for the clear, bright-line rule of absolute immunity for senior executive officials. *Id.* at 822 (Burger, C. J., dissenting). The rest of the Court acknowledged a need, in the absence of clear constitutional text, to apply a balancing approach, which had both a Holmesian or instrumental "functional" branch, and an "analytical" "special functions" branch. *Id.* at 810-12. This analytic branch focused most strongly on the fundamental separation of powers concern that one branch does not intrude too greatly on the prerogatives of another branch. See *Nixon v. Fitzgerald*, 457 U.S. 731, 753-57 (1982) (recognizing that "the Presidential privilege is 'rooted in the separation of powers'"). It was this analytic "special functions" branch which most strongly supported absolute immunity for the President in *Nixon*. There, the Court stated: "In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. However, this analytic "special functions" branch did not support absolute immunity for other executive officials. See *Harlow*, 457 U.S. at 812 ("[A] 'special functions' rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of their duties."). This "analytic" branch may in part explain why Justice Powell authored the majority opinions in both *Harlow* and *Nixon*, while more functional Holmesian and instrumentalist Justices dissented, refusing to give the President absolute immunity in *Nixon*. *Nixon*, 457 U.S. at 770 (White, J., dissenting) (Justices Brennan, Marshall, and Blackmun joined in Justice White's dissenting opinion) ("The Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions.").

Of course, it must be noted that in *Harlow* and *Nixon* the Justices used the term "functional" to describe an inquiry into immunity based upon the functions which the officer performs. This inquiry, however, is also functional in the jurisprudential sense because it is based upon a pragmatic inquiry into the needs of the officer for immunity. Similarly, the analytic "special functions" branch of immunity law is analytic in the sense that term is used in this Article because it focuses on creating a clearly defined, logical category of absolute immunity, not a functional or pragmatic case-by-case inquiry. Addressing the problem consistent with a natural law perspective, Justice Powell noted in *Nixon* that under this analytic branch of immunity doctrine, the Court "has refused to draw functional lines finer than history or reason would support." *Id.* at 755.

es can be called natural law, formalism, Holmesianism, and instrumentalism. Two of these approaches, formalism and Holmesianism, follow the dictates of positivism. The other two approaches, natural law and instrumentalism, reject it. Two of the approaches, formalism and natural law, emphasize an analytic, or logical, development of the law. The other two approaches, Holmesianism and instrumentalism, focus on functional, or pragmatic, concerns.⁴⁸⁰

On the present Supreme Court, one can find Justices who seem to follow each of these four decision-making styles. Currently, there appears to be one formalist (Justice Scalia); two Holmesians (Chief Justice Rehnquist and Justice White); two moderate instrumentalists (Justices Blackmun and Stevens); and four Justices who, to varying extents, appear to follow most closely the framers and ratifiers' original natural law approach (Justices O'Connor, Kennedy, Souter, and Thomas).⁴⁸¹

This situation is somewhat muddled, however, because Justice Thomas has indicated a predisposition to read the natural law philosophy of our constitutional tradition differently than Justices O'Connor, Kennedy, or Souter. For example, in the separation of powers area, instead of adopting the traditional view that the framers and ratifiers of the Constitution believed in a sharing of powers, checks-and-balances approach, Justice Thomas has suggested a belief that the framers were more attuned to a strict separation of powers approach, which reflects a more formalist approach towards separation of powers. Thus, Justice Thomas has indicated a predisposition to vote with the one clear formalist on the Court, Justice Scalia, in separation of powers cases.⁴⁸²

Therefore, with regard to separation of powers cases, there are perhaps three groups of two Justices on the Court: Justices Scalia and Thomas are likely to follow a formalist approach; Chief Justice Rehnquist and Justice White are likely to follow a Holmesian approach; and Justices Blackmun and Stevens are likely to follow an instrumentalist approach. Then, there is a final group of three Justices who appear to approach judicial decision-making more from the perspective of the framers and ratifiers' original natural law approach: Justices Kennedy, O'Connor, and Souter.

Given this categorization, for separation of powers purposes, the Holmesian and instrumental pragmatists make up only four Justices on the Court, while the Holmesian and formalist positivists also make up only four Justices on the Court. To command a majority of five, one of the three more natural law Justices needs to be persuaded. Perhaps for

480. See *supra* text accompanying notes 12-96.

481. See *supra* text accompanying notes 182-291.

482. See *supra* text accompanying notes 127-31, 248-52.

this reason, the only approach unreservedly in the majority in each of the six main separation of powers cases of the last decade was that of natural law.⁴⁸³ With some theoretical support for a natural law position from Justice Thomas⁴⁸⁴ and some practical support from Justice Blackmun,⁴⁸⁵ that is where the majority of the Court may be headed in the future. Given a closer look at history, this approach may be the most faithful to the original intent of the framers and ratifiers of our Constitution.⁴⁸⁶

483. See *supra* text accompanying notes 432-43, 459-63.

484. See *supra* notes 248 and accompanying text.

485. See *supra* note 266 (discussing Justice Blackmun's decision-making style as poised between instrumentalism and natural law). See also *supra* text accompanying notes 369-70.

486. See *supra* note 101 and accompanying text (citing to articles on the original intent of the framers and ratifiers of the Constitution); *supra* notes 102-31 (discussing the framers' and ratifiers' original views on the separation of powers).

