St. Mary's Law Journal

Volume 26 | Number 4 Article 8

1-1-1995

The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall.

R. Randall Kelso

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Environmental Law Commons, Health Law and Policy Commons, Immigration Law Commons, Jurisprudence Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Military, War, and Peace Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

Recommended Citation

R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall.*, 26 St. Mary's L.J. (1995).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol26/iss4/8

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE NATURAL LAW TRADITION ON THE MODERN SUPREME COURT: NOT BURKE, BUT THE ENLIGHTENMENT TRADITION REPRESENTED BY LOCKE, MADISON, AND MARSHALL

R. RANDALL KELSO*

I. Introduction 1051
II. The Two Competing Natural Law Traditions at the Nation's Founding 1053
A. An Overview of the Two Traditions 1053
B. Similarities Between the Two Traditions Regarding Judicial Decisionmaking 1057
1. Introduction 1057
2. The Two Natural Law Traditions and Formalism Compared 1058
3. The Two Natural Law Traditions and Holmesianism Compared 1061
C. Differences Between the Two Natural Law Traditions 1065
III. The Framers and Ratifiers as Embodying the Enlightenment Tradition 1074
IV. Justices O'Connor, Kennedy, and Souter as Embodying the Enlightenment Tradition 1080
V. Conclusion 1085

I. INTRODUCTION

During the last few years, a number of commentators have observed that no single "conservative" bloc currently exists on the United States Supreme Court. In particular, some commentators have suggested that Justices O'Connor, Kennedy, and Souter tend to employ a judicial decisionmaking style different from that of

* Professor, South Texas College of Law. B.A., University of Chicago; J.D., University of Wisconsin.

Published by Digital Commons at St. Mary's University, 1994

Chief Justice Rehnquist or Justices Scalia and Thomas.[1] One recent article analogized the judicial decisionmaking philosophy of Justices O'Connor, Kennedy, and Souter to that of Edmund Burke.[2] In this article, Ernest Young described the philosophy of these three Justices as grounded in respect for tradition and evolutionary reform, emphasizing such judicial decisionmaking tools as "judicial precedent"; "tradition as a whole as it has evolved from the original period to the present"; "the method of analogical reasoning" that is "our legal culture's 'most characteristic way of proceeding' "; and "faithful adherence to judicial craftsmanship."[3]

Unquestionably, these tools are part of the traditional common-law style.[4] Furthermore, as Young stated, and as I argued in two recent articles, Justices O'Connor, Kennedy, Souter, and presumably Justice Ginsburg[5] appear to be most in tune with this style.

---

1. *See, e.g.*, BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 375–76 (1993) (discussing Justices O'Connor, Kennedy, and Souter as representing more "moderate" version of conservatism than Chief Justice Rehnquist or Justices Scalia and Thomas); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 620–22, 715–17 (1994) (pointing out factions in conservative bloc on Supreme Court and labeling Justices O'Connor, Kennedy and Souter as more moderate); *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 379–81 (1992) (reporting high percentages of concurrence among Justices O'Connor, Kennedy, and Souter, especially on five-four decisions); Linda Greenhouse, *Changed Path for the Court? New Balance is Held by 3 Cautious Justices*, N.Y. TIMES, June 26, 1992, at A1 (noting that control of Supreme Court has passed to moderately conservative subgroup of conservative majority).

2. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 688–97 (1994) (advancing that Supreme Court's three-justice group of moderate conservatives has adopted Burkean philosophy).

3. *See id.* at 688-97 (summarizing model of "common-law constitutionalism" that Young denominates as "Burkean" approach).

4. *See* Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 42–46 (1981) (discussing Anglo-American, common-law approach traditionally described as embodying "the artificial reason of the law"); Harry Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 454–59 (1975) (describing traditional principles of stare decisis); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 781 (1991) (discussing importance of analogical reasoning to common law and American constitutional law traditions); Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 222–29 (1973) (illustrating principles and policies behind common-law tradition).

5. All three articles discuss the decisionmaking style of Justices O'Connor, Kennedy, and Souter, with Justice Ginsburg discussed in the first article listed below. *See* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994); R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 594-96, 630-32 (1993); Er-

Thus, to a great extent, Young's description of the jurisprudential style of Justices O'Connor, Kennedy, and Souter is accurate. However, to call this jurisprudential style representative of a Burkean approach to interpretation may be misleading in a number of important ways. Without attempting to provide an exhaustive analysis, this Article is intended to suggest some of the possible problems with denominating this decisionmaking style as Burkean.

II. THE TWO COMPETING NATURAL LAW TRADITIONS AT THE NATION'S FOUNDING

A. *An Overview of the Two Traditions*

During the seventeenth, eighteenth, and early nineteenth centuries, two natural law traditions competed for dominance in Western legal theory, both at the level of moral and political philosophy and at the level of judicial decisionmaking. One tradition, from which the mature Edmund Burke wrote,[6] is the religious and communi-

---

nest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 715-24 (1994). As this grouping of Justices suggests, the traditional common-law method of decisionmaking is not necessarily the sole province of either conservative or liberal judges. Judges of very different political beliefs agree that the democratic system requires judges to follow the basic aspects of the traditional common-law judicial decisionmaking style. Of course, in applying this decisionmaking style, different judges may reach different outcomes because their political backgrounds or individual experiences cause different views regarding the nation's evolving tradition, prior judicial precedent, or the conclusions to be drawn from analogical reasoning. R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 147-50 (1994).

6. Although some debate exists concerning the extent to which Burke's political philosophy evolved during his lifetime, it is probably more accurate to refer to the "mature" Edmund Burke when connecting Burke, as is done here, to the "classical and Christian" natural law tradition rather than to the Enlightenment natural law tradition. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 645-47 (1994) (explaining Burke's dislike of Enlightenment political theory and ideology). Earlier in his career, Burke was typically associated with "Whig," "reformist," and Enlightenment rhetoric. By the time of the French Revolution, however, and in part because of it, Burke had clearly shifted to the "conservative," "Tory," or "traditional" camp, which rejected the Enlightenment's abstract theorizing of rights as a sufficient basis for societal reform. *See* Conor C. O'Brien, *Introduction* to EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 55 (Conor C. O'Brien ed., 1968) (commenting on Burke's reaction to French Revolution).

> [Burke] enters the controversy [the French Revolution] as a Whig, and ends up the idol of the Tories. He runs down his friend Charles James Fox [leader of the Whigs], as he had once run down Lord North [leader of the Tories]. It is extremely improba-

tarian ethical natural law tradition. James McClellan has described this tradition as "classical and Christian, in the tradition of Cicero, Aquinas, Hooker, and Burke."[7] McClellan further stated that this "older and once dominant traditional natural law, encompassing the classical and Christian schools, subscribed to the view that a Divine Being, ruler of the universe through an eternal and universal law, is the supreme lawgiver, and that natural law is an emanation of God's reason and will."[8] This tradition is also similar to William Blackstone's views,[9] and, according to Professor Stephen

---

> ble that these results were calculated in advance. It is more probable that Burke had never fully realized—until events in France provided the critical test—how profoundly he was at odds with much that was fundamental in the philosophy of Englishmen with whom he had allied himself: Englishmen who cherished the principles of the Glorious Revolution and of the Enlightenment, and felt these principles to be essentially the same, or at least to have a common root—a rational rejection of superstition.

Id. For a thorough discussion of Edmund Burke see C. B. MACPHERSON, BURKE (1980) and FRANK O'GORMAN, EDMUND BURKE: HIS POLITICAL PHILOSOPHY (1973).

7. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 69 (1990). *See generally* PETER J. STANLIS, EDMUND BURKE AND THE NATURAL LAW (1958). As Professor Stanlis stated in his preface:

> It is the thesis of this study that far from being an enemy of Natural Law, Burke was one of the most eloquent and profound defenders of Natural Law morality and politics in Western civilization. . . . It should also be evident from this book that as an exponent of Natural Law . . . Burke was in the great classical tradition of Aristotle and Cicero and the Scholastic tradition of St. Thomas Aquinas, Bracton, and Hooker. It was precisely for this reason that he was opposed to the eighteenth-century revolutionary "rights of man" which derived from Hobbes, Locke, and the scientific rationalism of the seventeenth century.

PETER J. STANLIS, EDMUND BURKE AND THE NATURAL LAW at xi–xii (1958).

8. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 70 (1990).

9. *See id.* at 73 (discussing influences of "Christianity, the common law, and such legal and political thinkers as Blackstone and Burke," and contrasting influences with Enlightenment's "philosophical methods and rationalistic ideas"); *see also* GRANT GILMORE, THE AGES OF AMERICAN LAW 6–7 (1977) (concluding that Blackstone was more in line with classic tradition than Enlightenment tradition). Professor Gilmore noted that, while Blackstone's attempt to organize and restate the law of England in his *Commentaries on the Laws of England* was a classic kind of Enlightenment enterprise, Blackstone's goal was to preserve the substance of existing pre-Enlightenment legal categories from erosion and thus preserve the substance of the classic tradition. GRANT GILMORE, THE AGES OF AMERICAN LAW 6–7 (1977). As Gilmore stated:

> Blackstone's celebration of the common law of England glorified the past . . . . [He said that] changes in an already perfect system can only lead to harm in ways which will be beyond the comprehension of even the most well-meaning and far-sighted innovators. . . . Indeed, the Blackstonian construct well may be taken as a conservative reaction to the fundamental changes which English judges were making in the apparently settled rules of English law. Using the tools of 18th-century analytical "philoso-

Presser, closer to some of the early Federalist judges, including Justice Samuel Chase.[10]

The Enlightenment tradition represents the other natural law tradition of the seventeenth, eighteenth, and nineteenth centuries. James McClellan has described this tradition as "modern in the style of Hobbes, Locke, and even Rousseau."[11] According to McClellan, the Enlightenment "natural rights" tradition is "characterized by its rationalism, secularism, and radicalism. . . . Highly individualistic, [this tradition] rejected the divine origin of natural law, exalted the autonomy of human reason, and exhorted man to look for a law of nature in a secularized state of nature."[12] As Professor Jefferson Powell has noted, the Enlightenment tradition of rational liberty is based on an "understanding of human nature as constituted by 'basic deliberative capacities' and by the potential for 'some measure of self-direction.' On that basis, liberalism pursues 'the preservation and enhancement of human capacities for understanding and reflective self-direction' as 'the core of the liberal political and moral vision.' "[13] While many English, Scottish, and French Enlightenment writers contributed to the development of this tradition in the seventeenth and eighteenth centuries, Professor Rogers Smith has noted Locke's particular importance "because the political philosophy of liberalism is historically linked with a whole range of distinctive developments that are best en-

---

phy," Blackstone was in effect constructing a dike which, it could be hoped, would hold back the encroaching tide.

Id. at 5.

10. *See* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 44-54 (1991) (exploring legal ideology of Samuel Chase through English influence in latter 18th century). Interestingly, in his youth, Chase, like Burke, was more associated with the reformist, Enlightenment spirit, but moved toward the traditionalist and conservative camp with age. *Id.* at 48-49; *see also* Stephen B. Presser, *Should a Supreme Court Justice Apply Natural Law? Lessons from the Earliest Federal Judges*, 5 BENCHMARK 103, 104-10 (1994) (illustrating Justice Chase's view of natural law through dicta in *Calder v. Bull* and subsequent legal works).

11. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 69 (1990).

12. *Id.* at 70–71.

13. H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 225 (1993) (citing ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 200-01 (1985)).

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

compassed in his writings."[14] Moreover, although differing from the Lockean tradition in a number of specific aspects,[15] the civic republican tradition of the seventeenth and eighteenth centuries was closer to the Enlightenment tradition than was the classical and Christian natural law tradition.[16]

---

14. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 15 (1985). Of course this does not mean that Locke is the true oracle for all aspects of Enlightenment liberalism. *Id.* As Smith noted, "[f]our goals were central to Locke's original vision of liberalism: civil peace, material prosperity through economic growth, scientific progress, and rational liberty. . . . [However,] [l]iberals differed significantly on how these goals were to be achieved, particularly on how much positive governmental activity was needed to secure them." *Id.* at 18. Furthermore, on some matters, like the separation of powers doctrine, "the authorities on whom the colonists relied most often for such devices were the liberal heirs of the . . . Florentine tradition of republican discourse, such as James Harrington, Montesquieu, and Hume, and also the continental publicists, especially Vattel and Burlamaqui." *Id.* at 15.

15. *See* Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 688-90 (explaining differences between Locke's views and various versions of civil republican thought). *See generally* Linda R. Hirshman, *Symposium on Classical Philosophy and the American Constitutional Order: Foreword: Travels Far and Wide*, 66 CHI.-KENT L. REV. 3 (1990).

16. H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 67-74 (1993). Professor Powell explained:

> While some advocates of the civic republican interpretation of the founding view republicanism as antithetical to liberalism, republicanism is better understood as a possible historical complement to liberalism. . . . Even those whose commitment to Enlightenment politics was the most undeniable [citing James Madison, among others] saw no inconsistency in invoking the necessity of [the civic republican concept of] civic virtue to free government as well.

Id. at 67, 69; *see also* Suzanna Sherry, *Public Values and Private Virtue*, 45 HASTINGS L.J. 1099, 1103-04 (1994) (exploring complementary nature of civic republican and natural rights traditions during 18th and 19th centuries). *See generally* ALEXANDER BICKEL, THE MORALITY OF CONSENT (1975) (discussing Burke and Enlightenment as representing two main traditions in 18th-century natural law political philosophy). Bickel stated:

> Two diverging traditions in the mainstream of Western political thought—one "liberal," the other "conservative"—have competed, and still compete, for control of the democratic process and of the American constitutional system . . . . One of these, the contractarian tradition, began with the moderate common sense of John Locke. It was pursued by Rousseau, and it long ago captured, and substantially retains possession of, the label liberal, although I would contest its title to it. The other tradition . . . is usually called conservative, and I would associate it chiefly with Edmund Burke.

Id. at 3.

B. *Similarities Between the Two Traditions Regarding Judicial Decisionmaking*

1. Introduction

The classical and Christian and the Enlightenment natural law traditions share many aspects of the common-law methodology of judicial decisionmaking that Ernest Young identified as Burkean. As discussed by Young and echoed in my recent article on styles of constitutional interpretation, the eighteenth- and nineteenth-century natural law judicial decisionmaking tradition considered a wide range of factors regarding constitutional interpretation. Among these factors are considerations of constitutional text, purpose, and structure; the history of the framing and ratifying period; subsequent judicial precedents; and subsequent legislative and executive practices under the Constitution that constituted a gloss on meaning.[17] As Young recognized, "[t]he first point is that none of [these] generally accepted modes of constitutional argument are ruled out."[18]

These natural law traditions also reject the "formalist" version of original intent that Justice Scalia and Raoul Berger represent and the judicial restraint or "Holmesian" deference that Chief Justice Rehnquist and Judge Robert Bork display.[19] This fact underscores the earlier observation that the general decisionmaking style of Justices O'Connor, Kennedy, and Souter differs from that of Chief Justice Rehnquist or Justice Scalia.

---

17. *See* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 150–66 (1994) (discussing "general interpretive principles" of natural law approach); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 689 (1994) (noting that common-law model of interpretation considers "arguments from the constitutional text, the intent of the framers, judicial precedent, the broader philosophical purposes of the constitution, moral philosophy and social policy").

18. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 689 (1994).

19. *See id.* at 625-42, 698-706 (distinguishing natural law approach from approaches of Justice Scalia and Judge Robert Bork). *See generally* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 184–213 (1994) (discussing different versions of formalism of Justice Scalia and Raoul Berger, and Holmesian approaches of Judge Bork, Edwin Meese, and Chief Justice Rehnquist, and distinguishing each from natural law approach).

2. The Two Natural Law Traditions and Formalism Compared

Under the natural law style of constitutional interpretation, a court considers both the plain meaning, or letter, of a constitutional provision and the provision's purpose or spirit.[20] Additionally, a court will examine both the Framers and ratifiers' specific intent concerning a constitutional provision and any general legal concept that the Framers and ratifiers used in explicit constitutional text to help determine constitutional meaning.[21] In contrast, the formalist approach of Justice Scalia and Berger focuses on textual plain meaning devoid of purposive analysis and on the Fram-

---

20. *See* LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT 8-12 (1991) (discussing natural law style of interpretation that incorporates analysis of plain meaning of language and general textual intentionalism behind language); Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 383–84 (1977) (explaining use of statute's plain language and purpose behind language to interpret statute's meaning); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985) (noting common-law tradition of analyzing original intent to determine statute's meaning); *see also* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1034–35 (1991) (analyzing Constitution's spirit and nature to assist in its interpretation).

21. *See* LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT 8-12 (1991) (illustrating Justice Marshall's application of textual intentionalism); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1034-35 (1991) (reviewing Marshall's constitutional intent analysis in *McCulloch v. Maryland*); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985) (explaining that common-law interpretation looks beyond specific intent when necessary); *see also* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 151–57, 186–87 (1994) (discussing differences between "specific intent" approach and "general concept" approach). Richard Fallon added the following:

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

Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99 (1987). *See generally* RONALD DWORKIN, LAW'S EMPIRE 71 (1986) (asserting that conceptions are specific, discrete ideas of examples held by individuals, while concepts are broader, more abstract ideas reflected in conceptions).

Kelso: The Natural Law Tradition on the Modern Supreme Court: Not Burke,

ers and ratifiers' specific intent.[22] As Professor Leslie Goldstein observed:

> [Chief Justice] Marshall carefully distinguished between the conscious, specific, concrete policy goal that may have motivated a particular constitutional clause, on the one hand, and the broader, more generalized principle, or rule of law, that the clause established, on the other hand. For Marshall, constitutional law consisted of the latter rather than the former. For [formalists] the choice is the reverse.[23]

Similarly, Young contended that Edmund Burke would advocate following clear, well-established judicial tradition based on general concepts that the Framers and ratifiers used in explicit constitutional text, even if the resulting judicial precedents differed from the original specific views.[24] Such precedent is not necessarily in-

---

22. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY 363–72 (1977) (discussing his specific intent approach to constitutional interpretation); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 532–35 (1988) (mandating use of rule's plain language for its interpretation); *see also* Beau J. Brock, *Mr. Justice Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 634–49 (1991) (using plain meaning and specific intent approach in interpreting Constitution to establish legal certainty).

23. LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT 9 (1991). Additionally, according to Dean Rodney Smith:

> [Formalists, such as Raoul Berger] examine the text, history and structure of the Bill of Rights to ascertain whether those sources resolve specific issues. Not surprisingly, it is exceedingly rare to find that those sources yield specific interpretive answers to specific questions. The framers of the Constitution, the Bill of Rights and the Civil Rights Amendments largely were natural lawyers, who espoused broad principles and often eschewed the call to resolve specific issues in a specific manner within the Constitution.

Rodney K. Smith, *Establishment Clause Analysis: A Liberty-Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463, 469 (1990). Professor Goldstein also observed that, for Marshall and the founding generation, the "intent" of the Constitution is not the formalist's specific, subjective "intent" from the minds of the Framers, but rather the "intent" gleaned from applying the traditional modes and canons of construction to the document's objective text. LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT 9 (1991). These modes and canons of construction define the natural law method of judicial decisionmaking and provide the modes of construction that numerous recent commentators have discussed. *See id.* at 32-33 (evaluating Marshall's jurisprudence, which advocated viewing Constitution under broad principles rather than limited, specific intent); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985) (reviewing various judicial methods used to identify and interpret notion of intent).

24. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 664-68 (1994) (analyzing Burke as anti-originalist). In Young's view, "Burke placed little reliance on the original structure and the theoretical underpinnings of institutions; rather, institutions become effective in meeting

Published by Digital Commons at St. Mary's University, 1994

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

consistent with the Framers and ratifiers' actual original intent, because if they operated with a natural law understanding of judicial interpretation, they would have expected future judges to behave in exactly this way. Under this approach, when history suggests that the Framers and ratifiers intended a particular constitutional provision to reflect only their detailed, specific choices, as when they used language which is "relatively direct, specific, and focused,"[25] judges should adhere to those choices. On the other hand, when history indicates that the Framers and ratifiers embedded broad natural law concepts in the Constitution, like those dealing with the First Amendment, equal protection, and due process, they may have intended "to provide no hard-and-fast answers . . . and to let the answers develop over time in a common-law fashion. After all, the framers were common-law lawyers."[26] This method of interpreting general concepts within the Constitution is consistent with the Framers and ratifiers' true "original intent" because it satisfies their assumptions on how the Constitution would later be interpreted.[27]

---

the needs of society through a continuing process of adaptation that may or may not be consistent with the original intentions of the founders." *Id.* at 664. According to Young, Burke's view regarding the use of general concepts that might later be interpreted in ways different than the Founders' original specific intent was that, "[r]ather than attempt to anticipate future problems and needs, the founders of institutions would do better to lay out broad standards, then let future generations apply them in particular situations as they come up." *Id.* at 665.

25. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 77 (1993).

26. *Id.* at 79.

27. *See generally* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887-88, 948 (1985) (citations omitted) (arguing that Framers and ratifiers did not expect Constitution to be interpreted according to their personal intentions). During his confirmation hearing, Justice Souter described this approach as following the "original meaning" of the Constitution, rather than following the Framers and ratifiers' specific original intent. Justice Souter stated:

> "[M]y interpretive position is not one that original intent is controlling, but that original meaning is controlling. . . . [Justices ought to identify the general] principle that was intended to be established as opposed simply to the specific application that that particular provision was meant to have by, and that was in the minds of those who proposed and framed and adopted that provision in the first place."

David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36, 52.

Kelso: The Natural Law Tradition on the Modern Supreme Court: Not Burke,

3. The Two Natural Law Traditions and Holmesianism Compared

The two natural law traditions also differ from the judicial restraint, Holmesian deference model of original intent that Chief Justice Rehnquist, Judge Robert Bork, and former Attorney General Edwin Meese have advocated.[28] The natural law approach and the Holmesian approach agree that judges should consider the purposes behind constitutional provisions and not be restricted to the formalist model's rigid reliance on literal, logical meaning. As Justice Holmes stated, "[t]he life of the law has not been logic: it has been experience."[29] The Holmesian model of judicial decision-making and the natural law approach also each instruct judges to interpret general constitutional or statutory provisions in light of their general concepts if history suggests that was the Framers and ratifiers' intent.[30]

---

28. *See generally* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 143 n.86, 195–200, 208-09, 211 (1994) (discussing Holmesian approaches of Chief Justice Rehnquist, Judge Bork, and Edwin Meese, and distinguishing each from natural law approach); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 625-37 (1994) (discussing modern conservative jurisprudence).

29. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881). In *United States v. Whitridge*, Justice Holmes stated that "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." United States v. Whitridge, 197 U.S. 135, 143 (1905). *See generally* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches To Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 195–200 (1994) (discussing Holmes's focus on purpose in constitutional and statutory interpretation); R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 544–45 (1993) (noting that Holmes believed statutes and constitutions should be interpreted from clearly stated text and purpose).

30. *See* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (stating that "[a] page of history is worth a volume of logic"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–44 (1947) (discussing Holmes's theories of statutory interpretation); *see also* R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 544–45 (1993) (exploring Holmes's disagreement with formalists); R. Randall Kelso, *States of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 196–98 & nn.368 & 382–93 (1994) (asserting that those who follow Holmesian approach are sensitive to contextual arguments). As Justice Frankfurter noted:

> [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 ineptly, because it may

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

However, the Holmesian and natural law approaches differ in that the natural law approach rejects the strong preference for judicial deference to the legislature typified by the Holmesian approach and reflected in the writings of James Bradley Thayer.[31] Further, because the Holmesian approach rejects any notion of natural rights as "naive,"[32] Holmesian judges are less likely than natural law judges to conclude that the Framers and ratifiers intended some concept in the Constitution to reflect an Enlightenment natural law principle.[33] Instead, Holmesian judges are more likely to conclude that the Framers and ratifiers had a specific meaning in mind, which they intended to remain fixed.[34] In practice, such an approach to constitutional interpretation would then track the formalist approach to specific intent.[35]

> 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.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947). *See generally* R. Randall Kelso, *States of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 143 n.86, 184–213 (1994) (comparing differing models of judicial decisionmaking—including formalist model espoused by Justice Scalia and Holmesian model shared by Chief Justice Rehnquist, Justices Holmes and Frankfurter, and Judge Bork—to natural law model of judicial decisionmaking, and examining cases interpreted under differing approaches).

31. *See* R. Randall Kelso, *States of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 133-34, 167, 197, 200–01 (1994) (exploring judicial restraint views of James Thayer, Justices Holmes and Frankfurter, and Professor Alexander Bickel, reviewing interpretation theories of Robert Bork and Edwin Meese, and noting with natural law rejection of that model); *see also* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 86–90 (1994) (discussing Thayer's "minimalist" approach towards constitutional interpretation, which Justices Holmes and Frankfurter embraced).

32. *See* FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 40–41 (1961) (stating that "[t]he jurists who believed in natural law seemed to [Holmes] to be 'in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere' ").

33. *See infra* text accompanying notes 55–63.

34. *See* Michael Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 693–94 (1991) (asserting that Robert Bork and other advocates of originalism sometimes tend to assume that constitutional provisions have specific original meaning which puts greater constraints on judges, while downplaying fact that some provisions have more general meaning which gives judges greater latitude).

35. *See supra* text accompanying notes 21–23; *see also* R. Randall Kelso, *States of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 198–99 (1994) (discussing Holmesian approach, which in theory employs broad-based historical inquiry to determine Framers'

https://commons.stmarytx.edu/thestmaryslawjournal/vol26/iss4/8

The natural law approach also differs from the formalist and Holmesian approaches in another important aspect. Under the natural law approach, a sequence of judicial precedents interpreting a constitutional provision can provide a "gloss" on the meaning of a constitutional provision that modifies the Framers and ratifiers' initial specific views. As Young stated,[36] and other recent commentators have noted,[37] a sequence of precedents in the natural law tradition carries interpretive weight beyond the impact of mere stare decisis.

In deciding whether to overrule a case, a formalist or Holmesian judge following a pure stare decisis model of precedent focuses on whether a prior decision was incorrectly decided, whether individuals have substantially relied on that decision, or whether the decision represents "settled law."[38] In contrast, as Professor Powell has noted when discussing the writings of James Madison under the traditional natural law model,

> "*usus*," the exposition of the Constitution provided by actual governmental practice and judicial precedents, could "settle the meaning and intention of the authors." Here, too, [Madison] was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of the meaning even more highly.[39]

---

actual intent, and suggesting that, in practice, this approach often utilizes narrower, more specific analysis to determine intent).

36. As Young observed:

> When used as a means of divining the present meaning of a constitutional provision as it has evolved over time, precedent itself functions as a tool of interpretation; rather than offering a reason to adhere to an incorrect interpretation under the doctrine of stare decisis, the force of precedent enters into the initial determination of what the correct interpretation is.

Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 691–92 (1994).

37. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939 (1985) (identifying usage as common-law tool for determining intent in ancient instruments).

38. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., concurring and dissenting) (stating that "Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled"); Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991) (commenting that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

39. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939 (1985) (quoting Letter from James Madison to John Davis (c. 1832), *re-*

Thus, under the natural law model, a sequence of precedents can provide an independent gloss on the meaning of a constitutional provision that would call for the consideration of other factors, in addition to the three formalist and Holmesian factors discussed earlier, before a court overrules the precedent's gloss on meaning. Some of these additional factors, as recent opinions by Justices O'Connor, Kennedy, and Souter illustrate, include: (1) whether the prior decision has been unworkable in practice; (2) whether the decision created a direct obstacle to important objectives in other laws; (3) whether later decisions, legislative or executive actions, or a changed understanding of the facts removed or weakened its conceptual underpinnings or rendered it irreconcilable with related doctrines; and (4) whether the decision is inconsistent with some strongly held principle of justice or social welfare.[40] These considerations relate to the natural law model of decisionmaking because they flow from the natural law concern with "reasoned elaboration,"[41] or "reasoned judgment,"[42] and its concern with clearly defined tests, which lend coherence and consistency to the law by rejecting irrational stereotypes and prejudices that are not based upon sound factual premises, and which promote development of the law consistent with strongly held principles of justice embedded in the relevant legal materials.[43]

---

printed in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON (Philadelphia 1865)) (footnotes omitted).

> In *The Federalist* No. 37, James Madison commented on the need, in adjudication, for such specification: "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."

MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 74 (1994) (quoting THE FEDERALIST No. 37 (James Madison)).

40. *See Casey*, 112 S. Ct. at 2809-12 (affirming central holding of *Roe v. Wade* upon examination of legal developments and reliance on decision); Patterson v. McLean Credit, 109 S. Ct. 2363, 2370-71 (1989) (noting various developments in law that may render precedent unworkable and subject to being overruled).

41. *See* R. Randall Kelso, *States of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 164–65 (1994) (providing explanation for doctrine of "reasoned elaboration" as approach to judicial interpretation).

42. *See Casey*, 112 S. Ct. at 2806 (stating that constitutional interpretation may impose duty on Court to exercise "reasoned judgment").

43. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (suggesting that principled decisionmaking, in its neutrality,

C. *Differences Between the Two Natural Law Traditions*

Despite the similarities between the two natural law traditions, including their uniform rejection of the formalist and Holmesian models of interpretation, two critical differences must be recognized. The remainder of this Part discusses these differences. Parts III and IV of this Article suggest that both the historical approach of the Framers and ratifiers and the modern approach of Justices O'Connor, Kennedy, and Souter are best understood as embodying the Enlightenment natural law tradition, not the Burkean tradition.

First, the two traditions differ concerning which natural law principles are incorporated into the Constitution's text. The set of natural law rights derived from Enlightenment philosophy are materially different from those that emerge from a classic or Christian natural law methodology. Stated briefly, the Enlightenment project emphasized four central goals of liberalism: "civil peace, material prosperity through economic growth, scientific progress, and rational liberty."[44] The Enlightenment view of religion emphasized religious toleration,[45] while the Enlightenment political philosophy firmly embraced free speech.[46] Political participation and democratic ideology were also highly regarded. For example, in 1788, the London Revolutionary Society defined the Enlightenment concept of the social contract by stating:

> (1) That all civil and political authority is derived from the people; (2) That the abuse of power justifies resistance; (3) That the right of private judgment, liberty of conscience, trial by jury, the freedom of

---

transcends results in particular case). Further differences among the formalist, Holmesian, and natural law approaches, as well as differences from the instrumentalist approach that the Warren Court typified, are discussed in a recent article that more thoroughly explores these four constitutional interpretation styles. *See generally* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994).

44. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 18 (1985).

45. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 103–62 (1986) (surveying jurisprudence and commentary illustrating religious tolerance embodied in enlightenment philosophy).

46. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 116-19 (1985). As Professor Smith noted, however, the moral underpinning of the Enlightenment's strong support for the freedom of speech has still not been satisfactorily resolved. *Id.*

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

the press, and the freedom of election ought ever to be held sacred and inviolable.[47]

In contrast, the natural law principles that flow from Burke, Blackstone, and others in the eighteenth-century classical and Christian natural law tradition are more elitist, aristocratic, and conservative. As Young noted, Burke rejected the Lockean social contract and the Enlightenment faith in moral theory produced by human reason.[48] Politically, Burke's response to the French Revolution was more aligned with the "conservative" or "Tory" ideology, rather than the "Whig" view.[49] As Professor Presser has noted:

> The conservatives, as would Burke in 1791, conceived of the state as an organic entity, with hierarchical control, and a single set of correct answers to political problems to be elaborated and pronounced from the top down. Sovereignty in England, in other words, rested not in the people but in the "holy trinity," of crown, lords, and commons.[50]

---

47. STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTICS OF FEDERALIST JURISPRUDENCE 51-52 (1991) (citing A. GOODWIN, THE FRIENDS OF LIBERTY: THE ENGLISH DEMOCRATIC MOVEMENT IN THE AGE OF THE FRENCH REVOLUTION (1979)).

48. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 644-53 (1994) (examining Burke's rejection of theory in favor of pragmatism and explaining Burke's belief that "the social contract functions primarily as an articulation of the nature of civil society, not as an expression of popular consent").

49. *See generally* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTICS OF FEDERALIST JURISPRUDENCE 49-54 (1991) (discussing competing ideologies of commentators). Of course, the reference here is to the politics of the "mature" Edmund Burke.

50. *Id.* at 51. The specific point made here regarding the 18th-century classical and Christian tradition does not imply that every Christian theory of political philosophy must adopt this "top down" or "conservative" model. *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 260, 264, 286 (1985) (discussing "theological response to American constitutionalism" based upon Christian social ethic "to see and speak truthfully" and model dialogical community on "Christian concern for those who have no voice, the victim and the alien"). In addition, the specific point expressed regarding the 18th-century classical and Christian tradition is not wholly uncontroversial. For an account of the 18th-century classical and Christian tradition which suggests that this tradition shared much of the "democratic" ideology of the reformist Whigs, and in large part was responsible for the development and eventual triumph of that ideology, see M. STANTON EVANS, THE THEME IS FREEDOM: RELIGION, POLITICS, AND THE AMERICAN TRADITION (1994). Indeed, one way to reconcile Evans's account and the one suggested in this Article concerning the Enlightenment tradition versus the classical and Christian natural law tradition would be to note that perhaps the "best" aspects of both traditions share

Under the classical and Christian view, the religion clauses of the First Amendment should be interpreted in light of beliefs that Christianity is part of the common law and that the Constitution incorporates part of the common law.[51] Freedom of speech, in Blackstone's opinion, was developed against a background of conservative protection of the state and easy resort to seditious libel.[52]

Second, the two natural law traditions differ on whether judges may look beyond the Constitution's text for natural law principles to guide interpretation. Because of Enlightenment concepts of the social contract, the Enlightenment tradition precludes judges from using natural law principles unless the Framers and ratifiers adopted such principles.[53] Explicit constitutional language, like that used in the First Amendment, Due Process Clause, and Equal Protection Clause, provides the best evidence for such adoption. However, it is at least theoretically possible, and consistent with the social contract approach, that the Framers and ratifiers intended judges to resort to natural law principles beyond the literal text of the Constitution and that this understanding was part of society's social contract.[54]

---

many of the concerns regarding freedom and liberty Evans developed. *See id.* at 24–27 (discussing historical originations and interpretations of freedom and liberty).

51. *See* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 118-93 (1990) (discussing Christianity, common law, and constitutional interpretation).

52. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 12–13 (1985) (explaining that, at common law, people could speak freely, but were subject to punishment for derogatory remarks amounting to seditious libel). However, as Levy noted, by the time of the debate over the Alien and Sedition Acts in 1798, the Virginians, and their political leaders Thomas Jefferson and James Madison, "repudiated Blackstone on freedom of the press and his distinctions between liberty and licentiousness and between prior restraint and subsequent punishment. They argued that political opinions must be free from legal restraints and could not be measured or protected by the test of 'truth'." *Id.* at 309. Levy also discussed James Madison's "Report of 1800 by the Virginia House of Delegates," which provides Madison's views on why "the common law [of libel as stated by Blackstone] could not be permitted to explain the terms used in the First Amendment." *Id.* at 315–17.

53. *See* DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 78–83 (1989) (discussing consent pattern and legitimacy of political power in relation to constitutional interpretation and construction).

54. *See generally* Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 965–75 (1992) (presenting basic views on whether Framers and ratifiers intended that natural law principles outside written Constitution be used in constitutional interpretation); 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, 421–25 (1991) (elaborating on debate regarding interpretivist and non-interpretivist theories of judicial review in con-

In any event, under either of these two versions of intent, the Enlightenment natural law approach does not commit judges to the view that the concepts embedded in the Constitution have a static content which, when applied to concrete specific problems, has a static meaning. No drafter under the Enlightenment philosophic tradition would have maintained this view. As Professor David Richards explained, "[n]o great political theory, including Locke's, is the last word on its own best interpretation, and critical advances in political theory may enable us better to understand and interpret the permanent truths implicit in the theory and to distinguish these from its lapsing untruths."[55] Specifically, as I noted in a previous article:

> [A] person who wishes, consistent with the enlightenment tradition, to apply consistently a general concept in which the individual believes . . . may have to adjust one or more specific views which currently are not consistent with that general concept. Through this process, a dynamic is created whereby over time more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social realities, rather than specific views merely being the product of the individual's past experiences, unthinking adherence to tradition, idiosyncratic preferences, or prejudice.[56]

---

stitutional interpretation); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127–28, 1146–55 (1987) (discussing Framers' intent that courts should look outside Constitution when determining validity of governmental actions affecting fundamental rights).

55. DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 13 (1989).

56. R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 135 (1994); *see* Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99, 1254–58 (1987) (stating that, in considering intent, one can distinguish between specific intent, concerning the precise intent of Framers, and abstract intent, involving higher levels of generality). *See generally* RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT 110–95 (1979); ALAN GEWIRTH, REASON AND MORALITY 129–98 (1978); R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 107–16, 206–28 (1981). In particular, Professor Brandt discussed a methodology to separate "irrational" desires and aversions from "rational" ones. As he stated, "I shall call a desire 'irrational' if it cannot survive compatibly with clear and repeated judgments about established facts. What this means is that rational desire [or aversion] can confront, or will even be produced by, awareness of the truth; irrational desire [or aversion] cannot." RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT 113 (1929).

Thus, under this view, while the general concept embedded in the Constitution remains unaltered, the understanding of what that concept means when applied to specific fact situations can change over time.[57]

Justice Ginsburg, during her confirmation hearing, discussed one example of how the understanding of a general concept embedded

57. *See* David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36, 52 (quoting Justice Souter, during Senate confirmation hearing, as stating that "[p]rinciples don't change but our perceptions of the world around us and the need for those principles do"). Professor Powell noted that this "progressive" mode of reasoning, which depends upon judicial "tradition," was shared by James Madison on the Republican side of early American politics, and by Alexander Hamilton and Chief Justice John Marshall on the Federalist side. *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 95–100 (1993) (delineating progressive mode of reasoning among Federalists in decisions by Justice Marshall); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939 (1985) (arguing that Madison's approach to constitutional interpretation was founded upon traditional view of usage, defining Constitution based upon governmental practice and judicial precedent). Some Republicans adopted arguments related to a formalist plain-meaning approach, which viewed "constitutional propositions [as] deductions from static principles" that "no argument from subsequent precedent, practice, or experience could change." H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 92–95 (1993). The Supreme Court consistently rejected this approach. *Id.* at 97–100 (examining several early Supreme Court decisions illustrating that Court's refusal to use formalist approach to constitutional interpretation). The formalist position of some of the early Republicans was based upon one version of Enlightenment thinking that relied on rationalism and logic. *Id.* at 92, 117. However, the "progressive" or non-static mode of reasoning also flowed from a proper understanding of the Enlightenment philosophic enterprise. *See supra* text accompanying notes 53–56 and *infra* text accompanying notes 58–67. As Professor Powell stated, the "progressive" or "tradition-dependent" approach of Madison, Hamilton, and Marshall "shared the overall individualism of the Enlightenment". H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 94 (1993). Additionally, the substantive principles that emerged in 19th-century America from "the common-law vision of discourse as tradition-dependent" were "thoroughly liberal: individualism, society as an artificial social compact, human relationships as the intersection of autonomous rights-bearers, the supremacy of the national empire over local communities." *Id.* at 117. This progressive use of tradition that embraces substantive Enlightenment principles differs from the classical and Christian use of tradition in writers like William Blackstone, who intended to freeze existing law with classical and Christian principles. *See supra* note 9. Law did not develop in progressive directions based upon the Enlightenment general concepts that the Framers and ratifiers placed into the Constitution. Thus, while the formalist Enlightenment judicial decisionmaking methodology of some of the early Republicans did lose out in the Supreme Court to the progressive common-law methodology, this does not mean that the classical and Christian natural law methodology won. Instead, the common-law methodology of Madison, Hamilton, and Marshall won. This methodology consists of the courts engaging in reasoned elaboration of the Enlightenment's moral and political concepts that the Framers and ratifiers placed into the Constitution. As indicated herein, this methodology is also part of the Enlightenment judicial decisionmaking tradition.

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

in the Constitution can evolve over time consistent with Enlightenment reasoning, but inconsistent with the Framers and ratifiers' specific intent. According to Justice Ginsburg, a reasoned elaboration of the general concept of equality found in the Declaration of Independence and in the Equal Protection Clause of the Fourteenth Amendment supports the principle of equal rights for women, even though Thomas Jefferson, the Framers and ratifiers of the Fourteenth Amendment, and other men in the eighteenth and nineteenth centuries did not have equal rights for women specifically in mind.[58] Justice Ginsburg quoted Jefferson as stating that "[t]he appointment of women to public office is an innovation for which the public is not prepared. Nor am I."[59] Nevertheless, Justice Ginsburg presumed that, if Jefferson were alive today, he would assert a different specific view on the role of women in public life based on his general concept of equality—each individual's equal and unalienable right to life, liberty, and the pursuit of happiness—and a rejection of irrational stereotypes concerning appropriate women's roles.[60]

---

58. *See The Supreme Court: Excerpts from Senate Hearings on the Ginsburg Nominations*, N.Y. TIMES, July 21, 1993, at A12 (summarizing key remarks made and dialogue exchanged in course of Justice Ginsburg's confirmation hearings).

59. *Id.*

60. *Id.*; *see* Ruth B. Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17, 18 (1988) (discussing women's eventual protection under Equal Protection Clause of Fourteenth Amendment). As Justice Ginsburg noted:

> [A] too strict "jurisprudence of the framers' original intent" seems to me unworkable, and not what Madison or Hamilton would espouse were they with us today. It cannot be, for example, that although the founding fathers never dreamed of the likes of Dolly Madison or even the redoubtable Abigail Adams ever serving on a jury, we would today say it is therefore necessary or proper to keep women off juries.

Ruth B. Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17, 17 (1988). Justice Ginsburg also discussed the nation's history of laws reflecting irrational stereotypes concerning women, as evidenced by *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), in which the Court held "rational" a state's decision to spare women from the obligation to serve on juries in recognition of women's place "at the center of home and family life." *Id.* at 18–19, 20. Justice Ginsburg also referred to *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873), in which the Court upheld a state law excluding women from the state bar because the Court believed that women's proper role was in the home, and not a breadwinner outside the home. *Id.* at 19. By rejecting these irrational stereotypes regarding women, although many of the Framers and ratifiers of the Fourteenth Amendment harbored such views, one can glean a more enlightened interpretation of the phrase "equal protection of the laws" that the Framers and ratifiers added to the Constitution in the Fourteenth Amendment.

https://commons.stmarytx.edu/thestmaryslawjournal/vol26/iss4/8

This evolution in Equal Protection Clause doctrine regarding gender discrimination derives significantly from the belief that the Framers and ratifiers' commitment to equality expressed in the Equal Protection Clause partially rested on the Enlightenment-based natural law principle that persons should not be penalized for things over which they have no control—such as immutable characteristics like race or gender—and also in part from the natural law concern with reason, and thus rejection of irrational stereotypes.[61] This understanding of the Equal Protection Clause also supports the heightened scrutiny currently given to classifications based upon the illegitimacy of a child, even though concerns about illegitimacy, like concerns about equal rights for women, were not part of the specific intent of the Framers and ratifiers of the Fourteenth Amendment. Illegitimate children are not responsible for their illegitimacy, and a clear, historical record documents irrational stereotypes about illegitimacy that affected legal rules.[62] Furthermore, depending on the scientific evidence regarding the immutability of sexual orientation, this approach may warrant heightened scrutiny for classifications on that basis.[63]

On the other hand, under the social contract tradition of judicial decisionmaking, the judge must stay faithful to a reasoned elabora-

61. These two principles are fundamental parts of most Enlightenment-based, natural law moral theories because they are directly related to the Enlightenment concept of moral behavior being the result of "rational choice." The "choice" component of this understanding supports not imposing punishments for things over which people have no control, such as immutable characteristics. *See* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (rejecting legal stigma placed on illegitimate children as inappropriate means of encouraging marriage). The "rational" component supports the view that moral decisions are the product of reason, not irrational stereotypes or prejudice. *See* Craig v. Boren, 429 U.S. 190, 198–99 (1976) (holding that neither archaic and overbroad generalizations nor outdated misconceptions about women's roles in home can support gender discrimination in statutes); *see also* Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973) (recognizing long and unfortunate history of gender discrimination during which the "statute books gradually became laden with gross, stereotyped distinctions between the sexes").

62. *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEME FOR THE CONSTITUTION'S THIRD CENTURY 365–66 (1993) (asserting that "[i]n essence, the decisions [granting heightened scrutiny in cases involving illegitimacy] are based on the premises that persons born outside of marriage have suffered from irrational societal prejudices that imposes burdens upon them bearing no relation to their own responsibility or wrongdoing").

63. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297–99 (1985) (arguing for recognition of homosexuality as suspect classification); *see also* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 367–68 (1993) (discussing Supreme Court's equal protection rulings affecting homosexuals).

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

tion of the natural law concept that the Framers and ratifiers adopted. The judge may not replace that concept with what the judge perceives to be a better natural law concept. Thus, assuming that the Framers and ratifiers' concept of equality in the Fourteenth Amendment was one of "equality of opportunity" or "legal equality,"[64] a judge, although convinced that an understanding of equality as "equality of result" represents a "better" natural law theory,[65] could not properly read that principle into the Constitution under the social contract natural law approach. For instance, prior to the passage of the Thirteenth Amendment, judges under the Enlightenment social contract tradition correctly refused to find slavery unconstitutional because a ban on slavery was not part of the Constitution.[66] Likewise, equality of result is not part of the Constitution today.[67]

Perhaps because England has no written constitution, or because the classical and Christian natural law tradition assumes that natural law is an emanation of God's will and reason and is not dependent on a social contract, the classical and Christian natural law tradition as represented by Burke appears more receptive to the argument that judges may occasionally supplement the natural law principles the Framers and ratifiers adopted with natural law prin-

---

64. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 268 (1990) (stating that "[w]hat the republicans meant by equality was legal equality").

65. *See* JOHN RAWLS, A THEORY OF JUSTICE 75–80, 310–15 (1971) (discussing difference principle which permits differences in equality of result only to extent that such differences are to advantage of most deprived members of society).

66. *See* Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532, 539 (1969) (describing Marshall Court's approach to slavery that persisted after Chief Justice Marshall's death).

67. *Cf.* LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 12–18 (1991) (finding similar point in distinguishing interpretation theory of Chief Justice Marshall from that of Professor Ronald Dworkin). To the extent that Professor Dworkin is understood as suggesting that judges merely consult the best "moral philosophy of the day" in giving content to a term like "equality," his suggestion conflicts with the natural law approach to constitutional interpretation discussed here. *See id.* at 13 (defining Dworkin's theory that constitutional text should be viewed as "inspirational 'symbols' " requiring judges to consult contemporaneous moral philosophy). On the other hand, to the extent Dworkin merely suggests that the judge work out the best and more reasoned understanding of the concepts that the Framers and ratifiers embedded in the Constitution, his approach would be consistent with the natural law approach described here. *See id.* at 13 (stating that Dworkin clarified that judges must combine their understanding of constitutional concepts with Framers' conceptions).

ciples derived from other sources, including religious ones. At its extreme, this model elevates judges to the role of Platonic Guardians who decide constitutional cases to promote their visions of the just state.[68] Ernest Young suggested a less extreme but related approach when he contended that judges in the Burkean tradition should be permitted to resort to moral philosophy without being limited to the moral concepts of the Framers and ratifiers.[69] On the other hand, Young contended that Burke's use of tradition to shape judicial decisionmaking is restricted to "something internal to a tradition," though perhaps at an "aspirational, highly general" level. Young further rejected Professor David Luban's suggestion that interpretive tools for reform may be found outside an existing tradition.[70] This position suggests that the Burkean approach, at least as Young envisions it, agrees with the Enlightenment approach that judges should remain faithful to the moral concepts of the Framers and ratifiers elaborated in the traditional common-law methodology and should not interpret the Constitution in light of new moral concepts that judges deem superior.[71] Accordingly, the Enlightenment and Burkean traditions would agree that judges should only interpret the Constitution in light of the Framers and ratifiers' principles, not principles of justice or wise social policy outside the Constitution. These two traditions disagree, however, on whether the relevant natural law principles that the Framers and ratifiers placed into the Constitution were Enlightenment principles or classical and Christian principles.[72]

---

68. *See* LEARNED HAND, THE BILL OF RIGHTS 73 (1958) (stating that "[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not").

69. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 689 (1994) (suggesting that Burkean judges consider originalist history and moral philosophies which reflect society's moral intuitions).

70. *Id.* at 709-11.

71. In jurisprudential terms, both the Enlightenment natural law tradition and the Burkean tradition so understood would adopt "interpretive" approaches towards the Constitution and reject "non-interpretive" review. *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 19 n.12 (12th ed. 1991) (listing examples of interpretivist and non-interpretivist positions); *Symposium on Constitutional Interpretation*, 6 CONST. COMM. 19-113 (1989) (exploring interpretive versus non-interpretive debate).

72. See *supra* text accompanying notes 44-52 for a general discussion of the differences between Enlightenment and classical and Christian principles. For a discussion of the difference between these two traditions in the context of two recent, high-profile cases, see *infra* text accompanying notes 98-111.

III. The Framers and Ratifiers as Embodying the Enlightenment Tradition

The Enlightenment tradition is the main tradition of the Founders of the United States Constitution.[73] As Professor Richards noted, "Thomas Jefferson justified the American Revolution on the ground that Britain had violated 'certain unalienable Rights' in ways that . . . were familiarly Lockean . . . . The debates over the 1787 Constitution . . . were conducted within a framework of remarkable consensus—by both Federalists and Anti-Federalists—about Lockean contractualism."[74] When the Framers departed from or augmented Lockean notions, they most often resorted to the tradition of civic republicanism,[75] which is more closely associated with the Enlightenment natural law tradition than the classical and Christian natural law tradition. As Richards stated:

> The political philosophy of the founders was, I argue, clearly Lockean; however, their constructivist enterprise of constitutional design was framed by their own political experiences as colonists, revolutionaries, and framers of and leaders under state constitutions and the federal Articles of Confederation, and the sense they made of these experiences in light of the critical insights and constructive alternatives offered by the interpretive history and political science of Machiavelli, Harrington, Montesquieu, and Hume. The political theory of the U.S. Constitution is best understood in light of the humanist methods of reflection and argument that the founders brought to their task.[76]

---

73. *See generally* David A.J. Richards, Foundations of American Constitutionalism 18–130 (1989). As Richards noted, "the founders understood themselves to be participants in the best Enlightenment thought of Scotland, England, and France, and others defined their work as an elaboration and extension of such thought." *Id.* at 24 (citation omitted). Richards continued: "[S]uch Enlightenment thought was readily absorbed and distinctively used by Americans because they interpreted it as advancing more long-standing trends in American life—in particular, a democratizing emancipation of religious and political intelligence . . . ." *Id.*

74. *See id.* at 80–81 (explaining centrality of popular sovereignty to Framers and ratifiers); *see also* Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. Ill. U. L.J. 617, 629–34 (1992) (noting different theories of interpreting federal constitution).

75. *See supra* notes 15–16 and accompanying text.

76. *See* David A.J. Richards, Foundations of American Constitutionalism at vii-viii (1989) (discussing import of Framers' experiences). As James McClellan neatly summarized, the humanist tradition "exalt[s] the autonomy of human reason, and exhorted man to look for a law of nature in a secularized state of nature." James McClellan, *Joseph Story's Natural Law Philosophy*, 5 Benchmark 85, 87 (1994). This tradition is in contrast

It may be true, as Professor Presser noted, that some of the early Federalist judges, including Justice Samuel Chase, were more closely aligned with the classical or conservative tradition.[77] However, the Enlightenment tradition of Locke and civil republicanism remains the primary influence of the Framers and ratifiers.[78]

Even Justice Story, grounded in the classical and Christian natural law tradition, and perhaps its most literate American exponent on the federal bench,[79] exemplifies the Enlightenment triumph regarding theories of judicial review. James McClellan observed that, in his writings, Story appears poised between the Burkean

---

to the classical and Christian tradition from which "natural law is an emanation of God's reason and will." *Id.* As McClellan indicated, the humanist tradition includes the Scottish, English, and French Enlightenments, as well as continental writers such as Pufendorf, Burlamaqui, and Vattel. *Id.* at 87–88. Other aspects of the humanist tradition include the "Florentine tradition of republican discourse" to which Machiavelli belonged. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 15 (1985). Moreover, the civic republican tradition of James Harrington and others in 17th century England is an outgrowth of the Florentine tradition of republican discourse. *See generally* Frank Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 37–47 (1986) (discussing civic republican tradition). This fact also underscores the point that, between the classical and Christian tradition and the Enlightenment tradition, the civic republican tradition is more closely associated with the Enlightenment. *See id.* at 38 (explaining that general good and civic virtue are basis of classical civic tradition).

Though outside the scope of this Article, Lockean and Burkean political philosophies also differ regarding basic, underlying epistemological assumptions. *See generally* JOEL C. WEINSHEIMER, EIGHTEENTH-CENTURY HERMENEUTICS: PHILOSOPHY OF INTERPRETATION IN ENGLAND FROM LOCKE TO BURKE 23–45, 195–225 (1993) (explaining Lockean and Burkean interpretive philosophy). A related split also existed between the medieval law's fundamental faith in custom and tradition, with "reason" as a part of "reasonable custom," and the emerging faith in reason as a source of first principles during the Enlightenment. *See* James Q. Whitman, *Why Did Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1348–52 (1991) (explaining invocations of reason in customary treatises). *See generally* GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS (1990) (discussing within classical and Christian tradition how Cicero, Augustine, and Aquinas might have approached various questions of constitutional interpretation, with particular emphasis on Augustine).

77. *See* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 7 (1991) (asserting that Justice Chase was aligned with conservative, not radical, strain of republicanism).

78. *See supra* text accompanying notes 73-76.

79. *See* James McClellan, *Joseph Story's Natural Law Philosophy*, 5 BENCHMARK 85, 85 (1994) (stating that "[a]mong the American lawyers and judges, Justice Story stands out as possibly the most learned and influential defender of the natural law tradition").

and Enlightenment natural law traditions.[80] Despite Justice Story's rejection of the Enlightenment's social contract in favor of the classical and Christian explanation of the origin of the state,[81] McClellan characterized Story as "a product of the Enlightenment."[82] Like Grotius, Pufendorf, Burlamaqui, and Vattel, Story transmitted "to the natural law theory of the modern period its distinguishing marks: rationalism, sociality, and particular political aims."[83]

Justice Story's natural law principles reflected more of the Enlightenment's democratic assumptions than eighteenth-century, classical and Christian views, which were more elitist. According to McClellan, Story's "underlying assumption [is] that the natural law requires a representative form of democratic government, a vigorous and independent judiciary, separation of church and state, and the enforcement of the obligation of contracts according to the common law principles of interpretation."[84] Moreover, although a

---

80. *See id.* at 85, 86 (arguing that Story's "natural law is two-sided: one half modern in the style of Hobbes, Locke, and even Rousseau; the other half classical and Christian, in the tradition of Cicero, Aquinas, Hooker, and Burke").

81. *See id.* at 89 (asserting that Story shared "common ground with Aristotle, Aquinas, Blackstone, and Burke in believing that political society evolved from the early establishment of families and the union of tribes to the higher stage of the nation-state"). "The doctrine of the social contract, he declared in his *Commentaries on the Constitution*, was unfounded either in reason or history, and its endorsement by some of the first state constitutions in the 1770s served only to obscure the true basis of the citizens' rights." *Id.* Following the French Revolution, Story, like Burke, was suspicious of abstract political philosophy:

> "It has been observed by a profound statesman," recalled Story in reference to Burke's *Reflections on the Revolution in France*, "that the abstract perfection of a government, with reference to natural rights, may be its practical defect . . . . Great vigilance and great jealousy are therefore necessary in republics, to guard against the captivations of theory."

Id. at 88 (recounting 1829 address by Story as Dane Professor of Law).

82. *Id.* at 86.

83. James McClellan, *Joseph Story's Natural Law Philosophy*, 5 BENCHMARK 85, 88 (1994).

84. *Id.* at 88. Justice Story's views on separation of church and state were probably more in line with the classical and Christian natural law tradition than the Enlightenment tradition. *See* Rodney K. Smith, *Non-Preferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 249 (1991) (concluding that Justice Story apparently viewed First Amendment as meaning that "government could promote a generalized or nondenominational Christianity, so long as it did so in a manner that tolerated non-Christian religions"). This approach differs from the Enlightenment's more secular and strict separation of church and state. *See infra* notes 109-110 and accompanying text; *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1011 (1990) (defining religious "neutrality" in

few early cases indicate a judicial willingness to decide cases in light of extra-constitutional natural law principles,[85] the prevailing doctrine in the United States Supreme Court rejected that approach in favor of interpretation based upon connection to the constitutional text.[86] Furthermore, although some early Federalist judges believed in a criminal common law based upon the natural law principle that the state must defend itself,[87] Justice Story, Chief

---

various ways and juxtaposing it with strict separation of church and state); Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 879–922 (1986) (discussing separation of church and state as embodied in modern establishment clause doctrine). However, Justice Story's approach regarding the Establishment Clause is complicated by the fact that, during his tenure on the Court, the First Amendment was not yet applicable to the states. Story believed that the states should possess the freedom to encourage Christianity "so far as was not incompatible with the private rights of religious worship." RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 108–09 (1987). Nevertheless, Story also noted "that it was deemed advisable to exclude from national government all power to act upon [religion]. . . . Thus, the whole power over the subject of religion is left exclusively to state government." *Id.* at 109. This statement suggests a strict separation of church and state interpretation of the Establishment Clause as applied to the federal government. Such an interpretation might not have troubled Justice Story during his lifetime because states were free to encourage nondenominational Christianity at that time. It is also possible that Justice Story thought, consistent with traditional common-law methodology, that a general principle of strict separation was embodied in the text of the Establishment Clause. Once the First Amendment was incorporated into the Fourteenth Amendment, the strict separation view limited state encouragement of religion as well. *Terrett v. Taylor*, the one major religion case that Justice Story decided, is of little help because it did not involve the United States Constitution, but rather the Virginia Constitution, which Justice Story predictably interpreted to advance his view on the proper balance between states and the establishment of religion. *See* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 55 (1815) (permitting Virginia to engage in nondenominational aid to religion). Thus, untangling Justice Story's views regarding the First Amendment Establishment Clause is problematic at best.

85. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (rendering alternative holdings that state cannot revoke grants because of Contracts Clause read in common-law fashion or extra-constitutional principle of "the nature of society and of government" in general); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (stating that, even without express constitutional limitations, "certain vital principles in our free Republican governments, which will determine and over-rule an apparent flagrant abuse of legislative power," limited state governments).

86. *See generally* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 104–07 (1993) (reviewing early Supreme Court cases relying upon textual interpretation).

87. *See* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 67–73 (1991) (explaining common law of crimes as offenses against the Union that were "more than mere violations of the explicit texts of federal statutes").

Justice Marshall, and the remainder of the nineteenth century Justices never adopted that view.[88]

In reality, Blackstone and Burke lost the moral, political, and jurisprudential debates in late eighteenth and early nineteenth-century America. Federalist elitism and aristocracy gave way to Enlightenment democratic ideals and values. The triumph of Enlightenment principles was apparent at the nation's founding[89] and became increasingly evident as a matter of judicial decisionmaking during the Marshall Court's tenure from 1803 to 1835. As Professor Presser admitted, Justice Chase's method of constitutional interpretation yielded to Chief Justice Marshall and later Justices during the first half of the nineteenth century.[90] The triumph of Enlightenment political philosophy became more apparent by the time of the Civil War and the Civil War Amendments.

---

88. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32–33 (1812) (rejecting federal common-law criminal jurisdiction under United States Constitution); STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 88–92 (1991) (discussing Federalist belief in common law of crimes). As Professor Presser reported, even Justice Chase, who followed early Federalist judicial practice that was more sympathetic to the conservative natural law tradition of Blackstone and Burke, initially rejected the view that a nontextual common law of crimes based upon natural law could be read into the Constitution. STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 76–80, 95–97 (1991).

89. *See supra* text accompanying notes 73–76.

90. STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 161–62 (1991) (asserting that Marshall attempted to move away from ideological version of elitist views that Chase propounded). Professor Presser adopts Professor Morton Horwitz's terminology, which distinguishes between an earlier natural law style of judicial decisionmaking and Chief Justice Marshall's instrumentalist style. *Id.* at 165. In the terminology used in this Article, Horwitz's earlier natural law style is the classical and Christian natural law tradition of Edmund Burke and William Blackstone, while Horwitz's instrumentalist style is the Enlightenment natural law tradition of James Madison, Alexander Hamilton, and Chief Justice Marshall. Although the natural law and instrumentalist traditions share the premise that "judges could, and needed, to make law to advance particular social ends," it is probably more precise to denominate this early 19th-century judicial decisionmaking style as the Enlightenment version of natural law or natural rights theory, rather than as instrumentalism under Horwitz's view. *See* R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 553 n.59 (1993) (referring to pre-Civil War role of judges as articulated by several legal scholars). The term "instrumentalism" can then be reserved for the truly instrumentalist decisionmaking style of 20th-century judges like Justices William Brennan, Thurgood Marshall, and William Douglas of the Warren Court. *See generally id.* at 532–38, 581–83 (interpreting term "instrumentalism" as referring to Warren Court's approach to law).

The Framers drafted the Fourteenth Amendment's Due Process, Equal Protection, and Privileges and Immunities Clauses in light of the eighteenth- and nineteenth-century Enlightenment tradition.[91] In American politics and judicial decisionmaking of that time, the tradition of Blackstone, Burke, and Chase lost; the tradition of the Scottish, English, and French Enlightenments, as applied in America by Madison, Hamilton, Marshall, and Story, prevailed.[92]

---

91. *See* DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION 108–34 (1993) (providing thorough discussion of philosophic ideas that framed debates surrounding Civil War Amendments); *see also* DAVID FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 253–71 (1990) (discussing ideological beginnings of Reconstruction Amendments). Farber and Sherry stated:

> The antislavery Republicans needed a framework to support their view that slavery was an immoral aberration from the normal legal order. . . . Fortunately, a system of thought was at hand that satisfied . . . [their] requirements. . . . Of the natural law writers of the Enlightenment, Locke is best remembered today. . . . Just as it provided an almost perfect justification for the Revolution, Lockean theory was remarkably congruent with Republican ideology. . . . Although they have largely been forgotten today, three other writers of the natural law school were highly influential in eighteenth- and early nineteenth-century America. These were Pufendorf, Vattel, and Burlamaqui.

DAVID FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 258–59 (1990). As Farber and Sherry clarified, and as McClellan underscored, the philosophic approaches of Pufendorf, Vattel, and Burlamaqui are more in the Enlightenment tradition of natural law than in the classical and Christian natural law tradition of Blackstone and Burke. *See id.* at 259–60; James McClellan, *Joseph Story's Natural Law Philosophy*, 5 BENCHMARK 85, 88 (1994). Of course, this does not mean that religious arguments played no role in the anti-slavery debates before the Civil War or in the adoption of the Civil War Amendments. *See* DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 265 (1990) (stating that "[f]or many Republicans the 'higher law' had a religious basis"). This would be particularly true for those Republicans who took the view, discussed earlier at *supra* text accompanying notes 68–69, that natural law, in particular God's law, can supersede clear constitutional commands. *Id.* at 263–64. However, as Farber and Sherry noted, "[f]or moderates like Abraham Lincoln, belief in natural law did not imply immunities from the duties imposed by positive law [like the Constitution]." *Id.* at 264. Further, "For many Republicans, . . . the wellsprings of natural law were to be found with the founding fathers rather than biblical patriarchs," with the Declaration of Independence as perhaps the most significant basis of antislavery republicanism. *Id. See generally* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978) (describing Declaration of Independence as Enlightenment-based document).

92. *See* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 7–9, 161–69 (1991) (discussing early American politics and judicial decisionmaking). Even if a more compelling case could be made that the classical and Christian tradition of Blackstone, Burke and Chase was more influential at the founding, it would make little difference as a matter of judicial decisionmaking style today. As Young indicated, under the Burkean model a well-established subsequent judicial tradition can carry more interpretive weight than the Fram-

IV. JUSTICES O'CONNOR, KENNEDY, AND SOUTER AS EMBODYING THE ENLIGHTENMENT TRADITION

Given the differences between the classical and Christian natural law tradition and the Enlightenment natural law tradition, the decisionmaking approach of Justices O'Connor, Kennedy, and Souter, as Young described,[93] reflects more the Enlightenment tradition; presumably the decisionmaking approach of Justices Ginsburg and Breyer will reveal the same influences.[94] Two recent high-profile

---

ers and ratifiers' specific original intent. *See supra* text accompanying notes 24–27. As a historical matter, the Madison-Hamilton-Marshall-Story model of common-law judicial decisionmaking prevailed over the Burke-Chase model; therefore, the former should control over the Burke-Chase model in any event.

93. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 715-24 (1994) (analyzing "moderate" inclinations of three justices).

94. *See supra* note 5 and accompanying text. Justice Breyer will probably fit comfortably within the modern Enlightenment natural law tradition. *See generally* Stephen Breyer, *On Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (adopting modern natural law approach allowing review of legislative history to help illuminate legislature's purpose in enacting statute); Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 790-92 (1984) (adopting approach which holds that judges should consider effects of particular constitutional interpretation in light of Constitution's purposes and practical considerations unless plain meaning of text is so clear as to be determinative); Howard Latin, *Legal and Economic Considerations in the Decisions of Judge Breyer*, 50 LAW & CONTEMP. PROBS. 57, 75–81 (1987) (arguing that Judge Breyer considers regulatory and antitrust issues utilizing conventional common-law legal analysis, not law-and-economics methodology). At his confirmation hearing, Justice Breyer also suggested aspects of the natural law approach. *Excerpts from Senate Hearings on Supreme Court Nominee*, N.Y. TIMES, July 13, 1994, at A8. Justice Breyer stated in his opening remarks that the "vast array of Constitution, statutes, rules, regulations, practices, procedures—that huge vast web—has a single purpose.... That purpose is to help ... individuals . . . live together productively, harmoniously, and in freedom. Keeping that ultimate purpose in mind helps guide a judge." *Id.* Judge Breyer also noted that, in interpreting terms like "liberty" under the Due Process Clause, he would start with the text, adding that:

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

Id. at A10. This approach fits comfortably within Young's general description of "judicial craftsmanship" and within the framework of the natural law approach toward text, purpose, history, precedent, and reasoning about consequences in light of the Framers' purposes. *See supra* notes 3, 17–43 and accompanying text.

cases, *Planned Parenthood v. Casey*[95] and *Lee v. Weisman*[96] underscore this observation.[97]

In *Casey*, Justices O'Connor, Kennedy, and Souter issued a joint opinion upholding the core premise of *Roe v. Wade*[98] that the Fourteenth Amendment concept of liberty is broad enough to forbid a state from unduly burdening a woman's choice regarding abortion, at least prior to viability.[99] In reaffirming the basic tenet of *Roe*, the joint opinion defined liberty in terms reminiscent of the Enlightenment emphasis on human capacities for understanding and reflective self-direction.[100] In their joint opinion, these Justices declared:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[101]

The opinion followed Justice Harlan's earlier definition of liberty that was also reminiscent of the Enlightenment tradition. In *Poe v. Ullman*,[102] Justice Harlan defined liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly sensitive scrutiny of the state

95. 112 S. Ct. 2791 (1992).

96. 112 S. Ct. 2649 (1992).

97. *See generally* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 717–19 (1994) (providing thorough discussion of *Casey*). Young also cited *Weisman* in a footnote. *Id.* at 715 n.492. Young correctly noted that *Casey* follows the natural law approach toward an evolving tradition of judicial precedent as a gloss on constitutional interpretation. *See id.* at 717–19 (asserting that refusal to overrule *Roe v. Wade* stemmed from Court's respect for precedent and desire to build upon existing constitutional jurisprudence); *see also infra* note 106 and accompanying text (discussing Court's reliance on natural law theory in deciding *Casey*). However, Young failed to recognize that the substantive principle of liberty elaborated in *Casey* represents an Enlightenment view of liberty, not liberty as defined in the classical and Christian tradition. *See infra* text accompanying notes 100-106.

98. 410 U.S. 113 (1973).

99. *Casey*, 112 S. Ct. at 2816–19.

100. *See supra* text accompanying note 13.

101. *Casey*, 112 S. Ct. at 2807.

102. Poe v. Ullman, 367 U.S. 497 (1961).

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

needs asserted to justify their abridgement."[103] According to Professor Presser, no natural law principle supports this interpretation of liberty under the classical and Christian natural law tradition. Thus, according to the classical and Christian natural law tradition, the joint opinion in *Casey* is erroneous.[104] Furthermore, as Professor Presser observed, a judge in the classical and Christian natural law tradition, such as Justice Clarence Thomas, would have joined the dissent in *Casey*.[105] Justices O'Connor, Kennedy, and Souter's rejection of this approach demonstrates that their natural law style of judicial decisionmaking relies more on Enlightenment natural law principles than on classical and Christian natural law principles.[106]

---

103. *Id.* at 543 (Harlan, J., dissenting) (citations omitted). Harlan's dissent also included additional language suggesting aspects of the natural law approach, including the natural law respect for purposes and for an evolving sequence of precedents. *See supra* text accompanying notes 20, 36–43. As Justice Harlan noted, "[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe*, 367 U.S. at 544 (Harlan, J., dissenting). Moreover, "supplying of content to [the Due Process Clause] has of necessity been a rational process, . . . having regard to what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke." *Id.* at 542. This approach particularly reflects Enlightenment premises to the extent that Justice Harlan shared the view, suggested above, that the tradition of the Framers and ratifiers was the Enlightenment tradition. See *supra* text accompanying notes 73–76. On a more careful reading, however, these and other aspects of Justice Harlan's opinion in *Poe*, as well as in his other opinions, reflect a balance between natural law and Holmesian judicial decisionmaking premises. *See infra* note 106. In particular, note that Justice Harlan's respect for purposes and historical tradition is also consistent with a Holmesian approach. *See supra* text accompanying notes 29–30.

104. Stephen B. Presser, *Should a Supreme Court Justice Apply Natural Law? Lessons from the Earliest Federal Judges*, 5 BENCHMARK 103, 111 (1994).

105. *Id.*

106. It may also be useful to note that the joint opinion in *Casey* utilized the natural law methodology shared by the classical and Christian and the Enlightenment natural law traditions of judicial precedent representing a "gloss on meaning" to the Constitution. *See supra* text accompanying notes 36–43. In *Casey*, Justices O'Connor, Kennedy, and Souter canvassed all of the special reasons that could support overruling *Roe v. Wade*—unworkability in practice; extent of reliance; coherence, consistency, and reconcilability with related doctrines; and whether a changed perception of the facts mandates a different result—ultimately deciding that none applied. *Casey*, 112 S. Ct. at 2809–12. As Young observed, it is unclear "as an original matter" whether Justices O'Connor, Kennedy, and Souter would have reached the same conclusion concerning the extent of the Fourteenth Amendment's protection of liberty interests without 20 years of *Roe* as a precedent. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 717 (1994). Young also observed that this approach is

reminiscent of Justice Harlan's respect for, and deference to, precedent. *Id.* at 718–19, 723–24. Bernard Schwartz has taken a similar view:

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

BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 375–76 (1993). Consistent with this connection between Justice Harlan and Justices O'Connor, Kennedy, and Souter, many aspects of Harlan's judicial philosophy share Enlightenment natural law premises, including the principle regarding reasoned elaboration of the law around the concept of neutral principles. *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 984 (1978) (explaining that Harlan's efforts to perform his responsibilities in accordance with Wechsler's neutral principles model are unparalleled among modern Supreme Court Justices). A more complete analysis of Harlan's decisionmaking style, however, would likely illustrate greater aspects of the Holmesian judicial restraint model than the decisions of Justices O'Connor, Kennedy, Souter, or Ginsburg. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 61–65 (1961) (upholding state statute "sparing" women from obligation to serve on juries based upon minimum rationality standard of review and deference to state legislature's judgment concerning women's place "as the center of home and family life"). Young's citation to an article connecting Justice Harlan with Justice Frankfurter supports this conclusion. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 718 (1994) (noting that Justices Frankfurter and Harlan share common ideological ground, including "respect for precedent" and "case by case balancing" (citing Jeffrey Rosen, *The Leader of the Opposition*, NEW REPUBLIC 27 (1993))); *see also* Reynolds v. Sims, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting) (criticizing majority for expanding scope of Fourteenth Amendment as means of "developing" constitutionalism because expansion was contrary to text and history of Fourteenth Amendment); Baker v. Carr, 369 U.S. 186, 267–68 (1962) (Frankfurter, J., dissenting) (considering courts to be incapable of fashioning adequate remedies for state legislative decisions on elections, and asserting that Framers never envisioned this task for courts). Justice Frankfurter clearly adopted a Holmesian, not a natural law, judicial decisionmaking style. *See Baker*, 369 U.S. at 266–67 (Frankfurter, J., dissenting) (criticizing majority for entangling itself in political debates); *Poe*, 367 U.S. at 503 (reminding that judiciary has limited power derived from tripartite character of government); *see also* R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 395–96, 419 (1984) (discussing Justice Frankfurter's vote in *Baker* and Holmesian aspects of Justice Harlan's judicial philosophy). Additionally, even in *Poe v. Ullman*, in which portions of Justice Harlan's dissent had a flavor of natural law rhetoric, Harlan based his ultimate conclusion upon the "utter novelty" of the legislative enactment. *See Poe*, 367 U.S. at 554 (Harlan, J., dissenting). This underscores Harlan's willingness to defer to legislative practices that are not so novel. *See generally* R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and the Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 600–07 (1993) (discussing judges' utilization of aspects of two or more judicial decisionmaking styles). Justice O'Connor's decisionmaking style also occasionally resembles the Holmesian style. *Id.* at 602–03 n.266. Justice Kennedy's decisionmaking style is occasionally reminiscent of a formalist approach. *Id.* at 600. Justices Souter, Ginsburg, and Breyer generally exemplify a purer Enlightenment natural law approach, though Justice Breyer's decisionmaking style, like Justice Blackmun's, may turn out to include a mixture of natural law and liberal instrumentalism. *Id.* at 602–04

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

An examination of *Lee v. Weisman*[107] also reveals the tendency of Justices O'Connor, Kennedy, and Souter to follow the Enlightenment approach to natural law. Professor Presser observed that the dissent in *Weisman* "could have properly invoked the kind of religiously-based natural law beliefs of Samuel Chase to support the notion that a prayer at a public school graduation was an entirely appropriate exercise of public power."[108] However, in *Weisman*, Justices O'Connor, Kennedy, and Souter rejected that view in favor of a more Enlightenment-based understanding of the freedom of religion, which, according to Professor Richards, is consistent with the Framers and ratifiers' views on religion.[109] Although Justices O'Connor, Kennedy, and Souter, and presumably Justices Ginsburg and Breyer, view the Establishment Clause somewhat differently from each other, they will likely continue to operate from the Enlightenment's secular approach, advocating a more vigorous separation of church and state than the classical and Christian natural law model of Burke and Blackstone.[110] Justice Thomas

---

n.261. As Judge Breyer stated during his opening remarks in the confirmation hearings, the Supreme Court

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

Excerpts from Senate Hearings on Supreme Court Nominee, N.Y. TIMES, July 13, 1994, at A8.

107. 112 S. Ct. 2649 (1992).

108. Stephen B. Presser, *Should a Supreme Court Justice Apply Natural Law? Lessons from the Earliest Federal Judges*, 5 BENCHMARK 103, 111 (1994).

109. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 111–16 (1986) (surveying philosophies in development of Free Exercise and Establishment Clause).

110. Justices O'Connor, Kennedy, Souter, and Ginsburg view the Establishment Clause differently in some instances. Justice Kennedy believes that the Framers designed the Establishment Clause principally to counter potential government coercion. *See Weisman*, 112 S. Ct. at 2658 (stating that "[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"). Justice Souter has cited with approval aspects of Professor Laycock's analysis, which rejects mere "non-preferentialism among religions" as a basis for Establishment Clause review, and has discussed the interplay between original intent and the tradition of subsequent judicial precedents under the Establishment Clause. *Id.* at 2668–76 (Souter, J., concurring) (attributing to the Framers James Madison's and Thomas Jefferson's views, grounded in 18th-century Enlightenment philosophy, that "any official endorsement of religion can impair religious liberty"); *see also* Board of Education of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2484, 2487–90 (1994) (invalidating creation of special school district in New York based on view that legislature delegated civic authority "on the basis

is the only current Justice who arguably may be described as operating out of the classical and Christian natural law tradition of Blackstone and Burke.[111]

V. Conclusion

A traditional common-law style of judicial decisionmaking exists that was present at this nation's founding. As Ernest Young discussed in a recent article, and as reaffirmed herein, this common-law style is derived from a natural law tradition. This natural law judicial decisionmaking tradition is an alternative to the formalism of Justice Scalia or the Holmesian style of Chief Justice Rehnquist. This style was the dominant view of judicial interpretation for the framing and ratifying generation of the original Constitution and the Civil War Amendments. The decisionmaking style of Justices O'Connor, Kennedy, and Souter appears to have great affinity with this traditional common-law style.

---

of religion" rather than on basis of "neutral principles"). Justices O'Connor and Kennedy concurred with the majority on narrower, but similar, grounds. *Kiryas Joel*, 114 S. Ct. at 2495 (O'Connor, J., concurring); *id.* at 2500 (Kennedy, J., concurring). As in *Weisman*, the formalist, Holmesian, and possibly the classical and Christian natural law judges—Justice Scalia, Chief Justice Rehnquist, and Justice Thomas, respectively—dissented in *Kiryas Joel*. *Id.* at 2505 (Scalia, J., dissenting). For a general discussion of formalist, Holmesian, natural law, and instrumentalist approaches to the Establishment Clause, see R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 178-79, 193-94, 209-10, 223 (1994); *see also* Rodney K. Smith, *Conscience, Coercion, and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary*, 43 CASE W. RES. L. REV. 917, 932–33, 945–48 (1993) (suggesting that, while Justices Blackmun, Stevens, O'Connor, and Souter clearly rejected non-preferential state promotion of religion in *Weisman*, they may permit non-preferential state promotion of conscience as alternative to strict separation of church and state approach, and proposing that this approach would be consistent with views of James Madison and other Framers and ratifiers regarding meaning and purpose of Establishment Clause).

111. *See* Stephen B. Presser, *Should a Supreme Court Justice Apply Natural Law? Lessons from the Earliest Federal Judges*, 5 BENCHMARK 103, 111-12 (1994) (comparing Justice Chase and "Clarence Thomas or any other Supreme Court Justice who might embrace an historically valid American natural law jurisprudence"). However, in his decided cases, Justice Thomas's decisionmaking style may share more aspects of Justice Scalia's formalist decisionmaking approach. *See* Rodney K. Smith, *Justice Clarence Thomas: Doubt, Disappointment, Dismay and Diminishing Hope*, 7 J.L. & COM. 277, 277 (1991) (suggesting that Justice Thomas has "fallen under the sway" of Justice Scalia and has departed from some of his pre-Court statements that suggested natural law or natural rights judicial decisionmaking perspective).

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

One commentator asserted that, in eighteenth-century America, Burke equalled Locke.[112] If so, then whether this natural law model of judicial decisionmaking is called "Burkean," or the "Enlightenment tradition of Locke, Madison, and Marshall" makes little difference. As an historical matter, it is unclear whether the Constitution's Framers and ratifiers were philosophically unsophisticated enough to think that "Burke equalled Locke." However, as the preceding discussion suggests, from a philosophic and jurisprudential perspective, there are clear differences between the classical and Christian tradition of Burke and the Enlightenment tradition of Locke. These differences can yield dramatically different results in individual cases, as the preceding discussion of *Casey* and *Weisman* indicates.

Once identified, these differences clearly indicate that Justices O'Connor, Kennedy, Souter, and presumably Justices Ginsburg and Breyer, while explicitly rejecting the formalism of Justice Scalia, the Holmesian approach of Chief Justice Rehnquist and the liberal instrumentalist tradition of many members of the Warren Court, operate more from the Enlightenment natural law tradition than the classical and Christian natural law tradition. After all, Justices O'Connor, Kennedy, and Souter were the key votes supporting the *Casey* and *Weisman* results. Likewise, the Framers and ratifiers of the Constitution and the Civil War Amendments appear to have been influenced more by Enlightenment political and moral philosophy than by classical and Christian natural law.

This Article is not intended to be analytically exhaustive or to resolve all the questions that are raised by the issues discussed herein; however, this general discussion of the differences between the Enlightenment tradition of Locke and the classical and Christian tradition of Burke may contribute to a better informed contemporary discussion of the eighteenth- and nineteenth-century natural law approach to judicial decisionmaking. If indeed the eighteenth-century mind thought that "Burke equalled Locke," we should not make that mistake today. Locke does not equal Burke. The Enlightenment tradition of John Locke, James Madison, and Chief Justice Marshall differs from the tradition of Edmund Burke

112. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 661 (1994) (citing LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 153 (1955)).

or Samuel Chase. The Enlightenment tradition was the primary influence of the Framers and ratifiers of the Constitution, and today it appears to be the judicial decisionmaking tradition of Justices O'Connor, Kennedy, Souter, and perhaps Justices Ginsburg and Breyer. It is not the tradition of Edmund Burke.[113]

113. A related lack of precision regarding the Burkean tradition versus the Enlightenment tradition appears in Kathleen N. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 115–17 (1992). In discussing the judicial decisionmaking style of Justices O'Connor, Kennedy, and Souter, Professor Sullivan correctly noted that these Justices adopt many aspects of the traditional common-law model of judicial decisionmaking, including "adherence to precedent" and "reasoned elaboration" of the law. *Id.* She also observed that these Justices, unlike Justices operating under the Burkean approach, have a "forward-looking" dimension to their reasoned elaboration of the law, not a pure look "back to custom and understandings inherited from the past." *Id.* at 117. This reflects one important difference between the progressive, common-law methodology of the Enlightenment tradition of Madison, Hamilton, and Marshall and the classical and Christian natural law tradition of Blackstone and Burke. *See supra* note 57 and accompanying text. However, in describing the judicial decisionmaking style of Justices O'Connor, Kennedy, and Souter generally, Professor Sullivan noted that their approach resonates with "Burkean traditions, American legal pragmatism [of Holmes], and the reasoned elaboration of the legal process school." Kathleen N. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 117 (1992). Sullivan also suggests that their forward-looking dimension reflects an instrumental dimension. *Id.*; *cf. supra* note 90 (noting Professor Horwitz's use of term "instrumentalism" to refer to that aspect of early 19th-century Enlightenment natural law reasoning which shared instrumentalist premise that "judges could, and needed, to make law to advance particular social ends"). A more precise formulation of judicial decisionmaking styles would note that, while each of these approaches *is* different from the formalism of Justice Scalia (on whom Professor Sullivan focused), the Holmesian approach, the legal process school and its version of instrumentalism, the Burkean natural law tradition, and the Enlightenment natural law tradition are all distinct decisionmaking styles. Under this more precise view, Justices like Frankfurter, White, and Chief Justice Rehnquist share the Holmesian style of interpretation. Justices Douglas, Brennan, and Marshall share the instrumentalist style, while Justice Thomas perhaps uses the Burkean model, although his decisionmaking possesses aspects of Justice Scalia's formalism. However, the decisionmaking style of Justices O'Connor, Kennedy, Souter, and perhaps Justices Ginsburg and Breyer, follows none of these other judicial decisionmaking traditions. Rather, they appear to follow the traditional common-law methodology of Madison, Hamilton, Marshall, and Story, which is the Enlightenment natural law judicial decisionmaking tradition. *See supra* text accompanying notes 16–68 & 93–111.

A recent Federalist Society symposium on "Originalism, Democracy, and the Constitution," held April 7-9, 1995 at Northwestern University School of Law, underscores the value of distinguishing among these various versions of originalism. Four approaches to originalism were discussed at this conference: two "hard" approaches and two "soft" approaches. *See generally National Student Symposium on Originalism Draws 600 to Northwestern*, FEDERALIST PAPER, May 1995, at 1, 16. One hard approach, championed at the conference by Professor Lino Graglia, and called herein the Holmesian approach, combines a focus on the original intentions of the Framers and ratifiers with a presumption that "courts must refrain from striking [down] legislation unless it is clearly unconstitutional in

St. Mary's Law Journal, Vol. 26 [1994], No. 4, Art. 8

light of the original intentions of the Framers." *Id.* at 2. A second hard approach discussed at the conference was called "textualism." *Id.* at 16. This approach reflects Justice Scalia's approach, which is denominated in this Article as formalism. The two soft approaches to originalism, which reflect the two natural law approaches discussed in this Article, emphasize interpretation according to broader principles embodied in the constitutional text, along with emphasis on the evolutionary aspects of the common-law precedent system. *Id.* at 16, 18. The Burkean approach was championed at the conference by Professor Thomas Merrill, who dubbed this approach "conventionalism." *Id.* at 20. The traditional Madison-Marshall-Story approach was championed at the conference by Judge Frank Easterbrook in his remarks concerning *Marbury v. Madison* and *McColloch v. Maryland*. *Id.* at 18.

https://commons.stmarytx.edu/thestmaryslawjournal/vol26/iss4/8