Volume 112 | Issue 2 Article 5

January 2010

Judicial Decision-Making and Judicial Review: The State of the Debate, CIRCA 2009

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I. INTRODUCTION

Legal scholar, and later Supreme Court Justice, Oliver Wendell Holmes, Jr. opened his great book, *The Common Law*, with a statement about how judges go about deciding cases. He said,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[1]

Forty years later, New York Court of Appeals Justice, and later Supreme Court Justice, Benjamin Cardozo discussed with greater specificity how judges think in The Nature of the Judicial Process. Cardozo said that judges tend to follow the logic of existing precedents where that is reasonably possible, but then they consider history, custom, and the welfare of society.[2] This topic about how

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[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

[2] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30–31 (1921).

judges do, and should, decide cases is one of perennial interest, and a number of recent books have returned to the issue.

In one such book, How Judges Think, Seventh Circuit Judge, and prolific scholar, Richard Posner discusses how he and other judges that he knows go about deciding cases.[3] In a similar vein, Justice Antonin Scalia and legal scholar Bryan Garner discuss their views about how to persuade judges in The Art of Persuading Judges.[4] In Courts & Congress: America's Unwritten Constitution, Professor William Quirk discusses how courts have taken over deciding public policy issues that he feels are more appropriately left to the other branches of government, Congress, and the President. Thus, the American people are governed by an unwritten Constitution, which Quirk calls "The Happy Convention."[5] Contra the views of Quirk, in Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, Professor Daniel A. Farber argues that the Supreme Court should be more vigorous than it is today, particularly in protecting individual rights from congressional or executive action through use of the mostly dormant, or "silent," Ninth Amendment.[6] Finally, in Originalism, Federalism, and the American Constitutional Enterprise, Professor Edward A. Purcell, Jr. discusses the various ways courts have dealt with questions of federalism and limits on federal governmental power.[7]

In this Article, we will consider each of these five recent statements on the topic of judicial decision-making, placing the books into a broader context of theories on judicial review. As noted in this review,[8] there are four basic styles of judicial decision-making: (1) formalism (where literal text is given great weight); (2) Holmesian (often characterized by deference to government action and concern for underlying purposes of the law); (3) natural law (emphasis on judicial precedent and general principles underlying the law); and (4) instrumentalism (great attention paid to alternative social policy consequences of a decision). With regard to constitutional interpretation, formalist judges focus on sources of meaning existing at the time of ratification — text, context, and history — with particular focus on literal text. This leads to a static, or fixed, view of the Constitution based on the textual meaning at the time of ratification. Holmesian judges add to these sources a judicial deference to legislative, executive, and, to some extent, social practice under the Constitution. Natural law judges add to these sources great respect for precedent and reasoned

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3 RICHARD A. POSNER, HOW JUDGES THINK (2008).

4 ANTONIN SCALIA & BRYAN GARNER, THE ART OF PERSUADING JUDGES (2008).

5 WILLIAM QUIRK, COURT & CONGRESS: AMERICA'S UNWRITTEN CONSTITUTION 2 (2008). Quirk explains, "The new, unwritten constitution is called here the *Happy Convention*." *Id.*

6 DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE (2007).

7 EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007).

8 *See infra* notes 10–15, 19–30, 38–43 and accompanying text.

elaboration of the law. Instrumentalist judges add a focus on prudential principles. For conservative instrumentalists, this typically involves greater weight paid to prudential principles of judicial restraint; for liberal instrumentalists, this typically involves greater weight paid to principles of justice or social policy embedded in the law.

Comparing the five books mentioned above, it is clear that descriptions and evaluations of what happens in judicial decision-making are influenced by the observer's perspective on what style of deciding is preferred. Placed in this perspective, each of these five books makes a good contribution to legal scholarship once the predisposition of the author is understood: Posner (conservative instrumentalist); Justice Scalia (formalist); Professor Quirk (Holmesian); Professor Farber (natural law, with a hint of liberal instrumentalism); and Professor Purcell (liberal instrumentalist). Because his book is in many ways the most comprehensive of the five, and provides a good introductory overview of the topic of judicial decision-making, Part II of this Article summarizes and reviews Judge Posner's book, How Judges Think. Part III addresses the four other books in the order mentioned above. Part IV provides a brief conclusion.

II. JUDGE POSNER AND HOW JUDGES THINK

Judge Richard Posner's twenty-five years on the bench have produced many creative and useful contributions in a wide variety of legal fields.[9] On the topic of judicial decision-making, Judge Posner makes clear, in How Judges Think, the complexity of his thought when deciding cases. At a minimum, Posner advises that if a case is not controlled by precedent, an advocate appearing before him should identify the purpose behind the relevant legal principle, and then show that the purpose would be fulfilled by a decision in favor of the advocate's position.[10] More broadly, he suggests from studying the literature and observing the behavior of other judges that many of them think in a similar way, which he calls "pragmatism," an approach that goes beyond rules, purpose, principles, and precedent to emphasize the consequences of deciding a case one way or another.[11] Judge Posner concedes that there are some misguided judges, which he identifies as "legalists."[12] He says they behave in errant ways by giving too much weight to rules and precedents, and they fail to give enough

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9 *See generally* Symposium, *Commemorating Twenty-Five Years of Judge Richard Posner*, 74 U. CHI. L. REV. 1641 (2007).

10 POSNER, *supra* note 3, at 220.

11 *See id.* at 40 ("pragmatism" refers "to basing judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of syllogism"); *id.* at 238 ("The core of legal pragmatism is pragmatic adjudication, and its core is heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities.").

12 *Id.* at 41–42.

weight to the consequences of alternative decisions.[13] That is the most important consideration for pragmatists, other than possibly a soundly reasoned case directly on point.[14]

Along the way, Judge Posner recognizes two other groups of judges. First, there are judges, like Justice Kennedy, who reason, as did Justice Powell and Chief Justice John Marshall, that there are some overriding general principles to which current decisions should be related.[15] And then there are judges who agree with legalists that law should be clear and certain, but who are willing to look behind rules to their reasons, as did Justice Holmes, and who, like him, frequently defer to decisions of other branches or the states, as did Chief Justice Rehnquist and is done by Chief Justice Roberts.[16] In addition, Judge Posner tells us that most judging is "political," in the sense that it is not simply the logical application of rules and precedents.[17] That is especially true in the Supreme Court, he says, where arguments about the consequences of alternative decisions are far more important than arguments based on rehearsing precedents.[18] While discussing the Supreme Court as a political institution, Posner submits that the Justices probably would not do a better job if they decided fewer cases.[19] He says that deciding cases is not a protracted process, unless the judge has difficulty making up his mind, "which is a psychological trait rather than an index of conscientiousness."[20] He notes that the decline in cases decided by the Court from 129 in 1958 to sixty-eight in 2006, "has coincided with an increase in the quality and number of the Justices' law clerks [and] is a disturbing commentary on the effect of bureaucratization on productivity."[21]

As noted, Posner acknowledges four different judicial decision-making perspectives.[22] Not surprisingly, his major attention is focused predominantly on the style of interpretation that he adopts, what he calls "pragmatism." "Pragmatism" is a form of judicial decision-making also called "instrumentalism."[23] For such judges, the formulation and application of each rule is tested

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13 *Id.* at 42.

14 *Id.* at 239–40.

15 *Id.* at 310–11. For discussion of Justice Kennedy's decision-making style, *see* notes 93–133 and accompanying text.

16 POSNER, *supra* note 3, at 287–88. For discussion of Chief Justice Rehnquist's and Chief Justice Roberts' decision-making style, *see* notes 75–92 and accompanying text.

17 *Id.* at 9–10.

18 *Id.* at 269.

19 *Id.* at 269–70.

20 *Id.* at 299.

21 *Id.*

22 *See* notes 10–16 and accompanying text.

23 *See generally* CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW 11, 342–43 (2007) (an E-Book available at www.vandeplaspublishing.com); David Lyons, *Legal Formalism and Instrumentalism — A Pathological Study*, 66 CORNELL L. REV. 949, 956 (1981); Robert S. Summers, *Pragmatic Instrumentalism in Twentieth-Century American Legal*

by its purpose and effects. These judges are willing to engage in a broad-based historical investigation to help determine overall context and purposes. They believe that courts should seek to advance sound social policies where leeways exist in the law, and give less regard to precedent than to reaching sound results.[24] On the current Court, Justice Stevens inclines to this view, as do Justices Ginsburg and Breyer, and newly confirmed Justice Sonia Sotomayor; past champions of this view include Chief Justice Earl Warren, and Justices Douglas, Brennan, Marshall, and Blackmun.[25] While such instrumentalists on the Supreme Court have all been more or less liberal in their approach to policy questions, Judge Posner provides a good reminder of the possibility that a conservative law-and-economics approach may be a version of pragmatic instrumentalism.[26]

"Legalists," as described by Posner, are more commonly described as "formalists."[27] Such judges emphasize the literal, plain meaning of words. They prefer clear, bright-line rules which are capable of formal, logical, and predictable application. When using history as an aid, they search for the specific historical views of the framers and ratifiers on specific issues, and refuse to speculate on what history may suggest about broader concepts.[28] Justices Scalia, Thomas, and Alito tend to approach constitutional and statutory interpretation cases from this perspective.[29]

The two other styles of interpretation, which Posner acknowledges but does not develop in his book, are Holmesian decision-making and natural law decision-making.[30] One set of judges, following Justice Holmes, agree with formalists that the law should be clear and predictable. But they emphasize the need for judicial restraint and deference to the legislature and the executive, as

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Thought — A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 CORNELL L. REV. 861 (1981).

24 *See generally* KELSO & KELSO, *supra* note 23, at 11–13, 47–54, 325–53 (citing GRANT GILMORE, THE AGES OF AMERICAN LAW 86–98 (1977); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 213–35 (1960); Karl Llewellyn, *On the Current Recapture of the Grand Tradition*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 215, 217 (1962)).

25 *See* KELSO & KELSO, *supra* note 23, at 325–53, 1628 (discussing all of these Justices).

26 *Id.* at 341–43. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1984); RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981); Ernest A. Young, *Conservative Judicial Activism*, 73 U. COLO. L. REV. 1139–1416 (2002).

27 *See generally* KELSO & KELSO, *supra* note 23, at 12.

28 *Id.* at 35–41, 278–302 (citing Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527–942 (1999); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908)); Frederick Schauer, *Formalism*, 97 YALE L. J. 509 (1988).

29 *See* KELSO & KELSO, *supra* note 23, at 41–47, 278–302, 1626–28 (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) [hereinafter INTERPRETATION]; Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 634–49 (1991); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)).

30 POSNER, *supra* note 3, at 232–35.

well as deference to states. Although they consider the literal meaning of words, as do formalists, they are willing to look beyond the words, and pragmatically consider general purposes because, as Holmes said, "The life of the law has not been logic; it has been experience."[31] Chief Justice Rehnquist's opinions embodied this Holmesian style, as do the opinions of Chief Justice Roberts.[32]

The judicial decision-making style with the oldest pedigree is that of natural law. These judges endeavor to connect specific decisions and doctrines with general principles of law, in what is called "reasoned elaboration of the law." Words in the Constitution that are judged to reflect the adoption of broad principles, such as federalism or the separation of powers, are interpreted in light of those principles. There is an effort to develop a reasoned elaboration of law in light of its purposes and history. In doing so, such judges pay great respect to prior precedents of earlier judges, particularly those engaged in the same interpretive enterprise.[33] Chief Justice John Marshall so reasoned. In recent times, his major heirs have been Justice Kennedy and Justice O'Connor.[34]

In addition to his discussion of these various styles of decision-making, Judge Posner uses his central focus on how judges think as a springboard to provide information and views on a wide variety of topics which, in one way or another, bear some relation to judicial thought. For example, we learn that judges are busy but that most opinions are drafted by law clerks, who are more legalistic than the judges who decide the cases.[35] We also learn his view that law professors are not currently teaching what is most useful for lawyers to know about persuading judges.[36] This may be explained by the fact, he says, that law professors are tending more and more to be subject matter specialists

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31 *See* KELSO & KELSO, *supra* note 23, at 41–46, 303–24 (citing OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881); Robert W. Gordon, *Holmes'* Common Law *as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 722–23 (1982); Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. U. L.J. 427, 456 (1990); Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254 (1963); G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 655, 667 (1982)).

32 *See infra* notes 75–90 and accompanying text. *See generally* KELSO & KELSO, *supra* note 23, at 303–24, 1621–26.

33 *See generally* KELSO & KELSO, *supra* note 23, at 54–62, 354–93 (citing Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 3), 42 HARV. L. REV. 149, 365 (1928–29); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); David M. O'Brien, *The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 CONST. COMMENT. 119 (1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985)).

34 *See infra* notes 93–136 and accompanying text. *See generally* KELSO & KELSO, *supra* note 23, at 354–56, 393–404.

35 POSNER, *supra* note 3, at 221.

36 *Id.* at 215–19.

and, in the process, are not teaching the kind of information and skills generally needed to persuade judges.[37]

Similar insightful conclusions are sprinkled throughout the book. It would detract from some readers' enjoyment of the book to attempt to list them all. But here is a sample, drawn from a Chapter on the Supreme Court:

> * "Against the decision in *Brown* it could be argued, first, that if instead of forbidding public school segregation the Court had insisted that states practicing segregation spend as much money per black as per white pupil, the expense of maintaining parallel public school systems might have forced integration more rapidly than the Court's actual decision, which was not fully implemented for decades."[38]
>
> * "If the Justices acknowledged to themselves the essentially personal, subjective, political, and, from a legalist standpoint, arbitrary character of most of their constitutional decisions, then — deprived of 'the law made me do it' rationalization for their exercise of power — they might be less aggressive upsetters of political applecarts than they are."[39]
>
> * "Maybe when all the characteristics of the Court as an institution are considered — especially the fact that the Justices try to justify their decisions in reasoned opinions, which, even when they are advocacy products largely drafted by law clerks wet behind the ears, reflect a degree of deliberation and a commitment to minimal coherence that are not demanded of legislative bodies — the correct conclusion is that the Justices' legislative discretion is really rather narrowly channeled."[40]
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> * Speaking of Justice Breyer's book Active Liberty (2005), Judge Posner says that, "A Supreme Court Justice writing about constitutional law theory is like a dog walking on his hind legs; the wonder is not that it is done well but that it is done at all."[41]
>
> * "What reins in the Justices is . . . an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government spurred on by an

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37 *Id.* at 216–21.

38 *Id.* at 280.

39 *Id.* at 289.

40 *Id.* at 304–305.

41 *Id.* at 324.

> indignant public. So they pull their punches, giving just enough obeisance to precedent to be able to present themselves as 'real' judges, rather than as the more than occasional legislators that they really are."[42]

This having been said, a more complete book on the nature of the judicial process would have to account fully for all four of the judicial decision-making styles that Posner identifies, and how they differ in terms of their approach to common-law decision-making, such as in contracts and torts cases; statutory interpretation; and constitutional law decision-making. While a good account of a pragmatic approach to judicial decision-making, Judge Posner's book does not meet this broader goal. Had he undertaken that inquiry, his book would have considered in greater depth the various sources of interpretation used most prominently by formalist, Holmesian, natural law, and instrumentalist judicial actors.[43]

With regard to constitutional interpretation, such a detailed description of constitutional interpretation would note that any interpreter must consider a wide variety of possibly relevant considerations that will be given different weight by each of the four styles of decision-making. These considerations, or sources of constitutional meaning, can be described as follows:

> (1) The literal, or plain, meaning of the Constitution's text; and the text's purpose or spirit;
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> (2) The context of that text, including verbal or policy maxims of construction; related provisions in the Constitution or other related documents, like the earlier enacted Articles of Confederation; and the structure of government contemplated by the Constitution, including issues of federalism and separation of powers;
>
> (3) Historical evidence concerning the intent of the framers and ratifiers of the Constitution, both specific historical evidence, like *Notes of the Constitutional Convention* or *The Federalist Papers*, and general background historical evidence, viewed both from the perspective of specific historical intent of the framers and ratifiers and any general aspirations or general intent the framers and ratifiers may have had in mind;

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42 *Id.* at 375.

43 On this broader topic, *see generally* R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION (1984) (discussing common-law, statutory, and constitutional decision-making from formalist, Holmesian, natural law, and instrumentalist perspectives); KELSO & KELSO, *supra* note 23, at 35–62 (summarizing common-law, statutory, and constitutional decision-making from formalist, Holmesian, natural law, and instrumentalist perspectives).

> (4) Legislative, executive, and social practice under the Constitution;
>
> (5) Judicial precedent interpreting the Constitution; and
>
> (6) Prudential arguments concerning the consequences of a particular judicial decision, both from the perspective of text, context, history, practice, and precedent, and whether that decision would advance a particular background principle of justice or social policy that the judge believes is embedded in the Constitution or constitutional doctrine (more succinctly phrased as "embedded in the law"), or perhaps a principle of justice or social policy that is "not so embedded" in the Constitution or existing constitutional doctrine.

These sources can be organized under two broad headings: contemporaneous sources of meaning and subsequent considerations. Contemporaneous sources are those that existed at the time a constitutional provision was ratified. They include the text of the Constitution; the context of that text, including verbal and policy maxims of construction; related provisions in the Constitution or other related documents; the structure of government contemplated by the Constitution (structural arguments of federalism and separation of powers); and the history surrounding the provision's drafting and ratification. Subsequent considerations involve matters that occur after the constitutional provision is ratified. These include the sub-categories of (a) subsequent events, which involve legislative, executive, and social practice under the Constitution, and judicial precedent interpreting the Constitution; and (b) prudential considerations, which involve judicial consideration of the consequences of any judicial construction, including arguments of justice or social policy.

These sources can be organized by resorting to whether they involve relatively specific and limited interpretive tasks or resorting to more general kinds of reasoning. Table 1 may clarify these various sources of interpretation.[44]

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[44] A complete discussion of these sources of constitutional interpretation and their use appears at KELSO & KELSO, *supra* note 23, at 99–133 (citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)). *See also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (similar discussion of text, structure, history, doctrinal, prudential, and ethical considerations in constitutional interpretation).

Table 1
Sources of Constitutional Meaning

	More Specific Interpretive Tasks	General Kinds of Reasoning
Contemporaneous Sources		
Text	Literal or Plain Meaning of Text	Purpose or Spirit of Text
Context	Verbal Maxims	Policy Maxims
	Related Provisions	Structural Arguments
History	Specific Historical Evidence	General Historical Evidence
	(1) Specific Historical Intent	(1) Specific Historical Intent
	(2) General Historical Intent	(2) General Historical Intent
Subsequent Considerations		
Practice	Legislative or Executive Practice	Social Practice
Precedent	Core Holdings of Precedent	Reasoned Elaboration of Law
Prudential	Judicial Restraint Considerations	Other Prudential Concerns
Considerations	(1a) Text (e.g., prudential principles	(2) Practice & Precedent;
	of standing, ripeness, mootness)	(3) Principles of Justice and/
	(1b) Context/Structure (e.g., political	or Social Policy Embedded
	questions and *Ashwander* factors	
	in the Law(1c) Purpose/History	(4) Justice and/or Social
	(e.g., sensitivity to the needs of government)	Policy Not So Embedded

In general, formalists/legalists focus on contemporaneous sources of meaning, particularly literal text, which leads to a static, or fixed, view of the Constitution based on the textual meaning at the time of ratification.[45] Holmesian judges add to contemporaneous sources a judicial deference to later legislative, executive, and, to some extent, social practice.[46] Natural law judges add to these sources great respect for precedent and reasoned elaboration of the law.[47] Instrumentalist judges add a focus on prudential principles. For conservative instrumentalists, this typically involves greater weight paid to prudential principles of judicial restraint; for liberal instrumentalists, this typically involves

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[45] *See* KELSO & KELSO, *supra* note 23, at 278–302 (citing INTERPRETATION, *supra* note 29, at 44 (the alternative view of "The Living Constitution," which changes meaning based on later legislative, executive, or social practice; or later judicial precedents; or prudential considerations, is incompatible with the "antievolutionary purpose of a constitution")).

[46] *See* KELSO & KELSO, *supra* note 23, at 303–24 (citing Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (our tradition derives from both "our people and our laws."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)).

[47] *See* KELSO & KELSO, *supra* note 23, at 325–53 (citing H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–902 (1985); David M. O'Brien, *The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 CONST. COMMENT. 119, 145 (1991) ("'[A]mong the obvious and just guides applicable to [interpreting] the Const[itutio]n,' Madison listed: '1. The evils [and] defects for curing which the Constitution was called for & introduced. 2. The comments prevailing at the time it was adopted. 3. The early, deliberate, and continued practice under the Constitution . . . .'")).

greater weight paid to principles of justice or social policy embedded in the law.[48] These predispositions are reflected in the following Table:

Table 2
Sources of Constitutional Meaning and Styles of Interpretation

Interpretation Style	Main Focus of Interpretation Style	More Specific Interpretive Tasks	General Kinds of Reasoning
Formalism	Contemporaneous Sources		
	Text	Literal or Plain Meaning of Text	Purpose or Spirit of Text
	Context	Verbal Maxims	Policy Maxims
		Related Provisions	Structural Arguments
	History	Specific Historical Evidence	General Historical Evidence
		(1) Specific Historical Intent	(1) Specific Historical Intent
		(2) General Historical Intent	(2) General Historical Intent
	Subsequent Considerations		
Holmesian	Practice	Legislative or Executive Practice	Social Practice
Natural Law	Precedent	Core Holdings of Precedent	Reasoned Elaboration of Law
Instrumentalism	Prudential Considerations	Consequences Evaluated in light of Text, Context/Structure, and Purpose/History, mostly focused on Judicial Restraint	Consequences Evaluated in light of Practice and Precedent; background Principles of Justice and/or Social Policy Embedded in the Law; or Not So Embedded

A third way to think about the four judicial decision-making styles is to note that, jurisprudentially, there are two main questions that lie behind any act of judicial interpretation. The first concerns the nature of law, and the second concerns the nature of the judicial task. Concerning the nature of law, two main approaches have appeared in jurisprudential writings. Under one approach, law is seen as primarily a set of rules and principles whose application is guided by

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[48] *See* KELSO & KELSO, *supra* note 23, at 354–404. A complete discussion of these predispositions of the four judicial decision-making styles appears at *id.* at 134–72. Note that while conservative instrumentalists may share with Holmesian judges a policy of judicial restraint and deference to government, a conservative formalist will be driven more by the formalist focus on literal text and historical meaning at the time of ratification, not judicial deference or restraint. Thus, formalist judges do not necessarily have a policy of judicial restraint. As has been noted about formalist Justices Scalia and Thomas, Justices Scalia and Thomas have voted to strike down federal affirmative action provisions, state affirmative action plans, measures designed to promote minority ownership of media, campaign finance legislation that attempts to redress wealth inequities in the political process, portions of the Americans with Disabilities Act, part of the Family and Medical Leave Act, legislative attempts to promote minority representation, laws protecting women from violence, and laws protecting gays, the aged, and the disabled from discrimination. They have found constitutional violations in the actions of local communities seeking to protect their citizens from flooding, congestion, and environmental damage. They have even argued that the efforts of all fifty states to fund legal services for the poor by using the interest from a pooled account of lawyers' trust funds which could not earn interest for their owners, was nevertheless an unconstitutional taking even though the owners suffered no economic loss. *See also* William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 827–28 (2005). In a number of these cases, including campaign finance litigation, Chief Justice Rehnquist, from his more Holmesian perspective, has voted to uphold the law.

an analytic methodology of logic and reason. This has been called the *analytic*, or conceptualist, approach. Alternatively, law can be seen as ultimately to be judged, not in terms of logical consistency, but as a means to some social end through a pragmatic or functional treatment of rules and principles. This has been called the *functional*, or pragmatic, approach. The second main question any judge must ask before deciding how to resolve a legal dispute is whether judicial decision-making should be separable from morals or social values, i.e., should judges view law solely as a body of rules and principles from which legal conclusions are derived — the *positivist* assumption — or should judges view law as a body of rules and principles testable by reference to some external standard of rightness, some social or moral value — law as *normative* or prescriptive, not descriptive. Combining the two different views on the nature of law (analytic versus functional) and the nature of the judicial task (positivist versus normative) results in the four decision-making styles, as indicated in Table 3:

Table 3
Styles of Judicial Decision-Making

Nature of Judicial Task →	Positivism: Judges as Neutral Declarers of the Law	Normativism: Judges as Normative Actors
Nature of Law		
Law as Logical; Analytic or Conceptualist Attitude; Law as Library Science	Formalism/ Analytic Positivism	Natural Law
Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science	Holmesian/ Functional Positivism	Instrumentalism

Often judges who adopt the positivist assumption of the judicial role believe that law is a science to be governed by the analytic methodology of logic and reason. These are the formalists. In contrast, many judges who adopt the normative view of the judicial role believe that law is to be judged in practical terms as a means to advance that normative end. These are the instrumentalists. Formalism and instrumentalism, thus, tend to be the two decision-making styles that judges, and commentators, focus on most. As Table 3 indicates, however, a complete typography of judicial decision-making styles must take Holmesian and natural law decision-making into account.[49]

This typography of judicial decision-making styles can help organize and critique the other books on judicial review. We turn next to that task.

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[49] Full discussion of this point appears in KELSO & KELSO, *supra* note 23, Ch. 2–3; 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, 534–52 (1992).

III. THE EFFECT OF DIFFERENT APPROACHES TO JUDICIAL REVIEW ON CRITIQUES OF MODERN COURTS

A. Justice Antonin Scalia & Bryan Garner and the Four Decision-Making Styles

In The Art of Persuading Judges,[50] Justice Antonin Scalia and legal author Bryan A. Garner have written an interesting and informative book about the art of persuading judges. Following their own advice to be clear, use informative headings, and make it interesting, the co-authors of this concise treatise describe precisely what to aim for when attempting to persuade a judge and how to get there. Brief enough to be read in a few hours, the book can usefully rest at hand when a lawyer is preparing written submissions or readying for oral argument.

Lawyers who are called upon to engage in the art of persuasion will find the book an interesting read and a useful source to consult. The advice has a common-sense quality to it, and, of course, Justice Scalia has had many years to observe the process up close and personal. His co-author, Bryan Garner, has studied and taught advocacy to lawyers for many years. Their combination is a high-powered source of well-crafted ideas.

The major drawback of the book is that the authors discuss only two styles of judicial decision-making, not the four discussed in Part II, and thus their discussion is incomplete. Several times in the book, the co-authors refer to the source of legal decision-making as one or the other of two forces, which they describe as "textualism" (the formalist/legalist model discussed in Part II) versus "purposivism" (the instrumentalist model discussed in Part II). However, as discussed in Part II, there are four basic judicial decision-making styles of which an advocate must be aware — the two Scalia and Garner mention, textualism/formalism and purposivism/instrumentalism, and two others, Holmesian decision-making and natural law.[51] A complete analysis of the art of persuading judges must take all four judicial decision-making styles into account.

Before addressing this aspect of the book, it must be noted that most of the effective advocacy points made by Scalia and Garner apply to any judicial decision-making style. The book first explains general principles of argumentation and legal reasoning that apply to briefs and oral argument. Regarding briefs, the book covers preparatory steps, the writing process, brief architecture and strategy, and writing style.[52] For oral argument, the analysis is more detailed, covering long-term preparation, deciding who will argue, early prepara-

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[50] SCALIA & GARNER, *supra* note 4. Antonin Scalia is an Associate Justice, United States Supreme Court. Bryan Garner is author of Garner's Modern American Usage (2003) and The Elements of Legal Style (2002) and Editor in Chief of Black's Law Dictionary (8th ed. 2004); Black's Law Dictionary (7th ed. 1999).

[51] *See supra* notes 22–32, 43–48 and accompanying text.

[52] SCALIA & GARNER, *supra* note 4, at 57–136, 137–206 (oral arguments).

tion, readying yourself for oral argument, the substance and manner of an oral argument, handling questions, and behavior after the argument. Again following their own advice, the co-authors throughout have used informational headings to make clear the ideas which are to come.

The twenty-one items of advice on general principles of argumentation cannot be compressed without losing some of their flavor. But, overall, there is a call for understanding (the case, the jurisdiction, the judge, and the adversary's case); for accuracy, brevity, and clarity; for logical presentation (best argument first, issues before facts, appeal to rules, justice, and common sense, closing with what the court should do); and for avoiding distractions (overstating the case or making an overt appeal to emotions).[53] Advice on legal reasoning is dealt with more concisely. The authors recommend to find a rule that works together logically with the facts of the case. Look for it in legislation or case law. Always begin your presentation with the words of authoritative texts. Be prepared to use rules of interpretation and/or legislative history. Try to find an explicit statement of your major premise in governing or persuasive cases.[54]

Advice on briefing is provided in twenty-seven suggestions, beginning with the idea that the purpose of a brief is to bring out your theory of the case and your main themes in order to make it easier for the court to decide as you wish. Being able to craft such a document begins much earlier by developing an appealing style and a broad vocabulary through widespread reading of good prose.[55]

The book also notes that a brief should be written from an outline and repeatedly revised. The format and structure should follow the rules of the court and local practice. The most important single part is often a statement of the questions presented in such form as to suggest an answer favoring your case. On writing style, the authors say to value clarity above all other elements. Section headings should be informative. Use scrupulous accuracy when dealing with authorities. And there are a number of things to be avoided, such as jargon, needless Latin, acronyms, and poor typography.[56]

Garner advises to put no substantive point in a footnote.[57] Scalia, qualifying, says if the court is accustomed to issuing detailed opinions, some unimportant matters can be discussed below the text.[58] Again, Garner advises to put nothing in a footnote beyond what might be consulted in looking up a refer-

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53 *Id.* at 1–38.

54 *Id.* at 39–55.

55 *Id.* at 57–136.

56 *Id.* at 107–36.

57 *Id.* at 129.

58 *Id.* at 130.

ence.[59] Scalia prefers to have full citations in the text because judges are familiar with that technique and many are uncomfortable with change.[60]

The authors devote sixty-three items to oral argument, assuming that many judges who are undecided at the time of argument may be led to a decision by the information and perspectives it provides, particularly the opportunity for questions to be asked and answered. An oral argument begins long before arriving in court, they say, by preparations for public speaking and choosing the skilled advocate most familiar with the case. During weeks before the argument, the advocate should learn the case quite well and have a clear theory of the case and the judicial mandate that is sought. Moot courts should be conducted. On the eve of argument, check authorities for late developments.[61]

Be properly attired, the authors state, and arrive in court early with all your materials. Approach the lectern unencumbered and make eye contact with the court, providing a customary greeting and introducing yourself, if necessary. Have your opening remarks "down pat." Lead with your strongest argument. If you have nothing useful left to say, conclude even though you have time left.[62]

As to the manner of delivery, the authors say, flatly, that the argument should never be read and is better delivered if not memorized except, perhaps, the opener and the closer. Present the argument as if it were the truth rather than your opinion. Avoid distracting habits such as chewing your fingernails. Questions should be welcomed. If you do not fully understand a question, ask for clarification. If you do not know, say so. Try to begin with a "yes" or "no," and then explain or qualify. Try to recognize when a judge has asked you a friendly question. Beware of conceding anything.[63]

After the argument, advise the court of any significant new authorities. Evaluate your performance in an effort to learn from any mistakes and help yourself toward building a reputation for excellence in the art of advocacy.[64] The book concludes by suggesting that you not consider each case in isolation but, rather, as a platform from which to build on your successes. They say, "Argue not just for the day but for reputation."[65]

As indicated above,[66] several times in the book the co-authors refer to the source of legal decision-making as one or the other of two forces. For example, early in the book there is a reference to *stare decisis* as compared with a drive toward fairness to litigants, socially desirable results in the case at hand, and the adoption of a rule that will produce fairness, socially desirable results,

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59 *Id.* at 132.

60 *Id.* at 134.

61 *Id.* at 137–60.

62 *Id.* at 173.

63 *Id.* at 178–200.

64 *Id.* at 206.

65 *Id.*

66 *See supra* note 50 and accompanying text.

and predictability in future cases.[67] Again, a page later, a dichotomy is presented:

> Some judges believe that their duty is quite simply to give the text its most natural meaning — in the context of related provisions, of course, and applying the usual canons of textual interpretation — without assessing the desirability of the consequences that meaning produces. At the other extreme are those judges who believe it their duty to give the text whatever permissible meaning will produce the most desirable results.[68]

In discussing judicial philosophy — what it is that leads judges to draw conclusions — the options suggested are "Primarily text, or primarily policy?" or "Is the judge strict or lax on stare decisis? Does the judge love or abhor references to legislative history?"[69] Later, there is a reference to "textualists" relying on the words of a statute and "purposivists" gravitating in another direction.[70]

"Textualists," as described by Scalia and Garner, are more commonly described as "formalists."[71] "Purposivists," as described by Scalia and Garner, are more commonly identified as "instrumentalists."[72] As discussed in Part II, two additional styles beyond those identified by Scalia and Garner need to be considered by modern advocates: Holmesian decision-making, with its focus on deference to legislative and executive action;[73] and natural law decision-making, with its focus on precedent and reasoned elaboration of the law.[74]

Bearing in mind that arguments need to be addressed to all the styles likely to have some influence on the decision of a judge or judges, an advocate needs to go beyond the textualist/formalist and purposive/instrumentalist styles of interpretation. To help Holmesian judges reach decisions, advocates should indicate why deference should or should not be given to decisions of other branches of government, or by individuals as a matter of deference to social practice. To help modern natural law judges reach a favorable decision, an effort needs to be made to connect arguments to a reasoned elaboration of general principles of law and to pay great respect to existing judicial precedents.

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67 SCALIA & GARNER, *supra* note 4, at xxi.

68 *Id.* at xxii.

69 *Id.* at 5.

70 *Id.* at 51.

71 *See generally supra* notes 27–29 and accompanying text.

72 *See generally supra* notes 23–26 and accompanying text.

73 *See generally supra* notes 30–32 and accompanying text.

74 *See generally supra* notes 33–34 and accompanying text.

With respect to the Holmesian style of deciding cases, there are many examples in the opinions of Chief Justice Rehnquist. The late Chief Justice wrote for the Court in a number of cases wherein a key factor was the wisdom, as he saw it, of deferring to actions by another branch of government. This list of such cases is long.[75] Only a sample is covered here.

In *Rostker v. Goldberg,*[76] the Court upheld draft registration limited to males.[77] Men subject to the draft claimed a violation of the Fifth Amendment Due Process Clause. Writing for the Court, Chief Justice Rehnquist emphasized the customary deference accorded the judgments of Congress, especially to legislative judgments in the area of military affairs, an area in which the Court has admitted a relative lack of judicial competence. Further, in view of Congress's extended deliberations, the exemption of women from registration was not an accidental by-product of a traditional way of thinking about women, but a considered judgment to which judicial deference was appropriately applied.[78]

In *Sosna v. Iowa,*[79] Chief Justice Rehnquist wrote for the Court in upholding a one-year durational residence requirement for obtaining a divorce in Iowa. Refusing to apply the strict scrutiny called for by dissenting instrumentalist Justices Marshall and Brennan, Justice Rehnquist said that the state had made precisely the sort of determination that a state is entitled to make, in that it had not only effectuated state substantive policy calling for more than a constitutional minimum of connection with the state, but also provided a greater safeguard against successful collateral attack than would a requirement of nothing more than bona fide residence.[80]

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[75] An overview of Chief Justice Rehnquist's Holmesian style of decision-making appears at KELSO & KELSO, *supra* note 23, at 303–24. Of course, this observation does not mean that Chief Justice Rehnquist, or his successor Chief Justice Roberts, who also tends to follow a Holmesian style of decision-making (*see infra* notes 84–92 and accompanying text) will defer to the government in every case. Sometimes government action is clearly unconstitutional. Even in that case, however, the doctrine, as propounded by a Holmesian, tends to be as limited as possible in its application. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), Chief Justice Rehnquist wrote for the Court striking down Congress's attempt to use the Commerce Clause to regulate all guns around schools. Under the doctrine as phrased in *Lopez*, Congress can regulate, and does regulate today, guns around schools as long as the gun has moved in interstate commerce, which is true for most guns, since most guns are not manufactured, sold, and possessed in one state only. Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), Chief Justice Rehnquist wrote for the Court striking down Congress's attempt to use the Commerce Clause to make constitutional the Violence Against Women Act, later congressional statutes regulating various kinds of violent activity, such as Hate Crimes statutes, or the Unborn Victims of Violence Act, still remain active on the statute books today.

[76] 453 U.S. 57, 78–83 (1981).

[77] *Id.* at 83.

[78] *Id.* at 80–82.

[79] 419 U.S. 393, 410–14 (1975); *Id.* at 418 (Brennan, J., joined by Marshall, J., dissenting).

[80] *Id.* at 408–09.

In *Sandin v. Conner,*[81] Rehnquist wrote for the Court in abandoning a rule that defined a prisoner's protected liberty interests on the basis of whether there was mandatory language in the text of prison regulations.[82] The Chief Justice replaced that rule with the test of whether the prison has imposed atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life.[83] This rule clearly gives prison authorities more discretion than did the previous rule, at least where there are written prison regulations.

Chief Justice Roberts appears to closely resemble Chief Justice Rehnquist in that he also approaches cases from the Holmesian model of interpretation. Many of his decisions while on the D.C. Circuit Court of Appeals suggest that approach.[84] Examples also appear in his opinions as Chief Justice of the United States Supreme Court. For example, in *Morse v. Frederick,*[85] Chief Justice Roberts deferred to the judgments of a school's principal. In *Morse*, the Court upheld sanctioning a student who, at a school-sanctioned and supervised event, held up a banner saying "BONG HITS 4 JESUS."[86] Stating that Congress has declared that part of a school's job is educating students about the dangers of illegal drug use and that school principals have a difficult and vitally important job, the Chief Justice concluded that the principal could reasonably have found that the banner constituted promotion of illegal drug use in violation of established school policy. This was enough to permit school regulation under deferential rational basis review. The Chief Justice added that the First Amendment does not require schools to tolerate student expression at school events that contributes to the dangers of illegal drug use.[87] Reflecting a perspective not as deferential to schools, Justice Kennedy joined with Justice Alito in a concurrence that focused more on reasoned elaboration of free speech doctrine.[88] They noted that if the speech were not connected to the school-sanctioned event, and was student-generated speech, then the intermediate standard of review of *Tinker v. Des Moines Independent Community School District* would apply, even if the speech conflicted with the educational mission of the school.[89]

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81 515 U.S. 472, 477–87 (1995).

82 *Id.* at 474–75.

83 *Id.* at 484.

84 *See generally* KELSO & KELSO, *supra* note 23, at 1620–26.

85 551 U.S. 393, 401–10 (2007).

86 *Id.* at 397.

87 *Id.* at 403.

88 *Id.* at 422–25. (Alito, J., joined by Kennedy, J., concurring).

89 *Id.* (Alito, J., joined by Kennedy, J., concurring) (citing Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969)).

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,[90] Chief Justice Roberts delivered the opinion of the Court, upholding the Solomon Amendment. That Act cut off federal funds to institutions that deny military recruiters access equal to that provided by the institution to any other employer.[91] Deferring to judgments of the legislative branch, the Chief Justice said that Congress could have ordered schools to accept military recruiters and so could also accomplish that result by conditions on spending. The Act did not violate the plaintiff law schools' freedom of speech, said the Chief Justice, because the schools need not say anything; they need not agree with any speech of recruiters; and they are not restricted in what they may say about the military's policies.[92]

Almost all of Justice Kennedy's opinions, as a modern natural law judge, make an effort to connect his reasoning with some general principles of constitutional law, such as the separation of powers or the need to protect liberty. In order to help Justice Kennedy decide a close case, an advocate would be well advised to seek such connections because Kennedy's view prevailed in all twenty-five of the 5–4 cases decided in the 2006 Term of the Court, and he remains the key swing vote on the Court today.[93] There follows a few examples of how Justice Kennedy's reasoning differs somewhat from that of his formalist, Holmesian, or instrumentalist colleagues.

In *Lujan v. Defenders of Wildlife*,[94] Justice Scalia, writing for the Court, said that Congress could not create standing in "any person" to bring an action to enjoin any government instrumentality alleged to be in violation of the Endangered Species Act.[95] Scalia said the literal text of the Constitution provides that it is the President's duty to "take Care that the Laws be faithfully executed."[96] Rejecting such literalism and adopting a view consistent with precedents, Justice Kennedy, concurring in the judgment, joined by Justice Souter, said that Congress could identify an injury it seeks to vindicate and relate that injury to a class of persons entitled to bring suit.[97] But he agreed with Justice Scalia that the individuals had to establish a clear injury in fact. If a suit were allowed without requiring concrete injury, the vitality of the adversarial process would not be preserved, and the Judicial Branch would not be confined to its limited role in the constitutional framework of government.[98]

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90 547 U.S. 47, 51–70 (2006).

91 *Id.* at 55.

92 *Id.* at 60.

93 *See generally The Statistics*, 121 HARV. L. REV. 436, 442 (2007–08); Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2d 335, 335 (2006).

94 504 U.S. 555, 573–77 (1992); *id.* at 579–80 (Kennedy, J., joined by Souter, J., concurring).

95 *Id.* at 557–58.

96 *Id.* at 577.

97 *Id.* at 579–81 (Kennedy, J., joined by Souter, J., concurring).

98 *Id.* at 581 (Kennedy, J., concurring).

In *Clinton v. City of New York*,[99] the Court invalidated the Line Item Veto Act, saying that the Constitution did not authorize the President to repeal or amend parts of duly enacted statutes. Justice Stevens' opinion for the Court emphasized that the procedures for enactment of federal legislation, which did not authorize such action, were the product of great debates and compromises that produced the Constitution.[100] Justice Kennedy, concurring, provided further reasoned elaboration of the principle behind such a view. He noted that a law which gives the President sole ability to favor one group or another threatens liberty as does any concentration of power in the hands of a single branch.[101] The idea and promise of the separation of powers doctrine is that one branch of government ought not possess the power to shape the people's destiny without a sufficient check from the other two.[102]

In *Grutter v. Bollinger*,[103] a 5–4 Court upheld the affirmative action program in student admissions at the University of Michigan Law School.[104] The majority said that it was applying strict scrutiny, but, in doing so, said that it deferred to the law school's educational judgment in making academic decisions.[105] Justice Kennedy, dissenting, said that when strict scrutiny is properly applied to a university admissions program that is attempting to attain a critical mass of minority students, deference should not be given with respect to the methods by which individual consideration of applicants is preserved. He said that the law school had made no effort to guard against the danger that race would become the predominant factor as the school neared the end of the admissions season.[106] To Kennedy, giving deference and not closely examining the evidence merely because of a policy preference in favor of race-based affirmative action, such as occurred in the majority opinion, joined by instrumentalist Justices Stevens, Ginsburg, and Breyer, was a departure from strict scrutiny, and would perpetuate the hostilities that proper consideration of race was designed to avoid.[107] Kennedy similarly applied standard strict scrutiny to strike down the school's affirmative action program in *Parents Involved in Community Schools v. Seattle School District No. 1*,[108] while departing from the formalist reasoning of Justice Scalia that any affirmative action program violates the liter-

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99 524 U.S. 417, 438–49 (1998).

100 *Id.* at 439.

101 *Id.* at 451 (Kennedy, J., concurring).

102 *Id.* at 450–52 (Kennedy, J., concurring).

103 539 U.S. 306, 322–36 (2003).

104 *Id.* at 343–44.

105 *Id.* at 326.

106 *Id.* at 391 (Kennedy, J., dissenting).

107 *Id.* at 388–95 (Kennedy, J., dissenting).

108 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment). On Justice Scalia's views, *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in the judgment).

al command for equal treatment expressed in the Equal Protection Clause. In *Romer v. Evans*,[109] Justice Kennedy pointed out that the Court needed to reconcile the principle that no person shall be denied equal protection of the law with the practical need that most legislation classifies for one purpose or another. The Court's precedents reflect this balance by providing that if a law neither burdens a fundamental right nor targets a suspect class, a legislative classification will be upheld so long as it bears a rational relation to a legitimate end.[110] Applying that standard, Justice Kennedy invalidated Colorado's Amendment 2, which, as interpreted by Justice Kennedy and the other Justices in the majority, operated to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.[111] Kennedy concluded that the law was so broad that it lacked a rational relationship to any legitimate interests. He said that the law was so far removed from the state's expressed concerns about liberties of landlords or employers who have personal or religious objections to homosexuality that it is impossible to credit those alleged objectives, and therefore the law only reflected animus toward gays and lesbians.[112] Following a long line of precedents, which had held that mere animus towards groups is an illegitimate interest,[113] the Colorado Amendment was therefore held unconstitutional.

In *Lawrence v. Texas*,[114] Justice Kennedy wrote for the Court that Texas could not make homosexual sodomy a criminal offence.[115] For a majority comprised of instrumentalist Justices Stevens, Ginsburg, and Breyer, and natural law Justices Kennedy and Souter, Kennedy held that intimate decisions concerning physical relationships are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment, and there is no legitimate state interest which could justify the intrusion of this law into the personal and private life of individuals where the criminal barrier does not involve minors, persons who might be injured or coerced, public conduct, prostitution, or a formal recognition of relationships, and which does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homo-

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109 517 U.S. 620, 627–35 (1996).

110 *Id.* at 633.

111 *Id.* at 635–36.

112 *Id.* at 635.

113 *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985) (holding that prejudice against the mentally impaired an illegitimate governmental interest); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that prejudice against interracial marriage an illegitimate governmental interest); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (holding that animus toward "hippies" wishing to live in a commune an illegitimate governmental interest).

114 539 U.S. 558, 566–72, 575 (2003) (Kennedy, J., opinion for the Court).

115 *Id.* at 575–77.

sexual lifestyle.[116] In defending this result, Justice Kennedy wrote that a reasoned elaboration of the Court's precedents

> show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex . . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres . . . . [T]his demeans the lives of homosexual persons.[117]

In reaching this conclusion, Justice Kennedy held that the state had no legitimate interest in regulating their consensual sexual practices, and that any state regulation reflected mere "animus" toward them.[118] Justice Kennedy relied in part upon broader arguments of social practice, including the "values we share with a wider civilization," and opinions of "the European Court of Human Rights."[119] He further noted that, while twenty-four states and the Districts of Columbia had statutes banning sodomy in 1983, by 2003 legislative practice had changed, with only nine states banning sodomy generally and four states, including Texas, banning only homosexual sodomy.[120]

Adopting a greater focus on historical customs and traditions, typical for a formalist judge focused on contemporaneous sources of meaning existing at the time a constitutional provision was ratified, and reflecting a greater focus on deference to government, typical for a Holmesian judge, Justice Scalia stated in his dissent, joined by formalist Justice Thomas and Holmesian Chief Justice Rehnquist,

> [A]n "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]". . . . Many Americans [still] do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral.[121]

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116 *Id.* at 578.

117 *Id.* at 572–75.

118 *Id.* at 568–69.

119 *Id.* at 573.

120 *Lawrence*, 539 U.S. at 570–98.

121 *Id.* at 598, 602 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

Perhaps the clearest difference between the four styles of interpretation appeared in *Planned Parenthood v. Casey*.[122] There, in a 5–4 decision, the Court decided not to overrule *Roe v. Wade*. Justices Scalia, with Justices Rehnquist, White, and Thomas, dissented on that matter. Adopting a formalist approach, Justice Scalia said that the Constitution does not protect a fundamental liberty to abort an unborn child because of two facts: "(1) the Constitution says absolutely nothing about it [formalist focus on literal text], and (2) the longstanding traditions of American society have permitted it to be legally proscribed [formalist focus on historical traditions]."[123]

The same Justices also joined in a dissent by Chief Justice Rehnquist.[124] That dissent tracked Justices Rehnquist and White's Holmesian deference-to-government dissents in *Roe* twenty years earlier. The fact that a sizable number of states as a matter of legislative and executive practice banned abortion between 1868 and 1973 formed the basis of Justice White's and Justice Rehnquist's Holmesian dissents in *Roe*, given the great deference of Holmesians to legislative and executive practice. Justice Rehnquist noted in his dissent in *Roe*:

> By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and 'has remained substantially unchanged to the present time.'[125]

Justice White noted in his dissent in *Roe*'s companion case, *Doe v. Bolton*:

> The upshot [of *Roe*] is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. . . . This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.[126]

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[122] 505 U.S. 833 (1992). For a fuller discussion of the four decision-making styles as reflected in *Casey*, *see* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637 (2002).

[123] *Casey*, 505 U.S. at 980 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

[124] *Id.* at 952 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., dissenting).

[125] Roe v. Wade, 410 U.S. 113, 176–77 (1973) (Rehnquist, J., dissenting).

[126] 410 U.S. 219, 222 (White, J., joined by Rehnquist, J., dissenting).

Agreeing with the instrumentalist approach of *Roe*, Justice Blackmun would have had the Court not disturb *Roe*'s holding in any respect.[127] Justice Stevens, also supporting *Roe*, said that it protected a woman's freedom to decide matters of the highest privacy and most personal nature.[128]

The outcome of the case thus depended on the views of Justices O'Connor, Kennedy, and Souter. These three Justices joined in a rare joint opinion, parts of which were likely authored by each of the three Justices, but the opinion was not specifically authored by any one Justice. The joint opinion opened by rejecting a formalist view that the textually specific protections of the Bill of Rights and the customs and traditions of states at the time of ratification of the Fourteenth Amendment mark the outer limits of liberty protected by due process. Ultimately, they said, it comes down to "reasoned judgment" — the hallmark of the natural law style.[129] Attempting to describe the central core of privacy doctrine, the joint opinion said:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. . . . 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.[130]

As to whether, with respect to abortion, a state can have an interest sufficient to proscribe it entirely, the joint opinion said that a woman's suffering is too intimate and personal for the state to insist, without more, upon its own vision of a woman's role. With respect to reservations about reaffirming the central holding of *Roe*, the authors said they were outweighed by their analysis of individual liberty combined with the force of *stare decisis*. Here, *stare decisis* was not outweighed by any concern about whether *Roe v. Wade* was wrongly decided, because the case has not proved unworkable; people have relied on the decision; no evolution of legal principle had weakened its doctrinal footings; its

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127 Planned Parenthood v. Casey, 505 U.S. 833, 923–24 (Blackmun, J., concurring in part, dissenting in part, and concurring in judgment).

128 *Id.* at 911–15 (1992) (Stevens, J., concurring in part and dissenting in part). The instrumentalist nature of Justice Blackmun's opinion in *Roe* is addressed more fully at KELSO & KELSO, *supra* note 23, at 1267–70.

129 *See Casey*, 505 U.S. at 849.

130 *Id.* at 851 (joint opinion of Justices O'Connor, Kennedy, and Souter).

factual underpinnings remain intact; it has been expressly reaffirmed several times; and overruling might be perceived as a surrender to political pressure.[131]

Having refused to overrule the central principle that a woman has a right to terminate her pregnancy before viability, the joint opinion substituted an "undue burden" test for determining when the fundamental right had been violated — the question being whether a state regulation has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."[132] The opinion then applied that test to the state law in question, striking down a requirement of spousal notification, but upholding, under rational review, requirements of written informed consent, providing certain information to the patient, a twenty-four-hour waiting period, required record keeping, and a parental consent provision for women under eighteen, with a judicial bypass.[133]

In contrast to this approach, the instrumentalist opinions of Justices Stevens and Blackmun in *Planned Parenthood v. Casey* followed *Roe v. Wade* in its entirety, making every burden on abortion rights subject to strict scrutiny. This constitutionalized, under strict scrutiny, all regulations on abortion, following *Roe*'s concern about specific harm if a pro-choice position were not adopted.[134] This approach differed from the natural law approach of the joint opinion in *Casey*, where the Court did not sit as a super-legislature regarding all aspects of abortion regulation. Thus, the specific harm paragraph in *Roe* was not present in Justices O'Connor, Kennedy, and Souter's joint opinion in *Casey*, and not every regulation of abortion was constitutionalized under *Roe*'s strict scrutiny approach.[135]

More generally, the importance of the undue burden analysis in the joint opinion in *Casey* was to ensure that not every abortion regulation triggered strict scrutiny, and thus the Court did not act as a policy-making super-legislature, second-guessing every aspect of abortion regulation — an approach more like an instrumentalist, social policy style of decision-making. Rather, strict scrutiny was restricted in *Casey* to protecting the core principle of personal liberty from undue burdens.

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131 *See generally id.* at 854–64. Under this approach, there is a heavy burden to justify overruling a precedent. *See generally* R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing With Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973 (1996).

132 *Casey*, 505 U.S. at 877.

133 *See generally id.* at 874–901.

134 *Id.* at 917 (Stevens, J., concurring in part and dissenting in part); *id.* at 929–34 (Blackmun, J., concurring in part and dissenting in part); *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (Blackmun, J., for the Court) ("Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care.").

135 *Compare Casey*, 505 U.S. at 934–40 (Blackmun, J., opinion) (strict scrutiny applied to all of the legislative regulations in *Casey*), *with id.* at 879–901 (joint opinion in *Casey*) (rational review applied to less than undue burdens on abortion choice; strict scrutiny applied only to undue burdens).

It could be argued, given the literal text in *Casey*, which stated that "[i]n our considered judgment, an undue burden is an unconstitutional burden,"[136] that the joint opinion in *Casey* summarily concluded that the spousal notification provision was unconstitutional once it was held to be an undue burden. The better analysis of *Casey*, consistent with the general structure of fundamental rights analysis, is that when the joint opinion stated it was upholding the core holding of *Roe*, that meant a court should apply *Roe*'s strict scrutiny analysis to undue burdens on abortion rights. This would mean that where the state has a compelling interest to regulate, such as to protect maternal health from the first trimester on, or to protect pre-natal life after viability, a narrowly tailored statute directly related to advancing that interest and employing the least burdensome effective alternative would be constitutional even if it placed a substantial obstacle in the path of the woman seeking to obtain an abortion.

In light of the four methods of decision-making, Justice Scalia and Bryan Garner could have included several additional items in their section on the General Principles of Argumentation. Addressed to Holmesians, one would be "Invite consideration of the extent to which deference to governmental decisionmakers is appropriate." Addressed to natural law Justices, a second would be "Advise on how your position links to basic legal principles and a reasoned elaboration of the law." A third would be "Advise how your position is consistent with existing judicial precedents or can meet the heavy burden of justifying the overruling of precedent."[137] And a fourth, appropriate for a formalist, as well as for a Holmesian or natural law judge, and perhaps implicit in Scalia and Garner's book, but useful to state explicitly, would be "Invite consideration of the extent to which it is important that the law be precise and predictable." That consideration is one on which formalist, Holmesian, and natural law judges all agree.[138]

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[136] *Id.* at 877.

[137] On the reasons to overrule a precedent, and the heavy burden a natural law judge requires before overruling, *see supra* note 131 and accompanying text.

[138] *See generally* KELSO & KELSO, *supra* note 23, at 40 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)); *id.* at 42 (citing Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. L.J. 427, 456 (1990) ("Holmes believed a judge could do a number of things to improve the law within the limits imposed by his society's prevailing beliefs. First, a judge can increase the effectiveness of current law in achieving its socially desirable consequences by making it more fixed, definite, and certain.")); *id.* at 58 (citing Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1064 (1975) (The doctrine [natural law] demands, we might say, articulate consistency.")).

B. *Professor Quirk and Holmesian Decision-Making*

In Courts & Congress, Professor William Quirk presents a theory about how the federal government works, showing its unfortunate consequences, and calling on the American people to do something that might improve the situation.[139] Quirk's theory is that in order not to risk incumbency, the members of Congress have abandoned to the President their responsibilities for matters relating to war and peace, and have allowed the Court to be the final word on the most important cultural and social controversies — even though Congress could control the Court by using the Exceptions and Regulations Clause. An unfortunate consequence of all this, says Quirk, is that the people are not controlling policy through their representatives in Congress, as was intended by the framers. Instead, foreign affairs are largely in the hands of one person, and domestic affairs are left to unelected Justices. Thus, the American people are governed by an unwritten Constitution, which Quirk calls "The Happy Convention."[140]

Professor Quirk is concerned that our society, whose Constitution assumes that sovereignty is in the people, is becoming "the first historical example of a majority of self-governing people voluntarily turning over their power to some guardians" — the guardians being the President and the Supreme Court rather than the Congress, which was intended to be the main outlet for the people's power.[141] The main goals of Quirk's book are (1) to alert the people to the great power they were intended to have in Congress, and then (2) to suggest means for bringing about a better separation of powers so that Congress is not left to concentrate on its favorite power — spending money.[142]

Quirk explains that since Congress has been so quiescent, the political struggle over wartime issues and other foreign policy matters has become largely a struggle between the President and the Court. The latest round has gone to the Court, which held 5–4 in *Boumediene v. Bush*[143] that aliens charged with being enemy belligerents and detained at Guantanamo Bay are entitled to bring

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139 QUIRK, *supra* note 5. William Quirk is a Professor of Law, University of South Carolina School of Law.

140 Quirk states, "The new, unwritten constitution is called here the *Happy Convention*. The *Happy Convention* is an informal rearrangement of government powers by which each of the three branches assigns many of its constitutional responsibilities to other branches." *Id.* at 2.

141 *Id.* at 31.

142 Quirk summarizes his theme as follows:

> Congress, under the *Convention*, gives the Court the last word on the country's cultural, social, and moral issues. It gives the President a largely free hand in foreign affairs, going to war, and national security. The Court and president are happy to take on additional power. Congress retains the powers it wants, *e.g.*, spending, which help keep its members in office — but it outsources its responsibilities.

Id. at 101.

143 553 U.S. ___, 128 S. Ct. 2229 (2008).

habeas corpus in the federal courts because the military commissions set up by Congress, at the request of the President, did not provide procedures adequate to be a substitute for habeas corpus.

Quirk suggests several interpretations of the Constitution that would help make it easier for the federal government to overcome the Happy Convention. To begin with, the Supreme Court's opinion in *Marbury v. Madison*[144] should be understood, as Quirk says it was by President Lincoln, as establishing that in a case before the Court, the Court has the duty and power of deciding what was constitutional. However, the other branches are not bound by that decision.[145]

Next, Quirk suggests that Congress should feel free to strip the Court of appellate jurisdiction in many situations. In three Appendices he tells the story of a number of strippers that were enacted by Congress and upheld by the Court. As for *United States v. Klein*,[146] which some have interpreted as holding that the Exceptions and Regulations Clause must be accommodated with other provisions in the Constitution to insure that Congress, by stripping the Court of jurisdiction, does not deprive the Court of its constitutional role to interpret the Constitution,[147] Quirk appears to approve a statement by current Chief Justice Roberts, who, while serving as a special assistant to the Attorney General, wrote that the Act in *Klein* "was unconstitutional because it granted the Court jurisdiction but then limited the Court's consideration of the relevant law."[148] As thus interpreted, the decision would have little relevance to the usual stripper bill.

The book is an interesting read because Professor Quirk supplies so much historical evidence in support of his conclusions. For those who demand thoroughly balanced presentations on political issues, there will be disappointment. On the other hand, for those who want to see what can be said in favor of a change in relationships between Congress and the Court and, as well, the President, and to what substantive policies this might lead, there is much to enjoy. For example, Quirk states flatly, "The *Happy Convention*'s debt habits will

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144 5 U.S. (1 Cranch) 137 (1803).

145 QUIRK, *supra* note 5 (discussing Abraham Lincoln, First Inaugural Address, March 4, 1861 (cited *in* 4 BASLER, THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (1953) ("[T]he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased, to be their own rules, having, to that extent, practically resigned their government into the hands of that eminent tribunal.").

146 80 U.S. (13 Wall.) 128 (1871).

147 *See generally* Henry Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialetic*, 66 HARV. L. REV. 1362 (1953); Leonard G. Ratner, *Congressional Power Over the Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 1057 (1961); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982).

148 QUIRK, *supra* note 5, at 288.

bankrupt the country."[149] Again, "The *Happy Convention* didn't invent the basic deceptions built into the Social Security system, but it transformed a middle class irritant into a major hit."[150]

Despite all of Quirk's talk about the need for change, one senses that Quirk does not feel that he is beginning a movement with much chance for success in modifying the *Happy Convention*. In a particularly poignant paragraph opening Chapter 6, entitled "Life under the *Happy Convention*," Quirk states:

> A citizen living under the *Happy Convention* leads a life of frustration. The Court has no respect for the majority's values so culture war issues explode like roadside bombs. The citizen might well prefer not to hear about homosexual rights, flag burning, Ten Commandment plaques, abortion, atheist rights, and the death penalty for minors. But the citizen has no choice. The press, full of volatile, intemperate debate, intrudes on his life. This is not only distasteful but pointless, considering that the citizen, if he doesn't like what the Court has done, can't do anything about it. The electoral process, under the *Happy Convention*, is next to useless. The constitutional amendment process, under the *Convention*, is dead as a doornail. The Court's rulings, under the *Convention*, cannot be changed.[151]

Since the modern era of Supreme Court activism was inaugurated by *Brown v. Board of Education* in 1954,[152] Quirk's concern has been echoed by a number of other writers,[153] including Professor Louis Lusky in his 1993 book, Our Nine Tribunes: The Supreme Court in Modern America.[154] As Professor Lusky indicates in his book, the debate began even earlier in 1938 in the famous footnote 4 in *United States v. Carolene Products, Inc.*[155] In this famous footnote, the Supreme Court sketched three types of situations in which the normal presumption of constitutionality and deference to the legislature might not be appropriate:

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149 *Id.* at 135.

150 *Id.* at 139.

151 *Id.* at 129.

152 Brown v. Board of Education, 347 U.S. 483 (1954).

153 *See generally* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1986); JOHN DENTON CARTER, THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM (1973); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); LOUIS LUSKY, BY WHAT RIGHT? (1975).

154 LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA (1993).

155 304 U.S. 144, 152 n.4 (1938).

> (1) There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within specific prohibitions of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> (2) It is unnecessary to consider now whether legislation restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> (3) Nor need we enquire whether . . . statutes directed against particular religious, or national, or racial minorities. . . . [or] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[156]

As Professor Lusky pointed out, paragraph one of footnote 4 in Justice Stone's opinion in *Carolene Products* was added at the suggestion of Chief Justice Hughes, and rests on different premises than paragraphs two and three. Paragraphs two and three of footnote 4 affirm "self-government" principles: paragraph two affirms a commitment to government "by the people[,]" and paragraph three focuses on government "by the whole people[,]" which includes discrete and insular minorities. Paragraph one's commitment to specific protections in the Constitution, particularly the first ten amendments that focus mostly on protecting individuals from the government, and which are applicable to the states through being incorporated into the Fourteenth Amendment Due Process Clause, is based more on "individual autonomy" concerns, not "self-government."[157]

From this perspective, Professor Quirk's and Lusky's concerns really come down to whether one thinks the framers and ratifiers were more concerned only about the Court interpreting the Constitution to advance self-government, and deferring to the other political branches in other cases (and, thus, support heightened Court scrutiny based only on *Carolene Products* footnote 4 paragraphs two and three), or whether one thinks the framers believed individuals had natural law autonomy rights to be free from government regulation which they expected the Court to protect (as in *Carolene Products* footnote 4 para-

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156 *Id.* (citations omitted).

157 *See* LUSKY, *supra* note 154, at 123–30.

graph one). Judges and commentators who believe the former tend to share Justice Holmes' strong posture of judicial deference to government, reflected on the recent Supreme Court in opinions by Chief Justices Rehnquist and Roberts. Judges and commentators, who share the latter premise, tend to approach constitutional doctrine more from the natural law perspective of Chief Justice John Marshall and Justice Story, reflected on the recent Supreme Court in opinions by Justices O'Connor, Kennedy, and Souter.[158]

As Quirk's critique of the Supreme Court implicitly acknowledges, since *Brown v. Board of Education* in 1954, the Court has adopted more the natural law approach, rather than the Holmesian approach, to constitutional interpretation. By so doing, the Court has increased autonomy rights for individuals from government, including rights of minorities not to suffer pervasive discrimination, have better assured individuals of their freedom to speak, and have provided criminal defendants with some rights to protect them from unjustified convictions.

In our view, Quirk's book would have been a better source for thoughtful appraisal of the current governmental situation in the United States if Quirk had presented arguments "the other way" regarding some of these consequences of modern Supreme Court decision-making with as much detail and gusto as he presented his own views and the historical events he believes show support for those views. On the other hand, the author has shown that he is not intimidated by political correctness or by the aura of respectability associated with many organizations. He asserts, for example, "The ABA and the rest of the legal establishment have not helped the public understand the Constitution."[159] He has called the shots as he sees them. And, had he engaged in such a detailed presentation of opposing views, his book would have been a tome instead of a readable collection of generalities plus historical support that now appears in its relatively short 211 pages of main text, followed by eighty-three pages of historical appendices on stripping legislation.

The bottom line is that a reader already tending to believe Quirk's main thesis will have that belief strengthened by this book. However, a reader tending the other way will not likely be persuaded to change his or her mind because the arguments which might be used to evaluate, qualify, or weaken Quirk's positions, are not dealt with in this book. Nonetheless, even disbelievers or doubters still might enjoy reading about what can be said against the "Happy Convention" by a talented writer who enjoys dealing with history.

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158 *See generally supra* notes 75–136 and accompanying text (comparing the Holmesian versus natural law style of interpretation in specific cases). For further discussion of the natural law versus Holmesian difference in constitutional interpretation in the context of the issues raised by Professors Quirk and Lusky, see Charles D. Kelso & R. Randall Kelso, *Our Nine Tribunes: A Review of Professor Lusky's Call for Judicial Restraint*, 5 SETON HALL CONST. L.J. 1289 (1995). For discussion of natural law versus Holmesian constitutional interpretation more generally, *see* KELSO & KELSO, *supra* note 23, at 303–24, 354–404.

159 QUIRK, *supra* note 5, at 106.

C. *Professor Farber and Natural Law Versus Instrumentalism*

The Ninth Amendment is part of the Bill of Rights — the first ten Amendments, which in 1833 in *Barron v. Baltimore*[160] were held to be limited to the federal government.[161] The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[162] In his latest book, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, Professor Daniel A. Farber first observes that the Ninth Amendment appears in only one Supreme Court concurring opinion.[163] He then sets forth how he thinks judges should reason when finding limits on government power with aid from the Ninth Amendment.

Farber says that even without overruling *Barron v. Baltimore*, the principles of the Ninth Amendment should apply to restrain powers of the states as well as the federal government. The reason is that those principles are included within the Privileges or Immunities Clause of the Fourteenth Amendment (which Farber abbreviates as the "P or I Clause").[164] The P or I Clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[165] Farber reasons that the Ninth Amendment is an acknowledgment that citizens of the United States have certain retained rights, which are privileges and immunities under both natural law and the Bill of Rights. Thus, they are protected from state action by the P or I Clause.[166] Contra to Farber's analysis, the Supreme Court held, in the *Slaughter-House Cases*, that those privileges or immunities were limited to a citizen's relationships with the federal government, rather than applying the Bill of Rights or other unspecified natural rights against the states.[167]

Consistent with Farber's wishes, the Supreme Court has frequently applied vigorous scrutiny to both federal and state deprivations of certain unenumerated rights or Bill of Rights provisions designated as "fundamental." It has done so, however, under the substantive aspect of the Due Process Clause in the Fifth and Fourteenth Amendments.[168] Farber argues that this reasoning with

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160 32 U.S. (7 Pet.) 243 (1833).

161 *Id.* at 247.

162 U.S. CONST. amend. IX.

163 FARBER, *supra* note 6, at x (citing Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (striking down a ban on counseling the use of contraceptives, applied to a married couple)). Daniel Farber is a Professor of Law, University of California Law School, Berkeley.

164 FARBER, *supra* note 6, at 73.

165 U.S. CONST. amend. XIV, § 1.

166 FARBER, *supra* note 6, at 68–70.

167 83 U.S. 36, 74 (1873).

168 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923) (unenu-

regard to unenumerated rights is less soundly based than use of the Ninth Amendment because that Amendment explicitly recognizes the existence of such rights. During the time of the framers, those rights were thought to inhere in natural law, as recognized in the Declaration of Independence. Today such rights are increasingly recognized in international law, and in the law and the practices of many other nations, as well as our own.[169]

Farber criticizes conservatives generally, and Justice Scalia in particular, for saying that they are unable to find a meaning in the Ninth Amendment or for refusing to use it from fear of being labeled judicial activists.[170] At the opposite extreme, Farber challenges libertarians who would use the Ninth Amendment to protect a right to do whatever one wants whenever it is wanted.[171] He suggests a method for dealing with the Ninth Amendment that he thinks should produce reasoned decisions.[172] He also explores results from use of that method in dealing with current issues relating to unenumerated rights — some of which have been recognized in Supreme Court opinions, and some of which have yet to be so recognized.[173]

The book is divided into four parts. Part I, on Unwritten Rights and the Constitution, builds on quotations from James Madison, Thomas Jefferson, John Marshall, and Joseph Story to show that during the Founding era the idea of unwritten rights flowing from natural law was supported in many ways, including English common law and the law of nations.[174] The idea was captured in the opening of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness."[175] Farber shows how concern was expressed that the new federal government might have power to invade some of those rights, and that James Madison proposed the Bill of Rights as a defense. The Ninth Amendment was Madison's answer to the "exclusivity argument," that listing certain rights in the Constitution would be understood as a denial of other rights.[176]

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merated rights cases); *see also* Duncan v. Louisiana, 391 U.S. 145 (1968) (summarizing fundamental Bill of Rights provisions).

169 FARBER, *supra* note 6, at 184, 190–91.

170 *Id.* at 10–11. Farber states that Justice Scalia "and company" are "radicals in black robes." *Id.* at 192.

171 *Id.* at 12–13.

172 *Id.* at 108.

173 *See generally id.* at 111–72. The issues Farber discusses include reproductive rights, the end of life, gay rights, education, the right to government protection, the right to travel, and other rights.

174 *Id.* at 25.

175 *Id.* at 22 (citing THE DECLARATION OF INDEPENDENCE).

176 *Id.* at 40–41.

Prior to the Civil War, Congress did little regulating and so there was no reason to raise the Ninth Amendment as a defense to federal regulation. As a result, says Farber, the Ninth Amendment faded from view.[177] After the Civil War there were efforts to abolish slavery and to protect the human rights of former slaves. The Civil War Amendments resulted, and there was a new basis for protecting unenumerated rights against action by the states.

Part II, on Protecting Fundamental Rights, is preceded by Farber making clear that floor debate on the Fourteenth Amendment suggested that the P or I Clause was intended to overrule *Barron v. Baltimore*.[178] In 1873, however, the Court gave the P or I Clause a narrow interpretation in the *Slaughter-House Cases*,[179] saying that the P or I Clause protected only a short list of rights which owed their existence to the Federal government, its National character, its Constitution, or its laws. Supplying a few examples, the Court spoke of coming to the seat of government to assert any claim on the government, free access to its seaports, the privilege of the writ of habeas corpus, the right to use navigable waters, and the right to peacefully assemble and petition government for redress of grievances.[180] When the Court began to expand the protection of unenumerated rights in the 1900s in cases like *Meyer v. Nebraska* (right to teach and learn in English); *Skinner v. Oklahoma* (strict scrutiny of classifications in a compulsory sterilization law); and *Griswold v. Connecticut* (use of contraceptives by married persons),[181] the Court had long since stopped talking about natural law, it had never used the Ninth Amendment, and it settled on the Due Process Clause as the primary source for reasoning about unenumerated rights that could be considered "fundamental," and whose deprivation triggered strict scrutiny.[182]

As for determining what rights are "fundamental," the Court said in the 1930s that the test was whether a right was essential to "ordered liberty," so that abolishing it would violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[183] Since then the Court has gradually softened its test and has enlarged the scope of personal interests that qualify as being fundamental. Farber praises as true to the vision of James Madison and his generation Justice Kennedy's opinion in *Lawrence v. Texas*,[184] where the Court struck down a Texas statute that made homosexual sodomy a crime. Justice Kennedy spoke of intimate, personal choices central to

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177 *Id.* at 46.

178 *Id.* at 68–70 (citing Barron v. Baltimore, 321 U.S. 243, 247–51 (1833)).

179 83 U.S. (16 Wall.) 36, 79–80 (1873).

180 *Id.*

181 *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

182 FARBER, *supra* note 6, at 83.

183 Palko v. Connecticut, 302 U.S. 319, 325 (1937) (citations omitted).

184 539 U.S. 558, 566–75 (2003).

personal dignity and autonomy, and relied on a variety of sources summarized by Farber:

> * The general thrust of the Supreme Court's jurisprudence on privacy issues, which tended to reject interference with intimate relationships;
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> * State court decisions holding sodomy laws unconstitutional under their own state constitutions;
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> * A strong trend toward abolition of sodomy laws by state legislatures;
>
> * Decisions of international human rights tribunals, particularly in Europe, that had rejected sodomy bans.[185]

Farber says that Justice Kennedy's approach is not an invitation to judicial activism. It actually restrains the Court by making it a part of a larger community of courts and lawmakers.[186]

Farber concludes Part II by setting out his own list of criteria for determining when an alleged right deserves Ninth Amendment protection. The list of seven factors that Farber says should be considered in determining under the Ninth Amendment whether a given right is fundamental is as follows:

> * Supreme Court precedent establishing the right or analogous rights;
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> * Connections with specific constitutional guarantees;
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> * Long standing, specific traditions upholding the right;
>
> * Contemporary societal consensus about the validity of the right;
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> * Decisions by American lawmakers and judges recognizing the right;
>
> * Broader or more recent American traditions consistent with the right;
>
> * Decisions by international lawmakers and judges recognizing the right.[187]

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185 FARBER, *supra* note 6, at 89.

186 *Id.* at 95.

In Part III, on Applying the Ninth Amendment, Professor Farber considers some specific issues that the Court has or may consider in the future. Using his approach to identifying fundamental rights under the Ninth Amendment, he offers suggestions on how those matters should be resolved. On abortion, Farber says that a state should not be able to ban all abortions before the eighth week,[188] and should not be able to prevent abortions for the life or health of the mother, rape or incest, or because of a deformed fetus.[189] He approves the "undue burden" test of *Casey*.[190]

Regarding the end of life, he would find, with the Court, that there is a right to refuse medical treatment.[191] However, he thinks that not enough is known about the effect of laws barring assisted suicide for the Court to hold today that there is a fundamental right to assisted suicide, at least in the absence of permanent, agonizing pain. Thus, he agrees with the Court's holding in *Washington v. Glucksberg*.[192] He favors the conclusion, in accord with Justice Kennedy's decision in *Lawrence v. Texas*, that homosexual sodomy cannot be criminalized.[193] However, limiting "marriage" to heterosexuals might rationally be justified by a need for greater stability in such relationships because of children. Accordingly, he says, the time has not yet come for finding a fundamental right to same-sex marriage.[194]

Farber unhesitatingly affirms that at least a minimum level of education is a fundamental right that states must provide, as must the federal government in the District of Columbia. Farber disagrees with the Court's failure to hold, in *San Antonio Independent School District v. Rodriguez*, that there is a fundamental right to education.[195] A fundamental right should also be recognized, says Farber, in obtaining protection from violence when a law enforcement official is aware that violence is occurring and has a reasonable opportunity to deal with it.[196]

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187 *Id.* at 108.

188 *Id.* at 113.

189 *Id.* at 114.

190 *Id.* at 115. *See supra* notes 130–136 and accompanying text for a discussion of the "undue burden" test.

191 FARBER, *supra* note 6, at 124.

192 *Id.* at 129 (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

193 *Id.* at 137 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

194 *Id.* at 141.

195 *Id.* at 153 (citing Rodriguez v. San Antonio Indep. Sch. Dist., 411 U.S. 1 (1973) (no right to equal educational funding under the United States Constitution)). The Court has not yet definitively resolved the question of a right to minimal funding, as opposed to equal funding addressed in *Rodriguez*. *See generally* Papasan v. Allain, 478 U.S. 265, 285 (1986) (*Rodriguez* has "not yet definitively settled . . . whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.").

196 FARBER, *supra* note 6, at 139.

According to Farber, there is a fundamental right to travel within a state, between states, and internationally.[197] Going well beyond the cases, he suggests that there is also a fundamental right to possess one's home unless there is a need for building a highway or urban renewal and no feasible and prudent alternative.[198] And the Constitution should give some protection to informational privacy by restricting the government from disclosure of personal information.[199]

In Part IV on Broader Implications, Farber analyzes what kind of decision-making should accompany use of the Ninth Amendment and the P or I Clause to define and protect minority rights. He expresses the matter in a variety of ways, summarized in this statement: Good constitutional decisions involve neither the mechanical application of formal rules nor the freewheeling ways of pure politics. They rely instead on judgment and discretion, which by definition incorporate both flexibility and constraints.[200]

Regarding constraints on the recognition of further unenumerated fundamental rights, Farber mentions the selection process, the isolation of judges, the extensive use of precedent in constitutional law, and a common preference for evolutionary rather than radical change. With regard to citing foreign and international law, Farber points out that this has been done in many Supreme Court opinions since the beginning, and makes sense because "when other capable people are struggling earnestly with the same issues that concern us, it is foolish to ignore their efforts."[201]

Farber closes his book by noting that protecting fundamental rights is one of the great American traditions. It stretches from the Declaration of Independence to Madison's framing of the Ninth Amendment, and from the creation of the Fourteenth Amendment to the Supreme Court's modern case law.[202] It seems clear that Farber's vision for using the Ninth Amendment and the P or I Clause to protect individuals from government action does not signal a campaign for extremely creative extensions of existing law. Speaking of informational privacy, Farber approves of Justice Breyer's position, stating that "it may be useful for courts to take small steps in this area."[203]

Professor Farber has selected a topic not much discussed in legal literature. He has addressed what could be a dry subject in a remarkably readable fashion. The reader is sent back into history, brought forward, presented with a theory of interpretation, and then shown how it can be applied to a variety of fact situations. The basic materials should be familiar to any person who has

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197 *Id.* at 166.

198 *Id.* at 169.

199 *Id.* at 171.

200 *Id.* at 176.

201 *Id.* at 195.

202 *Id.* at 200.

203 *Id.* at 172.

taken a course on constitutional law, but Professor Farber has provided interesting details that would not ordinarily be provided in a basic course.

Fans of Justice Kennedy will enjoy Professor Farber's frequent praise of how Justice Kennedy's views accord with those of the framers. Fans of Justice Scalia may be turned off by Farber's frequent criticism. The underlying tension is of course quite familiar to anyone who has been reading current Supreme Court opinions. Justice Scalia, as well as Justices Thomas and Alito, tend to approach constitutional interpretation as formalists, who believe in a static or fixed Constitution that does not evolve in meaning over time, but rather whose meaning is determined primarily by literal interpretation and respect for historical traditions.[204] Justice Kennedy's approach mirrors the early natural law lawyers', including Chief Justice John Marshall, who believed more in an evolving Constitution based on enlightened reasoning about the natural law principles placed into the Constitution by the framers and ratifiers.[205] A complete theory of current Supreme Court decision-making would have to note that there are two other views regarding constitutional interpretation: (1) the liberal instrumentalism of Justices Stevens, Ginsburg, and Breyer;[206] and (2) the deference to government Holmes-like posture of Chief Justice Roberts.[207]

There is no reason to believe that any of the Justices are not doing their sincere best to discover and apply interpretations of the Constitution in a way which comports with their most deeply held views on the nature of the Constitution and the proper role of the Court. Thus, Professor Farber might well have taken a slightly more temperate view of Justices other than Kennedy. However, he is to be praised for the cautious and reasoned way that he applies his criteria for deciding Ninth Amendment cases. It is clear from those applications, as described above, that his approach does not necessarily lead to a revolution in constitutional law, as he assures his readers several times.[208]

As noted above, Farber indicates that seven factors should be used in determining rights under the Ninth Amendment: (1) precedent, (2) specific constitutional guarantees, (3) long-standing traditions, (4) contemporary societal consensus, (5) legislation, (6) recent traditions, and (7) international lawmaking.[209] A more-structured approach, related to the four styles of deciding used by current Justices, would organize these sources as in Tables 1 and 2 presented in Part II.[210] As those tables indicate, a formalist, like Justices Scalia, Thomas, and Alito, will focus on text, context, and historical sources of constitutional interpretation, believing that only sources contemporaneous with ratification of

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204 *See supra* text accompanying notes 27–29.

205 *See supra* text accompanying notes 33–34.

206 *See supra* text accompanying notes 23–26.

207 *See supra* text accompanying notes 31–32.

208 FARBER, *supra* note 6, at 91, 181, 198.

209 *See supra* text accompanying note 187.

210 *See supra* text accompanying notes 44–48.

a constitutional provision should be used (in Farber's terms, specific guarantees in the Constitution and long-standing historical traditions existing at the time of ratification upholding the right). Under this approach, the Constitution's meaning will be fixed at ratification. For a Holmesian judge, such as Chief Justice Roberts and the late Chief Justice Rehnquist, it is also appropriate to look for the purpose behind a provision and to consider and often defer to subsequent practice (in Farber's terms, legislation by American lawmakers after ratification recognizing the right and broader or more recent American traditions consistent with the right since ratification). For a natural law judge, like Justice Kennedy or former Justices O'Connor and Powell, interpretation begins with the text, context, history, and subsequent practice. However, beyond these sources used by formalists and Holmesians, great weight is also given to precedents, both core holdings of precedent and reasoned elaboration of general principles that can be found in the Constitution or precedents (in Farber's terms, Supreme Court precedent establishing the right or analogous rights; and recent recognition of a right by American judges). Instrumentalist Justices consider all of these sources and, in addition, the predicted consequences of alternative decisions, evaluated in light of prudential or policy considerations (in Farber's terms, contemporary social consensus).[211]

In his list of seven factors, Farber also states that decisions by international lawmakers and judges recognizing a right are also properly considered.[212] For a natural law judge like Justice Kennedy, whose general perspective Farber seems to favor, such international decisions should only be used by American judges to the extent they help the understanding of some general principle that the framers and ratifiers placed into the Constitution, rather than the instrumentalist focus on whether the international decision is merely good public policy. Since many of the framers and ratifiers believed in natural law, many of the individual rights in the Constitution were likely understood to have a universal natural law base.[213]

Perhaps the most relevant impediment to Professor Farber's approach for direct use of the Ninth Amendment by the Court is not the views of formalists, who of course can be expected to oppose this development on grounds that the Ninth Amendment does not literally specify any particular rights, or a Holmesian judge, on grounds the Court should defer to government action unless the unconstitutionality of the law is clear, but the great respect for precedent

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211 *See generally* FARBER, *supra* note 6, at 113–14.

212 *Id.* at 108.

213 *See generally* KELSO & KELSO, *supra* note 23, at 365–66 (citing Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (discussing cases where the Constitution refers to international law or international law is used as a background principle to identify the territorial scope of the Constitution, the powers of the national government, delineate structural relationships within the federal system, or individual rights cases); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 575–83 (2001) (discussing judicial practice from 1789 through the Civil War)).

held by the natural law swing Justice — Justice Kennedy. As Professor Farber indicates, the Supreme Court has never explicitly relied upon the Ninth Amendment as an independent source for recognizing rights.[214] To the extent Professor Farber wishes additional unenumerated fundamental rights to be protected by the Supreme Court, it seems that the Ninth Amendment is more likely to be used, if at all, as "collateral support" for rights developed through expansion of existing substantive due process doctrine (or reinterpretation of the P or I Clause).[215]

Under a "collateral support" view, the Ninth Amendment means just what it says, that is, that the enumeration of certain rights in the Constitution should not be construed to deny or disparage others retained by the people. From this perspective, the Ninth Amendment is a reminder of the background natural law theory that individuals have unalienable rights the government is created to protect.[216] As has been noted,

> The Founding generation disagreed about many things, but the existence of natural rights was not one of them. From James Madison to Roger Sherman, from *The Federalist Papers* to the Antifederalist papers, both supporters and opponents of the Constitution repeatedly affirmed their shared belief in natural rights. Virtually all commentators agree that the [f]ramers and ratifiers of the Bill of Rights believed in natural rights as a general matter.[217]

As Farber indicates, one concern that Madison and others had in drafting the Bill of Rights was that under the maxim of construction, *expressio unius est exclusio alterius* (the expression of one thing implies exclusion of others), the enumeration of certain rights in the Bill of Rights might suggest that the federal government had plenary power over all other matters.[218] Since that view was inconsistent with the intent of the framers and ratifiers that the federal government be a government of limited, delegated power, the Ninth Amendment was an attempt to craft language to prevent federal governmental power from being construed in any broader way. Based on an exhaustive look at the history and precedents of the Ninth Amendment, Professor Kurt Lash has noted:

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214 FARBER, *supra* note 6, at 1–2.

215 That door was partially opened in *Saenz v. Roe*, 526 U.S. 489 (1999) (citizens of the United States have a right protected by the P or I Clause to go to any state they choose and become citizens therein with an equality of rights with every other citizen).

216 *See generally* Randy Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee*, 16 S. ILL. U. L.J. 313 (1992); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

217 Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1974–75 (1991) (citations omitted).

218 *See* FARBER, *supra* note 6, at 33.

> One of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power extended to all matters except those expressly restricted. As Joseph Story would later write in his Commentaries on the Constitution of the United States:
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> > [The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and *é converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.[219]

From this perspective, the Ninth Amendment is a reminder that in interpreting all of the other clauses of the Constitution, including the Bill of Rights and the Civil War Amendments, there is reason to use a natural law theory of interpretation, which supports background natural rights, even if not specifically enumerated in constitutional text. Farber's book promotes this result, but differs from this perspective, since under a "collateral support" view the development of rights will be done primarily under substantive due process analysis, as currently done, and not the Ninth Amendment.

Professor Farber has written an interesting and readable book on a clause in the Constitution not discussed much in the constitutional literature, the Ninth Amendment. While provocative in trying to resuscitate the Ninth Amendment as an independent source of fundamental rights persons may have against state and federal governments, long-standing Supreme Court precedent suggests that the Court will likely continue to develop the fundamental rights doctrine through the Due Process Clauses of the Fifth and Fourteenth Amendments, and not the Ninth Amendment, as Farber advocates.

In addition, no matter which clause of the Constitution is used — Ninth Amendment or Due Process — there is a question of which of Farber's seven factors regarding interpretation a majority of the Supreme Court will adopt in developing a fundamental rights analysis. As indicated above, [220] the seven factors used will depend on whether the controlling votes on the Court are held by formalist, Holmesian, natural law, or instrumentalist Justices. It is unlikely in

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[219] Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 619 (2005) (citing JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898 (Fred B. Rothman & Co. 1991) (1833)).

[220] *See supra* text accompanying notes 209–213.

any near future a majority of the Court will adopt all seven of Farber's factors, reflecting an instrumentalist approach to judicial decision-making. Despite his praise for Justice Kennedy in his book, Kennedy is not likely to make much use in his decision-making of Farber's factor of contemporary views of good social policy, and Kennedy will tend to use international sources not based on whether they appear to be good social policy, but on whether they reflect a natural law principle of justice.[221]

D. Professor Edward Purcell and Instrumentalism

In his book, Originalism, Federalism, and the American Constitutional Enterprise,[222] Professor Edward Purcell notes that the relationship between the federal government and the states has changed from time to time since the Constitution was ratified. He concludes that this was inevitable and not a bad thing. The challenge facing government officials has always been to determine what is most appropriate for current conditions. Purcell adds that even if one believes in a static Constitution, as do formalists, and that the Constitution should be interpreted as understood by the framers and ratifiers, they did not have a single agreed-upon understanding of what relationships had been created between the federal government and the states or whether certain subjects were exclusively for the states.[223]

This view regarding the intent of the framers and ratifiers mirrors the instrumentalist view of Justice Brennan, and others, that a formalist style of interpretation is impractical, without regard to whether it is sound as a theoretical matter. As Justice Brennan once noted about historical intent, "Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality."[224]

Purcell first inquires into why there was no clear understanding at the beginning.[225] Then Purcell considers the consequences of that fact for American legal history.[226] He concludes with implications for relationships today

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221 *See generally* KELSO & KELSO, *supra* note 23, at 12, 54–62, 354–404 (discussing the natural law theory of interpretation, and its use by, among others, Chief Justice John Marshall, Justice Story, and, more recently, to various degrees, Justices Powell, O'Connor, Kennedy, and Souter). The instrumentalist leanings of Justice Souter, perhaps closer to Professor Farber's views, are discussed at *id.* at 400–04. The non-instrumentalist, and occasionally formalist, leanings of Justice Kennedy are discussed at *id.* at 393–94.

222 PURCELL, *supra* note 7. Purcell is the Joseph Solomon Distinguished Professor, New York Law School.

223 *Id.* at 17.

224 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

225 PURCELL, *supra* note 7, at 17–20 (Part I. "Structural Intrinsics").

226 *Id.* at 85 (Part II. "Consequential Dynamics").

within and between the states, and between the states and the federal government.[227]

In Part I ("Structural Intrinsics"), Purcell provides copious contemporary quotations by framers and others which show that there was no single original understanding of the Constitution regarding issues of federalism.[228] Further, it is unlikely that there could have been any such understanding because of four characteristics of the Constitution regarding relationships between the federal government and the states. Those four characteristics, says Purcell, were that federalism in the Constitution was double blurred, fractionated, instrumental, and contingent.[229] Purcell's explanations of these four characterizations follow.

"Double blurred" refers to the fact that the Constitution recognized two levels of government (states and federal) which had overlapping powers whose boundaries were not clearly identified.[230] "Fractionated" refers to the fact that the Constitution created a federal government that had three different sources of power that could affect the states differently from time to time.[231] The Constitution is "Instrumental" in that from concern about power abuses by different factions, the Constitution has built-in devices to allow one level or branch to check another.[232] Constitutional provisions were "Contingent" in that the Constitution contained many concepts that would inevitably evolve over time, such as "common Defence," "general Welfare," and "Commerce," and it provided for its own amendment.[233] Thus, Purcell concludes that there were too many ambiguities and elasticities to define any single and correct balance between states and the nation.[234] And even if there were at the beginning, it would have been impossible to maintain a definitive boundary between state and national authorities in view of rapidly changing conditions in technology, business, and social arrangements.[235]

The depth of Purcell's scholarship is most evident in Part II ("Consequential Dynamics"). Writing from a broad general perspective but including pin-point detail, Purcell considers events relating to federalism from four different perspectives. First, there were efforts in the political sphere that involved relations within and among the states to compete and to cooperate for various ends thought desirable.[236] Second, there were activities by each of the branches

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227 *Id.* at 189 (Part III. "Conclusion").

228 *Id.* at 17–20.

229 *Id.* at 6.

230 *Id.* at 17.

231 *Id.* at 38.

232 *Id.* at 53.

233 *Id.* at 69.

234 *Id.* at 85.

235 *Id.* at 76.

236 *Id.* at 86–93.

of the federal government, including administrative agencies, to influence events that involved the states.[237] Third, there have been various competing theories of federalism in the courts and in the political events that influence who serves on the courts.[238] Finally, he discusses views on the values alleged to be served by federalism, e.g., by leaving certain matters to the states as policy or as constitutionally required.[239]

The first of three main values asserted by some to be served by federalism is "preserving liberty."[240] Purcell points out, however, that the United States government was designed to protect liberty and to be the remedy for local abuses.[241] And, as for the practical workings of federalism, the states failed to act as checks in World War I years, in the aftermath of Pearl Harbor, or during the McCarthy era. Indeed, the states indulged in parallel abuses.[242]

The second value advanced for federalism is that it supports the states as "independent laboratories" for constructive experiments. In response, Purcell noted that this offers no help in identifying specific lines between state and national authority, and that the Constitution was intended to prevent experimentation with the fundamental rights of individuals.[243]

A third value offered for federalism is that decentralized government protects distinctly "local" values and interests. However, from the Civil War onward there has been much movement toward homogenization in the United States. Americans now rely on the same sources for information, education, and entertainment.[244] The disappearance of authentically local ideas has been evidenced in the development of uniform laws that respond to integrated and expanding national and international markets. Also, some of the local values held most firmly in the 18th century, slavery among them, have been repudiated by constitutional provisions, national legislation, Supreme Court rulings, and a developing national culture.[245] Further, local issues that absorb contemporary Americans increasingly are manifestations of problems common across the nation.[246]

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237 *Id.* at 99–108.

238 *Id.* at 159–60.

239 *Id.* at 161–86.

240 *Id.* at 162.

241 *Id.* at 163.

242 *Id.* at 164.

243 *Id.* at 165.

244 *Id.* at 169.

245 *Id.* at 173.

246 *Id.* at 175.

Another change, Purcell says, is that the early concept of "dual federalism" — that there were two sovereigns with specific areas of authority — evolved into "cooperative federalism" — where federal power is elastic.[247] The levels of government have overlapping interests and functions and they rely on political parties and pressure groups to maintain the system's working boundaries.[248]

In his Part III ("Conclusion"), Purcell does not criticize the outcome of any particular theory of federalism. Instead, he calls for any decision on federalism to be reasoned in terms of the ideals of the Constitution and the anticipated practical consequences in terms of such values as political democracy and individual freedom. He suggests that for federalism issues, as generally in constitutional law, decisions are based on personal viewpoints and interests. He criticizes originalists insofar as their reasoning is based upon a conclusion that the Constitution sets forth a specific theory on how the national government is related to state governments. But he admits that he cannot criticize their conclusions to any greater degree than the conclusions of non-originalists because both are based on personal viewpoints and both, presumably, are sincere efforts to decide rightly.[249]

Purcell concludes by advising that the Court could increase the likelihood of reaching wise results in federalism cases by following three general cautions.[250] First, it should recognize that such cases call for careful, flexible, and pragmatic line-drawing. Second, the Court should carefully analyze and explain likely consequences. Third, in determining whether any particular decision is consistent with the "values of federalism," the Court should determine whether and how the decision would affect both individual rights and open democratic processes. Only in this way can the Court demonstrate why its federalism decisions are both practically necessary and generally benevolent.

By grounding his jurisprudence ultimately on such pragmatic arguments of good policy, Purcell adopts, at the end of the day, an instrumentalist approach to constitutional interpretation. Purcell asserts, and probably correctly, that no line between the national government and the states could be drawn in terms of subjects that are "truly local" or "traditional,"[251] as Justice Rehnquist attempted to do in *National League of Cities v. Usery*.[252] *National League* was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*,[253] where the Court held that, despite the Tenth Amendment, the only federalism limit on Congress's power to regulate states directly was the Nation's political process.

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247 *Id.* at 178–79.

248 *Id.* at 178.

249 *Id.* at 201.

250 *Id.* at 204.

251 *See id.* at 169–73.

252 426 U.S. 833, 849–55 (1976); PURCELL, *supra* note 7, at 125.

253 469 U.S. 528, 530–31 (1985).

However, had the Court held consistently to the framing era's "dual theory of sovereignty" — elaborated in a natural law way consistent with the vision of Chief Justice Marshall and the Marshall Court — the Court could have bequeathed to the Nation a workable vision of federalism — a view that might have survived the many changes reviewed by Purcell.

Under the "dual theory of sovereignty," as explained by Justice Kennedy in *U.S. Term Limits, Inc. v. Thornton*,[254] the genius of our founding generation was to split sovereignty in the United States system into two parts: states and federal government. As Chief Justice Marshall had noted in *McCulloch v. Maryland*,[255] the founding generation established dual systems of government — states and federal government — with each deriving its authority independently from the consent of the people. The Constitution, after all, was adopted, as stated in the first three words of the Constitution, by "We, the People," not "We, the States." Further, the Constitution was ratified in special state conventions elected specially by the people for that purpose, not ratified by the existing state legislatures. Thus, in our system, there are two sovereign entities, the federal government and the states, both created by "the People," which are linked by the Constitution's Supremacy Clause of Article VI, § 2.

Under this dual theory of sovereignty, the federal government can regulate both individuals and states where constitutional power exists under the United States Constitution, and states can regulate individuals and the federal government under their own state constitutions and the United States Constitution consistent with doctrines of intergovernmental immunity. However, the federal government cannot tell the states in any manner how they should regulate their own people because that would be infringing on the states' reserved sovereign power. Thus, in *New York v. United States*,[256] Justice O'Connor wrote for a 6–3 Court, including Justices Kennedy and Souter, that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[257] This theory was extended in *Printz v. United States*.[258] There a 5–4 Court held that Congress could not require state officials to conduct a background check on persons who had applied to purchase a gun.[259] Relying on the structural arguments of the dual theory of sovereignty, history, and legislative and executive practice, the Court concluded that just as Congress could not commandeer the state legislature in *New York*, Congress cannot commandeer state executive or administrative officials in *Printz*.

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254 514 U.S. 779, 838–44 (1995) (Kennedy, J., concurring).

255 17 U.S. (4 Wheat) 316, 402–05 (1819).

256 505 U.S. 144 (1992).

257 *Id.* at 161.

258 521 U.S. 898, 908–12 (1997).

259 *Id.* at 935.

The Court has made it clear that the *New York* and *Printz* cases apply only where Congress attempts to "use" or "commandeer" state officials for federal purposes. These cases pose no Tenth Amendment limit on Congress's power to regulate states or individuals directly.[260] Thus, in *Reno v. Condon,*[261] a federal act barring unconsented disclosure of driver's license information was applied to both the states and private persons. The Court stated that *New York* and *Printz* did not apply where the federal exercise of Commerce Clause power regulated state activities directly, rather than seeking to control or influence the manner in which the states regulated private parties.[262] In *Condon*, since the federal statute regulated state workers at the state's Department of Motor Vehicles, and did not tell those workers how to regulate their own citizens, the federal act was constitutional. If the federal government attempted to tell states how to regulate their own citizens, such as requiring individual driver's licenses to contain certain information or be done in a standardized manner, that would likely be viewed as commandeering.

Regarding direct regulation of individuals and states by the federal government, the modern broad power to regulate, consistent with the 1985 case of *Garcia* and 2000 case of *Condon*, was held to exist by the Marshall Court in 1824 in *Gibbons v. Ogden.*[263] In *Gibbons*, Chief Justice Marshall noted that "[t]he genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally."[264] The phrase "internal concerns" suggests a broad reading of "commerce" to include all kinds of economic activity. Further, Marshall noted that the term "commerce" in the Commerce Clause also modified the phrases "with foreign nations" and "with the Indian tribes," and that it has been "universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations."[265] Marshall concluded, "[i]f this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence" and thus be equally applicable to commerce "among the several States."[266]

It has been argued that despite these passages, Marshall conceived of commerce as not including economic activity other than buying and selling goods, or transporting them to market, because Marshall indicated in *Gibbons* that "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which

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260 *Id.* at 924.

261 528 U.S. 141, 148–51 (2000).

262 *Id.* at 149–50.

263 22 U.S. (9 Wheat.) 1 (1824).

264 *Id.* at 195.

265 *Id.* at 193.

266 *Id.* at 192–95.

respect turnpike roads, ferries, [etc.,] are component parts of this mass" of subject-matters for state regulation.[267] However, as Marshall made clear in *Gibbons*, while the federal government has "no direct general power over these objects," the "legislative power of the Union can reach them . . . for national purposes," and the federal government "may use means also employed by a State, in the exercise of its acknowledged power."[268]

With respect to regulating commerce among the states, dealt with in *Gibbons v. Ogden*, Marshall wrote that "among" may be restricted to commerce which concerns more states than one.[269] However, Congress's power does not stop at state lines. Although Congress's power does not reach the "exclusively internal commerce" of the states, Marshall admitted, that concept is limited to concerns completely within a particular state, which do not affect other states, and with which Congress has not found it necessary to interfere for the purpose of executing some of the general powers of the government.[270] Thus, Marshall brought back into the federal realm what he appeared to take away by the phrase "exclusively internal commerce." Particularly given integrated markets today, very little commerce would not "affect other states" or, in particular circumstances, would it be true of that Congress would not find it "necessary" to act.

With respect to the power of states to enact laws that do not conflict with an Act of Congress, Marshall held in *Willson v. Black Bird Creek Marsh Co.*[271] that state laws enacted for the purpose of regulating their own purely internal affairs are constitutional, if not within a constitutional prohibition, unless they conflict with an Act of Congress passed in pursuance of the Constitution.[272] As to what federal laws are within the Constitution, Marshall said in *McCulloch v. Maryland*, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[273] Means for executing the many great powers, such as to levy taxes, borrow money, and regulate commerce, were not enumerated, said Marshall, but were intended to be ample for executing the great powers.[274]

Chief Justice Marshall and his Court thus interpreted the Constitution to create a scheme of concurrent federal and state powers to pass laws on many subjects, each government with power to seek its own legitimate purposes, with federal law supreme in case of conflict. This scheme might have served well

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267 *Id.* at 203. *See* Richard A. Epstein, *The Proper Scope of the Commerce Clause*, 73 VA. L. REV. 1387, 1405–08 (1987).

268 *Gibbons*, 22 U.S. (9 Wheat.) at 203.

269 *Id.* at 194.

270 *Id.* at 195.

271 27 U.S. (2 Pet.) 245 (1829).

272 *Id.* at 252.

273 17 U.S. (1 Wheat.) 316, 421 (1819).

274 *Id.* at 407–08.

even into the twenty-first century had not the Court in 1851 in *Cooley v. Board of Wardens*[275] departed from Marshall's reasoning by holding that the exercise of a power was not to be defined by its purposes but, rather, by the nature of a subject on which, as a means, the power operates. It was thus up to the Court, not Congress, said Justice Curtis, to decide whether a subject was exclusively for legislation by Congress, or exclusively for the states because the subject required local diversity or was not a matter of interstate commerce, or whether there was concurrent power. Thus, the Court planted a seed which was later to grow into many limitations on Congress's power under the Commerce Clause, and from which the Nation was not freed until the mid-1930s.[276]

By then, the approach of Marshall in *McCulloch* and *Gibbons* was no longer recalled and the Court turned to tests such as whether a subject of federal legislation was substantially related to interstate commerce.[277] Since the 1940s, however, the Court has reached results consistent with the Marshall Court approach, and has upheld congressional power to regulate under the Commerce Clause any economic activity with some connection to interstate economic activity, unless the subject matter of the regulation truly has no economic nexus, and thus is truly a non-economic act. Thus, in *Heart of Atlanta Motel v. United States,*[278] the Court stated that the Civil Rights Act of 1964 was constitutional, because the activity it regulated — racial discrimination in terms of purchasing rooms at hotels generally open to the public — was economic in nature and affected the movement of persons across state lines and, thus, the amount of money spent in interstate travel.[279] In *Perez v. United States*,[280] a criminal law banning extortionate credit transactions was constitutional because of the affect of

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275 53 U.S. (12 How.) 299, 319 (1851).

276 *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 655–62 (1985); KERMIT L. HALL, THE MAGIC MIRROR 277–85 (1989). The major cases espousing a narrow view of Congress' power under the Commerce Clause are *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that Congress could not regulate prices, wages, or hours in the mining industry because mining is a local activity that affects interstate commerce only indirectly); *United States v. Butler*, 297 U.S. 1 (1936) (holding that Congress could not regulate crop acreage because farming is not in interstate commerce); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that Congress could not regulate prices of a chicken slaughterhouse because the transactions occur after the chickens have come to rest and thus are intrastate); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that Congress could not pass child labor laws to prevent shipment in interstate commerce of goods made by children who worked longer hours than permitted since the evil occurred during the manufacturing process before the goods became articles of commerce); and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Sherman Antitrust Act could not be applied to a monopoly in manufacture because "[c]ommerce succeeds to manufacture, and is not a part of it.").

277 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124–28 (1942); United States v. Darby, 312 U.S. 100, 113–19 (1941).

278 379 U.S. 241, 250–58 (1964).

279 *Id.*

280 402 U.S. 146, 150–57 (1971). In his opinion, Justice Douglas said that the view of the Commerce Clause announced by Justice Marshall in *Gibbons* had been restored. *Id.* at 150–51.

extortionate credit, a crime involving money, on interstate organized crime. On the other hand, in *United States v. Morrison*,[281] a 5–4 Court held that a statute regulating gender-motivated violence had no economic nexus, since the statute was only targeted on violent action and, thus, was not a valid regulation of commerce under the Commerce Clause.[282] Similarly, in *Lopez v. United States*,[283] a 5–4 Court held that mere possession of a gun in a school yard had no economic nexus.[284]

In both *Morrison* and *Lopez*, Justice Kennedy was the critical fifth vote for the majority opinion. However, Justice Kennedy made it clear in *Lopez* that in his view *Heart of Atlanta Motel* and *Perez* were still good law.[285] In both *Lopez* and *Morrison* the Court's liberal instrumentalists, joined by Justice Souter, dissented, concluding that as long as the activity regulated could be thought to have some effect on interstate commerce, whether the activity itself has an economic component was irrelevant.[286] Similarly, liberal instrumentalists have not favored the *New York* and *Printz* limitations on Congress's power to regulate states under the natural law "dual theory of sovereignty."[287] The current majority on the Supreme Court, however, favors the dual theory of sovereignty, with Justice Kennedy being the critical fifth vote.

IV. CONCLUSION

Each of the five books addressed in this article consider from various perspectives the role of judges in deciding cases, particularly cases involving aspects of constitutional law. All of the authors — Judge Richard Posner, Justice Antonin Scalia and legal scholar Bryan Garner, Professor William Quirk, Professor Daniel A. Farber, and Professor Edward A. Purcell, Jr. — are knowledgeable individuals with a felicity for engaging writing. However, like the famous parable of five different individuals touching different parts of an elephant, and, thus, coming to different conclusions about what kind of animal they were touching, each book suffers a bit from not placing its analysis firmly into a broader theoretical perspective on different theories of judicial review.

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281 529 U.S. 598, 613, 617–18 (2000).

282 *Id.*

283 514 U.S. 549, 557–59 (1995).

284 *Id.*

285 *Morrison*, 529 U.S. at 613, 617–18; *Lopez*, 514 U.S. at 557–59 (Kennedy, J., joined by O'Connor, J., concurring).

286 *See generally Morrison*, 529 U.S. at 628–40 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting); *Lopez*, 514 U.S. at 615–16 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting).

287 *Printz*, 521 U.S. 898, 939–40 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting); *New York*, 505 U.S. 142, 201–02 (White, J., joined by Blackmun & Stevens, JJ., concurring in part and dissenting in part).

To summarize and conclude, there are four basic styles of judicial decision-making: formalism, Holmesian, instrumentalism, and natural law. With regard to interpretation, whether common-law, statutory or constitutional interpretation, judges who are formalist (or legalist, or textualist) focus on contemporaneous sources of meaning — text, context, and history of a provision or common-law precedent — with a special focus on literal meaning. For constitutional law, this leads to a static, or fixed, view of the Constitution, primarily based on the textual meaning at the time of ratification. Holmesian judges add to contemporaneous sources a judicial deference to later legislative, executive, and, to some extent, social practice. Natural law judges add to these sources great respect for precedent and reasoned elaboration of the law. Instrumentalist (or pragmatic, or purposivist) judges add a focus on prudential principles. For conservative instrumentalists, this typically involves greater weight paid to prudential principles of judicial restraint; for liberal instrumentalists, this typically involves greater weight paid to principles of justice or social policy embedded in the law. Placed in this perspective, each of these five books makes a good contribution to legal scholarship once the predisposition of the author is understood: Posner (conservative instrumentalist); Justice Scalia (formalist); Professor Quirk (Holmesian); Professor Farber (natural law, with a hint of liberal instrumentalism), and Professor Purcell (liberal instrumentalist).