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Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?

C.M.A. MCCAULIFF*

The Bill of Rights provides broadly conceived guarantees which invite specific judicial interpretation to clarify the purpose, scope and meaning of particular constitutional safeguards. Two time-honored but apparently divergent approaches to the jurisprudence of constitutional interpretation have been employed in recent first amendment cases: first, history has received prominent attention from former Chief Justice Burger in open-trial, family and religion cases; second, natural law has been invoked by Justice Brennan in the course of responding to the Chief Justice's historical interpretation. History, although indirectly stating constitutional values, provides the closest expression of the Chief Justice's own jurisprudence and political philosophy. Justice Brennan is less patient with indirect, experiential extraction of jurisprudential values from history. He presents his own public distillation of consitutional values, and directly applies them as absolute principles in the context of case-by-case claims of constitutional guarantees. Nevertheless, both of these approaches permit some agreement on fundamental values as well as provide the means of articulating clear differences in constitutional interpretation. The general characteristics of each approach to opinion writing and the different uses of each approach are confirmed by extending the study to two earlier Justices who used these methods to articulate their approaches and differences, Justices Horace Gray (1882-1901) and Stephen J. Field (1863-97). Justice Gray, the historian, was more "liberal," and Justice Field, the natural lawyer, was more "conservative" in his approach to constitutional problems involving the role of government regulation of business and the effect of private enterprise on nineteenth century consumers. The purpose of this article is to set forth the discourse of history and natural law in which some current first amendment issues find their solutions, and to use the reflections from the Gray-Field dialogue to delineate more closely the central features common to each approach.

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I. History as an Expression and Repository of Constitutional Values

History combines data, experience and sophisticated analysis of documents with gaps in knowledge and generalities about everything which undergoes change over a period of time. It prides itself on its objectivity in explicitly describing cause and effect; or rather, the causes and effects of everything from compulsory church attendance during the reign of the first English Queen Elizabeth and compulsory American military (or alternative) service during the war in Vietnam to Brunellescho's mathematical concept of renaissance architectural harmonies and General Doolittle's pioneering achievements in aerospace science. Nevertheless, subjectivity in the form of moral evaluation can not be eliminated from history, which views human beings as actors "with purposes and motives."[1] Historians' use of ethical, causal and purposive concepts comports with the "normal modicum of objectivity, impartiality and accuracy" found in judgments within contemporary society.[2] History depends on the questions we ask, and values therefore play a large part in forming our historical judgments. To sample the opinions of only two distinguished historians, both Sir Isiah Berlin, who thinks that the judgments we bring to history are the traditions of our own values,[3] and Jacob Burckhardt, who thought that history itself shapes our moral judgments,[4] found that morality and history have a point of conjunction. In this way, history is deemed to have value, and not merely functional utility.

Constitutional history similarly deals with the public values of the Founding Fathers and succeeding generations of amenders and interpreters. Since the United States Constitution and the Bill of Rights were written at particular points in time to endure from generation to generation, frequent reference to history is often necessary in judicial opinions. The relevance of history is even more pointed in first amendment cases, in which the Supreme Court has had to search for the purpose of various clauses.[5] Thus, Chief Justice Burger's examination of history is not unusual in

1. I. BERLIN, HISTORICAL INEVITABILITY 53 (1954).
2. *Id.* at 52.
3. *Id.* at 53. Berlin condemns the view that historians should refrain from moral judgment as "one of the greatest and most destructive fallacies of the last hundred years." *Id.*
4. J. BURCKHARDT, FORCE AND FREEDOM: REFLECTION ON HISTORY 360 (J. Nichols, ed. 1943).
5. Everson v. Board of Education, 330 U.S. 1, 8 (1947), dealing with the purpose of the establishment clause in the first amendment. Former Chief Justice Burger nowhere directly espoused the use of history as a source of expression for his values, but the prominent attention it receives in several of his opinions permits consideration of history as an organizing principle of his views.

itself. The very prominent position that the Chief Justice has given to history as a repository of constitutional values, however, both suggests its importance to his view of the Constitution, and provides the means for a coherent examination of constitutional jurisprudence.[6] He acknowledged that moral concepts provide the basis for law by imbuing otherwise sterile commands with "real meaning in terms of human value."[7] The Declaration of Independence, the United States Constitution and the Bill of Rights gave "promises of freedom, of ideals declared, and of hopes for the future" to be shown forth in the work of each succeeding generation first to "create a cohesive society or government"[8] and then to maintain these freedoms in the face of successive challenges. American national and constitutional history embodies "the sources of our law and way of life."[9] Thus Chief Justice Burger found in constitutional history the expression of national public values.

History is an especially appropriate vehicle for constitutional interpretation since it exists on the same level of specificity as the case-by-case facts which are presented to the Court. History is thus unlike natural law, which exists on a greater level of generality than the narrative, factual components of history and judicial cases. Natural law is unashamedly not factual and specific; it directly announces that it embodies a selection of particular values. Indeed, natural law has been described as political ideology.[10] Unlike natural law, constitutional history requires extensive analysis to determine the values embedded in history.

II. Natural Law as a Modern Expression of Constitutional Values

Natural law does not purport to rely on experience or empirical solutions but boldly asserts "that law is a part of ethics."[11] A. P. d'Entreves, the great modern scholar who has explicated the two-thousand year old concept of natural law, provides the following clarifications. Natural law is "a name for the point of intersection

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6. Wyzanski, *History and Law*, 26 U. Chi. L. Rev. 237, 242 (1959) directly espouses the value of history for judicial interpretation of law. H. Butterfield, The Whig Interpretation of History 64-132 (1951), describes the use of history as a moral interpreter.

7. Burger, *The Role of the Lawyer Today*, 59 Notre Dame L. Rev. 1, 3 (1983).

8. Burger, *Remarks at the Dedication of the Norton Clapp Law Center*, 4 U. Puget Sound L. Rev. 1, 2 (1980).

9. Burger, *supra* note 7, at 5.

10. A. Passerin d'Entrèves, Natural Law: A Historical Survey 113 (1965).

11. *Id.* at 114.

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between law and morals;"[12] its essential function is to mediate "between the moral sphere and the sphere of law proper."[13] In this way, natural law itself has no content but provides a methodology for asserting, for example, constitutional values.

Justice Brennan in an article remarked upon the aridity and moral bankruptcy of non-natural law approaches to jurisprudence, which flourished earlier in this century.[14] In the same article, Justice Brennan suggested that "law has again come alive as a living process responsible to changing human need."[15] He directly attributes this reflorescence of the law to a resurgence of interest[16] in natural law:

> Perhaps some of you may detect, as I think I do, a return to the philosophy of St. Thomas Aquinas in the new jurisprudence. Call it a resurgence, if you will, of concepts of natural law—but no matter. St. Thomas, you will remember, was in complete agreement with the Greek tradition, both in its Aristotelian and Platonic modes, that law must be concerned with seeing things whole, that it is but part of the whole human situation and draws its validity from its position in the entire scheme of things. It is folly to think that law, any more than religion and education, should serve only its own symmetry rather than ends defined by other disciplines.[17] (citation omitted)

This shift of emphasis from "legal precedent"[18] to "justice"[19] has "profound importance"[20] for judicial decision-making in Bill of Rights cases. Adherence to natural law frees Justice Brennan from the constraints of history. "For the Founding Fathers knew better than to pin down their descendants too closely. Enduring principles rather than petty details were what they sought to write down."[21] In this way, the Constitution is a "timeless"[22] and "sub-

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12. *Id.* at 116.
13. *Id.*
14. Brennan, *How Goes the Supreme Court*, 36 MERCER L. REV. 781, 785 (1985). For a recent study, *see* Defeis, *Justice William J. Brennan, Jr.*, 16 SETON HALL L. REV. 429 (1986).
15. *Id.* at 787.
16. J. RAWLS, A THEORY OF JUSTICE (1971), R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978) and LAW'S EMPIRE (1986) and J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1981) represent recent contribution to a rights-based theory of natural law.
17. Brennan, *supra* note 14, at 787-88. R. POUND, INTERPRETATIONS OF LEGAL HISTORY 3 (1923), suggested that authority, philosophy (natural law) and history provide tools to align past and present. *See also* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 35-36 (1969) for an application of Pound's principles of the Supreme Court in which authority is interpretation as a written constitution. Justice Brennan's view is based on natural law; Chief Justice Burger's on history.
18. Brennan, *supra* note 14, at 786.
19. *Id.*
20. *Id.*
21. *Id.* at 789-90. *Cf.* the same thought in Abington v. Schemp, 374 U.S. 203, 24 (1963) (Brennan, J., concurring).

lime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law."[23]

The achievement of timelessness is through the absolute expression of constitutional values. Natural law, a set of broad, high-minded but vague principles, is thus used to interpret the Constitution which itself is equally broad and high-minded and just as vague. To avoid multiplying the vagueness, the principles of natural law, such as a devotion to justice, acquire their own meaning for each generation but are conceived of absolute principles by their adherents at the time they are applied. Thus the ultimate constitutional issue for Justice Brennan is, "What do the words of the text mean in our time?"[24] As d'Entreves concluded, natural law is "an endeavour to formulate in legal or 'normative' terms certain fundamental values which were believed to be absolutely valid."[25]

III. Public and Private Sectors: Governmental Regulation in the Nineteenth Century

During the nineteenth century, both history and natural law provided judges with opportunities for presenting the reasoning in their decision-making. The opinions of two Supreme Court Justices, Gray (1882-1902) and Field (1863-1867), illustrate the factors for selecting history or natural law in the context of deciding cases on the validity of legislative regulation of business and governmental powers generally. Gray was best known for his adherence to precedent and his historical, if not antiquarian, interest. His reputation for scholarly use of legal history was and is unquestioned. The standard format for Gray's opinions with their precedential and chronological presentation appealed to him, presumably because that format most readily justified the recent *status quo* which enjoyed both Justice Gray's adherence and fairly broad acceptance among the general public. Field often urged a move away from immediate precedent by couching his opinions in terms of natural law.

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22. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 So. Tex. L. Rev. 433, 445 (1986).

23. *Id.* at 437, and A. Passerin D'Entrèves, *supra* note 10, at 117.

24. Brennan, *supra* note 22, at 438; "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time. Similarly what those fundamentals mean for us, our descendants will learn cannot be the measure to the vision of their time." The same thought appears in Brennan, *supra* note 14, at 793.

25. A. Passerin d'Entrèves, *supra* note 10, at 117.

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During the 1890s, the Court did change from broad approbation of legislative regulation of business to greater scrutiny of the reasonableness of that governmental regulation. When the Court first turned its attention to the role of the state government in the expanding industrialization of the country after the Civil War, it willingly supported legislative endeavors. The 1877 decision in *Munn v. Illinois*,[26] showed the way. In the 1870s, widespread hostility to railroads' extortionate rates led to revolt against the railroads' control of several state legislatures and gave rise to the temporary reforms partially reflected in *Munn* itself. Illinois farmers, who saw that grain storage houses (elevators) in Chicago would agree to store farmers' grain only if it had been carried from the farm by particular railroads, sought help from the state legislature to set rates for storage in the grain elevators in Chicago.[27] As historians have shown, the U.S. Supreme Court upheld the legislative rate regulation by adapting old common law to the new situation and thus declaring the legislation constitutional, despite political editorializing to the effect that rate regulation was communistic.[28] Although Justice Field dissented, *Munn* is the sort of decision that fitted in with the view Gray already shared, and later continued to hold on the Court. It even invoked Matthew Hale's 17th-century treatise *De Portibus Maris* for the concept that private rights yield to public interest when a business acquires an effective monopoly in the area it serves.[29] The farmers were still considered the backbone of America in 1876, and *Munn* might be idealistically seen as upholding the public interest. In political terms, *Munn* may be broadly characterized as humanistic rather than economically materialistic.[30] If *Munn* is read in this way, *laissez-faire* materialism had to take a back seat to public

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26. 94 U.S. 113 (1877).

27. *Munn* is perhaps the most famous case resulting from the Granger Movement in which farmers and small businessmen temporarily influenced the state legislatures which normally favored big business. R. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 282 (1956); J. LURIE, LAW AND THE NATION, 1865-1912, 21-22 (1983).

28. R. MCCLOSKEY, *Stephen Field* in, 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 1069, 1085 (1969) [hereinafter 2 THE JUSTICES]. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, LAW IN AM. HIST. 329, 358 (1971); R. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 1865-1910: A STUDY OF WILLIAM GRAHAM SUMNER, STEPHEN J. FIELD AND ANDREW CARNEGIE 79-87 (1951).

29. Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953).

30. McCurdy, *Justice Field and the Jurisprudence of Government Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 62 J. OF AM. HIST. 970 (1975) cautions against connecting the economic materialism of the then-current laissez-faire philosophy too closely with the judiciary. R. MCCLOSKEY, AMERICAN CONSERVATISM, *supra* note 28, at 169, described earlier conservatism as possessing "[m]uch that was warm and humanistic," as the "older tory tradition" did.

interest so that legislative power is deemed to protect that public interest. The emphasis on legislation at least at the time the *Munn* compromise was forged also meant that the court viewed itself as not interfering with the legislature.[31] Thus, the non-interventionist court provided a limited scope to judicial review.

A. *Continuity of the Status Quo in Justice Gray's Historical Opinions*

All of the concepts in *Munn* suited Justice Horace Gray well, and set the scene for the sort of expectations Gray had when he assumed his position on the Supreme Court. Thus, precedent suited him in constructing opinions. In most cases, Justice Gray did not reach beyond precedent to use the historical essay "as an instrument of extreme political activism, involving extensive judicial intervention in contemporary political problems."[32] Gray used history in the form of precedent to uphold state legislative regulation of industry. State legislation for health and safety came under the rubric of police power which *Munn* defined broadly. Gray described the police power as "that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime."[33] Everything from liquor, professional licensing, health measures and products to worker compensation fell under the police power. With regard to liquor, prohibitionists campaigned in several states and brought their special interest to the attention of state legislatures.[34] Several legislatures responded by prohibiting the manufacture and sale of liquor on the grounds that even though consumption initially injures the drinker, liquor ultimately harmed the drinker's family and "demoralized society." In such states, those interested in selling liquor simply imported liquor from neighboring states. The state simply responded by trying the prevent the importation.

In *Leisy v. Hardin*,[35] the Supreme Court thought that the interstate commerce clause protected the imported liquor so long as it remained in its original out-of-state package. Gray in dissent was not swayed by the interstate commerce issues but adhered to the

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31. R. McCloskey, *supra* note 28, at 60.

32. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. Ct. Rev. 119. Contrast Gray's interpretation of the Dred Scott decision, as noted in Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method* 12 Am. J. Legal Hist. 181, 188-92 (1968).

33. Leisy v. Hardin, 135 U.S. 100, 127 (1890) (Gray, J., dissenting).

34. J. Semonche, Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920, 28 (1978).

35. *Leisy*, 135 U.S. 100.

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force of precedent which supported the police power of the state. Using his usual precedential format, Gray cited Justice Story and the *Slaughterhouse Cases* and concluded that the police power was "essential to maintenance of the authority of local government."[36] The *Leisy* dissent was one of his more famous opinions. Its length of thirty-four pages in the United States Reports makes it a compelling example of what one commentator described as Gray's technique of convincing not by incisive cuts of the surgeon's knife but by massive pressures brought upon a single point."[37]

Indeed, in reviewing all the precedents, Justice Gray recognized that judicial power achieves its end "through the decisions of courts mounting precedent on precedent."[38] Gray emphasized that Congress did not give absolute protection to interstate commerce, especially because Congress had been silent in this particular area of interstate commerce. Furthermore, the state's prohibition laws were rendered ineffective by importation of out-of-state liquor, and Gray did not wish to see state legislative powers weakened because the "protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. *Salus populi suprema lex.*"[39]

During his rehearsal of precedents from Justice Marshall's day to the most recent cases, Gray isolated the *License Cases* of 1847 as controlling in *Leisy* because Chief Justice Taney recognized that a state law regulating interstate commerce was "valid so long as it was not in conflict with any Act of Congress."[40] There the liquor included varieties from out-of-state sold in their own packages.[41] Gray was not content to rest with that observation, however, and detailed each separate opinion in each of the *License Cases* in order to show that the majority in *Leisy* departed not only from the essence of the *License Cases* on which all the Justices who rendered an opinion had agreed after thorough and careful consideration, but also from forty years of precedent following the *License Cases*. Gray's conclusion in his *Leisy* dissent is one of his most powerful pieces of writing, and sets forth his reasons for following the decision in the *License Cases*.

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36. *Id.* at 128.

37. Spector, *supra* note 32, at 205.

38. Brown, *Police Power—Legislation for Health and Personal Safety*, 42 HARV. L.REV. 866, 871 (1929).

39. *Leisy*, 135 U.S. at 158. Therefore Justice Gray did not think that the commerce clause without enabling legislation was sufficient to impair "the police power in each State within its own borders to protect the health and welfare of its inhabitants." *Id.* at 132.

40. *Leisy*, 135 U.S. at 158.

41. *Id.* at 137.

> [B]ecause it was made upon full argument and great consideration; because it established a wise and just rule, regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to Congress and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by Congress, by the state legislatures, by the courts and by the people, and because to hold otherwise would add nothing to the dignity and supremacy of the powers of Congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.[42]

Because of *Leisy v. Hardin*, of the states lobbied with Congress which passed the Wilson Act that same year, giving states power over liquor within their borders as soon as it arrived.[43] Gray in effect had said in *Leisy* that the states already possessed the power Congress gave them in the Wilson Act. Again history was at the service of a liberal *status quo*, not to say a paternalistic view of state regulation which *Munn v. Illinois* had also set forth.[44] According to Gray, the state legislatures, as the chosen representatives of the people, were responding to popular majorities. Gray had no fear of the people in these instances.[45]

Especially in the wake of the Wilson Act, the Court stopped short of invoking the interstate commerce clause to prevent margarine from being imported into a state. In *Plumbley v. Massachusetts*,[46] the Court treated the state's legislative prohibition against margarine as a health provision within its police power. New manufacturing techniques such as the use of boric acid preservatives and the substitution of vegetable fats for butter permitted the introduction of oleomargarine as a less expensive substitute for dairy butter.[47] Again, public health and welfare were the stated concerns. It is likely, at least once the manufacture of margarine was perfected, that continued prohibition against margarine was enforced to eliminate competition for dairy farmers.[48] Use of the interstate commerce clause to prevent anti-competitive

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42. *Id.* at 160.
43. J. SEMONCHE, *supra* note 34, at 280.
44. *Leisy*, 135 U.S. at 160. R. GABRIEL, *supra* note 27, at 292. The Court's invocation of the police power is usually liberal.
45. Later, Budd v. N.Y. 143 U.S. 157, 551 (1892) upheld *Munn*, and Brewer, J. dissenting, simply stated, "the paternal theory of government is odious to me." Brewer felt that "[t]he utmost possible liberty to the individual and the fullest protection to his property is both the limitation and duty of government." *Id.*
46. 155 U.S. 461 (1894).
47. Brown, *supra* note 38, at 877.
48. *Id.* at 879.

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legislative provisions would not necessarily require overturning precedent and breaking continuity but could be done on a case by case determination of the reasonableness of the state legislation. This would have entailed a movement toward judicial activism and away from deference to the state legislature, and limited judicial review which accompanied Gray's precedential deference to state legislative power. Indeed, that deference, as much as anything, signified the liberalism in Gray's position since the legislative regulation provision at that time tended to be liberal and ostensibly protective of public welfare (though perhaps in some instance protecting special economic interests). As one commentator put it, these were social rather than individual values.[49]

Several of Gray's other opinions make a greater use of history itself rather than precedent alone, although Gray's methodology does not differ greatly in more historically oriented cases. These cases are also concerned with governmental powers. Thus in *United States v. Lee*,[50] Gray, in dissent, suggested that the doctrine of sovereign immunity should have prevented the Lees from being able to sue.[51] Here again corporate rather than individual values emerged as central in Justice Gray's view. George Washington Parke Custis Lee, son of Mary and Robert E. Lee, continued his mother's suit to recover land in Arlington confiscated by the government in 1862, when the Lees sent an agent to pay the taxes on the land, and government agents refused the payment unless tendered by the Lees in person. The Court distinguished between sovereign immunity defined as direct suit against the government itself and permissible suit against federal officers individually. In order to provide the Lees protection, the court took an activist position, and suggested that this was a justiciable question.

Gray immediately pointed out that sovereign immunity should have applied because the United States held the land at the time of the suit, and therefore courts have no authority to try the title.[52] He emphasized that sovereign immunity is "essential to the common defense and general welfare."[53] Gray limited himself to "the time since Magna Charta," which provided a due process clause akin to that of the fifth amendment.

Gray's use of history here again was admired and would still be considered unobjectionable.[54] The *Lee* dissent was a search of his-

49. *Id.* at 876-77.
50. 106 U.S. 196 (1882).
51. *Id.* at 225 (Gray, J., dissenting).
52. *Id.*
53. *Id.* at 226.
54. The criteria set forth in Kelly, *supra* note 32, at 8 and Nelson, *History and*

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tory to show how much continuity was needed in the area of sovereign immunity. Again, the necessity of sovereign immunity for good government did not change during this time. To be sure, Gray had his mind made up about sovereign immunity *before* he looked at the facts of this case.[55] This shows Gray's "integrity," but does not necessarily mean that history should be more than one factor in the decision-making process.[56] On the bench, he made a pure use of history. *Lee* was a respected dissenting opinion since Gray's integrity and rightness on the law were clear. Again, however, he was not thinking of a particular mistake which might have made application of the doctrine unfair in this case.

In *Lee*, Gray was not content with precedent, but looked to ancient statutes and treatises as well, commenting that even though Bracton held the king subject to God and the law, Bracton recognized sovereign immunity. This was simply a straight presentation of history without interpretation. Gray continued through Elizabethan, Jacobean and Victorian precedents before turning to American statutes and cases. At the end of his exhaustive discussion of all the precedents, Gray proceeded to draw his conclusion as to what the Supreme Court's practice had been throughout its history. He reconciled all decisions and aligned the cases with the English practice by dividing the factual situations into different categories, saving the last category for the *Lee* case itself: if the sovereign power appears and properly claims immunity stating that its agents nominally hold the property for the sovereign as public property, the court has no jurisdiction to entertain the claimants' suit.

Again, in deference to the powers of other governmental entities, Gray thought that the Court should reach no decision. He found no basis for judicial action because he felt that the historical precedents he cited controlled the outcome of this case since the principle of sovereign immunity operated on the basis of the sovereign's claim, and was not curtailed by any factual wrongdoing the claimant alleged to have suffered at the hands of the government. Thus, only history itself was relevant to Gray's approach to the Lees' case. Other factors, such as those included in the sympathetic presentation the Lees made, never dislodged the primacy of history for controlling the result Gray wished to see. Once history showed that the sovereign will not be sued without

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Neutrality in Constitutional Adjudication, 72 VA. L. REV. 1237, 1256 (1986) are met in Gray's opinions.

55. Briggs v. Lightboats, 11 Allen 157 (Mass. 1865).

56. Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314 (1985).

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its permission there was in Gray's mind no suit possible for the Lees.

United States v. Wong Kim Ark[57] involved the issue of congressional power over citizenship. The case demonstrates Gray's characteristic use of historical sources. Wong Kim Ark was born in San Francisco in 1873, and upon returning to the United States from a visit to China in 1894, was refused entry on the ground that he was not a citizen. Gray traced the English concept of citizenship, which revolved around birth in a land subject to the Crown's protection, and contrasted that view with the European position that a child takes its nationality from its parents. Gray noted that the law of England was the law of the American colonies and remained the law of the United States. The final hurdle for Gray to overcome was the argument accepted in the *Slaughterhouse Cases*,[58] that children of foreign nationals were excluded from American citizenship. Gray simply explained that the drafters of the fourteenth amendment did not intend to change existing law, and cited congressional debates on the fourteenth amendment which included American-born children of foreign nationals under the umbrella of American citizenship.[59]

Gray's decision directly construed the meaning of citizenship in the Constitution itself and in its fourteenth amendment. To do this he had to go beyond his characteristic recital of precedent. Gray himself had earlier ruled that Indians cannot be citizens since they are not subject to American jurisdiction, and had to exclude the precedent on jurisdictional grounds.[60] Furthermore, he had to distinguish several jurisdictional statutes on the ground that while a statute might amend common law, it could not change the constitution.

Gray recognized that Congress might enlarge grounds for naturalized citizenship, but he said it was powerless to diminish citizenship granted by the Constitution itself. According to Gray, the fourteenth amendment granted a racial guarantee to blacks which, if it was ignored, could also sweep away citizenship rights for Europeans.[61] Thus, history controlled but only when Gray had paired away all the tangential precedents to reveal the original meaning of the Constitution for citizenship by birth in an Ameri-

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57. 169 U.S. 649 (1894).

58. 83 U.S. (16 Wall) 36, 73 (1873). Justice Miller stated that the phrase, "subject to its jurisdiction" in the fourteenth amendment "was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States ." *Id.*

59. *Wong Kim Ark*, 169 U.S. at 675.

60. Elk v. Watkins, 112 U.S. 94, 102 (1884).

61. *Wong Kim Ark*, 169 U.S. at 694, 726.

can jurisdiction. This is a great departure from simple exclusion of all other factors beyond a straight line of precedents, even when precedents had to be categorized factually into different groups to make the meaning appear, as in *Lee*. Here, contradictory precedents and legislative directives required Gray to make many distinctions in order to isolate the fourteenth amendment and the constitutional references themselves from all other historical data.

It is difficult to conclude that policy here did not influence Gray's categorizations of the pure precedents to be followed. This would suggest that Gray, at least in *Wong Kim Ark*, was shaping his opinion from his judgments about history. In this way, history really is giving values to the judge who is deciding the case. Gray was stepping beyond his usual mode of decision-making. His own values perhaps originally shaped his study of history, and caused him to present a broader interpretation of history than mere recital of precedent alone would show. The history and present application of the word citizen formed the heart of Gray's opinion. There was no quarrel with the accuracy of Justice Gray's historical research, but there was much dissatisfaction with Gray's extension of constitutional protection to children of foreign nationals born in the United States. Gray's long-standing commitment to that workman-like use of historical precedents both: 1) buys credibility for Gray's treatment of history in *Wong* when he steps beyond precedent; and 2) obscures the real achievement and courage it took Gray to strike out here.

Chief Justice Fuller dissented on the ground that children of Chinese descent born in this country nevertheless owe allegence to the Emperor of China by the Emperor's own reckoning. Fuller's biographer recognized Gray's and Fuller's divergent purposes in studying precedents. "Gray was a legal historian—perhaps the greatest that the Court has ever had. His investigation of the ancient precedents was tireless and completely objective; once he had reached a conclusion from his research, he applied it relentlessly to the problem before him."[62] Fuller, on the other hand, used precedents "to distinguish them rather than to apply them; to unshackle the future from the past."[63] As one recent commentator concluded, "Justice Gray in his stolid, unswerving, and determined way carried the Court to a momentous decision . . . and bucked a political current that seemed to demand a contrary decision."[64]

62. W. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, 238 (1967).

63. *Id.*

64. J. SEMONCHE, *supra* note 34, at 111.

On the basis of this one case alone, one commentator concluded that, "Gray's knowledge of the teachings of history led him to a liberal view of citizenship and the status of aliens that has not seen its counterpart until the most recent decisions of the Warren Court."[65] History, however, did not always provide Gray with such a consistently liberal position as far as the would-be citizen was concerned.[66] Gray's consistency rather revolved around his upholding congressional sovereignty in all matters of citizenship. His opinion in *Wong Kim Ark*, "illustrates well the creative amalgam that can be wrought by mixing the archaic past to the present."[67] There, "the backward look dovetailed into a reading of the citizenship clause to protect the birthright of Chinese-Americans," an achievement which was "perhaps his most important legacy."[68]

Finally, the case in which Gray most departed from history and suffered most from contemporary conservative criticism was *Juilliard v. Greenman*.[69] This case again involved governmental power and sovereignty to issue paper treasury notes as money even in peacetime pursuant to a 1878 Act of Congress. He found analogous situations in American legal history in the chartering and establishment of a national bank despite constitutional silence, so that the implied powers of Congress were held to be very broad under the Necessary and Proper Clause in Justice Marshall's opinions in *McCulloch v. Maryland*[70] and *United States Bank v. Bank of Georgia*.[71] Similarly, Gray relied on *Osborn v. United States Bank*,[72] especially Justice Johnson's concurrence, which mentioned that "the framers of the Constitution evidently intended to give to Congress alone power over the currency of the country."[73] After treating implied powers in general, Gray briefly described the constitutional authority of Congress to establish the country's currency, citing two precedents.[74] Finally, Gray left American precedents behind and turned to the policies requiring recognition of Congress's power to issue paper money.

> It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations to the United States in such form, and to impress upon them such

65. Spector, *supra* note 32, at 207.
66. FILLER, *Horace Gray*, in 2 THE JUSTICES, *supra* note 28, 1386.
67. J. SEMONCHE, *supra* note 34, at 114.
68. *Id.* at 147.
69. 110 U.S. 421 (1884).
70. 17 U.S. (4 Wheat.) 316, 421 (1819).
71. 23 U.S. (10 Wheat.) 333, 347 (1825).
72. 22 U.S (9 Wheat.) 738 (1824).
73. *Id.* at 873.
74. *Juilliard*, 110 U.S. 421.

> qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States.[75]

Again, Gray suggested that the judiciary had no power to interfere with the legislature's decision thereby signifying agreements with Congress, which recommended judicial restraint. It is in the policy section of his opinion that Gray cited his one English case, making it clear that he did not find it possible to use it as a precedent but only as an illustration of modern governmental practices as far as currency was concerned.[76] It is equally clear that Gray searched for precedents since he referred to the English Court of Chancery but produced only a modern case brought there by a foreign sovereign, the King of Hungary, to enjoin issue of paper notes unless the King's license had been obtained. Gray looked only to legal history and precedents about money. Perhaps he did not find the history of money a persuasive argument either for himself or for the contemporary opinion reading public. At the time, social anthropology did not filter into judicial opinions so that Gray did not treat money as a medium of exchange whether it was in the form of shells used by the Indians or cows by ancient farmers.[77] Even today the use of social history in judicial opinions draws criticism, as commentary of the *Yoder* opinion itself shows. Conservative critics of the result Gray reached seemed to base their objections on the notion that if Gray could not find strong English, if not American, precedents allowing paper money, then he had to alter his outcome and should not have argued from silence that nothing in the Constitution prevented Congress from issuing paper money.

It was the one important Gray decision which had no precedents directly on point, and was therefore treated for critical purposes as profoundly unhistorical. Thus, Charles Francis Adams and George Bancroft "whose constitutional history Field quoted" were violently against the decision.[78] In effect, Field was asking

75. *Id.* at 447.

76. *Id.*

77. A. BURNS, MONEY AND MONETARY POLICY IN EARLY TIMES 4, 6 (1927).

78. Smith, *Mr. Justice Horace Gray of the United States Supreme Court*, 6 S. DAK. L. REV. 221, 242-44 (1961). Bancroft's pamphlet denouncing *Juilliard*, entitled "A Plea for the Constitution of the United States Wounded in the House of Its Guardians," is cited by FILLER, *supra* note 66, at 1385.

Gray to produce a specific history of the use of paper money in the United States or invalidate its use. Justice Field's lone dissent, which has been termed "vitriolic,"[79] is the basis for later historians' reference to the enmity between Field and Gray.[80] But, although his opinion has been tagged as unhistorical and dictated by policy, it is possible to argue that Justice Gray, steeped in historical knowledge, made a more subtle use of history in *Juilliard*.[81] Gray's knowledge of American constitutional history presented no barrier to Congress's use of paper money as legal tender. That is, Gray's "historical understanding provides the scaffolding used to construct the opinion" so that the Justice "writes not *of* history but *in* history."[82] In different terms, Justice Gray's brother, Professor John Chipman Gray, recognized this when he replied to Charles Frances Adams' denouncement of *Juilliard*.[83] Professor Gray suggested that the outcome in *Juilliard* could be directly traced to Adam's own grandfather who had appointed Marshall.[84]

Indeed, the historical precedents upholding the national bank require by analogy the same result in regard to paper money. In this sense, Gray's "scaffolding" is historical because the issue is virtually a replay of the congressional authority to charter and establish national banks. Justice Gray, with his deep sense of history, recognized that; but others not so well versed in history failed to see either his judicious use of history or the role it played in fashioning his "policies" which guided the result in *Juilliard.* The historical scaffolding was well hidden. As a recent commentator reminded us, the quality of the judge's resolution of a problem depends on the resources brought to the task so that historical context provides the "way of understanding the significance of the issues to be decided."[85] Here, Justice Gray's understanding of Marshall's precedents provided both the approach to and the resolution of congressional authority to issue paper money.

In learning the specific lessons of history and making them his own, Gray constructed a broad approach to history. He was then able to decide when the wider lessons of history, such as the analogy provided by the national bank, would permit a new practice. The historian in Gray knew that the absence of narrow, specific

79. Davis & Davis, *Mr. Justice Horace Gray: Some Aspects of His Judicial Career*, 41 A.B.A. J. 421, 424 (1956).

80. *See infra* notes 114-21 and accompanying text for a discussion of Field's dissent.

81. Smith, *supra* note 78, at 244.

82. *Id.* at 341.

83. *Id.* at 244.

84. For a recent study of Marshall's treatment of history, *see* Bloch & Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301.

85. Sullivan, *supra* note 56, at 354.

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history should not stand as a barrier. Through his study of history, Chief Justice Burger learned these same lessons and applied them rightly or wrongly in the creche case without considering the specific history of the celebration of the history of Christmas which Justice Brennan exhorted him to consider. The absence of specific history for a particular practice does not present a barrier to justices steeped in history unless that practice (paper money, municipal creches) discloses attendant harms.

B. *Field's Use of Natural Law to Dissent from Post-Civil War Liberalism*

Justice Stephen Field had a completely different style of opinion-writing from Justice Gray. His use of "natural law" facilitated carrying out his own conception of the proper balance between citizen and government and, further, within the branches of government, quite apart from the balance set forth in judicial precedents. Rather than a chronological development of precedents, Field developed his own structure of how the right balance was to be calibrated, and in broader terms stated principles of political philosophy on which the balance rested, even quoting in dissent such political philosophers as John Stuart Mill and Adam Smith.[86]

While this invocation of natural law gave Field much freedom in dissent, it also perhaps led to his being misunderstood by his contemporaries and modern commentators as well. Thus, commentators have emphasized the primacy of either one of the two major interpretations of Field's opinions: (1) the general principle of natural law philosophy to which Field appealed and for which he was extremely popular with such contemporary special interest groups as capitalists or other propertied classes; and more recently, (2) Field's balance of competing private, governmental and intra-governmental interests as a technical legal jurisprudence.[87] Field appears either as apologist for the *laissez-faire* economics of

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86. Butchers' Union Slaughterhouse and Livestock Landing Co. v. Crescent City Livestock Landing and Slaughterhouse Co., 111 U.S. 746, 757 (1884) (Field, J., concurring) citing A. SMITH, WEALTH OF NATIONS (1776). *Butchers' Union* is a later, but reversed legislative power issue following on the famous *Slaughterhouse* Cases *supra* note 58; *Juilliard*, 110 U.S. at 466 (Field, J., dissenting). For a discussion of Field's natural law jurisprudence, *see* C. HAINES, THE REVIVAL OF NATURAL LAW Concepts 159-62 (1930). For a recent discussion of the *Slaughterhouse Cases see* R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1976, 143-66 (1985).

87. R. MCCLOSKEY, *supra* note 28, at 87-88, 102, 172-73; McCurdy, *supra* note 30, at 972, and Scheiber, *supra* note 28 at 357-60, 391-93. While McCurdy in effect sees Field as a Jacksonian democrat, (R. MCCLOSKEY at 125) the labels "liberal" and "conservative" may be usefully applied to contrast Gray and Field, respectively.

the wealthy Gilded Age businessman or as a jurist drawing up and interpreting guidelines to delineate the proper spheres of the public and private sectors. In jurisprudential terminology, Field felt that private business should neither be subsidized by government nor subject to its regulation, and that government has the duty, on the one hand, not to interfere in private business and, on the other hand, not to alienate its powers, privileges, or publicly-owned property. Both views reach essentially the same conclusions, differing however, in their emphasis on political or jurisprudential terminology. .

Thus, for example, in *Munn*, which later constituted such an important precedent for Justice Gray, Justice Field dissented. To the majority in *Munn*, the growing industrialization of the country after the Civil War required great flexibility for legislatures to assist in expansion and regulate its growth. Field looked beyond that legislative regulation to the bases on which individual guarantees of life, liberty and property were based. "If this (price regulation) be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature."[88] Field denounced *Munn* as a decision which "gives unrestrained license to legislative will."[89] This phraseology lends itself to interpretation either as an establishment of the proper spheres of the public and private sectors or as an expression of fear of tyranny by a majority hostile to wealthy interests.

In a certain sense, the dichotomy between the two interpretations of Field is false because the majority in *Munn* had to decide the extent of the legislature's regulatory power, and inevitably that decision entailed a judgment about the Court's role as overseer of legislative involvement in industrial growth. The Court's unwillingness or inability to oversee the reasonableness of legislative rate-making in all the states during the early period of industrial expansion argued for initial flexibility and broad scope for the legislatures to extend concessions to new industries while at the same time preventing those industries from charging monopo-

88. Munn v. Illinois, 94 U.S. 113, 140 (1877).

89. *Id.* at 148. The whole passage reads:

The legislation in question is nothing less than a bold assertion of absolute power by the State control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise.

listic rates.[90] The regular, and perhaps more immediate, electoral process rather than judicial review was the early vehicle to fine-tune the legislature's rate-making.

The majority was willing to draw all but the most obviously confiscatory rate-making under the broad umbrella of the state's "police power," permitting each state's legislature to give immediate and continuing attention to industrial developments.[91] Field, however, wishing to restrict the legislature's role in industrial expansion, sought to place price regulation, not under the legislature's general police powers, but under the arguably more restricted power of "eminent domain."[92] If the rate-making power of the legislature were categorized as a taking, then the reasonability of the rate as just compensation might be subject to judicial review which would considerably narrow the legislature's rate-making power. By categorizing price regulation in *Munn* as a police power rather than a taking, the Court deliberately provided the legislature with a broad scope to respond quickly and flexibly to rate-making needs. Field's espousal of an eminent domain solution to price regulation does not, however, resolve the question of whether he was simply developing an abstract jurisprudence for lines of demarcation between public and private interests or whether this jurisprudence was designed to protect property in most instances against the special interests of a confiscatory majority.

The consistency of Justice Field's linedrawing itself is not in question.[93] In a 4-3 decision in *Illinois Central Railroad v. Illinois*,[94] Justice Field held that states lacked power to alienate public lands. If a state gave away public lands its grant was void. Therefore, the state could freely revoke its void grant. By the same token, the liberal position was equally consistent. In dissent, Justice Shiras with Justices Gray and Brown started from the equally well-settled position that the state power to convey its land was full so that its grants "are matters of legislative discretion."[95] Therefore, the revocation of the grant was in their view void.[96]

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90. McCurdy, *supra* note 30, at 984.

91. Scheiber, *supra* note 28, at 398; R. GABRIEL, *supra* note 27, at 292 states that the police power is a product of Jacksonian democracy.

92. Scheiber, *supra* note 28, at 374. The classic articles on eminent domain are: Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of 'Just Compensation,'* HARV. L. REV. 1168 (1967); and Dunham, *Griggs v. Allegheny in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

93. Scheiber, *supra* note 28, at 393.

94. 146 U.S. 387, 455 (1892).

95. *Id.* at 465, 467.

96. *Id.* at 475.

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Thus, the liberal position would have required the land to remain alienated. Neither jurisprudence was simply based on aggrandizing the private or public interest; both sides consistently adhered to their positions even when it required dispositions that might appear anomalous today if protection of property and legislation in the public interest are abstracted from their nineteenth-century contexts.

It is true, however, that even in the nineteenth century Field's protection of property was abstracted from its jurisprudential context. His concurring opinion in *Butchers' Union Slaughter-house and Livestock Landing Co. v. Crescent City Livestock Landing and Slaughter-house Co.*[97] contained an extensive passage which could be easily taken out of its factual setting. In a discussion of the recognition in the Declaration of Independence that rights are given "not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator' . . .,"[98] Field appeared to the most broadly formulated conceptions. "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained."[99] As if to set his concurrence in a political context, he went on to quote from Adam Smith's *Wealth of Nations,* which categorized labor as "the most sacred and inviolable" property.[100] Field stated "I cannot believe that what is termed in the Declaration of Independence a God-given and an inalienable right can be thus ruthlessly taken from the citizen, or that there can be any abridgement of that right except by regulations alike affecting all persons of the same age, sex, and condition." It is almost as though he had prepared this opinion for reprinting in a political journal. Indeed, his *Sinking Fund* dissent of 1878 had been republished as "*Laws, Morals and Common Sense.*"[101] As commentators have recognized, Field complained that the bar misconceived his views.[102]

Several other Supreme Court opinions were examined by both progressives and conservatives. Such cases as *Mugler v. Kansas*[103] and *Powell v. Pennsylvania,*[104] in which Field dissented, were re-

97. 111 U.S. 746 (1884).
98. *Id.* at 757.
99. *Id.* at 756.
100. *Id.* at 757 (quoting A. SMITH, 1 WEALTH OF NATIONS at 137).
101. MCCLOSKEY, *Stephen Field,* 2 THE JUSTICES, *supra* note 28, at 1080.
102. McCurdy, *supra* note 30, at 978 (citing Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 141 (1873), and Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512, 520 (1885)).
103. 123 U.S. 623 (1887).
104. 127 U.S. 678 (1888).

ceived optimistically by progressives and with fear by conservatives. In the face of fourteenth amendment claims, *Mugler* upheld the police power of the state legislature to prohibit continued use of a working brewery. The Supreme Court gave recognition to state power to alter various individual interests for the greater good of society in general, that is for reasons of public interest. Perhaps the Court upheld this absolute prohibition to cut down on, if not prevent, the sale of intoxicants, which the Court noted caused disease, poverty and crime, thereby harming the general welfare of society.[105] Field dissented on the ground that the state deprived the owner of the use of his brewery property without due process. He noted that the legislature's action was simply arbitrary. Field differentiated between confiscation and regulation and did not hesitate to characterize the state's legislation as having "crossed the line which separates regulation from confiscation."[106]

Powell perhaps constituted the high-water mark for legislative discretion. A seller of oleomargarine was prosecuted for violating the state statute which prohibited its sale. In defense, Powell claimed that his product was nutritious, and denied misleading the public into thinking that they were buying butter. Even so, the Supreme Court looked at the absolute ban on margarine as governmental necessity enacted under the police power for the good of society. Unlike Gray in police power opinions, Field thought that the Court had to protect society by overseeing regulations of the legislature.[107] While Field had very sympathetic facts for this dissent, the broad language of his dissent focussing on the constitutional rights of the individual could be quoted generally to limit the regulatory powers of the state.

His due process ground for judicial review was the fourteenth amendment, but he ranged beyond the Constitution itself and added the previously quoted language about God-given rights from *Butchers' Union.*

> I have always supposed that the gift of life was accompanied with the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others. I have supposed that the right to take all measures for the support of life, which are innocent in themselves, is an element of that freedom which every American citizen claims as his birthright. I admit that previous to the adoption of the Fourteenth Amendment of the Federal Constitution, the validity of such legislation was to be determined by the con-

105. *Mugler*, 123 U.S. at 662.
106. *Id.* at 678.
107. *Powell*, 127 U.S. at 696-97 (Field, J., dissenting).

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stitution of the State, . . . [108]

One commentator has observed that Field's "main dissenting force was toward setting up a definite super-consitutional immunity of private property from regulation in the public interest."[109] Included in these super-constitutional reasons were such economic considerations as the competition of the cheaper "beef tallow, lard or any other oleaginous substance" for the dairy manufacturer.[110] Thus Field could characterize the legislation in question as "nothing less than an unwarranted interference with the rights and the liberties of the citizen."[111] Field's more specific regulatory jurisprudence, which includes the promotion of competition and the elimination of legislation favoring special industrial interest groups, is subsumed under his more quotable broadly based appeals to the inherent rights free citizens enjoy. Indeed, contemporary legal reaction to *Mugler* and *Powell* was phrased in terms of popular government versus *laissez-faire.* The state's lawyer in *Powell* later wrote in democratic terms about the effective exercise of governmental powers and American representative government: "[T]he legislature, rather than the courts should determine questions of public policy as to the possession of property and the exercise of personal liberty."[112] He also suggested that the alternative was unacceptable: "a *laissez faire* democracy is not a practical democracy." Similarly, conservatives attacked "that boundless, irresponsible force called 'the police power,' " wondering whether liberty could "be maintained under a popular form of government."[113]

Thus Gray's citations of precedents and narrowly-based legal history may be interpreted as an affirmation of the post-Civil War liberalism already under attack by conservatives, including Justice Field in his repeated appeals to the citizen's natural law rights. The divergences in their opinions, however, can be most readily seen in *Juilliard,* for which Field is said to have criticized Gray "in an unprintably robust phrase."[114] Since there were no precedents directly on point, Field, unlike Gray, broadened his conception of relevant history to include prior bad debts of the govern-

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108. *Id.* at 692.

109. Nelles, *Book Review, Stephen J. Field: Craftsman of the Law By Carl Brent Swisher,* 40 YALE L.J. 998, 1002 (1931).

110. *Powell,* 127 U.S. at 693.

111. *Id* at 695.

112. Wintersteen, *The Sovereign State,* 28 AM. L. REG. (n.s.) 129, 138 (1889).

113. A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1187-1895, 35 (1961), (quoting the address of David Overmyer at the January, 1889, meeting of the Kansas Bar Association).

114. Nelles, *supra* note 109, at 998. *See also* C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 198-204 (1930).

ment related to the notes issued in 1776. Because of those bad debts, Congress did not attempt to issue notes again until 1862 during the Civil War. Field could not, however, use that history to show that Congress had no power to issue notes. He had to content himself with attempting to confine the issuance of notes to wartime and in strongly contemptuous rhetoric upbraided Gray for regularizing an emergency procedure: "What was in 1862 called 'the medicine of the Constitution' has now become its daily bread."[115] It is no accident that the words "daily bread," used in a secular context, echoes the phrase from the Lord's prayer, "give use this day our daily bread." At the same time, he heaped scorn on the one Court of Chancery precedent Gray produced. "Until some authority beyond the alleged claim and practice of the sovereign governments of Europe be produced,"[116] Field refused to believe that Congress had the power to borrow money.

The remainder of Field's dissent concerned what he considered economic laws about value and political philosophy. At the outset and toward the end .of his opinion, Field suggested that economically speaking, the notes had value "only as they are converted into coin"[117] and whatever the notes bring in the market, "they are not money in the sense of the Constitution."[118] Furthermore, Field painted the possibility of depreciation as a peculiar danger always attendant on paper money, so much so that depreciation appeared almost as an economic law for paper money.[119] In referring to debasement of the coinage, Field first enlisted Mill to characterize the government's action as robbery, and then stated that the Constitution does not sanction "any intentional wrong to the citizen."[120] In opposition to Gray's analogy to national banks, Field suggested that the power to coin money must be read in connection with the prohibition on the states to make anything but gold and silver coin as tender in payments of debts.[121] It suited his purpose to follow the history of what had and had not been used in the United States for legal tender whereas he was otherwise frequently willing to depart from current practices. If Field wished, as he did in *Illinois Central Railroad v. Illinois*, to circumscribe the public sector and delineate its proper sphere, then

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115. *Juilliard*, 110 U.S. at 458 (Field, J., dissenting). Davis & Davis, *supra* note 79, at 424 point out that Field was using William Graham Sumner's expression that the country's medicine had become its daily bread.

116. *Id.* at 459.

117. *Id.* at 452.

118. *Id.* at 464.

119. *Id.* at 470.

120. *Id.* at 466.

121. *Id.* at 463

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his suggestion that Congress pay the notes as they mature and avoid paying interest[122] would succeed in controlling the legislature and would at the same time set the Court in a position of primacy by declaring the act of elected representatives unconstitutional. Field's final observation that no effective control over the legislature would remain if they received the power to print money, constituted perhaps his most serious doubt. It revolved around the fact that paper money gives the legislature and executive ultimate discretion to increase debt dramatically, devaluing the property of the individual citizen.

The same concern manifested itself in Field's concurrence in *Pollock v. Farmers' Loan and Trust Co.*,[123] which declared the Income Tax Law of 1894 unconstitutional. Field found the tax question even graver than the imposition of paper money. Again he wrote in broad terms suitable for general quotation.

> If the provisions of the Constitution can be set aside by an Act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.[124]

The populists had advocated a tax on large incomes. It had proved a popular measure at election time since some sectors of the economy were faring poorly while industrialists prospered, yet the current taxes fell equally on the poor and the rich. Whether cast in political terms, as in the language just quoted, or in the jurisprudential terms of delineating the public and private sectors, Justice Field's approach to the solution of the major legal issues of his day rested on an appeal to the reason and morality of his natural law principles.

Field thought through his positions and reduced them to principles which he could apply, whatever the specific facts of particular litigation. He shares with Justice Brennan his basic jurisprudential division of society into public and private sectors. Similarly, both Justices felt that the absence of specific history precludes the approval of new practices when the questioned practice (paper money, municipal creches) threatened to blur the bright lines of their natural law jurisprudence.

Thus in the nineteenth century, judges were readily able to select history or natural law as a way to explain their decisions on governmental regulation of business and such other important

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122. *Id.* at 470.
123. 158 U.S. 601 (1895).
124. *Id.* at 607.

https://scholarlycommons.law.cwsl.edu/cwlr/vol24/iss2/6

constitutional issues as the nature of citizenship and the national currency. Field relied on natural law which allowed him to construct a rational system independent of case-by-case adjudication. Jurisprudentially he marked off the rights and duties of the governmental sectors and differentiated them from the functions of the private sector. Politically, his lines of demarcation gave private business much freedom and protection from governmental interference so that he appeared to favor wealthy capitalists.

Gray, on the other hand, sought to couch his opinions in precedential and historical terms whenever it proved possible. Because the post-civil war precedents were pro-legislature, Gray looked comparatively liberal. His use of history was often permissive, desiring to continue sovereign immunity, governmental regulation of perceived social harms, (such as sale of liquor) and holding the absence of specific history no barrier to congressional introduction of paper money. The characteristics of each method, the jurisprudential delineation of such sectors as private and public and the experience over time of particular practices, will already be familiar when they reappear in different contexts in the methodologies Burger and Brennan use to formulate their opinions.

IV. Public and Private Constitutional Values in First Amendment Cases in the Burger Court

Several general principles of Chief Justice Burger's jurisprudence emerge from his use of history in a variety of first-amendment cases and law review articles. Most generally, the Chief Justice's attitude toward decision-making and leadership appear in two brief historical examples. Chief Justice Burger defined the problem of authority and decision-making as in part a matter of finding the right time to achieve consensus. He quoted Justice Felix Frankfurter to the effect that a jurist has to find out "how to be ahead of the procession, but not too much ahead as TR (Theodore Roosevelt) said. If you're too far ahead, you've got no followers. If you're not ahead at all, then there's no leader."[125] While the Chief Justice recognized the dangers of "being right too soon," he did not exclude risk-taking because progress and change must nevertheless be made.[126]

In a similar fashion, the Chief Justice was acutely aware of the slowness of the human mind to assimilate constitutional developments. He saw an example of this slowness in General Robert E.

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125. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 206 (1985) (quoting from H. PHILLIPS, FELIX FRANKFURTER REMINISCES 238 (1960)).

126. *Id.*

Lee, who was opposed to slavery and secession but who nevertheless chose to defend Virginia rather than the nation. The observation that almost a century after the Revolution, paramount loyalty to a state and not the nation "was still the frame of mind of a great many people"[127] suggested to the Chief Justice a need for caution in judicial decision-making respecting constitutional questions in which, unlike the Civil War, we have the opportunity to accommodate slowness and avoid judicial destruction of the fabric of our constitutional compromises. Our constitutional fabric thus requires delicate handling, since our freedoms are often "in jeopardy."[128] All legitimate authority, including the judiciary, is based on leadership which assents to persuasive traditions, institutional heritage and legal precedent. In this way the Chief Justice does not concentrate simply on the intent of the Framers of the Constitution, but makes a broad examination of continuing constitutional development in the generations following the Framers.[129]

History therefore plays a very important role in Chief Justice Burger's constitutional jurisprudence. In more theoretical terms, history transmits American constitutional values from the Framers to the present generation of Americans and beyond. History thus was central to the Chief Justice's decision-making and explaining. Since Chief Justice Burger did not himself make any declaration espousing the value of history in his own views, it is instructive to examine a representative example of political thought in which history plays a similar role, the writings of Edmund Burke,[130] without, however, attributing the views of Burke to the Chief Justice. Burke held that both society and government are natural, and that the individual in the totality of his needs has a place for the state, local community and family, and that within the context of their time and society, individuals have concrete natural rights[131] guided by experience. In establishing governmental institutions, "mind must conspire with mind" over long periods of time.[132] Burke's experiential, concrete bias attuned itself to history, and he erected "a presumption in favor of any settled scheme of government against any untried project" when that nation has

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127. Corry, *Chief Justice Burger on CBS News Special*, New York Times, July 9, 1986. *See also*, Brennan, *A Tribute to Chief Justice Warren E. Burger*, 17 SETON HALL L. REV. 3 (1987) who observes that several of Burger's opinions "reflected his conviction that it is wrong to live without some deep abiding social commitment, and explain[ed] how thoroughly he devoted his professional life to pursuit of the elusive goal of freedom."

128. Burger, *supra* note 8, at 1.

129. *Id.* at 2.

130. E. BURKE, THE WRITINGS AND SPEECHES (1901).

131. Schwartz, *Edmund Burke and the Law*, 95 LAW. Q. REV. 355, 365 (1979).

132. W. HARRISON, CONFLICT AND COMPROMISE: HISTORY OF BRITISH POLITICAL THOUGHT, 1593-1900, 111 (1965).

long existed and flourished under the settled scheme.[133] The Constitution is interpreted though the "collected reason of the ages," and applied to particular and varied cases.[134] Thus traditions and institutions link one generation to the next as "repositories of the wisdom of the past" and conveniences when the same problems recur.[135] Consent and stability arise not only from safeguards against arbitrary power, but also from compromises as well as natural sloughing off of obsolete practices, and gradual acceptances of reform.[136] Both Burke and Chief Justice Burger were interested in jury and prison reform.[137]

For the Chief Justice some safeguards against arbitrary power arise from the independence and accountability of the judiciary itself. The Chief Justice referred to "the centuries-old struggle to establish and maintain a strong, independent judiciary," which has emerged as a mainstay of American freedoms.[138] The judiciary, as a coequal third branch under the Constitution, is assured of its independence. Its accountability appears in its opinions, and thus history is not only an expression of the jurisprudential values of such judges as, for example, Chief Justice Burger, but is also a method of explaining judicial decisions to the nation in terms of our own national history. In this way, history also serves a symbolic function in judicial opinions.

A. Independent Democratic Institutions: Open Trials and Accountable Judiciary

"The Constitution defines and mandates rights but it cannot execute or enforce them."[139] It takes the energy of free people and institutions to realize constitutional goals. In the open-trial cases, the peculiar fact that openness was not expressly guaranteed as a fundamental constitutional right occasioned an exhaustive recital of history in *Richmond Newspapers, Inc. v. Virginia*.[140] Chief Justice Burger in his plurality opinion began not with the American experience but with moots in Anglo-Saxon England in order to demonstrate that "throughout its evolution, the trial has been

133. *Id.*

134. *Id.* at 114.

135. *Id.* at 129.

136. A. Bickel, The Morality of Consent 16-18, 20 (1975).

137. Schwartz, *supra* note 131, at 362. Burger, *supra* note 7, at 5, and Burger, *Commencement Address*, 4 Pace L. Rev. 1, 2-9 (1983).

138. Burger, *The Interdependence of Judicial and Journalistic Independence*, 63 Geo. L.J. 1195, 1197 (1975).

139. *Id.*

140. 448 U.S. 555 (1980).

open to all who cared to observe."[141] Similarly, Burger uses available colonial records to indicate that open trials were sometimes considered "fundamental law."[142] Furthermore, the Chief Justice cites foreign observers' praise of open English trials to underline the beneficial effects of open trials as public policy. The purpose of this extensive historical survey is to negate the possibility that open trials were "a quirk of history" when "our organic laws were adopted."[143] Even when public policy was framed less psychologically, "people sensed from experience and observation"[144] that public acceptance of the trial procedure itself was necessary to prevent vigilantism and promote community catharsis, serving the function of satisfying the appearance of justice. From the survey, one can conclude that the Framers simply failed to draft an open trial clause through oversight.[145]

In these circumstances, the use of history provides a Burkean presumption that open trials should not be destroyed, and thus indicated the Court's respect for long standing customs that continue to function well. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[146] The Chief Justice went even further along the lines of a Burkean analysis by showing that this judicial acceptance of open trial, although not based on direct judicial precedent, is "hardly novel."[147] The Chief Justice indicates that the law itself implicitly validated the openness of trials as part of "the common law tradition." Therefore the constitutionalization of the open trial did not establish an unwarranted departure from custom itself and prior judicial decision-making. Nevertheless, the conclusion that open trials should be given constitutional status is further established symbolically as an institution of "democratic society."[148]

The need for this symbolic use of history is made clear by the fact that Virginia not only acted to close a trial contrary to the presumption but continued to press its contention in the Supreme Court. Here history pointed to establishing procedures for the exercise of legitimate authority, even if it did not lead the Court to

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141. *Id.* at 564.
142. *Id.* at 567.
143. *Id.* at 569.
144. *Id.* at 571.
145. But see the dissent by Justice Rehnquist which suggests not all procedures have to be uniform. *Id.* at 605-06.
146. *Id.* at 571.
147. *Id.*
148. *Id.* at 573, n.9 (Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950)(Frankfurter, J., dissenting from denial of certiorari)).

establish an absolute requirement of open trials. Thus the Court set up a requirement only of extensive judicial examination of a request for a closed trial. The need to explain the decision further required a search for the proper amendment under which to consider the value of open trials. The location of open trials as one of a complex of first amendment values all sharing a common denominator provided more than the usual need for symbolism. Freedom of the press itself was set forth as one of the key values of a democratic society. The special role of the press in popularizing the need for an independent judiciary has been given special recognition by the Chief Justice.[149] Thus the press and, by association, open trials turn into a bulwark of our national freedoms. The role of historic importance in making it clear to the new nation that an independent judiciary was a necessary ingredient of government limited the scope of the open trial right the Chief Justice was willing to give. Open trial simply receives constitutional recognition and by analogy is in that complex of freedom of assembly and the press.

Justice Brennan, on the other hand, observes no such historical limitations. His policy orientation frees him from seeing open trials only as a parallel to the established first amendment's freedoms. In that way, once history is satisfied the requirement of extensive pre-closure examination is almost a threshold inquiry because these related first amendment values are all reinterpreted in light of contemporary problems relating to freedom of information about any governmental exercise of power. Rewritten as a freedom of information issue, the notion of open trials inevitably requires an even stronger presumption of openness. Given such a policy, the individual's fair trial claim for newspaper publicity which might influence the jury would have to be extraordinary. On the actual outcome of this case, policy and history, or "logic and experience,"[150] reached the same conclusion, but the policy of providing access to governmental information meant in the first theory access by the press, an even more powerful concept in its own right. It was thus easy to subsume the Burkean characterization of open trials as one institution, along with freedom of assembly and the press, playing a historic role in a democratic society under the umbrella of the media's rights of access. In such a setting Burkean rebuttable presumptions harden into the absolutes of policy.

Unlike the religion cases examined below, the open trial cases lose the initial case-by-case determination presumed in *Richmond*

149. Burger, *supra* note 138, at 1198.
150. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

Newspapers, and later cases are considered from the perspective of the media's rights of access. Thus in *Globe Newspaper Co. v. Superior Court*,[151] the logical requirements of Justice Brennan's principle of public access to governmental information deny minor victims of sex crimes closure for testifying. The practical effect of the Massachusetts statute was to deny live television[152] coverage of the trial but not to hamper newspapers[153] which functionally could only print or digest transcripts even with their reporters present at the live trial. Chief Justice Burger in dissent, however, started with the *Richmond* presumption and balanced against it the historical protections given to minors. The extension of the protections given to minor defendants would have rebutted the presumption of open trials. History is decisive for the Chief Justice in *Globe*. Both his major arguments for closure were historical: 1) "[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors;"[154] and 2) "[i]t would misrepresent the historical record to state that there is an 'unbroken, uncontradicted history' of open proceedings in cases involving the sexual abuse of minors."[155] The Chief Justice shows a characteristic concern with the symbolic function of explaining decisions so that public acceptance of the decision would follow.[156]

Similarly, Justice Brennan was concerned with public understanding of the opinion. His general principle of freedom of access to governmental information prevented any uncertainties the media might feel about the Court's support for their claim to special protection in the area of access to information.[157] On the one hand, Chief Justice Burger's historical approach carves out an exception to accommodate minor victims, their families and those who wish to see traditional family values of protecting minors honored. On the other hand, Justice Brennan's policy of access to governmental information supports the actual role and symbolic

151. *Id.* at 615.
152. *Id.* at 614.
153. *Id.* at 616.
154. *Id.* at 614. "Many will find it difficult to reconcile the concerns so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape or other sexual abuse, are denied the modest protection the Massachusetts Legislature provided."
155. *Id.* (*quoting* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55, 573 (1980)).
156. *Id.* at 613.
157. *See, e.g.*, Emerson, *Freedom of the Press Under the Burger Court* in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 22, 123 (V. Blasi ed. 1983) [hereinafter THE BURGER COURT]: "There are no clear indications from *Richmond Newspapers* and *Globe* how far a majority of the Court is prepared to go in supporting a consitutional right of the press to obtain information from the government. . . . On the whole, despite *Richmond Newspapers*, the prognosis is not favorable."

stature of the media as the group most centrally interested in the use of that information. To the Chief Justice, history opens the door to flexibility but paramount loyalty to abstract standards signals rigidity.[158] Justice Brennan holds out the charm and attractiveness of unswerving faith to his principles wherever they may lead. This lends his views the moral stature, along with the intolerance, of a purist.

In *Press Enterprise Co. v. Superior Court*,[159] Chief Justice Burger returned to the same type of historical analysis he used in *Richmond Newspapers*. Here the history of open trials focused on the role of the jury as a democratic institution of importance to the criminal justice system. Thus jury selection must be open. In a later case involving the same parties[160] there was no jury to be selected. Only the question of access to a preliminary hearing was involved. The Chief Justice attempted a similar approach but there was a paucity of history thus leaving the Chief Justice with virtually only the exceptional example of the open preliminary hearing of Aaron Burr. Nevertheless, the *Globe* case showed that even in the face of contradictory history, policy or "logic" demanded a premium for the value of openness. Armed with the *Globe* precedent and knowing that the press was nevertheless *not* reassured by *Globe*[161] alone, the Chief Justice adapted Justice Brennan's policy and logic to require openness as a usual policy in the preliminary hearings in all states. *Globe* thus filled the historical void in *Press Enterprise*. In the absence of history, the Burkean value of compromise as an indication of the exercise of legitimate authority leads to a perhaps unexpected result.[162] *Press Enterprise II* is a particularly unusual opinion because it departs from Chief Justice Burger's adherence to the moral value of historical precedent in first amendment cases. The departure is occasioned by the *Globe* precedent which permits the policy of reassuring the press to enjoy pre-eminence over the other values protected during the course of history. The value of independent journalism receives important consideration in Chief Justice Burger's framework of freedoms.

Indeed, Chief Justice Burger related the independence of the

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158. *Globe*, 457 U.S. at 614, 615: "Today Justice Brennan ignores the weight of historical practice for the "wooden application of the rigid standard [the Court] asserts."
159. 464 U.S. 501 (1984). Burger also used the same approach in McDonald v. Smith, 472 U.S. 479 (1985) (Brennan, J., concurring at 485).
160. *Press Enterprise II*, 106 S. Ct. 2735 (1986).
161. Emerson, *supra* note 157, at 22, 25.
162. Justice Stevens dissenting in *Press Enterprise II*, 106 S.Ct. at 2750 suggests that the inconclusiveness of the history should have led to an exception for preliminary hearings which in some states are the functional equivalents of grand juries.

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press to the independence of the judiciary.[163] For example, in *United States v. Will*,[164] federal judges challenged the validity of Congressional freezes of previously enacted cost-of-living increases in judicial salaries under the compensation clause of the Constitution. Despite the clarity of the clause, the Court nevertheless rehearsed the policies which over the course of time gave to us judicial independence as a guarantee of Constitutional right for litigants in the face of pressure from other governmental branches or public opinion. This is Chief Justice Burger's recognition that judicial independence is not absolute. Review even for the decisions of the Supreme Court can be had in Congress and through constitutional amendments. Therefore, public explanation of the Court's decisions takes on symbolic importance and Supreme Court opinions attempt to put the decisions in context, often in historical context.

B. Independence for Families and Schools

"Parents first season us: then schoolmasters deliver us to laws . . . ."[165] This observation reflecting the experience of the metaphysical poet George Herbert dovetails into the theme of reliance on history in cases involving the institutions of families and schools.

In *Parham v. J.R.*,[166] which sought to establish the rights of minors being committed to mental hospitals, Chief Justice Burger referred generally to the traditional primary role families had played in the history of western civilization in bringing up children. He looked at this role as a source of jurisprudence on family life in general. "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State . . ."[167] Chief Justice Burger could have cited legal precedents at length to show how this view of western civilization became incorporated into the jurisprudence of family law, and could have given many opposing historical examples of how parents failed to act in the best interests of the child. He simply referred to the age-old role of parents

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163. Burger, *supra* note 138, at 1196. Burger states that the press pointed up the need for judges after federation, and since then, the judiciary has protected consitutional freedoms, including freedom of the press. Emerson, *supra* note 157, at 1198-99.

164. 449 U.S. 200 (1980).

165. G. HERBERT, *Sinne (I)* in THE WORKS OF GEORGE HERBERT 45 (F. Hutchinson ed. 1941).

166. 442 U.S. 584 (1979).

167. *Id.* at 602.

as the norm for initiating even mental health care in much the same way as George Herbert assumed parents' primary role, and added the invocation of history to that universally accepted basic norm. The question, of course, was the scope of the parents' role, now that more is known about mental health.

Here history provided merely a rebuttable presumption that the parents' role is primary.

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. (citations omitted).
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this.[168]

In looking to experience as a test of the jurisprudential presumptions of history in upholding the role of the family in bringing up children, Chief Justice Burger took a Burkean approach, and found that "those pages of human experience" show that over-all "parents generally do act in the child's best interest."[169] According to Chief Justice Burger this was not a situation which he deemed required a great departure from past practice or even a long justification to show why it was unnecessary to depart from historic practice in this instance, when adults sought psychiatric institutionalization of a child.

The Chief Justice did, however, cite[170] the then very recent case of *Addington v. Texas*,[171] decided at a time when courts were frequently presented with the opportunity to provide symbolic recognition of such personal rights as liberty, juvenile status, citizenship and parental custodial rights by requiring an enhanced standard of proof before termination of the right in question was permitted.[172] Nevertheless Justice Burger found the regular test, the best interest of the child, sufficient without the additional procedures of notice and an advesarial hearing which was requested for the children. The second part of the opinion, reviewing the adequacy of the medical process, once parents seek psychiatric treatment for their child, did not involve history, and thus is not analyzed here.

Burger's allusion to "broad parental authority" in raising chil-

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168. *Id.*
169. *Id.* at 602-03.
170. *Id.* 600-01, 609, 619.
171. 441 U.S. 418 (1979).
172. *Id.* at 423; *See* McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 VAND. L. REV. 1293, 1319-20 (1952).

dren left the field open for critics to interpret "authority" as authoritarian parental roles. Burgers' use of history in *Parham* has been challenged as a politically motivated institutional response to modern familial disintegration with an idealization of authoritarianism in a romantically popular reconstruction of an unrealized golden age of family life.[173] According to a leading family law commentator, the popular history of parenting which the Court accepts is now being revised.[174] The commentator sees an endorsement of authoritarianism in the Court's shorthand explanation to the opinion-reading public that due process is not served by adding an additional layer of adversarial hearings to commitment when most parents who seek psychiatric care for their children are not simply choosing to avoid their parental responsibilities by warehousing their children in mental hospitals.

In that sense, the commentator's claim attempts to prove too much, even though activists have failed to obtain additional symbolic and constitutional reassurances that the child's interest is unusually important. The Court acknowledged that parents and the state with its wards may fail to act in the best interests of the child. At greater potential risk is the child with "no adult who knows him thoroughly and cares for him deeply,"[175] although the state is statutorily mandated to act in the best interests of the child. The Court held itself ready to examine the case of the child at risk if the record and evidence showed the state used the mental hospitals to alleviate a dearth of foster homes. Thus Justice Burger sets his brief allusion to the authority of the family in western history in the context of showing that the situation in question required no exceptional treatment. It is equally possible to read his refusal to add another layer of state procedures as literal adherence to the family values jurisprudence has incorporated from the history of western civilization. The commentator's interpretation of authority as authoritarian involves a substitution of the oppressive parts of family history for the total picture of family history, together with the assumption that the Court itself singled out that part of family history when it referred simply to the history of concept of the family in western civilization. A large portion of the wide group of readers of Supreme Court opinions may nevertheless have been reassured by the Court's shorthand allusion to "broad parental authority" that would not unduly interfere with the historic role of parents in bringing up children.

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173. Burt, *The Burger Court and the Family*, in THE BURGER COURT, *supra* note 157, at 92, 102.

174. *Id.* at 93.

175. 442 U.S. at 618.

The same commentator found Justice Brennan's espousal of an adversarial hearing in *Parham* an outgrowth of his concern with the judicial role itself rather than the problems of family law.[176] According to him, Justice Brennan "invokes a characteristically conflated vision of the commanding force of rationality and inflated view of reason's judicial embodiment."[177] In this view, Justice Brennan is simply substituting judicial authority for parental and other traditional sources of authority which Chief Justice Burger relied upon. It is, however, characteristic of the moral stance of the natural lawyer to take a central role in fashioning which currently accepted norms should be changed and what those reformed norms should be.[178] In doing so, the adherent of natural law uses his or her faculty of reason to assess the validity of the norms.[179] Since opinion writing requires any judge to set forth reasons to support the decision, the enhanced significance of the role of reasoning to the natural lawyer may be overlooked. Therefore, it must be emphasized that Justice Brennan in trying to align societal norms and procedures with his rights-based view of natural law is not so much inflating the judicial role as asserting his own moral stance. The role of reason in natural law theory is to bring the moral faculty of judgment into the decision making process.[180] While the role of the judge as moralizer may or may not be exaggerated in Justice Brennan's jurisprudence it appears to arise not so much out of a simple egotistical view of the world from a judicial perspective as from the natural law theory Justice Brennan espouses.[181]

The history of the family was also central to explaining the disposition in *Yoder v. Wisconsin*.[182] According to *Yoder*, a strong family life and tradition can assume greater than usual familial responsibility such as the vocational education of the family's teenage children. "History is exalted in America permitting the past to become moral interpreter of the present."[183] For the moral symbolism of history to convince the opinion reader, however, the reader must be convinced that history is accurately presented. "In gaining assent to decisions, history has to be right or it will dis-

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176. Burt, *supra* note 173, at 106.

177. *Id.*

178. Gewirth, *The Ontological Basis of Natural Law: A Critique and an Alternative*, 29 AM.J. JURIS. 95, 96 (1984) and *infra* notes 252-54.

179. *Id.*

180. *Id.*

181. *See* Brennan, *supra* note 14 and text accompanied by *infra* notes 252-53.

182. 406 U.S. 206 (1972).

183. MILLER, *supra* note 17, at 180. *See also* BUTTERFIELD, *supra* note 6, at 64-65, and R. POUND, INTERPRETATIONS OF LEGAL HISTORY 20 (1923).

turb people who care about the history."[184] Thus unlike legal precedent, which we realize we reinterpret in accordance with need and changing views over time, we wish to assume that interpretations of history itself do not change. Commentators, however, have shown that interpretations of history change in accordance with the questions we pose today about the past and in disputes between historians about the interpretation of controversial historical points.[185]

In *Yoder*, the history of the Amish as a religious sect was relevant to the free exercise of their religion. Their long-standing commitment to a rural way of life and their tradition of separation from the rest of American society stood out for Chief Justice Burger as central to the continuance of the sect. Justice Douglas in dissent, however, mentioned drinking, the attractions of modern life for young Amish who wished to abandon tradition and the conflicts within the group.[186] The selectivity of the family history presented in *Yoder* has laid the opinion open to criticism. Again, the same leading family law commentator suggested that *Yoder* is to be understood as part of a complex of opinions authored by several different conservative Justices to mean that the conservative Justices admire only authoritarian management of children.[187] Therefore, the underlying motivation for idealizing family life was said to be a misdirected, if well-meant, attempt to restore confidence in the fragile integrity and weak viability of the modern family as part of the legitimacy of all traditional authority.[188] In part, the commentator made his argument of authoritarianism from recent historical studies that claimed family life was historically as weak and unstable as it appears today.[189] Since Chief Justice Burger and other members of the Court who wrote opinions on family law rehearsed the older views that the family had a strong, happy history, the commentator assumed that history was being used to uphold traditional authority in order to channel the opinion-reading public to be strong parents or at least to support parental authoritarianism.[190] That desire to find an over-all unitive

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184. M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 4 (1965).

185. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, CARDOZO L. REV. 917, 925-29, 944 (1985); Nelson *supra* note 54, at 1237.

186. 406 U.S. at 245-47 (Douglas, J., dissenting). It should be noted that Justice Brennan concurred in the opinions by Justices Stewart and White, but did not write an opinion himself.

187. Burt, *supra* note 173, at 95.

188. *Id.* at 98-100, 102-03.

189. *Id.* at 93 and 289, n.11.

190. *Id.* at 93 and 103.

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theme in the Burger Court's family law opinions made Chief Justice Burger's recitation of the history of the Amish sect and their family life carry a freight it cannot bear—that the opinion used history to further a value the commentator deemed "conservative," namely "authoritarianism."[191]

It is more likely the Chief Justice was simply saying that in light of the long history of the Amish as a religious sect in this country and the relatively recent state interest in compelling children's attendance at public schools for one or two years of high school, the evidence in the case must present some harm to warrant overturning ancient practice.[192] Furthermore, it is more likely that on overall assessment, the cases of the Burger Court *lack* a unitive, interpretive theme.[193] Thus, when a long-standing practice is continued to the present, the Court will uphold that practice unless considerations of policy or a current harm militate against continuity; those cases in which history is strong may contradict the holdings in other cases which seem to deal with similar problems but which, however, lack strong historical support.[194]

In this particular case, Chief Justice Burger's allusion to the familial and religious history of the Amish is designed only to show that uniformity throughout America is not required unless the uniform solution is remedying a greater harm. Of course, to show that the Amish were doing no harm, the Chief Justice painted history with a broad brush. It is easy enough to pick holes in general history by showing that at least today the problems of the modern world invade even historically isolated idiosyncratic cultural and religious subgroups. Chief Justice Burger's allusion to the Amish's long history of separation in effect established a legal standard which meant that the Amish way of life would have to be no longer viable in order to impose the ordinary educational requirements on them. Since the only harm the state complained about was the Amish's claim to an exception to the required state school attendance policy, the general history of the Amish was sufficient to overcome the state's policy of uniform high school attendance. It is not necessary for us to assume that Chief Justice Burger alluded to the history of the Amish people in order to promote or approve authoritarianism, or even to think that Chief Justice Burger himself believed the Amish people had a happy history living a rural way of life. He only had to show that the

191. *Id.* at 99 and 290, n.25.
192. 406 U.S. at 225-26.
193. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436 (1987).
194. *Id.*

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Amish had a history of independence and self-sufficiency in order to continue the exception to compulsory high school attendance, and that otherwise the idiosyncratic religious sect would be destroyed. Given that judicial purpose, Chief Justice Burger's generalized historical outline of the Amish sect was sufficient.

Nor did Chief Justice Burger have to write a treatise on the ease and happiness of early American rural life. History itself was not the point of the opinion, and it is too easy for professional historians to demand recognition in judicial opinions of what we would write in a historical monograph.[195] Thus, Burger is criticized for having "a historically inaccurate conception of the successful achievement of this simple harmonious life in early American history."[196] Indeed, the ease, success and happiness of rural life in early American history was not at issue in *Yoder*. Nor was the speculation that these were goals, achieved or unachieved, relevant to *Yoder*.[197] Simply put, the fact that the Amish survived by living that way of life based on their religious ideals was all that was needed to give them an exception to compulsory public high school attendance. In that sense, history served its purpose in the *Yoder* case quite well.

Finally, in the recent *Bethel School District v. Frazer*,[198] Chief Justice Burger sets forth the "role and purpose of the American public school system"[199] in a democratic society, particularly in school assemblies. The importance of the history of civilized behavior in public life provides the foundation for public schools "to prohibit the use of vulgar and offensive terms in public discourse."[200] Thus the Manual of Parliamentary Practice drafted by Thomas Jefferson and adapted by the House of Representatives provides Chief Justice Burger with a historical analogy to discuss the scope of regulatory authority for school officials to protect children and inculcate values of acceptable expression in public discourse under the first amendment.[201] Again this is not legal history, but Chief Justice Burger quickly turned to an examination of the legal precedents on schools and free speech. Justice Brennan concurred in order to limit the Court's holdings to the facts of this case. According to him orderliness rather than the content of the

195. C. MILLER, *supra* note 17, at 201.

196. Burt, *supra* note 173, at 102, 290, note 35.

197. *Id.* at 102. Burt suggests that a simple harmonious life has been an "ideal for community and for family life as a normative goal espoused throughout our national history, a goal that is sometimes more and sometimes less emphasized." *Id.*

198. 106 S. Ct. 3159. (1986).

199. *Id.* at 3164.

200. *Id.* at 3165.

201. *Id.* at 3164.

speech permitted the school authorities to decide that the student's speech was disruptive.[202]

History is particularly useful in explaining the special role of the family and in giving historic recognition to familial values. Familial history may be more relevant in judicial opinions when families seem to be drifting rather than providing strong support of the nurturing of children. In this sense, the use of such social history in legal opinions may indicate more than the position the Court wished to take in the case at hand, and may, as a leading commentator suggests, reveal the judicial values that the opinion writer himself holds. It is difficult, however, to conclude that the preferred judicial value is authoritarianism. It is more credible to conclude that the moral value in question is continuity rather than disruption of opinion, practices, and values society deeply holds.

C. *Independence for Religion and State*

"[N]o scholar or judge of intellectual rectitude should answer establishment clause questions as if the historical evidence permits complete certainty. It does not."[203] Because modern historians, as well as the Framers, and Americans then and now did not, and do not, share one view, the abundance of the historical evidence only adds to the frustration of writing and reading judicial opinions construing the establishment clause.[204] The major question then for these cases is whether it is appropriate to use history as a kind of parol evidence to construe the ambiguities of the establishment clause.

Justice Brennan almost always answers this question in the negative, since he "will probably find a violation of the establishment clause" whatever test is used.[205] He is guided by his own rights-based natural law philosophy in which he is concerned with the abstract freedom of religion of all citizens from the state and the rights of every denomination. In that way, the right of any partic-

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202. *Id.* at 3168.

203. L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT xiii (1986).

204. *Id.* at 123. "Except, perhaps, for Congregational New England, most of the nation believed that an establishment of religion violated religious liberty. The House approved of Madison's proposal [on freedom of religion] but the Senate voted it down . . . so far as the United States Constitution was concerned, the states were free to recreate the Inquisition or to erect and maintain exclusive establishments of religion, at least until ratification of the Fourteenth Amendment in 1868." *Id.* (footnote omitted.)

Levy presents a cogent argument for a broad interpretation of the establishment clause. W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976) presents a much narrower view of the establishment clause, arguing that it was simply designed to prevent favoritism of one denomination over another.

205. L. LEVY, *supra* note 203, at 129.

ular denomination may be weighed in the circumstances in question.[206] In the absence of a consensus in the country and on the Court, Chief Justice Burger is willing to use history to carve out exceptions to what might otherwise be a literal-minded interpretation of the clause to invalidate a long-standing practice. Did Chief Justice Burger have a duty to refrain from using history to fashion a five-to-four majority which will uphold a long-standing exception to what might otherwise appear to current eyes a violation of the establishment clause? Can a professional historian legitimately consider the Court's use of history in these circumstances a disservice?

In two recent opinions, Justice Brennan objected that history should not be considered because it prevented the establishment clause from being broadly applied. In *Marsh v. Chambers*,[207] the Court upheld a state's payment for a legislative chaplain. Chief Justice Burger noted that the practice "is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[208] The Chief Justice attached great weight, though not an irrebuttable presumption,[209] to "an unbroken practice."[210] He considered Justice Brennan's argument that the messages of history are ambiguous and therefore should not carry great weight,[211] but stated:

> "[w]e do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society."[212]

Justice Brennan argues not so much about the accuracy of the history Chief Justice Burger presents, but starts from his own natural-law reference point that religion and the state serve two separate functions which cannot overlap. He argues that "any of the formal 'tests' " the Court has established as guidelines for its decision-making could be used to strike down the old practice of paid legislative chaplains.[213] From his natural law perspective, Justice Brennan does not wish to give legal recognition to the historically

206. *Id.* at 141-42.
207. 463 U.S. 783 (1983).
208. *Id.* at 786.
209. *Id.* at 790.
210. *Id.* at 790 (quoting Watz v. Tax Commission, 397 U.S. 664, 678 (1970)).
211. *Id.* at 791 (quoting *Abington*, 374 U.S. at 237 (Brennan, J., concurring)).
212. *Id.*
213. *Id.* at 796.

different practice, which would prevent universal applicability of his principle that the wall of separation between religion and the state provides not only mutually exclusive legal categories but also that life must be governed according to those categories. In effect, his rhetorical statement that "any group of law students"[214] could "nearly unanimously"[215] apply the tests correctly underscores his commitment to syllogistic application of the establishment clause tests. That is the "path of formal doctrine," as Justice Brennan puts it.[216] In accordance with his natural law stance, Justice Brennan claims more than logical validity for his position. He specifically invokes morality which forms such an important part of natural law jurisprudence. The "moral intuitions" which gave rise to the establishment clause make ". . . a statement about the proper role of *government* . . ."[217] which is public and religion which is private. For Brennan prayer can only be private,[218] and thus Brennan cannot shake his conviction "that legislative prayer violates both the letter and the spirit of the Establishment Clause."[219]

Therefore, Justice Brennan condemns the Court's deference to history on these separate grounds. He objects to any history not directly related to the establishment clause itself, which supporters of both broad and narrow interpretations admit is ambiguous. History is too broadly painted in this particular respect. Secondly, he objects to the Court's treatment of its historical examination of the first amendment "simply as an Act of Congress" because the states forced the Bill of Rights on Congress.[220] History is too narrowly considered. Most importantly, Justice Brennan disagrees with the Court on the proper philosophy of historical interpretation. Here he finds Chief Justice Burger again too narrow because he looked at "specific practices."[221] Justice Brennan, on the other hand, limits his examination of history to "broad purposes not specific practices."[222] Here we can see Justice Brennan's natural law jurisprudence in operation. The very points he made in articles are stated in *Marsh* as quotations from his concurrence in *Abington v. Schemp*.[223]

Because Justice Brennan's natural law perspective leads him to

214. *Id.* at 800.
215. *Id.* at 801.
216. *Id.*
217. *Id.* at 802.
218. *Id.* at 811.
219. *Id.* at 813.
220. *Id.* at 815.
221. *Id.* at 816.
222. *Id.* (citing *Abington*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring)).
223. *Id.* at 816-17. *See* Abington v. Schemp 374 U.S. 203 (1963). *See also supra* notes 21 and 24.

focus on the "inherent adaptability of the Constitution,"[224] he finds that "the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history."[225] While Justice Brennan's jurisprudence is not derived from history but from the abstract principles of natural law, the historical survival of exceptional practices which deviate from those principles does not carry weight with Justice Brennan. The practices are simply long-standing wrongs which can now be righted by the application of the proper principles. Only those principles carry conviction:

> The argument is made occasionally that a strict separation of religion and state robs the Nation of its spiritual identity. I believe quite the contrary. It may be that individuals cannot be "neutral" on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative.[226]

The particularity, and perhaps even more, the relativism of the nitty-gritty facts of history which fly in the face of Justice Brennan's categories must not be allowed to interfere with the absolute delineation of governmental and private sectors.

Chief Justice Burger, however, embraces history and prior practice, which allow him to recognize deviation from the absolute as well the overlapping scope of such categories as state and religion. The particular lessons of history which do not sway Justice Brennan permit Chief Justice Burger to tolerate the continued existence of some long-standing deviation as within the scope of the Constitution. "History provides the 'facts' upon which the judgment of [constitutionality] is premised."[227]

In the second recent opinion, *Lynch v. Donnelly*,[228] the Court's upholding of a municipal Christmas display, which included a creche, depended on the historical intersection between the roles of the state and religion. "This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause."[229] According to Burger, the lessons of history teach that line-drawing, and not absolute rules, must provide the guidelines to interpreting the establishment clause.

> Rather than mechanically invalidating all governmental conduct or statues that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would

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224. *Marsh*, 463 U.S. 783 at 817.
225. *Id.*
226. *Id.* at 821 (citation omitted).
227. Sullivan, *supra* note 56, at 324.
228. 465 U.S. 668 (1984).
229. *Id.* at 678.

> dictate—the Court has scrutinized challenged—legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.[230]

The secular purpose of the municipality in displaying the creche is in effect analogized to a municipal official attending the religious funeral of a heroic police officer.[231] Chief Justice Burger suggests that since neither the Archbishop of Canterbury nor the Bishop of Rome threatens the state today, no harm is done.[232] To Justice Brennan's concern for harm to the private, religious aspect of the creche, the Chief Justice answers that mixing sacred and secular settings sacrilizes the secular rather than profanes the sacred: "That a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation."[233]

To Justice Brennan the mix is anathema. From his natural law perspective, religion and government must remain absolutely separate. Thus when he notes with dismay the future inclusion of a menorah along with a creche as governmental involvement in religion,[234] he is suggesting that the Court "blurs the distinction between" the secular, governmental sphere and the private, religious sector,[235] despite the fact that the Court used one of the acknowledged establishment clause tests.[236] Again, Justice Brennan stated that the Court operated under "a fundamental misapprehension of the proper uses of history in constitutional interpretation."[237] In *Marsh*, Justice Brennan characterized the misunderstanding as the use of very specific history to support the constitutionality of the exceptional practice. In *Lynch*, Justice Brennan found the Court seriously at fault for failing to discuss the specific history of "the public celebration of Christmas or the use of publicly displayed nativity scenes."[238]

Justice Brennan found the puritans' hostility to anglicans' celebration of Christmas in the 17th century dispositive[239] but their

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230. *Id.*
231. *Id.* at 710 (Brennan, J., dissenting).
232. *Id.* at 686.
233. *Id.* at 685.
234. *Id.* at 702.
235. *Id.* at 710.
236. *Id.* at 713: "Although the Court's relaxed application of the *Lemon* test to Pawtuckett's crèche is regrettable, it is at least understandable and properly limited to the particular facts of this case."
237. *Id.* at 718.
238. *Id.* at 713.
239. *Id.* at 723.

descendants acceptance of the secular celebration of Christmas in the nineteenth century irrelevant because general celebration of Christmas did not come down from the time of the Framers. "Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America's varied history solely to suit the views of five members of this Court."[240] That argument is broad enough, however, to invalidate the recognition of such later developments as imprinting the words "In God we trust" on the coinage in the wake of the Civil War and the addition of "one nation under God" in the pledge of allegiance in the wake of the Korean War. Chief Justice Burger's use of the history of the establishment clause is designed to illustrate that the overlap between the spheres of church and state rather than sharp categories existed even at the time Congress approved the establishment clause, quite apart from the history of Christmas celebrations in the eighteenth century. To Brennan, that general concentration on the overlap constituted misuse of history, especially because he found evidence of creches in eighteenth-century Europe but not in eighteenth-century America. Justice Brennan candidly restricts the scope of history in constitutional interpretation in favor of solving twentieth-century problems with twentieth-century categories, in the same way as he invokes the spirit of Aquinas[241] without adopting his substantive views.

While judicial abstention from a historical argument might both make a brighter doctrinal line of interpretation and strengthen the prohibitory function of the establishment clause, the fact remains that the country is divided about the proper interpretation of the clause. In light of the bitter division over the Bork nomination, it is clear that the disaffection of the citizenry who interpret the establishment clause narrowly would rapidly mount into outrage, if compromise were not reached by allowing long-standing exceptions to the establishment clause to remain until greater consensus one way or the other is reached. The failure of the Court to establish a purer doctrinal interpretation of the establishment clause simply mirrors the failure of the country at large to reach a consensus, at least since *Everson* (the "wall of separation" case) in 1947, if there ever had been a consensus on church-state relations in this country.[242]

240. *Id.* at 725.

241. Justice Brennan's "return to the philosophy of St. Thomas Aquinas" is quoted *supra* in the text accompanying note 17.

242. Everson v. Board of Education, 330 U.S. 1 (1947). For a study of the use of history in *Everson, see* Kelly, *supra* note 32, at 137-142. *See also* Kurland, *Religion and the Constitution: "Eternal Hostility Against Every Form of Tyranny over the Mind of*

The Court itself has no coherent position on all establishment clause cases, and as commentators have pointed out,[243] in many other areas as well. Given the plurality of views on the Court, it is clear that neither Chief Justice Burger nor Justice Brennan could weld a new consensus. The most Chief Justice Burger might do was to preserve the *status quo*, leaving room for the continued existence of whatever long-standing exceptions were already in place. That might contribute to a climate of stability from which a future consensus might emerge. At no small expense to his own reputation, Chief Justice Burger appeared willing to forge a holding pattern on whatever basis he could, even if other Justices' advocation of a bright line became fragmented in the muddy waters of the pluralistic Court. While his own position was consistent, as a recent commentator has shown,[244] he did not find enough like-minded members of the Court to forge his position into a general consensus.

Justice Brennan challenged Chief Justice Burger not to use history in either *Marsh* or *Lynch*, and thus to enhance the bright doctrinal line separating religion and state. Justice Brennan always puts forth his own consistent position, even if he must assert his views in lone dissent. Chief Justice Burger's concept of leadership on a pluralistic Court could not take the form of adhering to a pure, bright doctrinal line. Instead, he worked for consensus through historical exceptions whenever he could. History appeared a sound enough basis to achieve consensus in those instances. He declared long before he joined the Court that "[w]henever existing rules of law cannot meet newly developed conditions affecting important rights of substantial numbers we should not be fearful of a new solution merely because it is new."[245] Traditionally, history meant legal precedents, and not social history or the history of exceptional practices. Chief Justice Burger's "new solution" included both: 1) specific historical exception when Justice Brennan thought the analysis called only for the broad lessons (of *Marsh*), and 2) the broad history of the overlap between the roles of religion and state when Justice Brennan called for the specific history of the celebration of Christmas (*Lynch*).

Perhaps the much later understanding of Holmes' 1914 *Pipeline* opinion gives Chief Justice Burger some comfort that future commentators will sort out his contribution in the context of our very

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Man," U.C. DAVIS L. REV. 705, 714-17 (1987).

243. Alschuler, *supra* note 193, at 1452; Kurland, *supra* note 242 at 715.

244. Alschuler, *supra* note 193, at 1455.

245. Riley v. District of Columbia Redevelopment Land Agency, 246 F.2d 641, 646 (D.C. Cir. 1957) (Burger, J., dissenting).

fragmented Court. Justice Frankfurter reminisced that a commerce clause foundation for the *Pipeline* opinion was too upsetting to the other Justices, so that Holmes had to forego the commerce clause "to get out an opinion that is not disturbing for the future, which sustains this legislation, and gives little further encouragement to the underlying economic impulse behind the legislation which some of the boys certainly feared."[246] As Justice Frankfurter noticed, the vital fact for Holmes was the outcome, and not his own reputation.

> When you have to have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man . . .[247]
>
> Some people might say, "Well why didn't Holmes tell them to go to hell!" Imagine him thinking, "Let the statute be declared unconstitutional. I'll satisfy my sanity to have [the commentator] now that I am as bright as he is." That was cheap at the price—to have it declared constitutional.[248]

It is possible that Chief Justice Burger had some of the same considerations in mind when he chose to explain his decision in *Marsh* and *Lynch* on historical grounds.

V. Analysis of the Historical and Natural Law Approaches to Opinion Writing

In constitutional jurisprudence, the judge's use of history provides flexibility of practice tailored to the customs, expectations and experience of the people subject to the constitutional laws in question. History may also provide protection against extreme departures from precedent when circumstances and public opinion have not changed. It thus balances oppression against chaos and opts for the middle ground. History, at its simplest, reflects the recent precedential *status quo* and popularly held values whether liberal or conservative. The use of history thus conserves whatever *status quo* is established, and provides a continuum from that *status quo.*

The types of questions we ask about the past have expanded so that recent monographs based on research into these questions bring new historical knowledge.[249] The uses of history in judicial opinions as well as historical research itself have grown. Several types of extra-legal history may be used today in judicial opinions. Not only may basic human values, such as tolerance of ways dif-

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246. H. PHILLIPS, *supra* note 125, at 297.
247. *Id.* at 298.
248. *Id.* at 299.
249. Yablon, *supra* note 185, at 94; Burt *supra* note 173, at 93.

ferent from the majority, emerge from the study of history as they did for the late Judge Wyzanski,[250] but history itself may support such values by disclosing the survival of continued unusual practices and ways of life.

That toleration appears in an examination of the use of legislative chaplains and Amish separation and survival. History lent its support to continuity. The value of lack of disruption emerges from Chief Justice Burger's opinions; his life-long interest in history[251] has sensitized him to the possibility of violating deeply-held beliefs and enduring consitutional values, even to tolerate some overlap between the proper provinces of the state and religion. In that sense, history is not different from natural law in being the vessel for moral values and choices. History at its finest illustrates for its students the operation of morals, as it did for Justice Gray in the case of *Wong Kim Ark* and even in shaping Justice Gray's recognition of America's need for paper money.

Natural law provides a systematic classification as well as predictability in accordance with the abstract principles chosen. The values of the system itself are more important than the facts in any particular case. Natural law theory makes a central claim to "normative primacy and necessity."[252] It also claims for itself universal validity "in that it sets justified prescriptive requirements or precepts for the conduct of all human beings" and "stands as the most basic criteria of moral rightness."[253] In effect, natural law theory is self-authenticating and self-legitimating providing its own validation. Therefore, the use of natural law in opinion writing is ideal for setting forth a new departure from the precedential *status quo.* It simply does not matter if the view set forth is currently out of fashion because a natural law position claims for itself, not historical development, but unchanging validity. According to natural law theory, although society may have in error departed from that view sanctioned by natural law, the erroneous departure does not, to the natural law jurist, signify challenge to the validity of its principles but merely underscores the human error of that departure. Thus the validity of the principle remains untouched.

When applied to opinion writing, natural law theory provides an outstanding rhetorical device to convince its reading audience: the

250. Wyzanski, *supra* note 6, at 242.

251. Burger, *Creating a More Perfect Union,* NAT'L PARKS: THE MAGAZINE OF THE NAT'L PARKS AND CONSERVATION ASS'N 12, 14 (March/April 1987) states that as a boy Chief Justice Burger, housebound for a year with polio, "immersed himself in early American history and the biographies of our founders."

252. Gewirth, *supra* note 178, at 95.

253. *Id.*

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opinion writer assumes the stance of one who, on the high moral ground of validity, wishes to depart from the erroneous precedential *status quo*. In addition, reasoning "issues the moral precepts of natural law."[254] Again, the centrality of natural law's appeal to reason provides the natural law jurist with another rhetorical device since reasoning plays a persuasive role in opinion writing generally. Whether the natural law judge writes for the majority or in a dissent, natural law proves a powerful method of opinion writing for the judge who wishes to depart from the precendential *status quo*.

The choice of natural law can be distinguished from ordinary social policy-making and 'neutral principles'[255] on rhetorical grounds. It is political philosophy, and does take a stand just as policy making and neutral principles implicitly do by fashioning the policy to the case or adopting period liberalism.[256] Natural law, however, explicitly takes its stand and claims for itself a moral righteousness based on universal principles. Thus in a sense the rhetorical stance of explaining the decision to the reader rests on how right this principle of decision-making is. An opinion structured in this way is designed to give the proposed solution to the legal issue as strong a support as it is possible to give. In this sense, too, the judge is putting something of his or her own personality into the decision—his or her own moral view. It is a powerful tool of persuasion because it invites the reader to become convinced that the solution the natural law judge poses is cloaked in absolute righteousness, even if few can see it. The desire for right and for certainty forms part of this style of opinion writing.

Both methods are neutral. Justice Brennan, perceived as liberal, and Justice Field, perceived as conservative, used natural law as the organizing principle of their jurisprudence. Similarly both Chief Justice Burger, the conservative, and Justice Gray, the liberal, called upon history to explain their decisions. It is clear that these two approaches capably expressed the jurisprudential views of each Justice. Both Judges who relied on history sought continuity, Gray with the immediate liberal past, most characteristically through strict adherence to legal precedents, and Chief Justice Burger through longer sweeps of history to preserve harmless individual practices. Both natural lawyers had a coherent blueprint for their jurisprudence, Justice Brennan by drawing sharp, separate lines for the role of the state and for the role of religion by removing any influence the state might have on reli-

254. *Id.* at 96.
255. Nelson, *supra* note 54, at 1262-69.
256. *Id.* at 1287.

gious life and by privatizing religion to free daily secular life from religious influences, and Justice Field by drawing a strict wall of separation between the public, governmental sphere and the private sector.

In an era of change, the sharp theoretical choices of natural lawyers present the Court and the opinion-reading public with clear guidelines. Once those guidelines have been usefully understood, however, the times move on to a new synthesis and delineation so that life itself hardly seems capable of being drawn into the sharp, clear sectors of jurisprudence. There is thus also need on the Court for the less sharp lines of history. Justice Field and Justice Brennan fashioned their jurisprudence as a blueprint to chart a course for a changing world, Justice Gray and Chief Justice Burger to provide continuity between the worlds of yesterday and tomorrow.