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Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt A Living Constitution

R. RANDALL KELSO*

Two main approaches appear in the popular literature on constitutional interpretation: originalism and non-originalism. An originalist approach refers back to some aspect of the framers' and ratifiers' intent or action to justify a decision. A non-originalist approach bases the goal of constitutional interpretation in part on consideration of some justification independent of the framers' and ratifiers' intent or action.

What is often unappreciated in addressing the question of whether to adopt an originalist or non-originalist approach to constitutional interpretation is the complication that emerges if one concludes that the framing and ratifying generation believed in the model of a living Constitution. Under such a model, later legislative, executive, or social practice, or judicial precedents, can change the meaning of a constitutional provision. Thus, while standard originalist supporters share the premise that the original meaning of constitutional text is fixed at the time each provision is framed and ratified, interpretation according to originalism actually does not commit the interpreter to a static or fixed interpretation of the Constitution. Instead, a true originalist form of interpretation can incorporate the principle that the provision was capable of evolution over time.

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I. INTRODUCTION

Two main approaches appear in the popular literature on constitutional interpretation: originalism and non-originalism.¹ As classically defined, an originalist approach refers to some aspect of the framers' and ratifiers' intent or action to justify a decision.² A non-originalist approach bases the goal of constitutional interpretation in part on consideration of some justification independent of the framers' and ratifiers' intent or action.³

Among originalists, there is a debate whether the framers' and ratifiers' "original [subjective] intention" should govern (intent)⁴ or whether one should look instead to the "original meaning" of the words adopted by the framers and ratifiers (action).⁵ Even among

¹ See generally Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241 (2009) ("For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as 'originalists' and those who do not.") (footnote omitted); INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 3–10 (Jack N. Rakove ed., 1990).

² See generally Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 703 (2009) ("By this they meant the sense intended by the people who wrote and ratified it."); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("Although the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it.") (citation omitted).

³ See Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1238–39 (2015) (noting interpretation theories of purposivists, living constitutionalists, textualists, legislative intentionalists, and originalists); Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 194 (2015) (noting approaches called "democracy–reinforcement, 'moral readings,' minimalism, or broad deference to political processes" in addition to originalism) (footnotes omitted). For a classic discussion of non-originalist approaches or, in his terminology, "non-interpretivist" approaches, see Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 263–65 (1981).

⁴ RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363–72 (1977) (specific historical intent should be the focus of constitutional interpretation); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456, 465 (1986) (arguing for a "jurisprudence of original intention").

⁵ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., Princeton Univ. Press 1997) ("We look for

each of these two approaches, there are variations. For example, under the “original intent” model of interpretation, is it specific or general historical intent that is most critical?⁶ For “original meaning,” is it literal text or purpose that is the most critical in terms of textualist interpretation?⁷

a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris* And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawmaker meant, rather than by what the lawgiver promulgated It is the *law* that governs, not the intent of the lawgiver.”). *But see* Kay, *supra* note 2, at 703–04 (while noting that the proponents of “original meaning” seemed to have “carried the day,” “recourse to original intentions is more consonant with the values underlying the originalist approach to interpretation”).

⁶ As elaborated by Professor Richard Fallon,

One helpful division distinguishes between ‘specific’ or ‘concrete’ and ‘general’ or ‘abstract’ intent. Specific intent involves the relatively precise intent of the framers to control the outcomes of particular types of cases Abstract intent refers to aims that are defined at a higher level of generality, sometimes entailing consequences that the drafters did not specifically consider and that they might even have disapproved.

Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99 (1987). Professor Ronald Dworkin has made the same point using the terms “conceptions” to describe the specific, discrete ideas or examples held by individuals, while “concepts” are the broader, more abstract idea reflected in the conceptions. RONALD DWORIN, *LAW’S EMPIRE* 70–71 (1986). For further discussion, see CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW* § 6.2.3.2, at 156–59 (updated 2017 ed. 2007), available at http://libguides.stcl.edu/ld.php?content_id=36280424.

⁷ In considering constitutional text, as in considering statutory text, a judge must decide whether to read only the text literally, and thus risk missing the spirit, or purpose, behind why the text was adopted, or whether to interpret the provision in light of both its letter and spirit. Justice Holmes once wrote, “[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.” *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (citation omitted). Professor Lon Fuller once asked, “[I]s it really ever possible to interpret a word in a statute without knowing the aim of the statute?” Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958). On the other hand, it has been noted that purposes are elusive, and that judges may see purposes in the text that reflect the judge’s own views, rather than the views of the drafters. *See* R. Randall Kelso, *Styles of Con-*

In most cases, the result would be the same under either an original intent or an original meaning approach.⁸ For this reason, as Justice Scalia acknowledged, “[T]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between *original* meaning (whether

stitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History, 29 VAL. U.L. REV. 121, 129 (1994). Supporters of literal interpretation are concerned that attempting to determine a provision’s purpose, or purposes, is not a clear, mechanical process that can yield unambiguous results. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 532–34 (1988); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597, 1627 (1991).

In terms of interpretation theories prevalent when the Constitution was drafted, it has been noted,

[T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules of interpretation customarily followed by the courts. [This mode of interpretation was] calculated to give a just and well-rounded interpretation to every document, in the light of its declared general purpose; or, if its purpose is not declared, then, in the light of its apparent purpose, so far as this could be discovered.

WILLIAM WINSLOW CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 364 (1953). See also H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 952–64 (1993); Stephen F. Williams, *Rule and Purpose in Legal Interpretation*, 61 U. COLO. L. REV. 809, 809–11 (1990); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 383–84 (1985). For further discussion of literal versus purposive interpretation, see KELSO & KELSO, *supra* note 6, § 6.2.12, at 140–43.

⁸ In a few cases, there can be an important difference. For example, from an originalist approach focused on specific historical intent, the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896), by *Brown v. Board of Education*, 347 U.S. 483 (1954), may well have been flawed since segregated schools existed in 1868, even in the District of Columbia. See, e.g., BERGER, *supra* note 4, at 117–27, 363–72 (specific historical intent should be determinative, and *Brown*’s overruling of *Plessy* is unjustified). But see *infra* note 109 (noting debate over whether *Brown*’s overruling of *Plessy* is consistent with specific historical intent). From an original meaning perspective, Justice Scalia indicated his view that the clear text of the Equal Protection Clause requires a color-blind Constitution that overrides specific historical traditions, thus supporting the Court’s overruling of *Plessy* in *Brown*. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., concurring in the judgment in part and dissenting in part).

derived from Framers' intent or not) and *current* meaning."⁹ This is the issue on whether to adopt a static or living model for constitutional interpretation.¹⁰

What is often unappreciated in addressing this question is the complication that emerges if one concludes that the framing and ratifying generation believed in the model of a living Constitution. Under such a model, later legislative, executive, or social practice, or judicial precedents, can change the meaning of a constitutional provision.¹¹ This is true whether one adopts an original subjective intent or original meaning approach. In either case, it would be faithful to their theory of interpretation to interpret the Constitution today differently than they would have interpreted it years ago. In short, while it has been noted that standard originalist supporters share the premise that "the original meaning ('communicative content') of the constitutional text is fixed at the time each provision is framed and ratified,"¹² interpretation according to any version of originalism does not commit the interpreter to a static or fixed interpretation of the Constitution. Instead, a true originalist form of interpretation can incorporate the principle that the provision was capable of evolution over time.

Part II of this Article summarizes the four main judicial decision-making styles that exist regarding constitutional interpretation. Part III then summarizes the argument that the overwhelming historical evidence suggests that the framers and ratifiers believed in a living Constitution model of interpretation. Thus, when Justices Scalia and Thomas adopted, or newly-confirmed Justice Neil Gorsuch potentially adopts, a static or fixed approach to constitutional interpretation that seeks to determine how the framers and ratifiers would have decided the case in 1789 (or 1791 for the Bill of Rights,

⁹ SCALIA, *supra* note 5, at 38.

¹⁰ See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693–95 (1976). See also *infra* text accompanying notes 11–12, 24–28; KELSO & KELSO, *supra* note 6, at 165–66 (discussing differences between "static" and "living" constitutional interpretation).

¹¹ See *infra* text accompanying notes 52, 60–62, 87–149; KELSO & KELSO, *supra* note 6, at 159–65; Colby & Smith, *supra* note 1, at 244–45.

¹² Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

or 1868 for the Fourteenth Amendment's Due Process or Equal Protection Clauses),¹³ they are not following either the historically valid original intent or original meaning of the Constitution. A "true originalist" model of interpretation would focus on how the framers and ratifiers intended the meaning of the words they used to evolve over time in response to later legislative, executive and social practice, and judicial precedents, i.e., how the framers and ratifiers would interpret the Constitution if they were alive today.

Without historical support for the standard version of originalism, which adopts a fixed or static model of constitutional interpretation, its proponents are left with only the argument that such an approach is better, even if it was not shared by the framers and ratifiers.¹⁴ Part IV of this Article discusses the arguments why such standard originalism should not be preferred on normative grounds. Part V provides a brief conclusion and notes that the proper approach to constitutional interpretation on both original intent and normative grounds is to interpret the Constitution in the manner that the framers and ratifiers would expect it to be interpreted today.¹⁵ That approach is best reflected on the modern Supreme Court in the interpretation approach of Justice Kennedy, and former Justices O'Connor and Souter.¹⁶ Such an approach represents what this Article calls a "true originalist" interpretation.

¹³ Justice Scalia made very clear his preference for a "static" or "fixed" constitutional interpretation based on "original meaning." See SCALIA, *supra* note 5, at 38–39. Concerning Justice Thomas' theory of interpretation, see Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 649 (2007) (arguing that Justice Thomas is even more of a committed originalist than Justice Scalia). Regarding Justice Gorsuch, see Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 185 (2017).

¹⁴ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 91, 102–17 (2004). See also *infra* text accompanying notes 179–82.

¹⁵ This approach is consistent with Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013) (discussing "authorially intended meaning"); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 442–54 (2007) (discussing the difference between "original meaning," which is consistent with a living Constitution model of interpretation, and "original expected application," which reflects fixed or static meaning).

¹⁶ See *infra* text accompanying notes 102–05, 86, 124–29, 144–49.

II. THE FOUR STYLES OF JUDICIAL DECISION-MAKING AND CONSTITUTIONAL INTERPRETATION

As is discussed more in-depth elsewhere,¹⁷ jurisprudentially, there are two main questions that lie behind any act of judicial interpretation. The first concerns the nature of law: analytic versus functional.¹⁸ The second concerns the nature of the judicial task: positivist versus normative.¹⁹ Combining the two responses to these two

¹⁷ This discussion in Part II is an abbreviated version of material presented in KELSO & KELSO, *supra* note 6, at 19–62, 99–133.

¹⁸ See KELSO & KELSO, *supra* note 6, at 35. Under one approach, law is seen primarily as a set of rules and principles whose application is guided by an analytic methodology of logic and reason, i.e., the analytic, or conceptualist, approach. See EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 95–99 (rev. ed. 1974). Alternatively, law ultimately can be judged not in terms of logical consistency, but as a means to some social end through a pragmatic or functional treatment of rules and principles, i.e., the functional, or pragmatic, approach. *Id.* at 111–33.

[L]egal ordering [under an analytic approach] is not the collective pursuit of a desirable purpose. Instead, it is the specification of the norms and principles immanent to juridically intelligible relationships. [This approach] repudiates analysis that conceives of legal justification in terms of some goal that is independent of the conceptual structure of the legal arrangement in question.

Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 964–65 (1988).

The dominant tendency today [under a functional approach] is to look upon the content of law from the standpoint of some external ideal that the law is to enforce or make authoritative. Implicit in contemporary scholarship is the idea that the law embodies or should embody some goal (e.g., wealth maximization, market deterrence, liberty, utility, solidarity) that can be specified apart from law and can serve as the standard by which law is to be assessed.

Id. at 955 (footnotes omitted).

¹⁹ See KELSO & KELSO, *supra* note 6, at 35. This question asks whether judicial decision-making should be separable from morals or social values, i.e., should judges view law solely as a body of rules and principles from which legal conclusions are derived—the positivist assumption—or should judges view law as a body of rules and principles testable by reference to some external standard of rightness, some social or moral value – law as normative or prescriptive, not descriptive. See BODENHEIMER, *supra* note 18, at 91–109, 134–68. A judge could aim at producing decisions and opinions that are “good law” in the narrow sense of being clear, certain, and predictable, and unquestionably within the legitimate

questions creates four judicial decision-making styles: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); and natural law (analytic normative).²⁰

Focusing on constitutional interpretation, any interpreter must decide, among other things, how much weight to give to arguments about: (1) the plain meaning of the Constitution's text, and the text's purpose or spirit; (2) the context of that text, including verbal or policy maxims of construction, related provisions in the Constitution or other related documents, like the earlier enacted Articles of Confederation, and the structure of government contemplated by the Constitution, including issues of federalism and separation of powers; (3) the historical evidence concerning the intent of the framers and ratifiers of the Constitution; (4) the legislative, executive, and social practice under the Constitution; (5) the judicial precedent interpreting the Constitution; and (6) the prudential considerations about the consequences of a particular judicial decision.²¹

power of the court. Such judges are typically described as following a "positivist" approach to judicial decision-making. See Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 799–802 (1993). In contrast, a judge could aim at producing law and applications of law that accord with certain moral principles embedded in a society's legal and moral culture. Judges adopting this more "normative" perspective view the judge's role as requiring the judge to give some weight to the moral insights and traditions that lie behind legal rules and that may develop over time. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1063 (1975) ("[W]hat an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions.").

²⁰ See *infra* text accompanying notes 25–48; KELSO & KELSO, *supra* note 6, at 35–62. See also R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 150, 184–218 (1994); R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37, 40 (1997).

²¹ See KELSO & KELSO, *supra* note 6, § 5.1, at 99–100. A similar set of sources for constitutional interpretation—text, including context; history; structure/theory; precedent and practices; and prudential/value considerations—appears in RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3–12 (2001); Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407, 409 n.11 (2003) (reviewing RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001)); See also PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9–119 (1982) (discussing arguments of text, structure, history, doctrine (precedent), and prudential and ethical considerations).

These sources—text, context/structure, history, practice, precedent, and prudential considerations—can be organized under two broad headings: contemporaneous sources of meaning and subsequent considerations.²² Contemporaneous sources are those that existed at the time a constitutional provision was ratified.²³ These include: (1) the text of the Constitution; (2) the context of that text, including related provisions in the Constitution or other related documents, and the structure of government contemplated by the Constitution; and (3) the history surrounding the provision’s drafting and ratification.²⁴ Subsequent considerations involve matters that occur after the constitutional provision is ratified.²⁵ These include the sub-categories of: (4) legislative, executive, and social practice under the Constitution; (5) judicial precedent interpreting the Constitution; and (6) prudential considerations, which involve judicial speculation concerning the consequences of any particular judicial construction, including arguments of justice or sound social policy.²⁶ Naturally, use in constitutional interpretation of such subsequent sources leads to a living Constitution, which changes over time. As Justice Scalia once remarked, “[t]he ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that . . . grows and changes from age to age”²⁷

As is discussed below,²⁸ in terms of the four judicial decision-making styles, from a fixed or static approach to constitutional interpretation, typically adopted by formalists, judges should resort only to contemporaneous sources of interpretation, i.e., (1)–(3) listed above; Holmesian judges will place greater reliance on (4) legislative and executive practice; natural law judges will place

²² See KELSO & KELSO, *supra* note 6, §§ 5.1–5.3, at 99–125.

²³ See *id.* § 5.1, at 100.

²⁴ See *id.* The term “contemporaneous sources” conforms to usage by Justice Powell in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., joined by Rehnquist, C.J., and O’Connor, J., dissenting) (“As contemporaneous writings and the debates at the ratifying conventions make clear, the States’ ratification of the Constitution was predicated on this understanding . . .”).

²⁵ See KELSO & KELSO, *supra* note 6, § 5.1, at 100.

²⁶ See *id.*

²⁷ SCALIA, *supra* note 5, at 38.

²⁸ See *infra* text accompanying notes 31–71.

greater reliance on a reasoned elaboration of (5) judicial precedents; and instrumentalist judges will be willing to resort to (6) prudential considerations of social policy.²⁹

A. *Formalist Constitutional Decision-Making*

One approach to judicial decision-making is represented by analytic, positivist judges who combine a focus on certain, predictable treatment of existing positive law with an insistence on logical rule application.³⁰ Such judges have generally been called “formalists” because they concentrate on the formal aspects of law—technical rule manipulation in light of a statute’s or constitution’s words, and the literal holdings of common-law precedents.³¹ Under a positivist theory of law, the formalist sees the judge as a neutral arbitrator who attempts to decide cases in light of existing positive law.³² With an analytic, positivist theory of law, formalism has a preference for clear, bright-line rules that are capable of logical, mechanical application, rather than doctrine phrased as balancing tests, factors to weigh, or general standards.³³

²⁹ See KELSO & KELSO, *supra* note 6, § 6.4.4, at 171.

³⁰ See *id.* § 3.1, at 35.

³¹ *Id.* Under this approach, law is viewed as a closed system of related rules to be logically or mechanically applied. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607–09, 614–20 (1908). It has been noted, “Formalists generally viewed the law as a relatively closed system of conceptions and axioms from which judges and others could deduce resolutions of almost any issue.” Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 889–90 (1981) (citing Pound, *supra*). The formalist approach to statutory and constitutional interpretation similarly focuses on the logical elaboration of existing statutory or constitutional text. See KELSO & KELSO, *supra* note 6, at 39–41 nn.14–22.

³² See KELSO & KELSO, *supra* note 6, at 40. See also Schauer, *supra* note 7, at 521 (“To be formalistic, it is said, is to be enslaved by mere marks on a printed page.”) (footnote omitted). See generally Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527, 527 (1999).

³³ See KELSO & KELSO, *supra* note 6, at 40. See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–88 (1989).

This emphasis on deciding according to existing positive law supports formalist judges adopting a static or fixed view of constitutional interpretation.³⁴ However, as Justice Scalia noted, this approach does not necessarily adopt a strict, or narrow, construction of constitutional provisions.³⁵ Indeed, Justice Scalia stated, “[This] is not strict construction, but it is reasonable construction.”³⁶ The term “textualism” is not used in this Article to describe this interpretation style because all four judicial decision-making styles start their statutory and constitutional analysis with text.³⁷ In any event, Justice Scalia embraced the term “formalism,” as he emphatically asserted,

Of all the criticisms leveled against textualism, the most mindless is that it is “formalistic.” The answer to that is, *of course it’s formalistic!* The rule of law is *about* form . . . Long live formalism. It is what makes a government a government of laws and not of men.³⁸

B. *Holmesian Constitutional Decision-Making*

A second kind of judge combines a positivist emphasis on certain, predictable treatments of existing law with the functional view that legal rules are always means to societal ends.³⁹ Given this view of legal rules, purely logical treatment of existing law is not sufficient to carry out the judicial task.⁴⁰ Judges who adopt this view may be called “Holmesians” after Justice Holmes, whose famous statement was that “[t]he life of the law has not been logic: it has been experience.”⁴¹ As pragmatic functionalists, Holmesian judges are sensitive to the purposes behind relevant legal rules and texts to apply the doctrine in a way best calculated to achieve its intended

³⁴ See SCALIA, *supra* note 5, at 38–41, 45–47.

³⁵ See *id.* at 38–39.

³⁶ *Id.* at 38.

³⁷ See KELSO & KELSO, *supra* note 6, at 39.

³⁸ SCALIA, *supra* note 5, at 25. For further treatment of the formalist approach to constitutional interpretation, see KELSO & KELSO, *supra* note 6, at 278–302.

³⁹ See KELSO & KELSO, *supra* note 6, § 3.2, at 41.

⁴⁰ See *id.*

⁴¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881). See also KELSO & KELSO, *supra* note 6, at 41.

ends.⁴² However, as positivists, Holmesian judges believe that the judicial task is merely to interpret existing law, with any changes in the law coming from the other branches of government, the legislative or executive branch.⁴³ As Holmes stated, “[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”⁴⁴

Given this understanding, the role of the law in Holmes’ view was to accommodate what the dominant group in society wants.⁴⁵ Indeed, as Professor G. Edward White noted,

Holmes’ job at the Supreme Court consisted of, in many instances, reviewing the constitutionality of actions of a legislature. In such cases Holmes forged his famous attitude of deference, which was seen as humility and ‘self-restraint’ by admirers and had the added advantage of sustaining ‘progressive’ legislation about which a number of early 20th-century intellectuals were enthusiastic [I]n the 1950’s and 1960’s a similar version of deference would have perpetuated malapportioned legislatures, racially segregated facilities, the absence of legal representation for impoverished persons, and restrictions on the use and dispensation of birth control devices.⁴⁶

Professor Grant Gilmore noted that for Holmes, “if the dominant majority . . . desires to persecute blacks or Jews or communists or atheists, the law, if it is to be ‘sound,’ must arrange for the persecution to be carried out with, as we might say, due process.”⁴⁷

⁴² See KELSO & KELSO, *supra* note 6, at 41.

⁴³ See *id.*

⁴⁴ HOLMES, *supra* note 41, at 41.

⁴⁵ See G. Edward White, *The Integrity of Holmes’ Jurisprudence*, 10 HOFSTRA L. REV. 633, 657 (1982) (“While a constitution was ‘made for people of fundamentally differing views,’ the views that counted were those of the majority.”) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

⁴⁶ *Id.* at 655, 667 (footnote omitted). On this aspect of Holmes’ jurisprudence, see Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 254 (1963).

⁴⁷ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 49–50 (1977).

For these reasons, the Holmesian deference-to-government approach is the style most properly viewed as a strict construction approach to the Constitution, at least in cases involving individual rights challenges to the constitutionality of governmental action.⁴⁸ For structural issues of federalism or separation of powers, a deference-to-government approach does not call for strict construction of governmental powers, but rather for a deferential approach toward governmental powers.⁴⁹ This deference-to-government posture means that Holmesian judges are the most willing to permit legislative and executive action to act as a gloss on meaning to the Constitution.⁵⁰ To this extent, the Holmesian approach rejects a static model of constitutional interpretation in favor of a living Constitution.⁵¹ This is true so long as that living Constitution derives its support from legislative or executive action, rather than judicial consideration of general moral principles or social policy.⁵²

C. *Instrumentalist Constitutional Decision-Making*

The instrumentalist approach to constitutional interpretation involves resorting to background moral principles and social policies in cases where leeway exists in the law following consideration of the text and purpose of constitutional provisions.⁵³ Because of the

⁴⁸ See KELSO & KELSO, *supra* note 6, § 3.2, at 46. See also White, *supra* note 45, at 656–58.

⁴⁹ See KELSO & KELSO, *supra* note 6, at 46. See, e.g., *INS v. Chadha*, 462 U.S. 919, 986–87, 994–96 (1983) (White, J., dissenting) (legislative and executive practice should override text of Bicameralism and Presentment Clauses to make a legislative veto provision constitutional).

⁵⁰ See KELSO & KELSO, *supra* note 6, at 46.

⁵¹ See *id.*

⁵² See *id.*; see, e.g., Rehnquist, *supra* note 10, at 694–96, 704–06 (supporting Justice Holmes’ approach toward a “living” Constitution model of interpretation); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *FORDHAM L. REV.* 597, 603–06 (2013). For further treatment of the Holmesian approach to constitutional interpretation, see KELSO & KELSO, *supra* note 6, § 10.1, at 303.

⁵³ See KELSO & KELSO, *supra* note 6, § 3.3, at 47–48. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6–12, 115–32 (2005); Richard A. Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1, 1–8 (1996); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331, 1343–47 (1988) (comparing, *inter alia*, Ronald Dworkin’s natural law theory, which permits use of background “principles” to aid interpre-

general nature of many constitutional provisions, such as due process, equal protection, or freedom of speech, a greater percentage of constitutional cases tend to involve more leeway than in the case of statutory interpretation.⁵⁴ Followed faithfully, however, the instrumentalist approach to constitutional interpretation is not an invitation to unbridled judicial activism.⁵⁵ For example, Justice Brennan once noted that he grounded his approach to the Constitution in terms of a concern with “human dignity” shared by the framers and ratifiers of the Constitution and the Fourteenth Amendment, and thus part of the Constitution’s background context, not his personal views.⁵⁶ Nevertheless, because of the potential for greater judicial activism represented by the instrumentalist approach, instrumentalist judges are most often criticized for deciding cases based on grounds that the decision reflects a supposed community consensus, or values a judge thinks the community eventually will hold, or a “judge’s own values.”⁵⁷ Instrumentalist judges are thus often described as judicial activists by their detractors.⁵⁸

Because even a moderate instrumentalist judge considers actual background social policies of contemporary society as one source of constitutional interpretation, the instrumentalist approach rejects the formalist model of a static or dead Constitution.⁵⁹ Instead, the instrumentalist approach favors a living Constitution that draws its breath not only from the text and purpose of the framing and ratify-

tation, versus pragmatism’s additional use of social “policies”). For further discussion of principles versus policies, see KELSO & KELSO, *supra* note 6, § 2.4, at 30–34.

⁵⁴ See KELSO & KELSO, *supra* note 6, § 3.3, at 47–48.

⁵⁵ See *id.* at 53.

⁵⁶ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 439–45 (1986).

⁵⁷ John Hart Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16–22, 43–52 (1978).

⁵⁸ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 69–100 (1990); BERGER, *supra* note 4, at 288–99; LOUIS LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT’S POWER TO REVISE THE CONSTITUTION* 273–310 (1975). See also JOHN DENTON CARTER, *THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM* ix–xii (1973).

⁵⁹ See KELSO & KELSO, *supra* note 6, at 54.

ing generation, but also from the history and traditions of contemporary society.⁶⁰ Unlike the Holmesian deference-to-government approach, the instrumentalist approach does not limit this living Constitution to support from positive governmental action—that is, recent action of the legislative and executive branches.⁶¹ Instead, the living Constitution embodies many sources, including contemporary social views in America and Western civilization generally, recent judicial precedents, and prudential consideration by judges of contemporary social policy.⁶²

D. *Natural Law Constitutional Decision-Making*

Societies typically have positive legal enactments—constitutions, statutes, and a record of prior judicial decisions—and in deciding cases, natural law judges, like all other judges, will examine those enactments very carefully.⁶³ Regarding constitutional interpretation, however, judges in the natural law decision-making tradition will be quite careful to ask whether the drafters included natural law principles in the Constitution.⁶⁴ As Dean Roscoe Pound observed in 1938, “In studying the formative era of American law we are concerned immediately with the eighteenth-century natural law which became embodied for us in the Declaration of Independence

⁶⁰ See *id.*; see, e.g., Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247–50 (2002).

⁶¹ See KELSO & KELSO, *supra* note 6, at 54.

⁶² See *id.*; see, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 388–90 (1989) (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting) (“Where organizations with expertise in a relevant area have given careful consideration to the question . . . there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards,” and these standards might involve legislative enactments or views of social organizations “in other countries” as part of an evolving consensus among nations), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329, 329 (2004); Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 265 (2003); For further treatment of the instrumentalist approach to constitutional interpretation, see KELSO & KELSO, *supra* note 6, at 325–53.

⁶³ See KELSO & KELSO, *supra* note 6, § 3.4, at 55.

⁶⁴ See *id.*

and is behind our bills of rights.”⁶⁵ Natural law thinkers might also take natural law principles into account in passing statutes.⁶⁶ As Dean Pound noted,

[T]he believers in eighteenth-century natural law did great things in the development of American law because that theory gave faith that they could do them. Application of reason to the details of the received common law was what made the work of the legislative reform movement of enduring worth. Some of its best achievements were in formulating authoritatively what men had reasoned out in the era of the school of the law of nature in the seventeenth and eighteenth centuries.⁶⁷

It must be acknowledged that certain more radical versions of natural law theory may be as willing as versions of instrumentalism to let moral principles outside those natural law principles reflected in the Constitution affect constitutional interpretation.⁶⁸ On the other hand, the natural law theory of our constitutional tradition, as espoused by Chief Justice John Marshall, Justice Joseph Story, James Madison, and others during the framing and ratifying period, held that judges should consider only the background moral principles that emerge from considering the Constitution.⁶⁹ This flows from viewing the natural law philosophy of our framers and ratifiers as primarily influenced by Enlightenment natural law theory, and the Enlightenment’s social contract conception of the nature of government and the proper role of the judiciary in such a society to follow

⁶⁵ ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 17 (photo. reprint 1960) (1938).

⁶⁶ See KELSO & KELSO, *supra* note 6, at 55.

⁶⁷ POUND, *supra* note, 65, at 27.

⁶⁸ This possibility is discussed *infra* note 119 and accompanying text.

⁶⁹ See *infra* text accompanying notes 89–101. For an example of the Marshall Court following principles in the Constitution itself, rather than background natural law, and thus being unwilling to hold slavery was unconstitutional under the original Constitution despite its evident immorality from the perspective of natural law, see Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 *STAN. L. REV.* 532, 533–34 (1969).

the social contract as set out in a written Constitution.⁷⁰ It is important to remember, however, that the Ninth Amendment is a textual reminder that the framers and ratifiers believed citizens retained rights not enumerated in the Constitution, thus supporting the modern constitutional doctrine of “unenumerated” fundamental rights.⁷¹

III. HISTORICAL EVIDENCE SURROUNDING THE APPROACH OF THE FRAMERS AND RATIFIERS

A. *General Observations*

In the seventeenth and eighteenth centuries, virtually all discussion and writing about law and theories of interpretation approached the topic from the perspective of some version of natural law.⁷² As

⁷⁰ See KELSO & KELSO, *supra* note 6, at 55–56. Professor Kermit Hall has noted: “Natural law theory and the social contract gave American public law its emphasis on limiting governmental power. If government violated the social contract and if it denied natural rights and abused public trust, the people retained a right to overthrow it.” KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 58 (1989). See also Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 133–37 (1989) (concluding that we do not have an unwritten Constitution, and that judges should only resort to principles in the Constitution itself).

⁷¹ On this natural law background, see David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 313–19 (1992); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 1 (1988); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987). See KELSO & KELSO, *supra* note 6, at 1044 (discussing the text of the Ninth Amendment, which provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). For further treatment of the natural law approach to constitutional interpretation, see KELSO & KELSO, *supra* note 6, at 278–302.

⁷² The discussion in Section III.A of this Article is an updated, and shortened, version of an earlier work by this author. See R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY’S L.J. 1051, 1053–56, 1074–79 (1995). See also DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 367–83 (2d ed. 2005) (discussing the natural law tradition of Locke, Pufendorf, Vattel, Burlamaqui, and Grotius, among others); Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT’L L. 283, 292–309 (2014) (discussing the interpretation theories of Vattel, Grotius, Pufendorf, Burlamaqui, Rutherford, Bacon, and Blackstone, among others); Edward S. Corwin,

this Article discusses,⁷³ the traditional eighteenth-century natural law model of interpretation treated repeated legislative or executive practice, or a reasoned elaboration of precedent, as relevant to constitutional meaning, in addition to text, context, purpose, and history. In considering constitutional interpretation actions after a constitutional provision was ratified, the framers' and ratifiers' generation necessarily rejected a static or fixed version of constitutional interpretation.

As is discussed below,⁷⁴ there were two competing approaches in the eighteenth century to which the framing and ratifying generation would have turned for guidance: the classic/Christian natural law tradition and the Enlightenment natural law tradition. Under the classic/Christian tradition, the ultimate source of rights is God's reason and will.⁷⁵ Under the Enlightenment tradition, the ultimate source of natural rights is based upon human reason.⁷⁶ This led to placing a high value on freedom of speech and religious toleration, and it supported a belief in "civil peace, material prosperity through economic growth, scientific progress, and rational liberty."⁷⁷

The "Higher Law" Background of American Constitutional Law, 42 HARV. L. REV. 149, 157 (1928).

⁷³ See *supra* note 7; *infra* text accompanying notes 113–40, 159–94. For further discussion on the basic elements of this natural law approach see KELSO & KELSO, *supra* note 6, at 354–404.

⁷⁴ See *generally infra* text accompanying notes 75–84; Kelso, *supra* note 72, at 1053–56.

⁷⁵ As has been noted, this tradition is "classical and Christian, in the tradition of Cicero, Aquinas, Hooker, and Burke." JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 69 (2d prtg. 1990). See *generally* DOUGLAS W. KMIEC, ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 1 (3d ed. 2009) (analyzing "constitutional law by considering a number of ideas from early thinkers which have been influential in the forging of the American constitutional order").

⁷⁶ See Kelso, *supra* note 72, at 1055 ("[T]he Enlightenment . . . tradition is 'characterized by its rationalism, secularism, and radicalism . . . [and] rejected the divine origin of natural law, exalt[ing] the autonomy of human reason' . . .") (quoting MCCLELLAN, *supra* note 75, at 70–71).

⁷⁷ ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 18 (1985). The Enlightenment natural law tradition includes the English, Scottish, and French Enlightenments. This seventeenth-to-eighteenth-century tradition included such writers as Locke and Berkeley of the English Enlightenment; Hutcheson, Hume, and Adam Smith of the Scottish Enlightenment; and Montesquieu,

Determining the precise influences on the framers and ratifiers at the time of the founding is likely to be somewhat controversial.⁷⁸ This is particularly true among aspects of the eighteenth century natural law Enlightenment tradition.⁷⁹ Similar debates can be made re-

Rousseau, and Voltaire of the French Enlightenment. See William Bristow, *Enlightenment*, STANFORD ENCYC. OF PHIL. (Edward N. Zalta ed., Fall 2017 Edition), available at <https://plato.stanford.edu/entries/enlightenment/>. Under these approaches, rights derive from man and man's reason. *Id.* (noting the Enlightenment is sometimes called "the Age of Reason"). As Professor Jefferson Powell has noted, the Enlightenment tradition of rational liberty is based on an "understanding of human nature as constituted by 'basic deliberative capacities' and by the potential for 'some measure of self-direction.'" On that basis, liberalism pursues 'the preservation and enhancement of human capacities for understanding and reflective self-direction' as 'the core of the liberal political and moral vision.'" H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 225 (1993) (quoting SMITH, *supra*, at 200–01).

⁷⁸ For example, as between the Enlightenment tradition and the classical/Christian natural law tradition, the seventeenth and eighteenth-century civic Republican tradition is probably best viewed as more part of the Enlightenment tradition. As has been noted,

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

POWELL, *supra* note 77, at 67, 69 (footnotes omitted). See also Suzanna Sherry, *Public Values and Private Virtue*, 45 HASTINGS L.J. 1099, 1099–1104 (1994) (complementary nature of civic Republicanism and liberalism); Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 688–90 (1992) (discussing Locke and various versions of civil republicanism).

⁷⁹ For example, there is a debate over whether the framers and ratifiers were influenced more by Lockean or civic Republican ideology. Professor Mark Tushnet has noted:

The liberal [Lockean] tradition stresses the self-interested motivations of individuals [sometimes called possessive individualism] and treats the collective good as the aggregation of what individuals choose Although it acknowledges the role of public institutions in providing the framework for individual development, the liberal tradition insists that such institutions be neutral toward competing conceptions of the good and tends

garding events leading up to the drafting and ratification of the Fourteenth Amendment's Privileges and Immunities, Due Process, and Equal Protection clauses.⁸⁰

to emphasize the risks of governmental overreaching. The republican tradition, seeing public institutions as important means by which private character is shaped, is less suspicious of government.

MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 6 (1988). As this discussion suggests, and Professor Tushnet noted, "[A]s the framers considered questions of fundamental institutional design, they discovered that liberalism and civic republicanism converged on some important matters." *Id.* at 7. For a more recent discussion of the similarities and differences between Lockean and civil Republican ideology, see Jack M. Balkin, *Which Republican Constitution?*, 32 *CONST. COMMENT.* 31, 31–36, 44–55 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016)).

There are also debates over the influence on the framers and ratifiers of the Scottish versus the English Enlightenment. For example, the Declaration of Independence phrased "unalienable" rights as rights to "life, liberty, and the pursuit of happiness," reflecting the "moral sense" of the Scottish Enlightenment of Frances Hutcheson, David Hume, and Adam Smith, and their view of "sympathy," rather than "life, liberty, and property," thus reflecting the focus of Locke and the English Enlightenment. *See generally* GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 168–80 (1978); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 66–71 (1981); Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 *KY. L.J.* 353, 358–82 (2003). The Scottish Enlightenment was closer in this manner to the civic Republican tradition, and the French Enlightenment's phrasing of "liberty, equality, and fraternity." The Due Process Clause of the Fifth Amendment, of course, adopted the Lockean concept that no person may be deprived of "life, liberty, or property without due process of law." This phrasing was also used in the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1. However, in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), a foundational case for the Fourteenth Amendment's substantive due process doctrine, the Court concluded "liberty" includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," invoking the Scottish Enlightenment phrasing. On these varied influences, see ALAN GIBSON, *INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC* ix (2006).

⁸⁰ For example, there could have been debates over the influence of Adam Smith or John Locke during the pre-Civil War period leading up to the Thirteenth and Fourteenth Amendments. *See* KELSO & KELSO, *supra* note 6, § 13.1, at 405–09 nn. 5–16 (citing, *inter alia*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 1–9 (1977)). Further, there can be a debate sur-

However, any specific substantive disagreements among the seventeenth- and eighteenth-century natural law approaches are not critical from a focus on static versus living constitutional interpretation, as each viewed natural rights as an evolutionary project of greater, and a more enlightened, understanding of the demands of reason as applied to human nature.⁸¹ That more precise understanding would lead all of these traditions toward a convergence of their views based on that new understanding.⁸² Further, each viewed constitutional interpretation as intended to carry out the purposes of the framers and ratifiers, with those purposes influenced by the natural law tradition and an expectation that the then-current natural law style of drafting documents would be understood and applied so that courts would interpret legislation and the Constitution in light of that tradition.⁸³ While that model likely adopted more of an objective original meaning approach toward interpretation, rather than a subjective original intent,⁸⁴ whether the focus is on the framers' intent

rounding the influence of classic/Christian versus Enlightenment natural law reasoning in the eighteenth and nineteenth centuries, particularly as it affected the Federalist, Democratic, Whig, Republican, and other political parties. *See* KELSO & KELSO, *supra* note 6, § 8.4.1, at 262–63 nn. 66–71, 265–66 nn. 85–88. *See also* FARBER & SHERRY, *supra* note 72, at 361–67 (discussing the ideological origins of the Reconstruction amendments).

⁸¹ *See* KELSO & KELSO, *supra* note 6, § 8.4.1, at 270.

⁸² *See id.* For discussion of the elements of that developed understanding of the requirements of moral reason, and their similarity to foundational religious moral principles such as “love of neighbor as thyself,” *see infra* notes 216–26 and accompanying text; KELSO & KELSO, *supra* note 6, at 505–48. *See also* R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 QUINNIPIAC L. REV. 433, 434–40 (2011).

⁸³ *See* KELSO & KELSO, *supra* note 6, at 270. *See also supra* note 7; *infra* text accompanying notes 84–149.

⁸⁴ *See* LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 8–12 (1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–902 (1985). For example, the prevailing mode of interpretation in the United States and England in the late eighteenth and early nineteenth century took the view that it was improper to consider the legislative history of a provision to help determine its meaning. *See* KELSO & KELSO, *supra* note 6, § 6.2.3.1, at 150. Thus, notes of the Constitutional Convention, or statements made on the floor of the House and Senate during consideration of the first ten amendments, were not proper to consider, while contemporaneous statements about the meaning of the Constitution that were not part of the formal legislative history, but were part of the public dialogue

at the Constitutional Convention, the ratifiers' intent at the state ratifying conventions, or the original public meaning, all adopted a natural law approach toward interpretation.⁸⁵

Both the classical/Christian and Enlightenment natural law traditions, in whatever version, shared many aspects of the common-law methodology of judicial decision-making.⁸⁶ The eighteenth and nineteenth-century natural law judicial decision-making tradition utilized a wide range of arguments regarding constitutional interpretation, including "considerations of constitutional text, purpose, and structure; the history of the framing and ratifying period; subsequent judicial precedents; and subsequent legislative and executive practices under the Constitution," which were held to constitute a gloss on meaning.⁸⁷ Under a natural law approach, arguments of practice and precedent are held to constitute a gloss on meaning that alters what the Constitution means, consistent with a living model of constitutional interpretation.⁸⁸

It has been noted that this mode of reasoning, dependent on judicial tradition, was shared by Madison on the Republican side of

prior to ratification, like *The Federalist Papers*, were proper to consider. *See id.*; *see generally* Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1040–43 (1991); Tutt, *supra* note 72, at 299–300 (interpretation should be based on "objective" interpretation based on common usage of words at the time the instrument was drafted, "unless there are good Conjectures to the contrary."). This limitation gradually died out during the nineteenth century in America. Thus, notes of the Constitutional Convention or House or Senate statements about constitutional amendments became proper to use as history to determine the framers' and ratifiers' intent. *See* Baade, *supra*, at 1055–64. Early natural law opinions are thus more "textualist" than later natural law opinions, which involve more historical "originalism." *See* GOLDSTEIN, *supra*, at 7–12 (discussing the early textualist nature of Chief Justice Marshall's opinions). *See also* KELSO & KELSO, *supra* note 6, § 6.2.1.1, at 137 n.11; § 12.2.1.3, at 362–63 nn. 35–38.

⁸⁵ *See* KELSO & KELSO, *supra* note 6, at 270.

⁸⁶ *See id.* *See also* Kelso, *supra* note 72, at 1057.

⁸⁷ Kelso, *supra* note 72, at 1057. *See also* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 688–97 (1994); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 310–12, 317–28, 334–49 (2014).

⁸⁸ *See infra* text accompanying notes 120–29 (on legislative and executive practice); *infra* text accompanying notes 130–49 (on judicial precedents). *See also* KELSO & KELSO, *supra* note 6, §§ 12.2.2.1–12.2.2.2, at 364.

early American politics, and by Alexander Hamilton and Chief Justice John Marshall on the Federalist side.⁸⁹ As Professor Jefferson Powell observed, “[Madison] consistently thought that ‘*usus*,’ the exposition of the Constitution provided by actual governmental practice and judicial precedents, could ‘settle its meaning and the intention of its authors.’”⁹⁰ It has been noted:

‘Among the obvious and just guides applicable to interpreting the Constitution,’ Madison listed:

1. The evils and defects for curing which the Constitution was called for & introduced.
2. The comments prevailing at the time it was adopted.
3. The early, deliberate and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.⁹¹

⁸⁹ See POWELL, *supra* note 77, at 95–100.

⁹⁰ Powell, *supra* note 84, at 939 (footnotes and citations omitted). See also H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1539–42 (1987) (providing fuller treatment of Madison’s views).

⁹¹ David M. O’Brien, *The Framers’ Muse on Republicanism, The Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 CONST. COMM. 119, 145 (1991) (alterations and citation omitted). See also DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 74–76, 78–80 (1989). Madison is also famous for stating, “I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution.” Letter from James Madison to Henry Lee (June 25, 1824), reprinted in 9 THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910) [hereinafter WRITINGS OF JAMES MADISON]. See also John O. McGinnis & Michael B. Rappaport, *Originalism and Supermajoritarianism: Defending the Nexus*, 101 NW. U. L. REV. 1919, 1929 n.38 (2007). While this quote has been used to argue that Madison favored a static form of originalism, see *id.* at 1930, this quote actually supports a living Constitution form of interpretation, once it is understood that the historical evidence supports the view that the “sense in which the Constitution was accepted and ratified” was the natural law model of interpretation. As Madison also noted, one should follow the “‘established rules of interpretation’ in construing that [constitutional] meaning.” *Id.* at 1929 (citing Letter from James Madison to Martin Van Buren (July 5,

A Burkean approach to interpretation is similar. As Professor Ernest Young noted, “Burke placed little reliance on the original structure and theoretical underpinnings of institutions; rather, institutions become effective in meeting the needs of society through a continuing process of adaptation that may or may not be consistent with the original intentions of the founders[.]”⁹² In 1833, Justice Story similarly supported the practice of drawing inferences from congressional, executive, and state acquiescence in “more than forty years” of “full operation” under the Constitution, and from “the practical exposition of the government itself.”⁹³

James Madison’s views on the constitutionality of Congress authorizing a national bank provides a good example of these principles at work. Based upon legislative, executive, judicial, and social practice, James Madison changed his position between 1791 and 1816 on the constitutionality of Congress incorporating a national bank.⁹⁴ Indeed, he noted in a letter to Congress in 1816 that, while he opposed the bank in 1791 in part on constitutional grounds, he now viewed a national bank as constitutional based upon “repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial

1830), *reprinted in* WRITINGS OF JAMES MADISON, *supra*, at 376. Those “established rules” for Madison reflected consideration of purpose, history, legislative and executive practice, and judicial precedents (“usus”). *See* Powell, *supra* note 84, at 939. In a similar vein, Alexander Hamilton suggested that “[t]o avoid an arbitrary discretion in the courts,” they should follow “rules and precedents which serve to define and point out their duty in every particular case that comes before them.” THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The established “rules and precedents” in the eighteenth century supported the natural law model of interpretation. Support for a social contract theory of government—such as in Abraham Lincoln’s famous comment, “[N]o man is good enough to govern another man, without that other’s consent”—is illustrative. Abraham Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 266 (Roy P. Basler ed. 1953). The Peoria Speech is also consistent with the natural law model of interpretation adopted in this Article. *See infra* note 119 and accompanying text.

⁹² Young, *supra* note 87, at 664.

⁹³ JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 391, 408, at 363, 392 (1833). For discussion of Story’s belief in natural law, *see* MCCLELLAN, *supra* note 75, at 85–86.

⁹⁴ *See* KELSO & KELSO, *supra* note 6, § 6.3.1, at 160.

branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.”⁹⁵ The Supreme Court emphasized legislative/executive practice and precedent, stating in its opinion considering the issue in *McCulloch v. Maryland*, “[t]he principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.”⁹⁶

The Court also paid deference to legislative practice in other early cases. In *Martin v. Hunter’s Lessee*, the Court stated, “Hence [the Constitution’s] powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to [mold] and model the exercise of its powers, as its own wisdom, and the public interests, should require.”⁹⁷ In *Gibbons v. Ogden*, the Court stated,

If commerce does not include navigation, the government of the Union has no direct power over that subject Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.⁹⁸

⁹⁵ PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 37 (5th ed. 2006) (citation omitted). For the views of Madison, Jefferson, Hamilton, and others on the constitutionality of the national bank in 1791, see *id.* at 27–37. Alternatively, it could be argued that Madison’s change of heart regarding the bank’s constitutionality was based only on Madison changing his view on the “necessity” of the national bank, given his experience with the War of 1812, and thus Madison’s change was consistent with a fixed, static view of constitutional interpretation merely interpreting in light of new knowledge what was “necessary” under the Necessary and Proper Clause. See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 190–94 (2003). However, that is not the reason Madison gave in his letter signing the bank bill, which focused on later legislative, executive, judicial, and social practice, as quoted above, nor is it consistent with Madison’s support throughout his life that such later action (“usus”) can fix the meaning of the Constitution. See BREST, *supra*, at 37; Powell, *supra* note 84, at 939.

⁹⁶ 17 U.S. (4 Wheat.) 316, 401 (1819).

⁹⁷ 14 U.S. (1 Wheat.) 304, 326–27 (1816).

⁹⁸ 22 U.S. (9 Wheat.) 1, 190 (1824).

McCulloch v. Maryland also provides a good example of natural law interpretation, focusing not only on the literal text of the Constitution, but also on arguments of purpose and constitutional structure. As is stated in *McCulloch*:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a *constitution* we are expounding.⁹⁹

Reflecting support for a living constitution model of interpretation, Chief Justice Marshall also noted for the Supreme Court in *McCulloch*:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone

⁹⁹ 17 U.S. (4 Wheat.) at 407 (emphasis in original).

without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.¹⁰⁰

Justice Story similarly noted for the Supreme Court in *Martin v. Hunter's Lessee*,

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.¹⁰¹

¹⁰⁰ *Id.* at 415–16 (emphasis in original).

¹⁰¹ 14 U.S. (1 Wheat.) 304, 326 (1816). *See also* Feldman, *supra* note 87, at 288, 306–310, 317–28, 334, 350 (noting that neither the Justices nor treatise writers nor framers and ratifiers of the founding era adopted any kind of static “reasonable man” concept for constitutional interpretation, but, consistent with “living constitutionalism,” and with “natural law,” they adopted a range of arguments based on text, context, purpose, constitutional structure, history, legislative and executive practice, and precedents) (citing, *inter alia*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); and *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827)). Professor Feldman calls this approach “eclecticism” or “pragmatism.” Feldman, *supra* note 87, at 288. Consistent with the terminology in this Article, it is better to style it as “natural law,” since, as Feldman details, the Justices used pragmatic arguments to the extent they reflected constitutional, text, content, purpose (including the Constitution’s preamble), history, and legislative or executive practice, which is consistent with natural law interpretation, *see* KELSO & KELSO, *supra* note 6, § 12.2.2.1, at 364, but did not use their own sense of social policy separate from that plausibly related to the framers’ and ratifiers’ intent. To the extent “pragmatism” suggests instrumentalist use of contemporary social policies that might be reflective of the judge’s own sense of social policy, not that of the framers and

Justices O'Connor and Kennedy have noted that their approach does not adopt the static view of the Constitution. For example, they stated in *United States v. Lopez*:

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.¹⁰²

During his confirmation hearing in 1989, Justice Souter described this approach as following the original meaning of the Constitution, rather than following the framers' and ratifiers' specific original intent.¹⁰³ Justice Souter stated, "[Justices ought to identify the] principle that was intended to be established as opposed simply to the specific application that that particular provision was meant to have by, and that was in the minds of those who proposed and framed and adopted that provision in the first place."¹⁰⁴ This is consistent with interpretation by Chief Justice John Marshall, of whom it is understood

carefully distinguished between the conscious, specific, concrete policy goal that may have motivated a particular constitutional clause, on the one hand, and the broader, more generalized principle, or rule of

ratifiers, see *supra* note 53 and *infra* note 119, that does not reflect early Supreme Court practice.

¹⁰² 514 U.S. 549, 574–75 (1995) (Kennedy, J., joined by O'Connor, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)).

¹⁰³ See David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG. (Sept. 25, 1994), <http://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html?pagewanted=all>.

¹⁰⁴ *Id.* See generally Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 613–19 (1998) (discussing "principles" versus "original practices").

law, that the clause established, on the other hand. For Marshall, constitutional law consisted of the latter rather than the former.¹⁰⁵

*Brown v. Board of Education*¹⁰⁶ represents a good example of the difference between static, specific intent at the time of ratification and a broader, more general concept that can evolve over time. As is discussed by Professor Ronald Dworkin in his book *Law's Empire*, “conceptions” are the specific, discrete ideas or examples held by individuals, while “concepts” are the broader, more abstract idea reflected in the conceptions.¹⁰⁷ As elaborated by Professor Fallon:

An example comes from equal protection jurisprudence. The authors of the fourteenth amendment apparently did not specifically intend to abolish segregation in the public schools. Yet they did intend generally to establish a regime in which whites and blacks received equal protection of the laws – an aspiration that can be conceived, abstractly, as reaching far more broadly than the framers themselves specifically had intended.¹⁰⁸

¹⁰⁵ GOLDSTEIN, *supra* note 84, at 9. Similarly, Justice Ruth Bader Ginsburg noted during her confirmation hearing, that the general concept of equality in the Declaration of Independence and the Equal Protection Clause of the Fourteenth Amendment is broad enough to embody a principle of equal rights for women, despite the fact that the specific views of Thomas Jefferson and others in the eighteenth and nineteenth centuries were not ready for women to be equal participants in public life. During her confirmation hearing, Justice Ginsburg, quoting Jefferson, stated that “[t]he appointment of women to public office is an innovation for which the public is not prepared Nor, Jefferson added, am I,” but then noted that she presumed that if Jefferson were alive today he would have a different specific view on the role of women in public life based on the general concept of equality in which he believed—each individual’s equal and unalienable right to “life, liberty, and the pursuit of happiness.” See *The Supreme Court; Excerpts from Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES (July 21, 1993), <http://www.nytimes.com/1993/07/21/us/the-supreme-court-excerpts-from-senate-hearings-on-the-ginsburg-nomination.html?pagewanted=all>.

¹⁰⁶ 347 U.S. 483, 492 (1954).

¹⁰⁷ DWORKIN, *supra* note 6, at 70–71.

¹⁰⁸ Fallon, *supra* note 6, at 1199 (citations omitted).

Thus, despite the fact that segregated schools were common in 1868, including in the District of Columbia, a justice faithful to the general concept of equality placed into the Fourteenth Amendment could hold, as in *Brown*, that segregated schools deny individuals equal protection.¹⁰⁹ To the extent that the framers and ratifiers of the Fourteenth Amendment had natural law moral principles in mind, they would have intended to place into the Fourteenth Amendment that general concept of equality, not to control later decisions by their specific historical practices.

In short, a natural law approach does not commit the judge to the view that the concepts embedded in the Constitution have a static content that, when applied to specific problems, have an unchanging meaning.¹¹⁰ From an Enlightenment perspective, it has been noted, “No great political theory, including Locke’s, is the last word on its own best interpretation, and critical advances in political theory may enable us better to understand and interpret the permanent truths implicit in the theory and to distinguish these from its lapsing untruths.”¹¹¹ From a Burkean perspective, “the limits of human rationality require a constitution that can adapt in response to the unforeseen difficulties, changed circumstances, and outright mistakes that any human endeavor will inevitably entail.”¹¹² From a classic/Christian Augustinian perspective, it has been noted that constitutional concepts are “timeless principles of human nature and political order,” but, with respect to the framers and ratifiers, “[l]ike any of us, their immediate preferences were sometimes at odds with, and certainly did not exhaust, their aspirations.”¹¹³

¹⁰⁹ On the issue of whether, in any event, arguments of history support the Supreme Court’s decision in *Brown*, compare Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949–55 (1995) (discussing aspects of historical intent support *Brown*) with Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884–1914 (1995) (discussing history at the time of ratification does not support *Brown*).

¹¹⁰ See KELSO & KELSO, *supra* note 6, § 12.3.3, at 382.

¹¹¹ DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 13 (1989).

¹¹² Young, *supra* note 87, at 668–69.

¹¹³ GRAHAM WALKER, *MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS* 153–56 (1990) (citation omitted).

Under such an approach, a person who wishes to consistently apply a general concept in which the individual believes may have to adjust one or more specific views, which currently are not consistent with that general concept.¹¹⁴ Through this process, a dynamic is created whereby, over time, more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social realities. This is in contrast to specific views merely being the product of the individual's past experiences, unthinking adherence to tradition, idiosyncratic preferences, or prejudice.¹¹⁵ This is similar to the view that the principles in foundational religious documents, like the Bible, do not change, but that our understanding of the content of those principles can change, such as the difference between traditional and progressive religious understandings regarding slavery, anti-Semitism, and whether the earth revolves around the sun.¹¹⁶

From a natural law interpretation perspective, the framers and ratifiers would wish later generations to give that concept the more enlightened and progressive reasoning, since they were not putting into the Constitution their own fixed, subjective, specific views about some matter, but rather, were placing into the Constitution broad natural law principles whose content they believed was independent of their specific views, and which would better be discovered over time through the application of reason.¹¹⁷ As responsible believers in natural law, the framers would have been somewhat more humble than those who support a fixed, static Constitution give them credit concerning whether their reasoning at the time of ratification fully reflected a complete understanding of the natural

¹¹⁴ See KELSO & KELSO, *supra* note 6, at 383.

¹¹⁵ See *id.*

¹¹⁶ On this topic, see KELSO & KELSO, *supra* note 6, § 16.1, at 505–09. Note that this evolution in constitutional meaning consistent with (a) more enlightened understanding of general concepts, (b) legislative, executive, and social practice, and (c) judicial precedents is different than arguing meaning should change based on contemporary dictionary definitions of words, as opposed to common meaning at the time of ratification. No less an authority than James Madison warned, “[w]hat a metamorphosis would be produced in the code of law if all of its ancient phraseology were to be taken in its modern sense.” BARNETT, *supra* note 14, at 99 (quoting Letter from James Madison to Henry Lee (June 25, 1824), reprinted in WRITINGS OF JAMES MADISON, *supra* note 91, at 191).

¹¹⁷ See KELSO & KELSO, *supra* note 6, at 383.

law principles in which they believed.¹¹⁸ Justice Kennedy phrased this point well when he wrote for the Court in 2003:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹¹⁹

¹¹⁸ *See id.*

¹¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). Of course, an Enlightenment perspective is more likely than a Burkean or Augustinian perspective to embrace fully an evolved understanding of the general intent lying behind a natural law concept, since the Burkean perspective is tied more closely to evolution based on tradition, not reason, *see* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 366–71 (2006), and the Augustinian perspective is also wary of the competencies of human reason. *See* WALKER, *supra* note 113, at 159 (“[I]f all interpreters partake of a morally vitiated human nature themselves, then responsible judges will be modest, wary, and self-critical as they interpret the Constitution—especially since their interpretive decisions affect many other people.”).

This form of natural law interpretation does not support a more activist model of interpretation, where judges could resort to natural law principles thought best by the judge, even if not embedded in the Constitution. *See* Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 712 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975). Such suggestions are really a form of instrumentalist interpretation whereby contemporary social policies, with no connection to the Constitution, are appropriate to consider. On instrumentalist constitutional interpretation, *see supra* text accompanying notes 53–62; KELSO & KELSO, *supra* note 6, at 325–53. On “instrumentalism” generally, *see* KELSO & KELSO, *supra* note 6, § 3.3, at 47–54; Summers, *supra* note 31, at 863–74, 908–23. The “true originalist” approach to interpretation described in this Article, where judges should resort only to natural law principles reflected in constitutional text, is consistent with the social contract natural law approach dominant during the framing and ratifying period. *See, e.g., supra* text accompanying notes 69–70; GOLDSTEIN, *supra* note 84, at 2–3, 12–33; Moore, *supra* note 70, at 133–37 n.71. Even Justice Chase’s famous resort to natural law in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798),

B. *Legislative, Executive, and Social Practice*

Legislative or executive practice under a constitutional provision can provide a gloss on meaning to the Constitution, in addition to illuminating the meaning at the time of ratification. Such a gloss changes the meaning of the Constitution from what it was before, and thus is embraced by those who adopt a living Constitution as their model of constitutional interpretation. As Justice Story observed in 1833, “[T]he most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits.”¹²⁰

James Madison similarly noted about interpretation in 1830 that “[t]he early, deliberate and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies” is relevant in determining constitutional meaning.¹²¹ As noted previously,¹²² although as a congressman in 1791 Madison had opposed Congress creating a national bank as unconstitutional, in 1815 and 1816, when Madison was President, he supported the bank’s constitutionality based upon “repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.” Thus, for Madison, Congress’ power to create a bank changed from 1791, when Madison considered it unconstitutional, to 1815 and 1816, when it became constitutional, based in part upon legislative and executive practice and social understandings (the “general will of the nation”).

In the twentieth century, Justice Frankfurter made this same point in the specific context of executive action. In *Youngstown*

is best understood in this light. See KELSO & KELSO, *supra* note 6, § 12.2.2.3, at 369–71 nn.72–79. A related issue of interpretation regarding statutory interpretation according to the “equity of the statute” is discussed *infra* note 206.

¹²⁰ STORY, *supra* note 93, at 392.

¹²¹ O’Brien, *supra* note 91, at 145 (quoting Letter from James Madison to M.L. Hurlbert (May 1830), in WRITINGS OF JAMES MADISON, *supra* note 91, at 370, 372).

¹²² See *supra* text accompanying note 95.

Sheet & Tube Co. v. Sawyer, Justice Frankfurter stated in his concurrence:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President¹²³

Like Madison's resort to the "concurrence of the general will of the nation" in his signing statement regarding the constitutionality of a national bank,¹²⁴ most natural law jurists are willing to consider, at least to some extent, social understandings or practices regarding the meaning of constitutional provisions. For example, in *Atkins v. Virginia*, the majority, which included Justices O'Connor, Kennedy, and Souter, acknowledged social understandings as part of its consideration of whether the death penalty for mentally challenged criminals was cruel and unusual punishment under the Eighth Amendment.¹²⁵ Natural law judges should be willing to consider even social practice from other countries, not for its social policy value, but to the extent that practice helps illuminate a reasoned elaboration of a universal natural law concept placed into the Constitution, something judges did during the original natural law era.¹²⁶

¹²³ 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

¹²⁴ See *supra* text accompanying note 95.

¹²⁵ 536 U.S. 304, 316 n.21 (2002). In contrast, the dissent noted, [T]he Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls . . . is antithetical to considerations of federalism, which instruct that any 'permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (law and the application of laws) that the people have approved.'

Id. at 322 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion of Scalia, J.)).

¹²⁶ See generally David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 574–83 (2001) (discussing judicial practice from 1789 through the Civil War); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 7 (2006) (discussing cases where the Constitution refers to international law or international law is used as a background principle to identify

Since many of the framers and ratifiers believed in natural law, many of the individual rights in the Constitution were likely intended to have such a universal natural law base.¹²⁷ Naturally, international sources that can best shed light on that natural law concept would be most properly used, such as European decisions regarding aspects of basic human rights and human dignity.¹²⁸ For example, this explains why it was European views against banning homosexual sodomy, rather than views of other nations around the world that were used by Justice Kennedy in his opinion in *Lawrence v. Texas*.¹²⁹

C. *Judicial Precedents and a Living Constitution*

Under the natural law approach, a sequence of judicial precedents interpreting a constitutional provision can provide a gloss on meaning that can modify the framers' and ratifiers' initial specific views. As Professor Powell has noted when discussing the writings of James Madison, under the traditional natural law model,

usus, the exposition of the Constitution provided by actual governmental practice and judicial precedents, could 'settle its meaning and intention of its authors.' Here, too, [Madison] was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of that meaning even more highly.¹³⁰

As Madison himself said, "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal,

the territorial scope of the Constitution or the powers of the national government, or delineate structural relationships within the federal system or individual rights cases).

¹²⁷ See KELSO & KELSO, *supra* note 6, § 12.2.2.1, at 365.

¹²⁸ See *id.* at 366.

¹²⁹ 539 U.S. 558, 560, 576 (2003) (discussing, among other things, the "values we share with a wider civilization," including opinions of the European Court of Human Rights).

¹³⁰ Powell, *supra* note 84, at 939 (footnotes omitted).

until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”¹³¹

Professor Young made a similar point that Edmund Burke would counsel following a clear, well-established later judicial tradition elaborating the general concept used by the framers and ratifiers in explicit constitutional text, even if it could be shown that the judicial precedents conflicted with the framers’ and ratifiers’ original specific views.¹³² Regarding how precedent gets used, Professor Young noted that Burke would agree with Madison that a “series of particular discussions and adjudications”¹³³ carries interpretive weight beyond the impact of mere stare decisis.¹³⁴ Professor Young stated,

When used as a means of divining the present meaning of a constitutional provision as it has evolved over time, precedent itself functions as a tool of interpretation; rather than offering a reason to adhere to an incorrect interpretation under the doctrine of stare decisis, the force of precedent enters into the initial determination of what the correct interpretation is.¹³⁵

In his writing, Professor Dworkin has called this use the “gravitational force” of precedent, which is distinct to a precedent’s “enactment force.”¹³⁶ In Dworkin’s terminology, the “enactment force” of a precedent focuses on the narrow question of whether to follow an incorrect interpretation under the doctrine of stare decisis based

¹³¹ THE FEDERALIST NO. 37, *supra* note 91, at 229 (James Madison).

¹³² See Young, *supra* note 87, at 664–65. In contrast, at least one standard originalist commentator has disagreed with this understanding of a Burkean approach, and has counseled Burkean judges to follow text rather than precedent, both on original meaning grounds and because such an approach, in the author’s view, best reflects American judicial traditions. See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 636–37 (2006).

¹³³ THE FEDERALIST NO. 37, *supra* note 91, at 229 (James Madison).

¹³⁴ See KELSO & KELSO, *supra* note 6, at 367.

¹³⁵ Young, *supra* note 87, at 691–92 (emphasis in original).

¹³⁶ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1977).

upon practical reasons.¹³⁷ Some of these practical reasons are “convenience, reliance on accumulated experience, and the usefulness for planning of being able to predict what a court will decide.”¹³⁸ The “gravitational force” of a precedent, however, arises from “the fairness of treating like cases alike.”¹³⁹ Thus, the “gravitational force” of a precedent “may be explained by appeal, not to the wisdom of enforcing enactments,” but to fairness.¹⁴⁰

This view of “reasoned elaboration” of the law, where the reasoning of prior cases exerts an influence on what the doctrine means today, independent of the “enactment force” of the precedent’s core holding, is, according to Professor Dworkin, a “distinctive fact about common law adjudication.”¹⁴¹ More generally, it is a distinctive fact about constitutional law adjudication when in a common-law mode, as for interpretation of broad concepts placed into the Constitution, where there is a “good deal of the common law type of reasoning in the constitutional cases,”¹⁴² based on the view that the framers and ratifiers intended “the answers develop over time in a common-law fashion.”¹⁴³

¹³⁷ See Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1230 (1977) (responding to Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1008 (1977)).

¹³⁸ *Id.* See also Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176–84 (2006) (discussing the benefits of stare decisis and “bedrock precedents”).

¹³⁹ Dworkin, *supra* note 137, at 1230 (quoted in Greenawalt, *supra* note 137, at 1008).

¹⁴⁰ *Id.* at 1231.

¹⁴¹ *Id.* at 1230.

¹⁴² Edward H. Levi, *The Sovereignty of the Courts*, 50 U. CHI. L. REV. 679, 695 (1983).

¹⁴³ DANIEL A. FARBER, ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 79 (1993). On such common-law constitutionalism, see Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265–72 (1973). Because they were immersed in the Anglo-American system of judicial decisionmaking, the framers’ and ratifiers’ views were grounded in the grand traditions of the Anglo-American common law system. This approach favors principles such as reasoned elaboration of the law, fidelity to precedent, deciding cases on narrower grounds where possible, and deciding most cases only after full briefing and argument. See Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 450–63 (1975); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38–39 (1981); Church

The principle of “reasoned elaboration” includes clearly defined tests that work in practice, coherence and consistency in legal categories, and avoidance of functional balancing tests that are situation-specific and not easily reconcilable with other aspects of legal doctrine, unless contemporaneous sources and subsequent events mandate use of such tests.¹⁴⁴ These notions are implicit in the factors stated in Justices O’Connor, Kennedy, and Souter’s joint opinion in *Planned Parenthood v. Casey*, for determining when a judge should find the impetus to overrule precedent: (1) it is unworkable in practice; (2) it creates an inconsistency or incoherence in the law; (3) a changed understanding of facts has undermined its factual basis; (4) it represents a substantially wrong or substantially unjust interpretation of the Constitution; or (5) it raises concerns about a “commitment to the rule of law.”¹⁴⁵ The Court has subsequently added whether the decision was “well-reasoned” to factor (4)’s concern

of the *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 571–76 (1993) (Souter, J., concurring in part and concurring in the judgment) (discussing deciding cases on narrower grounds, the importance of full briefing and argument, and reasoned and consistent elaboration of the law). Deciding cases on narrower, fact-specific grounds, has been called “judicial minimalism” by Professor Sunstein. He has noted that such “minimalism” is most useful in giving “flexibility to politically accountable officials . . . in difficult cases at the frontiers of constitutional law [where] judges would do best to avoid firm rules that they might come to regret.” Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1899, 1907–15 (2006); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–6 (1999).

¹⁴⁴ Reasoned elaboration of the law would also include, in some version, commitment to developing the law according to “neutral principles.” On “neutral principles,” see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 (1959); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 982 (1978). For a critique of the possibility of developing the law according to neutral principles, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781 (1983).

¹⁴⁵ 505 U.S. 833, 854–69 (1992). For discussion of these factors for overruling a precedent, see KELSO & KELSO, *supra* note 6, §§ 4.3, 7.3.3–7.3.4, at 84–89, 209–28. The Supreme Court has also discussed these same factors in the context of statutory interpretation. See *Neal v. United States*, 516 U.S. 284, 295–96 (1996); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–74 (1989). Indeed, the Court has noted the even greater force of precedent in statutory construction because of the easier resort to amendment in such cases to correct faulty interpretation. *Id.* at 172–73, 175 n.1.

with a “substantially wrong” or “substantially unjust” interpretation as a reason to overrule precedent.¹⁴⁶

Absent the “gravitational force” of precedents, one might adopt the view, stated by Justice Scalia, that a precedent should be overturned if that precedent is wrongly decided, unless the precedent represents settled law¹⁴⁷ or, as stated by Chief Justice Rehnquist, the precedent has engendered substantial reliance.¹⁴⁸ For natural law judges, a precedent should not be overruled, even if it is not settled law, or there has been no substantial reliance on it, unless one or more of the factors discussed above counsels for it to be overruled.¹⁴⁹

D. *The Lack of Historical Evidence for the Static Approach to Constitutional Interpretation*

Since the time the Constitution was drafted and ratified, positivism, as a counterpoint to natural law theory, has become an accepted dichotomy in legal theory.¹⁵⁰ However, positivism was not any major part of the backdrop of eighteenth century legal theory. One of

¹⁴⁶ See *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010) (discussing whether decision is “well reasoned” as part of whether it is substantially wrong and deserves overruling) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009)).

¹⁴⁷ See R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 *BROOK. L. REV.* 973, 990–95 (1996) (“Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.”) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., dissenting)). As Justice Scalia noted, considering precedents after a constitutional provision is ratified is inconsistent with a pure static approach to constitutional interpretation, and thus “*stare decisis* is not *part* of my originalist philosophy; it is a pragmatic *exception* to it.” SCALIA, *supra* note 5, at 140 (emphasis in original).

¹⁴⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 233 (1995). See also Kelso & Kelso, *supra* note 147, at 993–95 (discussing the differences between Holmesian and natural law judges when considering overruling precedents).

¹⁴⁹ See Kelso & Kelso, *supra* note 147, at 995–96. The factors counseling overruling of precedent are discussed *supra* text accompanying notes 144–46.

¹⁵⁰ See Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 *VA. L. REV.* 957, 974 (2015).

the first modern spokesmen for positivism was Jeremy Bentham,¹⁵¹ who was only twenty-eight years old when the Declaration of Independence was drafted, yet noted in a pamphlet his view that the natural law rhetoric in the founding document was “nonsense upon stilts”¹⁵²—indicating how far his view was from the dominant opinion of the framing and ratifying generation. Even with respect to English law, during his lifetime, Bentham was a known critic of the existing ways of thinking about the law.¹⁵³ The emergence of Bentham’s positivism as a counterpoint to natural law really began in 1832 when Englishman John Austin published his positivist manifesto, *The Province of Jurisprudence Determined*.¹⁵⁴

One can find increasing discussion and acceptance of Bentham’s and Austin’s ideas in the United States in the second half of the nineteenth century in common law, statutory interpretation, and constitutional law.¹⁵⁵ Positivism has continued as a major force in legal jurisprudential thinking, particularly in the form of H.L.A. Hart’s concept that each society has a positive “rule of recognition” that defines which acts count as valid legal enactments.¹⁵⁶ The emergence of positivism can lead to a more fixed or static view of constitutional interpretation, as it is consistent with positivism to view the task of the framers and ratifiers as placing their fixed preferences

¹⁵¹ *Id.* at 960 (“[T]he individual most associated with the origins of legal positivism in the modern and analytic jurisprudential tradition is Jeremy Bentham.”).

¹⁵² Kevin F. Ryan, *We Hold These Truths*, 31 VT. B.J. 9, 12 (2005) (citing Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in BENTHAM’S POLITICAL THOUGHT 257, 269 (Bhikhu Parekh ed., 1973) (“[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts”).

¹⁵³ See Schauer, *supra* note 150, at 961 (“The connection between Bentham’s contempt for the English legal system of the late eighteenth century and his adoption of what we now think of as a positivist perspective is not difficult to discern. Bentham was, above all, a reformer.”) (footnote omitted).

¹⁵⁴ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (London, John Murray 1832). On nineteenth century “positivism” generally, see AUGUSTE COMTE, *A GENERAL VIEW OF POSITIVISM* 1 (J. H. Bridges trans., Trübner and Co. 1865) (1848).

¹⁵⁵ See generally GILMORE, *supra* note 47, at 11–13 (discussing a pre-Civil War “Golden Age” and a post-Civil War to World War I “formalist” or “conceptualist” age); HALL, *supra* note 70, at 211 (“From the Civil War to about 1900 the trend favored the formalistic and conservative judicial approach . . .”).

¹⁵⁶ H.L.A. HART, *THE CONCEPT OF LAW* 97–120 (1961). See also JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 197–200 (2d ed. 1980).

into the Constitution.¹⁵⁷ The more “analytic” version of positivism, reflected in the formalist interpretation theory of Justice Scalia, was most dominant on the United States Supreme Court from 1873 to 1937, while the more “functional” version of positivism, represented by the interpretation theory of Justice Oliver Wendell Holmes, came to prominence on the Court from 1937 to 1954.¹⁵⁸

It is important to note that even from a positivist jurisprudential perspective, a judge would properly engage in the natural law style of judicial interpretation if the judge concluded that our framers’ and ratifiers’ “rule of recognition” was to interpret the Constitution in such a manner.¹⁵⁹ In any event, during the framing and ratifying period for the Constitution, the Bill of Rights, and the Civil War amendments, natural law was the dominant background theory, and that approach to interpretation was adopted by early and continuous Supreme Court practice, as discussed above.¹⁶⁰ Only a few individuals at the time, including Thomas Jefferson, adopted arguments that viewed “constitutional propositions [as] deductions from static principles,” from which “no argument from subsequent precedent, practice, or experience could change [its] conclusion.”¹⁶¹

¹⁵⁷ See KELSO & KELSO, *supra* note 6, at 40–41 nn.20–22, 278–302 (discussing “Formalist Constitutional Interpretation”).

¹⁵⁸ See *id.* at 405–24.

¹⁵⁹ See Schauer, *supra* note 19, at 802–03 (“[T]he act of constitutional interpretation in the United States may require every bit as much moral inspection as would be required by the most morally thick of natural law theories. The difference would be only that the tradition of positivism would see this as a contingent feature of modern American constitutionalism, capable of being different at other times or in other systems, while the natural law tradition would see this as an instance of a conceptual truth equally applicable to all existing and possible legal systems.”).

¹⁶⁰ See *supra* text accompanying notes 72–88 (natural law theory); 89–149 (judicial practice).

¹⁶¹ POWELL, *supra* note 77, at 92, 95. A few other Jeffersonian Republicans also adopted such views, particularly after 1800. See POWELL, *supra* note 77, at 92, 110 (*citing, inter alia*, ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES (1803) (Appendix on Tucker’s views on how to interpret the United States Constitution)). However, Tucker’s views, and those of some other Jeffersonian Republicans, that strict interpretation was intended by the framers and ratifiers must be understood against a backdrop of their contention that the States ratified the Constitution. They used that assertion to advance constitutional interpretation in favor of states’ rights. *Id.* at 109–10. Undermining that historical case for such states’ rights argumentation, Chief Justice Marshall reminded such states’ rights

Further, even Thomas Jefferson's more formalist theory of interpretation must be considered against a backdrop of his view that, since "*the earth belongs in usufruct to the living*," each new generation has the right to make for itself a new Constitution.¹⁶² Under such a view, the Constitution would not be intended to endure for ages, but only until the next Constitution was adopted.¹⁶³ A static model of interpretation makes better sense in such circumstances, for needed flexibility can come from newly-adopted constitutional language.¹⁶⁴ Jefferson supported such a static model as he phrased the point,

on every question of construction, [we] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.¹⁶⁵

Thus, for initiatives that Jefferson supported, but which were of questionable constitutionality under his model of interpretation, like use of federal monies for internal improvements, Jefferson "felt that amendment of the Constitution" was proper.¹⁶⁶

advocates in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–06 (1819), that the framers rejected existing state legislature ratification of the Constitution, which had occurred for the Articles of Confederation, and instead "the instrument was submitted to the *people*" ("We, the People") voting in special state ratifying conventions. Given their willingness to make false historical assertions regarding ratification to advance a states' rights agenda, one can wonder whether their assertions regarding historical support for strict constitutional interpretation, which was also used to limit federal power and advance a states' rights agenda, was similarly based on an inaccurate account of historical intent.

¹⁶² DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 302 (Kermit Hall & David O'Brien eds., 1994) (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 *THE WRITINGS OF THOMAS JEFFERSON 1788–1792*, at 116 (Paul L. Ford ed., 1895) [hereinafter *WRITINGS OF THOMAS JEFFERSON*]).

¹⁶³ See KELSO & KELSO, *supra* note 6, § 7.1, at 178.

¹⁶⁴ See *id.*

¹⁶⁵ MAYER, *supra* note 162, at 285.

¹⁶⁶ *Id.* at 218–19. Even concerning the Louisiana Purchase, which was a very popular action, Jefferson preferred a constitutional amendment to ratify the purchase. As stated by Professor Mayer,

Despite Jefferson's support, the view of constantly, newly-adopted constitutions was rejected by the framing and ratifying generation, including James Madison, for whom "too frequent appeals to the people to 'new-model' government would, 'in great measure deprive, the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.'"¹⁶⁷ Unlike the detailed Constitutional Codes that emerged during the nineteenth century in civil-law systems,¹⁶⁸ the United States Constitution was not intended to be such a document.¹⁶⁹ Imposing a style of interpretation that fits better with documents drafted as a code, like formalism's focus on literal text, would be inconsistent with how the Constitution was drafted.¹⁷⁰ Similarly, requiring constitutional amendment for every evolutionary change in understanding of a natural law concept placed into the Constitution would be inconsistent with how the framers and ratifiers would have expected the constitutional amendment process to work.¹⁷¹ Of course, differences in the purpose of a document and the ease of amendment counsel for different balances

Although he eventually acquiesced in the Louisiana Purchase without the constitutional amendment that he believed was necessary to sanction it, what is noteworthy is the degree to which he agonized over what may be fairly regarded as a technical question. Indeed, he was willing to jeopardize the acquisition of Louisiana, despite its immense strategic importance, in order to save the principle of strict construction.

Id. at 215.

¹⁶⁷ *Id.* at 301 (quoting THE FEDERALIST NO. 49, *supra* note 91, at 314 (James Madison)).

¹⁶⁸ See Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1445 n.7 ("By 1868, the Napoleonic Code or codes related to it, governed 'two-thirds of the civilized world.'") (citation omitted).

¹⁶⁹ See KELSO & KELSO, *supra* note 6, at 178.

¹⁷⁰ See *id.* For discussion of a constitution that was drafted with formalist pre-suppositions more in mind, see *infra* text accompanying notes 205–06 (the Texas Constitution of 1876).

¹⁷¹ See KELSO & KELSO, *supra* note 6, at 178. See also *supra* text accompanying notes 111–16; *infra* text accompanying notes 200–03.

when dealing with the interpretation of statutes or treaties—a topic outside the focus of this Article.¹⁷²

IV. NON-ORIGINALIST ARGUMENTS FOR VARIOUS VERSIONS OF ORIGINAL MEANING

To the extent that standard originalism cannot be defended as reflecting the actual historical intent of the framers and ratifiers, a non-originalist argument needs to be advanced to support that kind of interpretation. Under non-originalist approaches, the judge or commentator has to decide what principles of justice or sound social policy should be advanced.¹⁷³ With regard to principles of justice, should it be, as Justice Scalia once remarked, “the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle?”¹⁷⁴

There are four basic non-originalist approaches: (1) a “consequentialist” approach, which looks to the jurist’s own view as to the best theory to yield the best consequences for society;¹⁷⁵ (2) a “current consensus” or “current majority” or “Dworkian” approach, which looks to what theory of interpretation is best reflected in existing doctrine;¹⁷⁶ (3) a “progressive historicist” approach, which looks to what theory of interpretation is most likely to be reflected in the future, or what the “community eventually will hold,” if that can be determined;¹⁷⁷ and (4) a “pluralist” model of interpretation

¹⁷² For brief discussion of these issues in the context of eighteenth-century thought about interpretation of statutes or treaties, see *infra* note 206 and accompanying text.

¹⁷³ See SCALIA, *supra* note 5, at 46.

¹⁷⁴ *Id.* at 45.

¹⁷⁵ See, e.g., Ely, *supra* note 57, at 16–22, 43–52 (discussing a “judge’s own values” approach).

¹⁷⁶ See, e.g., JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 6 (2006) (“Constitutional constructivism draws our principles and rights from our constitutional democracy’s ongoing practice, tradition, and culture.”) (footnote omitted); DWORKIN, *supra* note 6, at 225, 400 (interpretation according to the best political theory that explains the current legal order); Wellington, *supra* note 143, at 284–97 (community consensus model of interpretation).

¹⁷⁷ See, e.g., Brennan, *supra* note 56, at 444 (“On this issue, the death penalty, I hope to embody a community, although perhaps not yet arrived, striving for human dignity for all.”).

reflecting some unspecified combination of original intent, consequentialist, current majority, and progressive historicist reasoning.¹⁷⁸ Each will be discussed in turn.

A. *Arguments For and Against a Static Version of Original Meaning on Consequentialist Grounds*

A consequentialist approach could end up supporting static constitutional interpretation. For example, Professor Randy Barnett has argued for standard originalism on consequentialist grounds, independent of the framers' and ratifiers' intent.¹⁷⁹ Specifically, he has argued that "the impetus for an original meaning method of interpretation" is suggested by the parol evidence rule.¹⁸⁰ By such parallel, Professor Barnett has supported a static original meaning constitutional interpretation to "fulfill" the "evidentiary, cautionary, channeling, and clarification functions" of reducing agreements to writing.¹⁸¹ As Professor Barnett notes, although doctrines like "the statute of frauds, the parol evidence rule, and the objective theory of contract interpretation" have been "attacked by law professors as backwards and formalist, they remain with us today," and because the "Constitution is a law designed to restrict the lawmakers," it is important to "lock in" its meaning and not have such language evolve over time.¹⁸²

Justice Scalia similarly expressed a preference for static constitutional interpretation based, in part, on his view of the anti-evolutionary nature of a constitution.¹⁸³ He also supported it on grounds that such an approach tends to make constitutional interpretation more predictable,¹⁸⁴ and on grounds of promoting judicial restraint.¹⁸⁵ He also noted that in his view, "evolving standards [do not always] mark progress," since societies do not "always mature, as opposed to rot."¹⁸⁶

¹⁷⁸ See, e.g., Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994).

¹⁷⁹ BARNETT, *supra* note 14, at 91, 102–19.

¹⁸⁰ *Id.* at 102.

¹⁸¹ *Id.*

¹⁸² *Id.* at 103–05.

¹⁸³ See SCALIA, *supra* note 5, at 44–45.

¹⁸⁴ See generally Scalia, *supra* note 33, at 1179.

¹⁸⁵ See *id.* at 1179–80.

¹⁸⁶ SCALIA, *supra* note 5, at 40–41 (internal quotation marks omitted).

Taking these arguments together, there seems to be four reasons to support static constitutional interpretation: (1) anti-evolutionary nature of a constitution; (2) judicial restraint; (3) consistency with the written nature of a constitution; and (4) predictability. Each will be considered in turn.

1. ANTI-EVOLUTIONARY NATURE VERSUS ANTI-MAJORITARIAN NATURE OF A CONSTITUTION

The anti-evolutionary argument for static interpretation makes most sense when dealing with structural issues of separation of powers and federalism. From an original intent perspective, the framers were concerned about limiting government power and ensuring no tyranny by one branch over another.¹⁸⁷ The framers did not commit to a rigid, formalist approach to separation of powers, and in practice, functionalism should be considered.¹⁸⁸ However, the words used in the Constitution are reasonably detailed and specific regarding congressional and Presidential powers,¹⁸⁹ and, in deciding cases, the Court has emphasized text over legislative/executive practice.¹⁹⁰

¹⁸⁷ See KELSO & KELSO, *supra* note 6, § 19.1, at 771–73. As Madison noted, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” THE FEDERALIST NO. 51, *supra* note 91, at 322 (James Madison).

¹⁸⁸ See KELSO & KELSO, *supra* note 6, § 19.1, at 771–73; R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 564–72 (1993), and sources cited therein; Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1254–55 (1988); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–96 (1987).

¹⁸⁹ See U.S. CONST. arts. I, II. Of course, even with respect to such specific language, this does not commit even a formalist interpreter to dictionary literalism, but reading words in light of context. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 107–15 (2001) (discussing textualism, literalism, and both statutory purpose and context).

¹⁹⁰ See, e.g., *INS v. Chadha*, 462 U.S. 919, 944–51, 959 (1983) (legislative veto provision unconstitutional, as it conflicts Bicameralism and Presentment Clauses, despite legislative and executive practice of its use in almost 300 statutory provisions since 1932 through 1975); *Clinton v. City of New York*, 524 U.S. 417, 436–41 (1998) (unconstitutional to give President a line-item veto power, based on text of Presidential Veto power being limited to “Bills,” not line items in bills, despite legislative/executive support in passing the Line-Item Veto Act of

On the other hand, regarding individual rights provisions in the Constitution, it is clear from the natural law perspective of the framing and ratifying generation that the critical purpose of the Constitution was not to be “anti-evolutionary,” but rather to be “anti-majoritarian.”¹⁹¹ The point of natural law provisions involving individual rights was to remove certain decisions from the majoritarian democratic process based on the natural rights that individuals have to be free from majoritarian prejudices.¹⁹² As Professor Erwin Chemerinsky has noted:

[T]he framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities. The body of the Constitution reflects a commitment to separation of powers and individual liberties (for example, no ex post facto laws or bills of attainder, no state impairment of the obligation of contracts, no congressional suspension of the writ of habeas corpus except in times of insurrection). Furthermore, as Justice Jackson eloquently stated:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to

1996). See also KELSO & KELSO, *supra* note 6, § 19.4, at 793–811 (discussing “Legislative Power over National Policy”).

¹⁹¹ See Erwin Chemerinsky, *The Supreme Court, 1988 Term – Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74–75 (1989).

¹⁹² See *id.*

vote: they depend on the outcome of no elections.¹⁹³

2. JUDICIAL RESTRAINT VERSUS JUDICIAL ROLE IN PROTECTING INDIVIDUAL RIGHTS

From the perspective of our natural law tradition, the protection of individual rights to liberty and equality are paramount.¹⁹⁴ As our Declaration of Independence states, “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”¹⁹⁵ Thus, a pluralistic democratic society is viewed not as an end in itself, but rather, as the best means by which to ensure that society protects and advances that natural law set of rights. From that perspective, it would be counterproductive to engage in a static model of interpretation, since that model would allow for moral progress only when the democratic majority decided to adopt the more enlightened interpretation of the natural law principle. Yet, the whole point of enacting that constitutional provision was to remove the decision from democratic decision-making.

For example, when judges adopted post-1954 more enlightened interpretations of equal protection and due process to create advances in race relation cases, gender discrimination cases, and cases involving sexual orientation, they have acted consistent with a natural law understanding of those concepts.¹⁹⁶ For the Court to have sat on the sidelines and hoped for the legislative and executive processes alone to deal with those matters would have been a betrayal of what those natural law principles promote. For the most part, the Court did sit on the sidelines from the time the Fourteenth Amendment was ratified in 1868 until 1954, with little moral progress

¹⁹³ *Id.* (footnote omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹⁹⁴ See FARBER & SHERRY, *supra* note 72, at 3–23, 313–15, 361–83 (discussing influences of natural law on the Constitution, the Bill of Rights, and the Reconstruction amendments, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

¹⁹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁹⁶ On the race, gender, and sexual orientation cases generally during the twentieth century, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002).

made. The major exception was women's suffrage in 1920, which was the product of an enormous and sustained social movement, and not equaled with respect to the failed Equal Rights Amendment of 1972.¹⁹⁷

Admittedly, from the positivist perspective of formalism, such a view of judicial review raises counter-majoritarian difficulties, as discussed in the famous book by Professor Alexander Bickel, *The Least Dangerous Branch*, in 1962.¹⁹⁸ The counter-majoritarian nature of judicial review can still be a "central obsession of modern constitutional scholarship," unless judicial review is linked to aiding participatory governance.¹⁹⁹ Interpreting constitutional provisions in the natural law manner in which they were drafted aids in the participatory governance model of a constitutional republic adopted by the framers and ratifiers for our governance.

3. CONSTITUTION AS CONTRACT VERSUS CONSTITUTION AS A CONSTITUTION

Our Constitution was not drafted with Antonin Scalia's or Randy Barnett's presumptions about constitutional interpretation in mind. It has been noted that "[t]he federal constitution is a product of the Enlightenment. It manifests a qualified optimism about the power of government to improve society The powers delegated to all three branches of the federal government can grow to meet

¹⁹⁷ See Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 13–15, 18 (2000) ("According to the account of one of the historic champions of the Nineteenth Amendment, the effort to guarantee women the franchise took 72 years and included 56 state-referenda campaigns, 480 state-legislative campaigns, 47 state-constitutional conventions, 277 state-party conventions, 30 national-party conventions, and 19 campaigns before 19 successive Congresses—just to get the measure before the states for ratification.") (citation omitted).

¹⁹⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986).

¹⁹⁹ Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–36 (1998). For recent discussion of this issue, see Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMM. 61, 62–64 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE*).

future needs.”²⁰⁰ On the assumption that the document would be interpreted in light of a natural law style of interpretation, which would permit such growth in light of purpose, legislative and executive practice, and precedential arguments, drafting a formal amendment process that is relatively difficult makes sense.

From a static, fixed interpretation perspective, particularly one focused heavily on literal textual meaning, the Constitution would need to be much longer and more detailed, partaking, as Chief Justice Marshall warned in *McCulloch v. Maryland*, “of the prolixity of a legal code.”²⁰¹ Provisions for formal amendment would likely be drafted to be easier, since formal amendment would be the primary means of adjusting the Constitution to new realities. For example, the Texas Constitution, drafted in 1876, and reflective of a formalist style of interpretation, is long and detailed; it contains over 80,000 words, and thus is eight times longer than the United States Constitution.²⁰² As Professor Harold Bruff, of the University of Texas School of Law, has noted,

Designed for a largely rural, agrarian state with less than a million inhabitants and no oil industry, the Texas Constitution has endured to govern [a] largely urban and industrialized state only because it is relatively easy to amend . . . [while] encrusted with 326 amendments [as of 1990, and 491 as of 2015].²⁰³

From this perspective, to encrust a formalist, static model of interpretation, requiring greater resort to the formal amendment process onto a document, like the United States Constitution, whose amendment provisions were not drafted with a formalist model of

²⁰⁰ Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1338 (1990) (footnote omitted).

²⁰¹ 17 U.S. (4 Wheat.) 316, 407 (1819).

²⁰² See JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE, at xxxv–xxxvi (G. Alan Tarr ed., 1996).

²⁰³ Bruff, *supra* note 200, at 1339 (footnote omitted). “To amend the Texas Constitution, the amendment must be proposed by a joint resolution of the legislature, must receive a two-thirds vote in each house, and must carry a simple majority of the voters at an election.” *Id.* n.16. See generally RESEARCH DIV. OF THE TEX. LEGIS. COUNCIL, AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1867, at 1 (2016), available at <http://www.tlc.state.tx.us/docs/amendments/Constamend1876.pdf>.

interpretation in mind, frustrates both the intent of the framers and ratifiers and makes little practical sense in terms of consequentialist arguments.

As was discussed earlier,²⁰⁴ part of Randy Barnett's analysis to support static constitutional interpretation is that a constitution is like a contract. However, unlike constitutions, contracts tend to be short-term documents, focused on defining rights to a discrete transaction, and contracts are relatively easy to amend.²⁰⁵ As was discussed earlier, Jefferson solved the problem of static interpretation and needed amendments by saying that society should make a new constitution each generation, but that was understandably not thought at the time, nor today, to be a good idea.²⁰⁶

²⁰⁴ See *supra* text accompanying notes 181–82; BARNETT, *supra* note 14, at 102–03.

²⁰⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 89 (AM. LAW INST. 1981) (amendment valid even without consideration if it proposes a fair deal in light of unforeseen circumstances); U.C.C. § 2-209 (AM. LAW INST. 2014-2015) (in sale of goods cases amendment is valid even without consideration if done in good faith). More flexible interpretation is often built in to longer-term “relational” contracts through concepts like “good faith” or “best efforts” requirements of performance). See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1089–95, 1111, 1136–39 (1981). And, even in standard, simple, non-relational contracts, if words are so general as to be ambiguous, resort is made to material outside a static view of interpretation, such as “course of performance, course of dealing, or usage of trade.” RESTATEMENT (SECOND) OF CONTRACTS §§ 202–03; U.C.C. § 2-208. A similar observation can be made about treaty interpretation, even from an eighteenth-century perspective. See Tutt, *supra* note 72, at 308 (“If the text was not clear, the next step was to look at [] the common usage of the terms together, then their reasonable import, then finally, if necessary, context, subject matter, consequences, and purposes.”).

²⁰⁶ See *supra* text accompanying notes 162–68. Treatises are typically intended to be less evolutionary than Constitutions, and are more like contracts, although they are still different. As has been noted, “[T]reaties differ[] from compacts and agreements by virtue of their weightiness, their duration, their tendency to involve multiple interlocking instruments, and their ability to bind the whole nation.” Tutt, *supra* note 72, at 354.

For statutory interpretation, statutes are easier to amend than the Constitution, although harder than contracts. In addition, evolution in statutory guidelines often comes today through deference by Congress to agencies to develop rules and regulations, and Court deference to an agency's reasonable construction of its statutory mandate, see *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984), as well as Court deference to an agency's own interpretation of its regulation, see *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997). His-

4. STATIC VERSUS LIVING ORIGINAL MEANING IN TERMS OF PREDICTABILITY

While it is often claimed that a static view of interpretation leads to more predictable results than does a living model of constitutional interpretation, an evolving, living Constitution based on later legislative, executive, and social practice, and judicial precedents is not necessarily less predictable than a static or fixed Constitution, particularly for the plethora of broad terms used in the Constitution.²⁰⁷

torically, standard originalists supported *Chevron* and *Auer* deference. See Manning, *supra* note 189, at 107–08 (“[A]n important facet of the textualist conception of legislative supremacy acknowledges congressional latitude to delegate law-elaboration authority to agencies and courts. Hence, Congress can opt for more flexible, purposive interpretation simply by enacting standards rather than rules.”) (footnote omitted). Recently, some standard originalists have raised concerns about the *Chevron* and *Auer* doctrines, in part because these doctrines permit agencies to make law by modernizing interpretation of statutes in light of contemporary policies, not original intent. See, e.g., *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari) (citing concerns by himself, Chief Justice Roberts, and Justice Scalia); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150–58 (10th Cir. 2016) (Gorsuch, J., concurring).

Regarding statutory interpretation generally, from a natural law perspective the purpose of statute is critical, not mere literalism. See *supra* note 7 and accompanying text; *Heydon’s Case*, (1584) 76 Eng. Rep. 637, 638 (KB) (judges should inquire into the “mischief and defect” that the drafter was seeking to remedy and should “make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . .”). This permits departure from strict literal interpretation. In addition, there is a debate about how much this focus on purpose can be used to advance statutory interpretation in light of the “way of equity” of the statute. Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 493–505 (discussing the use by Aristotle, Aquinas, and Plowden of “practical wisdom” and following the “way of equity” of the statute). For a back-and-forth on how much courts and commentators in the founding era adopted textualist versus equity of the statute interpretation, compare William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 991–98 (2001) (courts and commentators somewhat willing to resort to equitable interpretation) with John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648–53 (2001). See also Manning, *supra* note 189, at 53–55, 108–15 (courts and commentators more skeptical and concerned about “equitable interpretation”).

²⁰⁷ See generally Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226,

For instance, regarding the issue of whether the Fourteenth Amendment guarantees a right to same-sex marriage, Justice Scalia noted in *United States v. Windsor* that while his position against recognizing such a right was predictable given his static theory of constitutional interpretation, it was equally predictable from their living theory of interpretation that Justice Kennedy and the majority would take the opposite view when the case came before the Court.²⁰⁸ That prediction was borne out two years later in *Obergefell v. Hodges*.²⁰⁹ In *District of Columbia v. Heller*, the contours of Justice Scalia's conclusion for the Court that the Second Amendment includes an individual right to own firearms was made more predictable, not less, by his recitation of the legislative, executive, and social practice regarding the Amendment's rights in the nineteenth and twentieth centuries, and by his discussion of judicial precedents.²¹⁰

In terms of predictability generally, the predictable result of a static, formalist approach to constitutional interpretation is to support locking in the values of an earlier generation.²¹¹ For our society, and those of Europe, those values are predisposed toward white, propertied, straight men holding traditional patriarchal views. As one author has noted,

Justices Scalia and Thomas have voted to strike down federal affirmative action provisions, state affirmative action plans, measures designed to promote minority ownership of media, campaign finance legislation that attempts to redress wealth inequities in the political process, portions of the Americans with

236–59 (1988) (discussion of the problem of ambiguity in constitutional interpretation). For traditional critiques of latent ambiguity in every act of interpretation, see David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 136–57, 164–76 (1985).

²⁰⁸ 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) (“In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion.”) (emphasis in original).

²⁰⁹ 135 S. Ct. 2584, 2604–08 (2015).

²¹⁰ *Compare* 554 U.S. 570, 576–605 (2008) (discussing arguments of text, context, and history of the Second Amendment in the 18th century) *with id.* at 605–28 (discussing arguments of legislative, executive, and social practice, and judicial precedents, regarding the Second Amendment after its ratification).

²¹¹ *See supra* text accompanying notes 179–82 (discussing Professor Barnett’s “lock in” rationale to constitutional interpretation).

Disabilities Act, part of the Family and Medical Leave Act, legislative attempts to promote minority representation, laws protecting women from violence, and laws protecting gays, the aged, and the disabled from discrimination. They have found constitutional violations in the actions of local communities seeking to protect their citizens from flooding, congestion, and environmental damage. They have even argued that the efforts of all fifty states to fund legal services for the poor by using the interest from a pooled account of lawyers' trust funds which could not earn interest for their owners, was nevertheless an unconstitutional taking even though the owners suffered no economic loss.²¹²

Given this reality, it is perhaps no coincidence that the strongest supporters of static, formalist interpretation in the United States tend to be white, propertied, straight men (and those who support or rely on them for support).²¹³

At a general philosophical level, there are two main camps regarding the basic content of natural rights to liberty: (1) individual liberty includes the liberty to try to exploit others versus (2) individual liberty supports the rights of each individual equally to reach their full potential free from exploitation by others.²¹⁴ Liberty as a liberty to try to exploit others reflects the political philosophies of writers like Thomas Hobbes, Friedrich Nietzsche, Ayn Rand, and Robert Nozick.²¹⁵

²¹² William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 827–28 (2005).

²¹³ Cf. Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 20–22 (2011) (noting that the strongest supporters of static, formalist interpretation tend to be those with traditional conservative political ideologies).

²¹⁴ See Kelso, *supra* note 82, at 434 (“Some moral philosophers have taken the position that egotism or self-interest is rational, and therefore good and just, and have built their moral systems on a foundational principle of self-interest Most moral philosophers, however, reject this view.”).

²¹⁵ See *id.* at 434 n.2 (“[Hobbes’] argument is concerned to persuade people to institute and maintain a sovereign. Given Hobbes’ psychological theory, people will do this only if they believe it is in their self-interest. Hence, self-interest is all

In contrast, most writers on natural rights to liberty affirm the principle that moral behavior is not self-centered—from more secular philosophers like John Locke,²¹⁶ David Hume,²¹⁷ Adam

that can yield obedience to the laws of nature and political obedience to the sovereign.”) (quoting 2 *ENCYCLOPEDIA OF ETHICS* 775 (Becker & Becker eds., 2d ed. 2001)); THOMAS HOBBS, *LEVIATHAN* xxiv–xxxiv (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); 2 *ENCYCLOPEDIA OF ETHICS* 906 (Becker & Becker eds., 1992) (“The morality of an abundant, creative, and egoistic power that Nietzsche describes as the origin of human evolution ultimately becomes the norm of his own ethics.”); FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 152–53 (Marion Faber, ed. & trans., 1998); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 302 (1974) (“The model is designed to let you choose what you will, with the sole constraint being that others may do the same for themselves and refuse to stay in the world you have imagined.”); AYN RAND, *ATLAS SHRUGGED* 480–81 (1957) (during the trial of Hank Rearden, the defendant refuses to apologize for selfish pursuits of profit and power).

²¹⁶ See Ryan, *supra* note 152, at 12 (“Natural rights theory, especially in its Lockean version, assumes that people have moral obligations independent of, or prior to, the formation of society or government, and that those obligations are best viewed as the requirement to respect the rights of others to life, liberty, and property.”) (citing JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 135, at 82–83 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690)).

²¹⁷ See, e.g., WILLS, *supra* note 79, at 193–201 (“moral sense,” not rational self-interest, determines morality from the Scottish Enlightenment perspective; discussing, *inter alia*, David Hume’s 1751 book, *An Inquiry Concerning the Principles of Morals*).

Smith,²¹⁸ Immanuel Kant,²¹⁹ John Rawls,²²⁰ and Ronald Dworkin;²²¹ to philosophers more associated with religious traditions, such as that of John Finnis²²² or Robert George;²²³ or to main-

²¹⁸ In Adam Smith's view,

[T]o the selfish and original passions of human nature, the loss or gain of a very small interest of our own, appears to be of vastly more importance . . . than the greatest concern of another with whom we have no particular [connection] Before we can make any proper comparison of those opposite interests, we must change our position. We must view them, neither from our own place nor yet from his, neither with our own eyes nor yet with his, but from the place and with the eyes of a third person, who has no particular [connection] with either, and who judges with impartiality between us When the happiness or misery of others depends in any respect upon our conduct, we dare not, as self-love might suggest to us, prefer the interest of one to that of many. The man within immediately calls to us, that we value ourselves too much and other people too little, and that, by doing so, we render ourselves the proper object of the contempt and indignation of our brethren.

ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 135–38 (D.D. Raphael & A.L. Macfie, eds., Oxford Univ. Press 1976) (1759).

²¹⁹ Immanuel Kant's view that reason compels an individual to "[a]ct only in accordance with that maxim through which you can at the same time will that it become a universal law" and for everyone to treat "all maxims of actions never merely as means, but as the supreme limiting condition in the use of all means, i.e., always at the same time as end," rejects egotism, and thus is in direct contrast to Nietzsche's egocentricism. IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 37, 56 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1795). *See also* 1 *ENCYCLOPEDIA OF ETHICS* 666 (Becker & Becker eds., 1992) ("This leads Kant to a new formulation of the categorical imperative: 'Act always so that you treat humanity, in your own person or another, never merely as a means but also at the same time as an end in itself.'") (quoting IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (1785)).

²²⁰ John Rawls' principle that justice derives from individuals agreeing on rules from an "original position" where no individual will be favored rejects Nozick's egocentric approach. JOHN RAWLS, *A THEORY OF JUSTICE* 17–22 (1971).

²²¹ Ronald Dworkin's principle of "equal concern and respect" for others, based upon his view of the best interpretation of the existing moral principles of Western industrialized societies, represents a rejection of the morality of egoism. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–73 (1977) ("Government must not only treat people with concern and respect, but with equal concern and respect.").

stream religious traditions, including Buddhism, Christianity, Hinduism, Islam, and Judaism²²⁴—and in various ways affirm as moral

²²² John Finnis' account of basic human goods, like knowledge and friendship, leads to a rejection of egotism in favor of loving one's neighbor as part of the ideal of "integral human fulfillment." John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 3 (1990) (defining "integral human fulfillment" as "the ideal of the instantiation of all the basic human goods in all human persons and communities").

²²³ See ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 28–47, 219–28 (1993). Professor George modifies Aquinas' approach to better account for principles of religious liberty, see *id.* at 41–42, while grounding morality in the non-egocentric advancement of the "common good." *Id.* at 29. As Professor George noted,

Human beings put their lives together in different ways by making different choices and commitments based on different values that provide different reasons for choice and action. There is no single pattern anyone can identify as the proper model of a human life, not because there is no such thing as good and bad, but because there are many goods.

Id. at 38–39.

²²⁴ See Mark 12:31 (King James) ("Thou shalt love thy neighbour as thyself."); ISSAC HERZOG, 1 THE MAIN INSTITUTIONS OF JEWISH LAW 386 (2d ed. 1965) ("[B]ring the law as much as possible into line with the highest ethical norms, already presided over the growth and development of Jewish law, . . . [which] commanded 'Love thy neighbour as thyself' and 'Love the stranger as thyself.' (Leviticus xix, 19, and 33–34)."); Amihai Radzyner, *Between Scholar and Jurist: The Controversy Over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field*, 23 J.L. & REL. 189, 208 (2007); Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 WASH. & LEE L. REV. 1529, 1541 (2007) (discussing "the recognition of equality between men and women in Islam, the imperative of *ijtihad* (independent reasoning to arrive at a legal principle) in modern times, [and] the dynamics between what is universal for all times and what is particular to seventh century Arabia"); Imam Feisal Abdul Rauf, *What is Islamic Law?*, 57 MERCER L. REV. 595, 600–603 (2006) ("Islamic Law, called Sharia, starts off from these two commandments" – "Love of God" and "Love of Neighbor"); R. Mary Hayden Lemmons, *Tolerance, Society, and the First Amendment: Reconsiderations*, 3 U. ST. THOMAS L.J. 75, 89 (2005) ("Hinduism: 'One should never do that to another which one regards as injurious to one's own self'; and Buddhism: 'Hurt not others in ways that you yourself would find hurtful.'") (quoting JEFFREY WATTLES, THE GOLDEN RULE 192 n.2 (1996)).

From this perspective, the specific doctrinal statements made in the various religious texts can all be understood as derivations from this basic point. For example, as Pope John Paul II noted in his encyclical, *Veritatis Splendor*, there is a direct connection between the specific principles of morality stated in the Bible and the

the basic principle of “love of neighbor as thyself.”²²⁵ It is this vision of morality that animated the framing and ratifying generation, not that of the morality of self-interest, and which underlies the supposed liberty right to try to exploit others for one’s own gain, as long as they have equal rights to try to exploit you.²²⁶

general non-egocentric moral command of “love of neighbor as oneself.” He stated:

[T]he commandments belonging to the so-called “second tablet” of the Decalogue, the summary . . . and foundation of which is *the commandment of love of neighbor*: . . . In this commandment we find a precise expression of *the singular dignity of the human person*, “the only creature that God has wanted for its own sake.” The different commandments of the Decalogue are really only so many reflections on the one commandment about the good of the person, at the level of the many different goods which characterize his identify as a spiritual and bodily being in relationship with God

POPE JOHN PAUL II, VERITATIS SPLENDOR: THE SPLENDOR OF TRUTH para. 13 (1993).

²²⁵ See *supra* notes 216–24 and accompanying text. For further discussion of this non-egocentric vision of morality from the perspective of modern views of moral reasoning around the world, see Kelso, *supra* note 82, at 434–45.

²²⁶ As phrased in a recent article regarding natural rights at the Founding, “natural rights called for good government, not necessarily less government.” Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016)). A similar thought is expressed in Lawrence B. Solum, *Republican Constitutionalism*, 32 CONST. COMMENT. 175, 205 (2017) (“virtue is required for liberty”) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* (2016)). Note that even though Jefferson did not embrace the natural law model of interpretation, see *supra* text accompanying notes 161–68, he believed in a non-egocentric vision of morality. See, e.g., Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 13 (2008) (“For Jefferson, the fundamental precepts of morality, which he believed were held in common in all religions, were captured by Jesus’ maxims, ‘Treat others as you would have them treat you’ and ‘Love thy neighbor as thyself.’”) (quoting KERRY S. WALTERS, *RATIONAL INFIDELS: THE AMERICAN DEISTS* 181 (1992)). While his life was fraught with contradictions regarding slavery, see, e.g., Aaron Schwabach, *Jefferson and Slavery*, 19 T. JEFFERSON L. REV. 63, 63–64 (1997), including his initial draft of the Declaration of Independence condemning slavery, which had to be removed to satisfy the objections of the Southern states, see *id.* at 79, Jefferson hoped eventually for a more just society free of exploitation of man by man. See *id.* at 86. As he stated in a letter, “I have sworn upon the altar of god, eternal hostility against every form of tyranny over the mind of man.” Letter from

B. *Arguments For and Against the Other Non-Originalist Approaches to Constitutional Interpretation*

The three other kinds of non-originalist arguments regarding constitutional interpretation are: (1) a “current consensus” or “current majority” or “Dworkian” approach, which looks to what theory of interpretation is best reflected in existing doctrine; (2) a “progressive historicist” approach which looks to what theory of interpretation is most likely to be reflected in the future, or what the “community eventually will hold,” if that can be determined; or (3) a “pluralist” model of interpretation reflecting some unspecified combination of original intent, consequentialist, current majority, and progressive historicist reasoning.²²⁷ Each will be discussed in turn.

1. CURRENT CONSENSUS APPROACH

A judge following a current consensus or current majority or Dworkian theory of justification would need to ask what judicial decision-making style best reflects the current majority view.²²⁸ While such an approach would most likely have adopted a traditional natural law model of interpretation between 1789 and 1873,²²⁹ a “current consensus” approach would have adopted a formalist style of interpretation between 1873 and 1937; a Holmesian style of interpretation between 1937 and 1954; and an instrumentalist style of interpretation between 1954 and 1986.²³⁰ Since 1986, no interpretation style has commanded a majority on the United States Supreme Court, although the swing votes on the Court since 1986—Justices O’Connor, Kennedy, and Souter²³¹—have reflected a version of natural law interpretation consistent with Ronald Dworkin’s concept of

Thomas Jefferson to Benjamin Rush (Sept. 23, 1800), *reprinted in* WRITINGS OF THOMAS JEFFERSON, *supra* note 162, at 460.

²²⁷ See *supra* text accompanying notes 176–78.

²²⁸ See, e.g., DWORKIN, *supra* note 6, at 225, 400 (discussing interpretation according to the best political theory that explains the current legal order); See also Wellington, *supra* note 143, at 284–97 (community consensus model of interpretation).

²²⁹ See discussion *supra* Sections III.A–B.

²³⁰ See KELSO & KELSO, *supra* note 6, §§ 13.1–13.2, at 405–18.

²³¹ See R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637, 652–54, 657–71 (2002). See also KELSO & KELSO, *supra* note 6, at § 16.3, nn.81–83; § 16.4, nn.87–105.

“equal concern and respect,” or Adam Smith’s concept of the “impartial spectator.”²³²

One weakness of this mode of justification is that it cannot explain why the interpretive approach should ever change, or criticize the interpretive approach of another era.²³³ For example, the Supreme Court’s approach to race discrimination changed from 1896, when the Court focused on existing customs and traditions to determine the reasonableness of legislation requiring whites and non-whites to ride in separate railway cars in *Plessy v. Ferguson*,²³⁴ to 1954, when the Court focused more on the reasoned demands of human dignity and not treating any individual as a second-class citizen in *Brown v. Board of Education*.²³⁵ From a current majority theory of justification, the Court could say after 1954 that race discrimination cases should follow *Brown*, but would have no grounds to reject *Plessy* as inappropriate for 1896 if the *Plessy* doctrine was consistent with majority legal doctrine then.²³⁶

2. PROGRESSIVE HISTORICIST APPROACH

Under a progressive historicist theory of interpretation, the focus of legal justification is on what theory of interpretation is most likely to be reflected in the future.²³⁷ An approach based on cognitive and moral developmental psychology suggests the views an enlightened community “eventually will hold” will reflect a modern version of natural law.²³⁸ The growing convergence among Western industrialized democracies for judicial review based upon a modern version

²³² For citation to Ronald Dworkin’s concept of “equal concern and respect,” see *supra* note 221 and accompanying text, and for citation to Adam Smith’s concept of the “impartial spectator,” see *supra* note 218 and accompanying text.

²³³ See KELSO & KELSO, *supra* note 6, § 8.4.2.1, at 274.

²³⁴ 163 U.S. 537, 550 (1896) (“[T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation . . . [and in] determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people . . .”).

²³⁵ 347 U.S. 483, 494 (1954) (“To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

²³⁶ For discussion of *Plessy* being consistent with majority legal doctrine in 1896, see KELSO & KELSO, *supra* note 6, § 26.2.1.1.B, at 1106–09.

²³⁷ See *id.* at 274.

²³⁸ See *id.* § 15.4.1, at 483–88 nn.71–81.

of natural law²³⁹ is consistent with this view of progressive historicist reasoning.

3. PLURALIST APPROACH

Professor James Fallon has argued for his interpretation theory on pluralist grounds.²⁴⁰ While such an approach has the strength of being able to pick and choose among all the other kinds of interpretation approaches how much emphasis to give each in various circumstances,²⁴¹ it has the weakness of not providing the judge with any guidance other than the judge's own internal balance.²⁴² As John Hart Ely famously remarked, it is likely to be adopted by a person who is "envisioning a Court staffed by Justices who think as they do."²⁴³

²³⁹ See *id.* § 17.1.4, at 572 n.68 (citing Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 483–85 (2003) ("Modern rights typically are phrased in terms of broad moral concepts—for example, the right of human dignity was made the central organizing value in the German Constitution, and the prestige of that constitution, and of the German Constitutional Court in implementing it, have made that 'dignity clause' particularly influential for other constitutional regimes around the world."). See also Kelso, *supra* note 82, at 441–54 (discussing modern moral reasoning and emerging trends in constitutional interpretation around the world); R. Randall Kelso, *United States Standards of Review versus the International Standard of Proportionality: Convergence and Symmetry*, 39 OHIO N.U. L. REV. 455, 498–504 (2013).

²⁴⁰ See FALLON, *supra* note 21, at 5. See also Fallon, *supra* note 6, at 1252–68 (discussing five categories of constitutional law arguments – text, historical intent, theory, precedent, and value – and refusing to pick any particular interpretation theory as presumptively valid). For discussion of other pluralist/pragmatic approaches to constitutional interpretation, see Griffin, *supra* note 178; Posner, *supra* note 53; Farber, *supra* note 53.

²⁴¹ See Fallon, *supra* note 6, at 1243–46, 1252–68. Professor Fallon notes, "With incommensurability and indeterminacy limiting the autonomy of the individual categories, the gestalt-like quest for coherence that is modeled by constructivist coherence theory . . . fulfills an important function in our constitutional practice." *Id.* at 1252.

²⁴² As Judge Cardozo noted almost a century ago, "It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate[.]" BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 11 (1921). While that choice can become predictable for any judge over time, without any guiding formula, the ultimate choice is up to the judge's own sense of prudence.

²⁴³ Ely, *supra* note 57, at 17.

4. TRUE ORIGINALISM AS THE BEST APPROACH FROM ANY PERSPECTIVE

As was discussed in Part III of this Article, the natural law theory of interpretation described herein best comports with both the subjective original intent²⁴⁴ and objective original meaning²⁴⁵ of the Constitution. As discussed in Part IV, there are reasons to believe that the natural law theory described herein also represents the best moral theory from a consequentialist perspective,²⁴⁶ a current consensus or Dworkian perspective,²⁴⁷ a progressive historicist perspective,²⁴⁸ and thus from a pluralist perspective (since it reflects a combination of all the other perspectives).²⁴⁹

As was noted earlier,²⁵⁰ Justice Kennedy has stated, “Had those who drafted and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.” A few recent Supreme Court Justices have approached constitutional interpretation from this properly humble Enlightenment natural law perspective: most prominently, current Justice Kennedy and former Justices O’Connor and Souter.²⁵¹

V. CONCLUSION

Judges like Justices Antonin Scalia, Clarence Thomas, and Neil Gorsuch have claimed legitimacy for their interpretive approach in the humble view that they are just following the original meaning of the Constitution.²⁵² That is not so. They are imposing on the Constitution an interpretive structure that would have been foreign to the Constitution’s framers and ratifiers, leading to decisions that have no connection to how the framers and ratifiers would have expected

²⁴⁴ See discussion *supra* Section III.A.

²⁴⁵ See discussion *supra* Sections III.A–C.

²⁴⁶ See discussion *supra* Section IV.A.

²⁴⁷ See *supra* text accompanying notes 230–31.

²⁴⁸ See *supra* text accompanying notes 238–39.

²⁴⁹ See *supra* text accompanying note 178.

²⁵⁰ See *supra* text accompanying note 119 (citing *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003)).

²⁵¹ See *supra* text accompanying notes 102–05, 119, 124–29, 144–49. See also KELSO & KELSO, *supra* note 6, §§ 12.3.2; 12.4.1–12.4.3, at 375–78, 393–403.

²⁵² See *supra* text accompanying note 13.

their Constitution to be interpreted today. Imposing on that Constitution a static/formalist interpretive methodology does not make practical sense. The main consequence of such an approach is a predisposition to support the values of an earlier white, propertied, straight male patriarchal society.