OUR NINE TRIBUNES: A REVIEW OF PROFESSOR LUSKY'S CALL FOR JUDICIAL RESTRAINT

OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA. By Louis Lusky.* Westport, Connecticut, Praeger. 1993. Pp. xviii, 213.

*Reviewed by Charles D. Kelso and R. Randall Kelso***

Louis Lusky's 1975 book, *By What Right?*,[1] applauded post-1937 decisions of the Supreme Court that allowed expanded congressional regulation of the economy. However, Lusky criticized many of the Court's other recent constitutional decisions as unprincipled innovations. In his 1993 sequel, *Our Nine Tribunes*,[2] Professor Lusky laments that the Court has continued its errant ways. Not having seen his or any other vision of principled limits on judicial review begin to materialize, Professor Lusky has tried to "exert some benign influence on government" by formulating proposals with a chance of acceptance by "voters," government "officials," and "*future* members of the Court, directly and through their teachers."[3] In this review of Lusky's latest book, we summarize his views and indicate how the themes regarding judicial review that resonate in his book are connected to on-going debates and emerging trends on today's Supreme Court.

I. PROFESSOR LUSKY'S VIEWS

Professor Lusky begins by summarily rejecting any notion that the Court should operate as a "continuing constitutional convention" — the way he frequently saw it behave in opinions written by Justice Brennan.[4]

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[1]LOUIS LUSKY, BY WHAT RIGHT? (1975).

[2]LOUIS LUSKY, OUR NINE TRIBUNES (1993) [hereinafter LUSKY, TRIBUNES].

[3]*Id.* at xiii, 18.

[4]*Id.* at 14, 23, 37-46, 135.

Instead, says Lusky, the real choice for the future is between two types of Courts. He defines them as follows:

> On the one hand is a court composed of Justices who respond only to the need to make the law self-consistent, closing their eyes and ears to large changes in the needs of the society. On the other hand is a court composed of Justices who do their best to respond effectively to the multifarious needs of the whole society while nevertheless accepting the judgments of its *elected* spokesmen unless there is understandable reason to believe that those elected officials cannot or will not fairly represent their constituents — all of them.[5]

Lusky believes that the framers wanted a Court of the latter type because it would be flexible enough to preserve the new government for all time while respecting a national commitment to self-government by the electorate.[6] The objective behind Lusky's commitment is to allow people to live together harmoniously in a political community and achieve "a sense of universal kinship, of membership in an ever-broader community."[7] This type of Court "would intervene against acts of elected officials *only* in cases of demonstrable and demonstrated necessity . . . to honor the national commitment to an open society (as well as other national commitments, such as preservation of a common market)."[8] For Lusky, an "open society" is "roughly the same as broad personal autonomy."[9]

Lusky asserts that national commitments to self-government and an open society have existed from the beginning. He finds them in the written Constitution, notably the Preamble, and in inferences drawn from the patterns underlying the framers purposes.[10] The Court is constructively innovative, says Lusky, only if the Justices can show that a particular new

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[5]*Id.* at 18.

[6]*Id.*

[7]*Id.* at 4.

[8]*Id.* at 18.

[9]*Id.* at 16.

[10]*Id.* at 20.

rule is needed in order to serve one or both of the two commitments.[11] Also, to reconcile their own action in creating a new rule with the commitment to self-government, the Justices must show reason to believe that they are better qualified to deal with the problem than are the elected parts of the government. Without this grounding, Lusky says, a decision is not likely to "evoke the voluntary compliance engendered by respect for legitimate authority."[12] Instead, it may aggravate conflicts and tensions, and provoke "evasion by those whom the Court has undertaken to bind, countered by angry claims of legal right on the part of those whom the Court has undertaken to benefit."[13] An inadequately grounded decision will thereby retard development of a sense of community and kinship.[14] This result occurs in part because newly recognized rights quickly energize their own constituency through media orchestration of public opinion.[15]

As Lusky sees it, the Court after 1937 properly removed "the crumbling remnants of the proud citadel of free business enterprise and vested property rights" by renouncing "its constitutional protection of laissez-faire in the economic field."[16] The Court appropriately began to provide individuals with "defenses against official censorship, racial discrimination, wrongful conviction, and theistic government," thus contributing to individual autonomy and an open society.[17] However, the Court then proceeded, without any limiting principles, to recognize many new rights by judicial behavior that was "inordinately proud and self-righteous."[18] The Justices, says Professor Lusky, have come to "regard themselves as masters of the Constitution, rather than its servants."[19] This attitude, Lusky notes, is evidenced not only by the Court's opinions themselves, but also by the

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 4-10, 145-51.

[15] *Id.* at 7-9.

[16] *Id.* at 19, 77.

[17] *Id.* at 19, 135.

[18] *Id.* at 18.

[19] *Id.* at 22.

fragmentation within those decisions,[20] by overly complex constitutional tests,[21] by the Court's propensity for declaring new rights rather than imposing power limitations,[22] and by an increasing number of footnote references to nonlegal materials.[23]

In support of his conclusions, Professor Lusky analyzes a number of post-1975 cases which, in his judgment, inappropriately recognized new rights, improperly displaced legislative powers, or engaged in both of those abuses.[24] It is apparent from examining Professor Lusky's comments on the cases that his position typically mirrors that of Chief Justice Rehnquist.[25]

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[20]*Id.* at 22, 29-35.

[21]*Id.* at 48-51. Professor Lusky noted examples of the Court's tendency to create intricate and complicated tests. *Id.* (citing United States v. O'Brien, 391 U.S. 366 (1968) (discussing speech versus non-speech); Flast v. Cohen, 392 U.S. 83 (1968) (defining taxpayer standing); Lemon v. Kurtzmon, 397 U.S. 1034 (1971) (delineating the establishment of religion); Miller v. California, 413 U.S. 15 (1973) (defining obscenity)).

[22]*Id.* at 22.

[23]*Id.* at 25-26.

[24]*Id.* at 97-114.

[25]Among all of the cases cited and discussed in his book, in only a few instances does Professor Lusky depart from the position taken by Chief Justice Rehnquist. One such instance of disagreement concerns Congress's power to create race-based affirmative action programs. *Id.* Professor Lusky approves of how the Court has handled its race discrimination cases, including the result in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), where the Court upheld an FCC program favoring minorities in the award of certain broadcast licenses. LUSKY, TRIBUNES, *supra* note 2, at 116. Chief Justice Rehnquist, along with Justices Scalia and Kennedy, joined Justice O'Connor's dissent in the case. *See Metro Broadcasting*, 110 S. Ct. at 3028. For a more detailed discussion of *Metro Broadcasting*, see *infra* note 108.

Further, despite generally approving the Court's action in race discrimination cases, Lusky charges that the Court's lack of technical expertise resulted in an unnecessarily abrasive opinion and ruling in Spallone v. United States, 493 U.S. 265 (1990). LUSKY, TRIBUNES, *supra* note 2, at 54-55. In that opinion by Chief Justice Rehnquist, the Court upheld individual fines against members of a city council for failure to remedy long-standing racial discrimination in public housing, but said that the fines were premature because the judge should have waited to see whether large fines on the city would suffice to induce compliance by the council. *Spallone*, 493 U.S. at 634. Professor Lusky says that it would have been wiser to enforce the desegregation decision by appointing a master to take charge of the public housing program, and spend already appropriated funds in a manner consistent with federal law. LUSKY, TRIBUNES, *supra* note 2, at 55-56.

Representative cases include *Craig v. Boren*,[26] *Plyler v. Doe*,[27] *First National Bank of Boston v. Bellotti*,[28] *Texas v. Johnson*,[29] and *Missouri v.*

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[26]429 U.S. 190 (1976) (holding that males have a right to intermediate scrutiny review and that the state's statistics on driving dangers did not justify denying males the ability to purchase 3.2 beer until 21 years old, but allowing females to purchase it at age 18). In dissent, Justice Rehnquist called a for rational basis scrutiny of discrimination against males. *Id.* at 217 (Rehnquist, J., dissenting). *Craig* was a "dismally benighted decision," says Lusky, agreeing with Rehnquist. LUSKY, TRIBUNES, *supra* note 2, at 91. *Craig v. Boren* is discussed more fully at *infra* notes 108-09 and accompanying text.

[27]457 U.S. 202 (1982) (holding that Texas did not satisfy "intermediate scrutiny" when it denied free public education to the children of illegal aliens). Justice Brennan wrote the opinion. *Id.* at 205. Chief Justice Burger, and Justices White, Rehnquist, and O'Connor dissented. *Id.* at 242 (Burger, C.J., dissenting). Lusky comments, "[n]ow that oil revenues have fallen and the state of Texas is in financial difficulty, the Justices may be less proud of having burdened it with this extra expenditure . . . ." LUSKY, TRIBUNES, *supra* note 2, at 73. *Plyler* is discussed more fully at *infra* note 110 and accompanying text.

[28]435 U.S. 765 (1978) (holding that it is invalid to bar corporations from spending money to lobby on public issues that do not materially affect their business or assets). Justice Powell wrote the opinion. *Id.* at 765. Justice White, joined by Justices Brennan and Marshall, and Justice Rehnquist dissented. *Id.* at 802 (White, J., dissenting); 822 (Rehnquist, J., dissenting). Professor Lusky observes, "[b]eing unable to account for this ruling on the basis of arguably legitimate First Amendment purposes — self-fulfillment of the individual or furtherance of self-government — I am driven to conclude that it resulted from nothing more than the Court's own hunger for power." LUSKY, TRIBUNES, *supra* note 2, at 62. *Bellotti* is discussed more fully at *infra* note 115 and accompanying text.

[29]491 U.S. 397 (1989) (holding that Texas could not convict a flag-burner of desecrating a venerated object). Justice Brennan wrote this opinion. *Id.* at 397. Chief Justice Rehnquist, along with Justices White, Stevens, and O'Connor dissented. *Id.* at 421 (Rehnquist, C.J., dissenting). In his dissent, Chief Justice Rehnquist observed, "the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justified a governmental prohibition against flag burning in the way respondent Johnson did here." *Id.* at 422 (Rehnquist, C.J., dissenting). Professor Lusky agrees with Rehnquist, predicting that if Congress proposed a flag-burning amendment, it would be quickly ratified by the requisite thirty-eight states. LUSKY, TRIBUNES, *supra* note 2, at 65. *Texas v. Johnson* is discussed more fully at *infra* notes 114-15 and accompanying text.

Jenkins.[30] Professor Lusky submits that the Court's reasoning in these cases failed to meet his tests for legitimate judicial review.[31]

Professor Lusky adds that he does not insist on acceptance of his proposed principles. The essential need is for the Justices to accept and respect *some* limiting principles.[32] Lusky does not find any such limiting principles in many of the Court's post-1937 decisions. But he does find limiting principles, which permit moving beyond normal judicial deference to the legislative process and the presumption of constitutionality, in an informed reading of footnote 4 of *United States v. Carolene Products*.[33]

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[30]110 S. Ct. 1651 (1990) (holding that to implement a school desegregation remedy, a district court may direct a school district to levy taxes and enjoin state laws limiting or reducing such levies). Justice White wrote the opinion. *Id.* at 1651. Chief Justice Rehnquist, along with Justices O'Connor, Scalia, and Kennedy concurred in part. *Id.* at 1667 (Rehnquist, C.J., concurring in part). Professor Lusky characterized *Jenkins* as "[t]he most extreme expansion of judicial power in recent years." LUSKY, TRIBUNES, *supra* note 2, at 73. *Jenkins* is discussed more fully at *infra* note 93 and accompanying text.

[31]For Professor Lusky's test for legitimate judicial review, see *supra* notes 4-15 and accompanying text. For Professor Lusky's view of the Court's failure in these cases, see *supra* notes 25-30.

[32]LUSKY, TRIBUNES, *supra* note 2, at 19.

[33]304 U.S. 144, 152 n.4 (1938). In this famous footnote, the Supreme Court sketched the types of situations in which the normal presumption of constitutionality and deference to the legislature might not be appropriate:

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

This footnote was penned by Justice Stone while Lusky served as his law clerk.[34] Lusky says this footnote impliedly affirmed two substantive national objectives — government by the people and government for the whole people — which demand extraordinary protection by the courts in cases of need.[35] Lusky states that the Court has applied strict or quasi-strict scrutiny to laws characterized as affecting "fundamental rights" or containing "suspect classifications" when, in fact, no specific prohibition can be found, there has been no failure in the political process, and there is no indication of invidious discrimination against a discrete or insular minority.[36] Lusky sees only a glimmer of hope that in the future the Court will restrain its excessive and unprincipled use of strict scrutiny.[37]

II. PROFESSOR LUSKY AND *CAROLENE PRODUCTS*

We believe that Professor Lusky is unduly pessimistic, even if one agrees with his critical theme. Recent appointments have so re-made the Court that it is currently operating, and will increasingly operate, under limiting principles not very far from those of *Carolene Products* footnote 4. To be candid, however, this may not suit Professor Lusky entirely. Though Professor Lusky identifies both "individual autonomy" and "self-government" as basic principles of our Constitution,[38] his focus seems to be on the "self-government" side of the equation. The "*great* objective" of government, says Lusky, is to "enable people to live together peaceably[,]" and the "single most essential means to that end is the achievement of a sense of universal kinship. . . . Law's primary means of expanding the circle of kinship is to define limits of permissible behavior."[39] As Lusky makes clear, he is willing to tolerate significant limits on permissible behavior, and thus significant limits on individual autonomy, in order to create the

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Id.

[34]LUSKY, TRIBUNES, *supra* note 2, at 30.

[35]*Id.* at 123, 158.

[36]*Id.* at 14, 158-59.

[37]*Id.* at 4, 18, 174-76.

[38]*See supra* text accompanying notes 6-9.

[39]LUSKY, TRIBUNES, *supra* note 2, at 4-5.

conditions he thinks are needed for the development of kinship, community, and democratic self-government.[40]

Professor Lusky's discussion of *Carolene Products* footnote 4 underscores this greater focus on self-government, rather than individual autonomy. As Professor Lusky states, paragraph one of footnote 4 was added at the suggestion of Chief Justice Hughes, and rests on different premises than paragraphs two and three.[41] As Lusky notes, paragraphs two and three of footnote 4 affirm "self-government" principles: paragraph two affirms a commitment to government "by the people[,]" and paragraph three focuses on government "by the whole people[,]" which includes discrete and insular minorities.[42] Paragraph one's commitment to specific protections in the Constitution, particularly the first ten amendments that focus mostly on protecting individuals *from* the government, is based more on "individual autonomy" concerns, not "self-government."[43]

Even if it is true, as Professor Lusky clearly believes, that some excessive and unprincipled expansion of constitutional rights has been aided by the addition of paragraph one to *Carolene Products* footnote 4,[44] that

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[40]*See, e.g., id.* at 63-73, 87-96, 142-51 & 167-75 (discussing freedom of speech cases, the Court's "overreaction against" historic societal taboos, and the importance of the Court serving to advance "the operation of the melting pot" in a society "not blessed with a high degree of homogeneity"). As Professor Lusky states, "[t]he initial proposition is simple. . . . It declares that meaningful freedom is maximized . . . in a society where individual actions are subjected to wise controls. Thomas Hobbes so declared in *Leviathan* (1651) . . . ." *Id.* at 172.

[41]*Id.* at 124-25. As Professor Lusky notes, the original draft of footnote 4, penned by Justice Stone, only included what became the second and third paragraphs, both of which focus on deficiencies in the political process as rationales for increased Court scrutiny. *Id.* at 123. In response to the original draft, Chief Justice Hughes proposed adding language that subsequently became the first paragraph of footnote 4. *Id.* at 125-26, 177-90.

[42]*Id.* at 123.

[43]*See generally id.* at 124-30. *See also infra* notes 7-82 and accompanying text (discussing the "Natural Law" approach towards individual autonomy during the Enlightenment).

[44]As Professor Lusky notes, paragraph one's underlying notion of certain fundamental rights deserving heightened scrutiny is based upon an "implicit assumption . . . that this recognition of their special significance by the revered Framers will legitimize extraordinarily intrusive judicial review as implementing the intent of the Framers themselves. The dynamics of government play no part in this calculus." LUSKY, TRIBUNES, *supra* note 2, at 124-25. A by-product of this "heightened scrutiny" analysis is the potential to read quite broadly textually specific provisions of the Constitution

does not necessarily mean that the concerns of paragraph one should be given short shrift. It may mean instead that a principled way must be found to apply paragraph one in a judicially appropriate and restrained manner, in the same way that Professor Lusky believes that paragraphs two and three can be applied in a principled and appropriately restrained manner.[45] We think that the Court is likely to take that road in the future, giving principled elaboration to the concerns underlying paragraph one of *Carolene Products* footnote 4, and thus providing an appropriate level of protection for the "individual autonomy" which is its promise. To the extent Professor Lusky has indicated that he would be happy with some limiting principles, not just his,[46] he should welcome this prospect.

III. FOUR SUPREME COURT DECISIONMAKING STYLES, SUPREME COURT DECISIONMAKING TODAY, AND PREDICTIONS FOR THE FUTURE

As we see it, there are four types of courts, or four types of decisionmaking styles, that can exist at any particular time. These four decisionmaking styles are: natural law, formalist, Holmesian, and

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protecting individual rights, and for expansion of fundamental rights analysis into areas which are not as textually specific as the Bill of Rights. Professor Lusky laments this expansion. *Id.* at 158-65.

[45]On such an approach towards paragraphs two and three, see *id.* at 13-18, 119-20, 130-32, and *supra* notes 4-15 and accompanying text.

[46]*See supra* text accompanying note 32 (discussing the dangers of Justices not respecting some limiting principles).

instrumentalist.[47] These styles of decisionmaking approach constitutional interpretation in different ways.[48]

A. INSTRUMENTALISM

The most extreme judicially activist decisionmaking style of these four, producing the type of court which, in Lusky's opinion, makes judicial review a kind of "continuing constitutional convention,"[49] is the instrumentalist approach. As a general jurisprudential matter, instrumentalist judges believe that courts should seek to advance sound social policies where leeways exist in the law. The judge must test the formulation and application of each rule by its purpose or policy. Where the reason for the rule stops, there stops the rule.[50] A classic account of this approach with respect to common-law

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[47]A full discussion of these four general decisionmaking styles appears in 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 (1993) [hereinafter Kelso, *Separation of Powers*]. These four decisionmaking styles are the product of judges disagreeing on two basic propositions concerning law. The first is whether legal decisionmaking is separable from moral or social value considerations (the positivist assumption, or law as science), or whether law is testable by reference to some external standard of rightness (law as normative, or prescriptive, not merely descriptive). *Id.* at 535. The second disagreement concerns whether law should be represented as a set of logically consistent and coherent set of doctrines (the analytic, or conceptualist, assumption), or whether legal doctrine ultimately is to be tested merely as a means to some social end (the functionalist, or pragmatic approach). *Id.* at 535-36.

With respect to the four decisionmaking styles, formalist judges adopt the analytic and positivist approach; Holmesian judges adopt a functional and positivist approach; instrumentalist judges adopt a functional and normative approach; and natural law judges adopt an analytic and normative approach. *See id.* at 536-63. For further discussion of these four decisionmaking styles in the context of common law, statutory, and constitutional adjudication, see R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 101-23, 261-310, 388-423 (1984) [hereinafter KELSO & KELSO, STUDYING LAW].

[48]Specific discussion of these four decisionmaking styles in the context of constitutional law adjudication appears in R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994) [hereinafter, Kelso, *Styles of Const'l*].

[49]LUSKY, TRIBUNES, *supra* note 2, at 135.

[50]This approach is discussed in greater depth in Kelso, *Separation of Powers*, *supra* note 47, at 534-38.

adjudication is Justice Cardozo's *The Nature of the Judicial Process*.[51] Justice Brennan's *The Constitution of the United States: Contemporary Ratification* is an unmistakable example of this approach in the context of Constitutional law.[52]

The instrumentalist approach to constitutional interpretation differs from the three other judicial decisionmaking styles most markedly in its willingness to embrace "non-interpretive" considerations to resolve cases where leeways exist in the law.[53] Instrumentalist judges of course start with the Constitution's literal text, the text's purposes or spirit, the text's relation to basic constitutional structure, the history of the framing and ratifying period, judicial precedents, and any consistent legislative or executive

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[51]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). As Cardozo stated therein:

> The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.

Id. at 66.

[52]William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). For discussion of the instrumentalist approach with respect to statutory interpretation, see KELSO & KELSO, STUDYING LAW, *supra* note 47, at 286-91.

[53]As it is typically defined, a court engages in "non-interpretive" review when:

> [I]t makes the determination of the constitutionality by reference to a value judgment other than one constitutionalized by the Framers. Such review is "non-interpretive" because the Court reaches [the] decision without really interpreting, in the hermeneutical sense, any provision of the constitutional text (or any aspect of governmental structure) — although, to be sure, the Court may explain its decision with rhetoric designed to create the illusion that it is merely "interpreting" or "applying" some constitutional provision.

Michael Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 264-65 (1981) [hereinafter Perry, *Interpretivism*]. On the "interpretive" versus "non-interpretive" debate generally, see GERALD GUNTHER, CONSTITUTIONAL LAW 19 n.12 (12th ed. 1991), and sources cited therein; *Symposium on Constitutional Interpretation* 6 CONST. COM. 19-113 (1989).

practice which can be held to constitute a "gloss" on meaning.[54] However, instrumentalist Justices are willing to go beyond such "interpretive" tools of construction.[55]

The Instrumentalist approach exercised great influence on the Supreme Court from 1954 to 1986, but probably reached its zenith in the late 1960's, when the Court included Justices Warren, Fortas, Douglas, Brennan, and Marshall. There may be grounds for Professor Lusky's criticism that in some decisions of this era these judges used the invitation of *Carolene Products* footnote 4 to expand rights without clear limiting principles being applied, other than some "non-interpretive" source of sound social policy.[56] Today, however, with the recent retirements of Justices Brennan, Marshall, and Blackmun, only Justice Stevens remains as a moderate adherent to the

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[54]For general discussion of these familiar modes of constitutional interpretation, see PHILIP BOBBITT, CONSTITUTIONAL FATE 9-58, 74-92 (1982) [hereinafter BOBBITT, FATE] (discussing arguments of text, structure, history, and doctrine); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 56-57 (1991) [hereinafter BOBBITT, INTERPRETATION] (discussing legislative and executive gloss on meaning); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). On legislative and executive gloss on meaning to the Constitution, see also Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued by 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 President.").

[55]*See* Perry, *Interpretivism*, *supra* note 53, at 265 ("The decisions in virtually all modern constitutional cases of consequence . . . cannot be plausibly explained except in terms of noninterpretive review, because in virtually no such case can it plausibly be maintained that the Framers constitutionalized the determinative value judgment.").

[56]*See* LUSKY, TRIBUNES, *supra* note 2, at 2-4, 13-24, 158-65 (summarizing Professor Lusky's concern with excessive and unprincipled modern constitutional decisionmaking). These "non-interpretive" sources of sound social policy can derive from a supposed community consensus or societal tradition, or values the judge thinks the community eventually will hold, or the judge's own values. *See* Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 283-301 (1973) (discussing the community consensus model); Brennan, *supra* note 52, at 444 ("On this issue, the death penalty, I hope to embody a community, although perhaps not yet arrived, striving for human dignity."); John Hart Ely, *The Supreme Court, 1977 Term — Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 1, 16-22, 43-52, 52-54 (1978) (discussing a judge's own values approach, the community consensus model, and values the judge thinks the community eventually will hold). For a brief discussion of the intellectual tension among these three approaches, see KELSO & KELSO, STUDYING LAW, *supra* note 47, at 156-60, 397-98.

instrumentalist approach.[57] Thus, Professor Lusky need no longer have a pressing concern about an instrumentalist majority on the Court; it is unlikely to exist in the near future.

B. FORMALISM

Professor Lusky's second type of court, one which seeks consistent law, "closing their eyes and ears to large changes in the needs of society,"[58] uses the formalist approach. Formalist judges emphasize the literal, plain meaning of words. They prefer clear, bright-line rules capable of logical and predictable application.[59] When using history as an aid in constitutional adjudication, formalists tend to search for the specific historical views of the framers and the ratifiers on specific issues. They refuse to speculate on what history may suggest about broader purposes the framers may have had in mind because this might lead to less predictable and less certain results.[60]

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[57]*See generally* Kelso, *Separation of Powers*, *supra* note 47, at 581-82, 598-99, 602 (discussing the decisionmaking styles of current and recently retired Justices).

[58]*See supra* text accompanying notes 5-6 (discussing the kind of Court desired by the framers).

[59]For a more in-depth discussion of this general formalist approach, see Kelso, *Separation of Powers*, *supra* note 47, at 533, 535-38. With regard to common-law adjudication, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). With regard to statutory interpretation, see Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991). With regard to constitutional law interpretation, see Beau James Brock, *Mr. Justice Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 634-49 (1991). *See also* KELSO & KELSO, STUDYING LAW, *supra* note 47, at 107-09, 261-64, 278-82, 390-91, 401-03 (discussing various attributes and consequences of formalist decisionmaking).

[60]*See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (plurality) (asserting under Due Process Clause analysis, judges should search for "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. . . ."); Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting) (holding that a non-denominational prayer at a high school graduation ceremony is constitutionally based upon the specific history of prayer in schools at the time of the ratification of the First and Fourteenth Amendments). The formalist desire for certainty and predictability also means that in determining a societal tradition the Court should not consider broad historical evidence of "public opinion polls, the views of interest groups, and the positions adopted by various professional associations. . . . A revised national consensus . . . must appear in the operative acts (laws and the application of laws) that the people have approved." Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (plurality).

Given a conflict between text and history, most formalists look to constitutional text as critical.[61] The formalist approach dominated the Supreme Court between 1872 and 1937. It was this approach against which Justice Holmes frequently dissented.[62] Professor Lusky clearly rejects such a limiting vision of the judiciary's role.[63] On the contemporary Court, however, only Justice Scalia, and perhaps Justice Thomas, approach constitutional and statutory interpretation from this perspective.[64] It is clear that their approach doesn't characterize the work of today's Court, nor is such a formalist approach likely to represent the majority approach at any time in the near future.

C. THE HOLMESIAN APPROACH

As indicated above, Lusky's preferred type of court combines deference to legislative and executive judgments, which helps advance self-government, with a response to society's needs only when elected officials

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[61]*See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2874 n.1 (1992) (Scalia, J., dissenting) (explaining that clear text of the Equal Protection Clause requires a "color-blind" Constitution, which overrides specific historical traditions, such as banning interracial marriages, or, presumably, permitting segregated public schools). It is, however, unclear whether a formalist like Raoul Berger would agree. He seems to take the view that specific historical evidence should override such text even as to the constitutionality of segregated public schools. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY 22-24, 27, 117-21, 123-27 (1977). And, of course, the original formalist textual reading of the Equal Protection Clause upheld the constitutionality of segregated schools. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that *separate*, but in form *equal*, facilities are constitutional).

[62]*See generally* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 211, 277-83 (1989) (discussing "the formalistic and conservative judicial approach" from "the Civil War to about 1900" in common law adjudication, and the Court-packing plan and Justice Robert's "switch in time" in 1937, and how those events resulted in the Court rejecting *Lochner*-era formalism, and replacing it with Holmes' posture of deference to Congress, which after 1937 upheld New Deal-style regulations).

[63]*See supra* text accompanying notes 33-37 & 41-46 (discussing footnote 4 of *Carolene Products*); LUSKY, TRIBUNES, *supra* note 2, at 158-59 (criticizing Justice Black's formalist posture of "rigid adherence to the constitutional text (as interpreted by himself) that is incompatible with Footnote 4's thesis").

[64]*See generally* Kelso, *Separation of Powers*, *supra* note 47, at 587-94, 597-98 (discussing evidence of the decisionmaking styles of Justices Scalia and Thomas).

are not effectively representing their constituents.[65] This approach represents the Holmesian style of judicial decisionmaking.[66] Unlike the formalist style, a Holmesian judge is willing to go beyond the literal meaning of words and look to the words' general purposes in light of a historical inquiry into purposes, because, as Holmes said, "[t]he life of the law has not been logic, it has been experience."[67] Furthermore, a Holmesian judge is willing, at least in theory, to interpret purposes in light of the drafter's *general* purposes, even if a specific manifestation was not in the drafter's mind.[68] The Holmesian posture of judicial deference counsels that courts should not rule legislation unconstitutional unless from text, purpose, and

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[65]*See supra* text accompanying notes 6-14, 24-37 (discussing implications of the Court's power to make constitutional rules).

[66]*See generally* Kelso, *Separation of Powers*, *supra* note 47, at 541-45, 576-78. Professor Lusky's list of the "very greatest" Justices and judges reflects his strong affinity for the Holmesian approach. Professor Lusky's list includes: "Holmes, Brandeis, Stone, the two Harlans, and . . . Learned Hand, Henry J. Friendly, and Harold Leventhal." LUSKY, TRIBUNES, *supra* note 2, at 36.

[67]OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). For a more complete discussion of Holmes's embrace of purpose in constitutional and statutory interpretation, see Kelso, *Separation of Powers*, *supra* note 47, at 544 n.38 ("'[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.'" (quoting United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J.))).

For Professor Lusky's embrace of "purposive" interpretation, see LUSKY, TRIBUNES, *supra* note 2, at 20 ("Implication of power in the Court to make constitutional rules involves two elements. The first is a national commitment or objective that is either spelled out in the written Constitution (notably in the Preamble) or is inferable from its underlying pattern or the known purposes of its makers."). In the context of discussing the *ut reg magis* maxim of construction, discussed more fully *infra* at text accompanying notes 72-73, Lusky also states, "[t]he [C]ourt inquires into what the lawmakers' *objective* was and then decides." *Id.* at 134.

[68]*See generally* Kelso, *Separation of Powers*, *supra* note 47, at 545 n.40 (quoting Felix Frankfurter, *Some Reflections on the Interpretation of Statutes*, 47 COLUM. L. REV. 527, 538-44 (1947) ("'[T]he purpose which a court must effectuate is . . . that which [the drafter] did enact, however ineptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as it often is the very reason for casting a statute in very general terms."' (citations omitted))). Of course, in determining these purposes, a Holmesian judge must remain faithful to the drafter's text and actual intent, and not read the judge's own views into the provision's purpose. *See, e.g.*, LUSKY, TRIBUNES, *supra* note 2, at 159-60 (criticizing the majority opinion in United Steelworkers v. Weber, 443 U.S. 193 (1979), for just this error); Zeppos, *supra* note 59, at 1618-19 (similarly criticizing the majority opinion in *Weber*).

history, the unconstitutionality is "so clear that it is not open to rational question."[69]

The Holmesian approach also has a strong preference for certain and predictable rules.[70] This strong view of judicial deference, coupled with a concern for certainty and predictability in the law, narrows the range of the inquiry into text, purpose, and history, and means that in practice Holmesian judges often decide consistently with the more specific views or specific intent of the framers and the ratifiers.[71] Justice Frankfurter championed this

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[69]James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). On this strong view of judicial deference to the legislative process implicit in the Holmesian approach, see MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 86-90 (1994) [hereinafter PERRY, LAW OR POLITICS] (discussing James Bradley Thayer's "minimalist" approach towards constitutional interpretation, and its embrace by Justices Holmes and Frankfurter); Kelso, *Styles of Const'l*, *supra* note 48, at 133-34, 167, 197, 200-01 (discussing the view of judicial restraint of Thayer, Justices Holmes and Frankfurter, and Professor Alexander Bickel, which typify this approach). Professor Lusky's thesis is similarly based on this strong view of deference unless clearly identified deficiencies exist with the political process. *See supra* text accompanying notes 6-14, 24-37.

[70]In the Holmesian tradition, certainty and predictability are prized for their functional utility in helping society better govern itself. *See generally* Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. U. L.J. 427, 456 (1990) ("Holmes believed a judge could do a number of things to improve the law within the limits imposed by his society's prevailing beliefs. First, a judge can increase the effectiveness of current law in achieving its socially desirable consequences by making it more fixed, definite, and certain. . . . So, too, the positivist judge ought to adhere strenuously to the doctrine of *stare decisis*, as that makes the law more reliable, certain, and knowable, and hence more effective in achieving its socially beneficial consequences . . . ."); LUSKY, TRIBUNES, *supra* note 2, at 48 (criticizing the Court for the development of "bewilderingly complex rules" which leave the Court with "large, if not unlimited, discretion. . . ."). In contrast, in the formalist tradition, certain and predictable rules are prized more for their analytical, logical clarity or neatness. *See supra* note 58-59 and accompanying text.

[71]For example, Professor Michael Perry, in discussing the Holmesian interpretative theories of Judge Robert Bork and Edwin Meese, draws a distinction between Bork and Meese in their broader, "better" moments, when they seem to acknowledge that some provisions of the Constitution were intended by the framers and the ratifiers to reflect broad purposes, versus when they refuse sometimes to acknowledge this fact and lapse into a more narrow, limited specific intent approach. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation* 77 VA. L. REV. 669, 693-94 & n.78 (1991) [hereinafter Perry, *Legitimacy*]. Professor Lusky indicates a similar rejection of the interpretative theory of Edwin Meese read in this more narrow, formalist specific intent manner, LUSKY, TRIBUNES, *supra* note 2, at xvi-xvii, 133, and his application of the *ut res magis* maxim of construction is meant to counter such exclusive reliance on the

approach in the 1940's, 50's and early 60's, and Justice White picked up the mantle in the 1960's, as did Chief Justice Rehnquist in the 70's and 80's.[72]

In his 1993 book, Professor Lusky notes a point he did not make in 1975. He states that as part of his preferred approach, judges should apply the ancient maxim of construction, *ut res magis valeat, quam pereat*, which means interpretation should go forward "so that the venture at hand may succeed, not fail."[73] Because this maxim focuses on ensuring that the drafter's purposes underlying a venture will succeed, it is clearly consistent with a Holmesian purposive approach.[74] Application of this maxim, Professor Lusky notes, provides a method of interpreting the Constitution more broadly than the specific intent of the drafters on particular issues, but in a manner consistent with the *real* original intent of the framers and the ratifiers.[75] Of course, how one defines "the venture" and evaluates its

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specific intent of the framers and ratifiers. *See infra* text accompanying notes 72-73.

[72]*See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 68 (1988) ("Holmes was one of the most influential shapers of modern American legal consciousness, as was his most notable disciple, Felix Frankfurter. Both defined the task of courts in a democracy as giving almost unrestrained enforcement to popular will as measured by legislative prowess."); Kelso, *Separation of Powers*, *supra* note 47, at 579, 583-84, 602-06 (discussing the decisionmaking styles of Chief Justice Rehnquist and Justice White).

[73]LUSKY, TRIBUNES, *supra* note 2, at 137-40 (discussing use of the *ut res magis* maxim of construction so that judicial review is "not confined to the written text but still kept within some verifiable, 'principled' limit").

[74]For example, Judge Learned Hand, a similar believer in the Holmesian style of interpretation, talked about the *ut res magis* maxim in his 1958 Oliver Wendell Holmes Lecture at Harvard. He stated:

> For centuries it has been an accepted canon in the interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand [*ut res magis*]; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language, unless they are constantly amended.

LEARNED HAND, THE BILL OF RIGHTS 14 (1958). On the Holmesian embrace of "purposive interpretation," see *supra* notes 66-67 and accompanying text.

[75]LUSKY, TRIBUNES, *supra* note 2, at 133-34, 140 ("The Constitution's makers intended not only to provide specifically for certain contingencies, but also, more generally, to establish a government that would endure for ages because it could adapt itself to large social changes and yet would continue to respect the basic national

"success" or "failure" is critical for purposes of applying this maxim of construction. On this point, Professor Lusky and the modern Supreme Court appear to part company. Nevertheless, this ancient maxim of construction provides a bridge between the Holmesian approach and the fourth approach to judicial decisionmaking in our constitutional history — the 18th and 19th century natural law approach. This approach was used in opinions of Chief Justice Marshall and Justice Story,[76] and may be re-emerging today in opinions of Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.

D. THE NATURAL LAW APPROACH

1. THE ENLIGHTENMENT AND THE *UT RES MAGIS MAXIM*

In his book, Professor Lusky properly notes that the framers and ratifiers of our Constitution were concerned about self-government and individual autonomy.[77] Yet, in his approach to individual cases, Lusky places most of the weight on the self-government side of the equation, while limiting discussion of individual autonomy.[78] In the Enlightenment tradition, however, individuals have natural rights against government, in addition to concerns about self-government.[79] The framers and the ratifiers

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commitment to such essentials as self-government and the open society. . . . Interpretation according to 'general intent' has long been acknowledged to be legitimate when a written instrument must be applied to unforeseen problems or situations. . . . [This approach is] equivalent to interpretivism because it *gives effect to the original intention.*").

[76]*See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 428 (1833) ("No construction of a given power is to be allowed, which plainly defeats, or impairs its avowed objects. . . . This rule results from the dictates of mere common sense; for every instrument ought to be construed, *ut [res] magis valeat, quam pereat* [so that the venture at hand may succeed and not fail].").

[77]*See supra* text accompanying notes 6-9.

[78]*See supra* text accompanying notes 37-42.

[79]*See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 3-21, 39 (1990) (discussing the ideological origins of the Constitution as a combination of Lockean and civic republican ideology, and noting, "[t]he framers, like most eighteenth-century American thinkers, took seriously Locke's notion [that] government was formed by the consent of the governed, primarily to provide protection of . . . inalienable [natural] rights"); Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101, 103 (1987) (discussing the Lockean tradition Barnett states, "[t]he standard for assessing the performance of government is its efficacy in enforcing the pre-

drafted the Constitution against the background of this Enlightenment philosophy.[80] Thus, to be truly faithful to the intent of the framers and the

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existing rights of individuals. . . . According to this view, then, individual rights come first and government, with all its various 'branches' and federal-state 'separations,' comes second as a means of securing these fundamental rights. . . . [T]he authors of our Constitution were very much influenced by the Lockean philosophy of 'rights first — government second.'").

[80]*See generally* DAVID RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 18-130 (1989) [hereinafter RICHARDS, FOUNDATIONS], and sources cited therein. As Richards notes, "[t]he founders understood themselves to be participants in the best Enlightenment thought of Scotland, England, and France, and others defined their work as an elaboration and extension of such thought . . . ." *Id.* at 24 (citing, BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1985); HENRY MAY, THE ENLIGHTENMENT IN AMERICA (1976); MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978); MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987); GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC: 1776-87 (1969) (other citations omitted)). Richards continues:

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

RICHARDS, FOUNDATIONS, *supra*, at vii-viii. *See also* H. JEFFERSON POWELL, THE MORAL FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 67-74 (1993) [hereinafter POWELL, FOUNDATIONS] (noting that the civic republican tradition and the Lockean tradition are "better understood" as Enlightenment tradition "complements" to one another; "[e]ven those whose commitment to Enlightenment politics was the most undeniable saw no inconsistency in invoking the necessity of [the civic republican concept of] civic virtue to free government as well." (citing THE FEDERALIST NO. 55 (James Madison) (other citations omitted)); 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. (forthcoming 1995) (manuscript at 30-37, on file with the author) [hereinafter Kelso, *The Natural Law*].

ratifiers, judges must remain faithful to the individual autonomy, natural rights aspect of the Enlightenment tradition.[81]

From the perspective of the *ut res magis* maxim "individual autonomy" and "self-government" are equally part of the venture at hand, i.e., the constitution, that was intended to "succeed" and not "fail." Specific provisions in the Constitution, particularly the first ten amendments as applied to the federal government and as incorporated into the Fourteenth Amendment, textually reflect many of the natural law rights in which the framers and ratifiers believed.[82] Thus, the promise of the first paragraph of *Carolene Products* footnote 4 — that such specifically stated "individual autonomy" rights will be vigorously protected by the courts — must be given as much attention as the focus on "self-government" contained in paragraphs two and three. Or, phrased in another way, individual autonomy is not just a concern to be weighed in a social balance but sacrificed for "community consensus" or "universal kinship"; instead, individual autonomy is a fundamental end in itself.[83]

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[81]*See generally* Barnett, *supra* note 79, at 104 ("Even if a contemporary analyst did not believe in natural rights, for the Constitution to be given its historically proper construction, such rights must be hypothesized and *assumed* to exist.").

[82]*See generally* FARBER & SHERRY, *supra* note 79, at 219-45, 253-73 (discussing the ideological origins of the Bill of Rights and the Reconstruction Amendments as reflecting Enlightenment premises). As Justice Breyer commented during his confirmation hearing, "[t]hat vast array of Constitution, statutes, rules, regulations, practices, and procedures — that huge vast web — has a single purpose. . . . Its purpose is to help [individuals] live together productively, harmoniously, and in freedom." *Excerpts From Senate Hearings on Supreme Court Nominee*, N.Y. TIMES, July 13, 1994, at A6. *Cf.* ROGERS SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL Law 18 (1985) ("Four goals were central to Locke's original vision of liberalism: civil peace, material prosperity through economic growth, scientific progress, and rational liberty.").

[83]This difference in perspective underscores another difference in the way a Holmesian approach versus a natural law approach is likely to approach the *ut res magis* maxim of construction. As Professor Lusky notes, Justice Holmes adopted the *ut res magis* maxim of construction in Missouri v. Holland, 252 U.S. 416, 433 (1920), when the Justice stated that the Constitution must be interpreted "in the light of our whole experience and not merely in that of what was said a hundred years ago." LUSKY, TRIBUNES, *supra* note 2, at 136-37. However, because of their posture of deference to government, Holmesian judges tend to apply this maxim most strongly in the service of deference to government decisions. *See, e.g.*, *Holland*, 252 U.S. at 433-34 (deferring to the federal government's treaty-making power); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934) (deferring to state legislature's alteration of contract rights to deal with the effects of the Great Depression). In addition, Holmesian judges tend to view "our whole experience" primarily through the lens of legislative and executive action. *See, e.g.*,

This approach toward "individual autonomy" rights does not mean that the "subjective" views of the judge will control in determining the extent of these rights, any more than the "subjective" views of the judge will control in applying Professor Lusky's more Holmesian "self-government" model of

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Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (plurality) (deferring to the "national consensus" of "state and federal statutes and the behavior of prosecutors and jurors"). In *Stanford*, Chief Justice Rehnquist, Justice White, and Justice Kennedy joined Justice Scalia's opinion that historical investigation of our evolving tradition for purposes of substantive due process analysis should be restricted to "laws and the application of laws," not broader historical evidence. *Id.* *See also* LUSKY, TRIBUNES, *supra* note 2, at 26 (criticizing the Court for resort to "nonlegal" materials). Furthermore, in deciding whether some right is necessary so that the "venture" may "succeed" and not "fail," the Holmesian deference to government presumption suggests that a Holmesian judge is likely to require something close to "absolute necessity" before concluding that, in Professor Lusky's words, "the new rule is needed for the preservation of the kind of government that the Framers sought to establish." *Id.* at 140.

In contrast, a natural law judge, balancing more equally "self-government" and "individual autonomy" values, is likely to view our society's traditions and the "success" of our venture in light of an on-going interplay of forces which include not only legislative and executive practice, but also "changes of society's practices, constitutional amendment, and judicial interpretation." Ruth Bader Ginsburg, *On Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17, 17 (1986). Such a view permits full consideration of how the Constitution's two basic values of "self-government" and "individual autonomy" require protection today. For example, Justice Ginsburg has noted that one of the main reasons the Supreme Court was willing to increase the level of scrutiny in gender discrimination cases in the 1970's was the Court's willingness for the first time to see the differential treatment of women and men in certain statutes as "*burdensome* to women." *Id.* at 20. Justice Ginsburg attributes this willingness in part to the "rapid growth in women's employment outside the home, attended and stimulated by a revived feminist movement; changing patterns of marriage and reproduction," all of which made the Court better able to see that women were being "unfairly constrained" by laws designed "ostensibly to shield or favor" them. *Id.* at 20-21. Furthermore, without the strong deference to government presumption of the Holmesian approach, natural law judges are more likely than Holmesian judges to adopt the view that recognition of a right is "necessary" for the venture to "succeed" to the extent the right will be "useful" or "convenient" to advance the broad purpose of the provision under review. They will not require "absolute necessity." *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412-22 (1819) (noting that "necessary" means only "convenient" or "useful", not "absolutely necessary," for purposes of interpreting the "Necessary and Proper" Clause of Article I, Section 8). Though *McCulloch* dealt with a case of governmental power, the "twin" purposes of "self-government" and "individual autonomy," as viewed under the Enlightenment tradition, suggests a similarly broad approach to claims of individual autonomy under the Enlightenment natural law view.

Carolene Products footnote 4.[84] Under the traditional natural law approach, the innovative tendencies of judges will be limited in several ways that are similar to what is called for in the Holmesian approach. First, because the Enlightenment natural law tradition is based upon notions of a social contract,[85] the role of a judge in the Enlightenment tradition, like the role of a positivist judge, is to reflect the *in fact* intent of the framers and the ratifiers of our Constitution. The natural law approach of our judicial traditions, like the Holmesian and formalist approaches, rejects "non-interpretive" review.[86] Second, under the natural law approach, as in the

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[84]For example, as Justice Breyer has explained, when interpreting the term "liberty" under the Fourteenth Amendment for purposes of the "right of privacy" analysis:

> [One] starts with the text for, after all, there are many phrases in the text of the Constitution, as in the Fourth Amendment, that suggest that privacy is important. One goes back to history and the values that the framers enunciated. One looks to history and tradition, and one looks to the precedents that have emerged over time. One looks as well to what life is like at the present as well as in the past. And one tries to use a bit of understanding as to what a holding one way or the other will mean for the future. . . . That's not meant to unleash subjective opinion. Those are meant to be objective, though general, ways to trying to find the content of that word.

Excerpts from Hearing on Breyer Nomination to High Court, N.Y. TIMES, July 14, 1994, at A10.

[85]*See generally* RICHARDS, FOUNDATIONS, *supra* note 80, at 78-97 (discussing the Enlightenment concept of the social contract and its adoption by the framers and ratifiers of our Constitution).

[86]*See id.* at 131-71 (discussing this point under the chapter heading "Interpreting the Founders Over Time"); Kelso, *Separation of Powers*, *supra* note 47, at 547-52 ("Natural law is not a justification for unbridled judicial activism. It does mean, however, that natural law thinkers are likely to include natural law principles in drafting a constitution and would likely take natural law principles into account in passing statutes. It also means that a judge following natural law presuppositions should interpret the words which the society had used in its constitution and statutes in light of natural law principles to the extent that the words were chosen to incorporate a natural law philosophy."). *See also* Kelso, *Styles of Const'l*, *supra* note 48, at 159-65; Kelso, *The Natural Law*, *supra* note 80, at 21-23 nn.54-73.

Of course, there are possible versions of a natural law approach to judicial decisionmaking which suggest that the judge should feel free to resort to natural law principles whether or not those principles are embedded in constitutional or statutory text. *See* Kelso, *Separation of Powers*, *supra* note 47, at 548 n.49. This version of natural law is what Judge Hand discussed in his famous statement, "[f]or myself, it would be more irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them,

Holmesian approach, careful attention is paid to the drafter's purpose in enacting a law.[87] This, too, will limit judicial discretion.[88] Third, like any sound common-law approach to judicial decisionmaking, innovative tendencies in the natural law tradition will be cabined by respect for the grand traditions of the Anglo-American common law system. These traditions include such principles as fidelity to precedent,[89] deciding cases

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which I assuredly do not." HAND, *supra* note 74, at 73. This "Platonic Guardian" version of natural law also seems to be the version referred to by Professor Lusky in his comments regarding natural law. *See* LUSKY, TRIBUNES, *supra* note 2, at xiv-xv, 148.

However, this version of natural law, with its resort to "non-interpretive" review, is inconsistent with the Enlightenment's concept of the social contract, and was rejected by the Marshall Court during the first half of the 19th century, mostly clearly with respect to the issue of slavery. *See, e.g.*, Donald Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969). Any modern revival of the judicial decisionmaking tradition of Chief Justice Marshall and Joseph Story can be expected to reject such "non-interpretive" review as well.

[87]*See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 383-84 (1977); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985) [hereinafter Powell, *Original Understanding*]; LESLIE F. GOLDSTEIN, IN DEFENSE OF TEXT 8-12 (1991). *See also* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1034-35 (1991); Kelso, *Styles of Const'l*, *supra* note 48, at 158-61. *See also Excerpt From Senate Hearings on Supreme Court Nominee*, N.Y. TIMES, July 13, 1994, at A16 ("[The Constitution's] purpose is to help the many different individuals who make up America from so many different backgrounds and circumstances, with so many different needs and hopes . . . live together productively, harmoniously, and in freedom. Keeping that ultimate purpose in mind helps guide a judge. . . . I will try to interpret the law carefully in accordance with its basic purposes. . . . I must do my absolute utmost to see that [my] decisions reflect both the letter and the spirit of [the] law.").

[88]Of course, there is always the danger that purposes will be misused. While not a main concern of instrumentalist judges who may be willing to read their values into a constitutional or statutory provision, see notes 51-55, 67 and accompanying text, it is a concern of Holmesian and natural law judges. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2576 (1989) (Kennedy, J., concurring) ("The problem with spirits [purposes] is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.").

[89]*See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809-16 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). For further discussion, see *infra* text accompanying notes 120-26.

on narrow grounds where possible,[90] deciding most cases only after full briefing and argument,[91] applying the method of analogical reasoning where appropriate,[92] respecting the role of the courts in our constitutional

[90]*See, e.g.*, Heller v. Doe, 113 S. Ct. 2637, 2651 n.2 (1993) (Souter, J., concurring) (discussing "two of the cardinal rules governing the federal courts: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied").

[91]*See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, Fla., 113 S. Ct. 2217, 2247-50 (1993) (Souter, J., concurring) (discussing the importance of full briefing and argument).

[92]*See, e.g.*, Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1991).

system,[93] reasoned elaboration of the law,[94] and other elements of sound judicial craftsmanship.[95]

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[93]As Justice Ginsburg noted during her confirmation hearing, our system of government does not contemplate a "tripartite" system of government, with courts being equal participants with the legislative and executive branches in making policy decisions. She stated, "my approach [towards judging] is rooted in the place of the judiciary . . . in our democratic society. The Constitution's preamble speaks first of 'we the people' and then of their elected representatives. The judiciary is third in line." *Excerpts From Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at A9. This understanding calls into question the Court's decision in Missouri v. Jenkins, 110 S. Ct. 1651 (1990), discussed *supra* note 30, and suggests, as Professor Lusky would wish, that rather than serving as a model for later judicial activism, *Jenkins* may end up being restricted to its facts. *See supra* note 30.

However, despite such a restriction, under our system of government courts do have a role to play ensuring that rights embedded in the Constitution, as elaborated by arguments of text, purpose, structure, history, subsequent legislative and executive practice, and judicial precedents, are not unconstitutionally burdened. On these elements of judicial decisionmaking generally, see *supra* note 53 and accompanying text. For discussion of the natural law approach to judicial precedents compared to the formalist, Holmesian, and instrumentalist approaches, see *infra* notes 120-26 and accompanying text. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."); *id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

[94]Reasoned elaboration of the law, or as stated in the joint opinion in *Casey*, "reasoned judgment," reflects in part a concern with clearly defined tests that work in practice, coherence and consistency in the law, rejection of irrational stereotypes and prejudices which are not based upon sound factual premises, and development of the law consistent with strongly held principles of justice embedded in the relevant legal materials. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992). It also includes attempts to develop the law consistent with "neutral principles." *Id.* For further discussion see *infra* note 125 and accompanying text. *See also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

[95]*See generally* Fallon, *supra* note 54; Charles Fried, *The Artificial Reason of the Law, or What Lawyers Know*, 60 TEX. L. REV. 35 (1981); Harry Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443 (1981); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C.L. REV. 619, 688-97 (1994). With regard to Mr. Young's article, it should be noted that while Young categorizes the judicial craftsmanship style of Justices O'Connor, Kennedy, and Souter as reflecting "Burkean" natural law roots, it is probably more accurate to categorize their decisionmaking style, which Mr. Young correctly describes, as representative not of Edmund Burke, but of the Enlightenment tradition of Locke, James Madison, Chief Justice Marshall, and Justice Story. *See* Young, *supra*. *See also* Kelso, *Natural Law*, *supra* note

Despite these points of similarity between a Holmesian and a natural law approach, there are a few critical points of difference. Perhaps the greatest difference is that Holmes rejected, and judges in the Holmesian tradition tend to reject, any notion of natural rights as "naive."[96] Thus, even though Holmesian judges are committed to following the actual intent of the framers and the ratifiers, they are less likely than natural law judges to conclude that the framers and the ratifiers intended some concept in the Constitution to reflect an Enlightenment natural law principle.[97] Holmesian judges are therefore less likely to conclude that the specific provisions of the first ten amendments, such as freedom of speech and freedom of religion, and the Fourteenth Amendment's Due Process and Equal Protection Clauses, must be read against a background of Enlightenment philosophic ideals. Judges in the natural law tradition, however, will embrace ideals regarding "individual autonomy" thought to be embedded in the First Amendment and in the Due Process and Equal Protection Clauses.[98]

From the perspective of Enlightenment philosophy, "individual autonomy" is based upon the concept of "rational liberty," which means a

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80, at 37-43 (discussing the Enlightenment tradition).

[96]*See* FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 40-41 (1960) ("[T]he jurists who believed in natural law seemed to [Holmes] to be 'in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors and something that must be accepted by all men everywhere.'").

[97]This specific result is the consequence of what can be called the principle of general interpretive bias. *See* Kelso, *Styles of Const'l*, *supra* note 48, at 149 ("General interpretive bias occurs because most judges are likely to think that the judge's interpretive model is consistent with that of the framers and ratifiers. Thus, formalist judges may tend to see the framers and ratifiers as formalists, Holmesian judges see them as Holmesian, and so forth.").

[98]With respect to the initial Constitution, the Bill of Rights, and the Reconstruction Amendments being drafted in light of Enlightenment Philosophy, see *supra* notes 80-82 and accompanying text. Under this approach, where history suggests that the framers and ratifiers intended a particular constitutional provision to reflect only their detailed, specific choices, as when they used language which is "relatively direct, specific, and focused," natural law judges will remain focused on those choices. *See* DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR., AND PHILIP P. FRICKEY, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 77 (1993) [hereinafter FARBER, THEMES]. On the other hand, where history suggests that the framers and ratifiers embedded broad natural law concepts, like those dealing with the First Amendment, equal protection, and due process, history may suggest that the framers themselves intended "to provide no hard-and-fast answers . . . and to let the answers develop over time in common-law fashion. After all, the Framers were common-law lawyers." *Id.* at 97.

commitment to protecting each individual's "rational choice."[99] The "choice" component of this definition supports not imposing punishments for things over which people have no control, such as immutable characteristics.[100] It also supports the view that individuals should be able to make fundamental choices about basic aspects of their lives.[101] The "rational" component of this definition supports the view that moral and just decisions are the product of reason, not irrational stereotyping or prejudice.[102]

Faithfulness to this Enlightenment tradition means that these principles should guide constitutional decisionmaking when interpreting provisions of the Constitution that are grounded in Enlightenment moral concepts, such as the First Amendment, the Due Process Clause, and the Equal Protection Clause. Further, under the Enlightenment tradition judges are not committed to the view that general Enlightenment moral concepts embedded in the Constitution have a static content which, when applied to contemporary problems, necessarily have the same specific meaning they had in 1791 or 1868. As David Richards reminds us, "[n]o great political theory, including Locke's, is the last word on its own best interpretation, and critical advances in political theory may enable us better to understand and interpret the permanent truths implicit in the theory and to distinguish these from its

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[99]*See* POWELL, FOUNDATIONS, *supra* note 80, at 225 (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.'" (quoting SMITH, *supra* note 82, at 200-01)).

[100]*See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (positing that in the context of applying intermediate scrutiny to a case involving an illegitimacy classification, a status over which the child burdened by the classification had no control, the Court noted, "the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility"); Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (noting that to justify heightened scrutiny in gender discrimination cases "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth").

[101]*See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[102]*See, e.g.*, *Frontiero*, 411 U.S. at 684-86 ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . .").

lapsing untruths."[103] Judges in the traditional natural law approach understood this fact.[104] Modern judges in this tradition can also be expected to understand the difference between a general concept embedded in a general constitutional provision and the more specific views of the framers and the ratifiers.[105]

2. MODERN EXAMPLES

Approaching the *ut res magis* maxim of construction in the way described above explains many of Professor Lusky's disagreements with modern constitutional law. For example, regarding gender discrimination law, Justice Ginsburg noted during her confirmation hearings that the general concept of equality and equal rights for all individuals — reflected 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

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[103]RICHARDS, FOUNDATIONS, *supra* note 80, at 13.

[104]*See* GOLDSTEIN, *supra* note 87, at 9 (1991) ("[Chief Justice] Marshall carefully distinguished between the conscious, specific policy goal that may have motivated a particular constitutional clause, on the one hand, and the broader, more generalized principle, or rule of law, that the clause established, on the other hand. For Marshall, constitutional law consisted of the latter rather than the former.").

[105]*See generally* Kelso, *Styles of Const'l*, *supra* note 47, at 157 ("[A] person who wishes, in accordance with the enlightenment tradition, to consistently apply a general concept in which the individual believes . . . may have to adjust one or more specific views which are currently not consistent with that general concept. Through this process, a dynamic is created whereby over time more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social realities, rather than specific views merely being the product of the individual's past experiences, unthinking adherence to tradition, idiosyncratic preferences, or prejudice."). For general discussion in the context of constitutional interpretation of such reasoning about general concepts, which may require adjusting of one's specific views, see Fallon, *supra* note 54, at 1198-99 ("[One] 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."). For discussion of a methodology to distinguish an individual's specific "irrational" desires, prejudices, or stereotypes, from "rational" desires, see RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT 113 (1979) ("I shall call a desire 'irrational' if it cannot survive compatibly with clear and repeated judgments about established facts. What this means is that rational desire [or aversion] can confront, or will even be produced by, awareness of the truth; irrational desire [or aversion] cannot.").

and others in the eighteenth and nineteenth century were not ready for women to be equal participants in public life.[106] The evolution in equal protection doctrine derives in large part from the view that the commitment of the framers and the ratifiers to equality, as reflected in the Equal Protection Clause, was grounded on the Enlightenment-based principle that persons should not be punished for things over which they have no control (such as immutable characteristics, like race or gender), and on the Enlightenment concern with rejection of irrational stereotypes.[107] These principles support the decision in *Craig v. Boren* to apply gender discrimination law equally to both women and men. That *Craig v. Boren* is [of course] not consistent with Professor Lusky's "political process" and "self-government" perspective, leads to Professor Lusky's conclusion that only women need special judicial protection from the political process in gender discrimination cases.[108]

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[106]During her confirmation hearing, Justice Ginsburg quoted Jefferson that "[t]he appointment of women to public office is an innovation for which the public is not prepared, nor am I." *See Excerpts From Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at A12. Nevertheless, Justice Ginsburg added, 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 his general belief of equality as every individual's equal and inalienable right to "life, liberty, and the pursuit of happiness." *Id.*

[107]*See* Frontiero v. Richardson, 411 U.S. 677, 684-86 (1976) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . . Moreover, . . . sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . .").

[108]For further discussion of Professor Lusky's view, see LUSKY, TRIBUNES, *supra* note 2, at 91. For a further discussion on *Craig v. Boren*, see *supra* note 26. It must be noted that some Justices in the Holmesian tradition deferred to the legislature even in cases of more classic gender discrimination against women. *See, e.g.*, Fay v. New York, 332 U.S. 261, 290 (1947) (upholding wholesale exclusion of women from jury service). For a close case of whether a statute could be said to benefit or burden women from this political process perspective, see Hoyt v. New York, 368 U.S. 57, 61-65 (1961) (Harlan, J.) (upholding a state statute sparing women from the obligation to serve on juries based upon a minimum rationality standard of review and deference to the state legislature's judgment concerning women's place at "the center of home and family life").

The natural law concern with immutable characteristics also suggests that affirmative action cases based upon race should be given the same scrutiny as classic cases of racial discrimination. It thus supports the approach in Richmond v. J.A. Croson, Co., 488 U.S. 469, 493-94 (1989) (O'Connor, J.). It also suggests the accuracy of the dissent in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), discussed *supra* note 25, with the caution raised in one of the dissenting opinions that perhaps cases involving Congress's power to act under Section 5 of the Fourteenth Amendment may call for greater deference

The same enlightenment principles which support *Craig v. Boren* also support the heightened "intermediate" scrutiny now given to classifications based upon the illegitimacy of a child.[109] The enlightenment principles also support the result in *Plyler v. Doe* — that children of undocumented aliens should not be punished for a status over which they have no control[110] — and the view that cases involving sexual orientation should be given heightened scrutiny under the Equal Protection Clause.[111]

Freedom of speech is much prized under the Enlightenment tradition, and includes not only freedom of speech regarding political or religious matters, but freedom of speech generally.[112] Consistent with that tradition, claims of free speech generally must be vigorously protected,[113] as should

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to be given to Congress. *Id.* at 3030-31 (O'Connor, J., dissenting). On Professor Lusky's view concerning *Metro Broadcasting*, see *supra* note 25.

[109]*See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988). This is true despite the fact that concerns about illegitimacy, like concerns about women, were not part of the specific intent of the framers and the ratifiers of the Fourteenth Amendment. However, illegitimate children are not responsible for their status, and a clear historical record exists of irrational stereotyping. *See generally* FARBER, THEMES, *supra* note 98, at 365-66 ("In essence, [these] decisions are based on premises that persons born outside of marriage have suffered from irrational societal prejudices that impose burdens upon them bearing no relation to their own responsibility or wrongdoing.").

[110]*See* Plyler v. Doe, 457 U.S. 202, 238 (1982) (Powell, J., concurring) ("'[V]isiting . . . condemnation on the head of an infant' for the misdeeds of the parent is illogical, unjust, and 'contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.'" (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972))). *See supra* note 27 (discussing Professor Lusky's view on *Plyler*).

[111]Under this line of reasoning, heightened scrutiny could be proper depending upon the extent to which homosexuality is an immutable characteristic and the extent to which laws against homosexuals are based upon irrational prejudices and stereotypes. *See generally* FARBER, THEMES, *supra* note 98, at 367-68, and sources cited therein.

[112]*See* RICHARDS, FOUNDATIONS, *supra* note 80, at 172-201 (discussing religious liberty and free speech); SMITH, *supra* note 82, at 92-119 (discussing liberalism and the freedom of speech generally).

[113]*See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (defining obscenity in a way that often protects most forms of speech from obscenity regulation); Central Hudson Gas & Electric Co. v. Public Service Commission, 447 U.S. 557 (1980) (giving heightened "intermediate" scrutiny to regulations of commercial speech). Of course, some limitations on free speech will be affirmed by this tradition. *See generally* Ferber v. New York, 458 U.S. 747, 774 (1982) (O'Connor, J., concurring) (permitting regulation of indecent sexual

freedom to dissent from political orthodoxy.[114] This is true even if both kinds of free speech cases go against the model of Holmesian deference to government.[115] Similarly, with respect to free exercise of religion and the Establishment Clause, the Enlightenment tradition prized very highly religious toleration and a strong separation of church and state, given the experience of religious persecution in England.[116] The tradition supports cases like *Lee v. Weisman*,[117] where the court struck down state supported programs at a high school graduation as coercive, despite the Holmesian tendency to defer to the political process, as do formalists, with great

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performances or photographs of children); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring) (allowing "nude" dancing in entertainment clubs to be regulated for content-neutral reasons based upon the negative secondary effects of such businesses).

[114]Texas v. Johnson, 491 U.S. 397, 414 (1989) (Brennan, J.) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *id.* at 420-21 (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.").

[115]*See id.* at 421-22 (Rehnquist, C.J., dissenting) ("In holding this Texas statute unconstitutional, this Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.' For more than 200 years, the American flag has occupied a position as a symbol of the Nation." (citations omitted)).

The same Enlightenment natural law tenaciousness for free speech values supports upholding the freedom of speech even in cases where not only Holmesian Justices would wish to defer to government, but also where instrumentalist Justices, who typically are strong defenders of the rights of free speech, would also support the social policy behind the free speech regulation. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (involving political free speech of corporations); Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (same); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (involving regulation of hate speech). See also supra note 28 (outlining Professor Lusky's view on *Bellotti*); LUSKY, TRIBUNES, *supra* note 2, at 72 (discussing views on *R.A.V.*).

[116]*See generally* DAVID RICHARDS, TOLERATION AND THE CONSTITUTION Ch. 4-5 (1986) [hereinafter RICHARDS, TOLERATION].

[117]*See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992) (Kennedy, J.) ("[T]he lesson of history that was and is the inspiration for the Establishment Clause . . . [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."); *Id.* at 2668-76 (Souter, J., concurring) (attributing to the framers and ratifiers James Madison and Thomas Jefferson's views, grounded in 18th century Enlightenment natural law philosophy, that "any official endorsement of religion can impair religious liberty.").

reliance placed on the specific historical views of the framers and the ratifiers.[118]

With respect to the right of privacy, judges concerned about the Enlightenment concept of "liberty" and "individual autonomy" can be expected vigorously to protect the right of individuals to make choices about their own lives. As stated in the joint opinion in *Planned Parenthood v. Casey*,[119] "[a]t the heart of liberty is the right to make one's own decisions about life, of meaning, of existence, and the mystery of human life."[120] The approach towards privacy of Holmesian Justices like Chief Justice Rehnquist, or Justices White or Harlan, is more restrained, and is based more on consideration of the liberties "deeply rooted in this Nation's history and traditions" as reflected in legislative and executive acts.[121]

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[118]*See, e.g., id.* at 2678-79 (Scalia, J., dissenting) ("Justice Holmes' aphorism that 'a page of history is worth a volume of logic,' . . . applies with particular force to our Establishment Clause jurisprudence. . . . [T]he Establishment Clause should 'comport with what history reveals was the contemporary understanding of its guarantees.'" (citations omitted)). Therefore, the dissent determined by reference to historical practices and understandings that officially organized prayer in public schools should be held constitutional. *See supra* text accompanying notes 59, 70 (discussing formalist and Holmesian reliance on the specific views of the framers and ratifiers).

Of course, unlike the formalist approach, a Holmesian judge will also consult for aid in interpretation of the purposes behind a provision as revealed by an historical inquiry. *See supra* text accompanying notes 66-67. For Chief Justice Rehnquist's view on the purposes of the Establishment Clause in light of such an historical inquiry, see Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

[119]112 S. Ct. 2791 (1992) (O'Connor, J., Kennedy, J., Souter, J.).

[120]*Id.* at 2807 (joint opinion of Justices O'Connor, Kennedy, and Souter) (upholding the "core" premise of Roe v. Wade, 410 U.S. 113 (1973)). Note that this approach to upholding *Roe* is based on a view of the scope of individual liberty under the Fourteenth Amendment's Due Process Clause, and is not based on the more Holmesian rationale of deficiencies in the political process. *See generally* LUSKY, TRIBUNES, *supra* note 2, at 82 ("Perhaps the most persuasive [reasoning] against overruling *Roe v. Wade* is that the necessary consequence would be to return abortion regulation to the 50 states, and thus to perpetrate an unjust discrimination against indigent women who lack the money needed for a private abortion or for travel to one of the states which, like New York and New Jersey, permit the use of Medicaid for abortions.").

[121]*See, e.g., Casey*, 112 S. Ct. at 2859-60 (Rehnquist, C.J., concurring in part and dissenting in part) ("[Twenty-one] of the restrictive abortion laws in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. . . . On this record, it can scarcely be said that any deeply rooted tradition . . . [supports] the classification of the right to abortion as 'fundamental.'"); *See also* Poe v. Ullman, 361

With respect to all of these cases, the main difference between current doctrine and Professor Lusky's approach is a difference in how individual autonomy is treated — broadly, as in the Enlightenment tradition, or narrowly, with deference to "self-government" and a skepticism towards natural rights, as in the Holmesian tradition. However, judges in each tradition decide cases by using the same well-established maxims of sound judicial craftsmanship. For the most part, the natural law approach and the Holmesian approach merely see differently the basic purposes behind many of the textually explicit provisions of the Bill of Rights and the Fourteenth Amendment, and thus they see differently the venture of the framers and ratifiers which is to succeed.

3. "USUS" AND THE TREATMENT OF PRECEDENT

In addition to the difference above in focus between the Holmesian and natural law approaches, there is another difference which affects outcomes in modern cases. The formalist and Holmesian traditions, as positivist theories of interpretation, tend to think that the Constitution has a fixed, correct meaning. Thus, a prior decision should be overruled if it was wrongly decided, unless the decision has produced a settled body of law or there has been substantial reliance on the decision.[122] These two exceptions reflect the formalist and Holmesian concerns with certainty and predictability in the law.[123]

U.S. 497, 543, 554 (1961) (Harlan, J., dissenting) (despite language in his opinion that reflects more of an Enlightenment focus on liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints," Justice Harlan's ultimate conclusion, finding unconstitutional a Connecticut statute which criminalized the buying and use of contraceptives by a married couple, was based upon the "utter novelty" of the legislative enactment, which suggests more a Holmesian emphasis on deference to legislative and executive practice in determining our evolving traditions under the Due Process Clause).

[122]*See Casey*, 112 S. Ct. at 2884 (Scalia, J., concurring in part and dissenting in part) ("[T]he Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled."); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (Rehnquist, C.J.,) ("Considerations . . . of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved. . . .").

[123]Obviously, it would do great damage to the certainty and predictability of the law if a settled body of law, or a law on which people had substantially relied, were suddenly changed. On formalist and Holmesian concerns with certainty and predictability, see *supra* notes 58-59, 67-69 and accompanying text.

In contrast, as Professor Jefferson Powell has noted in discussing the legal interpretation writings of James Madison, under the traditional natural law approach:

> "usus," the exposition of the Constitution provided by actual governmental practice and judicial precedents, could "settle the meaning and intention of the authors." Here, too, [Madison] was building on a traditional foundation: the common law has long regarded usage as valid evidence of the meaning of ancient instruments, and has regarded judicial determinations of that meaning even more highly.[124]

Under this view, a sequence of judicial precedents can provide an independent gloss on the meaning of the Constitution, just as can a sequence of legislative and executive action.[125] Additional factors may be required — in addition to precedents being wrongly decided and the absence of

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As one might expect, the instrumentalist willingness to use "non-interpretive" considerations in constitutional cases for the purpose of advancing sound social policy, is matched by instrumentalist judges' willingness to overrule precedents and to create new doctrine, if they think the old doctrine was wrongly decided or is wrong for society today. *See supra* notes 51, 54-55 and accompanying text. *See also* Brennan, *supra* note 52, at 441-42 (summarizing a quarter-century's change between 1961 and 1986 in the Supreme Court's interpretation of the Fourteenth Amendment). Because of their desire to advance sound contemporary social policy, instrumentalist judges will not make a fetish over the need to follow precedent even when it has been relied upon. *See, e.g.*, *Payne*, 501 U.S. at 849-50 (Marshall, J., dissenting) (criticizing the *Payne* reliance formulation, cited *supra* note 122).

[124]Powell, *Original Understanding*, *supra* note 87, at 939. *See also* Perry, *Legitimacy*, *supra* note 71, at 74 ("In THE FEDERALIST No. 37, James Madison commented on the need, in adjudication, for such specification: 'All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

[125]*See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("[T]his can scarcely be considered an open question, entirely unprejudiced by former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiarly delicacy, as a law of undoubted obligation."). Note that based upon such legislative and judicial practice between 1791 and 1816, James Madison changed his view regarding the issue presented in *McCulloch*, i.e., the constitutionality of Congress incorporating a national bank. *See generally* PAUL BREST AND SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 18 (3d ed. 1992).

substantial reliance — for a contemporary Court to overrule a precedent's gloss on the meaning of the Constitution. Some of these additional factors, as stated in recent opinions by Justices O'Connor, Kennedy, and Souter, include: the prior decision turns out to be unworkable in practice; the decision creates a direct obstacle to important objectives in other laws; the decision has been rendered irreconcilable with related doctrines or its conceptual underpinnings have been removed or weakened by later decisions, later legislative or executive action, or a changed understanding of the facts; or the decision is inconsistent with some strongly held principle of justice or social welfare.[126]

Application in contemporary cases of the natural law approach to precedent calls for paying judicious respect to some of the instrumentalist-era decisions. As a result, the Court may affirm some of these decisions even if a natural law approach might not have reached that conclusion initially.[127] Respect for prior judicial work-product is part of the Eighteenth Century natural law model of sound judicial craftsmanship.[128]

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[126]*See Casey*, 112 S. Ct. at 2809-12 (O'Connor, J., Kennedy, J., Souter, J.); Patterson v. McLean Credit, 491 U.S. 164, 171-72 (1989) (Kennedy, J.). These considerations are related to the natural law model of decisionmaking because they flow from the natural law concern with reasoned elaboration, or as stated in the joint opinion in *Casey*, "reasoned judgment." *Casey*, 112 S. Ct. at 2806. In part, reasoned elaboration of the law is concerned with clearly defined tests that work in practice, coherence and consistency in the law, rejection of irrational stereotypes and prejudices which are not based upon sound factual premises, and development of the law consistent with strongly held principles of justice embedded in the relevant legal materials. *See supra* note 94. For discussion of the role that a commitment to "rationality" or "rational choice" can be expected to play in such reasoned elaboration of the law and in rejection of irrational stereotypes, see *supra* notes 99-105 and accompanying text.

[127]*See, e.g.*, Young, *supra* note 95, at 717 (noting that it is unclear "as an original matter" whether Justices O'Connor, Kennedy, and Souter would all have reached the same conclusion as they did in *Casey* concerning the extent of liberty protected by the Fourteenth Amendment — without twenty years of *Roe* as precedent).

[128]In this regard, though in other respects more in the Holmesian tradition, see notes 65, 108, 120 and accompanying text, Justice Harlan provided a model of judicial craftsmanship in the 18th century Anglo-American common-law tradition. *See generally* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 375-76 (1993) ("The other group of Justices [Justices O'Connor, Kennedy, and Souter] seem to have taken as their model the second Justice Harlan. . . . 'Respect for the Court,' Harlan once wrote to another Justice, 'is not something that can be achieved by fiat.' . . . The true conservative, Harlan believed, adhered to stare decisis, normally following even precedents against which he had originally voted."). Justice Harlan's strong commitment to "neutral principles" reflects another aspect of this common-law tradition. *See* Greenawalt, *supra* note 94, at 984.

IV. CONCLUSION

Professor Lusky has done the world of legal scholarship a service by providing a sustained critique of instrumentalist decisionmaking, by calling for the development of some principled limits on judicial review, and by suggesting that his dual commitment theory of "self-government" and an "open society" can serve as a guide for the development of principled limits. His call for a new theory is timely and entirely appropriate. In our opinion, however, his proposed theory, as illustrated in his critique of the cases, is too imbued with a Holmesian perspective to become a signpost along the future path of constitutional law. On the current Supreme Court, only Chief Justice Rehnquist is a consistent practitioner of the Holmesian decisionmaking style.[129]

A new Court majority seems poised to engage in the kind of development suggested by Professor Lusky, but is likely to approach the task by giving full weight to both the "self-government" and the "open society" or "individual autonomy" aspect of the framers' and the ratifiers' commitment.[130] To do justice to both sets of values, as they have been elaborated and reflected in over 200 years of executive, legislative, and judicial action, some level of complexity will likely be required.[131] Hopefully, that complexity over time will become more structured, more simplified, and more easily understood as part of the natural law commitment to coherence, consistency, and workability in the law.[132] It is not at all

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[129]*See generally supra* note 72 and accompanying text.

[130]*See generally supra* text accompanying notes 77-121.

[131]*Cf.* LUSKY, TRIBUNES, *supra* note 2, at 48-51 (criticizing the Court for promulgating "sets of bewilderingly complex rules").

[132]*See, e.g.*, Waters v. Churchill, 114 S. Ct. 1878, 1885-86 (1994) (O'Connor, J.) ("[Even where the Court] has never set forth a general test to determine [application of some doctrine], [and] we agree with Justice SCALIA that the lack of such a test is inconvenient, this does not relieve us of our responsibility to decide the case that is before us today. . . . We must therefore reconcile ourselves to answering the question on a case-by-case basis, at least until some workable general rule emerges.") For an attempt to try to bring some better coherence and consistency to modern Equal Protection Clause, Due Process Clause, First Amendment, Contract Clause, Dormant Commerce Clause, Takings Clause, and Article IV, Section 2 Privileges and Immunities Clause jurisprudence, see R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to the Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493 (1992); R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1 (1995).

likely, however, that today's Court will recognize new "fundamental" rights or enlarge the number of classifications regarded as "suspect" without some principled basis grounded in the text, purposes, or history of relevant constitutional provisions. In short, the Court is not likely to return to the creative center of national policy making where it was in the 1960's. By chronicling the dangers in such an eventuality, however,[133] Professor Lusky's book may indeed help exert a benign influence on the Court, and on government in general.

On reasoned elaboration of the law generally, see *supra* notes 94, 126 and accompanying text.

[133]*See generally supra* text accompanying notes 12-15.