

# BURKEAN MINIMALISM

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*Burkean minimalism has long played an important role in constitutional law. Like other judicial minimalists, Burkeans believe in rulings that are at once narrow and theoretically unambitious; what Burkeans add is an insistence on respect for traditional practices and an intense distrust of those who would renovate social practices by reference to moral or political reasoning of their own. An understanding of the uses and limits of Burkean minimalism helps to illuminate a number of current debates, including those involving substantive due process, the Establishment Clause, and the power of the president to protect national security. Burkean minimalists oppose, and are opposed, by three groups: originalists, who want to recover the original understanding of the Constitution; rationalist minimalists, who favor small steps but who are often critical of traditions and established practices; and perfectionists, both liberal and conservative, who want to read the Constitution in a way that fits with the most attractive political ideals. The argument for Burkean minimalism is strongest in domains in which three assumptions hold: originalism would produce intolerable results; established traditions are generally just, adaptive to social needs, or at least acceptable; and the theory-building capacities of the federal judiciary are sharply limited. Burkean minimalists face a number of unresolved dilemmas, above all involving the appropriately Burkean response to non-Burkean, or anti-Burkean, precedents.*

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*And first of all, the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of the ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would no longer be studied. Personal self-sufficiency and arrogance (the certain attendants upon all those who have never experienced a wisdom greater than their own) would usurp the tribunal.*

—Edmund Burke<sup>1</sup>

*I tend to look at the cases from the bottom up rather than the top down. . . . In terms of the application of the law, you begin obviously with the precedents before you.*

—Chief Justice John Roberts<sup>2</sup>

*It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.*

—Alexander Hamilton<sup>3</sup>

*If, as in ordinary language, a preceding generation be called old, this old or preceding generation could not have had as much experience as the succeeding generation. . . . What then is the wisdom of the times called old? Is it the wisdom of gray hairs? No. It is the wisdom of the cradle.*

—Jeremy Bentham<sup>4</sup>

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1. Edmund Burke, *Reflections on the Revolution in France*, in *THE PORTABLE EDMUND BURKE* 416, 456–57 (Isaac Kramnick ed., 1999).

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of Judge John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

3. *THE FEDERALIST* No. 1, at 1 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

4. *JEREMY BENTHAM, HANDBOOK OF POLITICAL FALLACIES* 44–45 (Harold A. Larrabee ed., 1952).

## I. INTRODUCTION

Consider the following cases:

1. For over fifty years, the words “under God” have been part of the Pledge of Allegiance.<sup>5</sup> Some parents object to the use of those words, arguing that under current constitutional principles, the reference to God must be counted as an establishment of religion.<sup>6</sup>
2. For over seventy years, the Supreme Court has permitted Congress to create “independent” regulatory agencies—agencies whose heads are immune from the plenary removal power of the president.<sup>7</sup> The Department of Justice now attacks the notion of “independence,” arguing that it is inconsistent with the system of checks and balances under any reasonable understanding of that system.<sup>8</sup>
3. The president of the United States has long engaged in “foreign surveillance” by wiretapping conversations in which at least one of the parties is in another nation and is suspected of being unfriendly to the United States.<sup>9</sup> The practice of foreign surveillance has been upheld by several lower courts, which see that practice as falling within the President’s “inherent” authority.<sup>10</sup> Those subject to such surveillance argue that as originally understood, the Constitution is not easily construed to grant such “inherent” authority to the President.

Each of these cases presents a conflict between long-standing practices and what can be plausibly argued to be the best interpretation of the Constitution. Those who challenge the practices contend that the best interpretation must prevail. A predictable response is that when construing

5. Elk Grove Unified Sch. Dist. v. Newdow, 524 U.S. 1, 7 (2004).

6. *Id.* at 8.

7. Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935).

8. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

9. In federal court, the authority to engage in such surveillance has been asserted for thirty-five years. *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970). The practice of “national security surveillance” has been traced to a decision of the Eisenhower administration in 1954. See Morgan Cloud, *The Bugs in Our System*, N.Y. TIMES, Jan. 13, 2006, at A21. The Department of Justice suggests a much longer legacy:

This Nation has a long tradition of wartime enemy surveillance—a tradition that can be traced to George Washington, who made frequent and effective use of secret intelligence. . . . And for as long as electronic communications have existed, the United States has intercepted those communications during wartime, and done so, not surprisingly, without judicial warrants. In the Civil War, for example, telegraph wiretapping was common and provided important intelligence for both sides. In World War I, President Wilson authorized the military to intercept all telegraph, telephone, and cable communications into and out of the United States . . . . So too in World War II; the day after the attack on Pearl Harbor, President Roosevelt authorized the interception of all communications traffic into and out of the United States.

Alberto R. Gonzales, Attorney Gen. of the U.S., Prepared Statement (Feb. 6, 2006), [http://www.usdoj.gov/ag/speeches/2006/ag\\_speech\\_060206.html](http://www.usdoj.gov/ag/speeches/2006/ag_speech_060206.html).

10. See *United States v. Truong Dinh Hung*, 629 F.2d 908, 912–16 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875–76 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

the Constitution, courts should be closely attentive to entrenched practices, and must give deference to the judgments of public officials extending over time. On this view, constitutional interpretation should be conservative in the literal sense—respecting settled judicial doctrine, but also deferring to traditions.

Those who make such arguments adopt an approach to constitutional law that I shall call *Burkean minimalism*.<sup>11</sup> Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices. Like all minimalists, Burkeans insist on incrementalism; but they also emphasize the need for judges to pay careful heed to established traditions<sup>12</sup> and to avoid independent moral and political arguments of any kind. On this count, Burkean minimalists should be distinguished from their rationalist counterparts, who are less focused on long-standing practices and more willing to require an independent justification for those practices.<sup>13</sup> In the nation's history, Justices Felix Frankfurter and Sandra Day O'Connor have been the most prominent practitioners of Burkean minimalism, in the sense that they have tended to favor small steps and close attention to both experience and tradition.<sup>14</sup> As we shall see, Burkean minimalism can be used in diverse ways; some judges freely permit the democratic branches to reject traditions but are unwilling to overturn traditions on their own, whereas other judges believe that when plausibly challenged on constitutional grounds, democratic changes in long-standing practices must receive careful scrutiny from the courts. Burkeanism might therefore be used as a shield, enabling government to fend off attacks on traditions, or instead as a sword, allowing litigants to challenge departures from long-standing practices.

Within conservative constitutional thought, Burkean minimalism is opposed by those who adopt two alternative approaches. The first is

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11. A good illustration is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). For a brisk critique, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 444–45 (1990):

“[Y]ou cannot just admire Burke and think you have found a judicial philosophy. Prudentialism is the repeated sounding of a note of caution (repeated, not consistent—a consistently cautious person would be cautious about caution as well as about everything else), and a tune with one note soon becomes tedious.”

One of my goals here is to respond to Judge Posner's challenge, with the suggestion that Burkean minimalism is a plausible response to limited information and bounded rationality on the part of the federal judiciary.

12. See, for example, the emphasis on the history of executive claims settlement in *Dames & Moore v. Regan*, 453 U.S. 654, 683–86 (1981).

13. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 69–74 (2005) (emphasizing need for small steps and caution in the domain of privacy, but doing so with reference to the theoretical ideal of active liberty).

14. See *supra* notes 11–13. Of course there are significant differences between Justice Frankfurter and Justice O'Connor, to be taken up in due course, and neither justice was always a practitioner of Burkean minimalism. For example, Justice Frankfurter concurred in the non-Burkean decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and Justice O'Connor concurred in the result, on non-Burkean grounds, in *Lawrence v. Texas*, 539 U.S. 558 (2003).

*originalism*. Originalists, including Justices Antonin Scalia<sup>15</sup> and Clarence Thomas,<sup>16</sup> believe that the Constitution should be understood to mean what it meant at the time that it was ratified. On this view, the ratifiers' understanding, defined as the original public meaning, provides the lodestar for constitutional interpretation.<sup>17</sup> Departures from that understanding are illegitimate, even if those departures are long-standing. It is noteworthy that the conservative dissenters on the Warren Court, Justices Frankfurter and John Marshall Harlan, had strong Burkean inclinations and did not typically speak in terms of the original understanding of the ratifiers.<sup>18</sup>

The second alternative is *conservative perfectionism*. Conservative perfectionists believe that the Constitution's ideals should be cast in the most attractive light. Conservative perfectionism is responsible for the attack on affirmative action programs,<sup>19</sup> the effort to strike down restrictions on commercial advertising,<sup>20</sup> and the movement to protect property rights against "regulatory takings."<sup>21</sup> Conservative perfectionists are not greatly concerned with the original understanding of the founding document, and they are entirely willing to renovate long-standing practices by reference to ambitious ideas about constitutional liberty.<sup>22</sup> The most influential members of the *Lochner* Court were conservative perfectionists.<sup>23</sup> In the last decades, Chief

15. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 37–47 (1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, *Originalism*].

16. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–53 (2004) (Thomas, J., concurring in the judgment) (arguing for a return to original understanding of the Establishment Clause).

17. Note that the originalist approach, properly understood, points to the document's original public meaning, not to the framers' original "intent." See SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 38. Nevertheless, Justice Scalia also shows occasional Burkean tendencies. See *infra* notes 114–117, 175–177 and accompanying text.

18. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Frankfurter, J., dissenting) (rejecting invalidation of compulsory flag salute); *Baker v. Carr*, 369 U.S. 186 (1962) (Frankfurter & Harlan JJ., dissenting) (concluding that constitutionality of reapportionment schemes should be treated as a nonjusticiable political question). There are exceptions, in which Justice Harlan in particular spoke in originalist terms. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (Harlan, J., dissenting) (offering a historical challenge to the one-person, one-vote principle).

19. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting) (invoking principle of color-blindness as basis for attack on race-conscious admissions policy).

20. See, e.g., *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

21. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Rehnquist, J., dissenting) (calling for greater protection against regulatory takings). On the difficulty of finding historical support for this position, see John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. REV. 1099 (2000) (arguing that on the original understanding, regulatory takings did not offend the clause).

22. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522–24 (1996) (Thomas, J., concurring in part and concurring in the judgment) (arguing for broad protection of commercial advertising). Note that Justices Scalia and Thomas are originalists, but that one or the other, or both, have joined several opinions best characterized as perfectionist. See *id.*; see also *supra* notes 15–16.

23. For evidence, see, for example, *Lochner v. New York*, 198 U.S. 45 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). The Court's opinions spoke in terms of the ideal of liberty, rather than in terms of the original understanding, established traditions, or clear precedents.

Justice Rehnquist showed an occasional interest in conservative perfectionism.<sup>24</sup> Of course I am speaking here of ideal types, and no one is likely to be a consistent practitioner of any particular method; but the different tendencies can nonetheless be attributed to different judges.

What unifies Burkean minimalism, originalism, and conservative perfectionism? The simplest answer is that all three disapprove of those forms of liberal thought that culminated in the work of the Warren Court and on occasion its successors.<sup>25</sup> All three reject the idea, prominent in the late 1970s and early 1980s, that the Supreme Court should build on footnote four in the *Carolene Products* decision,<sup>26</sup> develop constitutional law by reference to a theory of democracy,<sup>27</sup> and protect traditionally disadvantaged groups from majoritarian processes.<sup>28</sup> All three approaches are at least skeptical of *Roe v. Wade*,<sup>29</sup> the effort to remove religion from the public sphere,<sup>30</sup> and the attempt to grant new protections to suspected criminals.<sup>31</sup> The three approaches count as conservative simply because of their shared doubts about the rulings of the Warren Court and the arguments offered by that Court's most enthusiastic defenders.<sup>32</sup>

But there are massive disagreements as well. For example, Burkean minimalists have little interest in originalism. From the Burkean perspective, originalism is far too radical, because it calls for dramatic movements in the law, and it is unacceptable for exactly that reason.<sup>33</sup> Originalists are in the grip of a priori reasoning. Burkean minimalists prize stability, and they are entirely willing to accept rulings that do not comport with the original understanding when a decision to overrule them would disrupt established

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24. See, e.g., *Penn Cent.*, 438 U.S. at 138–50 (Rehnquist, J., dissenting). But Chief Justice Rehnquist has shown strong Burkean tendencies as well, above all in the area of the Establishment Clause. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (Rehnquist, C.J., plurality opinion).

25. But see the important discussion in David A. Strauss, *The Common Law Genius of the Warren Court* (Univ. of Chi. Pub. Law & Legal Theory Research Paper Series, Paper No. 25, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=315682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=315682), arguing that the decisions of the Warren Court fit comfortably within the method of the common law. It is possible, of course, to believe that certain decisions comport with the common law method but not with Burkeanism, simply because of their adventurousness in width and depth (which are hardly unfamiliar for the common law but which are incompatible with Burkeanism).

26. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

27. A recent effort in this vein is BREYER, *supra* note 13. Notably, Breyer favors minimalism in the sense of small steps, *id.* at 69–74, but his effort to develop a theoretical account of constitutional law makes it difficult to place him in the Burkean camp.

28. The most important exposition is JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1983).

29. 410 U.S. 113 (1973).

30. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980).

31. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

32. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33–71 (1985). Burkean minimalists might well be prepared, however, to accept the rulings of the Warren Court even if they would not have joined them as a matter of first impression. See *infra* notes 195–208 and accompanying text.

33. For a concise and illuminating statement, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996). CHARLES FRIED, *SAYING WHAT THE LAW IS* (2004), can be taken to have Burkean features, especially in its careful attention to past doctrine; but in the end, Fried is best characterized as a rationalist minimalist, not as a Burkean.

practices. Burkean minimalists also prize our constitutional traditions, extending over decades and even centuries, and see those traditions as the product not of a particular canonical moment, but of countless decisions by many actors. On this view, the American Constitution is a product not of a national judgment in 1787, but of a kind of spontaneous order, reflecting the acts and judgments of diverse people at diverse moments in history. To Burkean minimalists, originalism looks uncomfortably close to the French Revolution, seeking to overthrow settled traditions by reference to an abstract theory.<sup>34</sup>

Nor do Burkean minimalists have any enthusiasm for conservative perfectionism, which they consider far too rationalistic. In the Burkean view, there is no reason to trust the theory-building efforts of federal judges: theories are contested and unreliable, and they might well misfire. To be sure, Burkeans are willing to build on existing law through analogical reasoning, and this process might allow Burkean minimalists to make common cause with their perfectionist adversaries. But insofar as members of the latter group are willing to invoke ambitious accounts (of, say, property rights, presidential power over war-making, or color-blindness) to produce large-scale departures from existing practice and law, Burkean minimalists have no interest in their enterprise.

I have three goals in this Article. The first is to identify the ingredients of Burkean minimalism—an approach to constitutional adjudication that has both integrity and coherence, that has played a large role in the history of American constitutional thought, and that casts fresh light on a number of contemporary disputes. My second goal is to offer a reconstruction of Burkean thought that might serve as an alternative to the influential approach offered by Dean Anthony Kronman.<sup>35</sup> On Kronman's approach, Burkeanism regards the past as having a kind of inherent or intrinsic authority. By contrast, I suggest that Burkeanism is best understood in pragmatic or consequentialist terms. The argument for Burkeanism is that respect for traditions is likely to produce better results, all things considered, than reliance on theories of one or another kind, especially when those theories are deployed by such fallible human beings as judges. This pragmatic approach has the advantage of showing why Burkeanism makes good sense in some contexts but none at all in others.

It may well be right, for example, to build separation of powers doctrine on established practices, but also to approach scientific questions, such as those involving climate change or the nature of matter, on the basis of the newest theories rather than the old ones. By keeping the eye on the pragmatic ball, we can see that in law and politics, Burkeanism operates as a kind of heuristic, one that might be justified in some domains on rule-consequentialist grounds. The basic idea is that if courts follow traditions, they will produce better consequences, all things considered, than they might under any other approach to interpretation. And if this view is correct,

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34. See Merrill, *supra* note 33, at 512–14.

35. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

it is necessary to rethink the long-standing opposition between Burke, defender of the common law and great critic of theories, and Jeremy Bentham, critic of the common law and enthusiastic defender of theory, in particular utilitarianism, which argues for an approach that will have the best consequences.<sup>36</sup> To be sure, Burke was hardly a utilitarian, self-consciously or otherwise, but on certain assumptions and in some areas, Burkeanism can be understood as a way of promoting utility or at least good consequences—if only indirectly.

My third goal is to answer a simple question: under what assumptions and conditions would Burkean minimalism be most appealing? Although I offer a sympathetic treatment of Burkean minimalism here, I do not believe that it is defensible in all contexts, even in constitutional law. One of my central claims is that no approach to constitutional interpretation makes sense in every possible world. It is certainly easy to imagine times and places in which judges should reject Burkean minimalism. With respect to racial segregation in the United States, for example, there has long been a strong argument for a non-Burkean or even anti-Burkean approach, which *Brown v. Board of Education*<sup>37</sup> exemplifies. Whether or not *Brown* can be defended as minimalist,<sup>38</sup> it is not easily characterized as Burkean, because it disrupted an established institution in the name of a theory involving equality on the basis of race. In areas in which traditions are unjust and in which judges can reliably assess them in constitutionally relevant terms, there is reason to reject Burkean minimalism. A central competitor to the Burkean approach is what I shall call “rationalist minimalism”—an approach that subjects traditions to critical scrutiny and that has played a large role in the domains of race and sex discrimination and in the area of free speech. In these and other areas, there may be an argument for some kind of perfectionism as well.<sup>39</sup>

The most committed Burkeans would likely suggest that Burkeanism makes sense in all political domains, including those domains that consist of constitutional law as elaborated by federal judges. A more nuanced approach would suggest that Burkeanism is easiest to defend when traditions are truly long-standing and when the relevant institution, loosened from traditions, has a great deal of power. Rejecting these positions, and speaking in terms that might not appeal to Burke himself, I shall suggest instead that the case

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36. See GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986).

37. 347 U.S. 483 (1954).

38. *Brown* could be seen as minimalist, rather than perfectionist, if it is regarded as having built on a series of decisions, rather than as a bolt from the blue. See the outline of the long line of cases leading to *Brown* in GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 471–73 (5th ed. 2005). *Brown* might even be seen as having a Burkean dimension if it is taken as having been based on experience, rather than a priori reason or theory. See Strauss, *supra* note 25. But it seems a stretch to see *Brown* in Burkean terms, insofar as the decision showed a willingness to uproot a long-standing institution by reference to an account of racial equality.

39. See RONALD DWORKIN, *JUSTICE IN ROBES* 12–21, 49–74 (2006) [hereinafter DWORKIN, *JUSTICE IN ROBES*] (exploring and defending theoretical abstraction in law); DWORKIN, *supra* note 32, at 33–71 (defending role of courts as “forum of principle”).

for Burkean minimalism is most plausible for federal judges when three conditions are met: (1) originalism would produce unacceptable consequences; (2) long-standing traditions and practices are trustworthy, or at least trustworthy enough; and (3) there is great reason to be skeptical of the rule-elaborating and theory-building capacities of federal judges.<sup>40</sup> Of course those who are selecting a theory of interpretation must decide whether these conditions are met, and hence we should expect disagreement across judges and those who observe them. Reasonable people disagree about whether originalism would produce unacceptable consequences, in part because they disagree about what originalism requires, in part because they disagree about whether what it requires is unacceptable.<sup>41</sup> In fact the disagreements among those who adopt different approaches often involve divisions with respect to (1), (2), and (3). Those who tend to accept Burkean minimalism—above all Justices Frankfurter and O'Connor—apparently believe that these three conditions are often met.

As we shall see, the argument for Burkean minimalism is extremely strong in the areas of separation of powers and national security, where the Court rightly gives attention to long-standing practices. But there are areas in which Burkean approaches are legitimately challenged on the ground that traditions are either indeterminate or constitutionally vulnerable. Burkean minimalism bears on a number of unresolved and increasingly pressing dilemmas in contemporary constitutional law, ranging from the protection of individual rights, to the question of presidential authority, to the appropriately Burkean response to non-Burkean, or anti-Burkean, precedents.

The final question is both important and difficult. Suppose that the Court has departed from Burkean practices in ruling, for example, that the Constitution protects the right to choose abortion. Suppose too that the Court's ruling has endured for decades. How should the principled Burkean deal with the right to choose? This question reintroduces some of the conflicts that the Court was required to resolve in the New Deal period, and it has no single Burkean answer. In dealing with non-Burkean or anti-Burkean precedents, reasonable Burkeans can differ.

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40. Constitutional interpretation occurs outside of federal courts, of course, and representatives and citizens, giving meaning to the founding document, might be loosened from Burkean strictures. On the difference between judge-made constitutional law and constitutional law as elaborated by citizens and public officials, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 145–53 (1993).

41. Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE, Sept. 21, 2005, <http://www.slate.com/id/2126680/>. What is striking about Amar's argument is the suggestion that originalism generally leads to results that seem to him desirable; in my view, the case for originalism must stand or fall on that consequentialist question.

## II. MINIMALISMS

## A. Definitions

1. *Narrowness*. There are different forms of minimalism, but all of them share a preference for small steps over large ones. This preference operates along two dimensions.<sup>42</sup> First, minimalists favor rulings that are *narrow rather than wide*. Narrow rulings do not venture far beyond the problem at hand, and attempt to focus on the particulars of the dispute before the Court. When presented with a choice between narrow and wide rulings, minimalists generally opt for the former.

Consider in this light Chief Justice Roberts's suggestion that one advantage of consensus within the Court is that it leads to narrower decisions. In his words, "[t]he broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds."<sup>43</sup> The nine justices have highly diverse views, and if they are able to join a single opinion, that opinion is likely to be narrow rather than broad. This, in the Chief Justice's view, is entirely desirable, as he explained with an aphoristic summary of the minimalist position in constitutional law: "If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."<sup>44</sup>

To be sure, the difference between narrowness and width is one of degree rather than kind; no one favors rulings that are limited to people with the same names or initials as those of the litigants before the Court. But among reasonable alternatives, minimalists show a persistent preference for the narrower options, especially in cases at the frontiers of constitutional law. In such cases, minimalists believe that justices lack relevant information; they do not have a full sense of the many situations to which a broad rule might apply. For this reason, minimalists fear the potentially harmful effects of decisions that reach far beyond the case at hand.<sup>45</sup>

With respect to the war on terror, for example, the Court has favored narrow rulings, refusing to say anything about the president's power as commander-in-chief and generally leaving a great deal undecided.<sup>46</sup> Or con-

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42. I explore minimalism in CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999), and CASS R. SUNSTEIN, *RADICALS IN ROBES* (2005).

43. Hon. John G. Roberts, Jr., Chief Justice, U.S. Supreme Court, Commencement Address at the Georgetown University Law Center (May 21, 2006).

44. *Id.* A possible response would be that the justices might unanimously agree on a legal issue that is not terribly controversial, perhaps as a way of bracketing a far more controversial issue, but in the process might produce a broad ruling on the less controversial one. Nonetheless, Chief Justice Roberts is right to say that unanimity generally breeds narrowness.

45. See BREYER, *supra* note 13, at 66–74 (discussing privacy); see also Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

46. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); see also *Ex parte Quirin*, 317 U.S. 1 (1942) (refusing to decide whether the president has inherent power to create military commissions). A partial exception is *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), in which the Court addressed a number of issues. Even in *Hamdan*, however, the Court did not say a great deal about the president's power as commander-in-chief, even if it implicitly resolved certain issues against him. See Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. (forthcoming 2006).

sider the “undue burden” standard in the area of abortion<sup>47</sup>—a standard that is rule-free and that calls for close attention to the details of the particular restriction at issue.<sup>48</sup> In the domain of affirmative action, many of the Court’s rulings have been particularistic, arguing that while one program is unacceptable, another one might not be.<sup>49</sup>

Minimalists fear that wide rulings will produce errors that are at once serious and difficult to reverse—a particular problem when the stakes are high. Hence it might be thought that narrowness is especially desirable in any period in which national security is threatened. Justice Frankfurter’s concurring opinion in the *Steel Seizure* case offers the most elaborate discussion of the basic point.<sup>50</sup> Justice Frankfurter emphasized that “[r]igorous adherence to the narrow scope of the judicial function” is especially important in constitutional cases when national security is at risk, notwithstanding the country’s “eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements.”<sup>51</sup> In his view, the Court’s duty “lies in the opposite direction,” through judgments that make it unnecessary to consider the most delicate questions of constitutional authority.<sup>52</sup> Thus the Court has an obligation “to avoid putting fetters upon the future by needless pronouncements today.”<sup>53</sup> Maintaining that the legislative history unambiguously demonstrated that the president’s seizures of steel mills were not congressionally authorized, Justice Frankfurter concluded that “[t]he issue before us can be met, and therefore should be, without attempting to define the President’s powers comprehensively.”<sup>54</sup> Justice Frankfurter argued for minimalism on the ground that it reduces the risk that erroneous judicial decisions will impose undesirable limits on democratic processes.<sup>55</sup>

In many domains, sensible people take small steps in order to preserve their options, aware as they are that large steps can have unintended bad

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47. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

48. *Id.*

49. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989). Notably, the Court has converged on a kind of rule, at least for educational institutions: one that forbids quotas and point systems but permits case-by-case judgments that include consideration of race. *Gutter v. Bollinger*, 539 U.S. 306 (2003). This rule, or principle, is skeptically discussed in Cass R. Sunstein, *Problems with Minimalism*, 58 *STAN. L. REV.* 1899 (2006).

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594–97 (1951) (Frankfurter, J., concurring).

51. *Id.* at 594.

52. *Id.* at 595.

53. *Id.* at 596.

54. *Id.* at 597.

55. In the same vein, see BREYER, *supra* note 13, at 69–74 (emphasizing the need for cautious, narrow decisions on questions involving the relationship between privacy and modern technologies).

consequences, particularly if they are difficult to reverse.<sup>56</sup> In law, wide rulings might produce outcomes that judges will come to regret. This point derives strength from a special feature of adjudication, which often grows out of particular disputes based on particular facts.<sup>57</sup> Unlike legislators and administrators, judges frequently do not see a broad array of fact patterns. Lacking information about a range of situations, judges are often in a poor position to produce wide rulings.

These are points about the risk of error, but there is an additional problem. For any official, it can be extremely burdensome to generate a broad rule in which it is possible to have much confidence. Narrow decisions might therefore reduce the costs of decision at the same time that they reduce the costs of error. For the same reason that standards might be preferred to rules,<sup>58</sup> then, narrowness might be preferred to width.

2. *Shallowness*. Minimalists also seek rulings that are *shallow rather than deep*. Shallow rulings attempt to produce rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on or uncertainty about the most fundamental issues. For example, there are vigorous disputes about the underlying purpose of the free speech guarantee<sup>59</sup>: Should the guarantee be seen as protecting democratic self-government, or the marketplace of ideas, or individual autonomy? Minimalists hope not to resolve these disputes. They seek judgments and rulings that can attract shared support from people who are committed to one or another of these foundational understandings, or who are unsure about the foundations of the free speech principle.<sup>60</sup> The minimalist preference for shallowness can be accepted by those who are inclined to one or another foundational account but believe that it is best if constitutional law can attract support from diverse accounts.

The difference between narrowness and shallowness is that the former speaks to the breadth of the decision, whereas the latter speaks to the level of theoretical ambition. We could imagine a decision that is narrow and deep—as, for example, in the idea that sex segregation is unacceptable at a particular institution (a narrow ruling) because the Equal Protection Clause prevents the subordination of women (a deep understanding of the clause). We could imagine a ruling that is wide but shallow—as, for example, in the

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56. See DIETRICH DÖRNER, *THE LOGIC OF FAILURE* (Rita Kimber & Robert Kimber trans., Addison-Wesley 1997) (1989) (stressing the value, in experimental settings, of attempting to settle social problems by taking small, reversible steps).

57. Admittedly, issues before the Supreme Court are often quite general rather than heavily particularistic, as for example in cases involving broad and ambitious challenges to statutory restrictions. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003). One of the distinctive features of Burkean minimalism is the effort to resolve a case in a way that makes the ruling less general than it might otherwise have been.

58. See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

59. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* (1990).

60. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1993).

idea that political speech may not be punished without a showing of a clear and present danger (a broader ruling), unjustified by a theoretically ambitious account of the free speech principle (and hence shallow). Chief Justice Roberts was speaking of narrowness, not depth. But unanimous rulings are also likely to be shallow, simply because diverse people are unlikely to be able to agree on a theoretically ambitious account of some area of the law.

The minimalist preference for shallowness is rooted in three considerations. First, shallow decisions, no less than narrow ones, simplify the burdens of decision. To say the least, it can be extremely difficult to decide on the foundations of an area of constitutional law; shallow rulings make such decisions unnecessary. Second, shallow rulings may prevent errors. A judgment in favor of one or another foundational account may well produce significant mistakes, whereas shallowness is less error-prone, simply by virtue of its agnosticism on the great issues of the day. If several foundational accounts or all reasonable contenders can converge on one rationale or outcome, there is good reason to believe that it is right. Third, shallow rulings tend to promote social peace at the same time that they show a high degree of respect to those who disagree on big questions.<sup>61</sup> In a heterogeneous society, it is generally valuable to assure citizens, to the extent possible, that their own deepest commitments have not been ruled off-limits. By accomplishing this task, shallow rulings reduce the intensity of social conflicts.<sup>62</sup> This practical point is supplemented by the fact that those who seek shallowness are demonstrating respect for competing foundational commitments.<sup>63</sup>

In the abstract, of course, narrowness and shallowness are nothing to celebrate. Narrowness is likely to breed unpredictability and perhaps unequal treatment. It might even do violence to the rule of law, if only because it leaves so much uncertainty.<sup>64</sup> Here is a problem for Chief Justice Roberts's call for consensus and narrowness: 9-0 decisions, converging on a narrow ruling, may actually disserve the predictability that the Chief Justice seeks, because narrowness leaves many questions undecided. In many contexts, rules are preferable to standards, and it can be worthwhile to risk the overinclusiveness of rules in order to increase clarity, so as to give people a better signal of their rights and obligations.<sup>65</sup> In the areas of contract, tort, and property law, narrowness would be unacceptable, because people require clarity in those domains. If the rules of property and contract are unclear, people will not be able to conduct their affairs with the certainty that these areas of the law demand. People need to know what they own, and they need to know that their agreements are secure. Of course there are public law

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61. See JOHN RAWLS, *POLITICAL LIBERALISM* 147–48 (1993).

62. See *id.* at 146–49 (discussing “modus vivendi” liberalism).

63. Of course, some such commitments are rightly placed out of bounds as a foundation for constitutional law: consider the commitment to slavery or to the oppression of religious minorities.

64. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–83 (1989); Sunstein, *supra* note 45.

65. Kaplow, *supra* note 58.

analogies: administrators need to know when social security disability claimants are entitled to disability payments, so that the system can run easily without endless conflicts about the basic rules.

Narrow rulings reduce the burdens imposed on judges in the case at hand, but they also “export” decision-making duties to others in a way that can increase those burdens in the aggregate. Insofar as minimalists prize narrowness, they are vulnerable to challenge on the ground that they leave too much openness in the system.<sup>66</sup>

Shallowness certainly has its virtues. But suppose that a deep theory is correct, in the sense that it reflects the proper approach to a constitutional provision. If the theory is indeed correct, perhaps judges ought to adopt it. Why should they refuse to endorse the proper theory? A shallow ruling, one that is agnostic on the right approach to the Constitution, would seem a major error if a more ambitious approach, though contentious, is actually correct. Assume, for example, that a certain theory—of free speech, the president’s authority as commander-in-chief, property rights—would produce the right foundation for future development. If so, there is good reason for courts to endorse it. Minimalists might leave uncertainty about the content of the law at the same time that they obscure its roots. I will return to these objections below.

### B. *Burkean Practices and Burkean Judgments*

1. *Practices and judgments.* There are many different forms of minimalism. Burkean minimalism is one variety, and indeed an especially important subset of minimalism. We could also imagine Burkeans who are not minimalist at all, because they favor wide rulings.<sup>67</sup> But many people who are drawn to Burke also have important minimalist sympathies, and hence Burkean minimalism provides a distinctive approach to constitutional law.

It is important to distinguish between Burkean minimalism and its more rationalist counterpart, which might be associated with Justices Ruth Bader Ginsburg<sup>68</sup> and Stephen Breyer.<sup>69</sup> Of course Burkeans prize shallowness; opposition to ambitious theories is part of the defining creed of Burkean-

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66. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006).

67. See *infra* notes 122–126 and accompanying text.

68. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (offering theoretical account of the problem of sex discrimination). It is important to be careful with these comparisons. Justice Ginsburg believes in small steps and has occasional Burkean inclinations. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (criticizing *Roe v. Wade* for proceeding too rapidly).

69. See BREYER, *supra* note 13. Justice Breyer, no less than Justice Ginsburg, is respectful of precedent and has some Burkean tendencies—as reflected, for example, in his emphasis on the need to proceed slowly and incrementally in the domain of privacy, see *id.* at 69–74; *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (Breyer, J., plurality opinion). In this domain, at least, Justice Breyer is skeptical of the use of a priori reasoning to resolve novel questions; and his insistent emphasis on experience and consequences, see BREYER, *supra* note 13, has a Burkean dimension. But insofar as Breyer emphasizes a theoretical account for organizing constitutional law, see *id.* at 15–33, his approach is easily distinguished from that of Justices O’Connor and Frankfurter, who had no such account.

ism.<sup>70</sup> The more basic point is that while Burkeans want to base their small steps on established traditions, rationalists are occasionally skeptical of traditions, and they are willing and sometimes even eager to ask whether established practices can survive critical scrutiny.

This difference should not be overstated. No real-world minimalist is likely to accept every tradition as such, even if that minimalist is a committed Burkean. Indeed, there are both conceptual and practical problems with any effort to take that path.<sup>71</sup> No real-world minimalist is likely to want to subject many traditions to critical scrutiny, at least not at the same time. Any such effort would quickly produce a departure from minimalism. In practice, there is a continuum from more Burkean to more rationalist forms of minimalism. But it is nonetheless possible to distinguish between the two sets of minimalists, if only because of their different emphases, which can lead in radically different directions.<sup>72</sup>

As it applies to the judiciary, we can understand Burkeanism in two different ways. First, Burkeans might stress actual social *practices*, and see those practices, as they extend over time, as bearing on the proper interpretation of the Constitution. A practice-oriented understanding would be reluctant to invoke a particular conception of the separation of powers to strike down actions that are long-standing—say, foreign surveillance by the president, or presidential war-making without congressional authorization.<sup>73</sup> On this view, judges in constitutional cases should follow a distinctive

70. See *infra* notes 81–85 and accompanying text. It is nonetheless true that Burkeanism will not only refuse to embrace some ambitious theories but also rule them out—and to that extent Burkeanism will seem contentious to those who hold such theories. For example, current constitutional law rejects the view that citizens, as such, are entitled to a minimal level of housing, food, and income. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Burkeans reject ambitious theories and seek incomplete theorization. But their own approach, focused on traditions, will declare certain theories out of bounds, not only by refusing to embed them specifically in constitutional doctrine (a tribute to shallowness) but also by insisting that they are not a proper part of that doctrine (a tribute to Burkeanism). Those who are most committed to shallowness will of course prefer outcomes that can be joined by Burkeans and non-Burkeans alike. By suggesting that Burkean minimalists embrace shallowness, I mean to signal both their opposition to abstract theories and their hope that narrow rulings, rooted in tradition, might be compatible with several or even many such theories.

Of course the most ambitious Burkeans might favor depth, in the form of acceptance of a particular approach: Burkeanism. To the extent that Burkeanism is itself theorized—and I attempt to take some steps in that direction here—it threatens to become deep rather than shallow, notwithstanding its skepticism about a priori reasoning.

71. The conceptual problem is that traditions are not self-defining, and hence it is not clear what it means to “follow” any and all traditions. The practical problem is that traditions often conflict with each other, and hence following all of them will not be possible. I take up these problems below. See *infra* notes 160–169 and accompanying text.

72. Compare, for example, the Court’s emphasis on an “emerging awareness” about the content of liberty in *Lawrence v. Texas*, 539 U.S. 558, 572 (2003), with the argument for deference to traditional morality in Justice Scalia’s dissent in *Lawrence*, *id.* at 586–98 (Scalia, J., dissenting). *Lawrence* is discussed in more detail below. See *infra* text accompanying notes 137–141.

73. See JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005) (noting that war-making, in American history, has rarely been preceded by a formal declaration of war).

conception of the role of common law judges, which is to respect and mimic, rather than to evaluate, time-honored practices.<sup>74</sup>

In a sense, Burkean courts attempt a delegation of power from individual judges to firmly rooted traditions.<sup>75</sup> For such Burkeans, ambiguous constitutional provisions should be understood by reference to such traditions,<sup>76</sup> and judges should be reluctant to allow litigants to challenge them. In voting against judicial involvement in response to claims for one-person, one-vote, Justice Frankfurter emphasized not only “a uniform course of decision” but also “the equally uniform course of our political history regarding the relationship between population and legislative representation.”<sup>77</sup> Indeed, and more ambitiously, Burkean judges might even question democratic initiatives that reject traditions without very good reason. In ruling that the president may not create military commissions without congressional authorization, a plurality of the Court placed heavy emphasis on traditions, ruling that while traditions supported the use of such commissions to try violations of the law of war, they did not support their use to try conspiracies to violate the law of war.<sup>78</sup>

Second, Burkeans might stress not social practices but the slow evolution of judicial doctrine over time—and might therefore reject sharp breaks from the judiciary’s own past. For these Burkeans, what is particularly important is the *judiciary’s* prior judgments, which should in turn be based on a series of small steps, and should avoid radical departures. On this view, current judges should respect those prior judgments. Justice O’Connor, for example, showed an inclination to favor this approach to constitutional adjudication.<sup>79</sup>

There are big differences between an approach that focuses on social practices and one that focuses on judicial decisions. Those who emphasize practices would be skeptical of evolutionary movements in constitutional law *if* those movements depend on the judges’ own moral or political judgments, minimalist though they might be. For Burkeans who emphasize practices, it is not legitimate for judges to build constitutional law through

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74. This view is reflected in EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1949), with its emphasis on legal change over time in accordance with changes in social values. *See id.* at 3–6.

75. *See, e.g.,* Van Orden v. Perry, 125 S. Ct. 2854 (2005) (Rehnquist, C.J., plurality opinion) (emphasizing long-standing tradition of public invocations of God). The rule of stare decisis can itself be seen as a practice of delegation, eliminating power from the current Court in a kind of intertemporal, intra-institutional allocation of authority.

76. An obvious example involves presidential power in the domain of international relations, in which long-standing practices play a large role in interpretation. *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Dames & Moore v. Regan, 453 U.S. 654 (1981); *Ex parte* Quirin, 317 U.S. 1 (1942).

77. Baker v. Carr, 369 U.S. 186, 266–67 (1962) (Frankfurter, J., dissenting).

78. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

79. *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring in the judgment) (refusing to vote to overrule *Bowers v. Hardwick*); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (O’Connor, J., joined by Kennedy & Souter, JJ., plurality opinion) (refusing to overrule the central holding of *Roe v. Wade*).

small steps that reflect the Court's own judgments over time. But for those who see the case-by-case evolution of judge-made constitutional law as an acceptably Burkean project, judicial steps deserve respect, in part because those steps are unlikely to depart radically from public convictions.<sup>80</sup>

2. *Burke*. Burke himself emphasized social practices rather than judicial judgments, but insofar as he spoke of and celebrated "jurisprudence," he tended to collapse the two.<sup>81</sup> I do not attempt anything like an exegesis of Burke, an exceedingly complex figure, in this space,<sup>82</sup> but let us turn briefly to Burke himself and in particular to his great essay on the French Revolution, in which he rejected the revolutionary temperament because of its theoretical ambition.<sup>83</sup> Burke's key claim is that the "science of constructing a commonwealth, or reforming it, is, like every other experimental science, not to be taught a priori."<sup>84</sup> To make this argument, Burke opposes theories and abstractions, developed by individual minds, to traditions, built up by many minds over long periods. In a particularly vivid passage, Burke writes:

"We wished at the period of the Revolution, and do now wish, to derive all we possess as *an inheritance from our forefathers*. . . . The science of government being therefore so practical in itself, and intended for such

80. See Robert Dahl, *Decision-making in a Democracy: The Supreme Court as National Policy-maker*, 6 J. PUB. L. 279 (1957).

81. To the extent that it is an empirical fact that judicial movements turn out to track changes in social practices, the division may not be quite as important as it seems to be. And indeed that does seem to be an empirical fact. For an early treatment, see *id.*; for a recent and broadly compatible discussion, see MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004). It is reasonable to doubt, however, whether the committed Burkean should permit constitutional law to evolve with successful movements, rather than simply requiring constitutional understandings to follow long-standing traditions. We should distinguish between the clearly Burkean practice of allowing ambiguous provisions to be "glossed" by traditional practices—in a way that allows elected officials to do as they wish, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)—and the less Burkean or (better) non-Burkean practice of "updating" constitutional understandings to fit with values perceived as contemporary, see *Roper v. Simmons*, 543 U.S. 551 (2005).

82. The literature is vast. See, e.g., STANLEY AYLING, *EDMUND BURKE: HIS LIFE AND OPINIONS* (1988); S. BLAKEMORE, *BURKE AND THE FALL OF LANGUAGE* (1988); ISAAC KRAMNICK, *THE RAGE OF EDMUND BURKE* (1977); CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE* (1992); EDMUND BURKE: APPRAISALS AND APPLICATIONS (Daniel E. Ritchie ed., 1990).

Within the legal literature, the most influential discussion is Kronman, *supra* note 35. My own treatment of Burkean minimalism is altogether different from Kronman's, insofar as I emphasize the limitations of human and judicial knowledge, whereas Kronman attempts, far more ambitiously, to defend "the ancient but now largely discredited idea that the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative." *Id.* at 1047. In my view, this idea should indeed be discredited on the ground that it is mystical. The real argument for Burkeanism, and for fidelity to past practices, depends on the proposition, on the surface of Burke's text, that the "private stock of wisdom" will often prove less wise than those practices.

83. Burke, *supra* note 1, at 416–51. In exploring the possibility that traditions are a product of many minds, and in spelling out that aspect of Burke's writing, I am deliberately abstracting from the elitist and antidemocratic elements of Burke's claims on behalf of traditions. Consider, for example, Burke's fears of the "hoofs of a swinish multitude." *Id.* at 449. For a general discussion of this aspect of political thought, with reference to Burke, see DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* (1998). I am aware that some of the discussion, and in particular the exploration of Democratic Burkeanism, might seem jarring to those interested in Burke himself.

84. Burke, *supra* note 1, at 442.

practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution than any man ought to venture upon pulling down an edifice which has answered in any tolerable degree, for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.”<sup>85</sup>

Thus Burke stresses the need to rely on experience and in particular the experience of generations. He objects to “pulling down an edifice,” a metaphor capturing the understanding of social practices as reflecting the judgments of numerous people extending over time. It is for this reason that Burke describes the “spirit of innovation” as “the result of a selfish temper and confined views,”<sup>86</sup> and offers the term “prejudice” as one of enthusiastic approval, noting that “instead of casting away all our old prejudices, we cherish them to a very considerable degree.”<sup>87</sup>

Why, exactly, would prejudices appeal to Burke? The word itself supplies an answer. Prejudices operate before judgment—they supply answers that antedate individual reflection. If prejudices are rooted in long-standing practices, it should not be surprising to find that Burke trusts them.<sup>88</sup> Emphasizing the critical importance of stability, Burke adds a reference to “the evils of inconstancy and versatility, ten thousand times worse than those of obstinacy and the blindest prejudice.”<sup>89</sup>

Burke’s sharpest distinction, then, is between established practices and individual reason. He contends that reasonable citizens, aware of their own limitations, will effectively delegate decision-making authority to their own traditions. “We are afraid to put men to live and trade each on his own private stock of reason,” because of the concern that any one person’s stock “is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them.”<sup>90</sup>

Burke’s enthusiasm for traditions, as compared to the private stock of reason, can be closely linked to the Condorcet Jury Theorem. The Jury Theorem shows that if each individual in a group is more than 50% likely to be right, the probability that the majority of the group will be right increases

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85. *Id.* at 451.

86. *Id.* at 428.

87. *Id.* at 451.

88. We might even see prejudices, on the Burkean view, as part of the family of cognitive operations sometimes described as “System I”—a rapid, intuitive process opposed to the moral deliberative and calculative “System II.” See Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005).

89. Burke, *supra* note 1, at 451.

90. *Id.*

to 100% as the size of the group expands.<sup>91</sup> Burke appeared to see traditions as embodying the judgments of many people operating over time. If countless people have committed themselves to certain practices, then it is indeed possible, on Condorcetian grounds, that “latent wisdom” will “prevail in them,” at least if most of the relevant people are more likely to be right than wrong.<sup>92</sup> The fact that a tradition has persisted provides an additional safeguard here: its very persistence might be taken to attest to its wisdom or functionality, at least as a general rule.

To be sure, it would be possible to object to Burkeanism on the ground that some traditions (not to mention prejudices) are a product not of wisdom, but of a collective action problem, significant disparities in power, or some kind of social cascade, in which practices persist not because diverse people decide independently in favor of them, but because people simply imitate other people.<sup>93</sup> Or perhaps most of the people who account for the tradition are not more than 50% likely to be right. Perhaps they are more likely to be wrong than right, in which case the collectivity’s chance of being right falls, by Condorcet’s own arithmetic, to 0% as the size of the group expands. These are important objections to Burkeanism in all its forms, and rationalists invoke those objections in both law and politics.<sup>94</sup> Many traditions reflect the independent judgments of fewer people than at first appears. Consider too the fact that recent generations are far more numerous, in terms of the sheer number of people, than their predecessors. For present purposes, the only point is that if many independent judgments have been made on behalf of a social practice, it may well make sense to adopt a presumption in its favor.

In light of these claims, Burke might be expected to express some skepticism about the common law, perhaps treating it as a form of a priori intervention by unaccountable officials whose decisions are not rooted in actual experience. But Burke sees his claims as a reason to value rather than to repudiate the common law, which he goes so far as to call the “pride of the human intellect.”<sup>95</sup> Burke contends that “with all its defects,

91. For a valuable overview, see William P. Bottom et al., *Propagation of Individual Bias Through Group Judgment: Error in the Treatment of Asymmetrically Informative Signals*, 25 J. RISK & UNCERTAINTY 147, 152–54 (2002).

92. Particular judges and others might follow a kind of intrapersonal Condorcet Jury Theorem: Consider a person who has accepted an idea or approach at most stages of life, and at one stage entertains favorably the possibility of a large-scale departure from previous views. She might follow the long-held idea, distrusting the departure as a kind of French Revolution. Perhaps this could be based on a priori reasoning—that is, she would be following what worked well for her in previous situations. Undoubtedly, following this approach often does a great deal of good for judges and others. The problem here is the same problem faced by the Condorcet Jury Theorem and Burkeanism in general: even if a self is seen as a series of selves existing over time, and hence fits the Condorcetian model, it may be that the prior selves were subject to a cascade (and were less than 50% likely to be right) and the newer, more recent self is the one to trust. (Thanks to Elizabeth Emens for raising this question.)

93. For discussion, see CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006).

94. See *infra* notes 129–133 and accompanying text.

95. Burke, *supra* note 1, at 456.

redundancies, and errors,” jurisprudence counts as “the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns.”<sup>96</sup> Of course jurisprudence lacks a simple theory, and it was hardly constructed a priori; but it is a product of experience, which is its signal virtue.<sup>97</sup> Burke appears to be seeing the common law as a form of customary law, developing with close reference to actual practices, which it tends to codify. On this view, theoretical attacks on the common law, based on (for example) utilitarianism, show far too much confidence in a theory, and far too little respect for the collective wisdom of entrenched practices. The same might be said of many areas of constitutional law, in which a committed Burkean might distrust theoretical abstractions in favor of the occasionally unruly and apparently self-contradictory rulings that are built on the foundation of particulars.

It remains possible to ask on what grounds, exactly, traditions might be thought to be reliable. Skeptics would insist that it is impossible to be a Burkean all the way down, in the sense of believing that traditions supply their own defense. I will return to this objection below.<sup>98</sup> For the moment, the belief is that by virtue of their longevity and in particular their support from countless people, traditions are likely to provide good service to those whom they regulate.

3. *Burke and judicial review.* Burke did not, of course, develop an account of judicial review; English courts lacked (and lack) the power to strike down legislation, and hence it could not possibly have occurred to Burke to explore the nature and limits of that power. Indeed, Burkeans might be tempted to reject judicial review altogether, perhaps on the ground that judges are too likely to go off on larks of their own. Perhaps little revolutions, of the kind if not on the scale that Burke despised, are a predictable product of an independent judiciary entrusted with the power of invalidation. We could easily imagine a Burkean challenge to the institution of judicial review, seeing it as an invitation to the exercise of a priori reason.

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96. *Id.*

97. Hayek’s work on morality and law makes similar claims. Thus Hayek emphasizes the development of social practices not through individual reason, which cannot be trusted, but through the contributions of countless people. See Friedrich Hayek, *The Origins and Effects of Our Morals: A Problem for Science*, in *THE ESSENCE OF HAYEK* 318 (Chiaki Nishiyama & Kurt R. Leube eds., 1984). In Hayek’s unmistakably Burkean words, “our morals endow us with capacities greater than our reason could do,” and hence “traditional morals may in some respects provide a surer guide to human action than rational knowledge,” in areas ranging from respect for property to the family itself. *Id.* at 330. In a quite Burkean sentence, Hayek writes:

It is the humble recognition of the limitations of human reason which forces us to concede superiority to a moral order to which we owe our existence and which has its source *neither* in our innate instincts, which are still those of the savage, nor in our intelligence, which is not great enough to build better than it knows, but to a tradition which we must revere and care for even if we continuously experiment with improving its parts—not designing but humbly tinkering on a system which we must accept as given.

*Id.*

98. See *infra* notes 243–273 and accompanying text.

But for those who sympathize with Burke's arguments, a Burkean account of judicial review is not difficult to sketch. Indeed, Burkeans might well be hospitable to a judicial role in reviewing legislation, at least if that role is understood in a certain way. On the Burkean view, the central role of the courts is to protect long-standing practices against renovations based on theories, or passions, that show an insufficient appreciation for those practices. The goal would be to provide a safeguard against the revolutionary or even purely rationalistic spirit in democratic legislatures.

Nor is this view at all foreign to American constitutional law. The Due Process Clause has long been understood in traditionalist terms. In his dissenting opinion in *Lochner*, Justice Holmes, though not a Burkean,<sup>99</sup> struck an unmistakably Burkean chord when he wrote that the clause would be violated if "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."<sup>100</sup> The incorporation of the Bill of Rights had a great deal to do with Burkean thinking, especially insofar as it was engineered by Justice Frankfurter. Justice Frankfurter explicitly urged that courts should ask whether proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."<sup>101</sup> And in the end, the incorporation decision has become rooted in a judgment about whether "a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."<sup>102</sup> Of course it would be possible to understand "ordered liberty" in a priori or purely theoretical terms. But in the account that Justice Frankfurter urged, the focus has been on "an Anglo-American regime," which placed the emphasis squarely on an identifiable tradition. Note also that in Justice Frankfurter's hands, and perhaps in others' too, the emphasis on tradition itself has a democratic element: if a practice has long been a part of Anglo-American law, then many people have approved it explicitly or implicitly. Many traditions have been constructed by citizens, rather than imposed on them. Burkean opposition to social engineering can be understood in this light.<sup>103</sup>

Much of the time, modern substantive due process has also been undertaken with close reference to tradition. Justice Harlan's influential approach was based on "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society."<sup>104</sup> More recently, efforts to cabin the use of substantive due process have been rooted

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99. See *infra* text accompanying notes 253–255; see also Richard A. Posner, *Introduction to THE ESSENTIAL HOLMES* ix, xxii–xxiii (Richard A. Posner ed., 1992) (noting Holmes's skepticism and pragmatism).

100. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

101. *Rochin v. California*, 342 U.S. 165, 169 (1952).

102. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

103. See JAMES C. SCOTT, *SEEING LIKE A STATE* (1999).

104. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment).

in the suggestion that unless the right in question can claim firm roots in tradition, courts should not intervene.<sup>105</sup> In rejecting the right to physician-assisted suicide, the Court said that substantive due process has been “carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition”—an approach that “tends to rein in the subjective elements” and that “avoids the need for complex balancing” in particular cases by fallible judges.<sup>106</sup> Thus the Court’s inquiry was framed by asking “whether this asserted right has any place in our Nation’s traditions.”<sup>107</sup>

On this highly Burkean and anti-perfectionist view, growing out of Holmes’s dissenting opinion in *Lochner*, the Court should not strike down legislation merely because it offends the justices’ account of reason or justice, or even because it is inconsistent with evolving or current social norms. It is necessary also to show a violation of principles that are at once long-standing and deeply held. Of course the Court has often refused to follow this Burkean approach to the Due Process Clause, in a way that has sharply divided Burkeans on the one hand from rationalist minimalists and perfectionists on the other.<sup>108</sup>

4. *Shields, swords, and Democratic Burkeanism.* This latter point suggests the need to make a distinction between two kinds of Burkean decisions: those that uphold and those that invalidate democratic judgments. As I have suggested, Burkeanism can operate as a shield to insulate government against constitutional challenges or a sword supporting those challenges. By their very nature, Burkeans should be sympathetic to efforts by state and federal governments to defend established practices against constitutional attack. If, for example, states are attempting to ban same-sex relations, to regulate obscenity, or to depart from the idea of one-person, one-vote, their decisions might be supported on Burkean grounds.<sup>109</sup> When government is acting in a way that seems to favor a kind of religious belief, Burkeans should not object *if* that form of favoritism has clear support in long-standing social traditions. Strikingly, Chief Justice Rehnquist’s defense

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105. *Washington v. Glucksberg*, 521 U.S. 702 (1997) (emphasizing need to apply the Due Process Clause by reference to established traditions).

106. *Id.* at 722.

107. *Id.* at 723.

108. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003). It is possible to read *Lawrence* as a perfectionist decision, accepting a broad understanding of sexual autonomy, *see* Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004), or, alternatively, as a more minimalist decision rooted in evolving social understandings, *see* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27. In neither case is *Lawrence* easily defended on Burkean grounds. The best effort might suggest that prohibitions on consensual sodomy, while long on the books, were subject to a recent pattern of nonenforcement. *See id.* Perhaps the committed Burkean would bow to the social practice of nonenforcement and strike down the (wildly infrequent) uses of the law as inconsistent with that practice. But for the Burkean, this is a stretch, simply because it is hard to see prohibitions on sodomy as violative of long-standing traditions.

109. Insofar as Justice Scalia has emphasized the need to permit traditional morals regulation, he has made strongly Burkean arguments. *See, e.g., Lawrence*, 539 U.S. at 586–98 (Scalia, J., dissenting).

of the use of the words “under God” in the Pledge of Allegiance is an almost entirely Burkean exercise. His emphasis is on the historical practices, which argue in favor of permitting the use of those words, rather than on the justifications for or justifiability of those practices; the mere historical fact of public acknowledgement of the existence of God seems to be enough for him.<sup>110</sup> Indeed, Chief Justice Rehnquist’s view of the Establishment Clause has a persistent Burkean feature, at least insofar as he would permit public recognition of God by reference not to theories or principle, but by reference to history alone.<sup>111</sup>

The separation of powers might be understood in similar terms. When the president is engaging in action in which presidents have long engaged, and with congressional acquiescence, Burkeans would be strongly inclined to uphold that action.<sup>112</sup> The central point is more general. If Burkeanism operates as a shield to be used on government’s behalf, we could easily imagine an endorsement by many Burkeans of a kind of bipartisan restraint—on the theory that decisions about whether to change long-standing practices should be made democratically, not by judges.<sup>113</sup> (Of course more thoroughgoing Burkeans would oppose democratic as well as judicial alterations of traditions—unless, perhaps, it was possible to identify a long-standing practice of allowing democratic institutions to make substantial breaks from traditions.)

In his dissenting opinion in *United States v. Virginia*,<sup>114</sup> Justice Scalia spoke in exactly these terms. He began by emphasizing that the Virginia Military Institute (VMI) “has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.”<sup>115</sup> On this view, the longevity of sex segregation at VMI was a good reason for the Court to stay its hand. In Justice Scalia’s view, the Burkean point provides a cautionary note for judges but not for citizens, who need not be Burkean and who are entirely free to conclude “that what they took for granted is not so, and to change their laws accordingly.”<sup>116</sup> Justice Scalia concluded that this democratic liberty to alter existing practices on anti-Burkean grounds is itself time-honored: “So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change.”<sup>117</sup>

110. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26–33 (2004) (Rehnquist, C.J., concurring in the judgment). What is striking about Chief Justice Rehnquist’s opinion is its nearly exclusive reliance on historical practices, treated as closely analogous to the use of the words “under God” in the Pledge of Allegiance. Emphasizing those practices, Chief Justice Rehnquist makes almost no effort to defend them in principle, in a way that fits well with one understanding of Burke.

111. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (Rehnquist, C.J., plurality opinion).

112. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 612–13 (1952) (Frankfurter, J., concurring). In particular, see the lengthy historical appendix, *id.* at 615.

113. For a classic defense of bipartisan restraint, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

114. 518 U.S. 515 (1996).

115. *Id.* at 566 (Scalia, J., dissenting).

116. *Id.* at 567.

117. *Id.*

In short, Justice Scalia was writing as a Democratic Burkean—one whose Burkeanism provides a limitation on judges, but not on political participants.

But it is also possible to use Burkeanism as a sword. If government is dramatically altering the status quo, Burkeanism might be invoked as the basis for attacking the attempted alteration. We have seen that the Due Process Clause has been so invoked.<sup>118</sup> This is Holmes's understanding of substantive due process as including a (sharply limited) role for traditional barriers on government behavior. There are analogues in other domains, in which established traditions have also helped to convince courts to impose limits on what government may do.<sup>119</sup> In striking down an unusual Colorado law that prohibited gays and lesbians from obtaining local antidiscrimination measures, the Court said, "[i]t is not within our constitutional tradition to enact laws of this sort."<sup>120</sup> A variation on this approach can be found in the *Hamdan* plurality's use of traditional practices to decide that the president lacks the authority to use military commissions to try a suspected terrorist for conspiracy to violate the law of war.<sup>121</sup>

It emerges that for purposes of constitutional law, Burkeanism comes in both democratic and antidemocratic varieties. The antidemocratic varieties emphasize the wisdom of traditions and regard innovations as modest versions of the French Revolution, reflecting constitutionally vulnerable hubris, passion, or folly. The democratic varieties are unwilling to allow any kind of rationalistic revolution through the courts—but they are entirely hospitable to democratic efforts to rethink traditions. Of course Democratic Burkeanism might be seen as a contradiction in terms. To the committed Burkean, the decisions of representative institutions cannot easily claim legitimacy if they overthrow long-standing practices, and certainly not if those decisions are in the grip of a theory. But it would be possible for more ambivalent and less committed Burkeans to contend that the argument for Burkeanism depends on institutional considerations—and that judges should accept Burkean principles to the extent of refusing to disrupt long-standing practices on their own.

5. *Shallow but wide?* In this light, we could identify a Burkean approach to the Constitution that endorses shallowness while also embracing width and sometimes even large steps in Burkean directions. This approach would be minimalist along one dimension but not so along other. It would be minimalist in its rejection of ambitious theories, but it would be non-minimalist in its enthusiasm for wide rulings, not limited to the facts of particular cases.

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118. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down government intrusion on familial living arrangements as inconsistent with long-standing traditions).

119. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (emphasizing long-standing practices in limiting authority of secretary of state to deny passports to Communists).

120. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

121. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Suppose that tradition and experience are the best sources of constitutional meaning. Suppose we agree that under the Due Process Clause in particular, traditionalism should discipline judicial judgment. Justice Scalia has so urged, largely in the interest of width.<sup>122</sup> Insofar as Chief Justice Rehnquist would invoke long-standing practices to permit public invocation of God, he would rule widely, not narrowly.<sup>123</sup>

Some Burkeans, insistent on rule of law virtues, would follow Burke's skepticism about abstract theories, and particularly about their deployment by judges, while also rejecting case-by-case particularism. Imagine, for example, a decision to return to a quite specific, historically rooted understanding of the scope of substantive due process—a decision that would have to count as a large step insofar as it would dramatically alter existing law. Or consider the view that public references to God raise no constitutional problem, simply because such references have been with us for a long time.<sup>124</sup> Of course a good Burkean would seek to know a great deal about context; perhaps some references to God are harder to defend, on traditional grounds, than others. But it is plausible that an investigation of actual practice would produce wide judgments, not narrow ones.

We might therefore distinguish between Burkean minimalists who prize narrowness as well as shallowness, and those ambivalently minimalist Burkeans who favor width but reject depth. Perhaps sensible Burkeans must reject a static approach to tradition,<sup>125</sup> one that freezes existing practice, especially as circumstances change. But Burkeanism as such need not forbid width in constitutional law. Interestingly, however, Justices Frankfurter and O'Connor—leading Burkean minimalists in the nation's history—favored narrowness no less than shallowness, on the evident ground that in the most controversial domains, wide rulings are too likely to produce error.<sup>126</sup>

### *C. Two Kinds of Minimalism*

1. *Burke and rational criticism of traditions.* Rationalist minimalists seek narrowness and shallowness, but they are entirely willing to rethink traditions and established practices. Such minimalists are interested in the reasons behind practices, not in practices themselves. An underlying idea is that traditions are often unjust or arbitrary and that society frequently progresses by subjecting them to serious challenge. On this view, the delegation of decision-making authority to long-standing traditions is perverse, and Burke was quite wrong to treat “prejudice” as a word of approval. We shall

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122. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J., plurality opinion).

123. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (Rehnquist, C.J., plurality opinion).

124. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26–33 (2004) (Rehnquist, C.J., concurring in the judgment).

125. Burke himself emphasized the non-static nature of traditions. See *infra* note 166.

126. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594–95 (1952) (Frankfurter, J., concurring); *City of Chicago v. Morales*, 527 U.S. 41, 64–69 (1999) (O'Connor, J., concurring).

see that the rationalist view can claim support in what might be called Pascal's challenge to Burke, emphasizing that current generations are, in a sense, older than past ones, and that those who are now living are in that sense "the ancients."<sup>127</sup>

Consider, for example, the long series of decisions striking down discrimination on the basis of sex.<sup>128</sup> In those decisions, the Court did not act abruptly. Instead it built up the doctrine by small, incompletely theorized steps. But it could not claim to rest its doctrine on traditions. On the contrary, the sex discrimination cases offer a narrative of progress and learning over time and thus squarely reject Burkeanism. They do so by repeatedly opposing "reasoned analysis" to "traditional, often inaccurate, assumptions about the proper roles of men and women"<sup>129</sup> and to the "accidental byproduct of a traditional way of thinking about females,"<sup>130</sup> with the suggestion that laws that are such "accidental byproducts" are unconstitutional for that very reason.<sup>131</sup> Tradition serves in these cases as a term of opprobrium, not praise.<sup>132</sup> Indeed, the Court has struck down sex discrimination on the express ground that it is a product of habit and tradition, rather than reason, and it has required government to defend any such discrimination in terms that Burkeans would find puzzling at best.<sup>133</sup>

Nor can Burkeanism account for the Court's decisions establishing the right to vote, including the one-person, one-vote rule<sup>134</sup> and even *Bush v. Gore*.<sup>135</sup> The doctrine here developed by increments, but the Court hardly built on traditions. Indeed, the rise of the one-person, one-vote rule was originally criticized on heavily Burkean grounds, with the suggestion that the Court was allowing a contentious theory to override long-standing practices.<sup>136</sup> The Court's decision in *Lawrence v. Texas*,<sup>137</sup> striking down the ban

127. See *infra* text accompanying notes 260–265.

128. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993), might well be understood as a general defense of rationalist minimalism. FRIED, *supra* note 33, is in the same vein, with its emphasis on the need both to pay close attention to doctrine and to rationalize it.

129. *Heckler v. Mathews*, 465 U.S. 728, 750 (1984) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

130. *Miller v. Albright*, 523 U.S. 420, 442 (1998) (Stevens, J., plurality opinion) (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment)).

131. *Heckler*, 465 U.S. at 750.

132. See *Miller*, 523 U.S. at 442.

133. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women*, 458 U.S. 718 (1982). A noteworthy feature of *Virginia* is the suggestion that efforts to justify sex segregation in terms that involve educational diversity and opportunity might be plausible if those efforts had been made in the recent rather than distant past—with the corresponding suggestion that an old law, not plausibly rooted in those concerns, could not be so defended. *Virginia*, 518 U.S. at 540.

134. *Reynolds v. Sims*, 377 U.S. 533 (1964).

135. 531 U.S. 98 (2000).

136. See Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252 (1962).

137. 539 U.S. 558 (2003).

on same-sex sodomy, is a good illustration of rationalist minimalism.<sup>138</sup> In *Lawrence*, the Court did not and could not claim that its decision was securely rooted in long-standing traditions. On the contrary, the Court emphasized an “*emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>139</sup> Hence the Court looked forward to what was now emerging, not backward to what was long settled. On this account, the present knows far better than the past. In the Court’s view, what was emerging was a product of sense and hard-won wisdom rather than arrogance or hubris. This narrative of progress, seeing traditions as badly confused or even invidious, is entirely foreign to Burkeanism.

Of course we could imagine a Burkean claim that at a certain point, an “emerging awareness” has become a tradition. This claim would be more plausible if the awareness were embodied not merely in judicial decisions, but also in social practices and norms. Perhaps the ban on sex discrimination can be so counted, as that ban has been understood in both law and practice after a period of several decades. Perhaps the same can be said for broad presidential power to protect national security—power that might seem a product of an “emerging awareness” of what is necessary for self-defense.<sup>140</sup> But in *Lawrence*, the Court did not claim that, with respect to privacy, the emerging awareness was entrenched. Instead it offered an account of developing wisdom—an account that is embodied in a serious challenge to Burke by both Pascal and Bentham, emphasizing that present generations have more experience than past generations.<sup>141</sup>

In many areas, the Supreme Court has acted in common law fashion, but in a way that is sharply critical of traditions<sup>142</sup> and that looks toward to a constitutionally preferred future. Indeed, much of equal protection doctrine is forward-looking in this sense, rooted in a norm of equality that challenges long-standing practices.<sup>143</sup> There is a large difference between the Due Process Clause and the Equal Protection Clause here. As we have seen, due process doctrine builds, if sometimes awkwardly and ambivalently, on traditions, and it can be seen, in a sense, as embodying Justice Frankfurter’s approach to constitutional law. By contrast, equal protection doctrine is sharply critical of traditions, setting out a principle that challenges practices of racial subjugation, and that has been elaborated in a way that goes well beyond the defining case of race and that attacks, rather than incorporates, social traditions.<sup>144</sup> Much of the recent and current debate involves the nature

138. It would be possible to understand *Lawrence* as perfectionist rather than minimalist. See Tribe, *supra* note 108.

139. *Lawrence*, 539 U.S. at 572 (emphasis added).

140. See Yoo, *supra* note 73.

141. See *infra* text accompanying notes 259–265.

142. See Strauss, *supra* note 25.

143. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

144. See *id.* at 1170–78.

and extent of that attack,<sup>145</sup> with Burkeans asking the Court to limit its reach.<sup>146</sup>

Establishment Clause doctrine has a similar feature, with history often creating problems for the Court's attempt to construct a theory of neutrality—a theory that seems to be in some tension with historical practices.<sup>147</sup> As I have noted, Chief Justice Rehnquist speaks in unmistakably Burkean terms in this domain. He would permit public invocations of God, justifying them almost solely by reference to traditional practices.<sup>148</sup> In sharp contrast, Justice Breyer insists that tradition is hardly enough; it is also necessary to show that any such invocations fit with the various purposes of the Establishment Clause.<sup>149</sup> Speaking as a committed minimalist, Justice Breyer emphasizes that “no single mechanical formula . . . can accurately draw the constitutional line in every case.”<sup>150</sup> Speaking as a non-Burkean rationalist, Justice Breyer calls traditions to account, asking for assurance that a public display suggests “little or nothing of the sacred,”<sup>151</sup> and conveys “a predominantly secular message.”<sup>152</sup> Justice Stevens, also a rationalist, writes in similar terms, insisting (against those who focus on “our heritage”) that judges must apply “the broad principles that the Framers wrote . . . by expounding the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations.”<sup>153</sup>

More generally, rationalist minimalists are willing to conclude that entrenched traditions might reflect power, confusion, accident, and injustice, rather than wisdom and sense.<sup>154</sup> It should be no surprise that Justice O'Connor, with her Burkean inclinations, refused to join the Court's opinion in *Lawrence*,<sup>155</sup> partly because the Court was overruling its own fairly recent decision in *Bowers v. Hardwick*.<sup>156</sup>

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145. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating sex segregation, notwithstanding its longevity).

146. *Id.* at 568–69 (Scalia, J., dissenting).

147. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

148. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (Rehnquist, C.J., plurality opinion).

149. *Id.* at 2868–71 (Breyer, J., concurring in the judgment).

150. *Id.* at 2868.

151. *Id.* at 2870.

152. *Id.*

153. *Id.* at 2888–89 (Stevens, J., dissenting).

154. See THE FEDERALIST, *supra* note 3, at 1 (“It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”).

155. *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in the judgment).

156. 478 U.S. 186 (1986).

Of course Justice O'Connor has occasionally been willing to subject traditions to critical scrutiny.<sup>157</sup> In the domain of religion in particular, "history and ubiquity" play an important role for her, not (as Chief Justice Rehnquist would have it) because tradition makes its own claims, but because ubiquitous practices are less likely to have a religious meaning.<sup>158</sup> But there is nonetheless a strong Burkean strand in Justice O'Connor's opinions, insisting on the need to look to practice and experience, rather than to anything like abstract theory. Indeed, her opinion upholding an affirmative action program at the University of Michigan Law School emphasized the extent to which race-conscious programs had become an entrenched part of the practices of businesses and even the military.<sup>159</sup> Hence the validation of such programs could be seen as reflecting a Burkean unwillingness to use an abstract theory—based on the idea of color-blindness—as the foundation of an attack on actual practices. Justice O'Connor seems to believe that the legitimacy of race-conscious admissions programs should be assessed by reference to experience, not by reference to some a priori theory about equality.

2. *Traditions in packages?* (a) *The problem.* At this stage the distinction between Burkean and rationalist minimalism might be challenged on the ground that traditions do not come in neat packages for judicial identification. Traditions are hardly self-defining, and this point severely complicates the Burkean enterprise. When a court attempts to follow a tradition, what, exactly, is it supposed to follow? Should a tradition be characterized at a high level of generality (involving, say, respect for intimate personal choices) or a low level (allowing, say, government interference with such choices when traditional morality is being violated)? When circumstances change—as a result, for example, of the rise of terrorism—how should we characterize an apparent "tradition" of limited presidential prerogatives? Might not any such characterization have an evaluative element, and might the task not be a simple matter of discovery?

Consider, for example, the question whether tradition grants the president the authority to engage in foreign surveillance.<sup>160</sup> Even if it is agreed that many presidents have exercised that authority, perhaps a modern surveillance program is relevantly different, because modern technologies, involving email and cell phones, permit far greater intrusions into the domain of personal privacy. If so, the existence of a long-standing practice need not count in favor of a contemporary assertion of power, at least if that power is being used in a way that goes well beyond traditions. Even if it is

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157. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Indeed, Justice O'Connor concurred in the result in *Lawrence v. Texas*, relying not on the Due Process Clause, often taken to embody traditional understandings, but instead on the Equal Protection Clause, a frequent source of constitutional attacks on those understandings. *Lawrence*, 539 U.S. at 580–81.

158. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–39 (2004) (O'Connor, J., concurring in the judgment).

159. *Gutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

160. See *supra* note 9.

agreed that presidents have not exercised that authority, perhaps a modern surveillance program is relevantly different, because the threat of international terrorism raises problems never encountered in the past. If so, the absence of a long-standing practice need not count against a contemporary assertion of power.

Indeed, Justice Thomas made an argument of exactly this sort in rejecting the *Hamdan* plurality's conclusion that traditions forbid the use of military commissions to try conspiracy to violate the law of war. While challenging that conclusion on its own merits, Justice Thomas also argued that the war against terror is genuinely new, and that old traditions, designed for old enemies, must be permitted to evolve in dealing with the kinds of war in which the United States is now engaged.<sup>161</sup> On this view, the error of the plurality lay in the use of traditions to forbid a practice that could not be said to be inconsistent with the past, simply because the past did not present the current situation.

Suppose, plausibly, that nearly every current dispute is, in one or another way, distinguishable from disputes that were settled in the past. Perhaps Burkean minimalists must ultimately turn out to be rationalists, in the sense that any particular account of tradition must ultimately be their own, and based on their "private stock of reason." Perhaps the resulting account will have a normative dimension.<sup>162</sup> On this view, any characterization of a tradition will have to be interpretive, in the sense that it will be a matter not of finding something, but of placing long-standing practices in what judges deem to be a reasonable or sensible light.<sup>163</sup> Some people contend that traditions should be read at a high level of generality, so as to contain certain abstractions that might then be used to test, and find wanting, particular practices, even long-standing ones.<sup>164</sup> If traditions are so used, changes might be sought not in spite of traditions but in their name. If so, the distinction between Burkean and rationalist minimalism begins to vanish. For this reason, the Burkean approach might have an inevitable rationalist dimension, one that is obscured by traditionalist talk.<sup>165</sup>

(b) *Burkean responses and Democratic Burkeanism Redux.* Burkeans have several possible responses. First, they might acknowledge this point and urge that their Burkeanism is fully consistent with it. Burke himself believed that traditions were far from static.<sup>166</sup> His claim was that social change

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161. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2829 (2006) (Thomas, J., dissenting).

162. See J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1618 (1990) (questioning Justice Scalia's "call for respecting the most specific tradition available").

163. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

164. E.g., LAURENCE H. TRIBE & MICHAEL L. DORF, *ON READING THE CONSTITUTION* (1991); Tribe, *supra* note 108.

165. A valuable discussion, suggesting the importance of making the distinction I am drawing, is in MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987).

166. For example, Burke approved of the Glorious Revolution:

should emerge from traditions, not in opposition to them. In distinguishing between “emergence” and “opposition,” some work will have to be done in characterizing traditions. If this is the central point, the line between Burkean and rationalist minimalism does become thinner, if only because reason will have to be used in deciding what kind of change should occur—a major concession to rationalists.

But perhaps we can thicken the relevant line. Perhaps Burkeans will want to adopt a presumption in favor of democratic outcomes—an inclination that divides Justice Frankfurter, who adopted such a presumption,<sup>167</sup> from Justice O’Connor, who did not.<sup>168</sup> On this view, the best understanding of Burkean minimalism ensures that courts will rarely strike down legislation unless that legislation is palpably inconsistent with traditions that can be clearly understood as such, or defies the unmistakable lessons of long experience.<sup>169</sup> Change can occur, and traditions can be revised, but through democratic rather than judicial judgments. On this view, the difference between Burkeans and rationalist minimalists is that members of the latter group are far more willing to invoke their own moral and political arguments to invalidate legislation. On this view, committed Burkeans will require a clear demonstration that a constitutional challenge is firmly rooted in tradition before invalidating a law—a position with clear roots in Justice Holmes’s approach to the Due Process Clause. The problem of characterizing traditions is resolved, or at least reduced, by refusing to strike down laws unless the characterization of tradition is uncontentious.

Recall that some people are Democratic Burkeans. They will uphold government power unless it is inconsistent with tradition, but they are reluctant to invalidate official judgments even if those judgments depart from tradition. On this view, the absence of a clear tradition in favor of foreign surveillance by the president need not be decisive of the constitutional question, especially because the problem of international terrorism is novel.<sup>170</sup>

This view cannot be supported by Burkeanism alone. It mixes Burkean claims with democratic ones. For Democratic Burkeans, the central idea is that in a democratic society, judges should invalidate legislation only when

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A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve. The two principles of conservation and correction operated strongly at the two critical periods of the Restoration and Revolution, when England found itself without a king.

Burke, *supra* note 1, at 424. Thus the revolution “was made to preserve our *ancient* indisputable laws and liberties, and that *ancient* constitution of government which is our only security for law and liberty.” *Id.* at 428.

167. See *supra* text accompanying notes 101–103; see also *Korematsu v. United States*, 323 U.S. 214, 224–25 (Frankfurter, J., concurring).

168. See, e.g., *New York v. United States*, 505 U.S. 144 (1992).

169. It might be possible to read *Lawrence* in this way, at least if the case is seen as involving a rarely enforced statute that served largely as a recipe for harassment, in defiance of the rule of law. See Sunstein, *supra* note 108.

170. Of course, the legality of such surveillance raises complex statutory and constitutional questions, which I cannot explore here.

it amounts to a clear violation of the Constitution, read with close reference to long-standing practices.<sup>171</sup> In the American context, most people should be willing to insist that judges should be reluctant to strike legislation down on the basis of their own convictions. At the same time, Democratic Burkeans would also claim that citizens in the democratic process should usually feel free to invoke their convictions in order to challenge long-standing practices. If citizens and their representatives are permitted to offer their own understandings of liberty and equality or even their own interpretations of the Constitution<sup>172</sup>—at least when they are expanding and not contracting rights as established by the courts<sup>173</sup>—perhaps they can understand the document in a non-Burkean way, even while judges are held to traditions. If traditions are a mixed blessing, and if they reflect confusion and error (and if “prejudice” is properly taken as a word of opprobrium), then we would not want citizens to hew so closely to the past—even if judges should be constrained in that way. Using Burkeanism in pragmatic terms, a judge, or a critic of the judiciary, might well be drawn to this position.

A possible response would be that in some domains, citizens themselves might be too tradition-bound—too likely to follow old practices that are no longer legitimate, if they ever were, when legitimacy is assessed by reference to constitutional ideals (properly understood). And this indeed is the view of rationalist minimalists and of perfectionists, who contend that the federal judiciary has a legitimate role in testing the grounds for such practices as restrictions on political dissent, favoritism toward certain religions, and discrimination on certain grounds. I will return to these debates below.<sup>174</sup>

(c) *Traditions at low levels of abstraction.* Alternatively, Burkeans might insist on reading traditions at a low level of abstraction, in a way that will minimize the theory-building and tradition-characterizing duties of the judiciary.<sup>175</sup> Justice Scalia, emphasizing deference to tradition, points to the need to consider “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”<sup>176</sup> This approach promotes width at the same time it expressly denies judges the power “to consult, and (if possible) reason from, the traditions . . . in gen-

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171. This view can be seen as a modest and friendly amendment, or specification, of that offered in Thayer, *supra* note 113. Thayer argued that courts should invalidate legislation only when the constitutional question was very clear. *Id.* at 144. The Burkean version says that whether the question is clear is answered by reference to tradition.

172. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); SUNSTEIN, *supra* note 40.

173. The various civil rights laws, not easily defensible on Burkean grounds, can be seen as examples. See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2000); Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–e17 (2000).

174. See *infra* text accompanying notes 243–252.

175. See Michael H. v. Gerald D., 491 U.S. 110, 127 & n.6 (1989) (Scalia, J., plurality opinion).

176. *Id.* at 127 n.6.

eral.”<sup>177</sup> By rejecting that power, and by distrusting the effort to “reason from” tradition, Justice Scalia is squarely embracing a Burkean approach to the role of the Court in constitutional cases. He is reading the Due Process Clause so as to delegate authority to tradition, rather than to authorize judges to use tradition as a foundation for normative arguments of their own. If it is stipulated that traditions should be read at a low level of abstraction, then it is genuinely possible to follow them, rather than to characterize them. In the context of separation of powers, we might also characterize the practice at a low level of abstraction, in a way that (for example) might make it more difficult for the president to argue that there is a clear tradition supportive of a controversial exercise of authority.

Critics of Burkean minimalism might object, at this point, that Burkeanism cannot be really rescued, as a neutral method, through the effort to read traditions at a low level of abstraction. What level of abstraction counts as “low”? The lowest level of abstraction would focus on what, very specifically, was done—in which case no tradition would resolve a current dispute, which, by hypothesis, involves a different time, different circumstances, and different parties. If the government said that people may not have more than two children, it would be easy to say that such a prohibition violates long-standing traditions, to which the prohibition does indeed seem foreign. But characterized at the lowest level of abstraction, the tradition—of procreative liberty—may not really apply to the current dispute, which involves a new time and by hypothesis a new situation. The anti-Burkean would insist that whether it does apply depends on a normative judgment about how to characterize it.

The best response, from the Burkean point of view, is that if there is indeed some kind of difference in circumstances, the tradition may not apply, and hence cannot be used. But the difference must be explained, not simply asserted. Sometimes there is no plausible difference between the cases to which the long-standing practice applied and the modern case. To know whether there is such a difference, it is true that the Burkean has to think about traditions rather than simply point to them. But much of the time, it is clear that no tradition supports a purported right, and it is also clear that the government is seeking to violate a long-standing practice simply because it rejects it on principle. In such cases, the Burkean path is clear.

Here, then, is a sharp difference between Burkean and rationalist minimalists. While agreeing with their rationalist adversaries on the need for small steps, Burkean minimalists applaud their rationalist adversaries for their insistence on small steps, but would be reluctant to create new rights, such as the right to physician-assisted suicide.<sup>178</sup> In contrast, more rationalist minimalists might well be willing to do so. If the Burkean position is to be defended, it is on the ground that traditions, taken as they actually have been, are more reliable than individual judges relying on their respective

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177. *Id.*

178. *See* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

private stocks of reason.<sup>179</sup> I believe that rationalist minimalists have some strong objections here, but let us bracket that point for now.

It should be apparent that insofar as Burkean minimalists adopt either a presumption in favor of democratic processes or an insistence on reading traditions at a low level of generality, they become less minimalist, because they reject narrowness in constitutional doctrine and begin to convert the doctrine into a system of rules. And as I have noted, we could imagine a Burkean who favors both shallowness and width, the latter perhaps in the service of the former.<sup>180</sup>

### III. THE CONDITIONS FOR BURKEAN MINIMALISM

No approach to constitutional law makes sense in every imaginable context. The Constitution does not offer a manual of instructions for its own interpretation, and hence the choice of a theory of interpretation very much depends on judgments about the institutional capacities of courts and legislatures.<sup>181</sup> With different judgments about those capacities, certain approaches to interpretation become more or less appealing.

Take, for example, the dispute between those who favor textualist approaches and those who believe that courts should stress purpose rather than text.<sup>182</sup> We can imagine circumstances in which one or another approach makes the most sense. If textualism would lead to greater before-the-fact care from legislators, and also to rapid after-the-fact corrections, the argument for textualism would be greatly fortified. Textualism would also be the optimal method of interpretation if courts would blunder under a purpose-based approach. But if textualism would often lead to unintended absurdity, and if courts could discern purpose both quickly and accurately, the argument for purposivism would be much strengthened. In short, the choice between textualism and purposivism rests in large part on judgments about institutional capacities,<sup>183</sup> and these judgments cannot be made in the abstract.<sup>184</sup>

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179. See also Hayek, *supra* note 97. On one (sympathetic) understanding of Burke, the problem is that it is not possible to obtain a perspective from outside of our tradition; we are inevitably a product of it. See Kronman, *supra* note 35, at 1032–34. In some general sense this is undoubtedly true. But it is certainly possible, from within any tradition broadly conceived, to be critical of particular practices, even long-standing ones. See WALZER, *supra* note 165. That possibility is enough to create a conflict between Burkean and rationalist minimalists, and to make perfectionism, operating within a diverse and heterogeneous interpretive tradition, a feasible enterprise. See DWORKIN, *supra* note 163.

180. See notes 118–123 and accompanying text.

181. See VERMEULE, *supra* note 66.

182. For different perspectives, see BREYER, *supra* note 13; SCALIA, A MATTER OF INTERPRETATION, *supra* note 15; VERMEULE, *supra* note 66; AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005).

183. See VERMEULE, *supra* note 66.

184. I am rejecting the view that a theory of legitimacy, or a claim about what interpretation necessarily requires, can settle the underlying debates. See Stanley Fish, *There Is No Textualist*

What works well in one legal system, or in one time or place, may not do so in another. In Nazi Germany, an emphasis on statutory purpose, and on changing social values, may lead to horrifying results.<sup>185</sup> In other times and places, an emphasis on purpose and changing values might be tolerable or even good.<sup>186</sup> Something similar is true for constitutional interpretation, and it helps to illuminate the argument between Burkean minimalists and their adversaries.

Having understood Burkean minimalism in pragmatic terms, I will now attempt to make some progress toward specifying the conditions in which Burkean minimalism can, in fact, be justified in those terms. A great deal depends on an assessment of traditions and of the capacities of those who reject them. But it should be clear that committed Burkeans might be skeptical, at the outset, about any such consequentialist assessment, which necessarily depends on evaluative judgments of the interpreter's own. Burkeans would be tempted to ask: ought we not to trust our traditions as such, rather than trusting ourselves, or our judges, to decide whether, and when, traditions are trustworthy? It would be a plausible understanding of Burke himself to suggest that the conditions for Burkeanism are simple: When the tradition is long-standing, and has been accepted by many people, it should not be abandoned, especially when those who wish to abandon it have a great deal of power. It would even be possible to understand Burke in terms that see the past as having a kind of direct authority, one whose force has nothing to do with consequences at all.<sup>187</sup>

I reject such positions for both politics and constitutional law. For politics, the problem is that tradition is often an insecure guide, and the experience of those who have lived under bad traditions is often enough to show that established practices need revision—and even enough to motivate the development and use of a theory, certainly by citizens and their representatives and (more rarely) by judges.<sup>188</sup> For constitutional law, the problem is that the process of adjudication, culminating in opinions by independent judges, properly holds traditions to account—at least under constitutional provisions that are best understood as critical, rather than celebratory, of entrenched practices. The Equal Protection Clause is the best example here. With respect to constitutional provisions of this kind, Burkeanism verges on self-contradiction: the tradition, with respect to such provisions, is to engage in criticism of traditional practices, and the criticism operates by reference to at least some kind of theory.

I do not mean to suggest that with respect to the Equal Protection Clause, a rejection of Burkeanism is logically compulsory. It would be possible to

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*Position*, 42 SAN DIEGO L. REV. 629 (2005). For discussion, see Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

185. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1991).

186. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

187. See Kronman, *supra* note 35.

188. See ALAN DERSHOWITZ, *RIGHTS FROM WRONGS* (2004).

find a tradition of opposition to racial discrimination, one that has operated for many decades, and to see that opposition as exhausting the meaning of the Clause. But if judges who are loosened from tradition—to ask questions about (for example) discrimination on the basis of sex and sexual orientation—are far from entirely unreliable or unmoored, and if the traditions themselves are suspect, Burkeanism loses much of its appeal.

At this point committed Burkeans have an additional set of arguments. They might object that any effort to specify the conditions for Burkeanism in a way that allows judges to pick and choose is simply too opportunistic—and that opportunistic Burkeanism is far worse than the real thing. This objection can be understood in two different ways. The first is pragmatic and very much in the spirit of my general argument here: perhaps a rule in favor of Burkeanism would be better than a more fine-grained approach, which asks whether Burkeanism makes sense in particular domains. In my view, this claim is wrong, but it cannot be defeated a priori; it must be evaluated by reference to the results that it would produce.

The second understanding of this objection is conceptual and normative rather than pragmatic. The claim would be that an approach to interpretation must be genuinely principled. It cannot be defended or rejected by reference to the results that it produces. Such a defense, or such a rejection, is indeed too opportunistic, too result-oriented.

So understood, the objection is unhelpful and confused. To be sure, an approach to interpretation has no appeal if it enables judges to do whatever they want in particular cases. Such an approach would produce bad consequences (including intolerable unpredictability). But no approach can be defended on grounds that are indifferent to consequences; an approach is unacceptable if it leads to (many) unacceptable results. This point holds for Burkean minimalism as well as for the alternatives.

Let us now explore some details.

### A. *Originalists and Burkeans*

1. *Possible worlds.* Burkeans reject originalism, but it is possible to imagine a world in which originalism would be worth pursuing. Suppose, for example, that the original public meaning of the document would generally or always produce sensible results in terms of both institutional practices and individual rights; that violations of the original public meaning would be unjust or otherwise unacceptable; that democratic judgments that did not violate the original public meaning would almost always conform, at the outset or fairly soon, to the proper understanding of human rights; and that judges not following the original public meaning would produce terrible blunders. In such a world, originalism would be the best approach to follow. The reason is that by stipulation, originalism would impose a desirable discipline on the judiciary, preventing it from making serious errors, at the same time that it would serve as a near-perfect safeguard against injustice, rights violations, or otherwise unacceptable results. What could possibly be

wrong with originalism in a world of this kind, or even in a world that is close to it?

It follows that there is no abstract argument against originalism. If originalism would produce the best results on balance,<sup>189</sup> as compared with the alternatives, the argument for originalism would be very powerful.<sup>190</sup> In our world, the strongest objection to originalism is that it would greatly unsettle existing rights and institutions, in a way that would make American constitutional law much worse rather than better.<sup>191</sup>

Burkean minimalists reject originalism for that reason: they believe that originalists are in the grip of an abstract theory, one that would do away with a kind of inheritance.<sup>192</sup> That inheritance takes the form of numerous judicial judgments over long periods of time, in which public commitments, social learning, and desirable adaptation have occasionally led to constitutional rulings that diverged from the original understanding. Minimalists, Burkean and otherwise, typically contend that this process of evolution was itself anticipated by the founding generation, which did not attempt to freeze its particular views.<sup>193</sup> If this view is correct, Burkeans and originalists can make common cause.

When Burkeans recoil at the suggestion that the founding document should be understood to mean what it originally meant, they are embracing a conception of the Constitution as evolving in the same way as traditions and the common law—not through the idiosyncratic judgments of individual judges, but through a process in which social norms and practices play the key role.<sup>194</sup> It is in this vein that Justice Frankfurter contended, “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”<sup>195</sup>

Consider, for example, the question whether a congressional declaration of war is a necessary precursor to the use of force by the president. On the basis of the constitutional text, read in light of its history, there is a plausible

189. See Posting of Randy Barnett to Legal Affairs Debate Club, [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp) (May 3, 2005, 1:43 PM) (“Given a sufficiently good constitutional text, originalists maintain that *better results will be reached overall* if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.”) (emphasis added).

190. This is one way of reading the argument in SCALIA, A MATTER OF INTERPRETATION, *supra* note 15.

191. I am putting to one side conceptual challenges to originalism. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

192. See Merrill, *supra* note 33, at 518–19.

193. See *Roberts Confirmation Hearing*, *supra* note 2 (statement of Judge John G. Roberts, Jr., Nominee to be Chief Justice of the United States); see also BREYER, *supra* note 13. As a matter of history, this claim is disputable. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

194. See LEVI, *supra* note 74, at 2–6.

195. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

argument to this effect.<sup>196</sup> The argument is controversial,<sup>197</sup> but let us stipulate that on the original understanding, the president may not use force without a congressional declaration of war. On Burkean grounds, judicial insistence on this idea runs into a serious problem: since the founding, the United States has been involved in over two hundred armed conflicts, and Congress has declared war on only five occasions.<sup>198</sup> Long-standing practices are inconsistent with the original understanding, and Burkeans insist that those practices must operate as a “gloss” on the document.<sup>199</sup>

At a minimum, Burkeans will notice that a congressional authorization to use force has operated as the functional equivalent of a declaration of war, and they will contend that such an authorization gives the president the same power that is accorded him or her by a declaration.<sup>200</sup> But Burkeans will add that if the president has often gone to war with neither a declaration nor an authorization, constitutional law must give some attention to that fact—and at least consider the possibility that for some military actions, congressional authorization is not required at all. The example could easily be extended to many cases in which social practices and judicial decisions have outrun the original understanding. For example, defenders of foreign surveillance by the president might argue in just this way, at least if the tradition, when properly characterized, really is long-standing.<sup>201</sup>

2. *Originalist rejoinders.* To their Burkean adversaries, originalists have two possible responses. First, they might accept the claims of *stare decisis* and social traditions and acknowledge that much of the time, established doctrines and practices must be accepted, whatever the content of the original understanding. Justice Scalia has described himself as a “faint-hearted” originalist;<sup>202</sup> his faint-heartedness consists in his unwillingness to use the original understanding as a kind of all-purpose weapon against existing law and practices. On this count, Justice Scalia is very different from Justice Thomas, who is not so faint of heart. Justice Scalia has said that Justice Thomas “doesn’t believe in *stare decisis*, period.”<sup>203</sup> Justice Scalia remarks,

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196. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM* (1993). But see YOO, *supra* note 73.

197. See YOO, *supra* note 73.

198. *Id.*

199. Cf. Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NW. U. L. REV. 151, 160–61 (2006) (arguing that “where both houses of Congress and the President pass a law which is untraditional, but within the scope of the original meaning of the Constitution . . . the federal courts ought to uphold the law based on the Constitution’s original meaning” and especially “where the political branches of the federal government have determined that the reliance interests generated by tradition are outweighed by the harm that complying with tradition” would incur).

200. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

201. See *supra* notes 9, 160 and accompanying text.

202. Scalia, *Originalism*, *supra* note 15, at 864.

203. Stephen B. Presser, *Touting Thomas*, LEGAL AFF., Jan./Feb. 2005, at 68.

“if a constitutional line of authority is wrong, [Justice Thomas] would say ‘Let’s get it right.’ I wouldn’t do that.”<sup>204</sup>

The line between Burkean minimalism and faint-hearted originalism might well turn out to be thin in practice. The question is under exactly what conditions originalists will prove faint of heart. The answer turns on the weight to be given to precedents and practices. If originalists are extremely faint-hearted, they will usually agree with their Burkean counterparts. Indeed, they might even become Burkeans.

As an example, consider the question whether originalists should overturn *Brown v. Board of Education*<sup>205</sup> or *Reynolds v. Sims*<sup>206</sup> if it turns out that the ban on racial segregation or the one-person, one-vote rule cannot be defended by reference to the original understanding. A faint-hearted originalist might believe that a decision to overrule either of these decisions would be a kind of revolution—one that would violate entrenched understandings, jeopardize the fabric of existing law, and have unanticipated bad consequences. If those who are faint of heart emphasize these points, they show strong Burkean impulses. The task for faint-hearted originalists is to specify exactly when, and why, they are willing to live with decisions that were originally illegitimate under their preferred theory.

The second response, offered by originalists to Burkean minimalists, is far more interesting. Originalists might well claim that the doctrines to which they most strenuously object are not, in fact, a product of slowly evolving judgments, firmly rooted in social practices and generally fitting the Burkean model of constitutional change. On this view, presidential power to make war or to engage in foreign surveillance may well be legitimate, if either is actually rooted in decisions extending over time; but judicial invention of baseless constitutional rights is not. Speaking in Burkean tones, originalists might argue that the most objectionable doctrines are a product of a kind of (French?) revolution, in which the Supreme Court, above all under the leadership of Chief Justice Earl Warren, was captured by a theory that was at once contentious and radical.<sup>207</sup> Of course *Roe v. Wade* is a particular target of originalist ire, but the right of privacy is generally objectionable on originalist grounds, and the one-person, one-vote rule is vulnerable as well, as are judge-made doctrines requiring a rigid separation of church and state.<sup>208</sup>

It may be that in its most objectionable decisions, the Court was paying insufficient attention to social practices, which it repeatedly rejected. Perhaps its own reasoning was, in the end, a priori, and not securely rooted in either precedent or practice.<sup>209</sup> It is not at all clear that committed Burkeans

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204. *Id.* at 69.

205. 347 U.S. 483 (1954).

206. 377 U.S. 533 (1964).

207. A counterargument can be found in Strauss, *supra* note 25.

208. *See Van Orden v. Perry*, 125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring).

209. *But see Van Orden*, 125 S. Ct. 2854 (2005).

must or should treat such a revolution as the established backdrop for constitutional law—just as it is not clear that after an illegitimate revolution, a Burkean polity should build on the revolution, rather than attempting a kind of restoration.

3. *Contexts.* I have noted that both Justices Frankfurter and O'Connor can be characterized as Burkean minimalists, but it is here that there are noteworthy differences between the two, stemming from the dramatically different contexts in which they sat on the Supreme Court. Often a Democratic Burkean, Justice Frankfurter typically invoked Burkean arguments as a shield for government's use in the face of constitutional challenge. Sitting at the inception of the Warren Court, Justice Frankfurter insisted that social practices deserved respect, and his form of Burkean minimalism raised a series of cautionary notes about the liberal initiatives of that Court, which he often rejected.<sup>210</sup> For Justice O'Connor, sitting long after the Warren Court, Burkean minimalism operated to insulate those initiatives from significant or immediate revision.<sup>211</sup> This difference raises a number of questions about the appropriately Burkean response to a non-Burkean, or an anti-Burkean, period in constitutional history.

On one view, the essential fallacy of a Burkean understanding of contemporary constitutional law is that it creates a ratchet effect, in which Burkeans end up having to “conserve” the aggressive and tradition-rejecting decisions of their liberal predecessors. Compare the question whether the Supreme Court, in the late 1930s, should have taken a Burkean approach to the body of doctrine that emerged from the *Lochner* era, including protection of freedom of contract<sup>212</sup> and restrictions on national power under the commerce clause.<sup>213</sup> When the Court has built up a body of doctrine that is constitutionally unmoored, and has done so in a relatively short period, perhaps any effort at conservation is not properly characterized as Burkean at all. Perhaps the Court's post-New Deal rejection of *Lochner* era decisions, in sweeping rulings not easily regarded as minimalist,<sup>214</sup> can be understood as a plausibly Burkean effort to return to traditions after a period characterized by an illegitimate judicial role (or rule).<sup>215</sup> Of course those Burkeans

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210. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

211. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *Casey* of course preserved *Roe v. Wade*, a decision of the Burger Court rather than the Warren Court; but *Roe* is appropriately placed within the general line of doctrine that the Warren Court inaugurated. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

212. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

213. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

214. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation against Due Process Clause challenge); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act against Commerce Clause challenge).

215. For a very different view, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that the New Deal period should be regarded as a constitutional moment, not as a return to any tradition).

who emphasize judicial judgments might well wonder whether the Court was right to sweep away its *Lochner* era decisions so abruptly. But if those decisions lack legitimacy, Burkean or otherwise, the decision to sweep might be right.

If this point is correct, Burkeans might well accept the Court's wholesale rejection of much of its jurisprudence between 1905 and 1935.<sup>216</sup> And if this is so, it would be possible to think that on Burkean grounds, Justice Frankfurter was right in his insistence on stability but that Justice O'Connor was wrong in hers. To be sure, the illegitimate decisions might deserve respect if that respect is necessary to protect established expectations or to insure against a large-scale social upheaval. But on Burkean grounds, there is no reason for a presumption on behalf of illegitimacy, even if it has persisted for decades.

I believe that a dispute on these questions helps to illuminate the division between contemporary Burkean minimalists, most notably Justice O'Connor, and the less faint-hearted originalists, most notably Justice Thomas. Burkean minimalists would be most unlikely to have joined all of the controversial decisions of the Warren Court, but they might now be willing to accept some or even most of them in the interest of stability. The argument for doing so is strengthened if those controversial decisions can indeed be seen to have emerged from an acceptably Burkean process of case-by-case evolution, closely attentive to social norms and practices.<sup>217</sup> On that count, originalists are skeptical.

In this dispute, the strongest Burkean point against originalism involves the risks associated with wholesale disruption of contemporary constitutional law, containing understandings of rights and institutions on which many Americans have come to rely. In the domain of governmental institutions, the Court's validation of independent regulatory agencies is the simplest example.<sup>218</sup> A dramatic departure, striking down the independence of such agencies, would unsettle much of American government, including such institutions as the National Labor Relations Board, the Federal Communications Commission, the Federal Trade Commission, and the Securities and Exchange Commission.<sup>219</sup> There are prominent examples in the domain of rights as well, including the rule of one-person, one-vote<sup>220</sup> and the prohibition on school prayer.<sup>221</sup> A decision to revisit these rulings would threaten deeply entrenched features of American constitutional doctrine. Many of the rights-protecting decisions of the Warren and Burger Courts, notwithstanding their dubious Burkean roots, have now become embedded in national

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216. See *supra* note 214.

217. See Strauss, *supra* note 25.

218. See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

219. It would be possible, of course, for a minimalist to favor modest steps in the direction of greater presidential control. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

220. *Reynolds v. Sims*, 377 U.S. 533 (1964).

221. *Engel v. Vitale*, 370 U.S. 421 (1962).

life as a social matter,<sup>222</sup> though it is certainly true that the same cannot be said of all such decisions.<sup>223</sup> Many such decisions are embedded not merely in national life but also in constitutional doctrine, in the sense that they cannot be rethought without making it necessary to rethink numerous other decisions as well.

### B. Perfectionists and Burkeans

Perfectionists believe that it is appropriate for federal judges to cast constitutional ideals in the best constructive light.<sup>224</sup> Of course they do not believe that judges can legitimately create the Constitution anew; their job involves interpretation, not rewriting. Hence judges owe a duty of fidelity to text, precedent, and all other relevant sources of law. But to the extent that fidelity permits, judges are entitled and even required to develop a principle that best justifies an area of law.<sup>225</sup> If, for example, the most property-protective view of the Takings Clause<sup>226</sup> puts that clause in its best constructive light, perfectionists believe that the Court should adopt that view, except to the extent that it is in palpable tension with existing doctrine.<sup>227</sup> If a democracy-centered understanding of the First Amendment makes best sense of the free speech guarantee,<sup>228</sup> then the Court should adopt that understanding to the extent that it can be made to fit with existing law.

Burkeans distrust abstract or a priori reasoning, and hence they will be deeply skeptical of any approach of this sort. They think that particular people—judges!—must decide what puts law in the best constructive light, and they are skeptical of judges' decisions.<sup>229</sup> Indeed, Burkean minimalists

222. See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006) (reviewing BREYER, *supra* note 13).

223. *Roe v. Wade*, 410 U.S. 113 (1973), is the most obvious source of controversy here.

224. The applicable theory can be found in DWORKIN, *JUSTICE IN ROBES*, *supra* note 39, at 49–74, and DWORKIN, *supra* note 163. I put to one side the many complexities in Dworkin's account.

225. DWORKIN, *JUSTICE IN ROBES*, *supra* note 39, at 49–74.

226. See RICHARD A. EPSTEIN, *TAKINGS* (1985).

227. Of course, there are hard questions about how courts should “trade off” fit and justification—as, for example, by selecting (among the reasonable alternatives) an approach that does somewhat less well along the dimension of fit but better along the dimension of justification.

228. See BREYER, *supra* note 13; ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

229. The best perfectionist response is this: Inevitably, judges have to make decisions. Their decisions will have to cast existing law in the best constructive light, one way or the other. Burkean approaches must themselves fit and justify existing law, and if judges cannot be trusted, why should we trust judges who choose Burkean minimalism? Furthermore, why should we trust judges to choose it in the first place? Perfectionists are right to say that any theory of interpretation, or approach to interpretation, must be chosen by judges; there is no avoiding that. But perfectionists should acknowledge that judges might choose a theory, or an approach, that is attuned to judicial fallibility. Originalists want to reduce the discretion of judges, and they might claim that their own approach puts constitutional law in the best constructive light. Burkeans can make the same claim. As noted in the text, Burkean minimalism must, in the end, be defended on perfectionist grounds.

might, and probably must, be willing to defend their own approach on the ground that Burkean minimalism both fits and justifies our practices, and hence defeats perfectionism under its own criteria. On this view, Burkean minimalism can be understood as a kind of *second-order perfectionism*—that is, a form of perfectionism that is alert to the institutional weaknesses of the federal judiciary, and that therefore refuses to pursue perfectionism directly. That very refusal may help to perfect constitutional democracy, because it minimizes the theory-building demands on the federal judiciary. Second-order perfectionism is, in fact, a good understanding of the pragmatic nature of Burkean minimalism.

It may well be true that in order to be defended, any approach to constitutional law must ultimately fit and justify our practices.<sup>230</sup> But it may also be true that in view of the limitations of federal courts, particularly in the domain of moral and political argument, judges do best if they defer to traditions, rather than attempt to evaluate the traditions on their own. As I have suggested, Burkean minimalism reflects a kind of delegation principle, in which judges grant law-interpreting authority not to regulatory agencies,<sup>231</sup> but to long-standing practices and judgments (including judicial judgments). An idea of this kind lies close to the heart of Burke's own view, incorporating his suggestion that if reason and wisdom are the goals, the best way to achieve them is to avoid a priori thinking and to defer to traditions, even those taken by rationalists to reflect prejudices.<sup>232</sup>

Certainly the argument for (first-order) perfectionism, and the attack on Burkeanism, would be strengthened if we were entitled to have real confidence in the theory-building capacities of federal judges.<sup>233</sup> This claim might draw strength from the observation that in an important sense, current generations are more experienced than past generations, with a greater stock of knowledge,<sup>234</sup> and current judges are a part of current generations. Even if current judges are able theorists, the argument is not airtight. Democratic skeptics might object that judicial perfection of constitutional ideals would threaten the right to self-government.<sup>235</sup> Perhaps that concern could be accommodated through the right theory of interpretation, which would, by hypothesis, give self-government its due.<sup>236</sup> Burkean skeptics might also

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The approach must reflect an appreciation of the federal judiciary's weaknesses in theory-building, and pay proper attention to the value of stability.

230. See DWORKIN, *JUSTICE IN ROBES*, *supra* note 39, at 49–74. Questions might be raised about whether the best accounts must fit and justify our practices, rather than be best on independent grounds; but an approach that claims to be best, without claiming to fit and justify, is unlikely to count as interpretation at all.

231. A delegation of sorts underlies *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (calling for judicial deference to agency interpretations of law).

232. See *supra* note 90 and accompanying text.

233. As Dworkin plainly does. See DWORKIN, *JUSTICE IN ROBES*, *supra* note 39, at 49–74.

234. See *infra* notes 259–260 and accompanying text.

235. See ELY, *supra* note 28; see also John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973) (rejecting *Roe v. Wade*).

236. See ELY, *supra* note 28; Ely, *supra* note 235.

worry that perfectionists would encounter serious pragmatic problems. By attempting to engraft their preferred theories onto actual societies, judicial efforts might turn out to be futile or counterproductive, if only because societies would resist those efforts.<sup>237</sup> But if a theory that fits our practices is indeed appealing in principle, and if courts can elaborate and implement it, perhaps they should do so.<sup>238</sup>

Some people do not take this possibility seriously. They believe, for example, that a perfectionist approach is forbidden by the very idea of “interpretation,”<sup>239</sup> or that considerations of legitimacy are by themselves sufficient to rule perfectionism out of bounds.<sup>240</sup> But I have emphasized that the Constitution does not set out the instructions for its own interpretation, and so long as the Court is respecting the text, which is after all what has been ratified, many different approaches fit within the boundaries set by the general idea of interpretation. Among the plausible possibilities, a great deal depends on judgments about institutional capacities.<sup>241</sup> It should be obvious that the argument for theoretical ambition from the federal judiciary would be strengthened if there were reason to trust not only the good will but also the capacities of theoretically ambitious judges.

It is here, of course, that Burkean minimalists break from perfectionists. Burkean minimalists notice that highly reasonable people will disagree about what casts constitutional provisions in the best constructive light. Because they are Burkeans, these minimalists distrust theoretical ambition as such. They are most unlikely to have confidence in judges having great theoretical ambitions; in the Burkean view, such judges suffer from hubris. To the extent that judges are entrusted with power, Burkeans believe, it is because of their willingness and ability to elaborate the Constitution’s text, read in light of society’s traditions and practices. Whether the theorists are concerned to vindicate property rights, or a democratic conception of the free speech principle, or the abstract ideal of color blindness, or a particular conception of the separation of powers, the Burkean minimalist firmly opposes them.<sup>242</sup> The opposition is based on the belief that perfectionism, unpromising even in the political domain, is a most unlikely foundation for judicial judgment.

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237. See GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991).

238. See DWORKIN, *JUSTICE IN ROBES*, *supra* note 39, at 49–74.

239. See, e.g., Fish, *supra* note 184 (contending that the task of interpretation necessarily is intentionalist).

240. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

241. See VERMEULE, *supra* note 66.

242. This point helps to explain Justice O’Connor’s crucial vote to uphold the affirmative action program at the University of Michigan Law School: the abstract theory of color-blindness was not permitted to operate to defeat programs that had been defended not only by universities, but by the military and American business as well. See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003), and in particular the notably Burkean suggestion that the benefits of affirmative action “are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* at 330.

C. *Burkeans, Rationalists, and “the Wisdom of the Cradle”:  
Are We the Ancients?*

Suppose that we are trying to decide between the two forms of minimalism: Burkean and rationalist. On what assumptions should we choose the former? Much of the answer depends on whether we agree with Burke. If established traditions reflect wisdom rather than accident and force, Burkean minimalism gains force. Perhaps a state wants to ban obscene material. Perhaps speakers object that existing constitutional doctrine can be understood to establish a principle of individual autonomy, one that does not permit government to ban adults from reading and viewing whatever they want.<sup>243</sup> If we believe that the traditional practices that support the ban are likely to embody wisdom, we might want courts to uphold it, whatever the ideal of individual autonomy seems to require.

In the same vein, Burkeans would want the Court to permit “ceremonial deism,”<sup>244</sup> in the form of public recognition of God. When a constitutional challenge is raised against ceremonial deism, Burkeans reject the challenge largely by reference to traditions.<sup>245</sup> The same analysis would suggest that when initially confronted with the issue, courts should have permitted deviations from the one-person, one-vote rule.<sup>246</sup> Burkean minimalists want courts to try to avoid the “political thicket,” not because they believe in judicial abstinence as such, but because they think that established practices of political representation deserve respect even if it is not easy to produce a theory to defend them. Speaking of morality generally, ethicist Leon Kass contends that in some domains, “we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear.”<sup>247</sup> For those who believe that judges ought not to challenge what “we intuit and feel, immediately and without argument,” Burkean minimalism has considerable appeal.<sup>248</sup> Recall Burke’s enthusiasm for prejudice, an enthusiasm that fits well with Kass’s suggestion that repugnance can be wise.<sup>249</sup>

By contrast, rationalist minimalists are highly skeptical of prejudices. They are willing to listen to the claim that, in some domains, the Court ought to scrutinize traditions and should be willing to generalize, from its own precedents, principles that operate as a sharp constraint on government. As we have seen, the ban on sex discrimination emerged from this process

243. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

244. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2084–87 (1996).

245. *County of Allegheny v. ACLU*, 492 U.S. 573, 595–96 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984).

246. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

247. Leon R. Kass, *The Wisdom of Repugnance*, in LEON R. KASS & JAMES Q. WILSON, *THE ETHICS OF HUMAN CLONING* 3, 19 (1998); see also Hayek, *supra* note 97.

248. For doubts about Kass’s argument in the domain of morality and politics, see Sunstein, *supra* note 88, at 539.

249. See Kass, *supra* note 247.

of generalization.<sup>250</sup> In that context in particular, it is difficult to defend the view that long-standing practices reflected wisdom and sense rather than power and oppression. Some theories of the Establishment Clause have produced sharp critiques of long-standing practices, based as they are on accounts of neutrality that jeopardize a number of traditions.<sup>251</sup> Rationalist minimalists are willing to impose fresh barriers in this way, and they are at least equally comfortable with permitting the government to develop new accounts of what it can legitimately do—accounts that might produce considerable novelty in the form, for example, of an expanded conception of the police power.<sup>252</sup>

Justice Holmes can be seen as an originator of a Burkean approach to the Due Process Clause, but he was far more pragmatist than Burkean: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>253</sup> In his *Lochner* dissent, Holmes insisted that “the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”<sup>254</sup> Holmes’s key point, a deeply anti-Burkean one, is that whether we find opinions “natural and familiar” is itself an “accident” of our time and place. There could be no clearer rejection of Burke’s suggestion that our “prejudices” are a reflection not of accident but of hard-won wisdom.<sup>255</sup> Of course a rejoinder might be that on pragmatic grounds, there is much to be said on behalf of practices that have endured. But Holmes had little sympathy for this argument.

*The Federalist No. 1*, with its explicit preference for “reflection and choice” over “accident and force,” offers a similar challenge to Burkeanism.<sup>256</sup> Consider too the words of James Madison, writing in a very young America:

Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?<sup>257</sup>

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250. See *supra* notes 128–133 and accompanying text.

251. E.g., *Lynch v. Donnelly*, 465 U.S. 668, 698 (1984) (Brennan, J., dissenting).

252. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

253. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

254. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

255. This point is a frontal assault against the claims on behalf of the constitutive role of traditions in Kronman, *supra* note 35.

256. THE FEDERALIST, *supra* note 3, at 1.

257. *Id.* No. 14 (James Madison), at 72.

In Madison's unmistakably anti-Burkean account, Americans "accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe."<sup>258</sup>

These are largely rhetorical passages, but there is actually an argument in the background, one that turns Burkeanism on its head. Thomas Jefferson captured that argument with his objection that some people "ascribe to the men of the preceding age a wisdom more than human," and his response that the age of the founders "was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading."<sup>259</sup> Jefferson is contending that current generations have more experience than past generations; in that sense, they have lived longer. Burkeans tend to cherish the wisdom of those long dead, but their stock of wisdom was far more limited than ours. In the same vein, Pascal contended that we are the ancients: "Those whom we call ancient were really new in all things, and properly constituted the infancy of mankind; and as we have joined to their knowledge the experience of the centuries which have followed them, it is in ourselves that we should find this antiquity that we revere in others."<sup>260</sup>

Jeremy Bentham attacked ancient wisdom in identical terms, contending that those who were ancient were, in the relevant sense, very young.<sup>261</sup> Bentham acknowledged that old people have more experience than young people, but insisted that "as between generation and generation, the reverse of this is true."<sup>262</sup> In fact, "the wisdom of the times called old" is "the wisdom of the cradle."<sup>263</sup> Bentham deplored the "reigning prejudice in favor of the dead,"<sup>264</sup> and also the tendency to disparage the present generation, which has a greater stock of knowledge than "untaught, inexperienced generations."<sup>265</sup>

These arguments turn chronology directly against Burke, not by attempting to vindicate a priori reason, but by suggesting that if experience is our guide, the present has large advantages over the past. This point helps support the idea that Burkeanism should not be used as a sword against government: if current generations would like to reject traditions, they should be permitted to do exactly that, because they have more experience. A similar idea might be found in the Court's Pascalian suggestion that what

258. *Id.*

259. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON* 552, 559 (Merrill D. Peterson ed., 1975). Note, however, that Jefferson is speaking of experience, not of a priori reasoning (or "book-reading").

260. Blaise Pascal, *Preface to the Treatise on Vacuum*, in *THOUGHTS, LETTERS, AND MINOR WORKS* 444, 449 (Charles W. Eliot ed., M.L. Booth et al. trans., 1910).

261. BENTHAM, *supra* note 4, at 43–53.

262. *Id.* at 44.

263. *Id.* at 45.

264. *Id.*

265. *Id.* at 47.

is crucial is not ancient practice, but an “emerging awareness.”<sup>266</sup> This suggestion stresses the judgments of current generations, which are presented as more informed and reflective than those of the distant past.

But if their focus is on the Supreme Court, Burkean minimalists need not insist that respect for long-standing traditions always makes sense in the political domain. Addressing courts in particular, Burkean minimalists might plead agnosticism on the proper treatment of traditions in democratic processes, and contend more modestly that their approach is distinctly well-adapted to the institutional strengths and weaknesses of the federal judiciary. For judges, the question is an insistently comparative one. It is not whether traditions are good, or great, in the abstract. It is whether tradition-tethered judges are better than judges who think that they ought to subject traditions to critical scrutiny. Burkean minimalists believe that traditions are the best available guide, at least when judges are asked to invalidate legislation.

A committed Burkean might reject these qualifications, or any effort to think through the circumstances in which Burkeanism makes the most sense. To the committed Burkean, the analysis is simple: if a practice has persisted for a long period, it is entitled to respect, unless circumstances are shown to have changed or the proposed changes themselves build on experience. For the most consistent Burkeans, any effort to evaluate circumstances threatens to depend on a priori reason, which is unreliable.

But the more ambivalent Burkean, alert to Pascal’s challenge and aware of Jefferson’s words, would seek to identify the conditions under which Burkean minimalism is the best approach to constitutional law. Suppose, first, that originalism would produce intolerable results, in part because it would be too destabilizing. Suppose, second, that we have reason to distrust the theory-building capacities of judges, so that perfectionism is out of bounds. Suppose finally that, in general or in particular areas, traditions and established practices are more reliable than the results that would be produced by minimalists who are willing to evaluate those traditions and practices by their own light. When these conditions are met, the argument for Burkean minimalism has considerable force.

The contest between Burkean minimalism and its rationalist sibling is much closer. Under some constitutional provisions, above all the Equal Protection Clause, the Burkean approach is hard or perhaps impossible to square with entrenched understandings in American constitutional law—and hence turns out to be self-contradictory. The reason is that some areas of doctrine have long operated on non-Burkean or even anti-Burkean premises. A form of rationalism, allowing and even welcoming challenges to certain forms of discrimination, has become part of the fabric of constitutional law.<sup>267</sup> An even more serious problem is that for some forms of discrimina-

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266. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003); see also *supra* note 139.

267. Indeed, rational basis review, allowing all traditions to be called to account, is an important piece of that fabric, though admittedly such review almost always results in validation. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (upholding mandatory retirement law as rational).

tion it is exceedingly difficult to argue that long-standing traditions reflect wisdom, rather than power and injustice. Here the argument for a form of rationalism, subjecting traditions to critical scrutiny, is quite powerful. In this context, Burke's celebration of "prejudice" makes no sense, and use of the word seems to be a stupid or cruel joke.

But in other domains, the Burkean approach can claim both to be consistent with existing law and to operate in a way that imposes appropriate discipline on judicial judgments. In the areas of separation of powers and national security, for example, Burkean minimalism deserves to have, and indeed has had, a major role, as the Court has proceeded via small steps and with close attention to institutional practices extending over time.<sup>268</sup> If Congress and President Bush have settled on certain accommodations, there is reason to believe that those accommodations make institutional sense. Justice Frankfurter offered the clearest statement of the Burkean position, with his suggestion that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power' vested in the President."<sup>269</sup> In the particular context of national security, Pascal's challenge, emphasizing social learning over time, is least likely to support an aggressive judicial role against the elected branches, simply because this is a domain in which judicial expertise is unlikely.<sup>270</sup>

A highly controversial application of this claim would be a suggestion that the president does indeed have the inherent power to engage in foreign surveillance—ensuring that he may do so as long as Congress has not said otherwise, and perhaps raising the possibility that he may do so even if Congress requires him to follow a specified procedure.<sup>271</sup> Without engaging the complex questions on their merits, let us simply stipulate that the president has long engaged in such surveillance and that it is not simple to find a constitutional provision giving him the "inherent" power to do so.<sup>272</sup> If this is so, the legal question is whether the long-standing practice legitimately produces a "gloss" on Article II, permitting the president to engage in the relevant conduct, certainly in the face of congressional silence and perhaps even overriding congressional will. This is not a simple question to answer,

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268. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Ex parte Quirin*, 317 U.S. 1 (1942). For lower court decisions in the same vein from various stages in recent history, see, for example, *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001); *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981); *United States v. Alocco*, 305 F.2d 704 (2d Cir. 1962).

269. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

270. Note that Frankfurter's argument is not a plea for general judicial deference to the President; more cautiously, it emphasizes the argument for deference when a long-standing practice is at issue.

271. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–13 (2000).

272. The strongest textual grounds would invoke the Commander-in-Chief Clause and the vesting of "executive" power in the president.

and for that reason the Burkean minimalist would want to avoid it. Such a minimalist would seek, to the extent possible, to understand existing legislation in a way that conforms to the President's claim of a "gloss."<sup>273</sup>

I do not mean to offer a particular answer here.<sup>274</sup> Perhaps existing legislation must be understood to override the President's claim of constitutional power. No general approach can resolve concrete cases. But whatever the best resolution of any particular controversy, a Burkean approach to such questions deserves respectful consideration, above all when the stakes are high and courts lack relevant information.

#### D. The Burkean Dilemma

As I have suggested, Burkean minimalism is likely to run into serious problems whenever the legal system has operated for a significant period on premises that Burkeans would reject. If an area of the law has been developed on perfectionist grounds, Burkeans might be tempted to abandon it, perhaps immediately; so too if rationalist minimalism has dominated a particular area of the law. But even more than most, Burkean minimalists respect the demands of *stare decisis*, believing as they do that entrenched decisions may well embody wisdom and that new departures are likely to have unanticipated adverse consequences, especially if existing law is embodied in social practices as well as judicial doctrines. As I have noted, Burkeanism might even risk self-contradiction insofar as it confronts an area of law that has long operated on non-Burkean grounds.

Burkean minimalists have no simple way out of this dilemma.<sup>275</sup> It is certainly reasonable for Burkeans to conclude that their best option is to respect the existing decisions but to attempt to confine them, refusing to extend rulings that fall within the camp of perfectionism or rationalist minimalism.<sup>276</sup> On this view, courts should not build on decisions lacking roots in long-standing traditions—they should narrow them without overruling them. It is easy to see how Burkeans might be drawn to this way of dealing with *Roe v. Wade*.<sup>277</sup> But it would not be out of bounds for Burkeans to conclude that the most indefensible departures from their preferred method must be sharply cabined or even overruled, at least if it is possible to do so without disrupt-

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273. Arguments to this effect can be found in Memorandum from U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 7 (Jan. 19, 2006), available at <http://www.fas.org/irp/nsa/doj011906.pdf> (urging, among other things, that the constitutional questions should be avoided by interpreting relevant legislation so as to allow the President to engage in foreign surveillance). It is not clear, however, if this argument gives sufficient attention, or weight, to the provisions of the Foreign Intelligence Surveillance Act. See 50 U.S.C. §§ 1801–63 (2000).

274. After the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), any defense of the warrantless wiretapping program faces serious obstacles. See Sunstein, *supra* note 46.

275. It will be noticed that this dilemma replicates the problem that originalists encounter when asked to respect the legacy of the Warren Court.

276. *Washington v. Glucksberg*, 521 U.S. 707 (1997), is an example.

277. 410 U.S. 113 (1973).

ing reasonable expectations or undoing a great deal of the fabric of existing law. Committed Burkeans might well take this approach to *Roe*. On this count, rationalist minimalists are very different, tending to take *Roe* as established doctrine, even if they believe that it originally overreached.<sup>278</sup>

These points help to illuminate a possible internal debate, among those with Burkean sympathies, about the proper approach to *Roe*. No Burkean is likely to believe that *Roe* was correct in the first instance; the best arguments for the Court's decision are perfectionist, emphasizing sex equality or personal autonomy with respect to certain kinds of decisions.<sup>279</sup> Skeptical of perfectionism, Burkeans are reluctant to accept those arguments. To the extent that they see *Roe* as an illegitimate departure from their approach, they might be willing to overrule it insofar as they could do so without undoing the fabric of current law or creating a kind of social upheaval. Democratic Burkeans would be especially comfortable with this route.

Other Burkeans might believe, not implausibly, that *Roe* has become embedded not merely in constitutional doctrine but also in social practices, and that a decision to overrule it, especially in the name of some kind of theory, would be too destabilizing. Consider here the Court's refusal to overrule *Miranda*—a decision evidently based on Burkean grounds, seeing the *Miranda* warnings as ingrained in the legal culture.<sup>280</sup> On Burkean premises, one can easily imagine reasonable disagreements on the question of whether to overrule *Roe*. Rationalist minimalists, ambivalent about both *Roe* as originally written and Burke, would be less likely to favor overruling the decision.

Many of the most vigorous disputes in contemporary constitutional law involve the proper resolution of this kind of dilemma.<sup>281</sup> Recall that a similar dilemma can be found in the aftermath of the *Lochner* era, in which the Court did not take a minimalist path, but on the contrary issued ambitious rulings that abruptly did away with decades of decisions.<sup>282</sup> If these ambitious rulings were justified on Burkean grounds or otherwise, it was because of the absence of any legitimate basis for the decisions that preceded them—an especially severe problem in light of the fact that the decisions imposed serious obstacles to democratic initiatives.<sup>283</sup>

278. See Ginsburg, *supra* note 68, at 379–82 (1985) (criticizing *Roe* for deciding too much too soon).

279. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

280. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

281. The most obvious example involves abortion. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Other examples include Congress' power under the commerce clause, see *United States v. Lopez*, 514 U.S. 549 (1995); the right to bear arms, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); the "unitary executive," see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); the scope of the Establishment Clause, see *Mitchell v. Helms*, 530 U.S. 793 (2000); and the reach of substantive due process, see *Glucksberg*, 521 U.S. 707.

282. See *supra* notes 212–215.

283. A contrary view is suggested in 1 ACKERMAN, *supra* note 215 (seeing the New Deal as a constitutional moment).

If the decisions of the New Deal and Warren Courts deserve to be treated with more respect, it is because many of those decisions protect democratic prerogatives,<sup>284</sup> and because many others have a strong claim to legitimacy, not least because they did not come as bolts from the blue. Perhaps the Court's rulings could claim a foundation in a legitimate but non-Burkean approach of one or another sort, calling for judicial deference to political judgments<sup>285</sup> or for a democracy-reinforcing approach to judicial review.<sup>286</sup> Perhaps the Court's rulings were sufficiently rooted in prevailing social commitments or in ordinary processes of case-by-case judgment; perhaps many or most of them were minimalist, or minimalist enough.<sup>287</sup> A final assessment of the question of legitimacy must depend on the merits, whose resolution is not my purpose here. But in the end, an adequate way out of the Burkean dilemma cannot avoid making some such assessment.

### E. *Unfinished Business*

There are three more general issues in the background, and it is now time to bring them into the foreground. The first involves the foundations of Burkeanism; the second involves the grounds for specifying its domain; and the third involves the relationship between Burkeanism and shallowness.

1. *Burkean foundations.* As I have developed it here, Burkeanism does not rest on a belief that the past has any kind of inherent authority, or on a judgment that people owe some kind of duty to the past, or the notion that we are in some way constituted by our tradition (a claim at once true and vacuous). Burkeanism is best justified in pragmatic terms, on the ground that it is likely to lead to better results than the imaginable alternatives. But what can be said against pragmatism can be said here as well: it is necessary to offer some account by which to understand results as good or bad, and by itself, pragmatism cannot supply that account.<sup>288</sup> It is hard to see how pragmatists can be pragmatists all the way down, because they need some kind of account of the good or the right in order to decide what outcomes make pragmatic sense. So, too, it is hard to see how Burkeans can be Burkeans all the way down, in the sense that they need some evaluative standard, if only a very vague one, by which to know that traditions are good. Traditions cannot easily be said to be good simply because they are traditions. (Would Burkeanism make sense for a nation that has experienced decades, or centu-

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284. See Strauss, *supra* note 25.

285. See Thayer, *supra* note 113. Thayer's plea for judicial deference helps to support some of the Court's New Deal rulings, including *United States v. Darby*, 312 U.S. 100 (1941), *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

286. See ELY, *supra* note 28, offering a democracy-reinforcing account that seems to support *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Brown v. Board of Education*, 347 U.S. 483 (1954), without also supporting *Roe v. Wade*, 410 U.S. 113 (1973).

287. See Strauss, *supra* note 25.

288. See DWORKIN, *supra* note 39.

ries, of injustice and oppression? Would Burkeanism, or Burkean minimalism, make sense for contemporary Iraq, Iran, and Cuba?)

Pragmatic Burkeans have several possible responses. They might believe that Burkeanism makes the most sense only for generally well-functioning democratic regimes, such as those in the United States, France, and England. They might claim that the foundation for their own approach is (say) utilitarian, and that Burkeanism is the best way of promoting utilitarian goals. Alternatively, they might say that the foundation of their own view is less sectarian, in the sense that it attempts not to take a stand on the deepest philosophical questions. They might be inclined to embrace a form of consequentialism that sees rights violations as part of what must be counted in the assessment of consequences.<sup>289</sup>

For purposes of evaluating Burkean minimalism in constitutional law, the need for commitment to any kind of foundational approach is diminished if we attend to the theory-building weaknesses of the federal judiciary. In light of those weaknesses, it might be possible to obtain an incompletely theorized agreement in favor of Burkeanism, at least in some domains—that is, an agreement in favor of Burkeanism amidst competing foundational views, or uncertainty about which of those views is correct. Perhaps Burkean minimalism can be accepted by those with highly disparate foundational accounts. But much more work needs to be done on this question.

2. *Burkean domains.* The second bit of unfinished business involves the specification of the domains in which Burkean minimalism makes sense. The analysis here has been inductive and impressionistic, with equal protection and separation of powers being taken as the polar cases. It would be much better to have a general account of when the grounds for Burkeanism are most likely to be satisfied, and to try to bring that account to bear on particular cases. As a first approximation, we might notice that Burkeanism seems most appealing when traditions have been accepted by many independent minds. If so, we might be inclined to ask whether the relevant tradition does, in fact, reflect the independent judgments of many people, or whether it is likely to reflect instead a cascade, in which most people simply followed the initial practice. Or perhaps the tradition is a product not of many independent people but some kind of injustice and coercion—a kind of imposition from above, rather than a genuinely shared practice.

With an approach of this kind, it might be possible to offer a better explanation of why the Equal Protection Clause, and perhaps the free speech principle as well, should not be understood in Burkean terms. For one thing, practices of discrimination on the basis of race and sex certainly do not reflect the independent judgments of those subject to discrimination. Often African-Americans and women rejected those very practices. To the extent that they were willing to accept them, there is good reason to think that their

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289. See Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3 (1982); Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1037–42 (1996).

actions and even their beliefs were adaptive to an unjust status quo.<sup>290</sup> If so, the foundations for Burkeanism are absent.

Freedom of speech can be seen as a precondition for faith in traditions. If people are not allowed to say what they think, then the independent judgments that support traditions are much less likely to be found. At least with respect to political issues, then, it would be odd to say that a nation should allow suppression of speech if it has long allowed suppression of speech. An entrenched practice of censorship cannot easily provide its own foundations.

Return in this light to the three cases with which this Article began. The easiest one involves the status of independent agencies. Such agencies have existed for many decades, and a judicial decision to forbid the independent agency form would wreak a kind of havoc—raising constitutional doubts about the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board, the National Labor Relations Board, and many other established institutions. There is no sufficiently persuasive reason to reject the Burkean suggestion that courts should not lightly unsettle existing arrangements, long accepted by both Congress and the President.

The use of the words “under God” in the Pledge of Allegiance is harder. Of course the Burkean minimalist knows what to do, which is to uphold the Pledge in the current form in which it has existed for many decades. The problem, emphasized by rationalist minimalists and by perfectionists, is that millions of Americans do not believe in God—and their own convictions are rejected in the national pledge to the country that they love. Perhaps the Establishment Clause should be construed to require principle of neutrality that would forbid government from taking this kind of stand in its national pledge. On balance, however, the better view seems to be that courts should permit the long-standing practice on the ground that the Pledge is not a religious ceremony, that no one is required to speak the words, and that the mere use of the term (“under God”) is not so sectarian as to justify invalidation. With respect to a practice that is so ingrained, it is probably best to say: *De minimis non curat lex*.

As I have suggested, the question of foreign surveillance cannot be resolved without carefully parsing the relevant statutes. It would be possible for Burkeans to say that if the president has long engaged in this practice, and if courts have long permitted him to do so, he can continue unless Congress has clearly said otherwise. If the Foreign Intelligence Surveillance Act clearly says otherwise, then the long-standing tradition should yield unless the Constitution is best read to give the president surveillance authority that is at once inherent and exclusive; and it is not easy to read the document, or the relevant traditions, to confer that authority.<sup>291</sup>

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290. On adaptive preferences, see JON ELSTER, *SOUR GRAPES* (1983); CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 256–58 (1997); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); and Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

291. See Sunstein, *supra* note 46.

These brief comments do not, however, provide anything like a full explanation of how to distinguish among the domains for which Burkean minimalism is and is not well-suited. Here too much more work remains to be done.

3. *Burke and shallowness.* Throughout I have treated Burkean minimalism as if it were committed to shallowness. In one sense this is obviously true: Burkeans distrust theoretical ambition, and they hope for rulings that avoid abstract commitments or theoretical positions of any kind. But once we give an account of Burkeanism, it is not so clear that depth can be avoided. If Burkeanism is treated as a heuristic for some other value—say, utilitarianism—then it stands or falls with that value. I have suggested the possibility of incompletely theorized agreements on behalf of Burkeanism, but it is not clear how incomplete the theorization will turn out to be. Those who stress traditions will have to reject certain commitments, that is, those that are incompatible with the relevant traditions.

For those who link Burkeanism and shallowness, there is an even more troublesome point. An understanding of Burkeanism might, in the end, require an account that is not so shallow after all. As I have presented it here, Burkeanism is most plausible if it is emphasized that traditions often reflect the independent judgments of many agents, and hence embody their dispersed wisdom or at least a good deal of sense. But once Burkeanism is understood and defended in these terms, it might appear at once deep and contentious—and thus prove unable to avoid dispute at the theoretical level. At that stage, the most that the Burkean might say is that if a practice embodies the judgments of diverse people, it is likely to be good, whatever our criteria for deciding what goodness entails. Perhaps that claim is enough to produce an agreement among those with competing theoretical accounts, or with a degree of confusion about the appropriate account.

#### CONCLUSION

One of my main goals here has been to offer a pragmatic understanding of Burkeanism, one that opposes each person's "private stock of wisdom" to the judgments embodied in long-standing practices. On this approach, Burkeanism is not best defended on the (unhelpfully platitudinous) ground that societies are constituted by their past, or on the (implausibly mystical) ground that the past has authority over the present. Burkeanism is best defended on the ground that those who follow entrenched practices, or who attempt humbly to build on them, will do much better than those who abandon traditions or evaluate them by reference to an abstract theory. And on this view, the apparent sentimentality of Burke's account, and his highly emotional writing, might themselves be understood in pragmatic terms.<sup>292</sup> A

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292. I do not contend that Burke was self-consciously attempting this strategy. Note as well that the Burkean argument for deference to tradition depends on the assumption that many people have contributed to that tradition. If foreign surveillance has been a secret practice, not known widely even in Congress, then it stands on less firm ground than do (for example) independent regulatory commissions. (Thanks to Seana Shiffrin for pressing this point.)

sentimental or emotional attachment to traditions may be the best or perhaps the only way to prevent people from relying on their private stock of wisdom—especially in view of the risk that passions can be much stirred by those who attack traditions.

I have also attempted to show that Burkean minimalism offers a distinctive approach to constitutional law. Like other minimalists, Burkeans value narrow, incompletely theorized rulings and thus reject both width and depth. What Burkeans add is an emphasis on the need to develop law with close reference to established practices and traditions, and a corresponding distrust of judicial judgments that are not firmly rooted in long-standing experience. In their years on the Supreme Court, Justices Frankfurter and O'Connor were frequently drawn to Burkean minimalism. Of course there are big differences between the two. Most notably, Justice Frankfurter sat during the early stages of the Warren Court, many of whose initiatives he attempted to resist; Justice O'Connor sat in the aftermath of the Warren Court, many of whose initiatives she attempted to preserve. Committed Burkeans, especially those with democratic sympathies,<sup>293</sup> might plausibly endorse Justice Frankfurter's efforts at resistance while questioning Justice O'Connor's efforts at preservation.

It is also reasonable to accept one half of Burkean minimalism—to resist theoretical ambition and in that sense to accept shallowness, while also insisting that rule-bound judgments often make a great deal of sense.<sup>294</sup> It is certainly possible to endorse a Burkean conception of the judicial role while rejecting a Burkean approach to politics in general. This position might be defended on the ground that while Burkeanism is a helpful way of disciplining judges, citizens require no such discipline, and do not benefit from it. Jefferson, Pascal, and Bentham might be enlisted on behalf of this view; recall the suggestion that current generations are the ancients, because they have the most experience.

One of my major claims has been that no theory of constitutional interpretation makes sense in every imaginable context. While the most committed Burkeans will favor their method in all domains, I have contended that the argument for Burkean minimalism is much stronger in some areas than in others. It has least force in cases involving official discrimination, where traditions are unreliable, and far more appeal in the area of separation of powers, where sensible practices are likely to have evolved over time. But the central point is much broader. Where originalism would produce unacceptable consequences, where traditions and long-standing practices deserve respect, and where there is reason to distrust the theory-building capacities of federal judges, Burkean minimalism has a legitimate and enduring claim on our attention.

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293. Recall the difference between thoroughgoing Burkeans, who value traditions as such, and Democratic Burkeans, who emphasize the role of Burkeanism in constitutional law without insisting on Burkeanism for the political process. *See* text accompanying notes 120–122.

294. Whether it does so depends on the set of considerations that lie behind the debate over rules and standards. *See* Kaplow, *supra* note 58.