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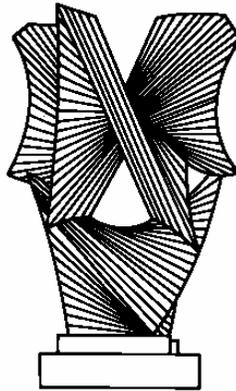
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## BURKEAN MINIMALISM

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## Burkean Minimalism

Cass R. Sunstein \*

### Abstract

*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.*

*No approach to constitutional law makes sense in every imaginable world. 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.*

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>

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<sup>1</sup> Edmund Burke, Reflections on the Revolution in France, in *The Portable Edmund Burke* 456-57 (Isaac Kramnick ed.) (1999).

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>2</sup>

## I. Approaches

Consider the following cases:

1. For over fifty years, the words “under God” have been part of the Pledge of Allegiance.<sup>3</sup> Parents object to the use of those words, arguing that under existing principles, the reference to God must be taken to count as an establishment of religion.<sup>4</sup>
2. 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>5</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>6</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.
3. For over seventy years, the Supreme Court has permitted Congress to create “independent” regulatory agencies—agencies whose heads are immune from

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<sup>2</sup> The Federalist No. 1.

<sup>3</sup> See *Elk Grove Unified School Dist. v. Newdow*, 524 U.S. 1, 16 (2004) (Rehnquist, C.J., dissenting).

<sup>4</sup> See *id.*

<sup>5</sup> In federal court, the authority to engage in such surveillance has been asserted for at least thirty-five years. See *United States v. Clay*, 4390 F.2d 1165 (5<sup>th</sup> 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*, *New York Times*, Jan. 13, 2006, at A23, but it appears that such surveillance extends at least far back as a decision of Franklin Delano Roosevelt in 1940, see United States Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President 7* (January 19, 2006).

<sup>6</sup> See *US v. Truong Dinh Hung*, 629 F2d 908, 912-15 (4<sup>th</sup> Cir 1980); *US v. Buck*, 548 F2d 871, 875-76 (9<sup>th</sup> Cir 1977); *US v. Butenko*, 494 US 881 (3d Cir 1974); *US v. Brown*, 484 US 418, 426 (5<sup>th</sup> Cir 1973); *In Re Sealed Case 02-001*, 310 F3d 717 (Foreign Intelligence Court of Review 2002).

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>

Each of these cases presents a conflict between longstanding practices and what is 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 the Constitution, courts should be closely attentive to longstanding practices, and must often 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 as such.

Those who make such arguments adopt an approach to constitutional law that I shall call *Burkean minimalism*.<sup>9</sup> Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, and with close reference to longstanding practices. Like all minimalists, Burkeans insist on incrementalism; but they also emphasize the need for judges to pay careful heed to established traditions<sup>10</sup> and to avoid independent moral and political argument of any kind. On this count, Burkean minimalists should be distinguished from their rationalist counterparts, who are less focused on longstanding practices, and who are more willing to require an independent justification for those practices.<sup>11</sup> In the nation’s history, Justices Felix Frankfurter and Sandra Day O’Connor have been the most prominent practitioners of Burkean

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<sup>7</sup> *Humphrey’s Executor v US*, 295 US 602 (1935).

<sup>8</sup> See Geoffrey Miller, *Independent Agencies*, 1986 Sup Ct Rev 41.

<sup>9</sup> A good illustration is *Youngstown Co. v. Sawyer*, 343 US 579, 610-611 (Frankfurter, J., concurring). For a concise 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 this challenge, with the suggestion that Burkean minimalism is a plausible response to limited information and bounded rationality on the part of courts and judges.

<sup>10</sup> See, for example, the emphasis on the history of executive claims settlement in *Dames & Moore v. Regan*, 453 US 654, 683-86 (1981).

<sup>11</sup> 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 theoretical ideal of active liberty).

minimalism, in the sense that they have tended to favor small steps and close attention to both experience and tradition.<sup>12</sup>

Within conservative legal thought, Burkean minimalism is opposed to those who adopt two alternative approaches. The first is *originalism*. Originalists, including Justice Antonin Scalia<sup>13</sup> and Clarence Thomas,<sup>14</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 provides the lodestar for constitutional interpretation. Departures from that understanding are illegitimate, even if those departures are longstanding. 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.<sup>15</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>16</sup> the effort to strike down restrictions on commercial advertising,<sup>17</sup> and the movement to protect property rights against "regulatory takings."<sup>18</sup> Conservative perfectionists are not greatly concerned with the original understanding of the founding document, and they are entirely willing to renovate longstanding practices by reference to ambitious ideas about

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<sup>12</sup> See notes supra. 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 *Brown v. Bd. of Education*, 347 US 483 (1954), and Justice O'Connor concurred in the result in *Lawrence v. Texas*, 539 US 558 (2003).

<sup>13</sup> See Antonin Scalia, *A Matter of Interpretation* 37-47 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989).

<sup>14</sup> See, e.g., *Elk Grove Unified School Dist v. Newdow*, 542 U.S. 1, 49-53 (2004) (Thomas, J., concurring in the judgment) (arguing for return to original understanding of Establishment Clause).

<sup>15</sup> See, e.g., *West Virginia State Bd. of Educ v. Barnette*, 319 US 624, 646 (1943) (Frankfurter, J., dissenting) (rejecting invalidation of flag salute); *Baker v. Carr*, 369 US 186, 266 (1962) (Frankfurter, J., joined by Harlan, J., dissenting) (concluding that constitutionality of reapportionment schemes should be treated as a nonjusticiable political question). There are exceptions. See, e.g., *Reynolds v. Sims*, 377 US 533, 589 (1964) (Harlan, J., dissenting) (offering a historical challenge to one person, one vote principle).

<sup>16</sup> See, e.g., *Grutter v. Bollinger*, 539 US 306, 364 (Rehnquist, CJ, dissenting) (invoking principle of color-blindness as basis for attack on race-conscious admissions policy).

<sup>17</sup> See, e.g., *Central Hudson Gas v. Public Service Comm.*, 447 US 557 (1980).

<sup>18</sup> See, e.g., *Penn Central Transp. Co. v NYC*, 438 US 104, 138 (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).

constitutional liberty.<sup>19</sup> The most influential members of the *Lochner* Court were conservative perfectionists<sup>20</sup>; in the last decades, Chief Justice Rehnquist showed an occasional interest in conservative perfectionism.<sup>21</sup>

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>22</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>23</sup> developing constitutional law by reference to a theory of democracy<sup>24</sup> and protecting traditionally disadvantaged groups from majoritarian processes.<sup>25</sup> All three approaches are at least skeptical of *Roe v. Wade*,<sup>26</sup> the effort to remove religion from the public sphere,<sup>27</sup> and the attempt to grant new protections to suspected criminals.<sup>28</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>29</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<sup>30</sup>; it calls for dramatic movements in the law, and it is unacceptable for exactly that reason. Burkean minimalists prize stability, and they are entirely willing to accept

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<sup>19</sup> See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 US 484, 515 (1996)(Thomas, J., dissenting) (arguing for broad protection of commercial advertising).

<sup>20</sup> For evidence, see cases cited in note supra; 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.

<sup>21</sup> See, e.g., 438 US at 138-150 (Rehnquist, J., dissenting).

<sup>22</sup> But see the important discussion in David Strauss, *The Common Law Genius of the Warren Court*, available at [ssrn.com](http://ssrn.com), 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 (familiar within the common law but incompatible with Burkeanism).

<sup>23</sup> *US v. Carolene Products*, 304 US 144, 153 n. 4 (1938).

<sup>24</sup> A recent effort in this vein is Stephen Breyer, *Active Liberty* (2005); notably, Breyer favors minimalism in the sense of small steps, see *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.

<sup>25</sup> The most important exposition is John Hart Ely, *Democracy and Distrust* (1983).

<sup>26</sup> 410 US 113 (1973).

<sup>27</sup> See, e.g., *Stone v. Graham*, 449 US 39 (1980).

<sup>28</sup> See, e.g., *Miranda v. Arizona*, 384 US 436 (1966).

<sup>29</sup> See Ronald Dworkin, *A Matter of Principle* (1985). As we shall see, 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.

<sup>30</sup> For a concise statement, Thomas Merrill, *Bork v. Burke*, 19 *Harv J Law and Pub Pol* 509 (1996). Charles Fried, *Saying What The Law Is* (2004), might well be taken as an elaboration of Burkean minimalism.

decisions that do not comport with the original understanding, simply because a decision to overrule them would disrupt established practices. To Burkean minimalists, originalism looks uncomfortably close to the French Revolution, seeking to overthrow settled traditions by reference to a theory.<sup>31</sup>

Nor do Burkean minimalists have any enthusiasm for conservative perfectionism, which they consider far too rationalistic. To be sure, they are willing to build on existing law through analogical reasoning, and this process of building 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, congressional 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 two goals in this Article. The first is to identify the ingredients of Burkean minimalism—an approach that has both integrity and coherence, that has played a large role in the history of American constitutional thought, and that casts some new light on a number of contemporary disputes. My second goal is to answer a simple question: Under what assumptions and conditions would Burkean minimalism be most appealing? One of my central claims is that no approach to constitutional interpretation makes sense in every possible world. It is certainly possible 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. Bd. of Educ.*<sup>32</sup> exemplifies. Whether or not *Brown* can be defended as minimalist,<sup>33</sup> it is not easily characterized as Burkean, simply because it disrupted an established institution in the name of a theory, involving equality

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<sup>31</sup> See Merrill, *supra* note, at 512-14.

<sup>32</sup> 347 US 483 (1954).

<sup>33</sup> *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 (5<sup>th</sup> ed. 2005). And *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. See David Strauss, *The Common Law Genius of the Warren Court*, available at [ssrn.com](http://ssrn.com). I believe, however, that it is a stretch to see *Brown* in Burkean terms, insofar as the decision showed a willingness to uproot a longstanding institution by reference to an account of racial equality.

on the basis of race.<sup>34</sup> 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. Rationalist minimalism, subjecting traditions to critical scrutiny, has played a large role in the domains of race and sex discrimination; in other areas, there may be an argument for some kind of perfectionism as well.<sup>35</sup>

I shall suggest that the case for Burkean minimalism is most plausible when three conditions are met: (1) originalism would produce unacceptable consequences, (2) longstanding traditions and practices are trustworthy, or at least trustworthy enough, (3) there is great reason to be skeptical of the rule-elaborating and theory-building capacities of federal judges. Those who tend to accept Burkean minimalism—above all Justices Frankfurter and O'Connor—apparently believe that these three conditions are pervasive. As we shall see, the argument for Burkean minimalism is extremely strong in the area of national security, where the Court rightly gives attention to longstanding practices. As we shall also see, 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 power to the appropriately Burkean response to non-Burkean, or anti-Burkean, precedents.

## 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>36</sup> First, minimalists favor rulings that are *narrow rather than wide*. Narrow rulings do not venture far beyond the problem at hand; they 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. To be sure, the difference

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<sup>34</sup> It would be possible to see *Brown* as reflecting no theory, and certainly no a priori theory, but instead a judgment rooted in experience, to the effect that racial segregation stigmatized or subordinated African-Americans. But even if *Brown* is so understood, it is hard to justify on Burkean grounds, simply because it disrupted an entrenched institution.

<sup>35</sup> See Ronald Dworkin, *Justice In Robes* (2006).

<sup>36</sup> I explore minimalism in Cass R. Sunstein, *One Case At A Time* (1999); Cass R. Sunstein, *Radicals in Robes* (2005).

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 the 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, and they fear the potentially harmful effects of decisions that reach broadly beyond the case at hand.<sup>37</sup>

With respect to the war on terror, for example, the Court has favored narrow rulings, failing to say anything about the President’s power as Commander-in-Chief and generally leaving a great deal undecided.<sup>38</sup> Or consider the “undue burden” standard in the area of abortion<sup>39</sup>—a standard that is rule-free and that calls for close attention to the details of the particular restriction at issue.<sup>40</sup> In the domain of affirmative action, the Court’s rulings have been insistently particularistic, arguing that while one program is unacceptable, another one might not be.<sup>41</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>42</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 national “eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncement.”<sup>43</sup> In his view, the Court’s duty “lies in the opposite direction,” through judgments that make it unnecessary to consider “delicate

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<sup>37</sup> See the discussion of privacy in Stephen Breyer, *Active Liberty* (2005); see also Cass R. Sunstein, *Problems With Minimalism*, *Stan L Rev* (forthcoming 2006).

<sup>38</sup> See *Hamdi v. Rumsfeld*, 542 US 507 (2004); *Rasul v. Bush*, 124 S Ct 2686 (2004); *Ex Parte Quirin*, 317 US 1 (1942)..

<sup>39</sup> See *Planned Parenthood v. Casey*, 505 US 833 (1992).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Adarand Construction Contractors v. Peña*, 515 US 200 (1995); *City of Richmond v. Croson*, 488 US 469 (1989).

<sup>42</sup> 343 US at 594-597.

<sup>43</sup> *Id.* at 594.

problems of power under the Constitution.”<sup>44</sup> Thus the Court has an obligation “to avoid putting fetters upon the future by needless pronouncements today.”<sup>45</sup> 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>46</sup> Frankfurter is arguing for minimalism on the ground that it reduces the risk that erroneous judicial decisions will impose undesirable limits on democratic processes.<sup>47</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 consequences, particularly if they are difficult to reverse.<sup>48</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>49</sup> Unlike legislators and administrators, judges frequently do not “see” a broad array of fact patterns, suitable for decision by rule. 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 wide rule in which it is possible to have 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>50</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 fundamental issues. For example, there are many disputes about the underlying purpose of the free speech guarantee<sup>51</sup>: Does the

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<sup>44</sup> Id at 595.

<sup>45</sup> Id at 596.

<sup>46</sup> Id. at 597.

<sup>47</sup> In the same vein, see Breyer, *supra* note, at 69-74 (emphasizing need for cautious, narrow decisions on questions involving relationship between privacy and modern technologies).

<sup>48</sup> See Dietrich Dorner, *The Logic of Failure* (1996) (stressing the value, in experimental settings, of attempting to settle social problems by taking small, reversible steps).

<sup>49</sup> Admittedly, issues before the Supreme Court are often quite general rather than heavily particularistic, as for example in cases of broad challenges to statutory restrictions. See, e.g., *Lawrence v. Texas*, 539 US 558 (2003). One of the distinctive features of Burkean minimalism is an effort to revolve a case in a way that makes it less general than it might be taken to be.

<sup>50</sup> See Louis Kaplow, *Rules vs. Standards: An Economic Approach*, 42 *Duke LJ* 557 (1992).

<sup>51</sup> See Frederick Schauer, *Free Speech: A Philosophical Inquiry* (1990).

guarantee aim of protect 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>52</sup>

The minimalist preference for shallowness is rooted in three considerations. First, shallow decisions, no less than narrow ones, simplify the burdens of decision. 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 judicial judgment in favor of one or another foundational account may well produce significant mistakes; shallowness is less error-prone, simply by virtue of its agnosticism on the great issues of the day. If several foundational accounts, or all contenders, can converge on a rationale or an 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 large questions.<sup>53</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>54</sup> This practical point is supplemented by the fact that those who seek shallowness are demonstrating respect for competing foundational commitments.<sup>55</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.<sup>56</sup> 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>57</sup> Narrow rulings reduce the burdens imposed on judges in the case at hand, but they also “export” decisionmaking

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<sup>52</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733 (1993).

<sup>53</sup> John Rawls, *Political Liberalism* 147-48 (1993)

<sup>54</sup> See the discussion of “modus vivendi” liberalism in *id.* at 146-49 (1993).

<sup>55</sup> Of course some such commitments are rightly placed out of bounds as a foundation for law; consider the commitment to slavery or to oppression of religious minorities.

<sup>56</sup> See Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U Chi L Rev 1175 (1989); Sunstein, *Problems With Minimalism*, *supra* note.

<sup>57</sup> See Kaplow, *supra* note.

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 uncertainty in the system.<sup>58</sup>

Shallowness certainly has its virtues. But if a deep theory is correct, perhaps judges ought to adopt it. 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. Suppose, 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 accept 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. Two Kinds of Minimalism**

*1. Practices and judgments.* It is important to distinguish between Burkean minimalism and its more rationalist counterpart, which might be associated with Justices Ruth Bader Ginsburg<sup>59</sup> and Stephen Breyer.<sup>60</sup> Of course Burkeans prize shallowness; opposition to ambitious theories is part of the defining creed of Burkeanism.<sup>61</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 to ask whether established practices can survive critical scrutiny.

This difference should not be overstated. No real-world minimalist is likely to accept all traditions as such. Indeed, there are both conceptual and practical problems

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<sup>58</sup> See Adrian Vermeule, *Judging Under Uncertainty* (2006).

<sup>59</sup> See, e.g., *United States v. Virginia*, 518 US 515 (1996) (offering theoretical account of problem of sex discrimination). It is important to be careful with these comparisons. Justice Ginsburg believes in small steps and has strong Burkean inclinations. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 NC L Rev (1985) (criticizing *Roe v. Wade* for proceeding too rapidly).

<sup>60</sup> See Stephen Breyer, *Active Liberty* (2005). Justice Breyer, no less than Justice Ginsburg, is respectful of precedent and has Burkean inclinations -- 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 Educational Telecommunications Consortium v. FCC*, 518 US 727 (1996). But insofar as Breyer emphasizes a theoretical account for organizing constitutional law, see *Active Liberty*, *supra*, at 15-33, his approach is easily distinguished from that of Justices O’Connor and Frankfurter, who had no such account.

<sup>61</sup> See below.

with any effort to take that path.<sup>62</sup> No real-world minimalist is likely to be willing 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>63</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 understanding of the separation of powers to strike down a longstanding practice—say, foreign surveillance by the president, or presidential war-making without congressional authorization.<sup>64</sup> On this view, judges in constitutional cases should follow a distinctive conception of the role of common law judges, which is to respect and mimic, rather than to evaluate, time-honored practices.<sup>65</sup> In a sense, Burkean courts attempt a delegation of power, from individual judges to firmly rooted traditions.<sup>66</sup> For such Burkeans, ambiguous constitutional provisions should be understood by reference to such traditions,<sup>67</sup> and judges should be reluctant to allow litigants to challenge them. Indeed, judges might even question democratic initiatives that reject traditions without very good reason.

Second, Burkeans might stress not social practices but the slow evolution of judicial doctrine over time—and therefore reject sharp breaks from the judiciary’s own past. For such Burkeans, what is most important is the judiciary’s prior judgments, which

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<sup>62</sup> 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 these problems up below.

<sup>63</sup> Compare, for example, the Court’s emphasis on an “emerging awareness” about the content of liberty in *Lawrence v. Texas*, 539 US 556, 572 (2003), with the argument for deference to traditional morality in *id.* at 586-97 (Scalia, J., dissenting).

<sup>64</sup> 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).

<sup>65</sup> 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.

<sup>66</sup> 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.

<sup>67</sup> An obvious example involves presidential power in the domain of international relations, where longstanding practices play a large role in interpretation. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 US 653 (1981); *Ex Parte Quirin*, 317 US 1 (1942).

should in turn be based on a series of small steps, and should avoid radical departures. And on this view, current judges should respect those judgments.

There are large differences between an approach that focuses on social practices and one that focuses on judicial doctrine. Those who emphasize practices would be skeptical of evolutionary movements in constitutional law *if* those movements depend solely 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 small steps that reflect the judges' own judgments over time. But for those who see the evolution of judge-made constitutional law as an acceptably Burkean project, judicial steps deserve respect, especially in light of the fact that those steps are unlikely to depart radically from public convictions.<sup>68</sup>

2. *Burke*. Burke himself emphasized social practices rather than judicial judgments; but he tended to collapse the two.<sup>69</sup> I do not attempt anything like an exegesis of Burke, an exceedingly complex figure, in this space,<sup>70</sup> but let us turn briefly to Burke himself and in particular to his great essay on the French Revolution, in which he rejected

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<sup>68</sup> See Robert Dahl, *Decisionmaking in a Democracy: The Supreme Court as National Policymaker*, 6 J Public Law 279 (1957).

<sup>69</sup> 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 as important as it seems to be. And indeed that does seem to be an empirical fact. For an early treatment, see Robert Dahl, *Decisionmaking in a Democracy: The Supreme Court as National Policymaker*, 6 J Public Law 279 (1957); for a 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 require it to follow longstanding 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 *The Steel Seizure Case*, 343 US at 610-11 (Frankfurter, J., concurring), and the less Burkean or perhaps non-Burkean practice of “updating” constitutional understandings to fit with values perceived as contemporary, see *Roper v. Simmons*, 543 U.S. 1160 (2004).

<sup>70</sup> The literature is vast. See, e.g., Isaac Kramnick, *The Rage of Edmund Burke* (1977); S. Blakemore, *Burke and the Fall of Language* (1988); S. Ayling, *Edmund Burke: His Life and Opinions* (1988); Conor Cruise O'Brien, *The Great Melody: A Thematic Biography of Edmund Burke* (1992); D. Ritchie, *Edmund Burke: Appraisals and Appreciations* (1990).

Within the legal literature, the most influential discussion is Anthony Kronman, *Precedent and Tradition*, 99 Yale LJ 1029 (1990). My own treatment of Burkean minimalism is very 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 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, and 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.

the revolutionary temperament because of its theoretical ambition.<sup>71</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>72</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 his most 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 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>73</sup>

Thus Burke stresses the need to rely on experience, and in particular the experience of generations; and 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>74</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>75</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>76</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," simply "because we suspect that this stock in each man is small, and that the individuals would do better to

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<sup>71</sup> Edmund Burke, *Reflections on the Revolution in France*, in *The Portable Edmund Burke* 416-451 (Isaac Kramnick ed. 1999).

<sup>72</sup> *Id.* at 442.

<sup>73</sup> Edmund Burke, *Reflections on the Revolution in France*, *supra* in *The Portable Edmund Burke*, at 451.

<sup>74</sup> *Id.* at 428.

<sup>75</sup> *Id.* at 451.

<sup>76</sup> *Id.*

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>77</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 a group will be right increases to 100% as the size of the group expands.<sup>78</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 probable that “latent wisdom” will “prevail in them,” at least if most of the relevant people are more likely to be wrong than right. The fact that a tradition has been able to persist 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 might be 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 people decide independently in favor of them, but because people simply follow other people.<sup>79</sup> This is an important objection to Burkeanism in all its forms, and I will return to it below.<sup>80</sup> 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, it would be possible for Burke to express some skepticism about the common law, treating it as a form of a priori intervention by unaccountable officials whose decisions are unrooted 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>81</sup> Burke contends that “with all its defects,

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<sup>77</sup> Id.

<sup>78</sup> For a good 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, 15254 (2002).

<sup>79</sup> For discussion, see Cass R. Sunstein, Infotopia: How Many Minds Produce Knowledge (forthcoming 2006).

<sup>80</sup> See below.

<sup>81</sup> Id. 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>82</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>83</sup> Burke appears to be seeing the common law as a form of customary law, developing with close reference to actual practice, which it tends to codify.

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 would never have occurred to Burke to explore the nature and limits of that power. Indeed, a faithful Burkean 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. But for those who sympathize with Burke’s arguments, a Burkean account of judicial review is not difficult to sketch. The central point is that courts ought to protect time-honored practices from renovations based on theories, or passions, that show an insufficient appreciation for them. The goal would be to provide protection against the revolutionary 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>84</sup> struck an unmistakably Burkean chord when he wrote that the clause would be violated if “a rational and fair man necessarily

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<sup>82</sup> *Id.*

<sup>83</sup> 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 (Chiaka Nishiyama et al. 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 his most 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.* at 330.

<sup>84</sup> See below; see also Richard A. Posner, Introduction, in *The Essential Holmes* ix, xxii-xxiii (noting Holmes’ skepticism and pragmatism) (Richard A. Posner ed. 1992).

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>85</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. Thus 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>86</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>87</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 spurred, the focus was on “an Anglo-American regime,” which placed the emphasis squarely on an identifiable tradition.

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, solid recognition of the values that underlie our society . . .”<sup>88</sup> More recently, efforts to cabin the use of substantive due process have been rooted in the suggestion that unless the right in question can claim traditional protection, courts should not intervene.<sup>89</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>90</sup> Thus the Court’s inquiry was framed by asking “whether this asserted right has any place in our Nation’s tradition.”<sup>91</sup>

On this highly Burkean view, growing out of Holmes’ dissenting opinion in *Lochner*, the Court should not strike down legislation merely because it offends the

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<sup>85</sup> *Lochner v. New York*, 198 US 45, 55 (1905) (Holmes, J., dissenting).

<sup>86</sup> *Rochin v. United States*, 342 US 165, 169 (1952).

<sup>87</sup> *Duncan v. Louisiana*, 391 US 145 (1968).

<sup>88</sup> *Griswold v. Connecticut*, 381 US 479, 501 (1965) (Harlan, J., concurring in the judgment).

<sup>89</sup> *Washington v. Glucksberg*, 521 US 707 (1997) (emphasizing need to apply due process clause by reference to established traditions).

<sup>90</sup> *Id.* at 712.

<sup>91</sup> *Id.*

judges' 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 longstanding 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>92</sup>

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. Burkeanism can operate as a shield or a sword. 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>93</sup> When government is acting in a way that seems to favor a kind of religion belief, Burkeans should not object if that form of favoritism has clear support in social traditions. Strikingly, Chief Justice Rehnquist's defense of the use of the words "under God" in the Pledge of Allegiance is an almost entirely Burkean exercise, stressing practices rather than reasons for practices.<sup>94</sup> If 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>95</sup> In fact we could easily imagine an endorsement, by many Burkeans, of a kind of bipartisan restraint, on the theory that decisions about whether to change longstanding practices should be made democratically, not by judges at all.<sup>96</sup>

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<sup>92</sup> See, e.g., *Lawrence v. Texas*, supra. 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?*, 2003 Supreme Court Review 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 long subject to a pattern of nonenforcement; perhaps the Burkean would bow to social practice in such circumstances.

<sup>93</sup> Insofar as Justice Scalia has emphasized the need to permit traditional morals regulation, he has made strongly Burkean arguments. See, e.g., *Lawrence v. Texas*, supra, at 586-97 (Scalia, J., dissenting).

<sup>94</sup> See *Elk Grove Unified School Dist. v. Newdow*, 542 US 1, 26-32 (2004) (Rehnquist, CJ, concurring in the judgment). What is striking about Chief Justice Rehnquist's opinion is its almost exclusive reliance on historical practices, treated as closely analogous to the use of the words "under God" in the Pledge of Allegiance.

<sup>95</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 593, 612-13 and in particular the lengthy historical appendix at 615 (Frankfurter, J., concurring).

<sup>96</sup> For a classic defense of bipartisan restraint, see James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

In his dissenting opinion in *United States v. Virginia*,<sup>97</sup> Justice Scalia spoke in exactly these terms. He begins by emphasizing that the Virginia Military Institute “has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.”<sup>98</sup> On this view, the longevity of sex segregation at VMI is a good reason for the Court to stay in 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>99</sup> Justice Scalia concludes that this democratic liberty, to alter existing practices, is itself time-honored: “So to counterbalance the Court’s criticisms of our ancestors, let me say a word in their praise: they left us free to change.”<sup>100</sup>

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>101</sup> This is Holmes’ understanding of substantive due process, as including a (sharply limited) role for traditional barriers on government behavior. There are analogues in other domains, where established traditions have also helped to convince courts to impose limits on what government may do.<sup>102</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>103</sup>

4. *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. 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

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<sup>97</sup> 518 US 515, 528 (1996) (Scalia, J., dissenting).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 530.

<sup>100</sup> *Id.*

<sup>101</sup> See *Moore v. City of East Cleveland*, 431 US 494 (1977).

<sup>102</sup> See, e.g., *Kent v. Dulles*, 357 US 116 (1958) (emphasizing longstanding practices in limiting authority of Secretary of State to deny passports to Communists).

<sup>103</sup> *Romer v. Evans*, 517 US 620, 629 (1996).

urged, largely in the interest of width.<sup>104</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 much narrower 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>105</sup> That view 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>106</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—favor narrowness no less than shallowness, on the evident ground that in the most controversial domains, wide rulings are too likely to produce error.<sup>107</sup>

5. *Burke and rational criticism of traditions.* Rationalist minimalists seek narrowness and shallowness, but they are entirely willing to rethink traditions and established practices. An underlying idea is that traditions are often unjust and that society frequently progresses by subjecting them to serious challenge. On this view, the delegation of decision-making authority to longstanding traditions is perverse, and Burke was quite wrong to treat “prejudice” as a word of approval.

Consider, for example, the long series of decisions striking down discrimination on the basis of sex.<sup>108</sup> In those decisions, the Court did not act abruptly; it built up the doctrine by small, incompletely theorized steps. But it could not claim to rest on traditions. On the contrary, the sex discrimination cases squarely reject Burkeanism by

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<sup>104</sup> See *Michael H. v. Gerald D.*, 491 US 110 (1989) (plurality opinion of Scalia, J.).

<sup>105</sup> See *Elk Grove Unified School District*, *supra* (Rehnquist, C.J., dissenting).

<sup>106</sup> Burke himself emphasizes the non-static nature of traditions. See note *infra*.

<sup>107</sup> See, e.g., *Youngstown Co. v. Sawyer*, 343 US 579, 610-611 (Frankfurter, J., concurring); *City of Chicago v. Morales*, 527 US 31, 64 (1999) (O'Connor, J., concurring).

<sup>108</sup> See, e.g., *Reed v. Reed*, 404 US 71 (1971); *Stanley v. Illinois*, 405 US 645 (1972); *Frontiero v. Richardson*, 411 US 677 (1973). Rebecca Brown, *Tradition and Insight*, 103 *Yale LJ* 177 (1993), might well be understood as a general defense of rationalist minimalism.

repeatedly opposing “reasoned analysis” to “traditional, often inaccurate, assumptions about the proper roles of men and women”<sup>109</sup> and to the “accidental byproduct of a traditional way of thinking about females”<sup>110</sup>—with the suggestion that laws that are such “accidental byproducts” are unconstitutional for that very reason.<sup>111</sup> Tradition serves in these cases as a term of opprobrium.<sup>112</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>113</sup>

Nor can Burkeanism account for the Court’s decisions establishing the right to vote, including the one-person, one-vote rule<sup>114</sup> and even *Bush v. Gore*<sup>115</sup>; the doctrine here developed by increments, with *Bush v. Gore* explicitly noting its own minimalism,<sup>116</sup> 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 longstanding practices.<sup>117</sup> More recently, the Court’s decision in *Lawrence v. Texas*,<sup>118</sup> striking down the ban on same-sex sodomy, is a good illustration of rationalist minimalism.<sup>119</sup> In *Lawrence*, the Court did not and could not claim that its decision was securely rooted in longstanding 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

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<sup>109</sup> *Heckler v. Mathews*, 465 US 728, 750 (1984); *Mississippi Univ for Women v. Hogan*, 458 US 718, 725 (1982).

<sup>110</sup> *Miller v. Albright*, 523 US 420, 442 (1998).

<sup>111</sup> *Heckler v. Mathews*, 465 US 728, 750 (1984).

<sup>112</sup> See *Miller v. Albright*, *supra* note, at 442.

<sup>113</sup> See, e.g., *United States v. Virginia*, 518 US 532 (1996); *Mississippi Univ. for Women v. Hogan*, 458 US 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 past – with the corresponding suggestion that an old law, not plausibly rooted in those concerns, could not be so defended. *Id.* at 540.

<sup>114</sup> *Reynolds v. Sims*, 377 US 533 (1964).

<sup>115</sup> 531 US 98 (2000).

<sup>116</sup> *Id.* at 514. Note that even in this very passage, the Court made an effort to link its conclusions to longstanding practices, saying that the nation’s “laws and traditions in the past half-century are most relevant here.” *Id.*

<sup>117</sup> See Philip C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 *Supreme Court Review* 52.

<sup>118</sup> 539 US 558 (2003).

<sup>119</sup> It would be possible to understand *Lawrence* as perfectionist rather than minimalist. See Tribe, *supra* note.

in matters pertaining to sex.”<sup>120</sup> Hence the Court looked forward to what was emerging, not backward to what was long settled. There could be no question that the endorsement and characterization of this “emerging awareness” was affected by the Court’s own evaluative judgments.

In many areas, the Supreme Court has acted in common law fashion, but in a way that is sharply critical of traditions<sup>121</sup> and that looks toward to a constitutionally preferred future. Indeed, much of equal protection doctrine is forward-looking in this sense, rooted as it is in a norm of equality that operates as a challenge to longstanding practices.<sup>122</sup> Establishment Clause doctrine has a similar feature, with history often creating problems for the Court’s attempt to elaborate a theory of neutrality.<sup>123</sup> Rationalist minimalists are willing to conclude that entrenched traditions might reflect power, confusion, accident, and injustice, rather than hard-won wisdom and sense.<sup>124</sup> And it should be no surprise that Justice O’Connor, with her Burkean inclinations, refused to join the Court’s opinion in *Lawrence*, simply because the Court was overruling its own fairly recent decision in *Bowers v. Hardwick*.<sup>125</sup>

Of course Justice O’Connor has occasionally been willing to subject traditions to critical scrutiny.<sup>126</sup> But there is a strong Burkean strand in her 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 part of the practice of businesses and even the military.<sup>127</sup> Hence the validation of such programs could be seen as reflecting an unwillingness to use an abstract theory—

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<sup>120</sup> *Id.* at 572 (emphasis added).

<sup>121</sup> See David A. Strauss, *The Common Law Genius of the Warren Court*, 2002 U. Chi. Pub. L. & Legal Theory Working Paper No. 25 (May 10, 2002), at <http://papers.ssrn.com/abstract?id=315682>.

<sup>122</sup> 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 (1988).

<sup>123</sup> See, e.g., *County of Allegheny v. ACLU*, 492 US 573 (1989).

<sup>124</sup> See *The Federalist* No. 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.”

<sup>125</sup> 539 US at 579-80 (O’Connor, J., concurring in the result).

<sup>126</sup> See *Mississippi Univ. v. Hogan*, 458 US 718 (1982). Indeed, Justice O’Connor concurred in the result in *Lawrence v. Texas*, *supra*, 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. 539 US at 580-81.

<sup>127</sup> See *Grutter v. Bollinger*, 539 US 306 (2003).

based on the idea of color-blindness—as the foundation of an attack on actual practices, vindicated by experience.

6. *Traditions in packages?* At this point 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 (involving, 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 a “tradition” of limited presidential prerogatives?

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 an evaluative dimension.<sup>128</sup> On this view, any characterization of a tradition will have to be interpretive, in the sense that it will be a matter of placing longstanding practices in what judges deem to be a sensible light.<sup>129</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 longstanding ones.<sup>130</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>131</sup>

Burkeans have two responses. First, they might acknowledge this point and urge simply that their Burkeanism is fully consistent with it. Burke himself believed that

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<sup>128</sup> See Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *Cardozo L Rev* (1994).

<sup>129</sup> See Ronald Dworkin, *Law’s Empire* (1985).

<sup>130</sup> See Laurence Tribe and Michael Dorf, *On Reading the Constitution* (1985); Tribe, *supra* note.

<sup>131</sup> A valuable discussion, suggesting the importance of making the distinction I am drawing, is Michael Walzer, *Interpretation and Social Criticism* (1984).

traditions were far from static.<sup>132</sup> His claim was that social change should emerge from traditions, not in opposition to them. If this is the central point, the line between Burkean and rationalist minimalism does become thinner. But perhaps we can thicken it. 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>133</sup> from Justice O’Connor, who did not.<sup>134</sup> On this view, the best understanding of Burkean minimalism ensures that courts will infrequently strike down legislation, unless that legislation is palpably inconsistent with traditions or defies the unmistakable lessons of experience.<sup>135</sup> If this is so, 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.

This view cannot be supported by Burkeanism alone; it supplements Burkean claims with democratic ones. The central idea is that in a democratic society, judges should invalidate legislation only when it amounts to a clear violation of the document, read with close reference to longstanding practices.<sup>136</sup> In the American context, many people might be willing to insist that judges should be reluctant to strike legislation down on the basis of their own convictions, while also claiming that citizens in the democratic process should usually feel free to invoke those convictions in order to challenge longstanding practices. In short, Burkeanism for judges, nonBurkeanism for citizens, with the particular suggestion that judicial review should rarely be exercised by reference to the “private stock of reason.” If citizens and their representatives are permitted to offer

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<sup>132</sup> For example, Burke approved of the Glorious Revolution. “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 most religiously to preserve. The two principles of conservation and correction operated strongly at the two critical periods of the Restoration and the Revolution, when England found itself without a king.” *Id.* at 424. Thus the revolution “was made to preserve our ancient indisputable laws and liberties, and that ancient constitution of government which is out only security for law and liberty.” *Id.* at 428.

<sup>133</sup> See note *supra*; see also *Korematsu v. US*, 323 US 214, 221 (Frankfurter, J., concurring).

<sup>134</sup> See, e.g., *New York v. United States*, 505 US 144 (1992).

<sup>135</sup> 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 Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Sexuality, Desuetude, and Marriage*, 2003 *Supreme Court Review* 27 (2003).

<sup>136</sup> This view can be seen as a modest amendment, or specification, of that offered in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893). Thayer argued that courts should invalidate legislation only when the constitutional question was very clear; the Burkean version says that whether the question is clear is answered by reference to tradition.

their own interpretations of the Constitution<sup>137</sup>—at least when they are expanding and not contracting rights as established by the courts—perhaps they can understand the document in a nonBurkean way, even while judges are held to traditions.

Second, 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>138</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>139</sup> This approach promotes width at the same time it denies judges the power “to consult and if possible reason from, the traditions . . . in general.”<sup>140</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 the 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.

Here, then, is a sharp difference between Burkean and rationalist minimalists, who are entirely willing to “reason from” traditions.<sup>141</sup> Burkean minimalists, on this view, would be reluctant to create new rights, such as the right to physician-assisted suicide,<sup>142</sup> whereas more rationalist, less Burkean minimalists might well be willing to do so. Burkeans applaud their rationalist adversaries for their insistence on small steps, but they are skeptical of their willingness to create new rights. If the Burkean position is to be

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<sup>137</sup> See Larry Kramer, *The People Themselves* (2004); Cass R. Sunstein, *The Partial Constitution* (2003).

<sup>138</sup> See *Michael H. v. Gerald D.*, 491 US 110, 127 (1989) (plurality opinion of Scalia, J.).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> For a good example of the difference, see Note, *Developments in the Law – The Constitution and the Family*, 93 Harv L Rev 1156, 1177, 1186-87, 1190-92 (1980), and in particular the suggestion that once “a traditional value has been accepted as an aspect of constitutional liberty, the Court must give that value a consistent and principled interpretation. . . . A court which extends the right of procreative autonomy from a marital to a nonmarital context is not contending that the procreative rights of the unmarried are traditional. It is merely claiming that, given a longstanding cultural consensus that procreative activities [are special], there must be some principled basis for treating the unmarried and married differently.” The Burkean objection here is that the judicial search for “some principled basis” may be less reliable than traditions, read at a low level of abstraction.

<sup>142</sup> See *Washington v. Glucksberg*, 521 US 707 (1997).

defended, it is on the ground that traditions are more reliable than individual judges, relying on their private stock of reason.<sup>143</sup>

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, simply because they reject narrowness in constitutional doctrine and begin to convert the doctrine into a system of rules. And indeed we could imagine a Burkean who favors both shallowness and width, the latter perhaps in the service of the former. I will return to this point below.

### **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>144</sup>

Take, for example, the dispute between those who favor textualist approaches and those who believe that courts should stress purpose rather than text.<sup>145</sup> We can imagine circumstances in which one or another approach makes best 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; so too if courts would blunder if they resorted to purpose. 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>146</sup> and these

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<sup>143</sup> See also Hayek, *supra* note. 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. In some general sense this is undoubtedly true. But it is certainly possible, from within any tradition broadly conceived, to be critical of practices, even longstanding ones. That possibility is enough to create a conflict between Burkean and rational minimalists, and to make perfectionism, operating within a diverse and heterogeneous interpretive tradition, a feasible enterprise. See Dworkin, *supra* note.

<sup>144</sup> See Adrian Vermeule, *Judging Under Uncertainty* (2006).

<sup>145</sup> For different perspectives, see Stephen Breyer, *Active Liberty* (2005); Antonin Scalia, *A Matter of Interpretation* (1996); Adrian Vermeule, *Judging Under Uncertainty* (2006); Aharon Barak, *Purposive Interpretation in Law* (2005).

<sup>146</sup> See Vermeule, *supra* note.

judgments cannot be made in the abstract.<sup>147</sup> What works well in one legal system, or in one time or place, may not do so in another. Something similar is true for constitutional interpretation, and it helps to illuminate the argument between Burkean minimalists and their adversaries.

### 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; 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 right understanding of human rights; and that judges, not following the original public meaning, would produce terrible blunders from the appropriate point of view. In such a world, originalism would be the best approach to follow. The reason is that originalism would impose a desirable discipline on the judiciary, preventing it from making terrible blunders, at the same time that it would serve as 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>148</sup> as compared with the alternatives, the argument for originalism would be very powerful.<sup>149</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 worse rather than better.<sup>150</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. That inheritance

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<sup>147</sup> I am rejecting the view that a theory of legitimacy, or a claim about what interpretation necessarily, requires, can settle the underlying debates. For discussion, see Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U Chi L Rev 640 (1999).

<sup>148</sup> See the illuminating comment of Randy Barnett: “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,” available at [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp) (emphasis added).

<sup>149</sup> This is one way of reading the argument in Scalia, *A Matter of Interpretation*, *supra* note.

<sup>150</sup> I am putting to one side conceptual challenges to originalism. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L Rev 204 (1980).

takes the form of numerous judicial judgments over long periods of time, in which public commitments have led to constitutional rulings that diverge from the original understanding.

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>151</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>152</sup>

Consider, for example, the question whether a congressional declaration of war is a necessary precursor to the use of force by the President. From the constitutional text, read in light of its history, there is a plausible argument to this effect.<sup>153</sup> The argument is controversial,<sup>154</sup> but let us simply stipulate that on the original understanding, the President may not use force without a declaration of war. On Burkean grounds, there is a serious difficulty with judicial insistence on this idea: 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>155</sup> Longstanding practice is inconsistent with the original understanding, and Burkeans insist that those practices must operate as a “gloss” on the document.

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 accorded by a declaration.<sup>156</sup> But Burkeans will add that if the President has often gone to war with

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<sup>151</sup> See Edward Levi, *Introduction to Legal Reasoning* (1949).

<sup>152</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 610-611 (1952) (Frankfurter, J., concurring).

<sup>153</sup> See John Hart Ely, *War and Responsibility* (1993); for a counterargument, see John Yoo, *The Powers of War and Peace* (2005).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See Curtis Bradley and Jack Goldsmith, *Congressional Authorization and the War on Terror*, 118 *Harv L Rev* 2653 (2005).

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, the question of foreign surveillance by the President might be analyzed in just this way.<sup>157</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>158</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>159</sup> Justice Scalia remarks, “if a constitutional authority is wrong, [Justice Thomas] would say, ‘Let’s get it right.’ I wouldn’t do that.”<sup>160</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.

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. Burkeans might argue that the most

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<sup>157</sup> See *supra*.

<sup>158</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U Cin L Rev* 849, 861 (1989).

<sup>159</sup> Quoted in Stephen Presser, *Touting Thomas*, *Legal Affairs* (Jan./Feb. 2005).

<sup>160</sup> *Id.*

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>161</sup> Perhaps 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>162</sup> It is not at all clear that committed Burkeans 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 Justice 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. For Justice Frankfurter, sitting at the inception of the Warren Court, social practices were taken to deserve respect, and Burkean minimalism raised a series of cautionary notes about the liberal initiatives of that Court, which he often rejected.<sup>163</sup> For Justice O'Connor, sitting long after the Warren Court, Burkean minimalism operated to insulate those initiatives from significant or immediate revision.<sup>164</sup> This difference raises a number of questions about the appropriately Burkean response to a non-Burkean, or 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 the Warren Court. 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>165</sup> and restrictions on national power under the

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<sup>161</sup> A counterargument can be found in David A. Strauss, *The Common Law Genius of the Warren Court*, available at [ssrn.com](http://ssrn.com)

<sup>162</sup> But see *id.*

<sup>163</sup> *West Virginia State Bd of Educ v. Barnette*, 319 US 624, 646 (1943) (Frankfurter, J., dissenting); *Baker v. Carr*, 369 US 186, 266 (1962) (Frankfurter, J., joined by Harlan, J., dissenting).

<sup>164</sup> See, e.g., *Planned Parenthood of Southeastern Penn. v. Casey*, 505 US 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 US 479 (1965).

<sup>165</sup> See, e.g., *Lochner v. NY*, 198 US 45 (1905); *Adkins v. Childrens' Hospital*, 261 US 525 (1923).

commerce clause.<sup>166</sup> When the Court has built up a body of doctrine that is constitutionally unmoored, 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>167</sup> can be understood as a plausibly Burkean effort to return to traditions after a period characterized by an illegitimate judicial role (or rule).

If this point is right, Burkeans might well accept the Court's wholesale rejection of much of its jurisprudence between 1905 and 1935.<sup>168</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 (by hypothesis) illegitimate decisions might deserve respect if respect is necessary to protect established expectations or ensure 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 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>169</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 people have come to rely. In the domain of institutions, the Court's validation of independent regulatory agencies is the simplest example.<sup>170</sup> In the domain of rights, prominent examples include the rule of one

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<sup>166</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 US 238 (1936).

<sup>167</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1 (1937); *West Coast Hotel v. Parrish*, 300 US 379 (1937).

<sup>168</sup> See *id.*

<sup>169</sup> See Strauss, *supra* note.

<sup>170</sup> See *Humphrey's Executor*, *supra* note.

person, one vote<sup>171</sup> and the prohibition on school prayer.<sup>172</sup> Many of the rights-protecting decisions of the Warren and Burger Courts, with dubious Burkean roots, have now become entrenched as a social matter,<sup>173</sup> though it is certainly true that the same cannot be said of all such decisions.<sup>174</sup>

## B. Perfectionists and Burkeans

Perfectionists believe that it is appropriate for federal judges to cast constitutional ideals in the best constructive light.<sup>175</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>176</sup> If, for example, a property-protective view of the Takings Clause<sup>177</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>178</sup> If a democracy-centered understanding of the first amendment makes best sense of the free speech guarantee,<sup>179</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. Indeed, they might 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

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<sup>171</sup> See *Reynolds v. Simms*, supra note.

<sup>172</sup> See *Engel v. Vitale*, 370 US 421 (1962).

<sup>173</sup> See Michael McConnell, Book Review, *Harv. L. Rev.* (forthcoming 2006).

<sup>174</sup> *Roe v. Wade*, 410 US 113 (1973), is the most obvious source of controversy here.

<sup>175</sup> The applicable theory can be found in Ronald Dworkin, *Law's Empire* (1985). I put to one side the many complexities in Dworkin's account.

<sup>176</sup> *Id.*

<sup>177</sup> See Richard Epstein, *Takings* (1985).

<sup>178</sup> 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.

<sup>179</sup> See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948); Stephen Breyer, *Active Liberty* (2005).

therefore refuses to pursue perfectionism directly. That very refusal may help to perfect constitutional democracy, because it produces an account of interpretation that minimizes theory-building demands on the federal judiciary.

Perhaps it is true that in order to be defended, any approach to constitutional law must ultimately fit and justify our practices. 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 attempting to evaluate them 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>180</sup> but to longstanding practices. An idea of this kind lies close to the heart of Burke's own view, with 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 as to reflect prejudices.<sup>181</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>182</sup> Even then, the argument would not be airtight. Democratic skeptics might object that judicial perfection of constitutional ideals would threaten the right to self-government.<sup>183</sup> Perhaps that concern could be accommodated through the right theory of interpretation, which would, by hypothesis, give self-government its due.<sup>184</sup> Burkean skeptics might also 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, simply because societies would resist those efforts.<sup>185</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>186</sup>

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<sup>180</sup> A delegation of sorts underlies *Chevron v. NRDC*, 467 US 837 (1984).

<sup>181</sup> See *supra*.

<sup>182</sup> As Dworkin plainly does. See Dworkin, *supra* note; Ronald Dworkin, *Justice in Robes* (forthcoming 2006).

<sup>183</sup> See Ely, *supra* note, and in particular his rejection of *Roe v. Wade*. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale LJ* 920 (1973).

<sup>184</sup> See *id.*

<sup>185</sup> See Gerald Rosenberg, *The Hollow Hope* (1996).

<sup>186</sup> See Ronald Dworkin, *Justice in Robes* (2006).

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>187</sup> or that considerations of legitimacy are by themselves sufficient to rule perfectionism out of bounds.<sup>188</sup> But 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>189</sup> It should be obvious that the argument for theoretical ambition from the federal judiciary would be strengthened if there is reason to trust not only the good will but also the capacities of theoretically ambitious judges.

It is here, of course, that Burkean minimalists depart from perfectionists. Because they are Burkeans, such minimalists distrust theoretical ambition as such. They are most unlikely to have confidence in judges with large theoretical ambitions; in the Burkean view, such judges suffer from hubris. To the extent that judges are entrusted with power, 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, the Burkean minimalist firmly opposes them.<sup>190</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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<sup>187</sup> See, e.g., Stanley Fish, *There Is No Textualist Position*, 42 *San Diego L Rev* 629 (1985) (contending that the task of interpretation necessarily is intentionalist); compare Cass R. Sunstein, *There is Nothing That Interpretation Just Is* (unpublished manuscript 2005).

<sup>188</sup> See Robert Bork, *The Tempting of America* (1985).

<sup>189</sup> See Vermeule, *supra* note.

<sup>190</sup> 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*, *supra* note, at 334, and in particular the 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. . . . What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘based on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’” *Id.* at 334.

### C. Burkeans and Rationalists: 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 what 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>191</sup> If we believe that the traditional practice, authorizing the ban, is likely to embody wisdom, we might want courts to uphold it, whatever individual autonomy seems to require.<sup>192</sup>

In the same vein, Burkeans would want the Court to permit “ceremonial deism,” in the form of public recognition of religious beliefs; when a constitutional challenge is raised against ceremonial deism, Burkeans reject the challenge largely by reference to traditions.<sup>193</sup> The same analysis would suggest that courts should have permitted deviations from the one person-one vote rule.<sup>194</sup> Burkean minimalists would want courts 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>195</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>196</sup>

By contrast, rationalist minimalists are willing to listen to the claim that in some domains, the Court ought to call traditions to account, and should be willing to

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<sup>191</sup> See *Stanley v. Georgia*, 394 US 557 (1979).

<sup>192</sup> See Henry Clor, *Obscenity and Public Morality* (1969).

<sup>193</sup> *County of Allegheny v. ACLU*, 492 US 573, 595-96 (1989); *Lynch v. Donnelly*, 465 US 668, 716 (1984).

<sup>194</sup> See *Reynolds v. Simms*, 377 US 533 (1964).

<sup>195</sup> Leon Kass, *The Wisdom of Repugnance*, in *The Ethics of Human Cloning* 19 (Leon Kass and James W. Wilson eds. 1998); in the same vein, see Hayek, *supra* note.

<sup>196</sup> For doubts about Kass’ argument in the domain of morality and politics, see Cass R. Sunstein, *Moral Heuristics*, 28 *Behavioral and Brain Sciences* 531, 539 (2005).

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 of generalization.<sup>197</sup> In that context in particular, it is difficult to defend the view that longstanding practices reflect wisdom and sense rather than power and oppression. Some theories of the Establishment Clause produce sharp critiques of longstanding practices, based as they are on accounts of neutrality that jeopardize a number of traditions.<sup>198</sup> Rationalist minimalists are willing not only to impose fresh barriers in this way, but also to permit the government to develop new accounts of what it legitimately does—accounts that might produce considerable novelty in the form, for example, of an expanded conception of the police power.<sup>199</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>200</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>201</sup> Holmes’ 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>202</sup>

The Federalist No. 1, with its explicit preference for “reflection and choice” over “accident and force,” makes a similar point.<sup>203</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,

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<sup>197</sup> See note supra.

<sup>198</sup> See *Lynch v. Donnelly*, 465 US at 695 (Brennan, J., dissenting).

<sup>199</sup> See *Home Building and Loan Assn. v. Blaisdell*, 290 US 398 (1934).

<sup>200</sup> See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv L Rev 457 (1897).

<sup>201</sup> 198 US at 54-55.

<sup>202</sup> This point is a frontal assault on the claims on behalf of the constitutive role of traditions in Kronman, supra.

<sup>203</sup> See *The Federalist No. 1*.

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?" In Madison's 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>204</sup>

These are largely rhetorical passages, but there is actually an argument in the background. Thomas Jefferson captured that claim 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>205</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>206</sup>

*These arguments turn chronology 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. A similar idea might be found in the Court's suggestion, when invalidating a ban on same-sex sodomy, that what is crucial is not ancient practice, but "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>207</sup>

But if their focus is on the Supreme Court, Burkean minimalists need not insist that respect for longstanding traditions always makes sense in the political domain. Focusing on courts in particular, Burkean minimalists might plead agnosticism on the proper treatment of traditions in democratic processes, and contend more modestly that

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<sup>204</sup> See The Federalist No. 14.

<sup>205</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in The Portable Thomas Jefferson 552, 559 (M. Peterson ed. 1977). Note, however, that Jefferson is speaking of experience, not of a priori reasoning (or "book-reading").

<sup>206</sup> See Blaise Pascal, Preface to the Treatise on Vacuum, in Thoughts, Letters, and Minor Works (Harvard Classics, vol. 48) (Charles W. Elliott ed., republished 2004).

<sup>207</sup> See Lawrence v. Texas, 539 US 558, 570 (2003).

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.

We should now be able to see the conditions under which Burkean minimalism makes most sense. 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 subject those traditions and practices to critical scrutiny. When these conditions are met, the argument for Burkean minimalism has considerable force.

No approach to the Constitution makes sense in all contexts or in every imaginable world. In our world, Burkean minimalism has clear advantages over originalism. It also has clear advantages over perfectionism of any kind insofar as there is reason to distrust the theory-building powers of federal judges, and to think that most of the time, longstanding practices are likely to make some sense, or at least enough so to stand against judicial scrutiny. 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 even impossible to square with entrenched understandings in American constitutional law—and hence turns out to be self-contradictory. A form of rationalism, allowing challenges to certain forms of discrimination, is part of the fabric of constitutional law.<sup>208</sup> An equally serious problem is that for some forms of discrimination, it is exceedingly difficult to argue that longstanding traditions reflect wisdom, rather than power and injustice. Here the argument for a form of rationalism, subjecting traditions to critical scrutiny, is quite powerful.

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<sup>208</sup> 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., *Massachusetts Bd. of Retirement v. Murgia*, 427 US 307 (1976) (upholding mandatory retirement law as rational).

But in other domains, the Burkean approach can claim both to be consistent with existing law and to operate it a way that imposes appropriate discipline on judicial judgments. In the area of national security, for example, Burkean minimalism has had a major role, as the Court has proceeded via small steps and with close attention to institutional practices extending over time.<sup>209</sup> 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>210</sup> In the context of national security, the Jeffersonian 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>211</sup>

A 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 long as Congress has not said otherwise, and raising the possibility that he may do so even if Congress requires him to follow a specified procedure.<sup>212</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>213</sup> If this is so, the legal question is whether the longstanding 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, and for that reason the Burkean minimalist would want to

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<sup>209</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 US 653 (1981); *Ex Parte Quirin*, 317 US 1 (1942). For lower court decisions in the same vein from various stages in recent history, see, e.g., *Made in the USA Found. v. US*, 242 F.3d 1300 (11<sup>th</sup> Cir. 2001) *American International Group v. Islamic Republic of Iran*, 657 F.2d 430 (DC Cir. 1981); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962).

<sup>210</sup> See *The Steel Seizure Case*, 343 US at 610-11 (Frankfurter, J., concurring).

<sup>211</sup> 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 longstanding practice is at issue.

<sup>212</sup> See *The Foreign Intelligence Surveillance Act*, 50 USC 1901.

<sup>213</sup> The strongest textual grounds would invoke the Commander-in-Chief clause and the vesting of “executive” power in the President.

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>214</sup>

I do not mean to offer a particular answer here. But at the very least, a Burkean approach to such questions deserves respectful consideration, above all when the stakes are large and when 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. 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>215</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, limiting the extension of rulings that fall within the camp of perfectionism or rationalist minimalism.<sup>216</sup> On this view, courts should not build on decisions lacking roots in longstanding traditions; they might 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>217</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 greatly disrupting

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<sup>214</sup> Arguments to this effect can be found in United States Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 7 (January 19, 2006), which urges, 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.

<sup>215</sup> It will be noticed that this dilemma replicates the problem that originalists encounter when asked to respect the legacy of the Warren Court

<sup>216</sup> *Washington v. Glucksberg*, 521 US 707 (1997), is an example.

<sup>217</sup> 410 US 113 (1973).

reasonable expectations or undoing a great deal of the fabric of existing law. Committed Burkeans might well take this approach to *Roe*.

More generally, many of the most vigorous disputes in contemporary constitutional law involve the proper resolution of this dilemma.<sup>218</sup> Recall that the same dilemma can be found in the aftermath of the *Lochner* era, in which the Court did not take a minimalist approach, but on the contrary issued ambitious rulings that did away with decades of decisions.<sup>219</sup> If these ambitious rulings were justified on Burkean grounds or otherwise, it was simply because there was no legitimate basis for the decisions that preceded them—an especially severe problem in light of the fact that those decisions imposed serious obstacles to democratic initiatives.

If the decisions of the New Deal and Warren Courts deserve to be treated with more respect, it is because many of those decisions respect democratic prerogatives,<sup>220</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 nonBurkean approach of one or another sort, calling for judicial deference to political judgments<sup>221</sup> or for a democracy-reinforcing approach to judicial review.<sup>222</sup> Perhaps the Court’s rulings were sufficiently rooted in prevailing social commitments or in ordinary processes of case-by-case judgment.<sup>223</sup> A final assessment of the question of legitimacy must depend on the merits. But an adequate way out of the Burkean dilemma cannot avoid making some such assessment.

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<sup>218</sup> The most obvious example involves abortion, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992). Other examples include Congress’ power under the commerce clause, see *United States v. Lopez*, 514 US 549 (1995); the right to bear arms, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale LJ* 627 (1989); the “unitary executive,” see Steven Calabresi and Sai Prakash, *The President’s Power to Execute the Laws*, 104 *Yale LJ* 541 (1994); the scope of the Establishment Clause, see *Mitchell v. Helms*, 530 US 793 (2000); and the reach of substantive due process, see *Washington v. Glucksberg*, 521 US 707 (1997)

<sup>219</sup> See note *supra*.

<sup>220</sup> See *id.*

<sup>221</sup> See Thayer, *supra* note, whose plea for judicial deference helps to support some of the Court’s New Deal rulings, including *West Coast Hotel v. Parrish*, 300 US 379 (1937); *United States v. Darby*, 312 US 100 (1941); and *Humphrey’s Executor*, *supra* note.

<sup>222</sup> See Ely, *Democracy and Distrust*, *supra* note, offering a democracy-reinforcing account that seems to justify *Reynolds v. Simms*, *supra* note, and *Brown v. Bd. of Educ.*, *supra* note, without also justifying *Roe v. Wade*, *supra*.

<sup>223</sup> See Strauss, *supra* note.

## Conclusion

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 longstanding experience. In the history of the Supreme Court, Justices Frankfurter and O'Connor have been the most consistent practitioners of Burkean minimalism. Of course there are large 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 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 endorse shallowness and to resist theoretical ambition, while also insisting that rule-bound judgments often make a great deal of sense.<sup>224</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 would be defended on the ground that while Burkeanism is a helpful way of disciplining judges, citizens require no such discipline.

One of my major claims has been that no theory of constitutional interpretation makes sense in every imaginable context. I have concluded that the argument for Burkean minimalism is stronger in some domains than in others; it has least force in cases involving official discrimination, and far more power in the area of separation of powers. But the central point is much broader. Where originalism would produce unacceptable consequences, where traditions and longstanding 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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<sup>224</sup> Whether it does so depends on the set of considerations that lie behind the debate over rules and standards. See Kaplow, *supra* note.

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