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TRADITION, PRECEDENT, AND JUSTICE SCALIA

David A. Strauss*

We knew from the start that Justice Scalia was not a great fan of stare decisis. During his first Term on the Supreme Court, there was a period of a little over a month in which he called for overruling five major precedents.\(^1\) The trend has not abated: last Term he again urged that at least five major cases be overruled,\(^2\) and he explicitly confined a sixth to its facts.\(^3\)

There are other indications, too, besides the votes to overrule cases. In his opinion for the Court last Term in *Employment Division, Department of Human Resources v. Smith*\(^4\)—which, if it is followed, will be the most important decision on the free exercise of religion in a generation—Justice Scalia cited (twice) *Minersville School District v. Gobitis.*\(^5\) *Gobitis* upheld a state law that required schoolchildren to salute the flag. Justice Scalia did not mention that *Gobitis* was overruled by one of the most celebrated civil liberties decisions in history, *West Virginia State Board of Education v. Barnette.*\(^6\) It is, to draw the

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* Professor of Law, the University of Chicago. I gave an earlier version of this paper at the conference on Justice Scalia at Cardozo Law School on October 29, 1990, and I am grateful to the participants in the conference for their comments. The Russell Baker Scholars Fund and the Russell J. Parsons Faculty Research Fund at the University of Chicago Law School provided financial support.


4. *Id.*

5. 310 U.S. 586 (1940), cited twice in *Smith,* 110 S. Ct. at 1600.

6. 319 U.S. 624 (1943). To be sure, *Gobitis,* like *Smith,* addressed the question whether the free exercise clause of the first amendment required an exemption from a general requirement,
obvious comparison, a little like citing Plessy v. Ferguson\(^7\) without mentioning subsequent developments in the law concerning racial segregation.

This attitude toward precedent naturally and appropriately evokes what might be called Burkean criticisms—criticisms that Justice Scalia is not showing the characteristic virtues of the true conservative. Justice Scalia, it is said, is too quick to use abstract principles that are insensitive to practical realities. His approach is unsound because it is too cavalier toward the views of past Justices who have thought carefully about the problems. Discarding precedents at the rate he seeks would disrupt the orderly development of the law. His readiness to overrule previous cases reflects arrogant overconfidence in his own capacities.\(^8\)

No doubt these criticisms are justified to a degree. But another aspect of Justice Scalia's record seems to confound the Burkean criticism. As brusque as he is in dealing with precedent, Justice Scalia is positively reverential in his views about tradition. Several of his opinions assign an extraordinarily important role to tradition in the interpretation of the Constitution. This is a paradox: one would expect a Justice's attitudes toward precedent and tradition to mirror each other. Both involve the weight that should be attached to what people living in an earlier time thought about a recurring problem.

In this paper, I will discuss three issues arising out of this apparent paradox. First I will consider whether there is in fact an inconsistency in Justice Scalia's positions. I will argue that there is not: a strong, classically conservative attachment to tradition can logically coexist with a disdain for stare decisis. To some degree, Justice Scalia, despite the way he treats precedent, deserves to be called a traditionalist, or a Burkean conservative.

Second, is Justice Scalia's attitude toward precedent, taken alone, properly subject to criticism? My answer again is that it is not. Indeed, the Burkean criticisms of Justice Scalia's approach to precedent—and those are the most telling criticisms to make—serve only to reinforce Justice Scalia's traditionalism. That leads to the third argument I will make: that Justice Scalia's traditionalism is far more

\(^7\) 163 U.S. 537 (1896) (overruled by Brown v. Board of Education, 347 U.S. 483 (1954)).

\(^8\) I take EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1789), to be the exemplar of Burke's traditionalism. For Burkean criticism of Justice Scalia, see Professor Burt's excellent paper in this symposium. Burt, Precedent and Authority in Anton Scalia's Jurisprudence, 12 CARDOZO L. REV. 1685 (1991) A more general Burkean defense of precedent is Kronman, Precedent and Tradition, 99 YALE L.J. 1029 (1990).
problematic than his views about precedent. Traditionalism of the kind to which Justice Scalia professes adherence—a kind of traditionalism that in fact Justice Scalia neither consistently follows nor adequately defends—entails positions that no one else today would accept. The problem with Justice Scalia is that he is too much of a Burkean, not the opposite.

I.JUSTICE SCALIA'S TRADITIONALISM

Justice Scalia expressed his views about tradition at some length in opinions—none of them for a majority of the Court—in three recent cases: Michael H. v. Gerald D., 9 decided in June of 1989, and Burnham v. Superior Court 10 and Rutan v. Republican Party, 11 both decided last Term.

A.

Burnham is the logical place to begin. The facts of the case are of limited significance; essentially, a New Jersey resident was served with process while in California on a brief trip. The question was whether the due process clause forbade California courts from asserting personal jurisdiction over him. 12

There was no majority opinion. Justice Scalia, who wrote the plurality opinion, and Justice Brennan, concurring in the judgment, agreed that California could assert personal jurisdiction in the case. But they engaged in an extended debate over a question of method: how should the Court go about deciding whether the due process clause permits states to assert personal jurisdiction over a nonresident served with process while briefly in the state for reasons unrelated to the lawsuit? Justice Scalia invoked tradition; 13 Justice Brennan acknowledged that tradition was important, but he relied primarily on arguments to the effect that allowing states to assert personal jurisdiction in these circumstances was fair and sensible policy. 14

Much of Justice Scalia's opinion was unremarkable. He made a historical argument that, from the English common-law courts through current American state courts, personal service of process within the relevant territory has been recognized as a basis for personal jurisdiction. He claimed to show that "[a]mong the most firmly

12 Burnham, 110 S. Ct. at 2106.
13 Id. at 2117.
14 Id. at 2122 (Brennan, J., concurring).
established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the state" and that "[d]ecisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action related to his activities there."

While Justice Scalia's argument on these points was more detailed than normal, and he purported to reach unusually definite conclusions about what history showed, these aspects of his opinion are not unusual: one would expect to find this kind of discussion of history in an opinion on personal jurisdiction. Another aspect of Justice Scalia's opinion in Burnham, however, is quite remarkable. It is a deliberate—almost boastful—refusal to offer any functional or policy arguments why courts should be allowed to establish personal jurisdiction in this way. Having established to his satisfaction that there is a traditional rule that a state may obtain personal jurisdiction by serving a person temporarily in the state, Justice Scalia refused to identify any policy basis for the rule. Instead he specifically asserted: "We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree . . . ."

Justice Scalia recognized that the Court's opinions defining the due process clause limits on personal jurisdiction often addressed the "desirability or fairness" of the rule in issue. But he explained that those cases were considering new rules, not traditional rules. New rules might need a functional justification; traditional rules, Justice Scalia asserted, did not.

B.

Justice Scalia's opinion in Rutan took this approach to tradition one step further. The issue in Rutan was whether the first amendment forbids the government from engaging in patronage hiring—that is, discrimination in favor of members of one political party in hiring (and promotions, transfers, and recalls) for government jobs.

15 Burnham, 110 S. Ct. at 2110.
16 Id. at 2111.
17 Id. at 2116 (emphasis added).
18 Rutan v. Republican Party, 110 S. Ct. 2729, 2746 (1990) (Scalia, J., dissenting). Justice Scalia's dissenting opinion was joined by the Chief Justice and Justice Kennedy. Justice O'Connor also joined parts of it, but she explicitly did not join the parts discussing the role of tradition.
In two earlier cases, Elrod v. Burns and Branti v. Finkel, the Court had held that the first amendment prohibits patronage dismissals. In Rutan, the Court extended that rule to hiring.

Patronage is a complex issue, as a matter of both political science and first-amendment law. Justice Scalia's dissent in Rutan did make functional arguments about the importance of patronage, and he argued that Elrod and Branti could be distinguished. But he emphasized two other points that provide a striking illustration of the divergence between his attitude toward precedent and his view of tradition. He said that even though Elrod and Branti could be distinguished, they were so unsound that they should be overruled. At the same time that he dismissed these precedents, though, he asserted that the traditional acceptance of patronage alone—quite apart from any functional justifications—established that patronage hiring did not violate the first amendment.

In his opinion, Justice Scalia essentially set out two priority rules for determining when a practice violates the Constitution. First, he said, the Court should consider the plain language of the constitutional provision. That seems mostly noncontroversial. But then, he said, remarkably, any practice that has been traditionally accepted should be upheld, so long as it is not inconsistent with the plain language.

His argument to this effect reflects a distinctive, highly traditionalist view of the purposes of the Constitution:

The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, wide-spread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.

Justice Scalia then added a passage that seems almost consciously to echo Burke:

Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of first-amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.

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21 Rutan, 110 S. Ct. at 2748 (Scalia, J., dissenting).
22 Id.
The contrast between substantial traditions and concocted abstractions, the suggestion that the Court is arrogant in enforcing the latter at the expense of the former, the hint that the Court is acting in a cold-blooded, even blasphemous way by dissecting venerable traditions: all of these are profoundly Burkean notions. How can it be that a Justice who says these things is simultaneously criticized, on Burkean grounds, for his hostility to precedent?

C.

Michael H.23 is the other side of the coin. Justice Scalia's Burnham and Rutan opinions described the circumstances in which, in his view, tradition was sufficient to uphold an institution. In Michael H., he discussed when tradition might be sufficient to invalidate a practice. Michael H. was the natural father of a child whose natural mother had been married to and living with another man at all relevant times. He challenged, as a violation of substantive due process, a California statute that conclusively (so far as the case was concerned) presumed that a child born to a woman living with her husband was a child of the husband. The effect of the statute was to deny visitation rights to Michael H.

Justice Scalia—writing a plurality opinion for himself, Chief Justice Rehnquist, and Justices Kennedy and O'Connor—asserted that in construing the substantive component of the due process clause, the Court had “insisted not merely that the interest denominated as a 'liberty' be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”24 The purpose of the due process clause, he continued, “is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.”25 Justice Scalia concluded that under this standard, Michael H.'s claim was easy to reject:

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and [the mother] has been treated as a protected family unit under the historic practices of our society . . . . We think it impossible to find that it has.26

Justice Brennan, in dissent, objected that Justice Scalia took too narrow a view of the relevant tradition. To the extent tradition was

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24 Id. at 2341.
25 Id. at n.2.
26 Id. at 2342.
material, Justice Brennan said, the question was not whether a relationship like that between Michael H. and the mother was traditionally protected, but whether “parenthood” was traditionally valued.\(^{27}\) Justice Scalia replied in an important footnote from which Justices O’Connor and Kennedy specifically disassociated themselves. He said:

Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.\(^{28}\)

The relevant tradition, therefore, was not the traditional treatment of parents generally, but the “tradition . . . regarding the rights of the natural father of a child adulterously conceived . . . .”\(^{29}\) And that tradition “unqualifiedly denies protection to such a parent.”\(^{30}\)

There is much to be said about Justice Scalia’s views of the role of tradition in constitutional interpretation. But for now what is significant is the highly important role tradition plays for him, and the contrast between that role and his readiness to overrule precedent.

For purposes of procedural due process, according to Justice Scalia, “pedigree” alone is sufficient to establish the constitutionality of an institution. For purposes of substantive due process, no practice that lacks a pedigree is constitutionally protected. That a practice belongs to a general category that is traditionally protected is not sufficient, if the specific practice in question is traditionally condemned. When a more specific constitutional provision is invoked, the text governs; but if the text is inconclusive, the next resort is to tradition. At that point the rule is that if a government practice is traditional, it is also constitutional.

If these aspects of Justice Scalia’s views are taken at face value, he is not guilty—as the Burkean criticism of him, and indeed his attitude toward precedent, suggest—of arrogantly enforcing abstract conceptions he favors in the face of the collected wisdom of the ages. On the contrary, he is deeply respectful of tradition and gives it near primacy in interpreting the Constitution.

II. TRADITION AND THE REFUSAL TO FOLLOW PRECEDENT

At first blush it seems highly paradoxical to say that a Justice who genuinely venerates tradition can hold Justice Scalia’s attitude

\(^{27}\) Id. at 2350 (Brennan, J., dissenting).

\(^{28}\) Id. at 2350 n.8.

\(^{29}\) Michael H., 109 S. Ct. at 2344 n.6.

\(^{30}\) Id.
toward precedent. But in fact there is no paradox. Precedent overlaps tradition; it is not subsumed by it. Some precedents may be said to be part of a tradition. But not all are. Some are simply the decisions of a group of judges rendered a few years ago. Burke’s injunction—not to cast aside the accumulated wisdom of generations, gained through trial and error, in favor of abstractions—does not call for such precedents to be sustained. On the contrary, it calls for them to be discarded.

It is one thing if a judicial precedent has been followed on many occasions, has become widely accepted by society, and has created a web of institutions dependent on it. Then Burkean conservatism would call for honoring it. More precisely, it would call for honoring the consensus and network of institutions that have grown up around it.

There is, in fact, some basis for saying that Justice Scalia does not approach precedents of this kind with his characteristic willingness to build from the ground up. For example, Justice Scalia appears to accept the incorporation of the Bill of Rights into the fourteenth amendment, even though there is a very strong textual argument, and at least a decent historical argument, against incorporation. (Recall that Justice Scalia considers the text to take priority over everything else, and he has characterized himself as an originalist who relies on the intentions of the Framers as revealed historically.) Indeed, Justice Scalia has aggressively relied on incorporation in arguing for his positions. And Justice Scalia has accepted an interpretation of the eleventh amendment that is at odds with its text but is based on a century-old precedent.

It is a different matter if a precedent is relatively recent and has not met widespread acceptance—especially if the precedent itself overturned a widespread practice. Then the precedent itself may be the arrogant abstraction that challenges the wisdom of the ages. A good Burkean conservative should be quite ruthless toward precedents of that kind. Burke did not approve the actions of the French Revolutionaries just because they had occurred. If he had had a

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31 In his dissent in Maryland v. Craig, 110 S. Ct. 3157, 3171 (1990) (Scalia, J., dissenting), Justice Scalia repeatedly invoked the text of the sixth amendment’s confrontation clause and criticized the Court for engaging in a balancing approach inconsistent with the language of that clause. He did this even though the sixth amendment applies only to the federal government, and the only constitutional provision literally applicable in Craig was the due process clause of the fourteenth amendment—which, when it applies of its own force, is usually interpreted to prescribe balancing.

chance to restore the monarchy, he would have done so. A Burkean judge would have the same attitude toward a relatively recent decision that swept away a long-established institution.

Burke is sometimes presented as a sort of wise, level-headed counsellor of prudence and humility against an overly intellectual, hot-headed, arrogant impulse to remake the world. That is the view of Burke invoked by critics of Justice Scalia’s attitude toward precedent. It undoubtedly captures an important side of Burke. But there is another side of Burke as well, one that is less comfortable. It is the angry, desperate side: the Burke who thought that the world, after the French Revolution, was out of joint and urgently needed to be set right. That is the side of Burke reflected in Justice Scalia’s views about tradition. That side of Burke, that kind of conservatism, need have no more tolerance for recent precedents inspired by judges’ abstract ideas, than Burke himself had with innovations inspired by the French Revolution.

The reconciliation of traditionalism with a willingness to overrule precedent is even more complete if another element is added to the mix. That is suspicion of judges. Any theory of judicial review must rely on some premises, implicit or explicit, about how judges characteristically behave—their strengths and weaknesses, their “institutional capacities,” as they are called. It would be plausible for a Burkean to distrust judges. This is ironic: Burke’s formulations of how society should change seem to use the development of the common law as a model, and there is reason to think this was conscious on Burke’s part.33

Judges, however, are deliberately removed from society, and there is a greater likelihood they will be out of touch with its practical concerns. They also come from an intellectual segment of society that is likely to value abstractions. The concern that judges will be too quick to discard tradition because it does not correspond to abstract ideas ought to come naturally to a Burkean. This solidifies the idea that precedents are dispensable, especially when they overturn traditions; those precedents are likely to have been the work of judges who were insufficiently respectful of tradition.

Justice Scalia’s writings, on and especially off the Court, often invoke the danger that judges will impose their “personal predilections.” This is, for example, his principal defense of originalism—that for all its difficulties, originalism (he asserts) at least provides a more definite rule, while any other approach will leave judges free to act on

the basis of their own views. Justice Scalia's opinions on tradition sound the same note. For example, in Michael H., in defending his position that the most specific tradition is to govern, Justice Scalia argued that "general traditions provide such imprecise guidance [that] they permit judges to dictate rather than discern the society's views." And he concluded his discussion of this point by asserting that "[a]lthough assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."36

In principle, therefore, one might see in Justice Scalia's work a coherent, Burkean approach to the law. Tradition is venerated. Apart from unequivocal textual commands, it is the principal source of constitutional law. Prior decisions per se, however, do not have the same claim. That is because they may reflect just the abstract theories of individual judges, rather than the hard-won lessons of years of experience. Especially when those decisions overturned traditional practices, judges should not hesitate to disregard them.

III. THE VICES OF JUDICIAL TRADITIONALISM

There are three problems with the traditionalism I have attributed to Justice Scalia. One is that this coherent approach is not consistently his. The second is that he does not justify it. The third is that it is not remotely an acceptable approach.

A.

Justice Scalia's traditionalism, especially that of Rutan and Burnham, is highly majoritarian. Unless the Constitution is clear, a majority can make any practice constitutional just by sustaining it for a time. The first place to look to test Justice Scalia's consistency, therefore, is to cases in which he is not a majoritarian. What one finds in those opinions is abstract reasoning—not a careful demonstration that the practices he condemns were not really traditional practices.

For example, in Nollan v. California Coastal Commission, Justice Scalia, writing for the Court, determined that a form of state regulation of property violated the just compensation clause of the fifth amendment. In Pennell v. City of San Jose, Justice Scalia, in dissent,

36 Id.
urged that a rent control statute effected an unconstitutional taking. Judging from Justice Scalia’s remarks in *Rutan*, one would expect a detailed discussion of the traditional forms of regulation of property in America. But except for a few brief and conclusory assertions that were not at the core of the opinion’s reasoning, Justice Scalia paid very little attention to tradition.

*City of Richmond v. J.A. Croson Co.*[^39] is a more dramatic example. Justice Scalia’s concurring opinion condemned as unconstitutional (in quite strong terms) a minority set-aside plan adopted by Richmond, Virginia, to channel more government contracts to African-American contractors. In particular, he emphasized an argument that African-Americans are “the dominant racial group” in Richmond; this, Justice Scalia suggested, heightened the injustice.[^40] One might have expected Justice Scalia to consider whether there is a tradition of ethnic groups using local government power to benefit themselves in this way. One might especially have expected this because in his *Rutan* opinion, Justice Scalia argued that one desirable feature of a patronage system is that it enables “racial and ethnic minorities” to advance themselves by “dominating a particular party ‘machine’ [and thereby] acquire[ing] the patronage awards the machine had power to confer.”[^41] But instead the *Croson* opinion relies entirely on abstractions about affirmative action.

An increasingly important element in Justice Scalia’s nonjudicial writings is also in tension with the traditionalism of *Burnham*, *Rutan*, and *Michael H*. That is his emphasis on the need for courts, especially the Supreme Court, to announce clear rules rather than more open-ended standards that allow for particularistic judgments.[^42] The antinomy between rules and discretion is an unavoidable part of any system of ordering behavior, and there is obviously much to be said on the “rules” side that Justice Scalia has taken. But while this approach is not inconsistent with traditionalism, the two will not always mesh well.

There can be discretionary traditions, such as the probable cause standard traditionally applied to searches and seizures by law enforcement agents, or the discretion traditionally afforded to administrative officers under both the old law of mandamus and the newer arbitrary

[^40]: *Id.* at 524 (Scalia, J., concurring).
[^41]: *Rutan v. Republican Party*, 110 S. Ct. 2729, 2755 (1990) (Scalia, J., dissenting). Justice Scalia carefully added that ethnic groups did this “on the basis of their politics rather than their race or ethnicity,” *Id.*, but it is utterly implausible to suggest that patronage machines were blind to ethnicity.
and capricious standard. There can also be heterogeneous traditions that are difficult to capture in rules. For example, the American system of separation of powers has developed partly along functional lines that paid little regard to the specific strictures of the Constitution, and partly along strict textual lines. Justice Scalia’s opinions in the area do not even attempt to say which is the tradition; indeed they pay little attention to tradition at all. Instead, they are guided by Justice Scalia’s abstract conceptions about the separation of powers.

B.

Traditionalism of the kind described in Justice Scalia’s *Burnham*, *Rutan*, and *Michael H.* opinions is also very difficult to defend. It looks very much like the exact position that Holmes called revolting—that there is no reason to uphold a practice other than that it dates from Henry IV, or George III. *Burnham* is a defiantly anti-Legal Realist opinion; it is also almost an anti-reason opinion. It seems to acknowledge no obligation to explain its result, except to say that tradition requires it.

Justice Scalia has not undertaken systematically to defend his traditionalism, but he has suggested two justifications for it. One is that traditionalism is a corollary of originalism. At one point in *Burnham*, he suggested that the crucial question was how well the practice (of obtaining personal jurisdiction by service in the territory) was established in 1868, when the fourteenth amendment was adopted.

This justification, effectively converting traditionalism into one version of originalism, raises many of the familiar questions associated with the latter. In particular, what reason is there to believe that the people who wrote and adopted certain constitutional provisions meant to protect, for all time, the particular practices in which they engaged? Justice Scalia does not identify any extraneous evidence showing that they held this view, and that is certainly not what they said in the text of the Constitution. They could have codified what was then the law of personal jurisdiction, but they did not. “Due process of law” is an odd way to effect such a codification. In fact, their choice of an open ended phrase instead of a codification is excellent evidence that Justice Scalia is exactly wrong—that they deliberately chose not to protect forever that which was familiar to them.

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45 *Burnham*, 110 S. Ct. at 2111.
Justice Scalia's other defense of his traditionalism is parallel to the defense he offered for originalism: it is needed to keep judges in line, to keep them from imposing their personal views. But Justice Scalia did not set out to defend this argument systematically, and a systematic defense would be very complex, both empirically and conceptually.

To begin with, this argument does not identify the theoretically correct way to interpret the Constitution. Justice Scalia's defense of traditionalism (and originalism—the same points apply) is that the principal alternative way of interpreting the Constitution is too dangerous because it allows judges to act on the basis of their predilections. He does not contend that the traditionalist answer is what the Constitution actually prescribes. It is just that, according to him, judges will come closer to what the Constitution prescribes if they try to be traditionalists.

In order to evaluate that claim, one must have an account of what the Constitution does prescribe. Without such an account, one cannot determine whether traditionalism or some other approach comes closer. That is, if there were no bounded rationality problem—if a judge had the capacity to do exactly what Justice Scalia wants her to do—what would Justice Scalia tell her? Justice Scalia does not answer this question. And without an account of what the Constitution really requires, it is impossible to determine whether he is correct in saying that traditionalism will yield the closest approach to that ideal.

The second question is an empirical one. When Justice Scalia talks about a judge who follows his or her own predilections, he does not have in mind a corrupt judge. Rather he seems to have in mind one who follows her own moral views; she does what seems to her to be the right thing to do.

It is far from obvious that such a judge will miss the "true" meaning of the Constitution by much. The assertion that she will come closer if she follows a traditionalist course is simply not convincing. In fact, it is apparent (as I will discuss presently) that traditionalism leads to results that are utterly unacceptable. A judge who follows his or her own "predilections" is likely to do better. If I had to choose (behind some suitable veil of ignorance) between a judge who always did what she thought was traditional and a judge who always did what she thought was right, I am certain I would choose the latter.

C.

In fact, traditionalism is just not an acceptable creed. At bottom
neither Justice Scalia nor anyone else arguably within the legal mainstream today accepts its implications. To make the obvious and blunt point, there are ugly, even unspeakable traditions in our history.

In his Rutan opinion, Justice Scalia addressed this issue, in connection with (of course) Brown v. Board of Education. The traditionalist, Burkean case in support of segregation was a strong one, and in court the defenders of segregation made traditionalist (as opposed to overtly racist) arguments. Segregation was a tradition of long standing; it was a local adaptation to a complex, intensely practical problem; Justices who lacked practical experience should not have judged it on the basis of abstract ideas.

Justice Scalia’s effort to reconcile his traditionalism with Brown is so obviously contrived that it gives the game away: traditionalism is just not an acceptable approach.

I argue for the role of tradition in giving content only to ambiguous constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment’s requirement of “equal protection of the laws,” combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of unchallenged validity did not exist with respect to the practice in Brown. To the contrary, in the 19th century the principle of “separate-but-equal” had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices.

I do not know of anyone—from the drafters of the equal protection clause (who in all probability did not think they were outlawing segregation at all, much less explicitly), to the advocates in Brown, to any commentator since Brown, pro or con—who thinks the plain language of the thirteenth and fourteenth amendments “leaves no room for doubt” that segregation is unconstitutional. The reference to the first Justice Harlan is neatly circular, since by far the act that caused him to be most “historically... respected” was his dissent in Plessy. And it is certainly odd that a constitutional challenge that garnered only a

47 C. Vann Woodward’s famous monograph, The Strange Career of Jim Crow (2d rev. ed. 1966), undermined the pedigree of segregation to some degree, showing that rigid, state-enforced Jim Crow did not follow immediately on Reconstruction but dated only from the turn of the century. But public school segregation, unlike some other manifestations of Jim Crow, “appeared early and widely[, was] sanctioned by Reconstruction authorities... and prevailed continuously.” Id. at 24.
single dissent disestablished the segregation tradition, while the very strong movement against the spoils system—which achieved nearly complete success on the federal level in 1883 and even greater success in many states—did not disestablish the tradition of patronage.

Racial discrimination is, of course, not the only deeply rooted tradition that should not survive. Even Justice Scalia will have a difficult time explaining how the fourteenth amendment "leaves no doubt" that discrimination against women is unconstitutional. (Section two of the fourteenth amendment contains gender discrimination.) And that is a deeply rooted tradition indeed. There are other candidates: school prayer, many law enforcement practices, malapportioned legislatures.

In fact, as this list suggests, the kind of precedent that a traditionalist is most likely to want to discard is the kind of decision that made the Warren Court famous. In their dissents, especially in the criminal procedure and reapportionment area, Justices Frankfurter and Harlan made, in many ways, the Burkean case against the Warren court. In the name of an abstract ideal of equality, they said, the Court was sweeping aside institutions painstakingly built up over time by generations. Those institutions may have been flawed, to be sure, but they embodied a series of practical adaptations that should not have been sacrificed in the name of an abstraction by judges who were far too remote to understand the complexity of the problem.

The descriptive part of this traditionalist criticism was correct. The Warren Court did uproot traditional institutions. It was moved by abstract ideas rather than by deep attention to empirical detail. There was a risk that the Justices simply did not understand the practical complexity of the problem. But the Warren Court initiatives that were most controversial at the time—Brown, school prayer, reapportionment—and the reform of state criminal procedure—are today widely accepted, notwithstanding the strong traditionalist arguments against them.

The antitraditional character of the Warren Court finally brings into focus both the true nature of Justice Scalia's traditionalism and why it is truly paradoxical. I have suggested that Justice Scalia's traditionalism can be reconciled with his disdain for stare decisis if one recognizes that his traditionalism takes the form not of a cool

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49 The Pendelton Act of 1883, 22 Stat. 403, established a merit system for the selection of federal civil service employees.
counsel of restraint and humility but of an urgent sense that something has gone awry and that the world should be returned to its older, more solid, traditional foundations. Certain recent developments are, for Justice Scalia, what the French Revolution was for Burke: a source not of new traditions to be accepted but of innovations to be overthrown, in the name of deeper traditions, as soon as possible. Justice Scalia is far from alone in this attitude; among many who might be called New Right legal theorists, there is the same (or an even more pronounced) angry tone that constitutional law has gone badly awry and must be returned to its true state.⁵⁴

The paradox, or at least the oddity, is this: what recent developments are Justice Scalia, and the other New Right theorists, so upset about? One's first inclination is to say (vaguely but usefully) that their bite noire, their French Revolution, was the Warren Court; as I noted, Warren Court precedents neatly fit the description of the kind of decisions that a Burkean traditionalist would want to discard.

But which Warren Court precedents, exactly, are so deplorable? Four important lines of Warren Court decisions were the most controversial, and most criticized, at the time: Brown and other racial discrimination decisions (which produced the most sustained and violent opposition); incorporation and the reform of criminal procedure (the former was vigorously criticized by the Frankfurter and Harlan dissents, while the latter was by far the focus of the most sustained attacks by politicians); the school prayer decision (which probably elicited the most widespread public opposition of any Warren Court action); and the reapportionment decisions (which were the most widely criticized by academics).

Not only does Justice Scalia (like other New Right theorists) have little trouble with any of these decisions today; he, and they, affirmatively embrace most of them. Everyone endorses Brown. As I mentioned, Justice Scalia is enthusiastic about incorporation; he has shown no disposition to overrule Warren Court precedents on criminal procedure, and indeed he is probably more favorable to the rights of criminal defendants than the dominant sentiment on the current Court. The basic validity of the reapportionment decisions has become a settled issue among virtually all segments of opinion in the legal community. Moreover, the most widely criticized aspect of the reapportionment cases—the Court's insistence on a rigid rule of "one person one vote" instead of a more flexible approach that would preclude only gross and senseless malapportionment—is firmly in line

with Justice Scalia’s emphasis on the need for clear rules. And while the contours of the school prayer decisions remain controversial (in connection with “moment of silence” laws, for example), no substantial segment of the legal community, including the New Right, endorses the constitutionality of official, sectarian school prayer of the form that existed before the Warren Court.

So what is upsetting to the traditionalists? What was the French Revolution that Justice Scalia and others like him seek to uproot? Since Justice Scalia agrees with the central Warren Court precedents, what accounts for the evident sense that the law has gone awry and must be redirected?

The answer seems to be not specific decisions, but an attitude—an orientation toward constitutional law and the role of the courts. The orientation is that the courts should be alert to help the less well-off in society. The egalitarian orientation of the Warren Court—rather than any of its specific decisions—is the target. Justice Scalia’s reverence for tradition and dislike of precedent are consistent because they derive from the same source: a profoundly antiegalitarian substantive agenda.

IV. CONCLUSION: ON THE PERILS OF METHODOLOGICAL CRITICISM

Traditionalists are not alone, of course, in their willingness to overrule precedent. Anyone with a strong substantive theory of constitutional interpretation will find precedents that are unacceptable. It does not matter whether that theory is originalism, or textualism (which may differ from originalism), or radical majoritarianism, or a theory of representation reinforcement, or the view that the Constitution should be interpreted in a way that protects those who are powerless in society. Superficially it is more paradoxical that a traditionalist like Justice Scalia would also want to overrule some precedents. But the paradox is only superficial; in an era like ours, in which recent history includes the Warren Court’s attempts to challenge entrenched practices, it is not at all surprising that a Burkean traditionalist would be generally hostile to precedent.

Commonly, those who disagree with a Justice’s substantive approach to the Constitution will concentrate their criticisms not on the approach but on matters of method. The classic example is the argument that *Lochner*\(^{55}\)—or, for that matter, *Roe*\(^{56}\)—is wrong not be-

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cause it reflects a mistaken view about what values the Constitution protects but because the Court invented a right that is not in the Constitution. Criticism of Justice Scalia for not following precedent follows these same lines.

This form of criticism is obviously often useful. Justices ought to be criticized if they are insufficiently deferential to precedent, or history, or text, or the political process. And methodological criticism has a potential for building bridges across substantive and political divides; people who cannot agree on anything else might agree on a point of method.

But the development of constitutional law in this century teaches two lessons about this form of criticism. One is that it is impossible (at least it has so far proved impossible) to define a single, homogeneous method—literalism, or originalism, or deference to the legislature, or some version of a Carolene Products\textsuperscript{57} approach—that does not sometimes produce utterly unacceptable results. The second is that the alliances between method and substance shift almost rhythmically. Holmes and Brandeis used skepticism about whether the Constitution really embodied substantive values to emphasize the importance of deference to the political process, and they brought about results that progressives favored;\textsuperscript{58} Justice Frankfurter, and now Chief Justice Rehnquist, use similar methods to the opposite effect. Justice Black’s textualism was the engine of the reform of criminal procedure and the opposition to McCarthyism;\textsuperscript{59} Judge Bork’s and Justice Scalia’s textualism does not appeal to those who applauded Justice Black. The counsels of concern for stare decisis that are now directed at Justice Scalia would have been fatal to much that the Warren Court did.

Methodological criticism has a way of becoming obsolete at inopportune times. Justice Scalia’s methodological claims, I have suggested, are the products of a substantive agenda that should be more frankly acknowledged. By the same token, disagreement with that agenda should not masquerade as criticism of Justice Scalia’s methods. Those of us who lament the increasingly conservative nature of the current Court should be careful about extolling precedent, and criticizing Justice Scalia for not following it.

\textsuperscript{57} See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

\textsuperscript{58} See, e.g., \textit{Lochner}, 198 U.S. at 65 (Holmes, J., dissenting).

\textsuperscript{59} See, e.g., Dennis v. United States, 341 U.S. 494, 579 (1951) (Black, J., dissenting).