REDISCOVERING CONSERVATISM: BURKEAN POLITICAL THEORY AND CONSTITUTIONAL INTERPRETATION

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Recent decisions of the Rehnquist Court—particularly the Court's 1992 decision in Planned Parenthood v. Casey—have caused many to question widely-held assumptions about the meaning of judicial conservatism. In this Article, Ernest Young argues that the views of modern judicial "conservatives" such as Judge Robert Bork and Justice Antonin Scalia are antithetical to classical conservative political theory, as exemplified by the writings and speeches of the eighteenth-century British philosopher/politician Edmund Burke. In particular, Mr. Young argues that strict adherence to the original understanding of the Constitution, judicial deference to democratic majorities, and formulation of legal directives as bright-line rules are all inconsistent with classical conservatism. Instead, Mr. Young advocates an approach to constitutional interpretation inspired by Burke's emphasis on tradition and evolutionary reform. Moreover, Mr. Young speculates that it is precisely this "common-law constitutionalism" that may be driving the emerging center of today's Supreme Court.

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Conservative constitutional theory might be interesting, but it
isn’t.

—Mark Tushnet

Until very recently, few would have questioned that conservative juris-
prudence is ascendant in this country, at least outside of legal academia.
Professor Robin West, for example, observed in 1990 that “[c]onservative
constitutionalism now dominates the Supreme Court, may soon dominate
the federal judiciary, and has already profoundly shaped the constitutional
law of the foreseeable future.” The Court’s 1991 and 1992 Terms, how-
ever, have led some to doubt whether the five Reagan-Bush appointments
to the Court have created a monolithic conservative block. Professor Kath-
leen Sullivan, for example, observed that “the Supreme Court did not unveil
a full-tilt conservative revolution [in the 1991] Term,” and that although
“the Court continued to veer sharply to the right” in some respects, “[i]n
other areas . . . the Court showed surprising moderation.” Writing from a
perspective substantially to the right of Professor Sullivan, Professor Lino
Graglia demanded to know “[h]ow . . . a Court that in its [1991] term
reaffirmed . . . a constitutional right to an abortion, disallowed nonsectarian

prayer at a high school graduation ceremony, and continued to discover new limitations on capital punishment and new protections for the criminally accused [can] possibly be considered . . . conservative?" And although the 1992 Term lacked a defining moment comparable to Planned Parenthood v. Casey and, on the whole, produced rather ambiguous results, the one thing that does seem clear is that the predicted conservative revolution never arrived.

The reason that those who anticipated a conservative apocalypse are now scrambling for explanations is that those observers never really stopped to consider what made the new constitutionalism “conservative.” Instead, virtually all participants in the debate have defined “conservatism” operationally, as whatever jurisprudence is advocated by judges, academics, and politicians generally considered to be on the rightward end of the political spectrum. This is even true of those who now criticize our new, more complicated Court from the right. A recent article by Professor Graglia, for example, never defines “conservatives” in any more meaningful way than “those likely to be opposed to the ACLU on every issue.” Such sweeping categorizations ignore differences that divide “conservative” justices from each other as sharply as those that separate them from their more liberal counterparts; as Professor Michael Paulsen points out, “there are deep rifts beneath the surface of an apparently ‘conservative’ Court, rifts that erupt occasionally into earthquakes along legal conservatism’s ideological fault lines.” Although these rifts have been characterized by different commentators in a number of ways, virtually all observers share the belief that the various positions on the Court, with the obvious exceptions of those of Jus-


5. Professor West’s article is an excellent example. In her twenty-six page description of the “conservative constitutional paradigm,” see West, supra note 2, at 651-77, Professor West does not cite to any representatives of conservatism outside the group of modern legal academics and judges whom she is analyzing. Hence, although Professor West presents an interesting analysis of the group she defines as “conservative,” she ignores the logically prior question of whether that group is really conservative at all. Cf. James G. Wilson, Justice Diffused: A Comparison of Edmund Burke’s Conservatism with the Views of Five Conservative, Academic Judges, 40 U. MIAMI L. REV. 913, 913 (1986) (comparing the views of Judges Bork, Easterbrook, Posner, Scalia, and Winter with traditional Burkean conservatism).

6. Graglia, supra note 4, at 149. Although Professor Graglia generally seems to be using “conservatism” as the opposite of judicial activism, he also makes clear that activism may be used for “conservative” purposes as well. See id. at 149-51, 158-59. However, he never provides any general definition of what would constitute such a purpose.


8. See id. at 4 (arguing that the conflict is among five different sources of authority—text, original intentions, Congress and the Executive, state governments, and judicial precedent—to which advocates of “judicial restraint” might defer); Christopher H. Schroeder, A Conservative Court? Yes, 1993 PUB. INT. L. REV. 127, 130-46 (characterizing the divisions as between “judicial role” conservatism, “ideological” conservatism, and “dispositional” conservatism); Sullivan,
tices Stevens, Blackmun, and (perhaps) Ginsburg, can be accommodated under the "conservative" umbrella.  

This consensus, however, fails to take conservatism seriously as a coherent ideology rather than a simple devotion to the status quo. Conservatism, I will argue, arises out of skepticism about the capacity of human reason to order the world around us. This skepticism leads the conservative to rely on tradition and habit, rather than abstract theory, as a source of knowledge, and to prefer slow, incremental change to radical transformations. Although this conservatism is properly defined as a "situational" ideology in that it emphasizes the value of traditional institutions against revolutionary change, not all defenders of the existing order are conservative. A judge, for example, may be reluctant to depart from the status quo because of concerns about separation of powers, because the existing order conforms to his substantive vision of the just society, or because the existing distribution of social goods promotes the interests of his own class; none of these motivations, however, are inherently conservative. Indeed, once the approaches of the "conservative" justices are examined in terms of their basic philosophical assumptions, it becomes apparent that the "fault lines" on the Court reach all the way down to the philosophical core. Justices Scalia and Souter, for example, differ not only with respect to particular results, but also in their basic assumptions about human nature, social evolution, and the judicial role. If this is true—and if conservatism itself is seen as a coherent set of philosophical first principles rather than as slavish devotion to the status quo—then it makes little sense to speak of divisions on the Court as conflicts within conservatism.

This Article seeks to redefine conservatism in constitutional law by returning to the thought of Edmund Burke, the eighteenth-century British politician and philosopher whose Reflections on the Revolution in France (arguing that the "conservative" justices are split over the methodological choice of "rules" or "standards").

9. See, e.g., Schroeder, supra note 8, at 127 ("The Rehnquist Court truly is a conservative Court. It is so much of one, in fact, that the disagreements on the Court and about the Court are now entirely debates within conservatism, not between liberalism and conservatism." (emphasis added)). It is too early to tell where Justice Ruth Bader Ginsburg will fit into this picture, although it seems likely that she will come to rest somewhere between the Court's moderate conservatives and her more liberal colleagues.

10. See Samuel P. Huntington, Conservatism as an Ideology, 51 AM. POL. SCI. REV. 454, 455-56 (1957) (contrasting "situational" or "institutional" ideologies, which are defined by their attitude toward the existing order and which "lack[] what might be termed a substantive ideal," with "autonomous" or "ideational" ideologies, which involve "the ascription of value to theoretically-defined formulations and the appraisal of existing reality in terms of those formulations").

11. See infra notes 31-119, 490-538 and accompanying text.

is still regarded as "the most revered of conservative texts."13 In so doing, I hope to demonstrate not only that conservatism is a coherent philosophy, but also that those generally identified as paradigms of conservative jurisprudence—such as Justice Antonin Scalia or Judge Robert Bork—are not really conservative at all. To some extent, of course, this is simply quibbling about definitions. My primary point is that Bork and Scalia are not Burkeans, and that Burke's philosophy offers a powerful critique of current "conservative" jurisprudence; this, I think, is an important contribution even if I cannot persuade anyone to stop calling Bork and Scalia "conservative."

The "conservative" label matters, however, for at least two reasons. First, "conservatism" is a term with both a plain meaning—based on its root "conserve"—and a history; to the extent that modern "conservative" jurisprudence is inconsistent with the political theory that has historically been used to conserve and protect existing social institutions, it is simply inaccurate to call the jurisprudence "conservative."14 Second, and more important, confusion about ideological labels has seriously distorted the debate about constitutional interpretation generally. This distortion extends beyond the now-discredited tendency to view the Rehnquist Court as a monolithic conservative bloc; scholars attacking originalism, for example, have tended uncritically to identify that position with Burkean arguments for traditionalism that actually undermine the originalist position.15 Hence, the identification of conservatism with originalism, judicial restraint, and rules has stifled virtually all attempts to gain a more sophisticated understanding of what classical conservatism can contribute to the more general debate about constitutional interpretation. Recovery of the Burkean meaning of conservatism, then, offers a perspective that has heretofore been largely absent from constitutional theory.

My argument proceeds in four parts. Part I summarizes the model of jurisprudence most commonly associated with modern judicial conservatism. This model—of which Judge Bork and Justice Scalia are the most prominent exponents—has as its three basic canons adherence to the original understanding of the Constitution, deference to democratic decision-making, and preference for rules over standards in the formulation of legal

13. Kent Greenawalt, Justice Harlan's Conservatism and Alternative Possibilities, 36 N.Y.L. SCH. L. REV. 53, 54 (1991); see also 1 Bruce Ackerman, We the People: Foundations 17 (1991) (noting that the historicist strand of constitutional thought "has yet to find its modern spokesman who is Burke's equal").

14. As Professor Huntington points out, all of the major manifestations of conservative ideology in Western political history have displayed the essential characteristics of Burkean thought. See Huntington, supra note 10, at 463-67.

Part II develops the older Burkan model of conservatism, which rests upon a pessimistic view of human nature and downplays the efficacy of a priori rationalizations about law and justice in favor of tradition and incremental social reform. In Part III, I argue that these assumptions critically undermine all three of the basic tenets that undergird the jurisprudence of Judge Bork, Justice Scalia, and others; rather than resting on conservative principles, those tenets in fact depend on ideas about human rationality, democracy, and the social contract that are more consistent with classical liberalism.

Finally, in Part IV, I attempt to sketch the outlines of a truly Burkan approach to constitutional interpretation, relying on gradual, evolutionary development of traditional constitutional principles in a manner similar to the common law. It is critical, however, to remember that Burke abhorred general theories; what emerges here, therefore, is less a theory than an outlook—a preference for some sorts of arguments over others, as well as a particular disposition toward the various sources of constitutional law. This somewhat vague prescription will likely leave devotees of current trends in constitutional theory profoundly unsatisfied. Such dissatisfaction, I think, is simply an indication that the Burkan critique goes deeper than individual theories of constitutional interpretation to question the very goals of constitutional theory as it is currently practiced. Indeed, the most important theme of this Article may be that constitutional theory is considerably less

16. See infra notes 22-119 and accompanying text.
17. See infra notes 120-207 and accompanying text. In developing a Burkan perspective on the Constitution, I mean to avoid the separate question of the extent to which Burke's ideas actually influenced the Framers themselves. See, e.g., Russell Kirk, The Conservative Constitution at ix-x (1990) (arguing that Burke was "much more in the mind of the Framers than was John Locke"). My interest, rather, is in what Burke can tell us about interpreting the Framers' legacy. In concentrating on interpretive methodology, I also wish to avoid for the most part the issue of the consistency of Burke's substantive ideas with particular constitutional doctrines. See, e.g., Wilson, supra note 5, at 916 n.3 (emphasizing Burke's substantive insistence on mixed government in criticizing the constitutional decisions of modern "conservative" judges).
18. See infra notes 208-335 and accompanying text. Interestingly enough, the literature advocating originalism, judicial restraint, and/or rule-based decisionmaking virtually never self-consciously identifies itself as conservative in the sense of drawing inspiration from conservative philosophers of other fields or eras. Judge Bork, for example, abhors the trend of importing political theory of any stamp into constitutional adjudication. See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 133-38 (1990). The absence of references to Burke or other conservative philosophers may reveal an awareness that classical conservatism rests on different, and indeed contradictory, assumptions. Nonetheless, one of the primary modern proponents of classical conservatism has uncritically signed on to a jurisprudence of original intent. See Kirk, supra note 17, at 101-103.
19. See infra notes 336-489 and accompanying text.
important than most of us tend to think: theory can only take us so far, Burke teaches, and in the end we are often left with little more than the application of prudent good sense to the particular problem at hand. Nonetheless, conservatism has a great deal to say about how to think about constitutional law, despite its aversion to theoretical systems. Hence, although conservative constitutional theory may remain profoundly uninteresting, I hope to demonstrate that conservative constitutionalism is not.

I. Modern Conservative Jurisprudence

Before turning to Burke, it will be useful to try to articulate what currently passes for conservative constitutional jurisprudence. Inevitably, this task involves an element of subjectivity in picking and choosing a few examples of conservative legal thought from among the multitude of voices at the rightward end of the political spectrum. In part, this is due to the problematic position of the conservative in a predominantly liberal society like America. Although I will consider this problem further below, this section focuses upon judicial, as opposed to political, social, or moral conservatism. In developing a model of modern judicial conservatism, I will focus primarily on the writings and opinions of Justice Scalia and Judge Bork; other theorists will be considered insofar as they shed light on the major features of Scalia’s and/or Bork’s jurisprudence. Although I will question both these men’s conservative credentials in Section III, the choice to start with them should not be controversial in terms of perceptions among the legal community and the public at large. Justice Scalia is almost universally regarded by both popular and academic commentators as the most philosophically rigorous member of the Supreme Court’s conservative wing; according to Professor Michael Paulsen, “Scalia’s is the most developed, intellectually compelling, consistent, and forcefully applied judicial

21. See supra note 1 and accompanying text.
22. See generally Louis Hartz, The Liberal Tradition in America 3-32, 145-77 (1955) (arguing that because it lacks a feudal past, America has been a fundamentally liberal society in its origins and political development, and that developing a coherent conservative philosophy in such an environment is impossible).
23. See infra notes 210-30 and accompanying text.
24. See Greenawalt, supra note 13, at 54-55 (distinguishing among social, political, and judicial conservatism).
25. See, e.g., Jeffrey Rosen, The Leader of the Opposition, The New Republic, Jan. 18, 1993, at 20 ("Scalia is the purest archetype of the conservative legal movement that began in the 1960s in reaction to the Warren Court."); An Antidote to Antonin, Newsweek, Mar. 29, 1993, at 23 (observing that if Justice Holmes’s description of the Supreme Court as "nine scorpions in a bottle" is correct, then Justice Scalia is "the chief scorpion" on the "Reagan-Bush" Court).
26. See George Knauss, The Constitutional Catechism of Antonin Scalia, 99 Yale L.J. 1297, 1299 (1990) (“[F]or all his strongly-held views, Justice Scalia nonetheless still seems to be a person driven by his methodological commitments rather than a desire to reach particular results.”).
philosophy of any current justice." As for Judge Bork, his nomination to the Supreme Court in 1987 has been described as an attempt by a "radical conservative regime" to effect "the first constitutional counterrevolution" in American history, and his fullest work of constitutional theory, The Tempting of America, has been described as "a conservative legal classic." Although there are other theorists commonly regarded as "conservative" who differ in meaningful ways from these two, Bork and Scalia seem like a fair beginning for my analysis.

Setting political beliefs aside, the decisions and writings of Justice Scalia, Judge Bork, and others display three primary methodological themes that I take to represent the basic tenets of modern conservative constitutionalism: originalism—the belief that judges should adhere to the intent of the Framers of the Constitution in deciding constitutional cases; judicial re-

27. Paulsen, supra note 7, at 10.
29. Stephen B. Presser, Robert Bork's Civil War, Chi. Trib., Nov. 19, 1989, at C1 (book review). Judge Bork himself has rather scrupulously sought to maintain a firm boundary between political ideology of any kind and the "neutral" principle of judicial restraint. Indeed, he goes out of his way to note that "conservatives as well as liberals have surrendered" to the temptation of "political judging." Bork, supra note 18, at 7.
30. One prominent group of theorists that I will not consider here is the Law and Economics movement, despite the fact that this group is often identified with conservatism. One reason is that it is unclear whether advocates of economic analysis see it as an autonomous approach to constitutional interpretation, or simply as part of a broader theory of legal pragmatism. See Richard A. Posner, What Has Pragmatism to Offer Law?, 63 S. Cal. L. Rev. 1653, 1664-68 (1990) (acknowledging that "[t]he economic approach cannot be the whole content of legal pragmatism" and emphasizing other aspects in his discussion of constitutional interpretation). More importantly, Law and Economics seems clearly not conservative in the Burkean sense. Although Burke was personally sympathetic to reliance on free markets, see Edmund Burke, Thoughts and Details on Scarcity (1795), in 9 The Writings and Speeches of Edmund Burke 119, 133-35 (Paul Langford ed., Clarendon Press 1991), it is difficult to see this as a logical consequence of his conservative beliefs about human nature, tradition, etc. Nor did Burke see economic analysis as an appropriate tool of general application to social and political problems; indeed, he protested the universalization of such analysis in the Reflections when he lamented that "the age of chivalry is gone. That of sophisters, economists, and calculators has succeeded, and the glory of Europe is extinguished forever." Burke, Reflections, supra note 12, at 127. Burke would almost certainly see such Law and Economics stalwarts as the Coase Theorem as highly rationalistic abstractions that bear little or no relation to social reality. See George F. Will, Foreword to Clinton Rossiter, Conservatism in America (2d ed. 1982) ("Burke thought that economic reasoning encouraged a desiccated rationalism inappropriate to the life of society."). Similarly, Burke would surely balk at the willingness of legal economists to reshape dramatically large areas of existing doctrine in order to bring them into line with the requirements of general economic theory. In the end, as Professor Anthony Kronman has observed, Law and Economics represents a radical project "to re-found the discipline of law on something deeper, more secure, and ultimately less subjective than the law itself." Anthony Kronman, Jurisprudential Responses to Legal Realism, 73 Cornell L. Rev. 335, 339 (1988). Burke, on the other hand, would prefer to seek resolution of our legal dilemmas in a deeper understanding of the traditions and processes of law itself. See infra notes 138-47 and accompanying text.
strait—the belief that judges should generally defer to decisions by the elected branches of government; and a preference for formulating legal directives in terms of rules that narrowly constrain the discretion of the decisionmaker, rather than in terms of standards, which allow more flexibility in responding to the circumstances of individual cases. I will discuss each of these interrelated positions in turn.

A. Originalism

Originalism is most commonly associated with Judge Bork, who defines his position as requiring simply that “a judge is to apply the Constitution according to the principles intended by those who ratified the document.” Professor Michael McConnell offers a somewhat broader definition of originalism—which he discusses under the label of “interpretivism” as the view that “judges must look to the text, structure, history, and purposes of the Constitution to determine the principles to apply to the circumstances of today.” Originalists vary in the relative emphasis that they place on text, extrinsic evidence of intentions, and other forms of historical evidence. Some originalists, whom I will call “textualists,” see the language of the Constitution as the foremost or exclusive authority, generally because it is the surest guide to the Framers’ intentions. Extra-textual historical evidence is thus useful only in determining what terms used in the text were commonly understood to mean at the time the relevant constitu-

31. Bork, supra note 18, at 143.
32. Scholars have not agreed on a label for the approach articulated by Judge Bork and others. Some have used “interpretivism” as basically synonymous with “originalism.” See, e.g., John H. Ely, Democracy and Distrust: A Theory of Judicial Review 1 (1980) (defining “interpretivism” as the view that “judges . . . should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution”). I prefer, however, Dean Brest’s use of “originalism” to signify “the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.” Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 204 n.1 (1980). Moreover, it seems clearly correct that “[w]e are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.” Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 1 (1984); see also id. at 1 n.1 (accepting the blame for “having started the use of the ‘interpretivist-noninterpretivist’ terminology” in an earlier article).
34. See Brest, supra note 32, at 205. Judge Bork, for example, argues that “what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. . . . The search is not for a subjective intention. . . . When lawmakers use words, the law that results is what those words ordinarily mean.” Bork, supra note 18, at 144. Note that a textualist need not be an originalist at all, if his reliance on the constitutional language is based on a belief that only a written text can impose constitutional obligations or adequately constrain judges, rather than on the usefulness of the text as a guide to original intent.
tional provision was adopted. "Intentionalists," by contrast, believe that the constitutional text often serves as a useful guide to the intent of the Framers, but is not necessarily preferred to other sources of authorial intentions.35 The intentionalist position is based on the idea that "the force of law derives from the authority of the lawmaker."36 It is thus important to adhere to what the lawmaker actually meant in enacting (or ratifying)37 a legal provision, even if that meaning diverges from the way the terms used were generally understood at the time.38 The distinction between intentionalism and textualism may make little difference in practice, however. Because the language used by the Framers will almost always be the best evidence of their intentions, it will often be unnecessary for originalist courts to look beyond the text to other extrinsic evidence of what the Framers meant.39

Justice Antonin Scalia describes another variant as "faint-hearted" originalism.40 Adherents of this theory are willing to postulate that provisions of the Constitution were originally intended to have evolving content; in this way, for example, originalists can argue that the "cruel and unusual punishment" clause of the Eighth Amendment precludes flogging, even though the practice was common when the Amendment was adopted.41 Although Scalia confesses that "in a crunch I may prove a faint-hearted originalist,"42 he rejects the idea of evolutionary content in principle:

A democratic society does not . . . need constitutional guarantees to insure that its laws will reflect "current values." Elections take

35. See Brest, supra note 32, at 209.
37. Originalists generally agree that the relevant intent is that of the ratifiers, as the Convention itself had no power to give the document legal effect. See, e.g., Ronald D. Rotunda, Original Intent, the View of the Framers, and the Role of the Ratifiers, 41 VAND. L. REV. 507, 512 (1988). Some argue, however, that judges must look to the intent of the Framers themselves as a "fair reflection" of the ratifiers' intent, due to the difficulty of determining what the ratifiers in each state convention actually thought. See Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 375 n.130 (1981). Because the ratifiers' intent ultimately controls, however, intentions of the Framers that were not publicly disclosed to the ratifiers cannot be authoritative. Such sources as the notes taken by participants at the Philadelphia convention, which were not made public until well after ratification, are thus important only insofar as they augment our knowledge of how the ratifiers might have understood the Convention's public utterances. See Rotunda, supra, at 510-11.
38. Likening constitutional interpretation to statutory construction, Professor Kay explains that "we believe the statutory obligation does not emanate from the mere words of the provision but from the act of legislation. . . . It is to that exercise of human will in making the relevant law that we refer in statutory construction." Kay, supra note 36, at 232.
39. See id. at 234-35.
40. Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 862 (1989); see also Brest, supra note 32, at 205 (describing "moderate originalism").
41. See Scalia, supra, at 861-62.
42. Id. at 864.
care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.43

Even setting aside Justice Scalia’s objections, “faint-hearted” originalism may not be all that helpful when it comes to deciding cases. As Dean Brest points out, a number of established doctrines that the true originalist must deplore are consistent with a more moderate form of originalism; for example, a moderate originalist may approve the Court’s gender-discrimination decisions based on an evolutionary view of the Equal Protection Clauses. The problem, however, is that the evolution of these doctrines cannot be said to have been guided by originalist sources in any meaningful way.44 “Faint-hearted” originalism is thus incomplete as a constitutional theory without some additional account of how judges construing open-ended provisions of the document can be constrained by sources beyond the text and the intent of the Framers.

These variants of originalism all rest upon a similar set of arguments. Advocates of originalism have advanced arguments based upon the requirements of democratic self-government, the need for judges to decide cases according to neutral principles, the nature of the Constitution as law or as a social contract, and upon the finality of judicial decisions in constitutional cases. Judge Bork, for example, begins his argument for originalism with the “Madisonian” model of constitutional government, which “assumes that in wide areas of life majorities are entitled to rule for no better reason [than] that they are majorities.”45 Judicial review is thus vulnerable to what Professor Alexander Bickel described as the “counter-majoritarian difficulty.”46 According to Bickel, judicial review is “a deviant institution in

43. Id. at 862; see also Lino A. Graglia, “Interpreting the Constitution: Posner on Bork, 44 Stan. L. Rev. 1019, 1030 (1992) (“The purpose of constitutional restrictions on self government is to impede policy adjustments in light of changing circumstances.”). Justice Scalia also notes that “even if one assumes . . . that the Constitution was originally meant to expound evolving rather than permanent values, . . . I see no basis for believing that supervision of the evolution would have been committed to the courts.” Scalia, supra note 40, at 862.

44. See Brest, supra note 32, at 234.


the American democracy" because "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it." Bork recognizes, however, that the Madisonian model also includes a counter-majoritarian element that places certain political principles beyond the reach of majority control. The tension between these two premises is resolved "by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution." The most basic form of the argument from democracy can thus stop here; former Attorney General Edwin Meese III argues, for example, that when a judge enforces the Constitution "according to its plain words as originally understood . . . [the judge] is enforcing the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue." In such cases, Meese concludes, "the institution of judicial review promotes the purposes of constitutionalism and validates the consent of the governed."

Judge Bork's argument, however, is somewhat more sophisticated. For Bork, the Court can only fulfill its role of mediating between the majoritarian and counter-majoritarian premises of the Madisonian model if it arrives at its decisions in a particular way:

"The Court's power is legitimate only if it has . . . a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices . . . the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or the minority."

47. Id. at 18.
48. Id. at 16-17.
49. See Bork, supra note 45, at 3.
50. Id.
52. Id. Not all originalist scholars accept the argument from democracy. Professor Kay argues, for example, that originalism may often be incompatible with democratic government. "The enactors' intent may have been popularly sanctioned when first enacted, but over time their judgments are increasingly unlikely to reflect contemporary majority opinion any better than the choices of unelected, but living judges." Kay, supra note 36, at 289. As a result, Kay concludes, a commitment to originalism may require courts to strike down legislative enactments as often as it requires judges to sustain them. Id.
53. Bork, supra note 45, at 3.
The crucial point is that "a legitimate Court must be controlled by principles exterior to the will of the Justices."54 Bork thus echoes Professor Herbert Wechsler's call for decision according to "neutral principles," which Wechsler defined as "reasons that in their generality and their neutrality transcend any immediate result that is involved."55 Bork goes further than Wechsler, however, by insisting on neutrality in the definition and derivation of principles, as well as in their application.56 "If the Court is free to choose any principle that it will subsequently apply neutrally," Bork points out, "it is free to legislate just as a political body would."57 For Bork, adherence to the original understanding of the Constitution is the only way of arriving at principles that are sufficiently neutral in terms of derivation and definition. With respect to derivation, originalism allows the judge to trace his principles to the Constitution itself, rather than to his own subjective value judgments.58 Similarly, originalism guides the judge's choice of the level of generality at which to define a principle by requiring definition at the level of generality "that interpretation of the words, structure, and history of the Constitution fairly supports."59 This method satisfies the requirement of neutrality because it "is a solution generally applicable to all constitutional provisions as to which historical evidence exists."60 Bork thus concludes that "[t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights."61

A more straightforward argument for originalism derives from the very nature of Constitution as law. Professor Henry Monaghan, for example, has argued that

"the root premise [of judicial review] is that the supreme court, like other branches of government, is constrained by the written constitution. Our legal gründnorm has been that the body politic can at a specific point in time definitively order relationships, and

54. Id. at 6.
55. Id. at 2 (quoting Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959)).
56. Id.; see also Bork, supra note 18, at 146 ("The philosophy of original understanding is capable of supplying neutrality in all three respects—in deriving, defining, and applying principle.").
57. Bork, supra note 18, at 146.
58. See id. at 146-47.
59. Id. at 150.
60. Id.
61. Bork, supra note 45, at 8. Justice Scalia presents the corollary of this argument when he observes that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law." Scalia, supra note 40, at 863. "Nonoriginalism," he warns, "plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are 'fundamental to our society.'" Id.
that such an ordering is binding on all organs of government until changed by amendment.\textsuperscript{62} Similarly, Justice Scalia contends that judicial review depends upon a “perception that the Constitution . . . is in its nature the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”\textsuperscript{63} A variant of this position argues that judges must look to the intentions of the Framers in addition to the constitutional text, because the authority of legal rules must ultimately be grounded in a pre-existing right of the lawmakers.\textsuperscript{64} Other originalists emphasize the unique nature of the Constitution as a social contract, rather than its more general qualities as a legal document. Versions of this argument emphasize obligations running between the federal government and the states, between the three branches of the federal government, and between the government generally and the people.\textsuperscript{65} The Constitution, the argument holds, specifies the rights and duties running along all three of these axes; when judges reach beyond the document in deciding cases, they overstep the contractual allocation of authority. Hence, federal courts, acting as part of the national government, violate the Tenth Amendment when they limit the powers of state governments in ways not contemplated by the original Constitution.\textsuperscript{66} Similarly, because Congress’s enumerated powers are limited only by other specific provisions such as the Bill of Rights, the Supreme Court violates the separation of powers inherent in Articles I and III when it invalidates congressional action based on val-

\textsuperscript{62} Monaghan, supra note 37, at 375-76 (footnotes omitted). Professor Bruce Ackerman makes a similar argument that the basic rules of society can only be changed by rare acts of “higher lawmaker” involving a mobilized citizenry; in other times, it is the province of the judiciary to preserve the efforts of “constitutional politics” against revision. See Ackerman, supra note 13, at 6-7. Professor Ackerman, of course, has a drastically different view of when legitimate acts of constitutional change can be said to have occurred. See id. at 58, 105-108 (arguing that the New Deal Court’s abandonment of Lochner-era jurisprudence was equivalent to the Founding and Reconstruction in terms of higher lawmaker).

\textsuperscript{63} Scalia, supra note 40, at 854. Justice Scalia’s argument is grounded in part on the relative institutional competencies of courts and legislatures. “If the Constitution were not that sort of a ‘law,’ but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?” Id. Indeed, he concludes, “the legislature would seem a much more appropriate expositor of social values.” Id.

\textsuperscript{64} See Kay, supra note 36, at 231; see also Bork, supra note 18, at 145 (“If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.”); Graglia, supra note 43, at 1024 (“An entirely sufficient reason for originalism, is that interpreting a document means to attempt to discern the intent of the author; there is no other ‘interpretive methodology’ properly so called.”).


\textsuperscript{66} See Earl M. Maltz, Murder in the Cathedral—The Supreme Court as Moral Prophet, 8 U. Dayton L. Rev. 623, 627 (1983).
ues that are not derived directly from the Constitution.\textsuperscript{67} Finally, the arguments from democracy described above can all be framed as necessary requirements of the contractual obligations running between the people and those who govern them: Because the only limits upon their majoritarian prerogatives to which the people have consented are those in the constitutional text, judges exceed their legitimate authority in imposing other limits based on values extrinsic to the Constitution.\textsuperscript{68}

The last set of arguments for originalism stems from the finality of Supreme Court decisions in constitutional cases. According to this argument, nonoriginalist interpretation is appropriate for nonjudicial political actors in attempting to ascertain their constitutional obligations because their interpretations can later be revised if the values imputed to the Constitution turn out not to be appropriate or acceptable. The judiciary, however, is unique in having the power to impose its own binding interpretation upon all other actors, who can overrule that interpretation only in extremely rare instances. As a result, Professor McConnell argues, judges should "stick to the common core of agreed-upon essentials, leaving more contentious propositions to bodies whose judgments are less final and conclusive."\textsuperscript{69} Hence, members of Congress may interpret the Constitution by looking "to natural law, science fiction, the \textit{New York Times} editorial page, 'or any other source that may shed light on the problem'"; \textit{judges}, however, must rely only on original intent.\textsuperscript{70}

This is necessarily an incomplete catalogue of the arguments that have been made in favor of originalism; indeed, as Professor Ronald Rotunda has observed, "[t]he issues relating to original intent and the uses of history have created almost a cottage industry in the scholarly literature."\textsuperscript{71} This survey is sufficient, however, for my present purpose, which is to evaluate not whether originalism is successful, but whether it is conservative in its basic assumptions. Before considering that question, however, it is necessary to examine two related aspects of contemporary conservative jurisprudence: judicial restraint and the preference for rule-based adjudication.

\begin{itemize}
\item 67. See id.
\item 68. See, e.g., McConnell, \textit{supra} note 33, at 92 (arguing that the basis for originalism "is that all legitimate authority, including that of judges, stems initially from the consent of the governed").
\item 70. \textit{Id.} at 1513-14 (quoting Michael J. Perry, \textit{Morality, Politics and Law} 150 (1988)); see also Kay, \textit{supra} note 36, at 234 ("[E]xplicit and direct recourse to the original intentions may be more necessary in constitutional than in statutory interpretation because erroneous interpretations of statutes are more easily corrected by the legislature."). As articulated by Professor McConnell, this argument bears an obvious affinity to Judge Bork's neutral principles argument in that both emphasize adherence to a common core of agreed-upon principles.
\item 71. Rotunda, \textit{supra} note 37, at 509.
\end{itemize}
B. Judicial Restraint

The concept of judicial restraint is only partially differentiable from originalism in constitutional interpretation. For virtually all originalists, a primary virtue of originalism is that it promotes judicial restraint by limiting the grounds upon which judges may strike down the actions of the other branches of government; indeed, many originalists argue that what is ultimately at stake in the battle over originalist interpretation is the balance of power between the courts and the political branches of government. It is possible, however, to formulate a nonoriginalist theory of constitutional interpretation that nonetheless emphasizes judicial restraint. In addition to respecting the text and original intentions of the Constitution, a judge might also exercise judicial restraint by deferring either to the decisions of Congress, the Executive, and state governments, or to doctrines and principles articulated in judicial precedent. Given these multiple objects of deference, conflicts are bound to arise when they point in different directions; indeed, there is good evidence that this tension is what drives the divisions among the “conservative” members of the Rehnquist Court. The arguments for judicial restraint, albeit similar to those for originalism, warrant separate consideration here.

The primary argument for restraint, as for originalism, rests on the democratic principle. “Most fundamentally,” Professor McConnell argues, “rule by judges is objectionable in this society because it is inconsistent with the principles of self-government. The tradition of this political community cannot accept the proposition that the elite make better decisions than the people, or that popular institutions are inferior to electorally accountable ones.” This argument is sometimes coupled with an assertion that judges (as well as lawyers and law professors) are profoundly unrepresentative of the general public. Judges, the argument holds, are generally

72. See, e.g., Bork, supra note 18, at 159-160. Some commentators see originalism as a particular form of judicial restraint. See Paulsen, supra note 7, at 4 (observing that the original intentions of the Framers are one of several sources of legal authority to which a practitioner of judicial restraint might defer).

73. Graglia, supra note 43, at 1048 (“[The originalism debate] is not over different techniques of reading, but rather over different systems of government. The debate is not over how the Court should interpret the Constitution, but over whether it should intervene in the political process only on the basis of the Constitution.”).

74. See Bickel, supra note 46, at 24 (arguing that the Court’s function “might (indeed, must) involve the making of policy,” but that that function must be narrowly tailored to the unique institutional competencies of the judiciary and limited to respect the roles of the other branches); see also Bork, supra note 18, at 187-93 (criticizing Bickel for departing from originalism by assigning some policy-making role to courts).

75. See Greenawalt, supra note 13, at 54; Paulsen, supra note 7, at 4.

76. See Paulsen, supra note 7, at 6-7.

77. McConnell, supra note 69, at 1538.
upper-middle-class, highly educated, and, as a result, subject to certain predispositions on moral issues. Legislators, on the other hand, are forced by the rigors of electoral politics to pay more attention to the views of the populace at large. As a result, Professor McConnell asserts, "it is difficult to avoid the conclusion that a preference for judicial rule contains a large element of class bias." 78 Finally, proponents of judicial restraint often emphasize the difficulties that the politically accountable branches of government face in correcting judicial decisions that flout the will of the people. Because of these difficulties, and because judges are generally reluctant to overrule their own precedents, courts should refrain from interfering in the political process. 79

A more subtle variant of the democratic argument is Alexander Bickel's fear that "judicial review may . . . have a tendency over time seriously to weaken the democratic process." 80 Professor Bickel relies heavily on the admonition of James Bradley Thayer, made during an earlier period of judicial activism, that judicial review inherently expresses a form of distrust of the legislature. "The legislatures," Thayer argued, "are growing accustomed to this distrust, and more and more readily incline[d] to justify it, and to shed the considerations of constitutional restraints, . . . turning that subject over to the courts . . . " 81 Judicial review, in other words, encourages legislators to become sloppy and lazy, knowing that their constitutional errors will be corrected by the judiciary. This argument may be expanded to encompass not only the legislature but the people at large:

[T]he exercise of [judicial review], . . . is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience . . . that come[s] from fighting the question out in the ordinary way, and correcting their own errors. . . . The tendency of a common and easy resort to this great function . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that. 82

78. Id. at 1537. Professor McConnell's observations apply not only to judges but also to "most of the lawyers who appear before them and the academics who comment on their work." Id. Judge Bork puts the point more strongly still, insisting that "[t]he theorists of left-liberal constitutional revisionism . . . are best understood as the academic spokesmen for, and the rationalizers of, the dominant attitudes of . . . a powerful American subculture whose opinions differ markedly from those of most Americans." Bork, supra note 18, at 241.
79. See McConnell, supra note 69, at 1538.
80. Bickel, supra note 46, at 21.
81. James B. Thayer, John Marshall 103-04 (1901) [hereinafter Thayer, John Marshall]; see also James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 156 (1893) [hereinafter Thayer, American Doctrine] ("The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent.").
82. Thayer, John Marshall, supra note 81, at 106-07.
It is important, in Thayer's view, not only that decisions be made correctly and be perceived as legitimate by the people, but also that the people actually participate in the process. Democracy depends upon a people with the will and experience necessary to engage in republican self-government; by taking the really important decisions away from the political process, the Court risks undermining the capacity of the people to play their own essential role in our democracy.\footnote{See also McConnell, supra note 33, at 108-09 (arguing that shifting more and more decisionmaking responsibility to judges "would debase and impoverish republican government"). For Professor McConnell, "self-government directed toward the common weal is good in itself. . . . If the quest for justice is taken out of the political arena and moved into the branch of government uniquely insulated from popular participation, one of the great functions of republicanism will be lost." Id. McConnell goes on to point out that this impoverishment of the democratic process occurs even in the areas of morality and human rights in which nonoriginalists are most eager for judicial intervention: "[N]ot only do Supreme Court opinions contain little serious moral reflection, but they serve as an excuse for dispensing with moral reflection at other levels of government. . . . Constitutional adjudication is not a supplement to moral-political deliberation; it is often a substitute." McConnell, supra note 69, at 1537. Indeed, Professor Maltz contends that such a decline in democratic discourse occurred following the Court's decision in Roe v. Wade, 410 U.S. 113 (1973). According to Maltz, "American society was in the midst of a fundamental reevaluation of its position toward the legality of abortion" in the period immediately preceding Roe; the Court's decision, however, "effectively ended this process of discourse and compromise" by locking in a particular solution and polarizing further debate. Maltz, supra note 66, at 630-31.}

A final set of arguments for judicial restraint arises from a conception of the institutional competence of the judiciary and its role in a government of coordinate and divided powers. In addition to the nonrepresentativeness of judges, courts have a number of other institutional disadvantages in deciding basic social and moral issues: their information is generally limited to the facts that litigants choose to present to them; they are institutionally insulated from the political and business worlds that give rise to the cases they hear; and their dockets are so crowded that judges can devote little time even to critical cases.\footnote{McConnell, supra note 33, at 106.} Moreover, as Professor McConnell notes, "it is the rare Supreme Court Justice who can keep up with more than a negligible sampling of the poetry, science, economics, literature, philosophy, theology, and history that should inform an expositor of moral reality."\footnote{Id.} Finally, judicial review is only an incidental check on the powers of the political branches, because the courts can only decide constitutional issues when cases happen to come before them. Proponents of judicial restraint thus argue that the judiciary cannot be regarded as the primary bulwark against violation of the Constitution by the legislature; otherwise, courts would have been assigned a more direct and immediate role in the legislative process.\footnote{See Thayer, American Doctrine, supra note 81, at 136.} Courts should thus respect the constitutional judgments of
the other branches because, in the end, it is those branches that are primarily responsible for ensuring conformity with the Constitution’s provisions. As Professor Thayer put it, “where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect.”

Most other arguments for judicial restraint are likely to be variations on these themes of democracy and institutional role. These same arguments figure prominently in defense of the third central tenet of current conservative jurisprudence: the preference for rules over standards in adjudication. I discuss this preference in the next section.

C. Rules over Standards

In the 1989 Holmes Lecture at Harvard Law School, Justice Scalia declared that “I stand with Aristotle ... in the view that ‘personal rule’ ... should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.” By firmly declaring his preference for “general rule[s] of law” over “personal discretion to do justice,” Justice Scalia was taking sides in the jurisprudential debate between proponents of “rules” and “standards” as the preferred form of legal directives. Professor Sullivan summarizes the usual definition of “rules” as follows:

A legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. ... A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule’s force as a rule is that decisionmakers follow it, even when direct application of the

87. Id. at 136-38.
88. Id. at 136.
90. Id. at 1176.
91. On the rules/standards debate, see generally Louis Kaplow, Rules versus Standards: An Economic Analysis, 42 Duke L.J. 557, 621 (1992) (arguing that the desirability of rules or standards is influenced by the frequency with which a law will govern conduct and the costs of promulgation); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1683 (1976) (arguing that there are two opposing rhetorical models used for substantive law disputes: individualism, preferring rules, and altruism, preferring standards); Frederick Schauer, Rules and the Rule of Law, 14 Harv. J.L. & Pub. Pol’y 645, 646-47 (1991) (arguing for a legal system based on presumptive positivism, where both rule-based and particularistic decision-making are compatible with the idea of law).
background principle or policy to the facts would produce a different result.92

Professor Sullivan provides the following description of “standards”:

A legal directive is “standard”-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. . . . Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.93

This typology corresponds roughly to the distinction between categorization and balancing in constitutional adjudication. Categorization, Sullivan argues, is rule-like in that it decides individual cases by determining whether a given fact situation falls within bright-line boundaries.94 Balancing, on the other hand, is standard-like in that it requires the decisionmaker to directly apply the background values at issue in light of all relevant circumstances.95

The choice of rules over standards has commonly been justified by appeal to “Rule of Law” values of certainty and equal treatment. “[T]he Rule of Law,” according to Friedrich von Hayek, “means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”96 Such certainty is essential to individual liberty: John Rawls, for example, argues that to the extent that “[t]he boundaries of our liberty are uncertain . . ., liberty is restricted by a reasonable fear of its exercise.”97 Rules also help avoid the arbitrariness

92. Sullivan, supra note 3, at 58.

93. Id. at 58-59.

94. See id. at 59. Professor Sullivan argues that the two-tier structure of strict scrutiny for government acts that implicate fundamental rights or suspect classifications, and rational basis review for other sorts of state action, is the primary form of categorization in modern constitutional law. This is true despite the balancing rhetoric that accompanies both levels of review, because “[t]he classification at the threshold cuts off further serious debate.” Id. at 60.

95. See id. Justice Scalia, of course, is notorious in his distaste for balancing. In criticizing the majority’s adoption of a “totality of the circumstances” approach to separation of powers in Morrison v. Olson, 487 U.S. 654 (1988), for example, Scalia fumed that “[a] government of laws means a government of rules. Today’s decision . . . is ungoverned by rule, and hence ungoverned by law.” Id. at 733 (Scalia, J., dissenting).

96. FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM 72 (1944); see also Scalia, supra note 89, at 1179 (“rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”).

that may accompany discretionary decisions under standards. When the
decisionmaker is empowered to take into account any factor that he deems
relevant, we run the risk that the decision may be influenced by improper
considerations such as antipathy toward particular individuals or groups,
subjective moral or political views, or even sheer caprice. Rules thus pro-
mote the value of treating like cases alike by excluding factors that, for one
reason or another, we think ought to be irrelevant to the determination at
issue.98

Judges may also choose rules over standards for reasons of judicial
restraint. Promulgation of rules means that legal directives are given sub-
stantive content by legislators ex ante rather than left to judicial elaboration
ex post.99 There is thus less opportunity for judges to shape the content of
the rule through application of open-ended, particularistic analysis. More-
over, it is easier for observers to evaluate whether a judge has been faithful
to a bright-line rule than to determine whether a court has applied a highly
discretionary, multi-factor balancing test in the way that the framers of the
standard would have approved. Advocates of rules argue that this enhanced
transparency of judicial decisions in turn deters judges from overstepping
the bounds of their power.100 Similarly, Justice Scalia explains:

[When . . . I adopt a general rule . . . , I not only constrain lower
courts, I constrain myself as well. If the next case should have
such different facts that my political or policy preferences regard-
ing the outcome are quite the opposite, I will be unable to indulge
those preferences; I have committed myself to the governing prin-
ciple. In the real world of appellate judging, it displays more ju-
dicial restraint to adopt such a course than to announce that, “on
balance,” we think the law was violated here—leaving ourselves
free to say in the next case that, “on balance,” it was not.101

While adherence to rule-based decisionmaking constrains the ability of
judges to follow their own subjective preferences, Scalia also notes that it

98. See Sullivan, supra note 3, at 62. Justice Scalia’s version of the equality argument fo-
cuses on “the appearance of equal treatment.” Scalia, supra note 89, at 1178 (emphasis added).
Conceding that general rules may fail to take into account subtle variations between cases, Scalia
argues that rules nonetheless protect the legitimacy of the Court better than standards. This is
because in cases where passions run high on both sides, losers who see precedent as being on their
side are unlikely to accept minor distinctions in the application of multifactor tests as a justifica-
tion for the Court’s decision to change course. “Much better,” Scalia argues, “to have a clear,
previously enunciated rule that one can point to in explanation of the decision.” Id.
99. See Kaplow, supra note 91, at 559-60.
100. See Kennedy, supra note 91, at 1690. According to Professor Kennedy, formulating
rules at a high level of generality also promotes judicial restraint. “Generality in statement,” he
argues, “guarantees that individual decisions will have far reaching effects. There will be fewer
cases of first impression, and because there are fewer rules altogether, there will be fewer oc-
casions on which a judge is free to choose between conflicting lines of authority.” Id.
101. Scalia, supra note 89, at 1179-80.
may embolden judges when they are constrained to reach unpopular results: "The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases." Rules thus require judicial deference to the majority will as expressed in the law, not to the popular passions of the moment.

A preference for rules is also related to originalism. The affinity of rule-based decisionmaking and a close adherence to the written text is obvious; textualism is rule-like in that it excludes from the decisionmaking process all considerations other than the parsing of the authoritative language. Broader forms of originalism have a similar rule-like structure in their approach to the historical tradition. The first dimension of this structure requires the judge to focus upon history to the exclusion of all other factors. Originalism adds a second dimension of rule-ness by limiting the historical inquiry to particular "constitutional moments in the discontinuous historical past," rather than the evolution of legal principles over a continuous period from the Founding to the present. Although the latter

102. Id. at 1180. As an example, see Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (noting the "personal toll" of joining the majority opinion holding that flag desecration is protected speech, but observing that "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.").

103. In Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (plurality opinion), for example, the Court upheld a California court's assertion of personal jurisdiction over a nonresident defendant who was personally served with process while in the state on business unrelated to the lawsuit. Writing for a plurality, Justice Scalia recited extensive historical evidence demonstrating that the idea that "the courts of a State have jurisdiction over nonresidents who are physically present in the State" is "[a]mong the most firmly established principles of personal jurisdiction in the American tradition." Id. at 610 (plurality opinion). Having established this, Scalia refused to conduct an "independent inquiry into the desirability or fairness of the prevailing in-state service rule." "[F]or our purposes," he declared, "its validation is its pedigree." Id. at 621 (plurality opinion). According to Professor David Strauss, Justice Scalia's opinion in Burnham represents "a deliberate—almost boastful—refusal to offer any functional or policy arguments why courts should be allowed to establish personal jurisdiction [over transients]." David A. Strauss, Tradition, Precedent, and Justice Scalia, 12 Cardozo L. Rev. 1699, 1702 (1991). The reason for this refusal was undoubtedly the standard-like nature of the functional or fairness inquiries; as Justice Brennan's opinion concurring in the judgment makes clear, the alternative to historical pedigree is a balancing test that considers such factors as the reasonable expectations of the defendant, the extent to which the defendant has purposefully availed himself of benefits provided by the forum state, the burdens on the transient defendant, etc. See Burnham, 495 U.S. at 635-40 (Brennan, J., concurring in the judgment). Although Justice Scalia recognized that such a discretionary test might be unavoidable in cases considering novel procedures, his opinion shows a clear preference for the rule-like historical test where it is available. See id. at 619 (plurality opinion).

104. Sullivan, supra note 3, at 114. In this sense, Burnham is a traditionalist, not an originalist, decision because it looks to the continuity of historical practice over time rather than focusing exclusively upon the Founding. Justice Scalia's opinions interpreting the general guarantee of due process have tended to follow this pattern. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25-26 (1991) (Scalia, J., concurring in the judgment).
approach leaves a great deal of discretion to emphasize particular phases of history at the expense of other periods, the former is rule-like in identifying the practices of particular periods as authoritative while disregarding the rest of history as largely irrelevant. Professor Sullivan thus describes "[t]he rule-like structure of originalism" as a "positivist attempt to find rules in the facts of the authoritative past." Originalism also appeals to supporters of rules because of the kind of legal directives that originalist inquiries tend to support and produce. For example, the Court's test for whether a given proceeding falls within the Seventh Amendment's requirement of a jury trial focuses on whether such a proceeding would have sounded in law or equity in 1791. Similarly, Justice Scalia believes that originalism can be used to constrain the discretion of judges even with respect to those open-ended provisions of the Constitution that seem most standard-like by their own terms. For Scalia, "the essence of the judicial craft" is to give "even the most vague and general text . . . some precise, principled content . . . . The trick is to carry general principle as far as it can go in substantial furtherance of the constitutional prescription." By grounding rules in the original understanding of the Constitution, judges can claim that their attempts to craft rules out of these amorphous areas of the law are not judicial legislation, but rather legitimate products of constrained interpretation.

When the imperatives of originalism and rule-based decisionmaking conflict, however, Justice Scalia appears to harbor a preference for rules. In Employment Division v. Smith, for example, Scalia held that the Free Exercise Clause does not preclude the state from "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." Although this interpretation has the virtue of providing a bright-line rule for deciding future cases, it does not rest upon any evidence of the original understanding of the First Amendment. Justice Scalia's preference for rules also

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105. Sullivan, supra note 3, at 114.
106. See Kay, supra note 36, at 288 ("The outstanding characteristic of original intentions adjudication, for good or ill, is that it is, compared with the alternative methods, most likely to produce relatively clear and stable rules for lawful government activity.").
108. Scalia, supra note 89, at 1183 (citing the development of per se rules under the broad directives of the Sherman Act as an example).
109. See id. at 1184-85.
111. Id. at 878.
112. See Paulsen, supra note 7, at 9-10; see also Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109, 1119 (1990) (producing substantial historical evidence that the original understanding of the First Amendment would require the sort of weighted balancing test advocated by Justice O'Connor's opinion in Smith); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L.
seems to win out when it conflicts with his political beliefs. In *Arizona v. Hicks*, for example, Justice Scalia no doubt infuriated advocates of strong law enforcement by holding that the act of moving a stereo turntable discovered in plain view to look at the serial numbers underneath constituted a “search” for Fourth Amendment purposes. In so holding, Scalia drew a bright line distinction between “‘looking’ at a suspicious object in plain view and ‘moving’ it even a few inches.” “A search is a search,” he declared, “even if it happens to disclose nothing but the bottom of a turntable.”

The example of *Hicks* highlights the extent to which the features of modern conservative constitutionalism constitute an interpretive methodology rather than a corollary of conservative political positions. Judge Bork, for example, criticizes conservatives as well as liberals for departing from originalism. Similarly, liberals have argued for judicial restraint in response to the *Lochner* Court, and Professor Sullivan has concluded that “rules and standards simply do not map in any strong or necessary way onto competing political ideologies.” This focus on methodology also characterizes the classical conservatism of Edmund Burke. As the next section illustrates, however, Burke’s conservatism is methodology of a very different kind.

II. THE CONSERVATIVE PHILOSOPHY OF EDMUND BURKE

As there is an element of subjectivity in identifying modern conservative constitutionalism with Judge Bork and Justice Scalia, so too is there a similar problem in choosing Edmund Burke as the definitive example of “philosophical” or “classical” conservatism. This choice, however, has generally not been controversial among those who study conservatism as a matter of political theory. Political scientist Samuel Huntington, for example, observes that “[a]ll the analysts of conservatism... unite in identify-

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Rev. 1409, 1511-12 (1990) (same). For Justice O’Connor’s test, see Smith, 494 U.S. at 899 (O’Connor, J., concurring in the judgment).
114. *Id.* at 324-25.
115. *Id.* at 325 (quoting *id.* at 333 (Powell, J., dissenting)).
116. *Id.* See generally Kannar, *supra* note 26, at 1324-28 (discussing *Hicks* as an example of Scalia’s “formalistic approach”).
117. See *Bork*, *supra* note 18, at 223-40 (discussing “[t]he Theorists of Conservative Constitutional Revisionism”).
ing Edmund Burke as the conservative archetype and in assuming that the basic elements of his thought are the basic elements of conservatism."  

Focusing on Burke nonetheless presents several problems at the outset. Critics from Burke’s time down to the present have questioned his consistency, 121 the coherence of his philosophy, 122 and the continuing relevance of his ideas in a society whose traditions and institutions are far different from the aristocratic eighteenth century order that Burke defended. 123 The relevance question I would like to put off until Part III; 124 my concern here is simply to lay out Burke’s philosophy as developed in its original context. Both the consistency 125 and coherence 126 criticisms of that philosophy seem

120. Huntington, supra note 10, at 456. Similarly, Robert Nisbet asserts that “Burke is the prophet—the Marx or the Mill—of conservatism.” ROBERT NISBET, CONSERVATISM: DREAM AND REALITY at x (1986).

121. See, e.g., Robert M. Hutchins, The Theory of Oligarchy: Edmund Burke, 5 THE THOMIST 61, 61-63 (1943) [hereinafter Hutchins, Oligarchy] [arguing that Burke’s views on virtual representation were inconsistent]; Robert M. Hutchins, The Theory of the State: Edmund Burke, 5 REV. POL. 139, 145 (1943) [hereinafter Hutchins, Theory of the State] (noting apparently contradictory statements on the nature of the state).

122. See, e.g., Hutchins, Theory of the State, supra note 121, at 155 (“In discussing the theory of the state Burke developed . . . not so much a philosophy of conservatism . . . as a series of specious arguments, rhetorical flourishes, and quotaline which Tories of all later generations have hurled at the heads of those who sought social improvement.”).

123. See, e.g., C. B. MACPHERSON, BURKE 74 (1980) (“By his insistence on the importance of circumstances Burke ruled himself out of court for the late twentieth century.”).

124. See infra notes 210-30.

125. Burke’s support for the American colonists but condemnation of the French revolutionaries is often Exhibit A in accusations of inconsistency. See, e.g., BURKE, APPEAL, supra note 20, at 493-94 (noting such accusations by members of his own political party, who had supported both revolutions). That instance, however, is explained by the fact that Burke viewed the Americans as demanding the restoration of their traditional rights under the British Constitution, see id. at 503, while he saw the French as casting away their traditions in favor of abstract, theoretical liberties. See, e.g., BURKE, REFLECTIONS, supra note 12, at 216. In general, Burke defended himself against charges of inconsistency by observing that “[i]t is in the nature of things, that they who are in the centre of a circle should appear directly opposed to those who view them from any part of the circumference.” BURKE, APPEAL, supra note 20, at 506. Because Burke’s thought arises in response to particular challenges from a variety of directions, then, he may appear contradictory while really defending the same position; as his biographer Lord Morley put it, “[h]e changed his front, but he never changed his ground.” JOHN VISCONTY Morley, BURKE, in 14 THE WORKS OF LORD MORLEY 162 (1921). But see FRANK O’GORMAN, EDMUND BURKE: HIS POLITICAL PHILOSOPHY 14 (1973) (asserting that “Burke did change his ground with regard to several important philosophical matters”).

126. Some problems of coherence are inevitable in light of the fact that Burke never attempted a comprehensive theoretical exposition of his ideas. In response to the suggestion that the Reflections might constitute such a work, Burke insisted that he “was throwing out reflections on a political event, and not reading a lecture upon theorism and principles of Government. How I should treat such a subject is not for me to say, for I never had that intention.” EDMUND BURKE, LETTER FROM EDMUND BURKE TO WILLIAM GISAC SMITH (July 22, 1791), in 6 THE CORRESPONDENCE OF EDMUND BURKE 304 (Thomas Copeland ed., 1970). Nonetheless, C. B. Macpherson concludes that, although “there is no orderly development of a theory of political obligation or political right drawn from first principles of human nature, as with Hobbes or Locke,” there are nonetheless “the rudiments of such a theory.” MACPHERSON, supra note 123, at 38. Moreover, as I hope to show
substantially overstated on the merits; more importantly for my present purposes, both criticisms are generally concerned with Burke's substantive political positions. My focus here, however, is on the philosophical methodology with which Burke approached political questions. The major aspects of that methodology, which derive their consistency and coherence from common roots in Burke's pessimistic view of human reason, are discussed in the sections below.

A. Human Reason and the Rejection of Abstract Theory

Although Burke generally does not reason from first principles in the formal sense of John Locke or Thomas Hobbes, his thought nonetheless ultimately rests upon a particular view of human nature. "The foundation of government is . . . laid," for Burke, "not in imaginary rights of men . . . but in political convenience, and in human nature; either as that nature is universal, or as it is modified by local habits and social aptitudes." Burke's view of human nature and rationality, which developed largely in response to the optimistic rationalism of the Enlightenment, is relatively pessimistic: "We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages." Burke's philosophy is thus largely an attempt to make the world safe for human beings of limited rationality, by suggesting ways of operating and preserving a political system that do not require unrealistic rational faculties in either the governors or the governed. Hence, just as James Madison and the other American founders have been described as attempting "to economize on virtue," Burke attempts to economize on both virtue and rationality. Noël O'Sullivan calls this approach "a philosophy of imperfection, committed to

below, definitions of coherent philosophies such as Hutchins's, see supra note 121, beg the question in that they assume the basic liberal premise that the political and social universe is susceptible of explanation by means of rational theorizing. See infra notes 131-37.

127. BURKE, Appeal, supra note 20, at 534; see also EDMUND BURKE, Observations on a Late State of the Nation (1769), in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 196 (Paul Langford ed., Clarendon Press 1981). ("[P]olitics ought to be adjusted, not to human reasonings, but to human nature; of which the reason is but a part, and by no means the greatest part.").

128. BURKE, Reflections, supra note 12, at 138. Burke rejected, however, the idea that humanity is universally depraved, observing that "he that accuses all mankind of corruption ought to remember that he is sure to convict only one." EDMUND BURKE, A Letter from Edmund Burke to John Farr and John Harris, Esq., Sheriffs of the City of Bristol (1777), in 1 THE WORKS OF THE RIGHT HON. EDMUND BURKE, supra note 20, at 206, 221 [hereinafter BURKE, Letter to the Sheriffs of Bristol].

129. See ACKERMAN, supra note 13, at 198-99.
the idea of limits, and directed towards the defence of a limited style of politics."\textsuperscript{130}

An initial corollary of Burke’s distrust of human reason is his rejection of abstract theories. Extremely suspicious of universal propositions, he saw the Enlightenment’s fascination with metaphysical speculation as insufficiently sensitive to the complexity of social and political reality:

Nothing universal can be rationally affirmed on any moral, or any political subject. Pure metaphysical abstraction does not belong to these matters. The lines of morality are not like the ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence. Prudence is not only the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.\textsuperscript{131}

Burke saw himself as a practical politician rather than a philosopher; hence, his distaste for theory is based in part on a pragmatic public servant’s preoccupation with real people and problems.\textsuperscript{132} Nevertheless, it is impossible to avoid the conclusion that Burke was much more than a politician. Despite Burke’s protestations against philosophizing, Professor Hutchins correctly pointed out that “[Burke] could seldom leave a question without a fling at the theory of it.”\textsuperscript{133} Thus, Burke acknowledged that “I do not put abstract ideas wholly out of any question, because . . . without . . . sound well-understood principles, all reasonings in politics, as in every thing else, would be only a confused jumble of particular facts and details . . . .”\textsuperscript{134} Nonetheless, he insisted that “[a] statesman, never losing sight of principles, is to be guided by circumstances.”\textsuperscript{135} For Burke, this pragmatism did not represent a sacrifice of principle in order to meet the exigencies of political life; rather, Burke believed that no other philosophical approach was possible given the limitations of human reason. As J. G. A. Pocock explained, “[Burke’s] account of political society . . . endows the community

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\item \textsuperscript{130} Noel O'Sullivan, Conservatism 4 (1976).
\item \textsuperscript{131} Burke, Appeal, supra note 20, at 498.
\item \textsuperscript{132} See Burke, Letter to the Sheriffs of Bristol, supra note 128, at 215 (“I do not pretend to be an antiquary, a lawyer, or qualified for the chair of professor in metaphysics. I never ventured to put your solid interests upon speculative grounds.”); see also Anthony T. Kronman, Alexander Bickel’s Philosophy of Prudence, 94 Yale L.J. 1567, 1570 (1985) (“The wisdom of the politician is pragmatic and contextual, attentive to the particularities of time and place, attached to established institutions and procedures and accepting of the need for compromise.”) (describing Bickel’s philosophy, which was in turn based on Burke's).
\item \textsuperscript{133} Hutchins, Theory of the State, supra note 121, at 139.
\item \textsuperscript{134} Edmund Burke, Speech on the Petition of the Unitarians (1792), in 2 The Works of the Right Hon. Edmund Burke 474, 474 (Henry G. Bohn ed., 1841) [hereinafter Burke, Unitarians’ Petition].
\item \textsuperscript{135} Id.
\end{itemize}
with an inner life of growth and adaptation, and it denies to individual reason the power to see this process as a whole or to establish by its own efforts the principles on which the process is based.” 136 As a result, Pocock concluded, “Burke’s thought can . . . properly be set in opposition to any rationalist system of politics, which presents political society as based on the assent of individual minds to universal principles rationally discerned.” 137

Rather than universal principles, Burke believed that political philosophy must begin with the reality of a particular society. 138 He insisted that “[t]he theory contained in [the Reflections] is not to furnish principles for making a new constitution, but for illustrating the principles of a constitution already made. It is a theory drawn from the fact of our government.” 139 As a result, political theory must take into account the unique character of each society, acknowledging that “social and civil freedom, like all other things in common life, are variously mixed and modified, enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community.” 140 It is impossible to judge the validity of general principles apart from this context; as Burke put it, “[t]he practical consequences of any political tenet go a great way in deciding upon its value. . . . What in the result is likely to produce evil, is politically false: that which is productive of good, politically true.” 141 This empiricism is joined in Burke’s thought with a conviction that no principle can be taken to extremes. “The whole scheme of our mixed constitution,” he observed, “is to prevent any one of its principles from being carried as far, as, taken by itself, and theoretically, it would go.” 142 Burke was thus unsympathetic to criticisms that the British constitution failed to perfectly measure up to any given philosophical or moral principle:

Allow [the avoidance of extremes] to be the true policy of the British system, then most of the faults with which that system stands charged will appear to be, not imperfections into which it has inadvertently fallen, but excellencies which it has studiously sought. To avoid the perfections of extreme, all its several parts are so constituted, as not alone to answer their own several ends,

137. Id.
139. Burke, Appeal, supra note 20, at 534.
141. Burke, Appeal, supra note 20, at 523.
142. Id. at 534.
but also each to limit and control the others: insomuch, that take which of the principles you please—you will find its operation checked and stopped at a certain point.\textsuperscript{143}

Indeed, Burke felt that attempts to achieve perfection in terms of a given principle might well be counterproductive; he thus insisted that "[i]t is no inconsiderable part of wisdom, to know how much of an evil ought to be tolerated; lest, by attempting a degree of purity impracticable in degenerate times and manners, . . . new corruptions might be produced for the concealment and security of the old."\textsuperscript{144}

Most of all, Burke abhorred the idea that fundamental and far-reaching reform should be undertaken in order to rebuild society along ideal lines dictated by abstract theory. This conviction rested on a sense that the confident reformers of the Enlightenment did not appreciate the underlying fragility of society:

An ignorant man, who is not fool enough to meddle with his clock, is however sufficiently confident to think he can safely take to pieces, and put together at his pleasure, a moral machine of another guise, importance and complexity, composed of far other wheels, and springs, and balances, and counteracting and co-operating powers. Men little think how immorally they act in rashly meddling with what they do not understand. Their delusive good intention is no sort of excuse for their presumption. They who truly mean well must be fearful of acting ill.\textsuperscript{145}

Burke hated abstract theory because it precluded the sort of prudence necessary to maintain the fragile institutions of civil society. As Professor Bickel explained, "[t]rue believers[,] . . . theorists, and ideologues made the French Revolution, and for Burke a politics of theory and ideology, of abstract, absolute ideas was an abomination, whether the idea was the right of the British Parliament to tax the American colonies or the rights of man."\textsuperscript{146}

Although Burke diligently sought reform of particular abuses in the British system of government, he refused to subject that system to the withering scrutiny of comparison with an ideal political theory. "We ought to understand [our Constitution] according to our measure," Burke said, "and to venerate where we are not able presently to comprehend."\textsuperscript{147}

\textsuperscript{143} Id.

\textsuperscript{144} Edmund Burke, Thoughts on the Present Discontents (1770), in 2 The Writings and Speeches of Edmund Burke, supra note 127, at 241, 310-11 [hereinafter Burke, Present Discontents].

\textsuperscript{145} Burke, Appeal, supra note 20, at 535.

\textsuperscript{146} Alexander M. Bickel, Edmund Burke and Political Reason, in The Morality of Consent, supra note 138, at 11, 19.

\textsuperscript{147} Burke, Appeal, supra note 20, at 536.
B. Tradition and Prescriptive Wisdom

In place of a priori reason, Burke believed people should rely on the prescriptive wisdom inherent in longstanding prejudices and existing institutions. "Burke," Professor Anthony Kronman writes, "is the outstanding defender of . . . the ancient but now largely discredited idea that the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative."\(^{148}\) The current disrepute of tradition is evident from the stigma attached to the word "prejudice." For Burke, prejudice was not a pejorative term but rather a name for the unexamined wisdom accumulated over generations; he thus praised the British as "men of untaught feelings, that, instead of casting away all [their] old prejudices, . . . cherish them to a very considerable degree, and . . . cherish them because they are prejudices; and the longer they have lasted and the more generally they have prevailed, the more [the British] cherish them."\(^{149}\) If we are to economize on reason, then, our limited capacities are better employed in searching for the truth contained within prejudice; such truth is not only more reliable but easier to apply, because it rests upon habit rather than the application of the individual's rational faculties. Above all, because prejudice serves as a surer source of knowledge than the reason of singular human beings, we should never attempt "to cast away the coat of prejudice and to leave nothing but the naked reason."\(^{150}\) Even the most intelligent individual is limited not only by his own understanding but also by the relative deficiency of his own experience. Prejudice and habit, then, provide a way of tapping a collective wisdom that transcends the capabilities of any individual. As Charles Parkin puts it, "[the higher reason] is more surely discerned in the collective and common experience of men, the co-operation of minds and the community of instinct and sentiment which links men to one another."\(^{151}\)

\(^{149}\) Burke, Reflections, supra note 12, at 138.
\(^{150}\) Id.

\(^{151}\) Charles Parkin, The Moral Basis of Burke's Political Thought 117 (1956). It is essential to distinguish Burke's understanding of "prejudice" from its modern usage as a synonym for bigotry. See, e.g., The American Heritage Dictionary 977 (2d college ed. 1982) (listing "[r]ational suspicion or hatred of a particular group, race, or religion" as a definition for "prejudice"). Although prejudice carries a strong presumptive authority for Burke, that authority was not irrefutable, particularly when historical experience over time showed a prejudice to be malignant. Burke thus opposed bigotry throughout his life, whether on behalf of Irish Catholics, the peoples of British India, or African-American slaves. See infra notes 178-84 and accompanying text. Burke's critiques of these and other instances of oppression, however, was always founded upon prudence and the inconsistency of unjust practices with other, more deeply rooted traditions, rather than upon abstract reason. See infra notes 185-96, 414-18.

The wisdom of Burke's emphasis on prejudice is evident when we consider alternative ways in which a community might respond to bigotry. While it might be theoretically possible, for instance, to subject each racial slur to rational scrutiny in order to determine whether it contained
Prescriptive wisdom is also evident in the ancient institutions of civil society. In his search for guidance in government, Burke looked not to abstract speculation but to the British constitution, which had evolved slowly and incrementally over hundreds of years.\footnote{152} Although such a structure may contain ingredients whose rational purpose is not immediately evident to individual minds, Burke asserted that we should venerate even these incomprehensible portions.\footnote{153} This is because the existing institutional arrangements reflect the accumulated wisdom of centuries of political decisions; each incremental step is the product either of rational deliberation or natural development and has been tested by the experience of many years. The cumulative product reflects a reason far superior to that of any individual or generation:

Prescription is the most solid of all titles, not only to property, but . . . to government. . . . It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it. It is a better presumption even of the choice of a nation, far better than any sudden and temporary arrangement by actual election. Because a nation is not an idea only of local extent, and individual momentary aggregation, but it is an idea of continuity, which extends in time as well as in numbers and in space. And this is a choice not of one day, or one set of people, . . . it is a deliberate election of ages and of generations; it is a constitution made by what is ten thousand times better than choice; it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil and social habits of the people, which disclose themselves only in a long space of time. It is a vestment, which accommodates itself to the body. Nor is prescription of government formed upon blind unmeaning prejudices—for man is a most unwise, and a most wise, being. The individual is foolish. The multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and when time is given to it, as a species, it almost always acts right.\footnote{154}

any truth, Burke would argue that we should seek to make abhorrence of racism so deeply engrained in the character of citizens that rejection of such slurs would be instinctive and automatic. In much the same way, it seems likely that Thomas Jefferson’s phrase “all men are created equal”—a much contested proposition at the time it was written—is held by most Americans today as an article of faith and tradition rather than considered political theory. In Burke’s terms, a commitment to some form of political equality—however contested the content of that term might be—has become an American prejudice.

\footnote{152} Burke, Appeal, supra note 20, at 535.
\footnote{153} Id. at 536.
\footnote{154} Edmund Burke, Speech on the Reform of the Representation in the House of Commons (1782), in 2 The Works of the Right Hon. Edmund Burke, supra note 134, at 486, 487. Burke’s idea that prescription is a better indicator of consent is based on his idea that the social contract includes not only the living but also the dead and the unborn. For Burke, the choice of a
This passage, according to Professor Pocock, represents a restatement of the classic English doctrine of the ancient constitution that undergirded the development of the English common law.\footnote{155} Pocock characterizes that doctrine as "the habit of interpreting English politics and society not with the aid of any political theory designed for the explanation of society in general, but in the light of those assumptions about English society which were already contained in its most distinctive and characteristic body of rules."\footnote{156} "That body of rules," Pocock adds, "was the common law . . ."\footnote{157} Such an approach recognizes the possibility of reform, but insists that the primary inspiration for such reform comes from the history and past practices of society.\footnote{158}

C. The Organic Social Contract

Burke’s idea of the past’s claim upon present and future generations is reflected in a theory of the social contract that differs substantially from the classical liberal conception. John Locke’s social contract is an expression of the principle that government must derive from popular consent, as well as a means for deducing the rights of persons in civil society.\footnote{159} Similarly, John Rawls’s original position follows in this tradition by acting as a philosophical test of a just society.\footnote{160} Burke’s contract, by contrast, has little to say about how or why people might choose to enter into society; indeed, for Burke, the origins of society are lost in the mists of time immemorial.\footnote{161}

single generation does not weigh heavily versus the preference of the multitudes who have gone before. See infra notes 162-72 and accompanying text.

\footnote{155} See Pocock, supra note 136, at 227. But see Paul Lucas, On Edmund Burke’s Doctrine of Prescription; or, An Appeal from the New to the Old Lawyers, 11 IHR. J. 35, 56-63 (1968) (arguing that “Burke both emerged from and rejected the intellectual womb of English legal traditionalism”).

\footnote{156} Pocock, supra note 136, at 210.

\footnote{157} Id.

\footnote{158} In what is probably the most sophisticated treatment of Burke in the modern legal literature, Professor Anthony Kronman suggests that Burke’s traditionalism springs from a deeper source. “The past,” Professor Kronman writes, “is not something that we . . . choose for one reason or another to respect; rather, it is such respect that establishes our humanity in the first place.” Kronman, supra note 148, at 1066. Kronman’s basic argument is that the ability to participate in multigenerational cultural projects—such as the continuing evolution of the law through precedent—is the essence of our humanity. Hence, tradition is worthy of respect purely for its own sake. Unfortunately, an in-depth treatment of Kronman’s argument is outside the scope of this Article. It is worth noting, however, that even if Kronman is not entirely persuasive in characterizing Burke’s traditionalism as resting on other than prudential grounds, it seems clear that, for Burke, prudential grounds are by no means inferior justifications.


\footnote{161} See Pocock, supra note 136, at 229 (describing Burke’s belief that “little or nothing can be known of the history of an immemorial constitution save that there is a great weight of presumption in its favour”).
For Burke, then, the social contract functions primarily as an articulation of the nature of civil society:

Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence, because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.\textsuperscript{162}

The first distinctive feature of this contract is that it includes not only the living, but also the dead and the unborn. Burke would thus never accept Thomas Jefferson's declaration that "the earth belongs in usufruct to the living: . . . the dead have neither powers or rights over it."\textsuperscript{163} Instead, Burke views society as an organic community. "Our political system," he writes, is like

a permanent body composed of transitory parts, . . . moulding together the great mysterious incorporation of the human race, [wherein] the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenour of perpetual decay, fall, renovation, and progression.\textsuperscript{164}

In this way, the British constitution "preserv[es] the method of nature in the conduct of the state," thereby "giv[ing] to our frame of polity the image of a relation in blood, binding up the constitution of our country with our dearest domestic ties, adopting our fundamental laws into the bosom of our family affections, keeping inseparable . . . our state, our hearths, our sepulchres, and our altars."\textsuperscript{165}

The role of consent in this community is minimized in several ways. First, Burke adopts a strong version of implied consent, whereby those born into the community automatically incur obligations upon receiving the ben-

\textsuperscript{162} Burke, Reflections, supra note 12, at 146-47.

\textsuperscript{163} Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), quoted in George Seldes, The Great Thoughts 209 (1985) (emphasis omitted).

\textsuperscript{164} Burke, Reflections, supra note 12, at 84.

\textsuperscript{165} Id.
enefits of civil society. 166 Second, Burke believes that, as a practical matter, the contract is justified by prescription and not by rationalistic speculation about its origins. "The foundations, on which obedience to governments is founded, are not to be constantly discussed," he writes. "That we are here, supposes the discussion already made, and the dispute settled." 167 Finally, and most interestingly, the social contract is binding in the deeper sense that it arises out of human nature and natural law; in this sense, the contract is not voluntary at all. 168 This position is evident in the Reflections, where Burke argues that

[each contract of each particular state is but a clause in the great primaeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by inviolable oath which holds all physical and all moral natures, each in their appointed place. 169

As a result, individuals are bound to other members of the political community by duties and obligations that are not chosen. "Dark and inscrutable are the ways by which we come into the world," Burke writes. "The instincts which give rise to this mysterious process of nature are not of our making. But out of physical causes, unknown to us, perhaps unknowable, arise moral duties, which, as we are able perfectly to comprehend, we are bound indispensably to perform." 170

The prescriptive authority of Burke's social contract creates an enormous presumption in favor of existing institutions. "The constitution of a country being once settled upon some compact, tacit or expressed," Burke declares, "there is no power existing of force to alter it, without the breach

166. Although Burke admits that "civil society might be at first a voluntary act," and even that "in many cases it undoubtedly was," he nonetheless insists that "its continuance is under a permanent standing covenant, co-existing with the society." Social obligations do not, for Burke, depend on the acts or choices of individuals; rather, he explains that "[m]en without their choice derive benefits from [social] association; without their choice they are subjected to duties in consequence of these benefits; and without their choice they enter into a virtual obligation as binding as any that is actual." Burke, Appeal, supra note 20, at 522.

167. Burke, Unitarians' Petition, supra note 134 at 476. As Leo Strauss observes, "Burke does not reject the view that all authority has its ultimate origin in the people or that the sovereign is ultimately the people or that all authority is ultimately derived from a compact of previously 'uncovenanted' men. But he denies that these ultimate truths . . . are politically relevant . . . ." Leo Strauss, Natural Right and History 298 (1953).

168. See O'Gorman, supra note 125, at 114.

169. Burke, Reflections, supra note 12, at 147.

170. Burke, Appeal, supra note 20, at 523. For a modern statement of a related view, see Michael J. Sandel, Justice and the Good, in Liberalism and Its Critics 172 (Michael J. Sandel ed., 1984) (recognizing "loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of this family or community or nation or people, as bearers of this history," and which "go beyond the obligations [we] voluntarily incur").
of the covenant, or the consent of all the parties. Such is the nature of a contract."\textsuperscript{171} The will of the majority, moreover, is irrelevant where the basic obligations of society are concerned; the majority "cannot alter the moral any more than . . . the physical essence of things."\textsuperscript{172} This admonition does not preclude reform, however, so long as the essential structure of the compact is kept according to tradition and passed on to future generations. The conditions and methodology of such reform are considered in the next section.

D. The Possibility of Evolutionary Change

Many commentators have tended to assume that Burke's views on tradition and the social contract lock him into a rigid defense of the existing order.\textsuperscript{173} Such criticisms ignore Burke's profound commitment to social and political reform. Burke writes, for example, that "[a] disposition to preserve, and an ability to improve, taken together, would be my standard of a statesman."\textsuperscript{174} This commitment to reform extended even to the basic constitution of society: "Publick troubles have often called upon the Country to look into its Constitution. It has ever been bettered by such a revision."\textsuperscript{175} Nor did Burke see his traditionalism as inconsistent with reform. For Burke, "the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission, without at all excluding a principle of improvement. It leaves acquisition free, but it secures what it acquires."\textsuperscript{176} This method has the advantage of ensuring that reforms are not merely transitory; instead, they are "locked fast as in a sort of family settlement, grasped as in a kind of mortmain for ever."\textsuperscript{177} The best evidence of Burke's commitment to reform, however, lies in the record of his political life. Prior to the French Revolution, which came near the end of Burke's political career, no one would have questioned Burke's reformist credentials. In his earlier years, Burke had spoken out against the oppression of Catholics in Ireland,\textsuperscript{178} served as the philosophical spokesman for

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\item \textsuperscript{171} Burke, \textit{Appeal}, \textit{supra} note 20, at 521-22.
\item \textsuperscript{172} Id. at 522.
\item \textsuperscript{173} See, e.g., Hutchins, \textit{Theory of the State}, \textit{supra} note 121, at 147-48 (arguing that under Burke's organic contract "[t]he people are . . . contractually bound to the precise constitution which they possess and to the precise distribution of political power which it ordains. A doctrine Locke had employed to legalize a revolution becomes, in Burke's hands, a means of defending the status quo.").
\item \textsuperscript{174} Burke, \textit{Reflections}, \textit{supra} note 12, at 206.
\item \textsuperscript{175} Edmund Burke, \textit{Address to the British Colonists in North America} (1777), in \textit{2 The Works of the Right Hon. Edmund Burke, supra} note 134, at 401, 404.
\item \textsuperscript{176} Burke, \textit{Reflections}, \textit{supra} note 12, at 83-84.
\item \textsuperscript{177} Id. at 84.
\item \textsuperscript{178} See Edmund Burke, \textit{Tract on the Popery Laws} (1765), in \textit{9 The Writings and Speeches of Edmund Burke, supra} note 30, at 434, 435 [hereinafter Burke, \textit{Popery Laws}].
\end{itemize}
the Rockingham Whig party in their opposition to George III's court system of ministry, and opposed Lord North's ministry by urging conciliation with the American colonists. Burke also strongly condemned slavery; prior to the American Revolution, he opposed seating American representatives in Parliament on the ground that any delegation would have included slave owners, and drafted a Negro Code that would have provided for the gradual emancipation of black slaves in America. Finally, much of Burke's later political career was preoccupied with seeking to shelter the people and customs of India from the abuses of the British East India Company; this effort culminated with his leading role in the seven year impeachment trial of Warren Hastings, the Governor-General of Bengal. Indeed, Burke's remark near the end of his life that "the affairs of India . . . are those on which I value myself the most" indicates that he viewed himself primarily as a reformer.

Burke's conservatism is evident, however, in the particular method of reform that he advocated. He was constantly aware of the complexity of civil society and the danger that our limited ability to fully grasp the workings of government posed for reformers; he thus criticized the French revolutionaries for forgetting that "[i]n states there are often some obscure and

179. See Burke, Present Discontents, supra note 144, at 260-61.
180. See Edmund Burke, Speech on Conciliation with America (1775), in 1 The Works of the Right Hon. Edmund Burke, supra note 20, at 181, 181 [hereinafter Burke, On Conciliation].
181. See Conor C. O'Brien, The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke 91-92 (1992); see also id. at 92 (noting Burke's skepticism of American rhetoric about freedom in the Virginia Resolves of 1765, on the ground that the authors were slave owners).
182. See Edmund Burke, Letter from Edmund Burke to the Right Hon. Henry Dundas: With the Sketch of a Negro Code (1792), in 2 The Works of the Right Hon. Edmund Burke, supra note 134, at 419, 420-28. It is thus unfair to identify Burke with the defense of slavery or segregation. See, e.g., Strauss, supra note 103, at 1712 ("The traditionalist, Burkean case in support of segregation was a strong one . . ."). Professor Strauss fails to recognize that the Burkean case for segregation was no stronger than the case for slavery—which obviously was not strong enough, given Burke's countervailing commitment to justice and reform. Indeed, Professor James Wilson concludes that "the essence of Burke's conservatism" was "a vigilant hostility to injustice." Wilson, supra note 5, at 942. The view of Burke as ineffectually committed to defending all aspects of any existing order, no matter how unjust, is an untenable straw man once Burke's political record is taken into account.
184. Edmund Burke, Letter from the Right Hon. Edmund Burke to a Noble Lord (1796), in Selected Writings and Speeches of Edmund Burke 512, 521 (Ross J. S. Hoffman & Paul Levack eds., 1949). Although Burke failed to secure Hastings's conviction, Lord Morley asserts that "he overthrew a system, and stamped its principles with lasting censure and shame." Morley, supra note 125, at 129. But see O'Gorman, supra note 125, at 105-106 (arguing that Indian reform was inevitable even absent Burke's role).
almost latent causes, things which appear at first view of little moment, on which a very great part of its prosperity or adversity may most essentially depend." 185 Because of this inherent danger, Burke insisted that "it is with infinite caution that 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." 186 A prudent reformer must thus begin not with abstract speculation but with "the existing materials of his country." 187 It was in this way that Burke explained the Glorious Revolution of 1688, which he saw as having restored constitutional government to Britain:

The very idea of the fabrication of a new government is enough to fill us with disgust and horror. We wished at the period of the Revolution, and do now wish, to derive all we possess as an inheritance from our forefathers. Upon that body and stock of inheritance we have taken care not to inoculate any cyon alien to the nature of the original plant. All the reformation we have hitherto made, have proceeded upon the principle of reference to antiquity; and I hope . . . that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example. 188

This method is unlikely to satisfy those who are impatient with continuing injustice. Burke, however, saw the slow pace of change as a positive factor, rather than a necessary inconvenience. "It is one of the excellencies of a method in which time is amongst the assistants," he wrote, "that its operation is slow, and in some cases almost imperceptible." 189 Burke supported this view with an analogy to physical construction: "If circumspection and caution are a part of wisdom, when we work only upon inanimate matter," he pointed out, "surely they become a part of duty too, when the subject of our demolition and construction is not brick and timber but sentient beings, by the sudden alteration of whose state, condition, and habits multitudes may be rendered miserable." 190

Slow reform, for Burke, minimized the risks of change by proceeding in small increments that could each be tested for consistency with the overall structure of government and society:

By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first, gives light to us in the second; and so, from light to light, we are conducted with safety

185. Burke, Reflections, supra note 12, at 112.
186. Id.
187. Id. at 206.
188. Id. at 81.
189. Id. at 217.
190. Id.
through the whole series. We see that the parts of the system do not clash. The evils latent in the most promising contrivances are provided for as they arise. One advantage is as little as possible sacrificed to another. We compensate, we reconcile, we balance. We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men.\footnote{Id.}

This description, as well as Burke’s references to “analogical precedent, authority, and example,”\footnote{See supra note 188 and accompanying text.} is reminiscent of the methods of the common law. Indeed, Professor Charles Fried describes the rejection of abstract philosophy in favor of precedent and analogy as paradigmatic of “the artificial Reason of the law.”\footnote{Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35, 57 (1981).} From a historical standpoint, Professor Pocock traces the kinship of Burke’s thought with that of Sir Matthew Hale, one of the foremost English common lawyers. For both Hale and Burke, Pocock argues, “a belief in immemorial customary law . . . was one of the cardinal beliefs of the society in which both men lived.”\footnote{Pocock, supra note 136, at 231. Burke’s roots in the common-law tradition are also evident in his metaphors, which often “[identify] the principles of political liberty with the principles of our law of landed property.” Id. at 212.} Burke’s theory of reform is thus grounded in the common-law tradition of evolutionary change whereby “custom was constantly being subjected to the test of experience, so that if immemorial it was, equally, always up to date.”\footnote{Id. at 213.} Even when evolutionary adaptation was required, however, Burke insisted on careful adherence to the general themes and values inherent in tradition. “I put my foot in the tracks of our forefathers,” he declared, “where I can neither wander nor stumble.”\footnote{Burke, On Conciliation, supra note 180, at 197.}

E. The Natural Aristocracy

For Burke, one means of ensuring that change would be prudently managed was to place power in the hands of a governing elite. “In all societies,” Burke argued, “consisting of various descriptions of citizens, some description must be uppermost.”\footnote{Burke, Reflections, supra note 12, at 100.} This uppermost description is the “natural aristocracy.” According to Burke, “A true natural aristocracy is . . . an essential integrant part of any large body rightly constituted”; this group operates in society as “the leading, guiding, and governing part. It is the soul to the body, without which the man does not exist.”\footnote{Burke, Appeal, supra note 20, at 525.}

\footnote{Id. at 212.}
aristocracy thus provides the structure that holds society together; without it, a people collapses into a mob. Burke was ambiguous, however, with respect to the membership of this natural aristocracy. On the one hand, Burke had a considerable attachment to the traditional system of hereditary privilege: "Some decent, regulated pre-eminence," he wrote, "some preference (not exclusive appropriation) given to birth, is neither unnatural, nor unjust, nor impolitic."¹⁹⁹ Membership in the elite is based on a set of "legitimate presumptions, which, taken as generalities, must be admitted for actual truths."²⁰⁰ These presumptions are based upon Burke's belief that a certain sort of upbringing is most conducive to forming the character of those who are to direct society:

To be bred in a place of estimation; . . . to be habituated to the censorial inspection of the public eye; . . . to have leisure to read, to reflect, to converse; to be enabled to draw the court and attention of the wise and learned wherever they are to be found; . . . to be taught to despise danger in the pursuit of honour and duty; to be formed to the greatest degree of vigilance, foresight, and circumspection, in a state of things in which no fault is committed with impunity, and the slightest mistakes draw on the most ruinous consequences . . . these are the circumstances of men, that form what I should call a natural aristocracy, without which there is no nation.²⁰¹

Under Burke's idea of "presumptive virtue" then, "[t]hose who have land, leisure, and information, and especially land, are presumed to be virtuous

¹⁹⁹. Burke, Reflections, supra note 12, at 103. The principal value of a hereditary aristocracy is its ability to serve as a means of transmission for the culture and traditions of society. The perpetuation of the great families, Burke felt, produces a valuable historical continuity; families, like the contract of civil society itself, are communities of the dead, the living, and the unborn. Burke thus observes that "[t]he immediate power of a Duke of Richmond, or a Marquis of Rockingham, is not so much of moment but if their conduct and example hand down their principles to their successors; then their houses become the publick repositories and office of Record for the constitution." Edmund Burke, Letter from Edmund Burke to the Duke of Richmond (November 15, 1772), in 2 The Correspondence of Edmund Burke 372, 377 (Lucy S. Sutherland ed., 1960). Burke's attitude toward the hereditary elite was not without ambivalence, however. Lord Morley recounts that "Burke used to reproach them with being somewhat languid, scrupulous, and unsystematic"; according to Morley, Burke became frustrated when he could not agree with important members of the ministry "as to what constitutes a decent and reasonable quantity of fox-hunting . . . in a [national] crisis." Morley, supra note 125, at 61-62. This frustration was only symptomatic of Burke's deeper awareness that the aristocratic system kept self-made men of ability (like himself) from ever attaining the highest positions of power; according to Isaac Kramnick, "Burke epitomized the love/hate ambivalence that the assertive bourgeoisie felt toward their aristocratic betters." Isaac Kramnick, The Rage of Edmund Burke: Portrait of an Ambivalent Conservative 8 (1977).

²⁰⁰. Burke, Appeal, supra note 20, at 525.

²⁰¹. Id. at 214-15.
and wise."²⁰² Despite his admiration of the hereditary aristocracy, however, Burke believed that this group must be supplemented by persons of ability from the other classes. Burke asserts that he does not wish "to confine power, authority, and distinction to blood and names and titles." Instead, he explains, "[t]here is no qualification for government, but virtue and wisdom, actual or presumptive. Wherever they are actually found, they have, in whatever state, condition, profession or trade, the passport of Heaven to human place and honour."²⁰³

Whatever its composition, the idea of a natural aristocracy is central to Burke's theory of civil society. At the heart of this theory is a distrust of the ability of law and institutional constraints alone to hold off the corruption of the State. Instead, good government ultimately must depend on the character of the rulers rather than the institutional structures that surround them:

The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of the powers which are left at large to the prudence and uprightness of Ministers of State. Even all the use and potency of the laws depends upon them. Without them, your Commonwealth is no better than a scheme upon paper; and not a living, acting, effective constitution.²⁰⁴

Burke's basic disagreement with Madison, then, lies in Burke's conviction that we cannot economize on virtue by means of institutional checks and balances or by setting conflicting interests against one another.²⁰⁵ Instead, Burke argues that we must concentrate power in the hands of a relatively few individuals who are either bred or carefully selected to be more virtuous than the population at large.²⁰⁶ Character is more important than law;

²⁰². Hutchins, Oligarchy, supra note 121, at 114. As illustrated below, however, Hutchins goes too far in asserting that "the presumption is irrebuttable." Id.

²⁰³. Burke, Reflections, supra note 12, at 101. Burke's catalogue of qualifications for the natural aristocracy thus includes "to be employed as an administrator of law and justice, and to be thereby amongst the first benefactors to mankind," "to be a professor of high science, or of liberal and ingenious art," "to be amongst rich traders, who from their success are presumed to have sharp and vigorous understandings," and "to possess the virtues of diligence, order, constancy, and regularity, and to have cultivated an habitual regard to commutative justice." Burke, Appeal, supra note 20, at 525.

²⁰⁴. Burke, Present Discontents, supra note 144, at 277.

²⁰⁵. Cf. e.g., The Federalist No. 51, at 265 (James Madison) (Max Peloff ed., 1987) (arguing that, because we cannot count on virtuous rulers, government must be so constructed as to check itself). As a proponent of the British Constitution's "mixed regime," of course, Burke approved of institutional measures based on divided functions and conflicting interests. See Burke, Reflections, supra note 12, at 244. The point here is simply that those measures are insufficient to preserve society if its statesmen fail to live up to a certain standard of virtue.

²⁰⁶. In addition to the provision of a governing elite, the presence of the natural aristocracy has a stabilizing influence in two more subtle ways. The first is through the concentrations of property that adhere to social status; such concentrations, particularly in the form of hereditary
"of all things [with which] we ought to be the most concerned," Burke writes, is "who and what sort of men they are, that hold the trust of every thing that is dear to us."207

III. MODERN CONSERVATIVE CONSTITUTIONALISM THROUGH BURKEAN EYES

Having developed a model of classical conservatism based on Edmund Burke's political philosophy, this section uses that model to critique the modern conservative constitutionalism of Justice Scalia, Judge Bork, and others. Because this Article is not an attempt to evaluate comprehensively the jurisprudence of any particular individual, this section does not discuss many aspects of modern conservative thought that are legitimately conservative in a Burkean sense; Justice Scalia, for instance, often exhibits a deep respect for tradition that is distinct from his commitment to originalism.208 This Article's purpose, rather, is to ask whether the methodological doctrines most commonly associated with conservatism today—originalism, judicial restraint, and rule-based decisionmaking—can accurately be described as "conservative" in the traditional, Burkean sense. Although such an inquiry sheds little normative light on how we "ought" to interpret the

wealth transmitted from generation to generation, provide a stabilizing force within the social and economic order. See Burke, Reflections, supra note 12, at 102 ("The power of perpetuating our property in our families is one of the most valuable and interesting circumstances belonging to it, and that which tends the most to the perpetuation of society itself."). The natural aristocracy was also important for its role in preserving the manners of the ancient world, which Burke referred to as chivalry and nobility. For Burke, the way people are accustomed to treat one another is at least as important as legal obligations. Human reason is not sufficient to formulate a system of government that can make allowances for all the complexities of human interactions through positive law; instead, we rely on manners to smooth over the inevitable conflicts and make an imperfect system workable. Burke was thus confident that "[w]hilst manners remain entire, they will correct the vices of law, and soften it at length to their own temper." Burke, Letter to the Sheriffs of Bristol, supra note 128, at 210. Although both these aspects of the natural aristocracy were crucial for Burke, they are less important in the context of judicial review; hence, I have devoted only minimal space to them here.

207. Burke, Present Discontents, supra note 144, at 278.

208. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24-25 (1991) (Scalia, J., concurring in the judgment) (arguing that historical acceptance of punitive damages is sufficient to uphold them under the Due Process Clause); Burnham v. Superior Court, 495 U.S. 604, 621-22 (1990) (holding that transient jurisdiction is constitutionally valid because of its historical acceptance, without considering the usual fairness balancing test used in personal jurisdiction cases); Michael H. v. Gerald D., 491 U.S. 110, 122-30 (1989) (plurality opinion) (holding that traditional denial of parental rights to adulterous natural fathers precluded a substantive due process challenge to a statute granting a conclusive presumption of fatherhood to the mother's husband). See generally Strauss, supra note 103, at 1701-05 (concluding that Justice Scalia "is deeply respectful of tradition and gives it near primacy in interpreting the Constitution"). Note, however, that to the extent the historical pedigree of an existing practice is used, as in Burnham, as a bright-line rule of validity that excludes all other considerations, that approach is in tension with the Burkean preference for particularized, standard-like decisionmaking. For criticism of Justice Scalia's specific approach to tradition in Michael H., see infra notes 403-09 and accompanying text.
Constitution, it can at least help clarify the terms of theoretical debate. Once we understand that "conservatism" may mean something other than originalism, restraint, and rules, for example, we are in a better position to understand the current divisions on the Supreme Court. To the extent that Burke's classical position is persuasive, however, my critique takes on a more normative focus. If Burke is basically right about the limitations of human reason, the importance of tradition, etc., then modern conservative constitutional jurisprudence is sorely misguided. Before embarking upon that argument, however, it is necessary to deal with some problems of translation in applying Burke's views to modern-day America.

A. The Dilemma of American Conservatism

The translation problem arises from Burke's own insistence on the importance of context. "[T]he general character and situation of a people must determine what sort of government is fitted for them," he insisted. "That point nothing else can or ought to determine." Some of Burke's strongest statements in this vein, moreover, occurred when he was addressing the subject of the American colonies. This attachment to the particulars of time and place creates a problem for Burke's modern students because modern America bears little resemblance, at least at first glance, to the aristocratic, traditionalist society which Burke was concerned with defending. "We live," according to Professor McConnell, "in the most thoroughly liberal political community in the history of the world, a community in which virtually all serious political figures from Barry Goldwater to George McGovern are 'liberals.'" The reason for this lies in what historian Louis Hartz has called "the storybook truth about American history: that America was settled by men who fled from the feudal and clerical oppressions of the Old World." America thus lacks the aristocratic remnants of the feudal tradition that Burke felt were so important. And

209. Professor Kathleen Sullivan's insightful Foreword to the Supreme Court's 1992 Term is an excellent example of a similar project. In her essay, Sullivan describes the divisions among the Court's "conservative" bloc in cases such as Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992), and Lee v. Weisman, 112 S. Ct. 2649 (1992), in terms of the choice between rules and standards; she traces this distinction, in turn, to alternative versions of philosophical conservatism. See Sullivan, supra note 3, at 104, 112-21.


211. See id.

212. McConnell, supra note 69, at 1514.

213. Hartz, supra note 22, at 3.

214. See, e.g., Alexis de Tocqueville, Democracy in America 14 (Phillips Bradley ed., Vintage Books 1945) (1835) ("The emigrants who colonized the shores of America . . . somehow separated the democratic principle from all the principles that [they] had to contend with in the old communities of Europe, and transplanted it alone to the New World. It has there been able to spread in perfect freedom and peaceably to determine the character of the laws by influencing the manners of the country.")
never having experienced a French-style revolution against an entrenched feudal order, America also lacks the tradition of reaction of which Burke’s *Reflections* were a part.\(^{215}\) In short, Burke developed his philosophy for a society that was already highly traditionalist;\(^ {216}\) his ideas are thus of questionable applicability to a nation that is itself a child of liberalism. In America, Hartz contends, “Burke . . . equalled Locke.”\(^ {217}\)

American conservatism has never coherently resolved this dilemma. The result has been that American conservatism is highly splintered; as Robert Reich observed near the end of Ronald Reagan’s presidency, “so many different ideologies now parade under the conservative banner that without a strong leader capable of uniting them the conservative movement is likely to fragment.”\(^ {218}\) This fragmentation, in turn, causes problems for conservative constitutionalism. The sheer diversity of philosophical viewpoints within contemporary American conservatism makes it difficult to formulate a single, coherent constitutional theory upon which all factions—economic free marketeers, New Right religious fundamentalists, neoconservative intellectuals, and others—can agree.\(^ {219}\) I am not, of course, attempting to develop a theory that will pass review by the Republican Party Platform Committee; however, the underlying causes of the dilemma go to the very *possibility* of a coherent conservative theory. American conservatism has splintered because some, perhaps most, American conservatives feel obligated to defend the democratic traditions of classical liberalism.\(^ {220}\)

\(^{215}\) See Hartz, *supra* note 22, at 5; see also *id.* at 35-50 (discussing the distinctive nature of the American revolution); 2 Alexis de Tocqueville, *Democracy in America* 108 (Phillips Bradley ed., Vintage Books 1945) (1840) (“The great advantage of the Americans is that they have arrived at a state of democracy without having to endure a democratic revolution, and that they are born equal instead of becoming so.”).

\(^{216}\) See Pocock, *supra* note 136, at 143.

\(^{217}\) Hartz, *supra* note 22, at 153. In more recent years, the “liberal consensus” school of thought exemplified by Tocqueville and Hartz has come under attack from scholars who emphasize the civic republican elements of the American political tradition. See, e.g., Bernard Bailyn, *Ideological Origins of the American Revolution* (1967); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975); Gordon Wood, *The Creation of the American Republic, 1786-1787* (1969). But see Isaac Kramnick, *Republican Revisionism Revisited*, 87 *Am. Hist. Rev.* 629 (1982) (arguing that both the American Founders and the British reformers of the late 18th Century relied on Locke far more than on republican traditions). I have no wish to step into this scholarly crossfire. Rather, the crucial point is that neither the liberal consensus historians nor the republican revisionists assert the existence of any *aristocratic* elements that would make Burke feel more at home.


\(^{219}\) See Tushnet, *supra* note 1, at 911.

\(^{220}\) See, e.g., Hartz, *supra* note 22, at 110 (noting that the Whigs, who replaced the Federalists as the party of the Right after 1840, “embraced America’s liberal unity with a vengeance, and
If the liberal rationalist tradition is truly inescapable in America, then a Burkean critique of modern constitutional jurisprudence will be meaningless. In that case, we are stuck with the debate between originalists and nonoriginalists—a debate which, I will argue below, is mostly a debate within liberalism.

Burke's own historical situation provides a clue towards resolving this dilemma. After all, Burke's partisan political loyalties were not to the Tories but the Whigs—the party of liberal reform which traced its origins back to the Glorious Revolution and John Locke. Professor Huntington points out that, although it is true that Burke equalled Locke in America, "it was equally true in England. Burke defended the English constitution of his day first against the efforts of George III to reassert the influence of the Crown over Parliament and then against the efforts of the democrats to broaden the control of the people over Parliament." Burke was a conservative, according to Huntington, because "one hundred years after Locke he was still attempting to preserve the institutions of 1689." Burke did not, however, merely restate Locke's arguments; rather, he clothed the political arrangements that the Whigs had established in the mantle of tradition and then developed a theory of politics that made adherence to tradition the primary imperative of good government. In so doing, Burke abandoned many of Locke's rationalist assumptions and subtly reworked many of Locke's central concepts. The social contract, for example, which for Locke had been a tool for deriving the rights of individuals in society, became for Burke a metaphor for the involuntary obligations of individuals to the community. Burke understood that preserving liberalism required a philosophy other than liberalism itself.

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devolved a philosophy of democratic capitalism")); Rossiter, supra note 30, at 219-20 ("The Right had to renounce Conservatism and accept the ground rules of democracy or be thrown out of the game for disloyalty and perversity. The game, as we know, was much too pleasant and profitable, and the Right has been playing it ever since 1840 with smashing success."). Again, I do not want to dispute the possibility that republicanism may have played an equally important role in the origins of the nation. Civic republican scholars, however, seem to agree that "the ghost of Republicanism has long since deserted the center of American life, where Liberalism is now Hegemonic." Ackerman, supra note 13, at 29. It is thus understandable that many American conservatives have chosen liberalism as the appropriate philosophical tradition to defend.

221. Huntington, supra note 10, at 461.

222. Id.; see also Frederick A. Dreier, Burke's Politics: A Study in Whig Orthodoxy 5 (1979) ("Burke's theory was orthodox Whiggism in the sense that it was compatible with Lockean principles.").

223. See Rod Preece, Edmund Burke and His European Reception, 21 The Eighteenth Century: Theory and Interpretation 255, 259 (1980) ("Burke... accepts much of [the maxims and principles of liberalism], but restricts their excesses by order, marries their liberties with virtue, enjoins their pursuit only by prudence, and denies those principles when discovered by the vagaries of 'barbarous metaphysics.'").

224. See supra notes 159-72 and accompanying text.
Seventeenth century liberalism failed to provide the tools for its own defense because it was what Professor Huntington calls an "ideational" ideology—an ideology based on "the ascription of value to theoretically-defined formulations and the appraisal of existing reality in terms of those formulations." Even when a society’s institutions generally conform to the ideal, Huntington argues that an ideational ideology cannot be used to defend the status quo:

The perfect nature of the ideology’s ideal and the imperfect nature and inevitable mutation of the institutions create a gap between the two. The ideal becomes a standard by which to criticize the institutions, much to the embarrassment of those who believe in the ideal and yet still wish to defend the institutions. Eventually the defenders are faced with an unavoidable choice: either they must abandon their ideology in order to defend their institutions and substitute a conservative philosophy for their old ideational theory, or they must adhere to their ideational theory at the risk of further contributing to the downfall of those institutions which largely embody their ideals.

The particular nature of liberalism, moreover, simply worsens the dilemma. Liberalism’s faith in both reason and progress requires continual revision of existing theories, followed by renewed criticism of political institutions for nonconformity with the new dispensation. Professor Mary Becker, for example, notes that "[t]he current versions of traditional liberalism, republicanism, critical legal studies, and feminism are, today, almost unrecognizable as developments of the liberal thought of even twenty years ago." Modern legal liberalism thus repeats the eighteenth century pattern in which the radicalism of the French revolutionaries succeeded the moderate liberalism of John Locke.

Conservatism’s job, then, is to save liberalism from itself. Indeed, this has been the role of American conservatism for much of our history. According to Clinton Rossiter, "[Americans] have thought of liberty as a heri-

225. Huntington, supra note 10, at 458; see also Karl Mannheim, Ideology and Utopia 219 (Louis Wirth & Edward Shils trans., 1936) (1929) (characterizing the "liberal-humanitarian idea" as "establish[ing] a 'correct' rational conception to be set off against evil reality").

226. Huntington, supra note 10, at 458-59 (citations omitted).

227. See Mannheim, supra note 225, at 222-23; see also Michael Walzer, The Communitarian Critique of Liberalism, 18 POL. THEORY 6, 14 (1990) (observing that "liberalism is a strange doctrine, which seems continually to undercut itself, to disdain its own traditions, and to produce in each generation renewed hopes for a more absolute freedom from history and society alike").


229. Cf. Roberto M. Unger, The Critical Legal Studies Movement 41-42 (1986) (advocating a "superliberalism" to be embodied in "an institutional structure, itself self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination in social life").
tage to be preserved rather than as a goal to be fought for. The result is a political tradition that is . . . conservative about liberalism . . . .”230 In order to preserve liberal traditions, however, one must discard the rationalist and progressive assumptions that pervade modern liberalism; the next grand theory of constitutional law will not inevitably be better, and indeed may be a great deal worse than what we have. Modern conservative jurisprudence, however, only half-fulfills the preservationist role. Proponents of originalism, restraint, and rules have indeed abandoned the liberal faith in inevitable intellectual progress, but have retained the Enlightenment’s confidence in human reason. This excess of rationalism lies at the heart of modern conservative constitutionalism and renders it antithetical to Burkean principles.

B. Originalism

If Edmund Burke were a judge in modern America, there is good reason to believe that he would not be an originalist. As the following passage illustrates, Burke placed little reliance on the original structure and theoretical underpinnings of institutions; rather, institutions become effective in meeting the needs of society through a continuing process of adaptation that may or may not be consistent with the original intentions of the founders:

Old establishments are tried by their effects. If the people are happy, united, wealthy, and powerful, we presume the rest. We conclude that to be good from whence good is derived. In old establishments various correctives have been found for their aberrations from theory. Indeed, they are the results of various necessities and expediencies. They are not often constructed after any theory; theories are rather drawn from them. In them we often see the end best obtained, where the means seem not perfectly reconcilable to what we may fancy was the original scheme. The means taught by experience may be better suited to political ends than those contrived in the original project. They again re-act upon the primitive constitution, and sometimes improve the design itself, from which they seem to have departed. I think all this might be curiously exemplified in the British Constitution.231

230. Rossiter, supra note 30, at 67-68. The primarily positional role of conservative philosophy should not be allowed to mask its intellectual sophistication. As Professor Huntington has observed,

Conservatism is the intellectual rationale of the permanent institutional prerequisites of human existence. It has a high and necessary function. It is the rational defense of being against mind, of order against chaos . . . . The theory of conservatism is of a different order and purpose than other common political theories, but it is still theory.

Huntington, supra note 10, at 460-61.

231. Burke, Reflections, supra note 12, at 220 (emphasis added).
Burke would thus undoubtedly object to a theory of interpretation that locks in local meaning of our constitutional structures; instead, we should leave future generations some room for adaptation. This idea is based on both fairness and prudence: "Where the great interests of mankind are concerned through a long succession of generations," Burke writes, "that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish." 232 Rather than attempt to anticipate future problems and needs, the founders of institutions would do better to lay out broad standards, then let future generations apply them in particular situations as they come up. Burke thus observes that "the best legislators have been often satisfied with the establishment of some sure, solid, and ruling principle in government . . . and having fixed the principle, they have left it afterwards to its own operation." 233

Interestingly enough, some scholars on the Left have not overlooked the anti-originalist bent of Burke’s philosophy. Professor Ackman notes, for example, that "the Burkean . . . insist[s] that the Constitution is best understood as a historically rooted tradition of theory and practice—an evolving language of politics, as it were, through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity." 234 Originalists, however, have long rejected the idea that the meaning of the Constitution can evolve in a manner similar to the common law. Over a hundred years ago, for example, Thomas Cooley drew a sharp distinction between the common law and our written constitution:

A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there

232. Id. at 217-18.
233. Id. at 218. This approach corresponds roughly to what Professor Monaghan calls "the two-clause theory" of constitutional interpretation, under which some clauses of the Constitution—such as the clause specifying the minimum age of the President—have a fixed historical meaning while others, such as the Equal Protection Clause, "were intended to be moulded to the views of contemporary society." Monaghan, supra note 37, at 362 (emphasis and internal quotation marks omitted); see also Elly, supra note 32, at 12 (describing non-"clause-bound" interpretivism). For Monaghan, however, this approach depends on an argument that the Framers intended to allow open-ended interpretation of some clauses. See Monaghan, supra note 37, at 362. Professor Elly, on the other hand, assumes that such interpretation must still draw upon some general principle to be found within the four corners of the document. See Elly, supra note 32, at 12. Burke recognized neither of these constraints in the context of the British Constitution, primarily because of its immemorial origins.
234. Ackman, supra note 13, at 22.
can be no such steady and imperceptible change in their rules as inheres in the principles of the common law . . . . Public sentiment and action effect such changes, and the courts recognize them, but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail . . . . What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.  

Two distinct arguments are discernible in Cooley’s statement. First, Cooley argues that there are certain benefits to having a written constitution, and that these would be lost if we were to allow the constitution to evolve in a manner similar to that of the common law. Most importantly, a written constitution allows us to protect certain principles that we value over the long term from short-term temptations that might cause us to abandon them. Second, Cooley refers to the nature of the constitution as law: Because its meaning “is fixed when it is adopted,” judges violate their duty and their oath when they attempt to stretch the constitution beyond its original meaning.

The first argument is fairly uncontroversial so far as it goes, but it leaves open the question of whether the Constitution ought to bind future generations within broad limits or narrow ones. Originalists, of course, take the latter view; in doing so, however, they turn their backs on a conservative tradition that has generally been cautious about the very idea of written constitutions. For example, Joseph de Maistre, one of the leading Continental critics of the French Revolution, began his essay on political constitutions with the following statement:

One of the gravest errors of a century which embraced them all was to believe that a political constitution could be written and created a priori, whereas reason and experience agree that a constitution is a divine work and that it is precisely the most funda-

235. 1 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927) (quoted in Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 452-53 (1934) (Sutherland, J., dissenting)). Modern originalists continue to echo this theme. See, e.g., sources cited supra note 43.

236. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-7, at 10-12 (2d ed. 1988) (discussing this concept in the context of “the parable of the pigeon,” based on experiments demonstrating that pigeons can learn to peck a key that denies them a short term food reinforcement after they discover that doing so will earn them a larger, but delayed reward) (citing G. W. Ainslie, IMPULSE CONTROL IN PIGEONS, 21 J. EXP. ANAL. BEHAV. 485 (1974)).
mental and essentially constitutional elements in a nation's laws that cannot be written.237

Burke's views differed in many respects from those of the French reactionaries;238 there is no reason to doubt, however, that he would have agreed with de Maistre in characterizing the idea of a written constitution as an innovation of the Enlightenment. Indeed, in asserting the need to buttress legal institutions with a natural aristocracy, Burke scornfully contrasts "scheme[s] upon paper" with "a living, acting, effective constitution."239 In particular, Burke felt that the common-law method of developing principles through analogy and precedent more prudently protected the foundations of the constitutional order while allowing needed room for growth.240

A theory of written constitutions that precludes future adaptation, then, is inconsistent with Burkean principles. Such a theory assumes a degree of rationality on the part of the Constitution's framers that Burke would have found unacceptable: it understands the Framers as "great gamblers on the power of untested abstractions."241 Originalists must be similarly optimistic about the Framers' ability to overcome problems of textual indeterminacy and capture complex principles of government within clear written provisions.242 For Burke, however, no statesman, no matter how wise, could capture the infinite detail of society's needs or anticipate all future


238. See 2 MICHAEL CURTIS, THE GREAT POLITICAL THEORIES 50 (1962) ("If Burke is the oracle of conservatism, de Maistre . . . is the fount of modern reaction, the prophet of the counter-revolution."); Hans Kohn, The American Idea, 17 Rev. Pol. 410, 412 (1955) (book review) ("Burke was certainly no de Maistre but a liberal conservative in the tradition of the Glorious Revolution.").

239. BURKE, Present Discontents, supra note 144, at 277.

240. See supra notes 185-96 and accompanying text. This imperative may be even more important in a democratic society like America. According to Tocqueville, democracies are especially vulnerable to short-term errors; "a democracy," he writes, "can obtain truth only as the result of experience." 1 TOQUEVILLE, supra note 214, at 239. It would thus be unwise to lock in the political choices of any given generation. Rather, the best answer to democratic fallibility for Tocqueville is to "[l]eave it to time, and experience of the evil will teach the people their true interests." Id. Note that the need for time would be the same whether judges or the people themselves are in charge of the adaptation, so long as the initial decisionmaker is a democratic one.

241. Bruce Ackerman, The Common Law Constitution of John Marshall Harlan, 36 N.Y.L. Sch. L. Rev. 5, 9 (1991). Ackerman, of course, is no originalist in the Borkian sense. Under Ackerman's "dualist" theory, however, the meaning of the Constitution changes only during rare and momentous episodes of "higher lawmaking"; in other times, the Supreme Court serves to preserve the products of higher lawmaking by striking down statutes that contradict the meaning of the Constitution as established in the most recent episode of constitutional politics. See ACKERMAN, supra note 13, at 6-7, 9-10. Ackerman's view—which he labels "independent constitutionalism" in his article on Justice Harlan—is thus equivalent to originalism in terms of its rejection of common law evolution. See Ackerman, supra, at 8-10.

problems in a rigid system of formal rules. Instead, time is essential to allow adaptation and compromise in light of unforeseen and changing circumstances. Burke would be appalled by the rationalist attitude evident in Alexander Hamilton’s opening to the Federalist Papers, in which Hamilton declares that “it seems to have been reserved to the people of this country . . . 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.” Hamilton’s confidence in a priori reasoning is also apparent from his later assertion that “[t]he science of politics . . . has received great improvement. The efficacy of various principles are now well understood, which were either not known at all, or imperfectly known to the ancients”; rather than address the particular circumstances of America, then, Hamilton proceeds to an in-depth consideration of the philosophical work of Montesquieu. Burke, on the other hand, emphatically rejects the notion of abstract political science:

The science of constructing a commonwealth, . . . or reforming it, is, like every other experimental science, not to be taught a priori. Nor is it a short experience that can instruct us in that practical science, because the real effects of moral causes are not always immediate . . . . The science of government [is therefore] . . . 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 . . . .

Burke’s position is irreconcilable with a view of the Framers as having sought, by deduction from abstract principles of political science, to create a regime of written law that would be sufficient to the needs of all society and all generations. On the contrary, Burke’s view coincides roughly with that of the common-law constitutionalists of the late nineteenth century, who, according to Professor Ackerman, believed that “the Founders and Reconstructers were far too optimistic about the role of self-conscious constitutional construction in history,” and that “deeper changes occurred through evolutionary processes by which an organic community adapted to imperfectly understood imperatives of growth and development.” Conservative beliefs about the limits of human rationality require a constitution that

244. Id. No. 9, at 72, 74.
246. Ackerman, supra note 241, at 6. Ackerman identifies Judge Cooley as one of these nineteenth-century common lawyers, see id., which would seem to contradict the general thrust of the long passage quoted in Justice Sutherland’s Blaisdell dissent. See supra note 235. My task here is not to reconcile these contradictory strands of Cooley’s thought, but rather to present them as discrete sets of arguments which are available to present proponents and opponents of originalism.
can adapt in response to the unforeseen difficulties, changed circumstances, and outright mistakes that any human endeavor will inevitably entail.

An originalist might respond to this claim with Judge Cooley's second argument: that the historical fact of our written constitution, and its inherent nature as binding law, require an originalist approach. After all, Burke's own British constitution was unwritten; consequently, his common-law constitutionalism assumes a constitution whose origins are lost in the mists of time. The meaning of such a constitution develops gradually through the adoption of old precedents to new situations, until eventually the constitution takes on meanings beyond anything envisioned by its Founders. Under such a regime it hardly makes sense to look back to the Founding to determine the correct interpretation of the constitution; indeed, the original meaning may be fundamentally unknowable, having faded into historical obscurity. Burke's own constitutional regime thus incorporated substantial skepticism about the possibility of historical knowledge. Where such knowledge is more accessible, however, the interpretive imperatives may be different. As Professor Pocock observes, "if law were founded on the decisions of known men in recorded circumstances it could be evaluated and criticized both on rational and on historical grounds." Hence, because our American Constitution does rest "on the decisions of known men in recorded circumstances," we are arguably obligated to adhere to its original meaning.

This argument may be met on several levels. Initially, it is possible to retrieve the analogy to the immemorial British constitution by arguing that, in many or most cases, we cannot know the actual intent of the Framers. Although this argument may be made in a strong form that denies the ability of the Framers to communicate a single, determinate meaning through a text like the Constitution, the more common criticism is that divination of the Framers' intent is impracticable as a matter of historical research. Rather than wade into the merits of this extensive debate, I simply wish to consider a few general aspects of originalist history that might make it

247. See Pocock, supra note 136, at 220-21; see also Ackerman, supra note 241, at 8-9 (contrasting "independent constitutionalists," whose time frame "has a definite beginning and emphasizes crucial turning points," with American common-law constitutionalists, whose time frame "has an indefinite beginning and emphasizes evolutionary development").

248. Pocock, supra note 136, at 220.

249. See, e.g., Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373 passim (1982). But see Kay, supra note 36, at 236-43 (surveying and persuasively refuting these arguments).

250. See generally Kay, supra note 36, at 243-59 (discussing problems of group intent and historical understanding, and concluding that originalism is "not impossible"); Perry, supra note 65, at 597-602 (concluding that originalism is a viable interpretive option, but not the best one); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 793-804 (1983) (arguing that practical problems of historical research render originalist history too indeterminate to constrain judges).
uncongenial to a Burkean conservative. Ironically, originalists might be viewed as having the same unrealistic expectations of historical science that Hamilton had with respect to political science; in the end, constitutional historians may be unable to provide the clear and definite answers that originalism requires. Burke might thus view originalist history as simply another form of optimistic rationalism. Although Burke does not discuss the efficacy of historical research directly, several of his more general views are relevant here. Burke’s pessimistic view of human nature, for example, would lead him to emphasize the dangers that self-interest poses for historical research in a legal context; as Professor H. Jefferson Powell observes, “[t]he pressures created by the need to defend a client or justify a viewpoint are so enormous, and the value of respect for historical method so abstract, that it is probably inevitable that the historical arguments of constitutionalists are historically irresponsible far more often than not.” Similarly, Burke’s pragmatism would be sensitive to “the limits imposed by time and training” upon judges with full caseloads and little historical expertise. Finally, Burke’s emphasis on the lessons of experience should require conservatives to take note of the Supreme Court’s “notorious” misuse of history in many instances. Taken together, all of these problems suggest that a prudent Burkean should be reluctant to accord the product of historical research dispositive status rather than use it in an advisory role that is sensitive to its inherent limitations.

251. See Tushnet, supra note 250, at 793 (“Interpretivist history requires both definite answers (because it is part of a legal system in which judgment is awarded to one side or the other) and clear answers (because it seeks to constrain judges and thereby to avoid judicial tyranny). The universal experience of historians, however, belies the interpretivists’ expectations.”).


253. Powell, supra note 252, at 661.

254. Id.

255. See generally id. at 661-91 (laying out 14 rules intended “to make the lawyers’ use of history as intellectually responsible . . . as possible”). An additional problem arising from the difficulty of ascertaining Framers’ intent is its potential for destabilizing large areas of the law. As Dean Brest points out, “a settled constitutional understanding is in perpetual jeopardy of being overturned by new light on the adopters’ intent—shed by the discovery of historical documents, re-examinations of known documents, and reinterpretations of political and social history.” Brest, supra note 32, at 231. Of course, the meaning of the Constitution may change under a common-law approach as well; under that approach, however, changes are incremental and occur on the basis of historical experience showing one or another interpretation is better suited to the needs of the community. The close historical debates in terms of originalist interpretation, that is, the ones likely to be swayed one way or the other by new historical data, are often waged over fundamental issues such as the Fourteenth Amendment’s incorporation of the Bill of Rights, compare Adamson v. California, 332 U.S. 46, 74-75 (1946) (Black, J., dissenting) (arguing that the Fourteenth Amendment was intended to “guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights”) with Charles Fairman, Does the
A second answer challenges the assumption that the Framers themselves were originalists. In the most exhaustive survey of the historical data, Professor Powell rejects the common assumption that the Framers intended that later interpreters would construe the Constitution in accordance with the available evidence of original intentions:

Of the numerous hermeneutical options that were available in the framers’ day . . . none corresponds to the modern notion of intentionality. Early interpreters usually applied standard techniques of statutory construction to the Constitution. When a consensus eventually emerged on a proper theory of constitutional interpretation, it indeed centered on “original intent.” But at the time, that term referred to the “intentions” of the sovereign parties to the constitutional compact, as evidenced in the Constitution’s language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else. The relationship of modern intentionalism to this early interpretive theory is purely rhetorical.256

Professor Powell acknowledges that his argument, even if true, is not dispositive as to whether courts should adhere to originalism; even if the Framers did not intend such adherence, there may be other reasons—such as the need to constrain judges—that militate in its favor.257 If the Framers did not intend their enactment of the Constitution to include a requirement to follow original intent, however, then it is hard to argue for originalism on the basis of the Constitution’s nature as binding law.258 At that point, the originalist cannot avoid confronting the Burkean prudential arguments in favor of evolutionary meaning.259

Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5, 171-72 (1949) (discussing the legislative history of the Fourteenth Amendment and concluding that Justice Black’s analysis in Adamson was incorrect), or the meaning of racial equality, see, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY 24-36 (1977). Moreover, any superiority of the new historical interpretation in terms of meeting the needs of modern society would be either coincidental or the result of the subconscious tug of modern values. Such a change would, in any event, lack the purposive adaptation to modern life characteristic of the common law.

257. See id.
258. See WELLINGTON, supra note 242, at 50-51.
259. The originalist response to Professor Powell is to infer the Framers’ intent that their own understandings of the Constitution should bind future generations from the care they took in debating and drafting the language of the document. According to Professor Kay, “We would not expect such deliberation from people who wanted their intentions to be ignored or to play a minor role in the future application of the rules they made.” Kay, supra note 36, at 284. Even if the Framers had intended for the Constitution to evolve in a manner similar to the common law, however, they would have had at least two good reasons to deliberate with such care: First, any evolution would likely be very slow; hence, the Framers and their children would have to live with the Constitution in essentially its original state for some time. Moreover, even the most fervent nonoriginalists agree that the original intentions and understanding of the Constitution are relevant
An originalist conceding the force of those arguments might not conclude that power to adapt the Constitution should be vested in the judiciary. Chief Justice Rehnquist, for example, admits that "[i]t seems to me that it is almost impossible . . . to conclude that [the Framers] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations." Nonetheless, the Chief Justice asserts that the intended means of adaptation was not judicial review but "the general language by which national authority was granted to Congress and the Presidency." The limitations on those branches to be enforced by the courts, by contrast, "were not themselves designed to solve the problems of the future, but were instead designed to make certain that the constituent branches, when they attempted to solve those problems, should not transgress these fundamental limitations." Judicially enforced limitations such as due process or equal protection, however, are worded in the same general manner as the grants of legislative and executive power in Articles I and II, so it is hard to discern Chief Justice Rehnquist's asserted distinction from the text. Moreover, the courts are forced in innumerable cases to apply those limitations to situations that the Framers could not have foreseen; unless these limits are allowed to evolve in parallel with state power, important areas of modern governmental activity will lack effective constitutional safeguards. Finally, if we agree with Burke that adaptation should follow the incremental method of the common law, then courts may have an institutional advantage in overseeing such adaptation.

The last argument in favor of originalism is Judge Bork's assertion that the only principles that are sufficiently neutral to apply in constitutional adjudication are originalist ones. Implicit in this assertion is the idea that the principles originally embodied in the Constitution are the only ones to which all the members of our community can be said to have consented. In a sense, this assertion begs the question because the fact that we have consented to a constitution does not necessarily mean that we have consented

to its present interpretation. See, e.g., Brest, supra note 32, at 205 ("The modes of nonoriginalist adjudication defended in this article accord the text and original history presumptive weight, but do not treat them as authoritative or binding."). On this view, the Framers had a strong incentive to provide careful guidance to future generations, even if they did not expect their intentions to be binding.

261. Id.
262. Id.
264. See infra notes 295-303 and accompanying text.
to one with a static meaning. More importantly, Bork’s position is premised on a distinctively liberal theory of the social contract: The Constitution represents the great covenant by which Americans entered into society together and defined their rights and duties vis-a-vis the state. And because our consent occurred through ratification at particular points in time, it is to those points that we look to determine the contract’s meaning.

The Burkean model, however, is fundamentally different. In the common-law conception, consent occurs in a continuing fashion rather than at a discrete moment in time; as Professor Pocock explains, “[I]t was the principle that the law was immemorial that made common lawyers realize that its origin was not in men’s assent to universally acceptable propositions, but in one emergency following upon another as wave follows wave . . . .” Moreover, Burke’s conception of the social contract deemphasizes consent altogether, using the contract instead as a metaphor for the obligations that bind individual to individual and generation to generation. For Burke, individuals are bound to members of the national community, as well as to generations that are dead or yet to be born, by moral obligations arising out of a common history; the community is a “permanent body composed of transitory parts.” And just as “the whole, at one time, is never old or middle-aged or young, but . . . moves on through the varied tenor of perpetual decay, fall, renovation, and progression,” so there can never be a single isolated point in time to which we can appeal to find the complete meaning of our mutual commitments. Instead, that meaning, like society itself, must evolve over time in a continuing process of experimentation and adaptation.

In the end, the most damning aspect of originalism for Burke would almost certainly be the radical restructuring of our constitutional order that a serious attempt to implement that interpretive philosophy would entail.

265. Cf. Tribe, supra note 236, § 3-6, at 65-66 (“[T]he very idea of grounding the legitimacy of constitutional claims in the ‘consent’ of the governed . . . . is circular because it leaves unanswered the question of whose consent counts and what the consent encompasses.”).


267. Believers in this liberal contract have a hard time explaining why the present generation is bound by the original act of consent. Dean Brest, for example, criticizes the liberal notion on the ground that “[e]ven if the adopters freely consented to the Constitution . . . this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone.” Brest, supra note 32, at 225. Burke’s organic contract provides an answer to this difficulty, see supra notes 162-72 and accompanying text, although it is probably not an answer Dean Brest would like.

268. Pocock, supra note 136, at 215 (internal quotation marks omitted).

269. See supra notes 166-70 and accompanying text.

270. Burke, Reflections, supra note 12, at 84.

271. Id.
As Professor Kay admits, "[t]he legal, social and economic impacts of judicial review cannot be wished away, nor may we want them to be. An abrupt and complete adoption of original intentions adjudication might inflict injuries that far transcend . . . specifically legal considerations . . . ."\(^{272}\) Some originalists attempt to evade this difficulty by developing a theory of stare decisis to confine the reach of a shift to originalist reasoning.\(^{273}\) Advocates of such a theory, however, are careful to insist that such a concession does not justify continuing the practice of nonoriginalist interpretation.\(^{274}\) Burke would find this "go and sin no more" approach curious: after all, if we are too happy with the results of all this nonoriginalist reasoning to abandon them, why render the theory that produced those results anathema? Instead of abandoning our existing constitutional practice, then, a true conservative would search within that tradition for its own "latent wisdom," and seek to improve that tradition by building upon the principles that have proven successful in the past.\(^{275}\)

C. Judicial Restraint

As with originalism, Burkean conservatism is neither committed to nor supportive of the modern conservative constitutionalists’ view of judicial restraint. Although Burke’s view of human reason commits him to the position that all actors in a political system should act cautiously, with a keen

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\(^{272}\) Kay, supra note 36, at 229; see also Brest, supra note 32, at 223 ("Strict originalism cannot accommodate most modern decisions under the Bill of Rights and the fourteenth amendment, or the virtually plenary scope of congressional power under the commerce clause. Although moderate originalism is far more expansive, some major constitutional doctrines lie beyond its pale as well."); Monaghan, supra note 37, at 382 ("The expectations so long generated by this [nonoriginalist] body of constitutional law render unacceptable a full return to original intent theory in any pure, unalloyed form.").

\(^{273}\) See, e.g., Monaghan, supra note 37, at 382.

\(^{274}\) See id. The problem with Monaghan’s concession is that stare decisis may be fundamentally incompatible with originalism. Originalism assumes that the Constitution itself can independently provide right answers to constitutional questions; if this is true, then the doctrine of stare decisis requires a court to choose to follow a prior decision even where that decision conflicts with what the Constitution itself objectively requires. It is unclear, however, why this practice would be any more legitimate than giving effect to a statute that conflicts with the Constitution. See generally Gary Lawson, The Constitutional Case Against Precedent, 17 HARV. J. L. \\& PUB. POL’Y (forthcoming 1994) (making this argument); Charles J. Cooper, A Note on Justice Marshall and Stare Decisis, 1992 PuL. Rev. 95, 100 ("The principle [sic] virtues of stare decisis—stability and predictability in the law—are in conflict with the truism that ‘the ultimate touchstone of constitutionality is the Constitution itself and not what [the Supreme Court] has said about it.’") (quoting Graves v. New York, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring)). The only way to avoid the force of this constitutional objection to stare decisis would appear to be to adopt some nonoriginalist interpretive theory that views precedent as a means by which courts ascertain the original meaning of the provision involved. The originalist is thus caught in a dilemma: either he must advocate overthrowing an unacceptable amount of present doctrine, or abandon some of his originalist interpretive premises.

\(^{275}\) See Burke, Reflections, supra note 12, at 138.
sense of their own limitations and those of their office, there is no reason to believe that he would impose this obligation more strongly on judges than on legislators or members of the executive branch. Indeed, insofar as the argument for judicial restraint rests primarily on majoritarian assumptions, Burke would have little of it. Burke saw unrestrained democracy as a threat to liberty: "[A]n absolute democracy, [like] absolute monarchy, is . . . rather the corruption and degeneracy than the sound constitution of a republic." The tyranny of the majority, for Burke, was the worst kind of oppression. Under the tyranny of a monarch, he observed, at least the people can turn to one another for support. "[T]hose who are subjected to wrong under multitudes," however, "are deprived of all external consolation. They seem deserted by mankind, overpowered by a conspiracy of their whole species." Accordingly, Burke would reject the overwhelming presumption in favor of majority rule put forward by advocates of judicial restraint. According to Professor Bickel, Burke believed "that there was nothing natural or necessary about allowing a majority to prevail. Rule by a majority obtained where it did . . . by convention and habit, and did not obtain universally on all occasions and for all purposes even where established." Rather than constructing a government around the principle that all departures from democracy require special justifica-

276. See supra notes 77-79 and accompanying text.
277. See Tushnet, supra note 1, at 914 n.11 ("Majoritarianism is . . . inconsistent with traditional conservatism, which, deeply suspicious of the majority, saw it as relatively less-properly more than those whom conservatives sought to protect.").
278. Burke, Reflections, supra note 12, at 174. Burke went on to cite Aristotle for the proposition that "a democracy has many striking points of resemblance with a tyranny." Id. (citing Aristotle, Politics bk. iv., ch. 4).
279. Id. at 174-75.
280. See, e.g., Graglia, supra note 43, at 1025 (asserting that "democracy is the norm," and that therefore "all deviations from that norm require justification."). Although Burke believed that the ultimate source of governmental authority was in the people, see Burke, Popery Laws, supra note 178, at 454, he saw the state as a trust, in which representatives use their best judgment to act in the best interests of the people rather than simply reflect the popular will. "We are not to go to [our constituents] to learn the principles of law and government," Burke insisted. "In doing so we should not dutifully serve, but we should basely and scandalously betray the people, who are not capable of this service by nature, nor in any instance called to it by the constitution." Edmund Burke, Speech on a Bill for Shortening the Duration of Parliaments, in 2 The Works of The Right Hon. Edmund Burke, supra note 134, at 481, 482; see also Burke, Reflections, supra note 12, at 109-10 (denying that a right to participate directly in management of the state is among "the real rights of men"). If the members of the "political" branches are seen primarily as trustees for the people, rather than as instruments by which the people exercise their own will, then the majoritarian argument for judicial restraint loses much of its force. After all, judges can act as trustees as well, and in some areas their distinctive institutional capacities may make them better trustees than legislators or members of the executive branch. See infra notes 297-303 and accompanying text.
tion, then, Burke would seek for the allocation of power that, over time, best conduces to the welfare of society.\(^{282}\)

This allocation for Burke was embodied in the principle of mixed government. Just as Burke opposed pure democracy, he also resisted attempts by George III to concentrate power in the monarchy. Instead, Burke insisted that power should be distributed among a variety of institutions comprising the government: "It is the nature of despotism to abhor power held by any means but its own momentary pleasure; and to annihilate all intermediate situations between boundless strength on its own part, and total debility on the part of the people."\(^{283}\) Burke's view of mixed government is further elaborated in his criticism of the French revolutionaries for abandoning the old institution of the Estates General, which were composed of a chamber each for the clergy, the nobles, and the common people:

In your old states you possessed that variety of parts corresponding with the various descriptions of which your community was happily composed; you had all that combination and all that opposition of interests, you had that action and counteraction which, in the natural and in the political world, from the reciprocal struggle of discordant powers, draws out the harmony of the universe. These opposed and conflicting interests . . . interpose a salutary check to all precipitate resolutions; They render deliberation a matter not of choice, but of necessity; they make all change a subject of compromise, which naturally begets moderation; they produce temperaments preventing the sore evil of harsh, crude, unqualified reformations and rendering all the headlong exertions of arbitrary power, in the few or in the many, for ever impracticable.\(^{284}\)

At first glance, this description looks a great deal like the Madisonian model of conflicting factions within the democratic part of a government.\(^{285}\) For Burke, however, the important thing was not simply that various groups had the power to check each other, but that these groups had varying institutional capacities that allowed them to contribute services which other groups could not provide. The aristocracy, for example, was deemed to have certain qualifications—education, character, a sense of enduring values inherited from families with longstanding traditions of leadership—that

\(^{282}\) See *Burke, Reflections*, supra note 12, at 110 (arguing that the allocation of powers in the state is "a thing to be settled by convention," which extends to "[e]very sort of legislative, judicial, or executory power").

\(^{283}\) *Burke, Present Discontents*, supra note 144, at 259-60.

\(^{284}\) *Burke, Reflections*, supra note 12, at 86.

\(^{285}\) See The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("This policy of supplying, by opposite and rival interests, the defect of better motives . . . . [is] particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other . . . .").
democratically elected representatives of the masses might not possess. On the other hand, Burke viewed the aristocracy as too prone to passivity; good government thus also required the more active input of the executive (the King) and the people. Only when all these elements were in balance would the state operate properly: “Our constitution stands on a nice equipoise, with steep precipices, and deep waters upon all sides of it. In removing it from a dangerous leaning towards one side, there may be a risque of oversetting it on the other.”

Burke viewed an independent judiciary as an important part of this balance. “Whatever is supreme in a state,” he argued, “ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it.” Burke thus criticized the French revolutionaries’ abolition of the parlements, which were the principal independent judicial courts prior to the Revolution. According to Burke, “[t]hese parliaments had furnished, not the best certainly, but some considerable corrective to the excesses and vices of the monarchy. Such an independent judicature was ten times more necessary when a democracy became the absolute power of the country.” Viewing the power of the parlements to invalidate laws as an essential element of their independence, Burke urged the French to restore such a role to the courts; moreover, he observed that this form of judicial review “would be a means of squaring the occasional decrees of a democracy to some principles of general jurisprudence.” Burke’s argument for retaining a form of judicial review in France was thus threefold: such review was an “ancient” or traditional practice, it counteracted the power of the majoritarian legislature, and it utilized the distinctive institutional capacity of courts to integrate statutes into a coherent, developing body of law.

As applied to modern American jurisprudence, the first of these arguments is identical to the traditionalist argument against originalism: whatever the theoretical arguments against it, “a relatively large judicial role . . . has become an historical given” in our political system that should not be lightly disturbed. As Professor Bickel points out, the cases establishing the right of judicial review are now over a century and a half old. As a result, “[s]ettled expectations have formed around them. The life of a nation that now encompasses 185 million people spread over a continent and more depends upon them in a hundred different aspects of its organiza-

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286. See supra text accompanying note 201.
287. See Burke, Present Discontents, supra note 144, at 268.
288. Id. at 311.
289. Id. at 253.
290. Id.
291. Id. at 254.
292. Tribe, supra note 236, § 1-9, at 15-16.
tion and coherence. It is late for radical change." Curiously, Bickel quickly retreats from this conclusion by asserting that because "[j]udicial review is a present instrument of government," it follows that "ultimately we must justify it as a choice in our own time." For Burke, however, a large part of the justification lies precisely in the fact that we have had judicial review for a long time and are basically happy with the results. He would thus seek within the tradition of judicial review for the principles that have been responsible for its success, and seek to reform the institution, if necessary, to bring it more completely in line with those principles.

One way to do this is to focus on Burke’s allusion to the institutional capacities of courts as an indication of where judicial review might fit into his concept of mixed government. Professor Bickel provides the classic statement of the institutional advantages of courts in *The Least Dangerous Branch*:

> [C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs. Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone’s view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words,

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293. Bickel, *supra* note 46, at 14. The history of that tradition manifestly denies Professor Graglia’s assertion that “[t]he Supreme Court serves the concept of a ‘living Constitution’ less by acting than by getting out of the way, as in its post-1937 refusal to enforce federalism limitations on national power.” Graglia, *supra* note 43, at 1031. Even Graglia’s own example illustrates his dilemma, because the federal government’s ability to adapt to changing circumstances under the broad enumerated powers in Article I would not be viable absent the Court’s arguably activist decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court affirmatively invalidated the acts of a state government that hampered action by the federal political branches.


295. Cf John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 Va. L. Rev. 833, 864 (1991) (observing that “what [proponents of judicial activism] are actually proposing is a version of the old idea of ‘mixed government,’ a combination of democracy and oligarchy, as developed in the writings of such theorists as Locke and Montesquieu”).
and thus to the evolution of principle by a process that tests as it creates. 296 “Leisure,” “training,” and “insulation” sound a great deal like the characteristics of Burke’s aristocracy. 297 As Professor Wilson suggests, “federal

296. BICKEL, supra note 46, at 25-26. But see Gregory C. Cook, Footnote 6: Justice Scalia’s Attempt to Impose a Rule of Law on Substantive Due Process, 14 HARV. J.L. & PUB. POL’Y 853, 870-72 (1991) (arguing that legislatures have superior deliberative mechanisms and are more in touch with the traditions of society); McConnell, supra note 69, at 1536 (“[J]udicial decisionmaking contains very little serious deliberation on moral issues.”). Although Professors McConnell and Cook are certainly correct in suggesting that we should not unquestioningly accept arguments about the superior institutional competence of courts with respect to matters of principle, it seems unlikely that their criticisms could outweigh the extent to which well-organized interest groups and short-term concerns about reelection distort considerations of principle in the legislative process, as well as the extent to which legislators simply do not focus on constitutional issues. See WELLINGTON, supra note 242, at 84-85. Moreover, Cook’s point is mitigated by the fact that courts generally have access to the deliberative process of the legislature in the form of legislative history. McConnell’s assertion, on the other hand, seems more appropriate as an argument for decreasing the workload of the Court in order to provide more time for moral deliberation; at any rate, it may not be realistic to infer the absence of such deliberation from published opinions (as McConnell does) when the pervasive rhetoric of judicial restraint gives judges an incentive to mask such deliberation behind doctrinal arguments.

An even more potentially damaging argument (for my purposes) has been raised by Professor David Strauss, who suggests that, despite the kinship between Burke’s traditionalism and the common law, “[i]t would be plausible for a Burkean to distrust judges.” Strauss, supra note 103, at 1707. This is because judges “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.” Id. It seems unlikely, however, that Burke would have accepted these conclusions. Burke has little to say directly to judges; his pronouncements on good government are directed primarily toward legislators and society at large. Burke’s model of the good legislator, however, emphasizes the detachment that, in the twentieth century, we have come to associate with federal judges. Rejecting a suggestion by his constituents that, as a legislator, he should be bound to follow their wishes, Burke asserted that “his unbiased opinion, his mature judgment, his enlightened conscience, [a legislator] ought not to sacrifice to you . . . . Your representative owes you . . . . his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.” EDMUND BURKE, Speech to the Electors of Bristol (November 3, 1774), in 1 WORKS OF THE RIGHT HON. EDMUND BURKE, supra note 20, at 179-80. Similarly, Burke insisted that “Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate . . . ; but parliament is a deliberative assembly of one nation . . . .” Id. at 180. Given a choice between our modern legislatures, where electoral and interest group politics play a prominent, if not preeminent, role, and the judiciary, which remains constrained to deliberative norms, see supra text accompanying notes 289-91, Burke would probably see the judiciary as having the institutional capacities most suited for divining and following traditions. As for the abstraction point, it is not at all clear that the abstractions popular, for example, in legal academia predominate over the common-law method of doctrinal development in modern constitutional adjudication. See infra text accompanying notes 488-94. Even if Strauss is correct that judges presently tend toward abstraction, moreover, that would simply be a reason to encourage the more frequent use of the common-law method, as opposed to originalism or abstract moral theory.

297. See supra text accompanying note 201. It is also worth noting that the character of judges—perhaps Burke’s most important qualification for the natural aristocracy—is scrutinized closely prior to confirmation, and subsequently regulated by a code of ethics that does not apply to legislators. See ABA CODE OF JUDICIAL CONDUCT (1990). Of course, the large proportion of legislators that are lawyers, and thus bound by the ethical rules of the profession even when acting
judges, lawyers who can create law without fear of loss or job or income, have all the characteristics of Burke’s aristocrats except personal wealth and inheritable title. They have the power to ameliorate abuses by the people or the executive, and yet they also have the power to create arrogant, disorderly tyranny.”

The courts, then, supply the missing element from Burke’s scheme of mixed government created by the absence of a hereditary aristocracy. Hence, a Burkean conservative ought to view the role of unelected federal judges in shaping social policy as an essential counterweight to the more majoritarian elements of government, rather than as “judicial tyranny.”

In addition, as Professor Bickel recognized, judges are uniquely situated to preside over the evolutionary development of constitutional principles. The “case and controversy” requirement encourages judges to make decisions in the way that Burke would prefer legislators to make them: incrementally, and in response to particular problems. Moreover, the life tenure of judges tends to ensure continuity even in this age of politicized appointments. Perhaps most importantly, courts are inherently backward-looking in their approach to decisionmaking; as Dean Wellington points out, “while other countermajoritarian institutions out of parochial interests slow the rate of change, the courts alone deliberately search the past for elements worth preserving.” Wellington goes on to observe that “[b]y applying those elements to the often heated controversies before them—thereby reminding the polity of the values to which it has long adhered—the courts may be seen as the key political institution charged with taking account of our public traditions.” In the end, the thrust of Burke’s traditionalism is that the principles by which society is governed should evolve in the same way that the common law evolves—by analogy, precedent, and incrementalism. And to the extent that this process represents a

outside a legal capacity, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 cmt. 3 (1992), cuts into this comparative advantage somewhat. Nonetheless, the ethical rules governing attorneys are not directly targeted at the sorts of vices likely to afflit legislators.

298. Wilson, supra note 5, at 943. Tocqueville makes a similar observation with respect to lawyers generally, noting that

[s]ome of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people.

1 TOCQUEVILLE, supra note 214, at 284.

299. See Wilson, supra note 5, at 942 (concluding that “one must assume that the courts, particularly the tenured federal courts, play the equivalent of the ‘aristocratic’ role in Burke’s mixed government”).

300. See BICKEL, supra note 46, at 32 (“Continuity is a chief concern of the Court, as it is the main reason for the Court’s place in the hearts of its countrymen.”).


302. Id. at 493-94.
distinctly legal form of reasoning, it makes sense for courts to have a prominent role.\footnote{Cf. Fried, supra note 193, at 57 (arguing that a distinctive form of legal reasoning fills in the gaps of philosophy and allows it to be applied to particular situations). Given the affinity of Burke’s traditionalism for these fairly standard prudential arguments, it is hard to understand Thomas Grey’s assertion that “the Burlean conception of constitutional law” rests on “the appeal to mystery.” See Grey, supra note 32, at 21. It is worth noting that Professor Grey cites Burke once, then spends most of his time talking about Durkheim.}

Burke’s conservatism thus offers a relatively new perspective on the majoritarianism debate, which has tended to take place between those who emphasize the counter-majoritarian difficulty and those who, by emphasizing the nomination process, congressional control over jurisdiction, the possibility of constitutional amendment, and antidemocratic aspects of the legislative and executive branches, note the deterioration in practice of the distinction between the judicial and “political” branches in terms of democratic legitimacy.\footnote{See, e.g., Tribe, supra note 236, § 3-6, at 63-65 (suggesting that the “dichotomy between a democratic political process and an antidemocratic adjudicatory process . . . is more metaphorical than real”).} These positions accept the primacy of democratic majorities as a given; in contrast, the Burlean view holds that the majoritarian elements of our constitutional system have no inherently superior claim to legitimacy than the counter-majoritarian components that are also embodied within it.\footnote{Cf. Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 29 (1991) (denying the “supposed need of the Constitution as a whole to affirm democracy”).} Judicial restraint, then, should be a value only in the sense of judicial “craftsmanship,” that is, the care taken by judges in respectfully meeting traditional legal sources on their own terms, rather than manipulating those sources to reach results that are really the product of moral or philosophical predispositions.\footnote{See Greenawalt, supra note 13, at 63; see also Charles Fried, The Conservatism of Justice Harlan, 36 N.Y.L. Sch. L. Rev. 33, 51 (1991) (citing “candor, care, being true to the facts, the record, and the precedents, and a modest respect for the other institutions that surround the Supreme Court” as “the hallmarks of Mr. Justice Harlan’s conservative ethic”).} Under this approach, deference is owed not to the political branches of government, but rather to judicial precedent and the common-law tradition of gradual evolution through “reasoned judgment.”\footnote{See Paulsen, supra note 7, at 13-16 (describing the method of Justice Souter).} This brand of judicial restraint works to ensure that courts do not overstep their proper role, while avoiding any artificial sense of judicial incapacity that allows the other branches to overstep theirs. Only in this way can we achieve the “nice equipoise” essential to Burke’s vision of mixed government.

D. Rules and Standards

Although a preference for formulation of legal directives in the form of rules or standards has, at times, been associated with substantive political
positions, Professor Sullivan argues convincingly that this choice ultimately does not consistently correlate with political liberalism or conservatism.\(^{308}\) The emergence of Justice Scalia as the primary advocate of rule-based decisionmaking, however, has caused rules to be consistently associated with judicial conservatism.\(^{309}\) Nonetheless, Burkeans must find this characterization to be precisely backwards; indeed, Burke was one of the most eloquent proponents of a balancing approach to political and social problems:

The pretended rights of these theorists are all extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of middle, incapable of definition, but not impossible to be discerned. The rights of men in governments . . . are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle; adding, subtracting, multiplying, and dividing, morally and not metaphysically or mathematically, true moral denominations.\(^{310}\)

Professor Sullivan’s conclusion that the contrasting positions on rules and standards on the present Court represent “two kinds of judicial conservatism, not one”\(^{311}\) is thus worth reconsidering in light of the Burkean tradition. Rather than equivocating between the two modes, that tradition comes down firmly on the side of standards.

The first and most clearly anti-conservative aspect of rules is the ambitious rationalism inherent in their formation. Comparing Justice Scalia to the “nineteenth-century legal codifiers facing the messy landscape of the common law,” Professor Sullivan observes that Scalia “is likewise optimistic about the possibility that judges can rationalize the chaotic jumble of twentieth-century constitutional precedents and reorder constitutional law around clear interpretive and operative rules.”\(^{312}\) The proponent of rules thus makes the same sort of rationalist assumptions about the rule-maker that the originalist makes about the Framers; neither allows much scope for elaboration and alteration in the light of subsequent experience.\(^{313}\) Standards, on the other hand, operate with greater humility. Although they may

\(^{308}\) See Sullivan, supra note 3, at 97-99. Professor Sullivan notes, for example, that standards have been associated with the progressive and realist assault on nineteenth-century categorical legal thought, as well as with McCarthy-era suppression of free speech under the Dennis balancing test. She thus concludes that “strong substantive theories of rules as conservative and standards as liberal—or vice versa—are wrong. The relationship between rules and standards on the one hand and political positions on the other is not necessary, but contingent.” Id. at 98.

\(^{309}\) See supra notes 89-91 and accompanying text.

\(^{310}\) Burke, Reflections, supra note 12, at 112-13.

\(^{311}\) Sullivan, supra note 3, at 121.

\(^{312}\) Id. at 114-15.

\(^{313}\) See supra notes 241-46 and accompanying text.
aim at a comparable level of determinacy as rules, standards become determine through a process of elaboration in the course of individual decisions. Through the gradual method of the common law, particularistic decisions in individual cases gradually add up to a rational pattern of doctrine.\textsuperscript{314} Professor Duncan Kennedy explains this process as follows:

[T]he application of a standard to a particular fact situation will often generate a particular rule much narrower in scope than that standard. One characteristic mode of ordering a subject matter area including a vast number of possible situations is through the combination of a standard with an ever increasing group of particular rules of this kind. The generality of the standard means that there are no gaps: it is possible to find out something about how judges will dispose of cases that have not yet arisen. But no attempt is made to formulate a formally realizable general rule. Rather, case law gradually fills in the area with rules so closely bound to particular facts that they have little or no precedential value.\textsuperscript{315}

The structure that emerges from this process will likely lack the simplicity of a general rule, yet it is more likely to conform to the complexities of social reality. Hence, as Professor Greenawalt notes, "Skepticism about abstract ideas and rapid change, and concentration on particular context, does incline one toward balancing approaches to the resolution of social problems."\textsuperscript{316} Standards also promote a Burkean notion of prudence through their facilitation of compromise. For Burke, "All government, . . . every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; . . . and we choose rather to be happy citizens than subtle disputants."\textsuperscript{317} This preference for moderation is based on a suspicion that absolutist positions can never adequately capture the complexity of real life, as well as a notion of political prudence. Although rules may be used to codify moderate positions, they are more amenable than standards to use by proponents of ideological extremes. Because a standard will be applied with some degree of discretion by decisionmakers of varying political views, the distribution of actual results will tend toward

\textsuperscript{314} See Ackerman, supra note 241, at 9.

\textsuperscript{315} Kennedy, supra note 91, at 1690; see also Sullivan, supra note 3, at 62 ("A rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way. . . . On this view, a rule is a standard that has reached epistemological maturity.").

\textsuperscript{316} Greenawalt, supra note 13, at 64. Greenawalt goes on to observe that "an activist might also approve of some sorts of balancing formulations" such as the compelling interest test. Id. As Professor Sullivan notes, however, "two-tier review generally decides cases through characterization at the outset, without the need for messy explicit balancing." Sullivan, supra note 3, at 60.

\textsuperscript{317} Burke, On Conciliation, supra note 180, at 200.
the middle to a greater extent than where decisionmakers are more con-
strained by a rule that incorporates a particular political position.\textsuperscript{318} Because standards allow room for the direct application of background principles in individual fact situations, they rank among the "the arts of compromise," the 'ways of muddling through' that permit us to reach an accommodation between our principles and the complex, murky, and often resistant reality on which these principles operate.\textsuperscript{319} And because this accommodation occurs over time through successive applications of the standard in individual cases, standards are a means of "permit[ting] the marginal and evolutionary reconciliation of our principles and practices."\textsuperscript{320}

A somewhat more complex set of Burkean arguments revolves around what advocates of rules often list as the primary disadvantage of standards: their incompatibility with the ideal of judicial restraint. Because standards leave considerable discretion to the decisionmaker to give content to the law \textit{ex post}, partisans of rules tend to see standards as a mask for application of the judge's own preferences, or "the wolf of judicial arrogance in the sheep's clothing of the common law judge."\textsuperscript{321} In response to this charge, proponents of standards point to three distinct sources of constraint, each of which rests on fundamentally Burkean assumptions. The first is a belief that, over time, social traditions and practices can meaningfully give content to a given constitutional provision.\textsuperscript{322} This response reflects a concern that decisionmaking should be slow and decentralized. Because standard-based adjudication relies on case-by-case application to develop the meaning of legal directives, it inevitably devolves considerable responsibility to the lower courts. This devolution ensures that decisionmaking will be incremental, with individual courts serving as laboratories wherein different resolutions of similar problems can be tested without risking the broad systemic consequences of experimentation by the Supreme Court itself. Moreover, decentralization may have the additional benefit of decreasing political pressure on the Court, both because the pace of change will be slower and because the Court will have the opportunity to examine the effects of innovations before having to pass on them.\textsuperscript{323}

\begin{itemize}
  \item \textsuperscript{318} See Sullivan, supra note 3, at 99 ("[S]tands will tend to correlate more systematically with moderation than rules. The choice of standards over rules thus dampens ideological swings as compared with a shift from one polar rule to another.").
  \item \textsuperscript{319} Kronman, supra note 132, at 1570 (quoting Bickel, supra note 46, at 64).
  \item \textsuperscript{320} Id.
  \item \textsuperscript{321} Sullivan, supra note 3, at 118.
  \item \textsuperscript{322} Id.
  \item \textsuperscript{323} See John O. McGinnis, The 1991 Supreme Court Term: Review and Outlook, 1993 Pub. Int. L. Rev. 165, 167 ("One method of controlling the pace of change and deflecting criticism of the Court itself is to decentralize decision making by announcing rules that provide lower courts greater responsibility for making decisions on a case-by-case basis.").
\end{itemize}
A second argument for the constraining effect of standards rests on a belief that "shared understandings embedded like bedrock in the legal culture will inform the line-drawing that the Justices do." This position, in turn, depends on the assumption that our heterogeneous society retains sufficient "shared understandings" that judges will be able to discern and be guided by a common tradition rather than their own personal values. As Professor Tushnet suggests, this view is more characteristic of conservative social theory than of liberalism; "[c]onservatism," according to Tushnet, "has insisted that consensus and community rather than conflict are the basis of social order," whereas liberalism assumes "that each of us is fundamentally in conflict with the rest." Although Tushnet overstates the case when he concludes that "within the conservative tradition, the imagined consensus means that no decisionmaker, whether legislator or judge, can possibly deviate in any interesting way from the community's views," he is certainly correct in attributing to Burkeans a belief in shared traditions and a greater emphasis on the community vis-a-vis the individual. Reliance on shared understandings is, of course, substantially more problematic in our modern, heterogeneous society than in Burke's eighteenth-century Britain; it may be, however, that the primary area of common ground that remains lies in the tradition of rights developed through constitutional adjudication. Moreover, standards are sufficiently capacious to be tailored to

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324. Sullivan, supra note 3, at 118.
325. See id. at 123 (noting that the Justices of rules "also doubt that any single or shared community can exist to anchor standards").
326. Tushnet, supra note 1, at 926; cf. Tushnet, supra note 250, at 785 (arguing that only "the communitarian assumptions of conservative social thought" can provide "the requisite continuities of history and meaning" which would make both interpretivism and neutral principles viable modes of interpretation).
327. Tushnet, supra note 1, at 926. Tushnet's view of conservatism is, for example, hard to square with Burke's preoccupation with the problem of how a representative should act when his views are in conflict with those of his constituents. See Burke, Letter to the Sheriffs of Bristol, supra note 128, at 216-18.
328. See Burke, Reflections, supra note 12, at 97-98 ("To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country and to mankind."); see also Burke, Appeal, supra note 20, at 521-22 (discussing the individual's involuntary obligations to the community).
329. See Lee Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 7 (1986) ("[T]he free speech idea . . . remains one of our foremost cultural symbols."); Kenneth Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 306 (1986) ("[T]he Constitution . . . continues to be seen as a repository for the central substantive values of our civic culture: individualism, egalitarianism, and tolerance of diversity."); Sullivan, supra note 3, at 123 ("Some bedrock notions like negative liberty run so deep that you can rely on them to help you draw lines across subject matters—whether confronting pregnant women or states with radioactive waste.").
the areas of agreement that exist, while making allowances for diversity.\textsuperscript{330} In any event, the opposite preference for rules partakes more of the liberal tradition of individualism, as articulated by John Rawls and Friedrich von Hayek.\textsuperscript{331} Moreover, rule-based decisionmaking accommodates the liberal individualist belief in the subjectivity of values by constraining the judge to refer only to facts in making decisions.\textsuperscript{332} That this position is now being put forward by Justice Scalia simply emphasizes the extent to which modern American conservatives have adopted the libertarian premises of classical liberalism.\textsuperscript{333}

Finally, proponents of standards insist that “the Court’s own internal practices of reasoned deliberation—the Justices’ very self-conception that they are doing law, not politics—will discipline the tendencies of any personal preferences to guide results.”\textsuperscript{334} This argument emphasizes the Burkean notion that the judge is a legitimate participant in the enterprise of mixed government, rather than an interloper in a presumptively majoritarian system.\textsuperscript{335} Indeed, the case for standards generally assumes that adequate constraints on judicial discretion may be found within the judicial process itself; none of the arguments canvassed above rely on other branches of government to check the development of standards by the courts. Rather, they rest on what the preceding two sections have developed as the essence of a Burkean approach to constitutional interpretation: a faith in the ability of judges to oversee the incremental evolution of our constitutional tradition.

\section*{IV. Toward a Burkean Approach to Constitutional Interpretation}

In this section, I hope to suggest a few directions that someone who finds value in Burke might pursue in interpreting the Constitution. One must be wary, of course, of the time-honored tradition in constitutional theory of claiming to have discovered the one true theory that has eluded all of one’s distinguished predecessors.\textsuperscript{336} Unfortunately, a critique of existing

\textsuperscript{330} See Sullivan, supra note 3, at 123 (“[S]tandards . . . may accommodate heterogeneity in multi-factored tests.”).

\textsuperscript{331} See supra notes 96-97 and accompanying text.

\textsuperscript{332} See Kennedy, supra note 91, at 1767-71. Note that Judge Bork displays a similar belief in the subjectivity of values when he asserts that “[t]here is no principled way to decide that one man’s gratifications are more deserving of respect than another’s or that one form of gratification is more worthy than another.” Bork, supra note 45, at 10.

\textsuperscript{333} See supra notes 96-97 and accompanying text.

\textsuperscript{334} Sullivan, supra note 3, at 118-19.

\textsuperscript{335} See supra notes 295-307 and accompanying text.

\textsuperscript{336} Surveying the literature, Judge Bork notes that “one of the most entertaining aspects of this doomed enterprise” is that “[e]ach of the moral-constitutional theorists finds the theories of all the others deficient.” Even worse, Bork concludes that “each is correct [because] all the
theories is rather unhelpful without an attempt to develop some alternative way of proceeding; as Justice Scalia has pointed out, "You can’t beat somebody with nobody." 337 In pursuing this attempt, however, it is prudent to narrow one’s claims. Burke would be the first to agree that no theory can be entirely satisfactory when brought into contact with the unruly facts of reality, and that theorizing can therefore only take us so far. 338 And yet, Burke devoted a great deal of time and energy to theory. In every instance, although he began with a particular political controversy, he strove to articulate principles of more general applicability. Burke’s theory, however, is inherently "self-limiting" in that "it recognizes the boundaries of philosophical argument and offers reasons for respecting them." 339 In so doing, Burkan conservatism acknowledges that no theory can be perfectly consistent, complete, or determinate. It does, nonetheless, offer a means of determining that some sorts of arguments are better than others in ways that may guide a court’s interpretation, even if they do not dictate particular results. 340 If this is true, then Burkan constitutional theory is worth pursuing despite its inevitable limitations.

Just as the Burkan approach challenges widely-held notions of what constitutional “theory” should do, it is also likely to upset general perceptions of what “conservatism” is all about. The approach set out below is, for example, far more amenable to the definition of unenumerated rights through constitutional evolution than the originalist jurisprudence that most associate with conservatism. On some level, of course, the question of whether my approach can properly be called “conservative” is far less important than whether it is a good approach. Nonetheless, it is worth noting that any seeming irony in calling the Burkan theory articulated here “conservative” is a product of confusion about the fundamental nature of conservative ideology. As a “situational” or “institutional” ideology, conservatism is far more concerned with preserving an existing set of institutions than with prescribing the substantive content of those institutions. Consequently, as Professor Huntington points out, “[n]o necessary dichot-

337. Scalia, supra note 40, at 855.
338. See Tushnet, supra note 1, at 926 (noting that “[t]he Burkan tradition rejects the rationalism of theories about political life”).
339. Kronman, supra note 132, at 1615 (describing Bickel’s prudentialism, which drew heavily on Burke).
onomy exists . . . between conservatism and liberalism.”

Positing such a dichotomy, moreover, “only serves to obscure the fact that in the proper historical circumstances conservatism may well be necessary for the defense of liberal institutions.” Indeed, it is only in this sense that originalism itself could possibly be called conservative; the Constitution, after all, was an extremely liberal project at its inception, and adherence to its original intent is, fundamentally, adherence to the platform of classical liberalism.

The true enemy of conservatism, then, is not liberalism but radicalism—from whatever source. There are elements of liberalism, of course, that are fundamentally incompatible with conservatism: excessive faith in human reason and corresponding reliance on abstract theory, for example. In the preceding section, I have sought to demonstrate that it is precisely these elements that modern “conservative” jurisprudence has chosen to emphasize; the tension between that jurisprudence and principles of stare decisis, moreover, is powerful evidence of modern judicial “conservatism”’s kinship with the radicalism that conservatives have traditionally opposed. Burkean theory, on the other hand, is the antithesis of radicalism: it eschews abstraction and seeks to limit its demands on human rationality by insisting that change be limited by incrementalism and guided by tradition. This is the historical meaning of conservatism in western political theory, and it is by this standard that the approach articulated below should be judged.

A. Common-Law Constitutionalism

The “theory” I want to advance is less a new way of looking at constitutional interpretation than an attempt to explain and justify what courts do now. This approach heeds Burke’s suggestion that “instead of exploding general prejudices,” we would do better to endeavor “to discover the latent wisdom which prevails in them.” Theories constructed in this manner, Burke argues, are more durable “because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.” Working to refine and strengthen our existing traditions of interpretation has two advantages: the effort begins with a tested method which we have at least been able to live with for two centuries, and the

341. Huntington, supra note 10, at 460.
342. Id.; see also supra notes 221-30 and accompanying text.
343. See, e.g., supra notes 237-46, 266-67 and accompanying text.
344. See Huntington, supra note 10, at 460.
345. See supra notes 272-75 and accompanying text.
347. Id.
product is more likely to be acceptable to practitioners of interpretation who might well be skeptical of a radically new approach. Defining the interpretive tradition, of course, is no easy matter. I want to argue, however, that a common-law model fairly describes much of what courts actually do when interpreting the Constitution, and that such interpretation would generally be more successful if the common-law model were more candidly acknowledged and more broadly employed.

By "common-law model," I mean a process that attempts to emulate Burke's rejection of abstract theory and his corresponding emphasis on tradition and incremental change. Although many of the characteristics of this process are clear from my preceding discussion, it is useful to reiterate them here. The first point is that none of the generally accepted modes of constitutional argument are ruled out; arguments from the constitutional text, the intent of the framers, judicial precedent, the broader philosophical purposes of the constitution, moral philosophy, and social policy may all be relevant in any given case. Given a Burkan set of assumptions, however, some of these arguments are more persuasive than others. For example, even the most fervent nonoriginalists tend to concede that originalist history is an important factor for judges to consider. For the Burkan, that history is primarily valuable as an aid in ascertaining the tradition as a whole as it has evolved from the original period to the present. Similarly, a Burkan judge will tend to reject arguments based on abstract moral theory except insofar as that theory can be shown to reflect and clarify the moral intuitions of society at large.

The relative importance of different sorts of constitutional argument will also vary according to the particular provision of the Constitution that is being interpreted. This kind of flexibility is essential to avoid the fallacy of treating the Constitution as a document that was created at a single time with a single set of premises and goals. The text of many provisions, for example, is sufficiently clear that almost all questions involving them can be resolved without recourse to other interpretive methods. In other areas, the values historically associated with a provision, as well as its tradi-

348. See supra notes 131-51, 185-96 and accompanying text.
349. Cf. Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1189-90 (1987) (observing that "most judges, lawyers, and commentators recognize the relevance of at least these kinds of constitutional argument").
350. See, e.g., Brest, supra note 32, at 228 (observing that "nonoriginalist adjudication . . . treats the text and original history as important but not necessarily authoritative").
351. Professors Tribe and Dorf refer to this fallacy as "hyper-integration." See Tribe & Dorf, supra note 305, at 20, 24-30. Although their critique focuses on the assumption that all parts of the Constitution embody the same values or principles, hyper-integration seems to apply equally well to the idea that all constitutional provisions call for the same interpretive approach, despite differences in language, history, and development.
352. See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 418-19 (1985):
tion of interpretation over time, may require that some types of arguments count more than others. \(^{353}\) Professor Cass Sunstein, for example, argues that evidence of traditional practices is highly relevant to substantive due process inquiries, but less relevant (or relevant in a different way) under the Equal Protection Clause:

\[\text{[T]he Due Process Clause has been interpreted largely . . . to protect traditional practices against short-run departures [and] has therefore been associated with a [conception] of judicial review [that] sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.}^{354}\]

The Equal Protection Clause, by contrast, has been understood . . . to protect disadvantaged groups from discriminatory practices, however deeply ingrained and longstanding. The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time honored convention is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. \(^{354}\)

The recognition that different parts of the Constitution should be read in different ways favors a jurisprudence of local doctrines rather than general theories. We should be wary, of course, of forgetting that "it is a Constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories, that must be interpreted." \(^{355}\) Nonetheless, Burkean skepticism about the capacities of human reason should deter us from attempting to emulate Professor Ronald Dworkin’s Hercules by trying

\[^{353}\text{See generally Truax, supra note 236, §§ 1-1 to 1-9 (outlining seven distinct models that represent “the major alternatives for constitutional argument and decision”).}^{354}\]

\[^{354}\text{Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163 (1988); see also Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring in the judgment) (“The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the ‘law of the land,’ and might be thought to have some counterhistorical content.”). History may well be relevant in equal protection cases, however, for the purpose of determining whether a given group should be accorded special protection as a suspect or quasi-suspect class. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461-64 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that the mentally retarded should be regarded as a quasi-suspect class based on the history of extensive discrimination against them).}^{355}\]
to formulate a general moral and political theory of the Constitution that can then be used to determine right answers in every case.\textsuperscript{356} Rather, we will do better to work within the traditions of interpretation that have grown up around particular constitutional provisions.

In a jurisprudence of \textit{doctrine}, the primary tool of constitutional interpretation will be judicial precedent rather than originalist history or abstract moral theory. This approach mirrors the reality of constitutional advocacy; although lawyers may make arguments about original understanding or moral philosophy to courts, they generally emphasize the requirements of doctrine as articulated in prior decisions.\textsuperscript{357} Many precedents, of course, will themselves rely in whole or in part upon arguments about the original understanding. By incorporating originalism in this indirect way, however, adherence to precedent also takes account of a constitutional provision’s line of growth from the original period down to the present.\textsuperscript{358} When used as a means of divining the present meaning of a constitutional provision as it has evolved over time, precedent itself functions as a tool of interpretation; rather than offering a reason to adhere to an incorrect interpretation under the doctrine of \textit{stare decisis}, the force of precedent enters into the

\textsuperscript{356} See Ronald Dworkin, \textit{Hard Cases}, 88 Harv. L. Rev. 1057, 1084-85 (1975). Although a comprehensive discussion of Dworkin is outside the scope of this Article, it is worth noting that his approach mirrors the common-law method in a number of important respects. In particular, Dworkin’s concept of “fit”—under which any theory of decisions constructed by the judge must fit and justify the majority of existing legal rules, precedents, and institutions, see id. at 1096-1101—resembles Burke’s own insistence that reformers should “make the reparation as nearly as possible in the style of the building.” Burke, \textit{Reflections}, supra note 12, at 250. Nonetheless, Burkean distrust of rationalism and abstraction ought to make conservatives suspicious of Dworkin’s superhuman Hercules, despite Dworkin’s own concession that Hercules is simply an ideal that real judges should seek to approximate. See Dworkin, \textit{ supra}, at 1108-09. The Burkean judge may, for example, find that analogical reasoning from accepted precedents is preferable to an attempt to emulate Hercules’ “top-down” approach to legal reasoning, which requires that judges approach individual cases by first constructing a theory at a high level of generality. See Cass R. Sunstein, \textit{On Analogical Reasoning}, 106 Harv. L. Rev. 741, 785-86 (1993) (arguing that lawyers and judges generally reason horizontally by analogy from one situation to another, and criticizing Dworkin’s theory for requiring lawyers and judges “to ask questions that are too broad and abstract—to hard, large, and open-ended for legal actors to handle”); see also Kent Greenawalt, \textit{Policy, Rights and Judicial Decision}, 11 Ga. L. Rev. 991, 1043 (1977) (“If a judge tries self-consciously to emulate Hercules, he may be set adrift in abstractions he cannot really handle and end up rationalizing his own preferences more than he would under some simpler process of decision.”).

\textsuperscript{357} See Tribe & Dorn, \textit{ supra} note 305, at 71 (“The elaboration of constitutional values proceeds mostly from prior decisions.”); Wellington, \textit{ supra} note 242, at 127 (“An additional strength of the common-law method is its experiential familiarity: it is how courts generally adjudicate . . . .”).

\textsuperscript{358} See Terrance Sandlow, \textit{Constitutional Interpretation}, 79 Mich. L. Rev. 1033, 1070 (1981) (“The question is not simply what the framers thought, but what has become of their ideas in the time between their age and ours.”).
initial determination of what the correct interpretation is. Use of precedent in this way allows the judge to tap into a cumulative wisdom that transcends his own rationality. As Dean Brest observes, “a doctrine that survives over a period of time has the approval of a court composed, in effect, of all the judges who have ever had occasion to consider and apply it.” More generally, a heavy reliance on precedent acknowledges the fact that “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.”

When specific precedents cannot directly determine a result, judges pursuing the common-law model are nonetheless constrained to some extent by the conventions of legal argument and reasoning. These considerations confine the range of arguments presented to courts by advocates. As Dean Wellington observes, “[l]awyers on both sides are hedged about in their adversarial roles by the conventions of the legal profession: each argues . . . ‘like a lawyer.’” Lawyers, according to Wellington, “are members of an interpretive community”; as a result, “they know that those before whom they contest will listen only to certain types of arguments.” Dean Wellington concludes that “[t]his shared sense of what is relevant in a situation sharply reduces the number of considerations that might otherwise be thought germane and makes it much more than merely idealistic to talk about treating like cases alike.” An important part of this shared vision of what it means to argue “like a lawyer” is a commitment to the method of analogical reasoning, which Professor Sunstein describes as our legal culture’s “most characteristic way of proceeding.” According to Sunstein, the doctrine of stare decisis means that a certain number of outcomes must be respected as starting points for further reasoning; as a result, “[w]ithin the legal culture, analogical reasoning imposes a certain disci-
pline" that can help courts to reach determinate results even in the absence of "widespread moral or political consensus."366

Similarly, judges may also be constrained by norms and procedures inherent in the judicial process. Charles Fried has defined judicial conservatism as involving a faithful adherence to judicial craftsmanship, including "dedication to analyzing the record of the case, a refusal to twist the historical truth to reach a desired result, a respect for adjacent institutions, and a vision of a judicial opinion as a ruling tailored to address the specific legal issues presented to the Court in a given case."367 These norms, of course, can hardly decide cases, and judges pursuing them may certainly find ways to impose their own subjective preferences. Nonetheless, a judge who approaches a dispute feeling that he is bound to certain norms of craft regardless of his substantive predispositions is already a long way from the attitude of a court that is nothing but a "naked power organ." Moreover, the norms themselves require the judge to pay scrupulous attention to the facts of each case—a focus that may in itself distance the judge from his more abstract ideological or moral beliefs. The individual discretionary power of any given judge is further constrained by the fact that, at the appellate levels at least, judicial decisionmaking is a collective process. The need to convince others of potentially differing views provides an incentive to confine discussion to the more common ground of distinctly "legal" modes of analysis, an incentive which strengthens the already "deeply internalized role constraints" of most judges, who tend to insist that "judgment is not politics."368 Even good faith commitment to the norms of legal reasoning, of course, cannot entirely prevent substantive moral and political views from intruding into adjudication. The need for consensus, however, will substantially constrain the range of possible outcomes. In addition, the commitments to adjudicative deliberation that judges do hold may ensure that

366. Id. at 770. Of course, in constitutional cases, the doctrine of stare decisis generally applies with less force than in common-law cases. See, e.g., Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 409 n.5 (1932) (Brandeis, J., dissenting). One aspect of my argument for a common-law approach to constitutional interpretation is thus a suggestion that precedent should be more important in the constitutional area. Even under the present approach, however, it seems clear that certain holdings are virtually unassailable. See, e.g., Henry P. Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 723 (1988) (acknowledging that despite the inconsistency of Brown v. Board of Education with originalism, originalists have to accept as given that "Brown will not be overruled"); see also Akhil R. Amar, Comment—The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 125 (1992) (arguing that after R.A.V., the Court's earlier decision in Texas v. Johnson, 491 U.S. 397 (1989), "is no longer up for grabs"). Cases such as Brown (and possibly Johnson) can thus function as generally accepted starting points for analogical reasoning in the way Professor Sunstein describes.

367. Fried, supra note 306, at 44.

368. Sullivan, supra note 3, at 120.
compromises among political and moral positions occur even when the composition of a court appears to be ideologically homogeneous.\textsuperscript{369}

These internal constraints on the adjudicatory process—precedent, legal reasoning, and collective deliberation—assume a critical importance in interpreting the Constitution's open-ended clauses, particularly in the area of unenumerated rights under the Due Process Clause. As the plurality in \textit{Planned Parenthood v. Casey}\textsuperscript{370} recognized, "The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."\textsuperscript{371} Judges have consistently insisted, however, that such judgment is not wholly indeterminate. While the \textit{Casey} plurality acknowledged that the boundaries of such judgment "are not susceptible of expression as a simple rule," the justices recognized that "[t]hat does not mean we are free to invalidate state policy choices with which we disagree."\textsuperscript{372} Perhaps the definitive affirmation that reasoned legal argument can decide cases without simply imposing the judge's own values dates back to Justice Harlan's dissenting opinion in \textit{Poe v. Ullman}:\textsuperscript{373}

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation... has struck between [individual] liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.\textsuperscript{374}

\textsuperscript{369} See \textit{id.} at 119-21 ("Because good deliberation requires the consideration of multiple perspectives, ... the Court will maintain a kind of internal ideological equilibrium. As Justices come and go, those left behind will fan out to ensure reasoned deliberation that takes the full range of ideological difference into account.").

\textsuperscript{370} 112 S. Ct. 2791 (1992).

\textsuperscript{371} \textit{id.} at 2806 (plurality opinion).

\textsuperscript{372} \textit{id.} (plurality opinion).

\textsuperscript{373} 367 U.S. 497 (1961).

\textsuperscript{374} \textit{id.} at 542 (Harlan, J., dissenting from dismissal on jurisdictional grounds). The \textit{Casey} plurality quoted extensively from this opinion in reaffirming the right to an abortion established in \textit{Roe v. Wade}, 410 U.S. 113 (1973). See \textit{Casey}, 112 S. Ct. at 2805-06.
Justice Harlan's dissent in *Poe* demonstrates the application of the common-law model to resolve actual cases. Arguing that a ban on the use of contraceptives violated the Fourteenth Amendment, Harlan relied heavily on the tradition of interpretation of the Due Process Clause, noting that the Court had consistently rejected both the purely procedural interpretation of the clause, as well as the view that the substantive rights protected by the clause were limited to those found in the original Bill of Rights. He then surveyed the development of substantive due process, observing that "[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed... The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.'" Focusing on precedents such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* in the substantive due process area, as well as search and seizure cases such as *Wolf v. Colorado*, Harlan concluded that a law authorizing the state to invade the home and inquire into the most intimate details of marital relations could not possibly be consistent with due process. He was aided in this conclusion by looking also to contemporary morality as revealed in the enacted statutes of other states and nations; the "utter novelty" of the means of enforcement employed by Connecticut was, for Harlan, "conclusive" as to its unconstitutionality.

Legislation or the absence thereof may be evidence of conventional morality, but it cannot be dispositive in every case. Public morality represents the general principles to which a community generally adheres; legislative majorities, however, may well violate these principles in particular cases. Exclusive reliance on statutes is similarly problematic when much time has elapsed between enactment and the time at which public morality is to be evaluated. Dean Wellington thus argues that courts must apply

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375. See Ackerman, supra note 241, at 21.
377. *Id.* at 544 (Harlan, J., dissenting) (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).
378. 262 U.S. 390 (1923).
379. 268 U.S. 510 (1925).
382. *Id.* at 554-55 (Harlan, J., dissenting) (noting that neither the federal government nor any other state or nation had such a statute).
384. See Wellington, supra note 301, at 514 n.133 (noting that problems of inconsistency are particularly serious in the legislative process, "when self-interest is least neutralized by considerations of conscience or moral obligation").
385. See Wellington, * supra* note 242, at 109 (arguing that courts should consider legislative history to determine whether a statute actually reflects public morality); Wellington, * supra* note
the "method of philosophy" in order to ascertain the state of conventional morality. This method has little to do with abstract moral theory; rather, a judge must "live in [society], become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play."\textsuperscript{386} Such reflection on the values of society at large is essential if the inquiry is to constrain judges, for the common-law model insists that judges apply society's values and not their own.\textsuperscript{387} Finally, the judge must apply the methods of legal argument and reasoning to moral values before they can be applied in concrete cases. This process, Wellington asserts, "has some promise of filtering out the prejudices and passions of the moment, some promise of providing the judge with distance and a necessary historical perspective."\textsuperscript{388}

Despite all this, one has to admit that this conception of public morality is a rather weak reed upon which to decide a case. Conventional morality will, in many cases, be too ephemeral a creature to constrain a judge who really wishes to decide an issue on the strength of his own values. Much the same thing, moreover, could be (and has been) said of tradition, legal reasoning, or even precedent. Nonetheless, the hope is that if each of these instruments can impose some constraint on courts, then the cumulative impact of all of them will be enough to preserve the balance between the judiciary and the other institutions in our mixed government.\textsuperscript{389} In assessing this claim, it is important to remember that this eclectic approach is essentially what we have been relying on for most of our history. In presenting arguments to courts, advocates will describe the original understanding, cite precedents, argue by analogy, appeal to tradition, public morality, or even abstract moral philosophy, and warn of dire policy consequences if their position is not adopted by the court. Similarly, in

\textsuperscript{383}, at 287 (noting also "the unreliability of drawing conclusions from subsequent legislative inaction, and, most importantly, the nature of the legislature which is responsive to shifting power configurations in a community, but not advantageously positioned to find shifting conventional morality in the community").

386. Wellington, supra note 383, at 246. Formal moral philosophy does influence conventional morality over time. Wellington notes, however, that "the impact of professional philosophical thought on common morality is slow and philosophical positions undergo a life-change, having to do with absorption and assimilation and interaction with the best of the past and with the conditions of society." \textit{Id.} at 280.

387. \textit{See id.} at 244. According to Wellington, "[j]udicial reasoning in concrete cases must proceed from society's set of moral principles and ideals, in much the same way that the judicial interpretation of documents . . . must proceed from the document." \textit{Id.}

388. \textit{Id.} at 248.

389. Of course, these various sources of law may well point in contradictory directions in any given case. That simply means that the case is hard, however—not that the judge is suddenly left without constraint. It is the judge's job to reconcile and balance the divergent sources of law in such a case, and merely because another judge might balance them differently does not mean that the first judge has stopped doing law and has imposed his own values.
justifying their decisions, judges will generally appeal to many or all of these sources. One of the reasons for proceeding in this way may well be that no one—not the advocates selecting the arguments, and not the judges writing the opinions—is sufficiently sure of his own preferred method of interpretation, if he even has one, to stake the outcome of real cases on one particular form of evidence or mode of analysis. This, I think, is as it should be. In the end, the most important thing Burke can teach us about constitutional interpretation may be simply a sense of humility in the face of the law’s complexity. As Professors Tribe and Dorf observed in the context of unenumerated rights, “the difficulty of these issues does tell us . . . that courts would do well to proceed with caution and humility—to avoid the rush to sweeping, global, across-the-board solutions.” 390 Similarly, Professor Bickel rested his prudentialism on a sense of “‘sheer wonder’—a fascination with the world, an appreciative grasp of its complexity and of the resistance it offers to ideas.” 391 The Constitution, Professor Thayer said, “is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness.” 392 In the face of such an institution, then, we would do well to proceed with a sense of our limits, leaning heavily on the interpretive traditions left to us by those who have gone before.

B. In Defense of Tradition

The emphasis on tradition is likely to be the most controversial aspect of the account of constitutional interpretation set out above. “[T]raditionalism is today in disrepute,” according to Professor Kronman. 393 “Any contemporary philosopher of law who . . . takes traditionalism seriously enough even to want to understand it, thereby . . . places himself in opposition to his age, an age in which the rationalizing spirit of philosophy, having escaped all previous limits, now rules the world of Western politics unchallenged.” 394 Burke’s body of work stands for the rejection of this rationalizing spirit; in this sense, most of this Article amounts to a defense of the idea of traditionalism. In this section, I hope to

390. Tribe & Dorf, supra note 305, at 63 (noting that “[i]t is in this respect that the Supreme Court in hindsight can be criticized for its performance in Roe v. Wade”); see also Fried, supra note 306, at 39 (identifying Justice Harlan’s conservatism as “simple humility—an unwillingness to think he possessed all of the insight into the resolution of a problem”).

391. Kronman, supra note 132, at 1598.


393. Kronman, supra note 148, at 1044.

394. Id. at 1046-47. But see Luban, supra note 15, at 1037, 1040 (observing that “the interpenetration of sociology, economics, and philosophy into legal thinking” had sent legal traditionalism into decline, but suggesting that “the pendulum among both legal academics and law students is swinging rapidly . . . back in the direction of law’s aboriginal grand tradition”).
address some of the more specific criticisms that have been levelled at the use of tradition in constitutional law.

1. Which Tradition?

Perhaps the most common criticism of tradition is that it is too indeterminate to constrain judges. According to Professor Ely, "people have come to understand that 'tradition' can be invoked in support of almost any cause. There is obvious room to maneuver, along continua of both space and time, on the subject of which traditions to invoke."395 The most serious version of this objection focuses on the fact that "historical traditions, like rights themselves, exist at various levels of generality."396 This debate is generally fought out over the terrain of the Supreme Court's decision in Michael H. v. Gerald D.,397 which upheld a California law establishing a conclusive presumption that a child born to a woman living with her husband, who is not impotent or sterile, is a child of the marriage. Michael H., whom blood tests showed almost certainly to be the genetic father of Victoria, challenged the presumption in the course of a suit to establish his paternity and obtain visitation rights. Michael's principal argument was that the statute infringed an alleged substantive due process right to establish his paternity of the child.398 In rejecting this argument, Justice Scalia's plurality opinion relied on the historical prevalence of similar statutes, and the complete absence of any case "award[ing] substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."399 By contrast, Justice Brennan's dissent emphasized the traditional interest "of a parent and child in their relationship with each other," which the Court had protected in a long line of precedents.400 In response, Justice Scalia argued that courts should choose among traditions defined at differing levels of generality by "refer[ring] to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."401 This, according to Justice Scalia, is the only way to constrain judges: "Because . . .

395. Ely, supra note 32, at 60.
396. Tribe & Dorf, supra note 305, at 100.
398. See id. at 113-16 (plurality opinion).
399. Id. at 124-26, 127.
400. Id. at 141-42 (Brennan, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923), Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
401. Id. at 127 n.6. Justice Scalia explained that "[i]f, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general." Id. at 128 n.6.
traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views.”

Justice Scalia’s proposed test has been criticized on the ground that “there are many different ways of describing a liberty, and many different ways of characterizing a tradition.” Professors Tribe and Dorf, for example, emphasize that Michael H. had lived with Victoria for a substantial period and established a relationship with her; consequently, the most specific formulation of the issue in the case would be: “What are the rights of the natural father of a child conceived in an adulterous but long-standing relationship, where the father has played a major role in the child’s early development?” There is, of course, probably no tradition at this level; when we go to a higher level of generality, however, we must choose between abstracting away either the adultery or the natural father’s relationship with his daughter. The result, as Tribe and Dorf point out, may depend on this choice, as natural fathers who have established such relationships are not all that far from Justice Brennan’s protected tradition of parenthood in general. It is thus hard to avoid Tribe’s and Dorf’s conclusion that “[t]he absence of a single dimension of specificity is a pervasive problem for the tradition-bound program.”

A second and potentially more serious problem with Justice Scalia’s approach is that the limitation of tradition to its most specific incarnation eliminates the ability of “abstract principles regarding the contours and contents of protected realms of liberty and equality” to serve as “a source of progressive pressure.” As Professor Balkin observes, “[O]ur most specific historical traditions may often be opposed to our more general commitments to liberty or equality.” It is “one of the untidy facts of historical experience,” Balkin asserts, that “different parts of the American tradition may conflict with each other. . . . Traditions do not exist as integrated wholes. They are a motley collection of principles and counterprinciples, standing for one thing when viewed narrowly and standing for another

402. Id. Justice Scalia buttressed his argument by noting that “Justice Brennan’s opinion and Justice O’Connor’s opinion, . . . which disapproves this footnote, both appeal to tradition, but on the basis of the tradition they select [they] reach opposite results.” Id. (citation omitted). Chief Justice Rehnquist was the only other member of the plurality to join the footnote containing Justice Scalia’s test. Id. at 112.


404. TRIBE & DORF, supra note 304, at 103.

405. Id. at 103-04.

406. Id. at 101.

407. Id. at 109; see also Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) (“[A] principle to be vital must be capable of wider application than the mischief which gave it birth.”) (quoting Weems v. United States, 217 U.S. 349, 373 (1910))).
when viewed more generally.” 408 Reference to the highly general, aspirational aspects of our traditions is essential if we are to have a basis from which to criticize established practices such as slavery or segregation; Justice Scalia’s bright-line rule, however, eliminates the flexibility necessary to permit such criticism. 409

Nonetheless, these criticisms do not require rejection of tradition altogether. Justice Brennan’s dissent in Michael H. suggests that instead of arbitrarily selecting the most specific level of generality, judges should seek a tradition at the level of generality used in related prior precedent. 410 Professor Balkin describes this process as a sort of common-law development, through which the specific content of abstract traditions are “determined from case-by-case adjudication, from judgments of similarity and difference to what has gone before—in short, from the tradition of readings and readings of authoritative materials that constitute the practice of constitutional stare decisis.” 411 This approach requires the same sort of faith in legal reasoning and the adjudicative process characteristic of common-law constitutionalism; Justice Scalia’s approach, by contrast, adopts what Professors Tribe and Dorf describe as “a form of judicial nihilism” that “implicitly assumes that there is no way to read the prior cases on their own terms so as to discern rationally the level of generality at which a right was

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408. Balkin, supra note 403, at 1618; see also The Supreme Court, 1988 Term—Leading Cases, 103 Harv. L. Rev. 137, 184 (1989) (“Previous due process decisions recognized the possibility that a specific tradition denying a right may contradict a broader, alternative tradition upholding a more general, and more fundamental, right that encompasses the specific right in question.”). As examples, Professor Balkin notes that

[i]he fourteenth amendment’s abstract commitment to racial equality was accompanied by simultaneous acceptance of segregated public schools in the District of Columbia and acquiescence in antimiscegregation laws. The establishment clause and the principle of separation of church and state have coexisted with presidential proclamations of national days of prayer, official congressional chaplains, and national Christmas trees.

Balkin, supra note 403, at 1618.

409. See infra notes 418-20 and accompanying text. Professor Balkin suggests that Justices O’Connor and Kennedy refused to join Scalia’s test because they recognized that flexibility is needed to make traditionalism a viable tool of interpretation. See Balkin, supra note 403, at 1621 n.31; cf. Strauss, supra note 103, at 1709 (noting the tension between traditionalism and a commitment to rules).

410. See Michael H. v. Gerald D., 491 U.S. 110, 142 (1989) (Brennan, J., dissenting) (“The better approach . . . is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of ‘liberty’ as well.”); see also Trane & Dorf, supra note 305, at 111 (describing this approach). Gregory Cook rejects this approach on the ground that “it is no rule at all to follow precedent blindly without ever asking whether it was correctly decided.” Cook, supra note 296, at 866 n.74. This argument, of course, would apply equally well to following uncritically the most specific tradition available. The better procedure is to give precedents—which are really just judicial traditions of interpretation—the same deference as other forms of tradition.

411. Balkin, supra note 403, at 1624.
recognized." Of course, it may be difficult to determine an appropriate level of generality in areas where there are no well-developed lines of related precedent. In such cases, it may be necessary to rely on a combination of Justice Scalia's approach and the Equal Protection Clause as a less arbitrary approach than a totally unbounded judicial inquiry. However, Justice Harlan's ability to use the intersection of widely divergent lines of precedent to ground an apparently novel right to privacy in *Poe v. Ullman* indicates that judges may have to fall back on the most specific tradition test in a relatively small number of cases. In the end, the rejection of tradition as too indeterminate to use as a source of law involves the same sort of nihilism as Justice Scalia's approach in *Michael H*.

2. Bad Traditions

A less sophisticated argument against reliance on tradition in constitutional adjudication points to the dark side of our collective past. Gary Wills, for example, is often quoted to the effect that "[r]unning men out of town on a rail is at least as much an American tradition as declaring unalienable rights." Citing the example of segregation, Professor Strauss concludes that "[i]n 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." It is, of course, impossible to deny the existence of such episodes. To paraphrase Professor Strauss, however, no one arguably within the mainstream of legal traditionalists—starting with Burke himself—accepts Strauss's impoverished definition of traditionalism. It is true that, in 1954, it was possible to make traditionalist arguments for segregation. Nonetheless, I hope to

413. See *Poe v. Ullman*, 367 U.S. 497, 549-52 (1961) (Harlan, J., dissenting) (combining precedents involving search and seizure with precedents protecting family prerogatives to discern a right of married couples to use contraceptives in the home). But see Cook, *supra* note 296, at 884 (arguing that Harlan's reference to the novelty of the Connecticut statute is consistent with Justice Scalia's narrow approach to tradition).
416. See *supra* notes 173-96 and accompanying text. Despite his confident characterization of Burkean traditionalism, Professor Strauss fails to cite or quote Burke's actual writings once in his article. And the secondary authorities on Burke that Strauss does cite—Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 Cardozo L. Rev. 1685 (1991); Kronman, *supra* note 148, and Pocock, *supra* note 136—do not even remotely support Professor Strauss's interpretation of Burke's traditionalism. Moreover, Justice Scalia (who is Strauss's real target) does not accept Strauss's version of traditionalism either. See Scalia, *supra* note 40, at 851, 864 (admitting that he would not uphold a statute that imposes flogging as a punishment).
show in this section that it was possible to make better traditionalist arguments against it.

The first step in such an argument is based on the observation that "abstract principles" can serve as "a source of progressive pressure." These principles are not the product of metaphysical theory; rather, they are simply the traditions of society taken at a higher level of generality. "A developed political institution," according to Professor Kronman, "is never just a collection of rules prescribing how those subject to it should behave. Any institution of even moderate complexity will also have an aspirational component—it will reflect certain ideals and be oriented toward the attainment of certain values that are never fully realized in practice." The existence of this aspirational component means that "one can always argue that the currently prevailing interpretation of an institution’s ideals is faulty or incomplete, and attempt to show that from the standpoint of a more adequate interpretation, certain of the institution’s existing features must be judged wanting and in need of reform." It is a more difficult matter, of course, to decide when we should accept and act on such arguments. Although I will return to this question below, for now it is important simply to recognize that tradition is not without critical resources that may serve as a basis for reform.

This fact is nowhere more evident than in the struggle against slavery and racism—the very instances that opponents of tradition cite as proving its unacceptability. Although some elements of the civil rights movement rejected American liberalism in favor of more radical ideologies, the more successful groups—both within and without the African-American community—grounded their arguments in an appeal to the classical liberal ideals of freedom and equality. As Charles Henry observes, "[Dr. Martin Luther King, Jr.] was able to strengthen [his] moral appeal by drawing on the democratic elements of the American political tradition." Dr. Benjamin Mays eloquently expressed this aspirational side of the American tradition:

I know that the Declaration of Independence was not meant for me; that its chief architect, Thomas Jefferson, was a slave owner;

418. See supra note 407 and accompanying text.
419. Kronman, supra note 132, at 1608.
420. Id. at 1609.
421. See generally ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 33 (1987); ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960s 373-75 (1984) (noting the limited appeal of black nationalism as compared to the liberalism of Dr. Martin Luther King, Jr.). According to Professor Matusow, "Among the black masses the classic liberal ideal, more important than any particular liberal failing of policy, never lost its appeal. That ideal envisioned a multi-ethnic, multiracial democracy characterized by equal justice and equal opportunity, and affording to each citizen reward according to merit." MATUSOW, supra, at 375.
... and that the "land of the free" and "sweet land of liberty" are not equally applicable to black and white. But these are ideals to which the nation clings and the goals toward which it strives when it is at is best and thinks nobly. It is not always easy for a black man to swear allegiance to the flag, but the American dream is embodied in that allegiance, and until it is repudiated one can still hope for and work toward the day when it becomes a reality.  

The philosophy of the struggle against racism in America is, of course, more complicated than this thumbnail sketch can convey. It is striking, however, that the opponents of segregation were able to tap into the traditions of the establishment they were fighting. What is equally striking, moreover, is that the defenders of segregation were cut off from those democratic traditions, and forced to fall back on the naked fact of segregation's existence without any way of justifying the institution itself in terms of shared American values.  

Louis Hartz makes a similar point with respect to the earlier Southern theorists of the Reactionary Enlightenment, who attempted to defend slavery on Burkean traditionalist grounds. According to Hartz, the aspirations to liberty and equality inherent in the American political tradition were simply too powerful for these theorists to develop a coherent traditionalism around the institutions of slavery.  

Rather than proving the arguments of the anti-traditionalists, then, the history of resistance to racism in this country shows the liberating potential of tradition at work, constantly undermining the claims of unjust institutions and providing a consensual basis for arguments in favor of reform.

The more sticky problems arise when we turn from the rhetorically powerful but ultimately unconvincing example of racism to narrower questions such as the issue in *Michael H. v. Gerald D.* Here, the injustice is less obvious, the gap in terms of generality between aspirational and specific traditions more broad. Professor Balkin notes that in such cases, the

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424. Although defenders of segregation were able to appeal to American traditions of federalism, opposition to social engineering, etc., it is difficult to find any (nonreligious) substantive defense of racism per se, as opposed to arguments for noninterference. And even if we include American religious traditions as relevant here, it is impossible to ignore the effectiveness of Dr. King's use of those traditions to criticize racial injustice. See generally Henry, *supra* note 422, at 329 (arguing that "the secular American political creed and the sacred civic religion of the nation" were inextricably intertwined in Dr. King's thought); *Manis, supra* note 423, at 10 (explaining the "dual role of legitimation and criticism" played by "a common set of religious understandings").

425. See Hartz, *supra* note 22, at 153. Hartz adds that "to the extent that it recognized slavery the Constitution had itself been a historic anomaly, contradicting the larger liberal tradition in which it had been created. To reject it on this score was to purge, not to repudiate, America's political past." *Id.* at 155-56.

426. 491 U.S. 110 (1989); see *supra* notes 397-413 and accompanying text.
need to determine whether the specific practice is a good or bad tradition “leads us back to the very value-laden inquiry that Justice Scalia sought to avoid by his theory of tradition. To follow tradition because it reflects the values of the many is insufficient—one must also believe that these values are justified . . . .” Professor Balkin thus concludes that tradition “does not solve the problem of determining the boundaries of constitutionally protected liberty, but merely phrases the same question in a different way.”

Phrasing the question in a different way, however, may make a difference. Instead of measuring a tradition by comparison to abstract notions of justice, the traditionalist judge derives the standard of justification from a more general understanding of history. From a Burkean standpoint, directing the judge to focus upon the lessons of history is likely to be more reliable than abstract theorizing, even if those lessons still require some degree of discretionary interpretation.

Justice Brennan’s performance in Michael H., of course, ought to inspire doubt as to tradition’s ability to constrain the judge. As Professor Balkin notes, “[Justice Brennan] miraculously discovers that the traditions protected by the Constitution—adultery, homosexuality, and fornication—are precisely those traditions to which majoritarian society objects the most.”

Allowing traditions defined at a high level of generality—like “parenthood”—to always trump more specific limitations on those principles proves too much; it means that “the Constitution never fails to protect tradition, no matter what the Supreme Court decides.” There may be ways, however, to avoid this extreme while retaining the concept of aspirational traditions as a basis for criticizing specific practices. In some cases—such as the examples of slavery and segregation—aspirational arguments will only be available on one side. The fact that the historical practice of racial discrimination is masked by a rhetorical affirmation of equality goes a long way toward proving that racism, however prevalent it may be in reality, is not part of our aspirational tradition. In this sense, words speak more loudly than actions, because words indicate what we think is right, while actions may simply display our inevitable failure to always live up to

427. Balkin, supra note 403, at 1618; see also Luban, supra note 15, at 1056-57 (“In the end, of course, if falls to us (who else?) to pass judgment on the traditions into which we are born, and to determine whether a multigenerational project should be tended and cultivated or abandoned without regret. Thus, in the end, rationalist inquiry into the justification of traditions is inescapably our lot.”).

428. Balkin, supra note 403, at 1625. Although Justice Brennan is undoubtedly correct in observing that “[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one,” Michael H., 491 U.S. at 141 (Brennan, J., dissenting), it is difficult to develop a meaningful theory of tradition based upon his directive that “we must be willing to abide someone else’s unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.” Id.

429. Balkin, supra note 403, at 1625.
those ideals. Burkean prudence may suggest that change should nonetheless be careful and incremental in such cases, but the imperative of reform will be clear.\footnote{430} In other cases, both opponents and defenders of a specific tradition may be able to claim the same aspirational value in a zero-sum fashion; \textit{Michael H.} appears to be such a case, as both parties were able to claim that awarding parental rights to the other would interfere with their own attempts to establish “parenthood.”\footnote{431} Because the general, aspirational tradition cannot choose between the two positions in such a case, it will be necessary to seek other such traditions that may be implicated, and if none can be found, to accept the balance that society has struck at the more specific level.\footnote{432}

A more difficult sort of case will present different aspirational traditions on each side. In some of these, the text of the Constitution or an established tradition of interpretation may suggest an appropriate ranking of these principles. For example, Professor Akhil Amar argues that the Court in \textit{R.A.V. v. St. Paul}\footnote{433} ought to have weighed the value of racial equality embodied in the Thirteenth Amendment against the free speech imperatives of the First Amendment.\footnote{434} Amar’s critics point out that this choice between values is one that the Constitution makes for us, because the Thirteenth Amendment cannot plausibly be read to trump the First.\footnote{435} Where a clear hierarchical ordering is unavailable, courts may nonetheless be able to reason by analogy to other situations in which courts have resolved similar conflicts. Such reasoning must also be the mainstay of analysis in the more general case in which a general tradition in favor of liberty is modified by a more specific limitation.\footnote{436} While it is impossible here to trace precisely the manner in which such an enterprise would proceed, the important thing is that rational argument is possible in such cases without sacrificing the attachment to tradition.

\footnote{430}{Professor Kronman suggests that the charge that traditionalism locks us into abhorrent practices is really based on opposition to the pace of change required by respect for the past. \textit{See} Kronman, \textit{supra} note 132, at 1609.}

\footnote{431}{\textit{See} \textit{Michael H.}, 491 U.S. at 130 (plurality opinion) (“Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa.”).}

\footnote{432}{I am inclined to think that \textit{Michael H.} was rightly decided for this reason.}

\footnote{433}{112 S. Ct. 2538 (1992).}

\footnote{434}{\textit{See} Amar, \textit{supra} note 366, at 155-61.}

\footnote{435}{\textit{See} Alex Kozinski & Eugene Volokh, \textit{A Penumbra Too Far}, 106 HARV. L. REV. 1639, 1649-51 (1993).}

\footnote{436}{\textit{See}, e.g., Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261, 281-82 (1990) (approving a clear and convincing evidence requirement used to limit the traditional right to refuse medical treatment in right-to-die cases, based on analogy to similar requirements in cases—such as civil commitment, termination of parental rights, and the parol evidence rule—involving less substantial interests).}
It will be difficult, however, to investigate seriously the potential of traditionalism as an aid to constitutional adjudication until the critics put away their stock references to slavery, segregation, and similar horribles. After all, defenders of traditionalism are equally entitled to cite the French and Russian Revolutions as examples of what happens when a society turns its back on its traditional heritage in favor some abstract ideal of social justice. Neither position is likely to get us very far, however; it seems preferable to accept the fact that we live in a society in which both the lessons of history and some minimal level of shared moral intuitions place both a return to segregation and a new Reign of Terror off the list of acceptable or likely alternatives.437 And if we insist on considering such possibilities, we ought at least to be able to agree on the truth of Judge Hand’s observation that “a society so riven that the spirit of moderation is gone, no court can save.”438 Perhaps then we can concentrate on the real—and vastly more difficult—problem of sifting out those traditions that are unworthy of continued adherence and yet not so obviously evil as to pose little problem of identification.

3. Is Tradition Undemocratic? Or Is It Too Democratic?

“Reliance on tradition,” according to Professor Ely, “seems consistent with neither the basic theory of popular control nor the spirit of the majority-checking provisions to which we are seeking to give content.”439 Ely explains the first prong of this critique by observing that tradition’s “overly backward-looking character highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday’s majority, assuming it was a majority, should control today’s.”440 This argument, in addition to sharing Professor Bickel’s flawed assumption that judicial review is a “deviant institution,” assumes a notion of the social contract which, unlike Burke’s formulation, rejects the idea that the present generation may be bound to respect choices made by those who have gone before.441 More importantly, Ely fails to assess the democratic acceptability of tradition as compared to other ways of deciding cases. If the open-ended clauses of the Constitution cannot be given content without reference to some sort of moral principles, then it seems more democratic to refer to the morality embodied in societal traditions than to the judge’s own

437. See Scalia, supra note 40, at 864 (admitting that the example of flogging poses a problem for originalists, but asserting that he cannot imagine such a case ever arising).
440. Id.
441. See supra notes 46-47, 159-72 and accompanying text.
beliefs.\textsuperscript{442} Ely would probably reply that judges should not undertake to apply any substantive moral guidelines; rather, they should defer to the political process so long as there is no evidence that that process is not functioning properly.\textsuperscript{443} This process-based approach, however, is problematic for a number of reasons,\textsuperscript{444} not the least of which is its ultimate failure to eliminate the need for a substantive theory of moral and political values.\textsuperscript{445} Absent that option, reference to the traditional values of society will always be more democratic than applying some alternate set of values that do not originate with the people.

The more serious objection is that tradition is too majoritarian: "If the Constitution protects only interests which comport with traditional values, the persons most likely to be penalized for their way of life will be those least likely to receive judicial protection," and that flips the point of the [counter-majoritarian] provisions exactly upside down."\textsuperscript{446} In replying to this objection, it will help to be a bit more specific about which provisions of the Constitution are at issue. As noted above, the Equal Protection Clause has a distinctly counter-historical bent, in that it was enacted, and has since been understood, to eradicate established patterns of discrimination against disadvantaged groups.\textsuperscript{447} History is still relevant to determine whether the discrimination at issue in a modern case is analogous to the

\textsuperscript{442} See Cook, supra note 296, at 870.

\textsuperscript{443} See Ely, supra note 32, at 101-04.

\textsuperscript{444} Although an adequate analysis of Professor Ely's theory is outside the scope of this Article, a Burkean critique of representation-reinforcing would emphasize the propensity of that theory to require abstract theorizing, see Wellington, supra note 242, at 70 ("To police participation in what Ely calls 'the American System of representative democracy,' each justice has to understand, develop, invent . . . that system and then be prepared to impose it."). Its tendency to downplay the importance of precedent, see Robert W. Bennett, Objectivity in Constitutional Law, 132 U. PA. L. REV. 445, 454 n.26 (1984) (noting that Democracy and Distrust does not discuss the role of precedent, and that "[i]t is its absence, rather than anything Ely explicitly says about precedent, that is so striking"), and most important, Ely's acceptance of Alexander Bickel's view that judicial review is a deviant institution in an otherwise majoritarian arrangement. See Wellington, supra note 242, at 71. For the Burkean, the judiciary has an important substantive contribution to make to American government; ensuring the proper functioning of the other branches, then, cannot be the sole role of the courts.

\textsuperscript{445} See Tushnet, supra note 15, at 1045 ("The fundamental difficulty with Ely's theory is that its basic premise, that obstacles to political participation should be removed, is hardly value-free."); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1064 (1980) ("The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory that process-perfecters are at such pains to avoid.").

\textsuperscript{446} Ely, supra note 32, at 62 (quoting The Supreme Court, 1976 Term—Leading Cases, 91 Harv. L. Rev. 70, 136 (1977)). This objection is actually consistent with the first: Ely is arguing that current majorities are disempowered by having to defer to past majorities, while both past and current minorities are likely to be discriminated against by the initial majority's ability to frame traditional rules in terms of its own values.

\textsuperscript{447} See supra note 354.
forms of discrimination the clause has generally been interpreted as barring, but that is a different analysis from substantive due process. The latter doctrine has been interpreted as protecting only liberties that are "so rooted in the traditions and conscience of our people to be ranked as fundamental."\textsuperscript{448} This doctrine, like equal protection, is counter-majoritarian, but in a subtly different way. Substantive due process protects individuals against present legislative majorities that would make a sharp break with history by denying rights which previous majorities for a substantial period of history have regarded as fundamental, and against local legislative majorities that would deny rights generally regarded as fundamental throughout the larger community.\textsuperscript{449} Substantive due process also prevents majorities from prohibiting specific forms of a generally protected liberty, when those forms are not materially distinguishable from the protected liberty enjoyed by the majority.\textsuperscript{450} As described above,\textsuperscript{451} this last form of protection can be a powerful counter-majoritarian force in that it allows minorities to challenge specific practices by referring to the more general, aspirational aspects of our traditions. It is difficult to see, however, what substantive due process could mean without ultimately looking to traditions that are established by majorities; any alternative would necessarily invoke either some form of abstract theory or simply the subjective preferences of the judge. Given these alternatives, one can sensibly conclude that the account of tradition I have developed provides as much counter-majoritarian potential as we can realistically hope for out of this particular doctrine.

4. The Need for Innovation

A final set of arguments centers around Justice Frankfurter's observation that "only a stagnant society remains unchanged."\textsuperscript{452} Taking up Burke's metaphor of the intergenerational social contract, Professor David Luban argues that this contract should actually be understood as containing two distinct clauses: a 'preservation' clause, in which we pledge to conserve our ancestral heritage and trust that our descendants will likewise preserve theirs," and "an 'innovation' clause, in which we offer our descendants the same freedom to break with the past that we ourselves en-

\textsuperscript{448} Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J.).


\textsuperscript{450} See Moore v. City of E. Cleveland, 431 U.S. 494, 503-06 (1977) (citing the general protection of "the family" in invalidating a city ordinance allowing nuclear families to live together, but not extended families).

\textsuperscript{451} See supra notes 418-25 and accompanying text.

\textsuperscript{452} National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).
joy.\textsuperscript{453} The latter clause, according to Luban, is essential for two reasons. First, because “[o]ur forebearers were not prophets,” the present generation must have the freedom to abandon tradition in order to meet unforeseen problems.\textsuperscript{454} The “innovation clause” is also necessary for a more fundamental reason, that is, to accommodate “the central role the possibility of new beginnings plays in maintaining our sense that life has meaning.”\textsuperscript{455} The intergenerational contract must thus be read as “not just an agreement to accept constraints imposed by the past, but also one which grants the freedom to adapt the past flexibly to meet the needs of the present.”\textsuperscript{456}

Burke, of course, would be surprised by Professor Luban’s suggestion that he had “neglect[ed] altogether” the reformist aspect of the intergenerational contract,\textsuperscript{457} as would the American colonists, the Irish Catholics, and the oppressed masses of India, all of whose causes Burke championed in the name of reform.\textsuperscript{458} Luban’s argument is developed as a critique of originalism, which he associates with the traditionalism of Burke and Professor Kronman.\textsuperscript{459} I have argued above, however, that this association will not bear close examination.\textsuperscript{460} Burke clearly accepts Professor Luban’s premise that institutions must adapt in response to problems unforeseen by previous generations; Burke acknowledges, for example, that “[e]very age has its own manners, and its politicks dependent upon them; and the same attempts will not be made against a constitution fully formed and matured, that were used to destroy it in the cradle, or to resist its growth during its infancy.”\textsuperscript{461} Burke’s thought thus permits the sort of common-law adaptation that Luban describes. Luban argues, for instance, that the tension between preservation and innovation must be resolved in terms of the specifics of each case, through legal reasoning based on analogy and meta-

\begin{itemize}
\item \textsuperscript{453} Luban, \textit{supra} note 15, at 1055.
\item \textsuperscript{454} \textit{Id}.
\item \textsuperscript{455} \textit{Id.} at 1054.
\item \textsuperscript{456} \textit{Id.} at 1056.
\item \textsuperscript{457} \textit{Id.} at 1055.
\item \textsuperscript{458} \textit{See supra} notes 178-84 and accompanying text.
\item \textsuperscript{459} \textit{See} Luban, \textit{supra} note 15, at 1055 (“One of the attractions of interpreting law by appealing to the intentions of its makers has always been its claim to keep faith with our ancestors; clearly, the Burkean contract argument, focusing exclusively on the preservation clause, may be invoked on behalf of originalism.”). For a summary of Professor Kronman’s argument for traditionalism, see \textit{supra} note 158.
\item \textsuperscript{460} \textit{See supra} notes 231-75 and accompanying text. It is similarly inappropriate to describe Professor Kronman as an originalist. Kronman’s argument for tradition occurs in the course of a defense of following judicial precedent, not original intentions. \textit{See} Kronman, \textit{supra} note 148, at 1031-33 (describing stare decisis as based on a belief that the past has “the power to confer legitimacy on actions in the present”). Indeed, Kronman’s article on Alexander Bickel’s prudentialism indicates an affinity for evolutionary development in the law. \textit{See} Kronman, \textit{supra} note 132, at 1608-09.
\item \textsuperscript{461} \textit{Burke, Present Discontents, supra} note 144, at 258.
\end{itemize}
phor, and without appealing to tradition or innovation as abstract concepts.\textsuperscript{462} All of these suggestions are consistent with Burkean constitutionalism.\textsuperscript{463}

Other language used by Professor Luban, however, suggests that he and Burke may have a genuine disagreement after all. For Burke, reform is something internal to a tradition; the reformer seeks the "latent wisdom" within the tradition in order to perfect it.\textsuperscript{464} As Professor Kronman explains,

Those who . . . belong to . . . a tradition, are . . . always involved in a controversy about the meaning of its ideals; indeed, in its aspirational dimension, the . . . tradition is just this controversy itself—a kind of endless debate about the proper construction to place on the partially inchoate commitments that the participants share in common.\textsuperscript{465}

Some of Luban’s phrasing—for example, his description of “the freedom to adapt the past flexibly”—is consistent with this view. In other places, however, Luban speaks of the need “to shake ourselves free of our heritage as the need arises,” or the “exten[sion] to our own children [of] the permission to unmake what we have made.”\textsuperscript{466} For Burke, “shaking ourselves free of our heritage” is anathema; instead, “a good patriot and a true politician always considers how he shall make the most of the existing materials of his country.”\textsuperscript{467} One may legitimately ask, moreover, whether such renunciation of the past is necessary to secure the advantages of innovation and reform emphasized by Professor Luban. Once we agree that we can use the aspirational, highly general elements of our tradition—such as "individual liberty" or “equality”—to criticize existing social arrangements, it becomes hard to see why we would need to step outside those traditions in order to find tools for reform. Even when moral and political philosophers debate the principles of liberty or equality at a very high level of generality, those debates take place within a tradition of commonly understood meanings attached to those terms; few participants in the mainstream of our political or philosophical discourse have felt the need (or displayed the ability) to come up with wholly “new” principles of justice.\textsuperscript{468} This, for Burke, is as it

\textsuperscript{462} See Luban, supra note 15, at 1056.
\textsuperscript{463} See supra notes 346-92 and accompanying text.
\textsuperscript{464} Burke, Reflections, supra note 12, at 138.
\textsuperscript{465} Kronman, supra note 132, at 1608-09.
\textsuperscript{466} Luban, supra note 15, at 1055.
\textsuperscript{467} Burke, Reflections, supra note 12, at 206.
\textsuperscript{468} See, e.g., Rawls, supra note 97, at 3 (acknowledging that “justice as fairness . . . generalizes and carries to a higher level of abstraction the traditional conception of the social contract”); id. at 20 (describing the process of “reflective equilibrium,” whereby the philosopher perfects his theory by repeatedly comparing it to his preexisting considered judgments about what justice requires). Even if examples of wholly new theories can be discovered, the recognition that al-
should be. "We know that we have made no discoveries," he writes, "and we think that no discoveries are to be made, in morality, nor many in the great principles of government, nor in the ideas of liberty, which were understood long before we were born . . . ." 469

Professor Luban also makes a second argument for innovation, grounded not in Burke's intergenerational contract but rather in the circumstances of modern American culture. "Ironically," Luban argues, "to be truly a traditionalist in America, one must give the rationalism that infuses our political culture its due." 470 Accordingly, he argues that "the highly rationalized character of our contemporary economy, the power of modern technology, and the rapidity of social change . . . . [all] call for legislative and administrative regulation that is actively intrusive, firmly consequentialist, and forward-looking in character." 471 Several responses, however, are available to this position. First, Luban seems to answer it himself when he notes that "the realm of statute" is "properly forward-looking and consequentialist, not traditionalist." 472 If this is true, and if, as seems likely, the areas of society that call for such legislative and administrative regulation are primarily governed by statutes, then it is unclear why courts need to adopt a similarly rationalist posture in non-statutory contexts. 473 Indeed, we may well see courts—especially when exercising the power of judicial review—as locking in certain values that we do not want to alter in the face of changing social conditions. 474 After all, it is one thing to say that values such as "due process" should evolve over time, and quite another to assert that government should be free to abandon the concept altogether because of some "forward-looking and consequentialist" justification. 475

More fundamentally, reasoning from the premise of increasing social complexity to the conclusion that more rationalism is needed seems precisely backwards. Professor Luban's preference for "actively intrusive,

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469. Burke, Reflections, supra note 12, at 137.
470. Luban, supra note 15, at 1050.
471. Id. To the extent that this argument is based on a tradition of rationalism, rather than on the need for rationalism in our present circumstances, it is vulnerable to Luban's earlier argument that we must adapt our traditions to present needs. If we accept Burke's prudential critique of rationalism, then we would want to emphasize the aspects of our tradition that are cautious about human reason.
472. Id. at 1047-48.
473. Robert Bennett argues further that the nature of the adjudicatory process makes it difficult for courts to effect a dramatic break with the past. "The courts only decide cases that litigants bring to them," he observes, "and litigants take clues about available claims from the justificatory sources judges employ." Bennett, supra note 444, at 488.
474. See supra note 43 and accompanying text.
475. See Luban, supra note 15, at 1048.
firmly consequentialist\textsuperscript{476} regulation would seem to reach its highest expression in the intricate web of statutes and regulations that make up the modern administrative state; it is far from clear, however, that this set of institutional arrangements has done a satisfactory job of coping with "the highly rationalized character of our contemporary economy, the power of modern technology, and the rapidity of social change."\textsuperscript{477} At the very least, it is unclear that this form of regulation has been more effective than the less overtly rationalist approach of enacting general statutes that are developed by courts over time in the manner of the common law.\textsuperscript{478} Moreover, courts have shown a capacity to adapt old concepts to even the most "cutting-edge" aspects of modern technology.\textsuperscript{479} The important point is the simple Burkean insight that increasing social complexity makes it more difficult, not less, to order the world around us in a rationalistic way. The harder it is to comprehend the intricate social, political, and economic inter-relationships of modern society, the less confident we should be of our ability to predict the consequences of government action. In such circumstances, the imperative of slow, cautious, incremental change should assume a greater, not a lesser, importance. We should thus be hesitant to abandon traditionalism in favor of Professor Luban's activist rationalism.

C. The Owl of Minerva

Explaining his conclusion that conservative constitutional theory is not interesting, Professor Mark Tushnet asserts that "[c]onservatism has no need for constitutional theory."\textsuperscript{480} One reason for this, he argues, is that

\textsuperscript{476} Id. at 1050.

\textsuperscript{477} Id.; see, e.g., Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 141-42 (1992) ("Federal administrative agencies have been subjected to an increasing barrage of criticism emanating from a variety of philosophical and political positions. . . . All this criticism centers around the charge that the agencies have failed effectively to discharge their mission of regulating given sectors of the economy to promote the public interest.").

\textsuperscript{478} The antitrust laws are the best example of this process. See Phillip Areeda & Louis Kaplow, Antitrust Analysis 51 (4th ed. 1988) ("[T]he Sherman Act may be seen not as a prohibition of specific classes of conduct but as a general authority to do what common-law courts usually do: to use certain customary techniques of judicial reasoning, consider the reasoning and results of other common-law courts, and develop, refine, and innovate in the dynamic common-law tradition.").

\textsuperscript{479} See, e.g., Arthur R. Miller, Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU? 106 Harv. L. Rev. 977, 980 (1993) (arguing that courts have been able to successfully apply to computer software general copyright principles developed in the context of literary works, despite "astonishing technological and social developments"). But see Irwin R. Gross, Software Protection: Distinguishing Between Interactive and Non-Interactive Aspects of Computer Programs, 20 Rutgers Computer & Tech. L.J. (forthcoming 1994) (arguing that general copyright principles are not appropriate in the area of computer software).

\textsuperscript{480} Tushnet, supra note 1, at 925.
conservative justices are already in power and thus need not convince others by deploying a general theory of interpretation. "Perhaps," Tushnet suggests, "constitutional theory develops only under the pressure imposed by the need to defend results in a hostile environment."\textsuperscript{481} This comment is reminiscent of Hegel's observation that "[t]he Owl of Minerva takes its flight only when the shades of night are gathering."\textsuperscript{482} Hegel's phrase captures the consequences of the conservative's distrust of abstract theory: the conservative would prefer to discuss the practical issues of day-to-day government and is drawn into theorizing only when confronted with a fundamental challenge that can be met only in more abstract terms. So it is with conservative judges as well, who would prefer to decide cases in terms of doctrine and circumstances rather than developing overarching theories of constitutional interpretation.

In recent years, there has indeed been a twofold challenge to traditional modes of constitutional interpretation, a challenge that has been articulated in abstract theoretical terms. Judge Bork may, ironically, be regarded as having launched the era of critical theory when he assailed the Warren Court for departing from the original understanding of the Constitution. Judge Bork's seminal article on this issue begins with the statement that "[a] persistently disturbing aspect of constitutional law is its lack of theory."\textsuperscript{483} Bork's article helped to precipitate a theoretical firestorm that rages unabated to the present day. Rather than defend traditional methods of interpretation, however, Bork's critics have tended to devise highly original, intricate, and abstract theories to justify the results of the Warren Court, as well as the general proposition that the courts may undertake an activist role in promoting individual rights against the state.\textsuperscript{484} Other critics have gone further and rejected all attempts to formulate a coherent theory, concluding instead that constitutional adjudication is simply politics by another name.\textsuperscript{485} The insidious thing about the modern debate, however, is that it has been carried out almost exclusively between factions that universally reject the traditional method of adjudication. There has been very little systematic defense of interpreting the Constitution through evolutionary doc-

\textsuperscript{481} Id. at 927.
\textsuperscript{482} Mannheim, supra note 225, at 231 (quoting Georg W.F. Hegel, Philosophy of Right (J.W. Drye trans., 1896)).
\textsuperscript{483} Bork, supra note 45, at 1. Although earlier prominent exercises in constitutional theory had been critical of the Court, I suggest that none of them would have entailed such a drastic revision of existing doctrine as Bork's originalism. See supra notes 257-60 and accompanying text.
\textsuperscript{484} See, e.g., Ely, supra note 32, passim; Dworkin, supra note 356, passim; Thomas Grey, Do We Have an Unwritten Constitution, 27 Stan. L. Rev. 703 passim (1975); Perry, supra note 65, passim.
trinal development, supplemented by reference to tradition and constrained by conventions of legal reasoning and adjudicatory process.\footnote{486}{But see Wellington, supra note 242, passim (advocating many elements of this approach); Bennett, supra note 444, passim (same).}

It is not the case, then, that conservatism has no need for constitutional theory. A theory is needed, first of all, to reclaim the mantle of conservatism from the adherents of originalism, judicial restraint, and bright-line rules. More importantly, theory is essential to protect existing interpretive practices from continued erosion in the face of theoretical assault. According to Professor Ackerman, Burkean commitment to traditional modes of interpretation continues to be prevalent among practicing lawyers and judges despite its absence from the law journals.\footnote{487}{See Ackerman, supra note 13, at 17.} Nonetheless, we cannot expect that situation to endure while the old methods become less and less intellectually respectable. As Judge Bork observes, many students presently in law school are learning “that legal reasoning of the sort that served us for centuries is now utterly outmoded, and a verbal formulation can always be devised to reach the correct political result.”\footnote{488}{Students are also led to believe that the only systematic alternative to abstract nonoriginalist theories is Bork’s own originalism. Both these beliefs, as Bork is well aware, will be carried with students as they serve as judicial clerks, lawyers, and eventually judges.} There is, of course, an element of hysteria in Bork’s depiction of legal academia. In reality, students are heavily indoctrinated in the traditional modes of evolutionary development simply by the necessities of reading and organizing decided cases. The danger, however, is that this process is distinct in their minds from the realm of interpretive theory; the practical aspects of argument in actual cases thus exist in an uneasy tension with the “pure” imperatives of interpretive systems. In such a situation, an individual’s theoretical commitments may not often be decisive, but will inevitably exert some pull away from established methods of interpretation. This problem can only be met by articulation of common-law doctrinal development as a distinct form of interpretive theory possessing a claim to intellectual legitimacy that is equivalent (if not superior) to the theories developed by Bork, Dworkin, Ely, and others.

This Article has attempted to highlight this gap in our thinking about constitutional interpretation and point toward some potential ways of filling it. Much work needs to be done, however, in considering the extent to which the usual constraints on common-law judges can be said to operate in constitutional adjudication, the extent to which norms of judicial craftsmanship actually operate as a self-imposed constraint on judicial decisionmak-
ing, and the extent to which viewing judicial precedents as a primary source of information about interpretive traditions should cause us to alter existing attitudes toward constitutional stare decisis. What this Article has attempted, rather, is to highlight the existence of a rich Burkean tradition that can assist us in answering these and similar questions and to reclaim the mantle of conservatism from the proponents of a jurisprudence that is radically inconsistent with Burkean ideals.

V. Epilogue: The Unsurprising “Phenomenon of Surprising Moderation”

Hegel’s observation about the Owl of Minerva suggests that “philosophy . . . always comes too late.”490 Recent terms, however, have shown promising indications that common-law traditionalism is making a comeback on the Supreme Court. At the outset of the Court’s 1991 Term, many observers expected a dramatic rightward tilt in the areas of abortion, establishment of religion, toleration of speech by marginal groups, federalism, and property rights.491 The results of the 1991 Term, however, were characterized by “surprising moderation”; in a series of important constitutional rulings, “political ‘liberals’ lost less than they feared and political ‘conservatives’ gained less than they hoped.”492 They key to this development was the apparent emergence of a “moderate” bloc on the Court, composed of Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter.493

490. MANNHEIM, supra note 225, at 231 (quoting GEORG W.F. HEGEL, PHILOSOPHY OF RIGHT (J.W. Drye trans., 1896)).


492. Id. at 26; see also Linda Greenhouse, Slim Margin: Moderates on Court Defy Predictions, N.Y. TIMES, July 5, 1992, § 4, at 1 (“[The 1991 Term] appeared only months ago to have all the makings of a conservative counterrevolution but . . . in the end produced powerful, if qualified, reaffirmations of some of the Court’s most important modern precedents.”). The most important cases are Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992) (upholding the basic principle of Roe v. Wade); Lee v. Weisman, 112 S. Ct. 2649, 2661 (1992) (barring school prayer at high school graduation ceremonies under the Establishment Clause); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking down hate crimes ordinance applied to cross-burning); Lee v. International Soc’y for Krishna Consciousness, Inc. (ISKCON II), 112 S. Ct. 2709 (1992) (affirming the right to distribute literature at airports); Yee v. City of Escondido, 112 S. Ct. 1522, 1531 (1992) (refusing to invalidate a rent control ordinance as a “permanent physical occupation” under the Takings Clause); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992) (requiring compensation for land-use regulations that totally deprive the owner of the economic value of his land, but creating an exception based on state common law defining the scope of property rights); New York v. United States, 112 S. Ct. 2408, 2414 (1992) (holding that the federal government may not require states to “take title” to radioactive waste, but permitting the federal government to induce shifts in state waste policy by other means).

493. During the 1991 Term, Justice O’Connor voted with Justice Kennedy 63.2% of the time and with Justice Souter 67.3% of the time. Justice Kennedy voted with Justice Souter 74.3% of the time. See The Supreme Court, 1991 Term—Leading Cases, 106 HARV. L. REV. 163, 379 (1992). Perhaps more importantly, these three justices joined with Justices Blackmun and Stevens
According to Professor Paulsen, the emergence of this bloc "may be the most significant development on the Rehnquist Court... in several years.... If they continue to link arms in major, fault-line cases..., they will control the course of the decision... and the way in which any 'conservative' majority opinion is written."  

It is too early to tell, of course, whether this "moderate bloc" will retain its pivotal role. As Linda Greenhouse has observed, "any Supreme Court term is just a snapshot in time, of an institution that is neither isolated nor changing." It is thus not altogether surprising that the Court's 1992 Term largely failed to confirm the patterns of the previous year; in a term that began with observers focusing on the impact of the new O'Connor-Kennedy-Souter alliance, those Justices found themselves in disagreement in a number of significant cases. Although it is difficult to draw broad conclusions from the results of a term in which the Court "dealt with issues of limited interest, in a manner that avoided broad pronouncements," it does seem fair to say that the continued existence of a "moderate bloc" on the Rehnquist Court has yet to be proven.

to form a majority in five out of fourteen five-four decisions over the course of the term, including Casey, Lee, and parts of ISKCON II. See id. at 381.

494. Paulsen, supra note 7, at 20-21; see also Greenhouse, supra note 492, § 4, at 1 (noting that "[w]hen [Justices O'Connor, Kennedy, and Souter] voted together, they were not on the losing side in any case this term"). The importance of this grouping can only increase with the replacement of Justice Byron White with Justice Ruth Bader Ginsburg, after which Justices O'Connor, Kennedy, and Souter presumably will occupy a position between evenly matched "conservative" and "liberal" wings.

495. Greenhouse, supra note 492, at 12.


497. See Constitutional Law Conference, 62 U.S.L.W. 2263, 2265 (Nov. 2, 1993) (reporting the conclusion of Professor Jesse Choper that the 1992 Term "dispelled the media 'myth' of a year ago that Justices O'Connor, Kennedy, and Souter constitute a 'new centrist core' who would join with Justices Blackmun and Stevens to form a moderate or liberal majority in a number of cases"). Although the statistical rate of agreement between Justices O'Connor, Kennedy, and Souter in the 1992 Term was comparable to that in the 1991 Term, compare The Supreme Court, 1992 Term—Leading Cases, 107 HARV. L. REV. 144, 373 (1993) (showing agreement rates ranging from 70.2% to 74.6%) with The Supreme Court, 1991 Term—Leading Cases, supra note 493, at 379 (showing agreement rates from 63.2% to 74.3%), this trio failed to vote together in the majority of a single five-four decision in 1992, see The Supreme Court, 1992 Term—Leading Cases, supra, at 375, as opposed to five such decisions in 1991, see The Supreme Court, 1991 Term—Leading Cases, supra note 493, at 381. Moreover, Justices O'Connor, Kennedy, and Souter disagreed in a number of prominent cases. See, e.g., Shaw v. Reno, 113 S. Ct. 2816 (1993) (O'Connor and Kennedy voting with majority to hold that obviously race-based redistricting is subject to strict equal protection scrutiny, with Souter dissenting); Zobrest v. Catalina Foothills School District, 113 S. Ct. 2462 (1993) (Kennedy voting with majority to hold that use of public funds to provide sign-language interpreter for deaf child attending parochial school did not violate the Establishment Clause, with O'Connor and Souter dissenting).

Nonetheless, Justices O'Connor, Kennedy, and Souter are important not only for their potentially pivotal role in future voting, but also for the sort of judicial conservatism that each may be seeking to articulate, whether individually or in concert with the other moderates. Although none of these Justices have yet produced a fully-developed judicial philosophy, each has displayed indications of kinship with the interpretive position that I have sought to develop in this Article. The hallmarks of moderate jurisprudence on the Rehnquist Court are avoidance of abstract reasoning and broad pronouncements, respect for precedent, and allowance for evolutionary growth in constitutional doctrine.499

This approach is nowhere more evident than in the joint opinion in Planned Parenthood v. Casey,500 in which Justices O'Connor, Kennedy, and Souter joined Justices Blackmun and Stevens in declining an invitation squarely to overrule Roe v. Wade.501 The Casey opinion begins with an exploration of the abortion right's roots in the doctrine of substantive due process. Quoting extensively from Justice Harlan's opinion in Poe v. Ullman,502 the plurality recognized that "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity."503 Acknowledging that the question of whether those limits extend to protect the right to an abortion involves a difficult exercise of "reasoned judgment," the plurality was unwilling to say that its analysis of tradition, social mores, and precedent was so conclusive that the Justices would have arrived at the result in Roe as an original matter;504 instead, the plurality chose to rely on a lengthy discussion of stare decisis in concluding that Roe should be upheld.505 Finally, the plurality went on to uphold most provisions of the Pennsylvania statute as not imposing an "undue burden" on the basic abortion right.506 The Casey joint opinion thus displays all the key aspects of common-law constitutionalism: attention to doctrinal development, as informed by societal traditions rather than originalist sources; concern for doctrinal continuity and an aversion to sharp breaks with existing

499. See Greenhouse, supra note 496, at A19 ("[The moderates' approach] was marked by concern for precedent, a taste for incremental rather than quantum shifts in legal doctrine, and by a seeming aversion to the aggressive arguments for change that the Bush Administration put forward in several high-profile cases."); Schroeder, supra note 8, at 143 (referring to this approach as "dispositional conservatism," as contrasted with "judicial role conservatism" and "ideological conservatism").

502. 367 U.S. 497 (1961); see discussion supra notes 373-82 and accompanying text.
503. Casey, 112 S. Ct. at 2806 (plurality opinion) (citations omitted).
504. See id. at 2806-08 (plurality opinion).
505. See id. at 2808-16 (plurality opinion).
506. See id. at 2816-33 (plurality opinion).
case law; and willingness to undertake incremental reform of current doctrine. The opinion ends, moreover, with a nice Burkean touch: "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one." 507

Of the three members of the Casey plurality, Justice Souter seems the most clearly Burkean in terms of jurisprudential principles. According to Jeffrey Rosen, "[Justice] Souter . . . has taken up the mantle of [Justice Felix] Frankfurter and his disciple, [Justice John Marshall] Harlan: respect for precedent; case by case balancing; Burkean continuity with the past."

Similarly, Professor Paulsen describes Souter as "a classic, conservative, common-law jurist: Doubtless influenced by his years as a state court judge, he appears to view all law, including constitutional law, as 'evolving.'" 509 This commitment to evolutionary development of constitutional doctrine was evident at Justice Souter's confirmation hearings, where he repeatedly identified himself with Justice John Marshall Harlan and expressed agreement with Harlan's approach in deriving "an unenumerated right of privacy" from the Due Process Clause of the Fourteenth Amendment. 510 Although defining himself as an

507. Id. at 2833 (plurality opinion).

508. Rosen, supra note 25, at 27. Justice Souter's pivotal role in the surprising outcomes of the 1991 Term led Mr. Rosen to write of "Souter's displacement of Scalia as the intellectual leader of the new majority." Id. This assessment, however, may have been somewhat premature. Rather than leading a "new majority," Justice Souter found himself in the 1992 Term often joining Justices Blackmun and Stevens in dissent. See Linda Greenhouse, "The Court's Counterrevolution Comes in Fits and Starts," N.Y. Times, July 4, 1993, § 4, at 1, 5; see, e.g., Shaw v. Reno, 113 S. Ct. 2816, 2845-49 (1993) (Souter, J., dissenting) (disagreeing with majority's holding that obviously race-based redistricting is subject to strict equal protection scrutiny); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2469-74 (1993) (Blackmun, J., dissenting) (Souter joining dissent dissenting from holding that use of public funds to provide sign-language interpreter for deaf child attending parochial school did not violate the Establishment Clause); Herrera v. Collins, 113 S. Ct. 853, 876-84 (1993) (Blackmun, J., dissenting) (Souter joining dissent from Court's refusal to grant federal habeas corpus relief based on belated claim of actual innocence in light of newly discovered evidence). As Greenhouse points out, however, "[t]hese developments do not necessarily mean that the conservative New Hampshire judge suddenly emerged this year as a liberal." Greenhouse, supra, at 5. Rather, it is simply too early to assess the influence that Justice Souter's judicial philosophy will have over his fellow justices.

509. Paulsen, supra note 7, at 13-14; see also id. at 15 (describing "Souter's moderate traditionalism, attachment to precedent, and fondness for balancing and incrementalism").

510. See Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 54 (1990) (statement of Judge David Souter) [hereinafter Confirmation Hearings]; see also id. at 140 (agreeing with Justice Harlan that courts should search "the history and traditions of the American people" in defining unenumerated rights). Despite these indications of Justice Souter's current independence at his confirmation hearings, commentators have noted that during his initial term on the Court he "provided a quiet, dependable vote for the Court's increasingly strong conserva-
"interpretivist," Souter explicitly rejected the intentionalist version of originalism and made it clear that the application of constitutional principles is "enlightened by changing facts and circumstances in society." Such evolution, however, is ultimately rooted in continuing study and application of precedent; as Linda Greenhouse has observed, "Justice Souter's hallmark is a willingness to confront some of the Court's murkiest doctrinal areas, working his way through the contradictions to try at the same time both to make sense of the precedents that apply and to steer clear of those that do not."

Justice Souter's testimony before the Senate Judiciary Committee also indicated an ambivalence toward modern notions of judicial restraint. Although acknowledging that judges are constrained in interpreting the Constitution by the nature of the judicial role, Souter insisted that the courts have an important part to play in "making a just society." Rather than emphasizing the aberrant nature of judicial review in a majoritarian system, Justice Souter appears to find the sources of judicial restraint "in precedent, tradition, and a naturally conservative personal disposition." Finally, Justice Souter has indicated a Burkean distrust of bright-line rules. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, Justice Souter wrote a separate concurrence calling for a rejection of the bright-line test for Free Exercise claims articulated by Justice Scalia in *Employment Division v. Smith*; in so doing, Souter called for a Free Exercise jurisprudence based on "substantive neutrality," which would require the Court to engage in a more complex, fact-intensive analysis of the actual burdens imposed upon religious observance by formally neutral laws. Although Justice Souter has hardly been on the Court long enough
to permit confident generalizations about his judicial philosophy, there is reason to hope that his evolving jurisprudence will blossom into a viable Burkean alternative to Justice Scalia’s brand of judicial “conservatism.”

Justice Anthony Kennedy has shown similar Burkean propensities, although his fundamental jurisprudential commitments remain somewhat mysterious. At the time of his appointment to the Court, many observers characterized Kennedy as Bork without a paper trail, arguing that the real differences between the two judges were insignificant. Political conservatives have since become disillusioned, however, by Justice Kennedy’s positions in key cases on abortion, the Establishment Clause, and other high-profile social issues. Kennedy’s recent opinions indicate a movement away from originalism in favor of evolutionary development of constitutional principles, as well as a preference for incremental change over

(“[T]he decision whether to adhere to a prior decision, particularly a constitutional decision, is a complex and difficult one that does not lend itself to resolution by application of simple, categorical rules, but that must account for a variety of often competing considerations.”). And while Souter’s opinion places substantial emphasis on originalist history, it also acknowledges that “there are differences of opinion as to the weight appropriately accorded original meaning,” so that original intent simply “ranks in the hierarchy of issues to be explored.” Id. at 2250.

522. To some extent, this continued uncertainty is a function of the fact that Justice Kennedy—like Justices Souter and O’Connor—has been less interested in articulating an abstract jurisprudential theory than his colleague, Justice Scalia. In Justice Kennedy’s case, however, it also seems fair to say that there has been substantial evolution in his views. Compare, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (joining Chief Justice Rehnquist’s plurality opinion questioning the validity of Roe v. Wade), with Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816 (1992) (plurality opinion of O’Connor, Kennedy, and Souter, JJ.) (reaffirming the “essential holding” of Roe). See generally Richard C. Reuben, Man in the Middle, Cal. L. Law., Oct. 1992, at 35, 35 (observing that, after announcing the decision in Casey, the Justice “seemed a different Anthony Kennedy, no longer the formalistic conservative of his first five years on the court”); Paulsen, supra note 7, at 16 (describing contrast of recent opinions with earlier positions but also noting that “there were hints all along that Kennedy’s idea of judicial restraint was very different from Scalia’s”).

523. See Christopher Schroeder, Kennedy and Bork: Different Courses, Same End, Manhattan Law., Aug. 8-14, 1989, at 13. But see Reuben, supra note 522, at 36-37 (noting that, from the beginning, “Kennedy’s conservatism was far different from the ideologically driven Bork’s. Born into Sacramento’s upper class, Kennedy offered a pragmatic realism reflecting traditional small-town values, his general practice law office and state capital politics”).

524. See Terence Moran, Profiles in Caprice: Justice Anthony Kennedy, N.J. L.J., July 13, 1992, at 4; Reuben, supra note 522, at 35 (“Kennedy’s significant departures from right-wing orthodoxy have earned him a severe public beating from conservatives.”).

525. See, e.g., International Soc’y for Krishna Consciousness v. Lee, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J., concurring in the judgment) (arguing that the definition of a public forum in First Amendment doctrine must evolve in response to “times of fast-changing technology and increasing insularity” rather than remain limited to the restricted class of public spaces that were recognized as public fora at a particular time in history). See generally Moran, supra note 524, at 4 (“In big cases, [Justice Kennedy’s] mode of analysis has changed; he frequently takes into account social forces and psychological factors far afield from the historiographic confines of original-intent jurisprudence.”).
far-reaching rejection of past precedents.\textsuperscript{526} And although Justice Kennedy has at times evinced a preference for bright-line rules,\textsuperscript{527} his more recent opinions have shown a tendency toward more standard-based, fact-intensive inquiries.\textsuperscript{528} The result has been, according to Professor Paulsen, "a judicious mind-set of moderation, caution, incrementalism, and 'reasoned judgement.'\textsuperscript{529} Criticism of Justice Kennedy’s jurisprudence in recent years by some on the Right as "rudderless and unpredictable"\textsuperscript{530} thus may be inaccurate as well as unfair. Rather, Justice Kennedy increasingly may be seeking both direction and discipline in the more complex—but ultimately more satisfying—pursuit of common-law constitutionalism.

The third member of the Court’s new center—Justice Sandra Day O’Connor—has been the subject of intensive scrutiny ever since joining the Court in 1981.\textsuperscript{531} As with Justices Souter and Kennedy, a comprehensive survey of her work on the Court is beyond the scope of this Article; it is possible to discern, however, a number of tendencies consistent with the interpretive perspective I have advocated here. For example, Justice O’Connor’s William Howard Taft Lecture on the bicentennial of the Judiciary Act of 1789 sets out a fundamentally Burkean view of the American revolutionary tradition and the role of human reason in politics:

A comparison of the legal revolution engendered by the Judiciary Act and the course of the French Revolution illustrates this Nation’s distinctive commitment and approach. The French Revolu-

\textsuperscript{526} See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (plurality opinion of O’Connor, Kennedy, and Souter, JJ.) (refusing to overrule Roe v. Wade and instead opting to modify the approach to abortion restrictions under the "undue burden" test). See generally Paulsen, supra note 7, at 17 (arguing that Justice Kennedy "is committed to sticking close to past precedents and not himself creating ‘new law.’ He is conservative not in the sense of being unshakable in first principles of text, structure, and history, but, like Souter, in being incremental in terms of changes in the law—whether in a substantively liberal or conservative direction").

\textsuperscript{527} See, e.g., Simon & Schuster v. New York Crime Victim’s Bd., 112 S. Ct. 501, 512-15 (1991) (Kennedy, J., concurring in the judgment) (arguing for a per se rule against content-based restrictions on speech that would not consider whether the state can show a compelling interest to justify the restriction).

\textsuperscript{528} Compare, e.g., Lee v. Weisman, 112 S. Ct. 2649, 2658-61 (1992) (employing a coercion test for Establishment Clause violations that requires courts to engage in a fact-intensive evaluation of whether psychological—not merely physical or legal—coercion is at work) with id. at 2683-85 (Scalia, J., dissenting) (advocating a test limited to coercion “by force of law and threat of penalty,” and describing the majority’s psychological coercion test as “infinitely expandable”).

\textsuperscript{529} Paulsen, supra note 7, at 16.

\textsuperscript{530} Reuben, supra note 524, at 36 (quoting Professor Michael McConnell); see also Paulsen, supra note 7, at 17 (commenting that “there seems to be truth to the charge that Justice Kennedy trims his jurisprudential sails to what he perceives to be the prevailing political winds”).

tionaries valued reason, and assumed that pure acts of will, guided by reason, would allow them to construct the ideal society. That revolution was transformative, seeking to uproot that which had gone before. Our Nation’s revolution was by contrast essentially a conserving one: conflict and institutional change appeared necessary to protect traditional liberties, community structures, and personal rights. Change, in this view, must take place through means in accord with law and must build upon that which has gone before.\(^{532}\)

This sensitivity to the limits of abstract rationalism has led Justice O’Connor to develop an approach to constitutional interpretation that shares many of the principles of common-law constitutionalism. Although her fear that federal judges might “follow the model of the French Revolutionaries and attempt to replace their inheritance with one particular version of the ideal society” has prompted O’Connor to be a consistent advocate of judicial restraint,\(^{533}\) she has also eloquently defended the role of the courts in exercising the power of judicial review. The joint opinion in Casey, for example, insists that “[t]he People’s] belief in themselves as [a Nation that aspires to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”\(^{534}\) Similarly, Justice O’Connor’s substantive due process decisions have evinced a willingness to look beyond originalist history and narrowly-defined traditions to recognize and uphold “new” rights; those opinions, however, have derived those rights through a painstaking analysis of the principles inherent in the Court’s precedents rather than by turning to

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532. Sandra Day O’Connor, The Judiciary Act of 1789 and the American Judicial Tradition, 59 U. Cin. L. Rev. 1, 4 (1990); cf., e.g., Burke, On Conciliation, supra note 180, at 86 (noting that the American colonist’s view of liberty was based on English traditions, and that “[a]bstract liberty, like other mere abstractions, is not to be found”); Burke, Appeal, supra note 20, at 120-21 (describing the American Revolution as aimed at restoring traditional English liberties to the colonies); id. at 230, 254-55 (condemning the French revolutionaries for relying on abstract “rights of man” that presuppose “the absence of a state of civil society,” and commending the British Constitution as designed “to prevent any one of its principles from being carried as far, as taken by itself, and theoretically, it would go”).

533. O’Connor, supra note 532, at 10; see, e.g., id. at 8 (“[J]udges cannot, ultimately, presume to direct the Nation’s ongoing process of change accomplished through the legislative process . . . . [J]udges are citizens like others in the republic and not, in Judge Learned Hand’s phrase, Platonic Guardians.”); see also Robert J. Glennon, Justice Sandra Day O’Connor: Democrat with a Small “d”, A.B.A. J., June 1986, at 54 (suggesting that Justice O’Connor’s commitment to judicial restraint springs from the fact that, as the only member of the Court ever elected to legislative office, “[o]nly Justice O’Connor has had exposure to democratic accountability”).

abstract theories of justice.\textsuperscript{535} Finally, Professor Sullivan has noted that “[w]here other justices are attracted by bright lines, [Justice O’Connor] is able to find the finest of distinctions.”\textsuperscript{536} Although some commentators have argued that this preference for standards over rules is a product of her gender,\textsuperscript{537} it is equally consistent with a Burkean distrust of rationalism and abstraction.\textsuperscript{538}

It may be, then, that despite all this talk of the Owl of Minerva, the shades of night are not gathering after all. Although the Court will likely retain pronounced left and right wings for the foreseeable future, neither group will be able to form a majority without persuading at least two of the Justices that made up the \textit{Casey} plurality; the arrival of Justice Ruth Bader Ginsburg, moreover, is likely to strengthen the centrist tendencies of the current Court.\textsuperscript{539} There is thus every reason to hope for a robust revival of

\textsuperscript{535} See id. at 2804-08 (following Justice Harlan’s analysis in \textit{Poe v. Ullman} in deriving a right to privacy from the Court’s earlier precedents); \textit{Cruzan v. Director, Missouri Dep’t of Health}, 497 U.S. 261, 287-89 (1990) (O’Connor, J., concurring) (deriving a substantive due process “right to die” from earlier precedents involving the right to refuse unwanted medical treatment). See generally David B. Anders, \textit{Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O’Connor and Justice Scalia Over Unenumerated Fundamental Rights}, 61 \textit{Fordham L. Rev.} 895, 915-21 (1993) (arguing that Justice O’Connor “has apparently abandoned her originalist approach to Fourteenth Amendment rights and replaced it with a fundamental rights theory”). Although Mr. Anders seems correct in noting O’Connor’s departures from originalism, he vastly oversimplifies in asserting that she has become a “fundamental rights” theorist. Justice O’Connor’s focus in both \textit{Casey} and \textit{Cruzan} is firmly on history and precedent—not on the abstract theory commonly identified with “fundamental rights” theories. Cf. id. at 900-01 (defining “fundamental rights” theory by reference to the interpretive theory of Ronald Dworkin).

\textsuperscript{536} Howard Kohn, \textit{Front and Center: On a Changing Supreme Court, Sandra Day O’Connor Has Emerged as a New Power}, L.A. \textit{Times Mag.}, Apr. 18, 1993, at 14, 14 (quoting Justice O’Connor); see, e.g., \textit{TXO Production Corp. v. Alliance Resources Corp.}, 113 S. Ct. 2711, 2732 (1993) (O’Connor, J., dissenting) (acknowledging that, in determining whether a punitive damages award violates due process, “there is no ‘mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable’” and proposing a standard-like test based on “the relationship between the punitive damages award and compensatory damages, awards of punitive damages upheld against other defendants in the same jurisdiction, awards upheld for similar torts in other jurisdictions, and legislatively designated penalties for similar misconduct”) (quoting \textit{Pacific Mut. Life Ins. Co. v. Haslip}, 499 U.S. 1, 18 (1991)); Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O’Connor, J., concurring in part) (refusing to join footnote six of the majority opinion, in which Justice Scalia articulated his rule that traditions should be defined at the most specific level of generality); see also M. David Gelfand & Keith Wernan, \textit{Federalism and Separation of Powers on a “Conservative” Court: Currents and Cross-Currents from Justices O’Connor and Scalia}, 64 \textit{Tul. L. Rev.} 1443, 1451 (1990) (noting O’Connor’s preference for “contextual balancing” in both the federalism and separation of powers areas).

\textsuperscript{537} See Sherry, supra note 531, at 604-09.

\textsuperscript{538} See supra notes 312-16 and accompanying text; see also Kohn, supra note 536, at 14 (“O’Connor is rooted in the here and now, in details, not abstractions, certainly not in ideology or a single theory of constitutional interpretation.”).

Justice Harlan's common-law constitutionalism in future years. Sustaining this revival, however, will require continued work to explore how tradition and the conventions of the common law can actually restrain judges; otherwise, Harlan's modern disciples will continue to be vulnerable to charges that "reasoned judgment" constitutes nothing more than "rattl[ing] off a collection of adjectives that simply decorate a value judgment and conceal a political choice." Moreover, the project of developing a coherent Burkean approach to interpretation should help to reclain the good name of "conservatism" from the misperceptions that presently surround it. After all, it is not surprising that conservative justices would act with moderation. What is surprising is that, in an age when "conservative" constitutional jurisprudence is dominated by originalism, judicial restraint, and bright-line rules, there are any real conservative justices left.

1993, at 5 (predicting that Justice Ginsburg "should find [herself] comfortably seated at times alongside Justices Sandra Day O'Connor and David H. Souter, the high court's wavering center").