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nos Estados Unidos

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## CONSERVATISM AND CONSTITUTIONALISM IN THE UNITED STATES

## CONSERVADORISMO E CONSTITUCIONALISMO NOS ESTADOS UNIDOS

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**Abstract:** This paper inquires whether conservative political philosophy provides intellectual resources that might be expected to prevent judges from yielding to the temptation to impose their own strong moral beliefs about how society should be improved. The question emerges from the fact that for more than four decades a Supreme Court dominated by relatively conservative appointees has continued to produce decisions mandating radical social changes that cannot be convincingly traced to conventional sources of legal authority.

The paper examines a range of ideas about what conservatism is and rejects the possibility that most of these can be expected to discipline the temptation to impose personal moral visions and aspirations. However, one strand of conservative thought is identified that can provide the necessary self-restraint. This strand can be found in the writings of Burke on tradition and of Oakeshott on practical knowledge and in Scalia's defense of the practice of defining traditions at the narrowest level of generality. It was manifested in ancient common law judging and is still implicit in otherwise inexplicable aspects of modern constitutional interpretation.

**Resumo:** Este artigo questiona se a filosofia política conservadora fornece recursos intelectuais que poderia esperar-se que impedisse os juizes de ceder à tentação de impor suas próprias crenças morais sobre como a sociedade deveria ser melhorada. A questão emerge do facto de que, por mais de quatro décadas, um Supremo Tribunal dominado por juizes relativamente conservadores tem continuado a produzir decisões determinando mudanças sociais radicais que não podem ser imputadas de maneira convincente a fontes convencionais de autoridade jurídica.

O artigo analisa uma série de ideias sobre o que é o conservadorismo e rejeita a possibilidade de que a maioria delas possa disciplinar a tentação de impor visões e aspirações morais pessoais. No entanto, identifica-se um fio de pensamento

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conservador que pode fornecer o autocontrolo necessário. Esta vertente pode ser encontrada nos escritos de Burke sobre tradição e de Oakeshott sobre conhecimento prático e na defesa de Scalia da prática de definir tradições no nível mais estreito da generalidade. Foi manifestado na antiga adjudicação do *common law* e ainda continua implícito em aspectos inexplicáveis da interpretação constitucional moderna.

**Summary:** Introduction; I. The Record of the Modern Supreme Court: Lawlessness and the Abstract Conceptualization of Tradition; II. Conservatism and the Abstract Conceptualization of Tradition; III. Respectful Regard for Traditional Understanding as a Limit on the Dangers of Abstraction; IV. The Institutional Implications of Practical Knowledge: Deference in Common Law Judging; Conclusion

**Resumo:** Introdução; I. O Registo do Supremo Tribunal Moderno: a Ilegalidade e a Conceptualização Abstrata da Tradição; II. Conservadorismo e a Conceptualização Abstrata da Tradição; III. Respeito pelo Entendimento Tradicional como um Limite aos Perigos da Abstração; IV. As Implicações Institucionais do Conhecimento Prático: Deferência no Julgamento do “Common Law”; Conclusão

**Keywords:** Conservatism; Judicial lawlessness; Constitutional interpretation; Traditional knowledge; Practical knowledge

**Palavras-chave:** Conservadorismo; Ilegalidade judicial; Interpretação constitucional; Conhecimento tradicional; Conhecimento prático

## **Introduction**

In what follows I will be discussing conservatism both as a contemporary ideological orientation and as a set of philosophical traditions. By “constitutionalism” I will be referring to the American foundational document as understood according to conventional legal methods of interpretation, that is, primarily according to its textual and historical meaning. I do not wish, however, necessarily to exclude other common approaches, such as reliance on structural principles or the doctrine of *stare decisis*. The interpretive method that I do mean to exclude from the category of “conventional” is the conflation of constitutional meaning with a jurist’s own personal moral or political judgments. The question I will be addressing, then, is whether there is any reason to expect conservative judges to enforce the Constitution independently of their personal moral or political judgments about how society might be improved.

This question can be phrased in everyday psychological terms. Obviously, when a judge’s convictions about the morality of laws and social arrangements are strong, it is tempting to impose those convictions regardless of what conventional legal authority might require. It is often thought that conservatism can supply intellectual resources that require or, at least aid, the jurist in restraining this impulse. Is this true? And, if so, what are those resources?

## **I. The Record of the Modern Supreme Court: Lawlessness and the Abstract Conceptualization of Tradition**

There are some obvious reasons to think that there must be a link between conservatism and constitutionalism. Conservatives, after all, are thought to favor maintaining the present state of affairs and honoring past practices and traditions. It makes some sense, then, to think that they will not use constitutional interpretation to usher in social and political improvements of their own devising. Conservatives are also thought of, especially by their critics, as being cautious, conventional, and rule-oriented. Surely conservative jurists, then, might be expected to avoid imaginative, new interpretive methods, to stick to hoary legal authorities like constitutional text and original intentions, and to practice the gradualism and concreteness of the ancient common law. Finally, conservatives are thought to disapprove generally of government power, of interference with the free markets, and of centralized control. It seems reasonable, therefore, to assume that conservative judges will be disinclined to resort to their own ideals in order to regulate as national issues of constitutional dimension matters long left to individuals, private associations and local governments.

The decades since the end of the era of the Warren Court—roughly from 1970 till the present—provide a kind of a test for these intuitions, at least at the level of the Supreme Court. During almost all of this period, a numerical majority of the justices have been nominated by presidents belonging to the more conservative of the two major parties. Well aware of criticisms claiming that the Court too often behaves lawlessly (by which critics emphatically have meant to include the

ambitious imposition of the justices' personal values), these nominees assured the public of their commitment to traditional understanding of legality, of acting (as John Roberts famously put it in his confirmation hearings) as umpires applying rather than creating the rules.

To some extent the performance of the Court since the early 1970's confirms a linkage between conservative political thought and constitutionalism. Republican appointees have engendered a renewed attention to traditional legal authorities like text and historical intent. Some of the Warren Court's far-reaching and legally dubious pronouncements-- for example, on police searches and interrogations-- have been gradually trimmed. Some unconventional proposals for radically expanded judicial power—over public school financing is one and over medical involvement in the termination of the lives of adults is another—have been declined. In some areas, notably supervision of state regulation of abortion, Republican appointees eventually moved the Court towards a relatively specific case-by-case methodology.

Despite this record, it is obvious to all that the Supreme Court has continued to issue far-reaching and legally controversial (to say the least) constitutional decisions throughout the long period being considered here. Under the Burger Court and then the Rehnquist Court and now the Roberts Court, judicial intervention in virtually all areas of American life has become normal. The scope and persistence of this intervention is nicely captured by the fact that Roe v. Wade<sup>2</sup>, the revolutionary decision establishing a constitutional right to abortion, was issued at the beginning of the period in 1973, and Obergefell v. Hodges<sup>3</sup>, striking down the traditional requirement that married couples be of the opposite sex, forty two years later in 2015. But the seismic changes imposed by the post-Warren Court's expansion of the right to privacy are only a part of the story. Beginning in 1971, the Warren Court's historic decision requiring racial nondiscrimination in public schools was converted into a nationwide campaign to achieve racial balance. This campaign involved federal judges in detailed supervision of pupil placement, curriculum, and school financing. It disrupted the education of legions of school children and exacerbated race relations in major American cities, at least in the short-run.<sup>4</sup> As these cases eroded the distinction between intentional and *de facto* racial segregation, the already controversial constitutional basis for school desegregation, which originally rested on claims about a linkage between intentional school segregation and minority performance, was further attenuated. Moreover, the federal courts' involvement in executive decisions about the administration of public institutions and in discretionary legislative decisions about budgetary priorities was extended to other kinds of institutions, most notably, state prisons.

An extended assault on legislative determinations about the kinds of gender distinctions that are appropriate began cautiously in the early 1970's. Decades

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2. 410 U.S.113 (1973).

3. 135 S. Ct. Rep. 2584 (2015).

4. For a wide-ranging and sensitive treatment of this subject, see J. ANTHONY LUKAS, *Common Ground: A Turbulent Decade in the Lives of Three American Families*, New York, 1985.

later, this assault had been ambitiously extended and rationalized in ways that essentially displaced any need for the proposed Equal Rights Amendment to the Constitution. The Court invalidated gender distinctions in areas as different as the purchase of beer and admission to military schools. Similarly, the Court that was dominated by Republican appointees significantly extended the Warren Court's bold but limited introduction into American life of the principle of "a wall of separation" between government and religion. Thus, it became unconstitutional for public schools to sponsor a moment of silence in school classroom, not to mention to permit student led prayers at football games or to post the Ten Commandments in a courthouse. Significant judicial protections for freedom of speech, of course, had a history going back to World War I. The Warren Court added to these protections, notably in cases involving the civil rights movement, but was cautious in potentially far-reaching cases involving, for instance, draft card burning and flag desecration. Subsequently, a Court dominated by conservative appointees issued far-reaching decisions protecting profane anti-war messages worn in a courthouse as well as flag burning. It has extended free speech protections to commercial advertising, the intentional infliction of emotional distress, commercial depictions of animal cruelty, and violent video games sold to minors. The Court constructed an elaborate doctrine under which the decision making procedures used by public school disciplinary officers, prison review boards, federal administrative agencies, and tenure committees on university campuses became subject to judicial oversight. It significantly restricted the states' authority to impose the death penalty. Constitutional law has been extended to cover peremptory jury challenges, and many aspects of political reapportionment. Even as it has used its power to control a wider segment of public life, the Court that was populated with justices chosen to restrain judicial power has—more repeatedly and more emphatically than the Warren Court—rejected efforts by the political branches to share in the task of constitutional interpretation.<sup>5</sup>

Some observers, needless to say, have found this record of legally questionable expansions of judicial power to be explicable only as the imposition of the personal moral ambitions of the justices. Progressive observers have made the same charge with respect to other controversial decisions. The accusation of lawlessness was made, for example, when the Court's used a novel equal protection theory to invalidate Florida's method of counting votes during the 2000 presidential election, when it issued decisions limiting affirmative action programs, when it handed down historically controversial decisions recognizing a second amendment right for individuals to bear arms, and when it extended the idea of freedom of speech to restrict campaign finance regulations. For my purposes here, the distinction between conservative and progressive objectives is a matter of momentary political coloration. Some conservative objectives, such as establishing the principle of race neutrality, were not so long ago progressive goals. Some, like limiting the use of abortion, might be again. Some policies now discredited and sometimes popularly associated with backward looking, harsh

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5. *See, e.g.* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for an extreme, almost frenzied assertion of judicial supremacy.

conservatives—for example, prohibition, eugenics, and racial segregation—were in different historical circumstances forward-looking, hopeful policies proposed by liberals. The over-riding consideration is that in the post-Warren Court era, the justices have been surprisingly committed to using constitutional interpretation to achieve some conception of an improved society.

This extended effort to use constitutional cases to achieve social and political reform has certainly raised the deeply disquieting possibility of lawlessness in the enforcement of America's fundamental law. The Court's reasoning, as well as its subject matter, has blurred the line separating the legal from the political and administrative. The practical effects have included a vast expansion of areas subject to resolution as a matter of constitutional law. The Court has exercised great power, often in sudden and unexpected directions. It has centralized vast amounts of authority over the lives of individuals and over local institutions. It has not only limited but also de-legitimized the efforts of individuals and localities to establish policies that matter in everyday life.

Despite the audacity of this record, it might seem to be too much to say that the justices have been lawless in the sense that they have been imposing their own moral convictions. Certainly their opinions take the form of extended legal explanations, and an unending flood of academic commentary has been unleashed in an effort to reconcile the judicial record with legitimate interpretive methods. Here, of course, I do not propose to prove that the Court's record is entirely based on the lawless imposition of personal conviction. But I do wish to insist that at critical junctures in major opinions the justices' explanations cannot be understood except as an acknowledgment of the necessity of relying on their own judgments about moral progress.

The paradigmatic decisions on abortion and same-sex marriage, while some forty years apart, both clearly demonstrate this acknowledgment. To appreciate this, it is necessary to recall some familiar aspects of these decisions. The abortion decision and the same-sex marriage decision are both oddly unconcerned about which words in the Constitution establish the right at issue. Justice Blackmun tossed off that the right to privacy might be found in either "the Fourteenth Amendment's concept of personal liberty...or in the [Ninth Amendment]."<sup>6</sup> Justice Kennedy indulged in a lengthier, almost metaphysical speculation about the interaction between the due process and equal protection clauses.<sup>7</sup>

Even assuming that the right to privacy has some basis in the words of the Constitution, both *Roe* and *Obergefell* are imprecise about the connection between the freedom at issue in the case and the concept of privacy. Justice Blackmun's opinion contains a paragraph describing some of the psychological and physical consequences of pregnancy and childrearing, as well as the possible consequences of an unwanted pregnancy for family life and personal fulfillment.<sup>8</sup> Decades later, Justice Kennedy writes rhapsodically about the importance of

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6. 410 U.S. at 153.

7. 135 S. Ct. Rep. at 2602-04.

8. 410 U.S. at 153.

love and marriage, not merely for a stable and happy life, but for “shap[ing] an individual’s destiny.”<sup>9</sup> In short, in both cases the term “privacy” is used to refer to some of the choices that might be thought necessary for a gratifying life or for self-definition.

In part because of this casual treatment of constitutional authority, dissenters in both cases and critical observers did not argue that the majority opinions were merely mistaken or ill advised. Dissenting in *Roe v. Wade*, Justice Byron White wrote, with the force of bitter understatement, “[A]s an exercise in raw judicial power, the Court perhaps has authority to do what it does today.”<sup>10</sup> John Hart Ely, a proponent of liberalized abortion policy, famously wrote that *Roe* “is not constitutional law and gives almost no sense of an obligation to try to be.”<sup>11</sup> In *Obergefell* all four dissenters argued, in one way or another, that the majority opinion “had,” as the Chief Justice phrased it, “nothing to do with the Constitution.”<sup>12</sup> Justice Alito wrote, “What [the majority opinion] evidences is the deep and perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.”<sup>13</sup>

In both cases, the Court recounts in apparently respectful and erudite terms the long cultural history of attitudes on, in the first case, abortion and, in the second, the nature of marriage. But in both cases, it turns out that this history is not determinative. In the case of abortion, it is not determinative because medical ethicists, legal thinkers, public health professionals, and others had never come to agreement about when human life begins. In the case of same-sex marriage, history is not determinative in large part because attitudes about homosexuality and the nature of marriage had recently begun to change in some circles. In short, in both *Roe* and *Obergefell* past practices and traditional understandings, as well as currently prevailing political sentiments, are recounted but put aside. Unweighted from the historical and the political, the Court is freed to come to its own conclusions.

In both *Roe* and *Obergefell*, the Court’s conclusions turn out to be quite original. On abortion, while the annals of human history could not produce a moral consensus, seven members of the Court are able to propose a moral calculus whereby a woman’s interest in privacy strangely diminishes with each trimester of pregnancy while the state’s interest in protecting potential life just as mysteriously increases. Thus, the Court is able to think of a solution that had evaded all those thinkers across human history. On same-sex marriage, the Court’s solution is not so complex or obviously unprecedented, as a number of states and foreign countries had recognized same-sex marriage in recent years. But the Court does imply, repeatedly but without explanation, that, while marriage is not necessarily between a man and a woman, it is necessarily between only two individuals. Thus, as in *Roe* the Court thinks of a solution

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9. 135 S. Ct. Rep. at 2599.

10. 410 U.S. at 222 (White, J. dissenting).

11. JOHN HART ELY, *The Wages of Crying Wolf*, *Yale Law Journal*, 82, 1973, pp. 920 ff..

12. 135 S. Ct. Rep. at 2626 (Roberts, C.J., dissenting).

13. 135 S. Ct. Rep. at 2643 (Alito, J., dissenting).



that departs from most of human history not only in the right it bestows but also, since polygamy has ancient roots and modern adherents in a number of cultures, in the limits it places on that right.

To summarize, the modern era of conservative domination of the Supreme Court has been defined by two stunning decisions that, at least on the surface, cannot be viewed as law in any conventional sense but appear to be the consequence of a few minds arriving at an original solution to an important moral issue. This rather obviously suggests that conservative jurists may be unable to escape from the underlying commitment, openly embraced by progressives, to the Enlightenment's faith in the capacity of the unencumbered human mind, that is, the mind operating independently of history and tradition and practice.

The evidence for this possibility is so pervasive and familiar in the Court's record that conservative jurists' commitment to Enlightenment rationality does not, perhaps, seem surprising. But many of the same people who are not surprised continue to think that a conservative political philosophy is likely to produce constitutionalism. These two ideas can be held at the same time because it is assumed that the dangerous hubris and adventurism of the Enlightenment rationality can be mitigated and contained by the conservative's respect for tradition, for convention, for concreteness, and for localism.

Conservative justices like Anthony Kennedy not only assume that their political philosophy can domesticate their intellectual commitment to rationality, they also assert this compatibility and attempt to demonstrate it. In *Obergefell*, Justice Kennedy professed great respect for traditional understandings of marriage and claimed to be mandating a departure from those understandings only after careful and thoughtful consideration. In constitutional law this intellectual process even has a name. Accordingly, Justice Kennedy's ultimate justification was not text or precedent but "reasoned judgment," a term that he traced to the great conservative justice, the second John Marshall Harlan.<sup>14</sup>

The term "reasoned judgment," like many words used to explain constitutional decisions, is deployed with such earnestness that one is tempted to assume that it is meant to convey its literal meaning. But, since the Court in a case like *Obergefell* must explain why its moral and practical conclusions should displace those that have been arrived at by others, the term cannot be taken in any literal sense. The judgments of the dissenters in *Roe* and *Obergefell* come to different conclusions yet are surely reasoned. The judgments of all those who throughout history hadn't thought of the trimester scheme or of a conception of marriage as between two, but only two, people of either sex, were not on that ground unreasoned. The issue is what distinguishes the Court's favored beliefs and conjectures-- about the moral value of same-sex unions or the likely consequences for children of same-sex parents or the eventual effects of altering a fundamental understanding about the nature of marriage on the institution of marriage itself—from the beliefs and conjectures of others. It cannot be that one

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14. 135 S. Ct. Rep. at 2598.

is reasoned and all the others not.

Accordingly, it must be that conservative justices like Kennedy and Harlan employ the term “reasoned judgment” in some looser, perhaps figurative, sense. In part they might be conveying a sense of tired resignation and inevitability. Jurists tend to feel (wrongly) that their duty always requires them to resolve whatever moral issue in front of them. In cases like Obergefell the justices also seem to feel that ultimately there is no possibility of an authoritative or fully convincing explanation for the decision (which must be made one way or the other) so they can appeal finally only to their own conscientiousness and effort and good faith. Less speculatively, the justices clearly use the term “reasoned judgment” to convey their sense of reluctance and hesitation. It is a way of saying that they have given due weight to the wisdom that adheres in tradition and practice and that they are imposing their own judgment only after performing their professional duty carefully.

Here then we can see in action the effect of a conservative philosophy on judicial behavior. But what, precisely, is being explained or justified by expressing a sense of duty and reluctance? To what kind of conclusion are the justices reluctantly driven? The answer, I think, lies in the crucial step that the Court makes in both the abortion decision and the same-sex marriage decision and, indeed, in most of the inexplicably adventuresome decisions that Republican appointees have been partially responsible for over the past four and a half decades. That step is to define the right at issue abstractly or generally or as “broad principles rather than specific requirements.”<sup>15</sup> As I have already indicated, In Roe the right of privacy is said to include abortion because the right of privacy is defined as autonomy over those choices that importantly affect the quality of a person’s life. In Obergefell the right of privacy is said to include the right to marry someone of the same sex because the right to privacy is defined as those “intimate choices that define personal identity and beliefs.”<sup>16</sup> What the justices cannot in good faith avoid is their own conclusion about the level of generality at which the principle inherent in historical and political understandings should be conceived.

This resort to abstraction, to broad principles, is one of the basic intellectual underpinning of modern constitutional law. It is used not just when the Court relies on history and tradition as authority for inferring unenumerated rights (such as the right to abortion and marriage) but also when it interprets textual provisions (including, for example, the equal protection clause, the religion clauses, the free speech clause, the second amendment’s right to bear arms, and so on). Once the general principle is announced, the Court implements it deductively, by employing doctrines, propositions, tests, and maxims that are attempts to link the specific outcome in the case with the general principle. Thus the Court has utilized a panoply of legal abstractions to reshape society in both profound and detailed ways.

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15. 135 S. Ct. Rep. at 2598. *See also id.* at 2602.

16. *Id.*

The centrality of principle was authoritatively rationalized by perhaps the most influential legal philosopher of our time, Ronald Dworkin, who went so far as to argue that constitutional principles should be stated “at the most general possible level.”<sup>17</sup> The effect of Dworkin’s argument has been almost magical. It has allowed the modern Court to claim to be staying true to the original Constitution while changing its operational meaning. It has authorized the Court to sit as a continuing convention of minds, unencumbered by the past while claiming to speak for the past. It has enabled conservatives, especially, to claim tradition and practice as justifications for improving society. The explanation for the outcome, as disturbing as that outcome may be to some, is that the legal judgment is “reasoned” because it a thoughtful extension of the wisdom already available in the text and in traditional standards, both formal and informal. The wisdom is thought to be implicitly present even if it was unrecognized either by the authors of the text or by the individuals and communities responsible for informal understandings or by the political branches that had formalized some customary understandings into law.

The reliance on abstraction has not gone entirely unchallenged. In the course of a case that ended by undermining traditional rules on the parental rights of non-custodial, unmarried fathers, Justices Scalia and Brennan exchanged pointed arguments about the Court’s practice.<sup>18</sup> Scalia’s position was that constitutional rights should be defined at the most specific or the narrowest level of generality found in relevant traditions and practices, while Brennan argued for broader conceptualizations. Later, In a case where the Court rejected an asserted right to assisted suicide, a majority went some distance towards adopting Scalia’s position,<sup>19</sup> but more recently the Court has emphatically returned to its usual practice of generalizing the right beyond what was historically recognized.<sup>20</sup> The Court has also largely rejected Scalia’s related argument (made when the Court invalidated the centuries old practice of political patronage) that abstract doctrines used to implement principles should not themselves be used as authority to invalidate long established customary practices<sup>21</sup>. The justices’ continuing commitment to generalized principles implemented deductively through legal doctrines reflects the broader fact that Scalia’s position is largely incomprehensible to the modern mind, whether liberal or conservative.

Scalia defended his position in part by noting that broadly defined principles will tend to conflict with one another. He also emphasized the need to constrain judicial discretion. Other strong justifications are readily available. To the extent that social practices are contextual, extracting a principle from the social fabric in which it has been embedded might alter both the meaning and value of the practice itself. In any event, the basic rationale for Scalia’s position is that only the narrowest possible statement of a principle is an accurate reflection of what

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17. RONALD D. DWORIN, *Freedom’s Law: The Moral Reading of the American Constitution*, Cambridge Mass, 1996, p. 7.

18. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

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

20. *E.g.*, *Lawrence v. Texas*, 529 U.S. 558 (2003).

21. *Rutan v. Republican Part of Illinois*, 497 U.S. 62 (1990).

has been traditionally respected and protected. Remember, as articulated by the justices themselves, the source of the Court's authority to enforce an implied right as having Constitutional status is the long acceptance of the right in American political practices. It would seem, therefore, that an accurate account of those practices would be essential to the lawfulness of the Court's decision. Without an accurate account, the Court's depiction would seem to be nothing more than the justices' beliefs about what history and custom should have respected.

The most common rationale for the nearly universal rejection of Scalia's lonely but apparently sensible position is that, if a right is defined narrowly according to what has long been protected, the Court's interpretations will only reflect older understandings and thus, as it is commonly phrased, the Constitution will not live or grow or evolve. Why this rationale is so widely thought to be unanswerable is at first glance perplexing. Keep in mind that Scalia was proposing that the Court define constitutional rights according to what has actually been honored in tradition and practice. The underlying question he is presenting, then, is whether the Court is justified in altering the judgments inherent in history, that is, whether and how constitutional meaning should change or evolve. That question cannot be answered by assuming that interpretive methods must allow the justices to do precisely what is at issue. Viewed in this light, the objection that Scalia's proposed methodology would not permit the Court to change constitutional meaning is not an argument but simply a failure of imagination.

From this perspective, Justice Kennedy's reliance on "reasoned judgment" as a justification for amending the traditional understanding of the right to marry is not a justification either. It merely signals a failure to imagine the possibility of deferring to judgments held by many others in many circumstances even when those judgments seem misguided or worse. It signals a failure to imagine the possibility of resisting the impulse to act on a jurist's conviction that received wisdom is, on sober reflection, inadequate and in need of improvement. And it is true that many legal thinkers, both liberal and conservative, simply cannot conceive of limiting the Court's role to enforcing, rather than changing, established constitutional meaning. This is to say that, because of their conviction that those responsible for past practices have been limited or wrong, they cannot conceive of the possibility of resisting the impulse to impose a new state of affairs.

But a strong argument underlies this sometimes unthinking rejection of Scalia's proposal. As is often the case, Oliver Wendell Holmes, Jr. gave vivid and often-quoted expression to this argument. Recall his words in "The Path of the Law;" he wrote, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>22</sup> Notice that Holmes is not saying that it is "revolting" to abide by past understandings. What is revolting is to abide by them without some better reason than that they have long been accepted. Consequently, the judges' role is to evaluate traditional legal understandings, to bring those understandings (to borrow Michael Oakeshott's phrase) "before the

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22. OLIVER WENDELL HOLMES, JR., *The Path of the Law*, *Harvard Law Review*, 10, 1897, pp. 457 ff.

tribunal of...intellect.”<sup>23</sup> To do otherwise, argued Holmes, would be to abandon reason.

In short, then, Scalia’s position is so widely rejected in part because of a failure to imagine the possibility of resisting the temptation to impose strong personal conviction but also because Scalia’s argument against generality and abstraction seems to the modern mind to be an argument for unreasoning acceptance of historical understandings. If the Court describes and enforces exactly those rights that have been historically honored, it is acting irrationally. To demand reasons, on the other hand, is necessarily to attempt to conceive of some principle that might justify the particular practice. The principle that explains and justifies the practice will be a reason that is more general or more abstract than the “rule laid down.” Thus it would be literally irrational for the Court to accept the historical definition of a right at the lowest level of abstraction. Viewed this way, the elevation of the level of generality at which the historically-based right is defined is not an act of willfulness but of reasoned fidelity. Even understood this way, however, there is no escaping the conclusion that the justices are imposing their moral convictions about how and whether particular social practices can be justified.

Here, then, for those who want to preserve constitutionalism, is the relevant question about placing philosophical conservatives on the Court: Do any of the various positions, inclinations, and ideas that are commonly collected under the label “conservative” provide an effective intellectual basis for consistently declining the modern practice of interpreting historical practices according to the degree to which those practices can be given a reasoned justification by judges?

## II. Conservatism and the Abstract Conceptualization of Tradition

Perhaps surprisingly in light of common assumptions among many practicing conservatives, there are claims about the nature of conservative thought that give strong reasons to doubt that conservatives on the Court have the intellectual resources effectively to withstand the temptations of lawlessness. The most extreme example is F. A. Hayek’s claim that conservatism is not a political philosophy, indeed, that it lacks the content necessary to engage with those of differing views.<sup>24</sup> Conservatism, wrote Hayek, is nothing more than an irrational devotion to the past and blind fear of change that together engender a “fondness for authority”.<sup>25</sup> If this is true, conservatives on the Court would have no intellectual framework to discipline their role. They might, it is true, be expected to resist defining historically derived rights at an exalted level of generality, but they could offer no reasons to justify this resistance. They would cling to past practices, not even for the “revolting” reason that these practices had

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23. MICHAEL OAKESHOTT, *Rationalism in Politics and Other Essays*, Indianapolis, 1991, p. 9.

24. F.A. HAYEK, *The Constitution of Liberty*, Chicago, 2011, pp. 519-28.

25. *Id.* at 522.

long been accepted, but merely out of fear of change. Against the modern demand that judges evaluate the need for reform by coming to their own judgment about the principle that can justify past practices, Hayek's conservatives could offer nothing except fear of change and mindless devotion to authority. If this is right, putting conservatives on the Court could be expected to produce fear-driven lawlessness and, perhaps, unmoored drift subject to all kinds of professional and political influences that could make some claim to superiority. Whatever the nature of decisions of such a court, they could not be thought to have been a function of the content of a conservative political philosophy, since Hayek says, in effect, that there is none.

As attractive to many progressive intellectuals as Hayek's rather extreme dismissal of conservatism must be, it is at odds with the fact that untold numbers of people think they have a conservative political philosophy. It is also at odds with the rich efforts to trace and describe that philosophy, notably by Russell Kirk. Indeed, many include the thinking of F. A. Hayek as a major component of the conservative philosophy they think they hold.

Like Hayek, Michael Oakeshott offered an account of conservatism as a disposition rather than a philosophy.<sup>26</sup> According to Oakeshott, however, the conservative is driven, not by irrational fears, but by a sensitive appreciation for what exists, for what is familiar, as well as a realistic understanding of the risks of altering it. As applied to political affairs, the conservative disposition begins with a recognition of the vast range and variety of decisions that people make in attempting to order their lives. This rich, chaotic mix of individual plans and efforts and relationships, with all of its noise and imperfections, is to a conservative person a thing of beauty. The variety and energy that the conservative appreciates, however, is threatened by governmentally imposed programs intended to make life better. The range of aspirations and decisions that the conservative admires is displaced by a few dreams embraced by government reformers.<sup>27</sup> Oakeshott does not argue that conservatives are always opposed to such reforms, nor does he say that they are afraid of change. Rather, he depicts them as attending carefully to circumstances in order to assess the risks inherent in centralized plans for improvement.

Although Oakeshott's conservatism is more a sensibility than a political philosophy, its claims are by no means indefensible or irrational. However, appreciation for the present does not by itself provide a justification for resisting the temptation of imposing reform based on a judge's convictions about the principle that can justify accumulated traditions and social practices. As Scalia's argument shows, in law fidelity to the narrowest possible conception of received practices is necessary for legally obligatory reasons—the possibility of constraint on judicial discretion and the accuracy with which authoritative practices are described. To appreciate that the present is both familiar and valuable does not equip a conservative jurist with the capacity to resist the temptation of imposing

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26. OAKESHOTT, *supra* note 23 at 407 et seq.

27. The word "dreams" is OAKESHOTT'S. *Id.* at 426.

a personal moral conviction when an imperfection is identified (as it inevitably is in litigated controversies) and risk of reform seems acceptable (as it often does in case-by-case adjudication).

A refined alternative to skepticism about whether a conservative political philosophy exists is the claim that it does not exist as a part of the American political tradition.<sup>28</sup> Beginning with the framing of the Constitution, the nation was and is, so goes the argument, a project of Enlightenment rationality. Americans have all been, from the beginning, either classical liberals (roughly, today's libertarians and free market advocates) or progressive liberals. In either case, Americans have always been committed to autonomy, freedom, and reason. This would explain much of the Court's behavior in the post-Warren Court era. Specifically it would explain why there has been such a widespread attachment to a reasoned or principled understanding of text and history and, thus, to the Court's role as an initiator of improvements of various kinds. It would also help explain why so many self-described conservatives on and off the Court do not seem able even to imagine any alternative to that attachment.

Of course, it is possible to question this description of American culture. It makes little or no room for the so-called "cultural conservatives," especially religious conservatives of various kinds, who have long been a part of political life in the United States. Even its depiction of the framing of the Constitution as a moment of Enlightenment rationalism is not entirely convincing, since it does not allow for the framers' reliance on British institutional and legal traditions, not to mention their reliance on colonial political experience. Moreover, it does not account for the way in which the Constitution was actually constructed, which included, along with high-toned theoretical argumentation and purposeful calculation, ordinary compromise and outright horse-trading. Nor does it account for the many ways in which the intellectual innovations and, at least in the opinion of many, the eventual success of the Nation's constitutional founding have rested on aspects of the original plan, such as the Bill of Rights and a new, complex version of national sovereignty, that some of the principal architects thought were serious mistakes.

Even granting that there is much truth in the description of American culture as predominantly individualistic, optimistic, and rationalistic, the wide meaning given to word "liberal" does not answer, indeed, it papers over precisely the question at issue. Assuming that a kind of philosophical liberalism is deep and endemic in American life, that kind of liberalism is broad enough to include significantly different components. Most people think those components are usefully referred to today as liberal and conservative. Yuval Levin, for instance, acknowledges that both Thomas Paine and Edmund Burke were classical liberals, yet he traces out profound philosophical differences between them that can still

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28. The standard argument is LOUIS HARTZ, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*, New York, 1954. Conservative thinkers have acknowledged the force in the claim although with significant qualification. See, e.g., OAKESHOTT, *supra* note 23 at 31, et seq.' HAYEK, *supra* note 24 at 273.

be found in what are today termed liberal and conservative positions.<sup>29</sup> So, the question—why has conservative thinking, as it is called today, not produced a Supreme Court more committed to constitutionalism?—remains.

As I have already indicated, the conservative (as the word is now commonly used) critique of modern judicial methods includes a number of elements. Most are joined in the trend, led by Antonin Scalia, towards increased reliance on constitutional text and its original meaning. This position necessarily honors the past, as conservatives are reputed to do. It is conventionally legalistic, as conservatives are supposed to be. And in enforcing textual limits on government power, it reflects conservative distrust of governmental power.

This form of textualism also appears to hold out, as conservatives have advocated, the possibility of constitutionalism along with its important advantages. Because the Court is restricted to enforcing the meaning of the text, its power can be constrained to the subject matter of that text. For that reason, judicial power will not fall, so goes the theory, unpredictably—potentially everywhere and anywhere. When exercised, it will be based on interpretative considerations at which judges have traditionally been thought competent. There will be, then, at most limited and defensible displacement of other decision makers. The exercise of power might well, it is admitted, have grave consequences for people's lives and entail unpredictable risks. But the justification for this exercise of power is not the preferences or beliefs or even the ideals of the individual justices but the widely accepted authority of the Nation's foundational document.

Scalia's textualism has had much more influence than his advocacy of defining tradition at its lowest possible level of abstraction. Of course, it (like all forms of conventional legal justification) has been criticized in a long running debate as hiding—but not escaping—the need for discretionary judgment. Without entering into this argument, it must be admitted that implementation of this component of modern conservative philosophy has not succeeded in establishing constitutionalism as the predominant modern practice. The reasons are inescapable and, thus, have applied even to positions taken by Justice Scalia himself.<sup>30</sup>

The fundamental problem is that textualism runs up against other tenets of conservatism. Respect for precedent, for example, would require abandoning textual meaning when whole lines of prior decisions depart from what was written and ratified. If those prior decisions gradually approved basic and far reaching changes in the operation of government (the modern administrative state comes to mind), overturning precedent not only conflicts with certain tenets of conservative legalism, but also with the conservatives' belief that imponderably consequential changes ought not be initiated by the Court. Conservative thinkers on and off the Court, jurists like Justice Kennedy and O'Connor and scholars like

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29. YUVAL LEVIN, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left*, New York, 2013.

30. For a striking example of Scalia's doctrinal creativity in the rationalist style, see *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).



Richard Epstein, have abandoned legalism for what they regard as statesmanlike pragmatism in such circumstances.<sup>31</sup>

Devotion to textual meaning also becomes difficult for a conservative when the written words, perhaps because they are vague or open-ended, seem themselves to call for judgments outside the historical meaning of the text. This problem is acute when it is arguable that the words in the text were intended to call for judgments outside the text. The problem is doubly acute when prior cases have interpreted either open-ended or explicit provisions to call for such judgments. Both of these difficulties— the words in the text themselves and the precedent interpreting those words-- prompted Justice Scalia to propose that henceforth the principles protected by the words “due process of law” should be drawn from tradition and practice, as many cases had held, but at the most accurate, the narrowest, level of generality. Without this backstop, a conventional legalist, when interpreting words that are themselves open-ended or that have been authoritatively interpreted as being open-ended, would be forced into the same kinds of unpredictable and disruptive decisions that have accompanied the unconstrained imposition of the justices’ convictions.

In the end, then, conservative jurists seem to be forced to rely at least in part on some form of traditionalism in their efforts to re- establish a constitutional regime recognizable as lawful . For most of the justices, this has meant reliance on their own reasoned judgment about the principles inherent in political and cultural traditions. In operation this amounts to, as I have already indicated, an effort at respectful regard for history and a careful, even reluctant willingness to change the specific understandings and practices that have predominated.

Conscientious regard for widespread, deep-seated behaviors and beliefs seems to be, at least potentially, a major impediment to the sort of deliberate centralized problem-solving associated with modern judicial decision making. Moreover, because this kind of caution and respect subordinates individual judgment to the implicit or explicit judgments of others, it reflects a range of conservative sensibilities, including a preference for the concrete over the abstract, an appreciation for the complexity of human affairs, a fear of hubris, and a somewhat pessimistic attention to risk and cost.

These sensibilities lead naturally to many familiar but apparently discordant components of contemporary conservative thought. They lead to a preference for free markets and decentralized decision making in general as opposed to centralized government planning. This is because more information can be absorbed by the cumulative efforts of many individual working on discrete, concrete tasks than can be absorbed by a limited number of centralized decision makers. The allure of the planning process for progressives is that it promotes a sense of scientific empiricism and competent decision making because information is collected in a central location and ends are consciously articulated

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31. See, e.g., RICHARD A. EPSTEIN, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*, Cambridge Mass, 2014, pp. 68-69, 535-539, 570; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

and deliberately pursued. But conservatives tend to see these advantages as illusory because the planners cannot know how much information they are missing, nor can they rationally pursue articulated goals without limiting and simplifying them.

The distrust of central planning leads not only to a preference for free markets and other decentralized systems, such as federalism, but also to an emphasis on families, voluntary associations, traditional relationship, and historical continuity. All of these tend to limit human striving to the concrete, to what can be validated by experience, to what others have understood and believed. Even some versions of the libertarian emphasis on individuals' freedom fit into this mix because each individual makes choices in concrete circumstances and those judgments can be grounded in the limits and understandings informally passed on by civil society.

Traditionalism, then, is not necessarily a blind devotion to the past. It is a set of understandings about the sources of knowledge and wisdom. Moreover, these understandings competed with Enlightenment rationality during the formation of the nation.<sup>32</sup> This competition was explicit in the availability of the writings of Edmund Burke and implicit in the widespread acceptance of British common law methods. It was evident in prevailing Christian beliefs about the limits and fallibility of human nature, beliefs that not only placed limits on aspirations for earthly perfection but also grounded some versions of the doctrine of natural rights in divine order rather than logical deduction. Doubts about individual mental effort as the source of political wisdom resulted in the creation of a complex constitutional system of checks and balances and in the founders' reliance for constitutional authorization on the dispersed decision making of the ratification process.

Traditionalism, then, reflects a major, even a unifying, intellectual strain of what can be called a conservative political philosophy. Moreover, tradition as a way of understanding constitutional meaning, indeed, as a source of constitutional meaning, has deep roots in American jurisprudence and has been utilized by conservative justices throughout the modern era. Nevertheless, as I have indicated, it cannot be said that attention to and respect for historical understandings and practices have led to constitutionalism. In fact, reasoned judgements by conservative justices about this country's constitutional traditions have led, as in the instances of the right to abortion and the right to same-sex marriage, to archetypal instances of the lawless imposition of personal moral convictions. At lower levels of visibility and controversy, they have also led to the relentless broadening and the numbing routinization of judicial intervention in public affairs that accompanies unconstrained judicial idealism.

The issue presented, then, remains whether conservatism as a philosophy necessarily entails "reasoned judgment" about the meaning of customary

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32. JAMES STONER JR., *Common-Law Liberty: Rethinking American Constitutionalism*, Lawrence, 2003, p. 162; LEVIN, *supra* note 29; HAYEK, *supra* note 24 ch. 12.

practices. Is there at least a version of that philosophy that convincingly supports Justice Scalia's proposal that the justices should describe traditions narrowly and accurately? Or does conservative thought require that the Court describe traditional norms at some higher level of generality, that is, as principles requiring judicially imposed alterations in prevailing practices?

### **III. Respectful Regard for Traditional Understandings as a Limit on the Dangers of Abstraction**

The writings of the British statesman and writer Edmund Burke are the most widely known articulation of a conservative political philosophy that provides potential intellectual support for Justice Scalia's position on tradition and thus for the possibility of conservative support for constitutionalism. Burke's writings are important because they include a potentially radical rejection of the idea that an individual mind's abstractions and deductions can be trusted as a source of knowledge or wisdom. Therefore, to derive the definition of a right or its application from generalized principles, rather than from the actual practices of a people, would seem to be folly. He was not, of course, against thinking about how political life should be carried on, but he believed the collective, accumulating thought of many people over many years was superior to the thinking of a few individuals operating in the present. Moreover, Burke specifically rejected the notion so common today that old wisdom is only valuable if it is based on reasons that are evident and satisfactory today. As Anthony Kronman saw, Burke believed continuity among generations is a unique aspect of human life, distinguishing humans from "the flies of summer."<sup>33</sup> This capacity is therefore valuable in itself. Moreover, Burke described the British as "generally men of untaught feelings."<sup>34</sup> Employing a word and an idea that today might require trigger warnings, Burke praised them for cherishing their prejudices "because they are prejudices."<sup>35</sup> Even intellectuals ("men of speculation"), who seek to "discover the latent wisdom which prevails in [prejudices]" do not think it wise to "cast away the coat of prejudice and to leave nothing but the naked reason."<sup>36</sup>

Burke's approval of emotional, unthinking attachments to received traditions was based in part on arguments about social utility. But not entirely. Reason for Burke was in important instances secondary to sentiments. Moral disapproval, even revulsion, can be based on "natural feelings."<sup>37</sup> When confronted with savagery and brutality, it is right that humans feel revulsion because "in... natural feelings we learn great lessons." Passions, he believed, can "instruct our

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33. ANTHONY T. KRONMAN, *Precedent and Tradition*, *Yale Law Journal*, 99, 1990, pp. 1029 ff., 1048-52. Burke's words can be found in EDMUND BURKE, *Reflections on the Revolution in France*, The Library of Liberal Arts, 1955, p. 108.

34. BURKE, *supra* note 33 at 98.

35. *Id.* at 99.

36. *Id.*

37. *Id.* at 39.

reason.”<sup>38</sup> Burke’s sentimental Englishmen could be moderate and affectionate because they understood themselves to have been shaped by the activities in which they were participants. They were satisfied to have what Burke called prejudices because they knew that there is no such thing as an unencumbered mind. It is not too much, I think, to understand Burke as believing that morality is rooted in humility and connectedness rather than in abstract thought. Indeed, he repeatedly drew a connection between lofty theorizing and a harsh unwillingness to compromise and even the suppression of tender feelings, of “all natural sense of wrong and right.”<sup>39</sup>

Since reliance on abstraction is a form of alienation from self and others, rationalists can feel virtuous in their willingness to enforce principles by inflicting sacrifice on others. Indeed, to be “principled” is to be unflinching. Modern judges are certainly subject to this temptation. Indeed, respected apologists for the contemporary judicial emphasis on principle attempt to make a virtue of the heartlessness that tends to accompany the enforcement of abstract ideas. The more elevated the abstraction—if it is thought to embody the best conception of a moral principle or a deep understanding of abiding political traditions—the more natural is the impulse to inflict costs. Hence the constitutional theorist, Alexander Bickel, who early in his career thought that justices should identify constitutional principles through rigorous and scholarly contemplation, wrote that the Supreme Court should enforce those principles “without adjustment or concession and without let-up.”<sup>40</sup>

The established modern demand that widespread understandings and practices be explained by and rationalized into abstract principles is, then, in direct conflict with Burke’s fundamental views about the sources and nature of political wisdom and decency. To the question that in recent times seems so unanswerable—why should a justice be restrained in the face of personal conviction?—these aspects of Burke’s thinking supply a direct answer: because an individual’s present sense of strong conviction cannot be trusted to be either wise or humane.

This answer is reinforced by another aspect of Burke’s philosophy, his account of the derivation of rights. For the revolutionary French rationalists, rights, of course, are properly derived as deductions from an imagined state of nature inhabited by free, autonomous individuals. The rationalists asked what preconditions or rights would have to exist to induce such individuals to submit to the authority of the state. Burke, observing that fully autonomous individuals have never existed and therefore are mere abstractions, argued that rights do not exist as principles deduced from an abstraction. He thought that rights exist as practices based on understandings and prejudices that evolve slowly from actual experiences and relationships.

Burke’s rejection of the rationalists’ use of some artificial, imagined state

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38. *Id.* at 91.

39. *Id.* 93. See also pp. 65-66, 73, 78, 87.

40. ALEXANDER BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New Haven, 1962, p. 59.

to deduce rights has wide implications for modern judicial practices. That imaginary state was an effort to conceive of an autonomous, free individual. Such an individual makes choices unburdened by circumstance and obligation. Burke's position is that no such individual exists, that we are all creatures of the family, the culture, and the polity into which we are born. Accordingly, we all have commitments and obligations to which we have not consented, and, indeed, that make up the self that must make choices. This insight has ramifications for the modern practice of defining rights by rationalizing and thereby generalizing rights historically protected. Burke's critique of the French rationalists' ideal of the autonomous individual implies that the more freedoms are expanded in this way, the greater the individuals' insulation from obligations to others and to society. Individuals become more liberated but also more isolated from society and even from their own embedded natures.

Modern conservative judicial practices, as I have described them, have been inconsistent with Burke's views about the derivation of rights because conservative jurists have been captured by Enlightenment devotion to abstraction and deduction. As I have said, this capture is evident, first, in the conceptualization of rights as deductions from principles that are more general than either text or tradition. It is also evident in the implementation of these idealizations through the application of abstract propositions and tests that are themselves deduced from the general principle. This dependence on abstract principles and doctrines, this insistence on deduction, is certainly related to what Burke criticized in the way French rationalists attempted to derive rights. However, it is different in that modern conservatives base their definition of rights, not on an imagined state of nature, but on inferences from political traditions, whether written or practiced. In this sense, the modern Court—including even when Justice Kennedy imposes a dramatic revision in the understanding of the institution of marriage—could actually claim the mantle of Edmund Burke.

Such a claim only begins with the fact that the Court uses historical practices and understandings as authority for its conceptualization of rights. Burke's writings are complex and, despite his distrust of abstract thinking, aspects of his thought also provide fertile grounds for concluding that the modern Court's methods are consistent with conservative thinking. In considering this possibility the operative question is whether Burke's skepticism about abstractions is sufficient to restrain the justices even when their reasoned judgment is that the right as defined historically should be understood at a higher level of generality. That is, what does Burke's thinking as a whole imply about a justice who begins analysis with attention to traditional practices and, furthermore, is reluctant to require a departure from those practices and does so after careful, respectful thought?

Although Burke doubted the capacity of a mind operating independently of historical practices and believed that rights should be generated prescriptively rather than deductively, much in his life and writings acknowledges that intellect, if exercised respectfully, can improve social practices. He was not a romantic or irrationalist. While he objected to the inflexible application of principle in politics, he knew that the of particulars have to be organized or conceptualized.

Moreover, as is well known, his political life as a Whig provides a long record of reformist proposals that he no doubt thought were based on principles that made sense of existing British traditions. He even thought that armed revolutions could lead to improvement, at least when aimed at restoring traditional rights and institutional arrangements.<sup>41</sup> Indeed, it is possible to see Burke's critique of the French Enlightenment's claims about the sources of political wisdom and rights, not as a generalized attack on principle and deduction or even radical change, but as a specific argument about the excesses of the French Revolution. He acknowledges, for instance, that the captivity of the French king and queen would have been justified, even a "noble act...of justice," if they had been "inexorable and cruel tyrants."<sup>42</sup> This kind of justified revolutionary act, however, should be carried out with a gravity and dignity commensurate with French history. Certainly, much of the rest of his argument emphasizes the folly of a few ungrounded intellects attempting to impose a *complete* break from an existing culture and political system.<sup>43</sup>

Clearly, for Burke reform contrived by intellect could be valuable, at least if it begins with an accurate and respectful consideration of the past. The question how often and how far existing practices should be changed is necessarily, given Burke's understanding of the nature of wisdom in politics, a question of context and degree. Thus his political philosophy cannot be understood to provide any *a priori* injunction against the kind of decision making engaged in by the modern conservative Court. Even ruptures from very widespread and prolonged traditional understandings, including those about the nature of marriage, are not necessarily ruled out.

They are not ruled out, that is, as conservative reforms initiated by inventive, respectful minds somewhere in a political system. They might, nevertheless, be ruled out as reforms initiated by a court rather than by, say, a parliament or a religious institution. But aspects of Burke's thought at least indirectly suggest that judicially imposed reforms are compatible with his political philosophy.

Burke certainly did not believe in pure democracy, which he saw as potentially dangerous. Indeed, his defense of the Glorious Revolution and a hereditary monarchy demonstrates that he did not even believe that the people had a basic right to choose their leader. His support for royal authority coincided with concern about excessive decentralization, which he argued could lead to chaos. However, Burke's belief in human fallibility did lead him to conclude that political power should be dispersed among a wide range of participants. The same belief led him to argue that the influence of all participants should be limited by checks and balances. In particular, within the complex interactions among layers of private associations and governmental institutions that he saw as healthy, he attempted to justify a special role for a natural aristocracy composed of those with education and refinement.

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41. BURKE, *supra* note 33 at 34-5.

42. *Id.* at 94.

43. *Id.* at 40, 51, 62.

Burke's ideas about government structure can, obviously, be applied to justify the role of the modern Supreme Court. Indeed, both justices and legal theorists have long argued that the Court's expansive definition of individual rights is a necessary protection against majoritarian excesses. The American system, it is often observed, is not a pure majoritarian system and the Court acts to check abuses against minority interests. The excesses that arise from popular pressures within state and local governments are seen as especially dangerous because they often constitute a defiant and centrifugal force. The authority of the Court when enforcing the fundamental law, while not exactly monarchical, represents the highest authority of the nation and must be asserted to prevent chaotic unraveling. Important legal scholars, such as Alexander Bickel, have described the justices as intellectual aristocrats who have the training and opportunity to inject a higher level of erudition and judgment into the public arena.<sup>44</sup> By these arguments, the American constitutional scheme turns out to be not a product of ubiquitous Enlightenment rationalism, but a deeply conservative system after all. And so what has been decried as judicial lawlessness by many conservatives would also have to be regarded as consistent with conservative thought.

This surprising and somewhat perverse conclusion, however, omits the aspect of the British political heritage that relates most directly to the issue of judicial power. Burke cherished, along with the complex political arrangements that included monarchy and aristocracy and some popular accountability, the common law. What does that legal tradition tell us about the modern judicial practice of imposing reform by way of reasoned judgment about tradition and practice?

#### **IV. The Institutional Implications of Practical Knowledge: Deference in Common Law Judging**

One view of the ancient common law is that it was a rigid and obscure intellectual system that at bottom rested on an irrational attachment to political traditions and the past. Thus, the legal scholar David A. Strauss asserts, "Historically, the common law tradition has been burdened with a degree of mysticism and also, at times, with excessive conservatism."<sup>45</sup> Like Holmes, Strauss conceives of the essential defect in this system as an insistence on "adhering to the practices of the past just because of their age."<sup>46</sup> Happily, however, due regard for the past can be compatible with rationality if historical practices are not seen as authority, but as an antidote to the intellectual limitations to which the human mind is subject. Strauss acknowledges the force in Burke's argument that consulting the experiences and judgments implicit in traditions is a valuable way to expand understanding. However, he concludes reassuringly that "rational traditionalism" is possible.<sup>47</sup> This enlightened version of traditionalism respects the past "but

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44. BICKEL, *supra* note 40 at 25-7.

45. DAVID A. STRAUSS, *Common Law Constitutional Interpretation*, *University of Chicago Law Review*, 63, 1996, pp. 877 ff., 888.

46. *Id.* at p. 891.

47. *Id.*

also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete.”<sup>48</sup> In fact, in a passage eerily foreshadowing Justice Kennedy’s approach in the same-sex marriage case, Strauss adds that the relevant question is: “are we sufficiently confident in the abstract or theoretical argument to justify casting aside the work of generations?”<sup>49</sup> In short, “if one is quite confident that a practice is wrong...this [rational] conception of traditionalism permits the practice to be eroded....”<sup>50</sup> The problem, for both Strauss and Burke, is to explain how a strong sense of conviction can justify alterations in customary practices and understandings when it is precisely the reliability of that sense of conviction that is at issue.

This conundrum may be more of a difficulty for the modern mind than it was for Burke. Strauss refers to nothing in Burke’s writings indicating that he thought the place for principled revisions to tradition was in the rulings of common law judges. And there is serious reason to doubt that the common law Burke knew and honored conceived of the judicial role as imposing such revisions. It is true that common law judges believed they had a role in revising past mistakes, but the mistakes at issue were mainly errors in prior cases. In fact, as Blackstone makes clear, the rationale for revising precedent was that the prior ruling had not been an accurate reflection of “the established custom of the realm.”<sup>51</sup> Customary practices being a manifestation (or at least the best approximation) of reason, precedent was to be revised when it had been untrue to custom, not when the judge believed that a judicial ruling could improve upon custom. If courts were not the place to reform traditional understandings, it was fairly clear in Burke’s day where that responsibility fell. When the courts misread custom or if they were true to custom but custom needed to evolve, judicial rulings could be changed by Parliament. That institution was a focal point for the many intersecting opinions and pressures arising from the complex social interactions that Burke thought enriched and checked one another.

Because the checking and compromising inherent in political decision making subjects principled claims about reform to multiple viewpoints and energetic challenges, it also has the advantage of moderating the potential for harshness and even moral cruelty inherent in reliance on abstraction. In logical imperfections and limitations there is room for the sentiments, for the softening of the reformist impulse.

Strauss and other representatives of the modern enlightened mind might reasonably reply that in practice the behavior of common law judges did not always conform exactly to Blackstone’s rather fine distinctions. Moreover, even if Burke did assume that the common law courts were not the place for principled revision of tradition, the British understanding of the judicial function may have been altered by customary practices and understandings in the New World.

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48. *Id.*

49. *Id.* at 895.

50. JAMES R. STONER, JR., *supra*, note 31, pp. 172-75.

51. ST. GEORGE TUCKER & WILLIAM BLACKSTONE, *Blackstone’s Commentaries*, 2000, Book 1, pp. 69-70.



Perhaps even in the colonial world but at least in the new age within which the modern Supreme Court operates, it may be that there is no good reason to restrict principled reform to the political branches and civil society. Certainly, much contemporary legal scholarship has been aimed at explaining that conclusion. Strauss and others make a specific, if implicit, explanation for modern judicial methods. It is that Burke should not be understood to exclude the judiciary from the use of “rational traditionalism” because, well, that would assign to judges the role of deciding cases irrationally.

As I have indicated, there are several important aspects to Burke’s thinking, aside from his willingness to see custom reformed, that support the conclusion that he could not or should not have been committed to a common law model that is, to use Strauss’s words, “excessively conservative.” Nevertheless, there is at least one available explanation for excluding—or at least minimizing—the judiciary’s role in employing intellect to reform customary understandings and practices. That explanation emerged more clearly later in the thought of Michael Oakeshott, whose political philosophy provides what his description of conservatism, as we have seen, does not.

Oakeshott claimed that the extraction of a general principle from the specifics of a customary practice is not a reasoned or enlightened way to understand that practice. Oakeshott saw that such principles are necessarily abridgements and simplifications. A custom is a “pattern of behavior” and the “coherence” of the custom lies in the pattern itself.<sup>52</sup> (It was much the same point that Scalia later made less evocatively when he insisted that implied rights in constitutional law should be defined according to the narrowest, most accurate account of the underlying tradition.) Oakeshott acknowledged that in the modern age principles are presented as “gifts straight from the gods.”<sup>53</sup> But in fact they are, he said, efforts to employ the mind as an entity standing outside of experience. This, according to Oakeshott, is a misunderstanding of the nature of knowledge. And when common law judges apply standards of conduct, such as “reasonable care,” he said that they are attempting to give voice to the patterns in current moral activity.<sup>54</sup>

Modern enlightenment rationalists, perhaps Strauss, must find Oakeshott’s account of the nature of understanding incomprehensible except as a rejection of rationality. Oakeshott, however, is clear that the abstractions, principles, maxims, and propositions that constitute the expression of the rational mind are a component of understanding. He thought, however, that understanding cannot be separated from activity and experience. The complexity, the subtlety, the feel of an activity—whether cooking or scientific inquiry or politics—is lost by the

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52. OAKESHOTT, *supra* note 23 at 126 and *passim*.

53. *Id.* at 128. For those who find Oakeshott’s insistence on the inadequacy of abstract categories anti-intellectual or even somehow primitive, it should give pause that his account bears at least a family resemblance to accounts of the reasons for recent strides in the field of artificial intelligence. See GIDEON LEWIS-KRAUS, *The Great A.I. Awakening*, N. Y. Times (Dec. 14, 2016), <http://nyti.ms/2hMtKOn>.

54. OAKESHOTT, *supra* note 23. at 130.

methods of rationalism if they are not combined with the practical knowledge that comes from engaging in the activity itself.

The problem with modern rationalism, then, is that it understands the mind to be operating independently of experience. It thus conceives of understanding to be a rationale or an order imposed upon experience. Although Oakeshott sweepingly claimed that all of political life is now under the sway of rationalism, it is a fact—implicitly conceded in his account of common law judging-- that some decision makers are more insulated from the experience of political life than are others. Some, certainly judges, are relatively cut off from the interactions, the jostling, and the conflict that constitute and create patterns of customary behavior and norms. At a minimum, the role of a judge requires a degree of detachment and impartiality that is incompatible with robust participation in political and social life. Thus do the justices of the Supreme Court attempt to stand outside of political and historical practices in order to judge them. In this sense they do not see themselves as participants in the present or as heirs of the past.

Blackstone's conception of the common law judge—and Oakeshott's and probably Burke's—was premised, not on a rejection of reason, but on a belief that it is from reason combined with experience that full understanding can emerge. It follows that if customary standards and practices are to be reformed, the changes should emerge from a setting where the decision makers understand themselves to be participants in the arena of activity rather than independent intellects observing from above. It follows that the common law judge's duty is to embody customary understandings in law.

## **Conclusion**

A strand of conservative political philosophy is consistent with constitutionalism. It is almost lost in the welter of other conservative ideas and the general dominance of Enlightenment rationalism. But it is there, in Burke, in the British common law tradition, and in Scalia's almost forgotten proposals. The conservative idea is not merely that practice and tradition provide valuable intellectual resources but also that attempts to understand the present and the past independently of experience are futile and dangerous. The institutional recommendation that follows from this is that the judges' role should not include abstract rationalization of customary standards. The judicial role should be limited to faithful enforcement of those standards.

The force in this strand of thought is such that here and there it appears in unexpected places. Scalia himself was in general no proponent of common law methods; nevertheless, he saw the impossibility of fully understanding political traditions through the imposition of abstractions. Even Justice Kennedy is subject to the force of this aspect of conservatism when he proposes that traditional practices regarding religion in the public square should in certain

instances be given legal priority over judicially constructed doctrines.<sup>55</sup> Customary understandings are at least implicitly honored in the many instances, like the boundary drawn at polygamy for the right to marry, where the Court uses unexplained assertion to limit a principle. More generally, both the importance of experience and the limitations inherent in the judicial role have long been given recognition in the various doctrines and theories, going back to James B. Thayer and beyond, that favor judicial deference to the political branches in establishing constitutional meaning.

The conservative basis for constitutionalism may be a faint sound in modern jurisprudential debates, but it is present in our practices even if it is often misunderstood or ignored. At any rate, the continuing debate over the judiciary's role in interpreting the Constitution would be clarified if the pretense were dropped that the debate pits reason against an irrational attachment to the past or compassion against indifference. The debate is, or should be, over the nature of reason and sources of moral judgment, about how and where understanding and decency can best be achieved. Constitutionalism, understood as the refusal of jurists to impose their personal moral judgments about the abstract justification for customary practices, can be defended as both wise and humane.

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55. *Town of Greece v. Galloway*, 1234 S. Ct. 1811 (2014).