

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2017

Conservatives and the Court

Robert F. Nagel

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Constitutional Law Commons](#), [Jurisprudence Commons](#), and the [Supreme Court of the United States Commons](#)

Citation Information

Robert F. Nagel, *Conservatives and the Court*, *Nat'l Aff.*, Winter 2017, at 37, available at <http://scholar.law.colorado.edu/articles/210/>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact jane.thompson@colorado.edu.

Conservatives and the Court

Robert F. Nagel

THE NEWLY ELECTED Republican president will soon nominate a replacement for the late Justice Antonin Scalia, and it now seems likely that Republican nominees will dominate the Supreme Court for the foreseeable future. During the campaign, candidate Donald Trump promised to select conservatives who would practice “judicial restraint.” This continues the pattern set by Republican presidents going back to Richard Nixon, who vigorously announced his intention to turn back the tide of activist decision-making inaugurated by the Warren Court. For almost all of the ensuing four and a half decades, Republican appointees have constituted a working majority. And yet, from 1973 when the justices decreed a constitutional right to abortion, through 2015 when they set aside the traditional understanding of marriage, the Court has continued to exercise unbridled power. It is certainly time to consider what, if any, relationship there is between conservative political thought and judicial restraint.

There are some obvious reasons to believe that conservative justices will practice judicial restraint. Conservatives, after all, are thought to favor maintaining the present state of affairs and honoring past practices and traditions. It makes some sense to think that they will not use constitutional interpretation to usher in vast social and political changes. Conservatives are also thought of, especially by their critics, as being cautious, conventional, and rule-oriented. Surely conservative justices can be expected to avoid imaginative legal interpretive methods, to stick to hoary legal authorities like the constitutional text and its authors’ intentions, and to practice the gradualism and concreteness of the ancient common law.

ROBERT F. NAGEL is the Ann and Herbert W. Vaughan Visiting Fellow at the James Madison Program in American Ideals and Institutions at Princeton University.

Finally, conservatives are thought to disapprove generally of government power, of interference with markets, and of centralized control. It is reasonable, then, to assume that conservative justices will not add to an already lengthy list of areas subject to national authority by converting matters long left to states or localities into national issues of constitutional dimension. To a limited extent, the performance of the Court since the early 1970s confirms these linkages between conservative political thought and judicial restraint. Certainly, Republican appointees have engendered a renewed attention to traditional legal authorities like text and history.

Nevertheless, under the Burger Court, then the Rehnquist Court, and now the Roberts Court, judicial intervention in virtually all areas of American life has become normal. The seismic changes imposed by the post-Warren Court's expansion of the right to privacy is only a part of the story. In area after area—decreeing that the Ten Commandments must be removed from a courthouse wall, requiring the admission of women into military academies, protecting nude dancing as speech, to give just three examples—the Court has imposed significant changes on ever-expanding segments of public life. At the same time, a Court populated with justices chosen to restrain judicial power has, more often and more emphatically than the Warren Court, insisted on judicial supremacy over constitutional issues.

Observers tend to explain this record by engaging in psychological and sociological speculations about, for instance, the insidious influence of an Ivy League education. Such explanations may be plausible, but they are limited in that they assume the causes of continuing judicial activism lie outside of conservative political philosophy itself. Is that really true?

THE TROUBLE WITH ACTIVISM

The way to begin examining this assumption is to ask *why* conservatives thought that the Warren Court's activism was an illegitimate practice. The primary component to the charge of activism was the claim that the Court's landmark decisions too often rested on weak reasoning and departed from constitutional text and legal precedent. Because critics thought that the Warren Court was unconstrained by legal standards, they also argued that it was making moral, political, or practical judgments of a kind appropriately made by politicians, private associations, and individuals.

To make legally unjustified judgments using considerations that non-lawyers feel competent to make might have seemed wrong but relatively unimportant if the consequences of the Court's decisions had been limited. But critics were reacting to the fact that Warren Court decisions required major alterations in social conditions and individual conduct, alterations that affected people directly and in crucial ways. The amount of power exercised by the Warren Court suggested to critics another way in which the justices were unrestrained. Existing practices and traditional norms have, for many people, a reassuring, familiar aspect, and so interference with them requires a certain boldness or audacity. In short, the Court was not being restrained by the risk of failure.

Over the years, the charge of activism has largely been drained of force by confusing and sometimes cynical usage. Nevertheless, the content of the notion of "activism" should make it clear that highly significant moral and societal considerations are implicated. If the Court's determinations are widely understood to be based on factors other than legal authority, the advantages of a system perceived as resting on the rule of law are jeopardized. Moreover, a Court freed from legal constraints is unpredictable; no issue can be assumed to be settled, and no way of life can be relied upon. Justices perceived as being driven by hubris to displace more appropriate decision-makers risk undermining the self-respect and self-reliance of those displaced. Mandates from the nation's Supreme Court that initiate sudden and sweeping changes can increase the sense in parts of the public of impotence, uncertainty, alienation, and anger. And — if conservative thinkers are right to believe that practices and traditions hold much wisdom and, in any event, deserve to be honored — some or all of the "progress" initiated by the Court may prove more costly and damaging than alternative mechanisms might have been.

Given these stakes, the conviction that appointing conservatives to the Court would naturally produce a significantly more restrained Court seems entirely understandable. Indeed, the argument for restraint seems little more than a reflection of conservative instincts and the argument for activism a plain manifestation of the progressive impulse. The Court's record over the past four and a half decades, however, is utterly at odds with these expectations.

The list of conservative justices who have contributed to the record of judicial activism since 1970 is long and includes most of the Republican

appointees. What impulse did they not restrain? What idea could they not resist? The paradigmatic decisions on abortion and same-sex marriage, while some 40 years apart, are intellectually so close as to point the way toward an answer.

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 marriage had recently begun to change in some quarters. In short, in both *Roe v. Wade* and *Obergefell v. Hodges*, past practices and traditional understandings, as well as currently prevailing political sentiments, are recounted but put aside. Unweighted by the historical and the political, the Court is freed to come to its own conclusions.

In *Roe* and also in *Obergefell*, the Court's conclusions turn out to be 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 recognized same-sex marriage in the years preceding the decision. But the Court does assert, 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 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.

Two of the most stunning decisions ever issued by the Supreme Court were thus authored by Republican appointees, Justices Harry Blackmun and Anthony Kennedy. These decisions cannot be viewed as law in any conventional sense. They represent nothing more than the mental effort of a few individuals attempting to improve society as they understand it.

This plain fact suggests that conservative jurists may be unable to escape from an 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.

REASONED ABSTRACTION

The evidence for this possibility is so pervasive and familiar 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 judicial restraint. These two ideas can be held at the same time because it is assumed that the dangerous hubris and adventurism of Enlightenment rationality can be mitigated and contained by the conservative's respect for tradition.

The term used by Justice Kennedy to convey this possibility is "reasoned judgment," a phrase that he rightly traces to the great conservative justice John Marshall Harlan. The use of the term as a justification for a judicial decision is perplexing if it is meant to distinguish the Court's determination from the judgments of others. Surely, Justice Kennedy cannot mean that the beliefs of all those who have been committed to the traditional understanding of marriage are unreasoned. Thoughtful conservative justices like Kennedy and Harlan must be using the term 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 conclusions are the justices reluctantly driven? The answer lies in the crucial step that the Court takes in both the abortion decision and the same-sex marriage decision and, indeed, in most of the inexplicably activist 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, as "broad principles rather than specific requirements."

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." What the justices cannot in good faith avoid is their premise about the level of generality at which the principle inherent in historical and political understandings should be conceived.

This resort to broad principles is the basic intellectual underpinning of modern constitutional law. It is employed not just when the Court uses history and tradition as authority for inferring implied rights (such as the right to abortion and marriage) but also when it interprets textual provisions (including the equal protection clause, the religion clauses, 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 particular ways.

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." The effect of Dworkin's argument has been almost magical. It has enabled the modern Court to sit as a continuing convention of minds, unencumbered by the past while claiming to speak for the past. It has enabled conservatives to claim that their judgment is "reasoned" because it is a thoughtful extension of the wisdom already available in the text and in traditional standards, both formal and informal. This 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.

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, Justice Scalia argued that constitutional rights should be defined at the most specific level found in relevant traditions and practices. Later, in a case in which the Court rejected an asserted right to assisted suicide, a majority went some distance toward adopting Scalia's position, but more recently the Court has emphatically returned to its usual practice of generalizing rights beyond what was historically recognized.

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 customs. 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.

The basic rationale for Scalia's position is that only the narrowest possible statement of a principle is an accurate reflection of what has traditionally been respected and protected. Since the claimed source of the Court's authority to enforce an implied right is the long acceptance of the right in American political practices, it would seem that an accurate account of those practices would be essential. The most common basis 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 objection is so widely thought to be unanswerable is baffling. After all, the underlying issue Justice Scalia was presenting was 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 treat the Constitution's meaning as evolving. That is a way to circumvent the question, not address it.

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 at all. 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 restraint in the face of a jurist's conviction that received wisdom is, on sober reflection, inadequate and in need of improvement.

But a stronger argument underlies this sometimes-unthinking rejection of Scalia's proposal. Scalia's argument against abstraction seems to the modern mind to be an argument for unreasoning acceptance of historical understandings. To demand reasons 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 more general than the “rule laid down.” Thus, it would be literally irrational for the Court to accept the historical definition of a right at the narrowest 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.

Here, then, is the relevant question about placing philosophical conservatives on the Court: Do any of the various 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? To answer that question, we need to inquire into the nature of conservative ideas in legal thinking.

THE LIMITS OF TEXTUALISM

The conservative critique of modern judicial activism includes a number of elements. Most are joined in the trend, led by the late Justice Scalia, toward 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 holds out, as conservatives have advocated, the possibility of judicial restraint. 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 this reason, judicial power will not, so goes the theory, come down unpredictably, landing potentially anywhere. When exercised, that power will be based on interpretative considerations in which judges have traditionally been thought competent. There will be, then, at most limited and defensible displacement of other competent 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 rather the widely accepted authority of the nation’s foundational legal document.

Scalia's textualism, as a form of judicial restraint, has had much more influence than his advocacy of defining tradition at its lowest possible level of abstraction. But as an implementation of modern conservative philosophy, it has not significantly reined in judicial activism by conservatives on the Court. The reasons are inescapable and, thus, have applied even to some positions taken by Justice Scalia himself.

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 conservatives' belief that imponderably consequential changes ought not be initiated by the Court. Very serious conservative thinkers on and off the Court, jurists like Justice Scalia and scholars like Richard Epstein, have abandoned legalism for a kind of statesmanlike pragmatism in such circumstances.

Devotion to textual meaning also becomes difficult for a conservative when the written words, perhaps because they are vague or open-ended, seem to call for judgments outside the historical meaning of the text. This problem is acute when historical evidence indicates that the provision was intended to call for judgments outside the text. Such difficulties 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 criticized as judicial activism.

In the end, then, conservative jurists are forced to rely, at least in part, on some form of traditionalism in their efforts to practice judicial restraint. 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 deep-seated behaviors and beliefs seems to be, at least potentially, a major impediment to the sort of deliberate centralized problem-solving associated with judicial activism. 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.

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 has deep roots in American jurisprudence and has been utilized by conservative justices throughout the years of their (numerical) domination of the Court. Nevertheless, attention to and respect for historical understandings and practices cannot be said to have led to judicial restraint. In fact, reasoned judgments by conservative justices about this country's constitutional traditions have produced, as in the instances of the right to abortion and the right to same-sex marriage, archetypal instances of activism. 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.

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

The works of the British statesman and writer Edmund Burke are the most widely known articulation of a conservative political philosophy that can provide intellectual support for Justice Scalia's position on tradition, and thus for the possibility of conservative judicial restraint. Burke's writings are important because he rejects 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.

Burke 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 that old wisdom is valuable only if it is based on reasons that are evident and satisfactory today.

As Anthony Kronman saw, Burke believed that continuity among generations is a unique aspect of human life, distinguishing humans from “the flies of a summer.” This capacity is therefore valuable in itself. Moreover, describing the British as “generally men of untaught feelings,” Burke praised them for cherishing their prejudices “because they are prejudices.” 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.” Reason for Burke was, in important instances, secondary to sentiments. Passions, he believed, can “instruct our reason.”

The modern demand that widespread understandings and practices be explained by and rationalized into abstract principles is, then, in direct conflict with some of Burke’s views about the sources and nature of political wisdom. 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 conviction cannot be trusted.

RATIONAL TRADITIONALISM

There are, however, other aspects to Burke’s thought. Much in his life and writings acknowledges that intellect, if exercised respectfully, can improve social practices. While he objected to the inflexible application of principle in politics, he knew that the “confused jumble” of particulars must be organized into principles. 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.

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 of how often and how far existing practices should be changed is, given Burke’s understanding of the nature of wisdom in politics, a question of context and degree. Even ruptures from very

widespread and prolonged traditional understandings, such as 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. In fact, some of Burke's ideas about government structure have resonance with arguments made by progressive apologists for the role of the modern Supreme Court.

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 and rights. 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 represents the highest authority of the nation and must be asserted to prevent chaotic unraveling. Important legal scholars 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.

All of these arguments track aspects of Burke's thought—his distrust of democracy, his support for royal authority, his concern about excessive decentralization, his belief in checks and balances, and the special role he saw for a natural aristocracy. Aspects of Burke's thinking, then, suggest that the American constitutional scheme, rather than a product of ubiquitous Enlightenment rationalism, is a deeply conservative system. And what has been decried as judicial activism by many conservatives would also have to be regarded as an implementation of conservative political philosophy.

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. Part of the political heritage Burke cherished was 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?

One view of the 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 prominent legal scholar David Strauss asserts, “Historically, the common law tradition has been burdened with a degree of mysticism and also, at times, with excessive conservatism.” 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.” Happily, however, due regard for the past can be compatible with rationality if historical practices are not seen as authoritative, 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.

He concludes reassuringly, however, that “rational traditionalism” is possible. This enlightened version of traditionalism respects the past “but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete.” In a passage foreshadowing Justice Kennedy’s approach in the same-sex marriage case, Strauss adds that the relevant question is this: “Are we sufficiently confident in the abstract or theoretical argument to justify casting aside the work of generations?” The problem, for Strauss and for 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 contemporary mind than it was for Burke. There is serious reason to doubt that the British common law conceived of the judicial role as imposing progressive change. It is true that common-law judges believed they had a role to play 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.” 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. In Burke’s time, when 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.

As already 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 involves, to use Strauss's words, "excessive conservatism." 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 later in the thought of another British conservative, Michael Oakeshott.

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. Justice Scalia later made much the same point, if less elegantly, when he insisted that implied rights in constitutional law should be defined according to the most specific account of the underlying tradition. Oakeshott noted that in the modern age principles are presented as "gifts straight from the gods." 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.

Modern Enlightenment rationalists 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, and doctrines 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 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, therefore, is that it understands the mind to be operating independently of experience. Moreover, it is a fact that some decision-makers are more insulated from the experience of political life than are others. 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. 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 a full understanding can emerge. It follows that the common-law judge's duty is to embody customary understandings in law.

EXPERIENCE AND LAW

A strand of conservative political philosophy, then, is consistent with judicial restraint. 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. It is intermittently present in our practices—in judicial reliance on tradition and deference to political judgments—even if it is often misunderstood or ignored.

This 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 inadequate. It follows from this that the judge's role should not include abstract rationalization of customary standards. The judicial role should be limited to faithful enforcement of those standards.

The continuing debate over the desirability of judicial restraint would be clarified if everyone dropped the pretense that the debate pits reason against an irrational attachment to the past. The debate is, or should be, over the nature of reason—about how and where understanding can best be achieved. Judicial nominees who do not appreciate this will be inclined to continue the Court's long record of activism, regardless of the intentions of the politicians who nominate or confirm them.