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## Reconciling Originalism with the Father of Conservatism: How Edmund Burke Answers the Disruption Dilemma in *N.L.R.B. v. Noel Canning*

Recent scholarship argues that conservative and originalist jurisprudences contradict each other. In some cases, original, founding principles are invoked to overturn long-standing traditions. When that occurs, conservative values, such as respect for precedent, are challenged. The problem, as that scholarship points out, is that the same judges that espouse this disruptive originalism also claim to be conservative. As the polemic goes, good Burkean conservatives should reject originalism in favor of a precedent-based approach. This Comment challenges that scholarship by engaging in a more thorough analysis of Edmund Burke's philosophy. After a deep examination of Burke's thoughts on precedent and his doctrine of prescription, I argue that arguments pitting Burke *against* originalism go too far. Instead, Burke's attitude toward "canonized forefathers" leaves room for an approach that simultaneously respects precedent while drawing upon founding wisdom. I offer an articulation of this approach, which I call Burkean Originalism, in this Comment. Essentially, Burke would resolve these difficulties by investigating both founding wisdom and the established tradition. With a presumption in favor of precedent, Burke would only invalidate longstanding tradition when doing so is consistent with founding principles, reliably determined, and if the consequences are not substantial.

### I. INTRODUCTION

It is no secret: originalist judges are usually also conservative. The list ranges from the late Judge Bork to current Associate Justices Thomas and Scalia, to name but a few. Yet, recent debate has unearthed a striking inconsistency over the union of these two philosophies. Professor David Strauss has made a persuasive case that conservatives ought to disavow themselves of originalism because it is a "destructive creed" that attacks "the existing order,

the existing tradition.”<sup>1</sup> Instead, Professor Strauss contends that a return to “conventionalism” is more consistent with conservatism.<sup>2</sup>

To be sure, a noticeable tension is present within the opinions of conservative originalists. On the one hand, a hallmark characteristic of conservative jurisprudence is a respect for precedent.<sup>3</sup> Our society orders itself around the gradual development of constitutional law. Thus, a conservative approach emphasizes predictability in the administration of justice.<sup>4</sup> Disrupting the existing order is more often the work of progressives. Originalists, on the other hand, seek to closely guard the founding ideals of our country by curing deviant precedent. Utilized as a sort of constitutional trump card, these judges often exhibit a preference for the framers’ understandings over established convention when discerning the constitutionality of statutes and practices. The result is often disruption, sacrificing century-long practices on the altar of original meaning.

Professor Strauss’s argument notwithstanding, this same disruption dilemma is found in Burke’s thought as well, but is a nuance yet to be explored in the current scholarship. Such is this Comment’s aim. As Burke said in his most famous *Reflections on the Revolution in France* regarding the rash overthrow of the French government:

A spirit of innovation is generally the result of a selfish temper, and confined views. *People will not look forward to their posterity, who never looked backward to their ancestors.* Besides the people of England well know, that the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement.<sup>5</sup>

To Burke, the success of government (and the prosperity of

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1. David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 144 (2011).

2. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 934–35 (1996).

3. Strauss, *supra* note 1, at 138.

4. In *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 515–16 (1996), Professor Thomas W. Merrill refers to Justice Scalia’s renowned article, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), in which Scalia advances five “ideals” best served by a rule-based approach to law. Merrill maintains that these ideals can be closely analogized to those of conservatism. Merrill, *supra*, at 515–16.

5. EDMUND BURKE, *Reflections on the Revolution in France*, in 4 WORKS AND CORRESPONDENCE OF THE RIGHT HONORABLE EDMUND BURKE 153, 177 (Francis Rivington & John Rivington eds., 1852) (emphasis added).

future generations) requires looking backward. His chief opponents were those who refused deference to the “collected reason of ages.”<sup>6</sup> While it may be said that conservatism and originalism clash, I argue that Burke, the father of conservatism and the face of the conservative charge against originalism, manifested this same inner-conflict in his own thought. At the very least, an appeal to conservatives to reject originalism in Burke’s name goes too far.

Burke’s writings never concede that this conflict is unworkable. On the contrary, he emphatically believed the surest path to true progress demands respect for both ancient wisdom and established convention. Therefore, my purpose is to outline a Burkean approach that synthesizes these tensions. Under this approach, which I term *Burkean Originalism*, judges determine where precedent and founding principles depart from one another. Then, with founding wisdom as their guide, judges consider the weight of the originalist evidence, the severity of the departure, and the strength of the established precedent.

In Part II below, I describe the type of court case in which these tensions are most pronounced. In this most difficult case, reliable evidence of founding principles conflict with a very well established tradition. This Comment is most concerned with how originalist conservative judges rule when these two factors directly clash. In Part III, I delve into Burke’s writings to demonstrate that Burke would find this case difficult, a damaging notion to some scholars’ attempts to frame Burke as a pure traditionalist. Synthesizing Burke’s thought is challenging because, unlike many philosophers, he never wrote a treatise that states his philosophy and resolves contradictory thoughts. Instead, we are left with many volumes of books, speeches, notes, and letters that contain numerous inconsistencies and manifest some evolution in thought over time. As a result, I also look to the writings of several political scientists such as Francis Canavan, Russell Kirk, and Leo Strauss to mitigate this interpretive difficulty. These scholars are generally regarded as the authority on Burke’s writings. Ultimately, however, it is near impossible to authoritatively say exactly how Burke would approach questions of jurisprudence and originalism because the questions I address were simply not asked in his day. Section III, therefore, outlines the most likely interpretation of Burke’s thought, though

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6. *Id.* at 228.

there may be some scholars who take issue with it. In Part IV, I outline my idea of Burkean Originalism, in which I apply the writings of Burke to the modern question of approaching constitutional questions with presumptions in favor of both originalism and conventionalism. This Comment aims to resolve the paradoxical world that originalist, conservative judges inhabit so that these judges can approach future cases involving this disruption dilemma, including the upcoming recess appointment case of *N.L.R.B. v. Canning*, without betraying their own ideologies. My idea of Burkean Originalism centers on the following canon: long-standing traditions should be preserved unless evidence of a countervailing founding principle is reliable and the consequences of disrupting the tradition are not substantial.

## II. THE MOST DIFFICULT CASE

In most cases, originalist and conservative values do not contradict. Some judicial inquiries involve inconclusive evidence of original meaning or weak and recent conventions. But imagine a case in which incontrovertible evidence of original meaning clearly contradicts a firmly established tradition. Here, a judge who simultaneously espouses originalist and conservative jurisprudences arguably faces a no-win scenario: respecting original meaning would disrupt a long-standing tradition, but respecting tradition would ignore original meaning.

This tension reveals itself palpably in the warring opinions of Justices Thomas and Scalia in *McIntyre v. Ohio Elections Commission*.<sup>7</sup> Here, the Court invalidated a century-long practice prohibiting anonymous campaign literature. Following a majority opinion consisting of standard First Amendment strict scrutiny analysis, Justice Thomas's concurrence and Justice Scalia's dissent debate the sufficiency of originalist evidence in light of this long-standing tradition.

Their ultimate disagreement was whether the originalist evidence in this case justified the disruption of an entrenched tradition. Justice Thomas highlighted instances where the founders

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7. 514 U.S. 334 (1995). The majority opinion, which is not discussed in this Comment, resolves this question entirely on First Amendment, strict scrutiny analysis. Issues of the reliability of evidence regarding the original meaning of the First Amendment are tangential at best.

appeared to value anonymity, including the trial of John Peter Zenger and the publications of the *Federalist* and *Anti-Federalist* papers under pseudonyms.<sup>8</sup> Even further, a *Federalist* versus *Anti-Federalist* public debate developed over the value of anonymous speech and, ultimately, as Thomas points out, it appears that the *Federalists* accepted the *Anti-Federalist* position that it ought to be protected.<sup>9</sup> To be sure, despite finding this evidence persuasive, Justice Thomas lamented the lack of an especially conclusive historical record.<sup>10</sup> Additionally, he expressly acknowledges the paradox that I hope to address in this Comment: “While, like Justice Scalia, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition.”<sup>11</sup>

Justice Scalia, on the other hand, argued the opposite: the long-standing tradition of anonymous electioneering, which had found its way into the laws of nearly every state, trumped the weak evidence that the founders sought to protect such speech.<sup>12</sup> This case, he contends, is “the most difficult for determining the meaning of the Constitution.”<sup>13</sup> His dissent highlights the conservative/originalist paradox by noting that originalism is not the only basis by which to make a decision:

But there is other indication, of the most weighty sort: the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of

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8. *Id.* at 360–61 (Thomas, J., concurring).

9. *Id.* at 366.

10. *Id.* at 367 (“The historical record is not as complete or as full as I would desire.”).

11. *Id.* at 370. Elaborating, Justice Thomas said:

When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when interpreting the Speech and Press Clauses. After reviewing the weight of the historical evidence, it seems that the Framers understood the First Amendment to protect an author’s right to express his thoughts on political candidates or issues in an anonymous fashion.

*Id.* at 370–71.

12. *Id.* at 378 (Scalia, J., dissenting).

13. *Id.* at 375.

constitutionality.<sup>14</sup>

Scalia viewed the originalist evidence in this case with serious skepticism. As such, he established a type of originalist canon for dealing with tradition: “Where the meaning of a constitutional text (such as ‘the freedom of speech’) is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine.”<sup>15</sup> From this statement, it is not entirely clear how Scalia would answer this question if the originalist evidence were clearer. So, while Scalia frames this as “the most difficult” case, it appears there may yet be a more extreme case—i.e., a case in which the evidence of original meaning is clearer than in *McIntyre*.

In fact, an extreme case of this ilk happens to be one of the most anticipated cases on the Supreme Court’s October 2013 docket: *National Labor Relations Board v. Canning*.<sup>16</sup> In January 2013, the D.C. Circuit ruled that President Obama’s appointments to the National Labor Relations Board (NLRB) on January 4, 2012 were invalid.<sup>17</sup> Since three out of the five board members were invalidly appointed, the court vacated the NLRB’s decision against Noel Canning for lack of a quorum.

The primary basis for the panel’s unanimous decision was an originalist reading of the “Recess Appointments Clause,” which the panel determined authorizes appointments only in intersession, as opposed to intrasession, recesses. Among the various sources of evidence, the panel cited Samuel Johnson’s English dictionary from 1755, actions taken by the First Congress, the Federalist Papers, and

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14. *Id.* at 375–77 (“And that is what we have before us here. Ohio Rev. Code Ann. § 3599.09(A) (1988) was enacted by the General Assembly of the State of Ohio almost 80 years ago. See Act of May 27, 1915, 1915 Ohio Leg. Acts 350. Even at the time of its adoption, there was nothing unique or extraordinary about it. The earliest statute of this sort was adopted by Massachusetts in 1890, little more than 20 years after the Fourteenth Amendment was ratified. No less than 24 States had similar laws by the end of World War I, and today every State of the Union except California has one, as does the District of Columbia, and as does the Federal Government where advertising relating to candidates for federal office is concerned. Such a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.”) (citations omitted).

15. *Id.* at 378.

16. 705 F.3d 490 (D.C. Cir. 2013).

17. *Id.* at 493.

executive decisions from the decades following ratification.<sup>18</sup> Taking the interpretations of the clause in the years immediately following ratification as most instructive of original meaning,<sup>19</sup> the panel noted that executives had made only three documented intrasession recess appointments prior to 1947, the earliest being 80 years after ratification. The practice is relatively new. And the interpretations of those executives who followed this practice are so far removed from the original Framers that they have little bearing at all on the question of original meaning.<sup>20</sup> In this way, the panel privileged what it saw as strong evidence of original meaning over a modern, now-well-established practice.

The D.C. Circuit's controversial decision marks the first time an executive's exercise of this appointment power has been found unconstitutional. But it is not the first time a federal court of appeals has addressed the issue. In fact, the Eleventh Circuit reached the opposite conclusion in 2004 in *Evans v. Stephens*,<sup>21</sup> when it determined that President Bush's intrasession appointment of Judge Pryor to the same circuit did not violate the constitution. Unlike *Canning*, which invoked a heavy dose of originalism, the *Evans* court instead focused on the fact that such intrasession appointments are part of an established tradition.<sup>22</sup> "Twelve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate."<sup>23</sup>

Pitted against each other in this way, *Evans* and *Canning* put originalist conservative judges in a tough position. The D.C. Circuit's evidence of the original meaning of the "Recess Appointment Clause" is extensive and solid. On the other hand, the Eleventh Circuit correctly highlights that many presidents have frequently and persistently used this clause over the last century to make these allegedly unconstitutional appointments. To those jurists who simultaneously espouse both originalist and conservative inclinations, the debate in *McIntyre* or the conflict between *Canning*

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18. *Id.* at 500–501.

19. *Id.* at 501 (citing *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)).

20. *Id.* at 506 ("The dearth of intrasession appointments in the years and decades following the ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments.").

21. 387 F.3d 1220 (11th Cir. 2004).

22. *Id.* at 1225–26.

23. *Id.* at 1226.

and *Evans* may appear to play out like a schizophrenic dialogue, an inner clash of competing values. This extreme case is a useful frame for imagining how a similarly conflicted Edmund Burke might navigate the collision between founding principles and established tradition.

### III. BURKEAN PRESCRIPTION

Traditional invocations of Burke assume too much. Professor Strauss narrowly views Burke's philosophy as merely a "theory of precedent."<sup>24</sup> However, I intend to show that Burke's political thought is more nuanced, containing both a theory of precedent as well as a reverence for past or founding wisdom. In light of this nuance, Burke's writings provide precedent for originalism since people cannot "look forward to posterity, who never looked backward to their ancestors."<sup>25</sup> Professor Strauss's argument that conservatives should "reject originalism"<sup>26</sup> *because* of Burke's conservatism, therefore, goes too far.

#### *A. Burke's Political Biography, Objectives, and Opponents*

##### *1. An introduction to Burke's political career and thought*

Born in 1729 in Dublin, Ireland,<sup>27</sup> Edmund Burke spent most of his adult life as a politician.<sup>28</sup> In 1765, Burke was elected to the British House of Commons, where he spent the next thirty years.<sup>29</sup> During that period, Burke influenced the major political discussions of his day through his speeches, pamphlets, and books.<sup>30</sup> He never sought after higher positions of leadership, but he was never nominated for such positions either.<sup>31</sup> Viewed as too heated and

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24. David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J. L. & PUB. POL'Y 969, 973 (2008) (pointing to Burke as a counter to those who say that there is really no theory of precedent on which to support a precedent-based approach to constitutional interpretation).

25. BURKE, *supra* note 5, at 177.

26. Strauss, *supra* note 1, at 144; *see also* Strauss, *supra* note 24, at 973.

27. CONNOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE* 3 (1992).

28. Harvey Mansfield, *Edmund Burke*, in *HISTORY OF POLITICAL PHILOSOPHY* 687 (Leo Strauss & Joseph Cropsey eds., 3rd ed. 1987).

29. *Id.* at 687; O'BRIEN *supra* note 27, at 404.

30. Mansfield, *supra* note 28, at 687.

31. *Id.* (noting that the highest office Burke achieved was that of Paymaster General, a

passionate, his rhetoric and style was met with distrust, even by those for whom he advocated most vociferously.<sup>32</sup>

Consequently, Burke's legacy consists of his political thought. But, as any student of Burke can attest, he never wrote a treatise of political philosophy.<sup>33</sup> Instead, he abhorred the sort of abstract dialectic of philosophers,<sup>34</sup> and considered himself "a practical politician rather than a philosopher."<sup>35</sup> To Burke, rational decision making required consideration of real circumstances rather than abstract propositions, a concept known as practical reason: "Circumstances are infinite, and infinitely combined; are variable and transient; he who does not take them into consideration, is not erroneous, but stark mad."<sup>36</sup> While Burke embraces practical reason, the coherency of his thought is necessarily limited by his decision not to write a treatise or a systematic and sustained exposition of his philosophy. Consequently, there is considerable debate among philosophers over the meaning of some of his writings—a limitation I openly concede here at the outset.

Nonetheless, as a whole, Burke's writings are "inherently conservative."<sup>37</sup> He argued endlessly against political radicalism,<sup>38</sup>

"dignified secretarship lacking in glory").

32. *See id.* at 687–88. William Pitt, First Earl of Chatham, remarked of Burke that he possessed "[m]uch to admire, and nothing to agree with." In 1788, when Burke's party faced the prospect of regaining power, Burke was omitted from a list of leading officeholders.

33. *Id.* at 688 (noting that nonetheless, "[h]is marvelous literary skills do not excuse us from taking him seriously, which requires taking his thought seriously as political philosophy" and that "Burke's thought in a treatise would have lost the essence of his thought, and his style was suited to its substance").

34. EDMUND BURKE, *An Appeal from the New to the Old Whigs*, in 4 WORKS AND CORRESPONDENCE, *supra* note 5 at 409 ("Nothing universal can be rationally affirmed on any moral, or any political subject. Pure metaphysical abstraction does not belong to these matters. The lines of morality are not like the ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence. Prudence is not only the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.").

35. Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 645 (1994).

36. EDMUND BURKE, *Speech on a Motion for Leave to Bring in a Bill to Repeal and Alter Certain Acts Respecting Religious Opinions*, in 6 WORKS AND CORRESPONDENCE, *supra* note 5, at 101.

37. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2050 (2012) (book review).

38. *See* MICHAEL FREEMAN, *EDMUND BURKE AND THE CRITIQUE OF POLITICAL RADICALISM* (1980) (arguing that Edmund Burke proposed his own conservative theory of revolution and of political radicalism in opposition to the radical ideas of contemporary revolutionaries).

advocating instead that in order “[t]o avoid . . . the evils of inconstancy and versatility . . . no man should approach to look into [the state’s] defects or corruptions but with due caution.”<sup>39</sup> He was the first critic of the French Revolution,<sup>40</sup> which he saw as “liberty without wisdom, and without virtue”—“the greatest of all possible evils.”<sup>41</sup> Rather, Burke advocated approaching political questions cautiously, with a “profound reverence for the wisdom of our ancestors”<sup>42</sup> and with “reference to antiquity.”<sup>43</sup> Though controversial at the time,<sup>44</sup> this perspective has led to his contemporary label as the philosopher of “conservatism.”<sup>45</sup>

## 2. *Political opponents: The proponents of natural rights*

To properly understand Burke’s philosophy, it is essential to understand the primary theory he opposed, that governmental authority derived solely from the dispositions of the governed.<sup>46</sup> In this section, I outline this theory as represented in the writings of his three primary opponents. As it happens, the conflict between Burke and his opponents was over who held the “title” to authority. Ultimately, by highlighting the theory of Burke’s opponents, which rejects outright any duty to draw on founding wisdom to interpret current constitutions, I intend to demonstrate that Burke’s conservatism opens the door for a Burkean Originalism.

In Burke’s day, many political thinkers advocated a “natural rights” understanding of government legitimacy: the wills of the governed supplied the state’s authority, and when the state abused that authority, the people had the right to revoke it.<sup>47</sup> Unlike Burke,

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39. BURKE, *supra* note 5, at 229.

40. FREEMAN, *supra* note 38, at 4.

41. BURKE, *supra* note 5, at 353.

42. EDMUND BURKE, *Speech on Moving His Resolutions for Conciliation with America*, in 3 WORKS AND CORRESPONDENCE, *supra* note 5, at 269.

43. BURKE, *supra* note 5, at 176.

44. Carl T. Bogus, *Rescuing Burke*, MO. L. REV. 387, 452 (2007) (noting that Burke’s writings against the French Revolution were controversial, and often led to bitter disagreements and severed relationships).

45. Mansfield, *supra* note 28, at 688 (noting that Burke has been identified with the “traditionalism” school of thought in recent revivals of conservatism).

46. FRANCIS CANAVAN, EDMUND BURKE: PRESCRIPTION AND PROVIDENCE 114 (1987) [hereinafter EDMUND] (“To try to understand the Burkean doctrine of prescription in itself, without reference to the opposing doctrine, is to run the risk of missing its point.”).

47. FRANCIS CANAVAN, THE POLITICAL REASON OF EDMUND BURKE 104–05 (1960)

these thinkers contended that there could be only one “legitimate title to political authority: ‘the rights of men’”<sup>48</sup> and that “a Nation has at all times an inherent, indefeasible right to abolish any form of Government it finds inconvenient.”<sup>49</sup> As each individual has this right to judge for herself, current generations owe no duty to attend to “canonized forefathers.”<sup>50</sup> This theory found its most prominent expression in the voices of Joseph Priestley, Richard Price, and Thomas Paine.<sup>51</sup>

Joseph Priestley was arguably the most tame of Burke’s opponents, as he simultaneously advanced a “natural right” theory of government authority while dissociating himself from revolutionary extremism.<sup>52</sup> Priestley saw government as the “great instrument of . . . progress of the human species.”<sup>53</sup> Government’s claim to authority hinges on whether it advances or retards that progress,<sup>54</sup> and the governed are the judges of that. The people are only bound by maxims or policies that they themselves judge to be good.<sup>55</sup> Priestley justified this conception of government authority because of his understanding of the irrevocability of natural rights. Since man may not be deprived of his natural right to “reliev[e] himself from all oppression,” the conclusion that government’s authority is limited by the will of the people necessarily follows.<sup>56</sup> Yet, he apparently lost confidence in this principle by remaining open to the notion that some natural rights may be surrendered so long as the power is distributed in a way “most conducive to the public welfare.”<sup>57</sup>

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[hereinafter POLITICAL REASON].

48. CANAVAN, EDMUND, *supra* note 46, at 115.

49. THOMAS PAINE, RIGHTS OF MAN: FOR THE BENEFIT AND USE OF ALL MANKIND 48 (1795) [hereinafter RIGHTS OF MAN: FOR THE BENEFIT].

50. *Id.* at 43 (criticizing hereditary government as requiring “a belief from man to which reason cannot subscribe, and which can only be established upon his ignorance”).

51. CANAVAN, POLITICAL REASON, *supra* note 47, at 106–13.

52. *Id.* at 107–08.

53. JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT 5 (1768).

54. *Id.*

55. *Id.* at 8 (“Their own reason and conscience are their only guide, and the people, in whose name they act, their only judge.”).

56. *Id.* at 12 (“[T]his must be the only true and proper foundation of all the governments subsisting in the world, and that to which the people who compose them have an unalienable right to bring them back.”).

57. CANAVAN, POLITICAL REASON, *supra* note 47, at 108.

Going further than that, Richard Price argued that only representational forms of government can possess legitimate title to authority.<sup>58</sup> Continuing Priestley's line of argument, Price contended that "all civil government . . . is the creature of the people. It originates with them."<sup>59</sup> He criticized the British government as protecting liberty-in-name-only<sup>60</sup> because the current representative system was undemocratic, and the elected representatives were neither subject to term limits nor to the instructions of their constituents.<sup>61</sup> Two important principles emerge from Price's work: first, "government is, or ought to be, nothing but an institution for collecting and for carrying into execution the will of the people";<sup>62</sup> and second, as a result, "[c]ivil governors are properly the servants of the public."<sup>63</sup> These two principles considered, Price ultimately concluded that "representation in the legislature of a kingdom is the *basis* of constitutional liberty in it, and of all legitimate government; and that without it a government is nothing but an usurpation."<sup>64</sup> This conclusion, set forth in his *Discourse on the Love of Our Country*, "aroused Burke's wrath" and received significant attention in *Reflections on the Revolution in France*.<sup>65</sup>

Finally, Thomas Paine, an important figure in American history, published his famous *The Rights of Man* as a riposte of Burke's *Reflections*.<sup>66</sup> Paine contended, as a starting point and much like Priestley and Price, that man is endowed with God-given rights at

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58. *Id.* at 109–10.

59. RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY 6 (1776) [hereinafter OBSERVATIONS].

60. CANAVAN, POLITICAL REASON, *supra* note 47, at 109.

61. PRICE, OBSERVATIONS, *supra* note 59, at 9–11.

62. *Id.* at 87.

63. RICHARD PRICE, DISCOURSE ON THE LOVE OF OUR COUNTRY 23 (1789).

64. *Id.* at 39–40.

65. CANAVAN, POLITICAL REASON, *supra* note 47, at 109; *see also* BURKE, *supra* note 34, at 173 ("Dr. Price . . . proposes that his majesty should be told, on occasions of congratulation, that 'he is to consider himself as more properly the servant than the sovereign of his people.'"); *id.* at 204 ("Before I proceed further, I have to remark, that Dr. Price seems rather to overvalue the great acquisitions of light which he has obtained and diffused in this age."); *id.* at 216 ("Why do I feel so differently from the Reverend Dr. Price, and those of his lay flock, who will choose to adopt the sentiments of his discourse?—For this plain reason—because it is *natural* I should . . .").

66. THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION vii–viii (1791) (acknowledging that Paine had promised supporters of the French Revolution that he would answer Burke's pamphlet upon publication).

creation.<sup>67</sup> From this assumption, he drew even more radical conclusions than the other two thinkers.<sup>68</sup> His ostensible purpose in responding to Burke was to lay out a theoretical justification for the French Revolution. To achieve this goal, Paine declared that “[a]ll hereditary government is in its nature unjust” because in such governments authority may only be inherited if the people can properly be treated as inheritable property—an offensive proposition to Paine.<sup>69</sup> Thus, a monarchy, whose authority inheres in a particular genealogical line, cannot claim any legitimate title to authority, and the British government is therefore tyrannical by definition.

In sum, Burke’s primary political opponents judged the legitimacy of government by present, individual concerns rather than tradition or collected wisdom. These popular sovereignty arguments by Priestley, Price, and Paine vindicated the political radicalism of the French Revolution because they taught that government is illegitimate when it fails to execute the will of the people. But Burke viewed this theory, that an unfulfilled general will justifies radical change, as capricious at best, but likely quite dangerous, since the conventional institutions of government have become deeply entrenched into every aspect of society over time. The point of conflict between Burke and his opponents was, therefore, not normative (i.e., what type of constitution is good), but technical: it was a question of title to political authority.<sup>70</sup> Against the view that title derives from the national will, Burke offered an alternative basis known as “[p]rescription,” which holds that tradition and natural rights combine to form the “most solid of all titles.”<sup>71</sup> To appreciate the doctrine of prescription, one must first understand Burke’s reverence for precedent.

### *B. Burke and Precedent: The Beginnings of Conservatism*

As a starting point, Burke faced a dilemma. Philosophic and

67. CANAVAN, *POLITICAL REASON*, *supra* note 47, at 111.

68. *Id.*

69. PAINE, *RIGHTS OF MAN: FOR THE BENEFIT*, *supra* note 49, at 67.

70. CANAVAN, *EDMUND*, *supra* note 46, at 115.

71. EDMUND BURKE, *Reform of the Representation of the Commons in Parliament*, in 6 *WORKS AND CORRESPONDENCE*, *supra* note 5, at 130.

institutional evolution is both natural and desirable;<sup>72</sup> yet, change can exact significant, retrogressive costs on society.<sup>73</sup> Burke navigated this problem by advocating for gradual change and respect for precedent. This approach represents the inception and essence of philosophical conservatism.<sup>74</sup>

Change is the most powerful law of nature.<sup>75</sup> Thus, at its most basic level, change is a reality to be expected, not a possibility to be determined.<sup>76</sup> Going further, not only is change natural, it is desirable as well, for “a state without the means of some change is without the means of its conservation.”<sup>77</sup> Burke was well aware that traditional institutions may have defects,<sup>78</sup> and his overall approach to tradition allows for the correction of these defects.<sup>79</sup>

At the same time, permitting change risks opening Pandora’s box. Like Burke and Price, Paine also recognized that the traditional institutions were defective and allowed for their correction. As it happened, their prescribed method for curing these institutions was radical and revolutionary.<sup>80</sup> Dramatic change of this nature troubled Burke because of its tendency to produce serious institutional and moral instability.<sup>81</sup>

Burke’s answer to this predicament is that change should be permitted so long as it is gradual. To Burke, precedent is presumptively valid because it represents the “collected reason of ages.”<sup>82</sup> History bestows wisdom on mankind from “the solid test of

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72. EDMUND BURKE, *A Letter to Sir Hercules Langrishe, Bart., M.P., On the Subject of the Roman Catholics of Ireland, and the Propriety of Admitting Them to the Elective Franchise, Consistently with the Principles of the Constitution as Established at the Revolution*, in 4 WORKS AND CORRESPONDENCE, *supra* note 5, at 544–45; *see also* BURKE, *supra* note 5, at 168 (arguing that institutional change is essential to the conservation of the state and its constitution).

73. BURKE, *supra* note 34, at 432.

74. Russell Kirk, *Burke and the Philosophy of Prescription*, 14 J. HIST. OF IDEAS 365, 365 (1953) (stating that philosophic conservatism begins with Burke and that his doctrine of prescription comprises a defense of traditional society).

75. BURKE, *supra* note 72, at 544–45.

76. *Id.* at 544 (demonstrating, by Burke’s employ of the phrase “[a]ll we can do,” that nature acts on mankind regardless of obstinacy).

77. BURKE, *supra* note 5, at 168.

78. *Id.* at 229.

79. *Id.* at 168.

80. *See generally* PAINE, *supra* note 66.

81. BURKE, *supra* note 34, at 432.

82. BURKE, *supra* note 5, at 228.

long experience.”<sup>83</sup> This collected wisdom, which he terms “prejudice” (a contemporaneous term devoid of its present-day pejorative meaning),<sup>84</sup> accumulates in the species rather than the individual: “The individual is foolish . . . but the species is wise.”<sup>85</sup> For Burke, abandoning the collected wisdom of the ages, as Price and Paine seemed to suggest, is dangerous.<sup>86</sup> Without it, men are left only with their “own private stock of reason.”<sup>87</sup> But Burke suspects that this private stock in each man is small,<sup>88</sup> and his conservatism asserts that meddling with institutions on the basis of such limited understanding is immoral.<sup>89</sup>

Implicit in Burke’s presumption is the understanding that collected wisdom is not static but is augmented through the operation of time and experience. To contend otherwise is to deny the need for change, which is to deny nature.<sup>90</sup> Precedent, therefore, must be understood to develop in tandem with societal wisdom.

The question, then, is not whether change ought to occur, but rather by what degree. And the degree of change hinges, in large part, on how much society credits its own collected wisdom. Dramatic and rash change occurs when society rejects the collected wisdom. The rationalism of Priestley, Price, and Paine grants supreme deference to individual judgment,<sup>91</sup> and positing that

83. *Id.* at 198.

84. *Id.*

85. BURKE, *supra* note 71, at 130; *see also* BURKE, *supra* note 5, at 198 (“They despise experience as the wisdom of unlettered men; and as for the rest, they have wrought underground a mine that will blow up, at one grand explosion, all examples of antiquity, all precedents, charters, and acts of parliament. They have ‘the rights of men.’”); *id.* at 222 (“Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice, and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.”).

86. Kirk, *supra* note 74, at 377.

87. BURKE, *supra* note 5, at 222.

88. *Id.*

89. BURKE, *supra* note 34, at 426.

90. It is logical to suggest that recognition of a need for change occurs when the collected wisdom outgrows existing precedent. When this occurs precedent is readjusted to represent the now-updated collected wisdom. If precedent represents collected wisdom, and if collected wisdom were static, then precedent would never evolve because society would not apprehend any defects.

91. CANAVAN, POLITICAL REASON, *supra* note 47, at 112.

submission to a dictated collected wisdom is the mark of ignorance.<sup>92</sup> Gradual change through adherence to an ever-developing set of precedent, on the other hand, venerates the collected wisdom and provides the benefits of natural evolution without creating dangerous inconstancy.<sup>93</sup> In Burke's words, change that proceeds by "insensible degrees" prevents the "unfixing [of] old interests at once."<sup>94</sup>

Burke's gradualism settles the "change" dilemma as far as it is presently framed.<sup>95</sup> However, this dilemma is further complicated by the arguments of his political opponents who essentially ask: is not a debate over how fast to change defective institutions premature if those institutions are illegitimate in the first place? To them, the question of whether a government has legitimate title to govern is one that looms large over the heads of each generation. And, of course, Burke's doctrine of prescription mitigates this concern by re-framing precedential legitimacy in terms of age and effects. As I intend to show, Burke carves out space, in the course of defending prescription, for harmony between originalism and conservatism.

### *C. Prescription: The Most Solid of All Titles*

Professor Strauss's contention that conservatives should reject originalism would perhaps prove decisive if Burke were a pure traditionalist.<sup>96</sup> As the argument would go, Burke values a

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92. PAINE, *supra* note 66, at 42.

93. BURKE, *supra* note 72, at 544–45 ("This mode will, on the one hand, prevent the *unfixing old interests at once*: a thing which is apt to breed a black and sullen discontent in those who are at once dispossessed of all their influence and consideration. This gradual course, on the other side, will prevent men long under depression, from being intoxicated with a large draught of new power, which they always abuse with licentious insolence.").

94. *Id.*; see also BURKE, *supra* note 5, at 168 (arguing that, when remedying defective institutions, the change should be confined to the offending part only and must not destroy "the whole civil and political mass").

95. *See id.* at 178 ("By a constitutional policy working after the pattern of nature, we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives. The institutions of policy, the goods of fortune, the gifts of Providence, are handed down to us, and from us, in the same course and order. Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts; wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenor of perpetual decay, fall, renovation, and progression.").

96. Strauss, *supra* note 1, at 144 (arguing that a preference for adhering to precedent cuts

somewhat dogmatic adherence to precedent, so trifling with original principles is needless and often disruptive. However, Burke's commitment to precedent is not absolute as his theory of prescription demonstrates. Prescription is arguably his most influential, controversial, and opaque contribution to political theory.<sup>97</sup> In this section, after defining this doctrine generally, I intend to demonstrate three principles: (1) Burke's answer to the question of title conflates tradition and natural rights, whereas his opponents focus only on the latter; (2) by refusing to deny the existence of natural rights, his conservative theory of traditionalism is opposed to simply following precedent for precedent's sake—a common misconception evident in passing references to Burkean conservatism; and (3) a close look at his writings exposes a tension between his embrace of gradual progression and his reverence for ancient wisdom, which tension lends itself to multiple interpretations regarding Burke's historicism. These three principles create breathing space for originalism in Burke's philosophy.

Borrowing from Roman property law,<sup>98</sup> Burke's prescription theory extends the principle of adverse possession of property—whereby title to land may be gained through a long, uninterrupted, and uncontested period of possession—to government authority.<sup>99</sup> Title to political authority derives from a series of unimpeached conventions spanning many generations.<sup>100</sup> According to Burke, a “mysterious veil” is draped over the origins of government,<sup>101</sup>

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against originalism); see also Strauss, *supra* note 24, at 973 (pointing to Burke as an expression of a conservative theory of precedent).

97. See Russell Kirk, *Burke, Providence, and Archaism*, 69 SEWANEE REV. 179, 180–81 (1961) (noting the significant controversy over Burke's prescription principle, which was hotly debated by Dr. Leo Strauss and other critics of Burke).

98. Mansfield, *supra* note 28, at 702.

99. Paul Lucas, *On Edmund Burke's Doctrine of Prescription; Or, an Appeal from the New to the Old Lawyers*, 11 HIST. J. 35, 36 (1968).

100. Kirk, *supra* note 74, at 378. Given the historical context and the popularity of the ideas of Price and Paine, Burke's pronouncement of this theory was quite controversial, and perhaps only appeared legitimate because of his status and reputation. As Kirk noted:

Courage was required for such declarations in support of prejudice; in a lesser man, this stand would have been dismissed with scorn by the literate public. Burke, however, they could not scorn. It is some indication of the strength of Burke's belief in Christian humility that he, with his acute and far-ranging mind, could be the partisan of the instincts of the race against the assumptions of the man of genius.

*Id.*

101. EDMUND BURKE, *Speeches in the Impeachment of Warren Hastings*, in 7 WORKS AND CORRESPONDENCE, *supra* note 5, at 324. Here, Burke's contention that title is unconcerned with

meaning that whether authority was wrongfully *obtained* is irrelevant to whether current authority is rightfully *possessed*, so long as prescription has run its course.<sup>102</sup> His theory of prescription, therefore, amplifies his theory of precedent while his opponents remain endlessly skeptical of dictated tradition.<sup>103</sup> For Burke, there is a presumption in favor of *any* “settled scheme” over some “untried project.”<sup>104</sup>

This presumption, however, is rebuttable. Burke admitted that even old institutions were not *per se* legitimate; instead, insofar as they produce intolerable grievances impervious to reformation or restraint, they are ripe for change.<sup>105</sup> Concerning old institutions, there is certainly a thumb on the scale in favor of their legitimacy. The British Constitution’s sole claim to authority, for example, is found in prescription.<sup>106</sup> But prescription is merely the “most solid” of titles; it is not automatically solid. Instead, prescription is grounded in natural law, which affixes the limits and determines the ends of government; it supplies government’s “bearings and its

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the origins of possession differs from more ancient understandings, in which title to property may be obtained only when the adverse possessor actually believes she rightfully possesses the land. Lucas, *supra* note 99, at 40.

102. See POLITICAL REASON, *supra* note 47, at 121 (“That they were illegitimate in their beginnings does not mean that they are illegitimate now.”); Francis Canavan, *Burke on Prescription of Government*, 35 REV. POL. 454, 468–69 (1973) [hereinafter *Burke on Prescription*] (stating that prescription eliminates concern for original legitimacy and focuses the inquiry instead on the existing constitution). It is important to be clear about what Burke does and does not mean. Consideration of original legitimacy is irrelevant when prescription has occurred (since adverse possession does not grant title to the possessor until sufficient time has passed). However, until title is gained, the presumptive legitimacy of authority is still open for discussion for Burke. See FREEMAN, *supra* note 38, at 102 (demonstrating that the French Revolution was not yet settled and the violation of established tradition was so great that Burke felt his attack was not inconsistent).

103. RIGHTS OF MAN: FOR THE BENEFIT, *supra* note 49, at 42 (“[I]gnorance *submits* to whatever is dictated to it.” This statement typifies Paine’s suspicion of hereditary wisdom and authority.).

104. BURKE, *supra* note 71, at 130.

105. EDMUND BURKE, *Speech on a Motion Made in the House of Commons by the Right Hon. C. J. Fox, May 11, 1792, For Leave to Bring in a Bill to Repeal and Alter Certain Acts Respecting Religious Opinions, Upon the Occasion of a Petition of the Unitarian Society*, in 6 WORKS AND CORRESPONDENCE, *supra* note 5, at 106 (“We must assume the rights of what represents the public to control the individual, to make his will and his acts to submit it to their will, until some intolerable grievance shall make us know that it does not answer its end, and will submit neither to reformation nor restraint.”).

106. FREEMAN, *supra* note 38, at 95.

ensigns.”<sup>107</sup> Consequently, Burke’s theory of prescription must not be understood as a rigid commitment to the status quo. Rather, by recognizing that elapsed time is a means to gain title, each new generation need not “constantly discuss” the origins of government with skepticism.<sup>108</sup> That the institutions exist is proof enough of their presumptive legitimacy. What is left to be determined is whether, in the course of history, the institutions develop, or fail to develop, in accordance with collected wisdom and within the bounds of natural law.

Prescription, therefore, solves Burke’s dilemma. At one level, his gradualism safely navigates the tension between change and precedent addressed in the preceding section. Then, his prescription theory of title, founded in respect for precedent and ancient wisdom, reduces the prospects of revolution because the people can discuss the efficacy of institutions without constantly resorting to a debate over whether authority was rightfully obtained. It was Burke’s object to demonstrate that political authority was not dependent on the flippant, fickle will of a majority of the people at any given time.<sup>109</sup> According to him, theories of title that emphasize popular sovereignty “tend . . . to the utter subversion, not only of all government, in all modes, and of all stable securities to rational freedom, but of all the rules and principles of morality itself.”<sup>110</sup> Thus, political radicalism not only undermined its own, often laudable, goals, but also inflicted costly damage to the natural progression of mankind. To Burke, prescription represented a more reasonable model for accommodating progression while minimizing instability.

### *1. Prescription combines both tradition and natural rights*

Despite his fierce rejection of Priestley, Price, and Paine, who each advance increasingly radical arguments that title to authority derives only from the natural rights of the people, Burke never

107. BURKE, *supra* note 5, at 178.

108. BURKE, *supra* note 36, at 106.

109. POLITICAL REASON, *supra* note 47, at 127.

110. BURKE, *supra* note 5, at 432; *see also id.* at 202 (“Finding their schemes of politics not adapted to the state of the world in which they live, they often come to think lightly of all public principle; and are ready, on their part, to abandon for a very trivial interest what they find of very trivial value.”).

rejected the existence or utility of natural rights.<sup>111</sup> Instead, the point of disagreement lay in the role that natural rights ought to play in determining title, and, for Burke, prescription has priority over natural rights on this question.<sup>112</sup>

Burke's refusal to deny the existence of natural rights, even when doing so would clarify and strengthen his theory, reveals his firm commitment to both tradition and natural rights.<sup>113</sup> Tradition, the *modus operandi* of gradual progress, is restrained by natural rights in that tradition should not evolve towards a suppression of these rights. This combination unearths a tension in his thought and opens his theory up to some vulnerability.<sup>114</sup> As one scholar asked, "[h]ow is a moral order characterized by permanence related to this temporal scene of constant change?"<sup>115</sup>

While I do not intend to entirely resolve this question on Burke's behalf,<sup>116</sup> I draw attention to it because originalist-conservatives operate under a similar tension. Their conservatism pushes them toward a precedent-based jurisprudence, and the development of those precedents is restrained by founding principles. To be sure, the analogy between natural rights and founding principles is imperfect. However, to originalists, founding principles set constitutional limits and determine institutional ends just as Burke's natural rights serve as "bearings" and "ensigns" to prescription.

## 2. *Following precedent for precedent's sake is not Burkean*

The need and inevitability of change, the accumulation of

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111. BURKE, *supra* note 5, at 198 ("Far am I from denying in theory; full as far is my heart from withholding in practice (if I were of power to give or to withhold) the real rights of men. In denying their false claims of right, I do not wish to injure those which are real, and are such as their pretended rights would totally destroy."). *But cf.* LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 318 ("Burke comes close to suggesting that to oppose thoroughly evil current in human affairs is perverse if that current is sufficiently powerful."). Professor Leo Strauss, and some subsequent critics, read in Burke a firm commitment to whatever happens in history, which would suggest that Burke denied a place for natural rights in his philosophy. However, there is a strong argument that this criticism is unjust. Kirk, *supra* note 97, at 181.

112. FREEMAN, *supra* note 38, at 94.

113. POLITICAL REASON, *supra* note 47, at 115–16 (stating that it would have been easier for him to simply deny that man, in civil society, enjoyed natural rights).

114. *Id.* at 100 (outlining the contradiction between Burke's belief in progress and his nostalgia for the past).

115. Rodney W. Kilcup, *Burke's Historicism*, 49 J. MODERN HIST. 394, 394 (1977).

116. However, Burke's belief in progress by precedent is not formally incompatible with his belief in natural rights. *See* FREEMAN, *supra* note 38, at 100.

collected wisdom, and the restraint that natural rights place on tradition all combine to suggest that precedent is not always right. In Burke's words, "Precedents merely as such cannot make Law—because then the very frequency of Crimes would become an argument of innocence."<sup>117</sup> Prescription does not entirely settle the question of title; it just gives it a starting place.

While there is a "sacred veil" draped over a precedent's origins, which veil should remove any debate over the precedent's original legitimacy, institutions must still fulfill their inherent, natural ends. Prescription therefore focuses the question of institutional legitimacy on its fulfillment of natural purposes rather than on whether the institution was originally unjust or tyrannical. And the passage of time alone will not justify a government that frustrates these ends.<sup>118</sup>

To be sure, Burke felt an institution's legitimacy is determined by looking to its effects: "Old establishments are tried by their effects. If the people are happy, united, wealthy, and powerful, we presume the rest. We conclude that to be good from whence good is derived."<sup>119</sup> However, this statement must be interpreted with caution. Burke offers little guidance for judging the effects of these old establishments, and he abhors revolutionaries like Price and Paine who are audacious enough to judge and change constitutions "at pleasure."<sup>120</sup> In fact, Burke labors to challenge strictly traditionalist arguments that claim a custom is necessarily good merely because a nation has flourished under it.<sup>121</sup>

Consequently, Burke rejects dogmatic adherence to precedent yet warns us against rashly judging institutions. This principle calls into question many contemporary, often passing, invocations of Burke's thought. For one, Professor Strauss neglects this nuance altogether.<sup>122</sup> Associating him with "traditionalism"<sup>123</sup> and

117. POLITICAL REASON, *supra* note 47, at 122–23 (quoting from Burke's notes for a speech).

118. EDMUND, *supra* note 46, at 127.

119. BURKE, *supra* note 5, at 292.

120. BURKE, *supra* note 34, at 472.

121. HENRY THOMAS BUCKLE, 1 THE HISTORY OF CIVILIZATION IN ENGLAND 419 (Parker et al. eds., 1861). *But cf.* Kirk, *supra* note 74, at 374–75 (arguing that Buckle translates Burke's exceptions for the rule).

122. *See generally* Strauss, *supra* note 2.

123. *Id.* at 892–93.

“incrementalism,”<sup>124</sup> Strauss tends to convey that a good Burkean conservative is entirely beholden to precedent. He acknowledges that there may be Burkean grounds for respecting the founders’ intent, but he quickly dismisses the current-originalist approach by labeling framers’ explanations of their rationales as “the product of less careful consideration, and may even be post hoc rationalization, self-justification, and political posturing.”<sup>125</sup> This approach fails to take seriously Burke’s clear disavowal of “precedents merely as such,” his pride in British reforms that had hitherto proceeded “with reference to antiquity,” and his hope that future reforms will be so “carefully formed.”<sup>126</sup>

Even Professor Steven Calabresi, a defender of originalism, assumes, as his starting point, that Burke’s thought leaves no room for originalism.<sup>127</sup> Pointing to ten of the most important overrulings of the twentieth century, he demonstrates how Supreme Court decisions manifest an actual commitment to the text of the Constitution (as originally understood) rather than a hesitancy to overturn precedent. Drawing a sharp contrast with Strauss and others who have invoked Burkean traditionalism, he concludes:

If we are going to be good Burkeans and follow tradition, we must admit that the United States has a tradition of allowing the Court occasionally to upset the apple cart by appealing to the Constitution’s text or first principles. . . . [A] good Burkean living in the American constitutional culture should admit that it is not our practice to follow precedent on any constitutional matter of any significance. Burkean Americans then should be textualists and should follow the document, not the doctrine.<sup>128</sup>

While Professor Calabresi’s point lends supports to my argument that Burke would be opposed to dogmatic precedent adherence, his contention fails to consider that even Burke himself allowed for occasionally upsetting “the apple cart.”

Professor Thomas Merrill pits Burke against originalism in his piece *Bork v. Burke*.<sup>129</sup> Here, again, Burke is seen entirely as a

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124. *Id.* at 930.

125. *Id.* at 899–900.

126. BURKE, *supra* note 5, at 176.

127. Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 636–37 (2006).

128. *Id.* at 686–87.

129. *Supra* note 4.

traditionalist, also referred to as a “conventionalist” in much of the literature. To be sure, Professor Merrill uses Burke’s thought to create a persuasive defense of conventionalism against originalism, stating that Burke was skeptical of the French revolutionaries because “they had a false and inflated notion of the power of human reason to rearrange society in accordance with abstract rational principles.”<sup>130</sup> Yet, without more consideration of Burke’s writings, even this line of reasoning can be construed to leave plenty of room for originalism.

Finally, in perhaps the most thorough analysis of Burke’s thought, Professor Ernest Young advocates that conservative judges ought to adopt a more “conservative” jurisprudence.<sup>131</sup> To Professor Young, reliance on originalism, judicial restraint, and bright-line rules have threatened “the good name of ‘conservatism.’”<sup>132</sup> In fact, he uses Burke’s conservatism as a sword to critique originalists, and the persuasiveness of Young’s polemic is diminished by his agenda. Professor Young lifts five major principles from Burke’s philosophy: (1) human reason and the rejection of abstract theory, (2) tradition and prescriptive wisdom, (3) the organic social contract, (4) the possibility of evolutionary change, and (5) the natural aristocracy.<sup>133</sup> More so than the other authors, he certainly acknowledges that precedent develops cautiously. Yet, this focus ignores and distracts from Burke’s recognition that there is significant value in founding wisdom and looking backward toward our ancestors.

### *3. Tension in Burke’s emphasis of both gradual progression and ancient wisdom*

The polemic against conservative originalist attempts to attack a “contradiction” between the “competing” judicial values. However, Burke himself manifests a similar inner conflict. Therefore, to say originalist conservatives are not Burkean misses the mark.

In *An Appeal from the New to the Old Whigs*, Burke defines the British Constitution as the product of “many minds, in many ages.”<sup>134</sup> He thus urged:

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130. *Id.* at 519–20.

131. *See generally* Young, *supra* note 35.

132. *Id.* at 724.

133. *Id.* at 642–59.

134. BURKE, *supra* note 34, at 487.

Let us follow our ancestors, men not without a rationale, though without an exclusive confidence in themselves; who, by respecting the reason of others, who, by looking backward as well as forward, by the modesty as well as by the energy of their minds, went on, insensibly drawing this constitution nearer and nearer to its perfection by never departing from its fundamental principles, nor introducing any amendment which had not a subsisting root in the laws, constitution, and usages of the kingdom.<sup>135</sup>

The proper development of institutions demands continuity with the past, which instills order and ensures conservation.<sup>136</sup> Change, though necessary, must be gradual, “insensibly drawing [the] constitution nearer and nearer to its perfection by never departing from its fundamental principles.”<sup>137</sup> Indeed, as Professor Russell Kirk so ably put it, Burke envisioned that “[o]ur part is to patch and polish the old order of things, clothing ancient form with new substance, fitting recent experience and need into the pattern of the wisdom of our ancestors.”<sup>138</sup>

On the other hand, other students of Burke have advised caution when interpreting Burke’s relationship with his British ancestors.<sup>139</sup>

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135. *Id.* at 489.

136. *Burke on Prescription*, *supra* note 102, at 470 (“For it is continuity with the past that makes the constitution a predisposed order of things to which men are born and which has an antecedent claim on their obedience and consent.”).

137. BURKE, *supra* note 34 at 489; for additional statements by Burke along this vein see also BURKE, *supra* note 5, at 177 (“You will observe, that from Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties as an *entailed inheritance* derived from our forefathers, and to be transmitted to our posterity.”); *id.* (“A spirit of innovation is generally the result of a selfish temper, and confined views. People will not look forward to posterity, who never looked backward to their ancestors. Besides, the people of England well know, that the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement.”); *id.* at 178 (“We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men; on account of their age, and on account of those from whom they are descended.”); GRAHAM WALLAS, *HUMAN NATURE IN POLITICS* 182–83 (4th ed., 1948) (“Burke was sincerely convinced that men’s power of political reasoning was so utterly inadequate to their task that all his life long he urged the English nation to follow prescription, to obey, that is to say, on principle their habitual political impulses. But the deliberate following of prescription which Burke advocated was something different, because it was the result of choice, from the uncalculated loyalty of the past. Those who have eaten of the tree of knowledge cannot forget.”).

138. Kirk, *supra* note 74, at 379. Kirk stated further, “[w]e must try to distinguish between a profound, slow, natural alteration and some infatuation of the hour. Here again the instrument of expedience is required for the wise reconciliation of prescription with necessary alteration.”

139. *See, e.g.*, FREEMAN, *supra* note 38, at 97 (labeling such passages as “rhetorical exaggeration” and stating that they “are not to be taken literally”); Mansfield, *supra* note 28, at

At times, he spoke condescendingly toward Britain's ancient founders, prompting one scholar to say that Burke "praises the British constitution to the skies, but never its founders."<sup>140</sup>

These statements by Burke have led to a considerable number of interpretations, with some finding a place for founding principles in judging established institutions where others do not. This disagreement in the scholarship demonstrates why the assumptions by Professors Strauss, Merrill, and Young that Burke's philosophy leaves no room for originalism go too far.

#### IV. BURKEAN ORIGINALISM

Part II defined the dilemma that this Comment seeks to resolve: How will a conservative originalist decide a controversy involving a long-standing tradition that conflicts with strong originalist evidence? In Part III, I suggested that, despite attempts by some to pit Edmund Burke against originalism, the father of conservatism manifested the same inner conflict as these conservative originalists. Now, I attempt to show how Burke may approach this dilemma. I argue that Burke would synthesize the pure originalist and strict traditionalist approaches, engaging in, what I term, Burkean Originalism.

##### *A. Burkean Originalism Defined*

In order to articulate my idea of Burkean Originalism, we must first understand his preference for practical reason over abstract theory.<sup>141</sup> To Burke, principles and theories should be applied only after consideration of actual circumstances and potential consequences.<sup>142</sup> Accordingly, any approach bearing his name must

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703 ("Prescription takes its bearing from current use, unless property or government has been recently usurped. It is opposed to historical claims that would overthrow established power, and it is skeptical of historical research that would confirm it.").

140. Mansfield, *supra* note 28, at 697. Going further, Mansfield wrote, "[t]he dead are not founders; they are silent partners who have had their say and now make their points by unspoken reproach." *Id.*

141. It is on this point that many (most notably Leo Strauss) have refused Burke the title of "philosopher." Dating back to Aristotle, philosophers have continually concerned themselves with abstract, immutable principles rather than the practical life. Instead, Burke is often referred to as a "philosophically informed statesman." Gary D. Glenn, *Burke*, in *AN INVITATION TO POLITICAL THOUGHT* 353–54 (Kenneth L. Deutsch & Joseph R. Fornieri eds., 2009).

142. EDMUND BURKE, *Speech on Presenting to the House of Commons, a Plan for the Better Security of the Independence of Parliament, and the Economical Reformation of the Civil and Other Establishments*,

be characterized by a concern for particulars. Burke aptly characterized his own methodology: “I must see with my own eyes, I must, in a manner, touch with my own hands, not only the fixed, but the momentary circumstances, before I could venture to suggest any political project whatsoever. . . . I must see all the aids, and all the obstacles.”<sup>143</sup> Indeed, a major element of his criticism of the French Revolution rests on his allegation that the French failed to situate theoretical truth within practical reality.<sup>144</sup> His firm commitment to the practical over the theoretical even bled into his faith, where he readily recognized that Christianity’s theological (and thus abstract) claims were less certain than man’s right to the enjoyment of society.<sup>145</sup> In sum, to understand his approach to difficult questions, we must see him as a politician rather than a thinker; law is a messy endeavor and requires him to get his hands dirty. Unlike clean, abstract reasoning, Burke wades deep into the thick, muddy reality.

In light of his distaste for abstraction, Burke would resolve this “founding wisdom versus established tradition” dilemma by unearthing the pertinent particulars. I argue that Burke would ask three questions: (1) What founding principles can we *reliably* discern? (2) How and why did we depart from those principles? and (3) What are the practical consequences of disrupting the tradition that has grown from the departure? Armed with these questions, Burkean Originalism prescribes the following canon: long-standing traditions should be preserved unless evidence of a countervailing founding principle is reliable and the consequences of disrupting the tradition are not substantial.

This canon favoring longstanding traditions follows naturally from Burke’s theory of prescription. Established precedents are the product of the collected reason of ages and are thereby presumed valid by virtue of their endurance.<sup>146</sup> Yet, as Burke’s prescription

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in 3 WORKS AND CORRESPONDENCE, *supra* note 5, at 401 (“Those things, which are not practicable, are not desirable.”).

143. EDMUND BURKE, *Letter to a Member of the National Assembly*, in 4 WORKS AND CORRESPONDENCE, *supra* note 5, at 384.

144. *Id.* at 386 (“What a number of faults have led to this multitude of misfortunes, and almost all from this one source—that of considering certain general maxims without attending to circumstances, to times, to places, to conjunctures and to actors!”).

145. EDMUND BURKE, *Tracts Relative to the Laws Against Popery in Ireland*, in 6 WORKS AND CORRESPONDENCE, *supra* note 5.

146. *See supra* Part III.C (stating that the age of institutions is a rebuttable presumption that favors their validity).

theory admits, this presumption is rebuttable: a precedent's ultimate validity hangs on its effects, and those effects are judged with reference to, among other things, founding principles. Consider how Burke's approach contrasts with Justice Scalia's. In *McIntyre*, he proposed the following canon: "Where the meaning of a constitutional text . . . is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."<sup>147</sup> Justice Scalia's approach is hierarchical: clear, original meaning trumps established tradition, which trumps unclear original meaning. The Burkean Originalism I propose here eschews hierarchy and instead weighs the evidence of meaning and practice simultaneously.

Of course, the difficulties of "doing history" raise concerns about the reliability of any determination of original meaning. Due to the robust trove of founding-era documents, any judge that attempts to draw originalist conclusions is susceptible to playing "fast and loose with history," especially since judges are not professional historians.<sup>148</sup> Consequently, many scholars question the value of such an exercise. Burke is no exception. His proclivity for gradual change and prescriptive authority makes him skeptical of historical arguments against established tradition,<sup>149</sup> so founding principles will influence his judgment only if they are reliably established. For example, Burke would be skeptical any time opposite and equally plausible arguments can be made from original evidence, such as in cases like *Dred Scott v. Sandford*,<sup>150</sup> *Lee v. Weisman*,<sup>151</sup> and *District of Columbia v. Heller*.<sup>152</sup> But there are plenty of founding principles that can be reliably discerned.<sup>153</sup> Without outlining a theory of

147. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995).

148. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 639 (2008). To be sure, Cornell does admit that we should not expect professional quality history in judicial opinions, but we also should not let them get away with bad history. *Id.*

149. Mansfield, *supra* note 28, at 702.

150. 60 U.S. 397 (1857) (involving majority and dissenting opinions that drew opposite conclusions over the founders intent regarding the citizenship status of African Americans).

151. 505 U.S. 577 (1992) (involving majority and dissenting opinions that drew opposite conclusions over what the original meaning of the establishment clause says about school prayer).

152. 554 U.S. 570 (2008) (involving majority and dissenting opinions that drew different conclusions about the original meaning of the Second Amendment as pertaining to gun control legislation).

153. *See, e.g., N.L.R.B. v. Canning*, 705 F.3d 490 (D.C. Cir. 2013); *Crawford v. Washington*,

reliability, it is consistent with Burkean thought to suggest that a historical conclusion is reliable if, after *honest* inspection, the weight of the evidence convincingly confirms it.

Burke's second question, concerning the point of departure, is especially relevant because a precedent's prescriptive authority depends on the duration of its existence. Again, his prescription theory derives from the principle of adverse possession, which appreciates how the passage of time influences societal expectations of property use.<sup>154</sup> For example, Burke opposed the French Revolution even after its completion because not enough time had elapsed for new traditions to become firmly established.<sup>155</sup> Thus, locating the point of departure provides perspective on the legitimacy of a precedent's "title" to authority.

Presumably, there is a direct relationship between the duration of a precedent's existence and the consequences that would result from disrupting it, which is Burke's third question. The older the precedent, the more likely society has ordered itself around that precedent, and any change could have far-reaching consequences. Burke's emphasis on gradual change grew out of his dread of institutional and moral instability that so often lurked in the penumbra of progressive reform.<sup>156</sup> He readily conceded that a legitimate constitution must provide means for its own amendment, but rash disruption betrays the collected wisdom and inflicts retrogressive costs on society.<sup>157</sup> Consequently, predicting the results that would follow from disrupting a precedent is Burke's final, and most important, endeavor.

To be sure, applying practical reason to investigations into the reliability of founding principles and the dangers of overturning precedent can lead different Burkeans to different conclusions. The three questions seek conclusions that, at least to an extent, require some subjectivity. But that type of subjective, fact-intensive decision making is inherently Burkean, and it is not entirely different from other jurisprudential approaches. For example, textualists frequently

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541 U.S. 36 (2004); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 335 (1995) (demonstrating that even if original evidence does not establish a constitutional right, it may still convey a founding principle).

154. *See supra* Part III.C.

155. FREEMAN, *supra* note 38, at 102.

156. BURKE, *supra* note 34, at 432.

157. *Id.*

employ the same tools of statutory construction and draw distinct conclusions.<sup>158</sup> Hundreds of years of tort cases demonstrate that the “reasonable person” test often involves a balancing of normative interests, which can often lead reasonable judges to equally reasonable but different opinions.<sup>159</sup>

Ultimately, Burkean Originalism is a method of judicial reasoning, and its utility is grounded in its preference for precedent-respectful outcomes after thoughtful consideration of founding wisdom. Just as many jurists are pulled in different directions by opposing conservative and originalist inclinations, Edmund Burke exhibited this same personal tug-of-war, and, despite what Professor Strauss argues, this tension is workable and advantageous.

### *B. Burkean Originalism: Three Applications to Prior Decisions*

Ironically, my abstract articulation of Burke’s jurisprudence very nearly betrays his distrust of theory. Thus, in the following sections, I apply Burkean Originalism to three Supreme Court opinions: *Crawford v. Washington*,<sup>160</sup> *McIntyre v. Ohio Elections Commission*,<sup>161</sup> and *Apprendi v. New Jersey*.<sup>162</sup> By drawing on these cases, I intend to show how Burkean Originalism can influence judicial outcomes.

#### *1. Crawford v. Washington: an opinion worthy of Burke*

*Crawford* relied on founding principles to halt a judicial tradition of admitting testimonial hearsay evidence that is never subject to cross-examination.<sup>163</sup> The Confrontation Clause of the Sixth Amendment ensures that the accused has the right to be “confronted with the witnesses against him.”<sup>164</sup> However, in its 1980 decision in *Ohio v. Roberts*,<sup>165</sup> the Court decided that out-of-court testimony by witnesses unavailable for cross-examination is permissible so long as the testimony bears “adequate indicia of reliability.” In a 7-2

158. See, e.g., *Smith v. United States*, 508 U.S. 223 (1993) (showing that Justices O’Connor and Scalia arrive at different interpretations of the phrase “use a firearm”).

159. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 560 n.82 (1972).

160. 541 U.S. 36 (2004).

161. 514 U.S. 335 (1995).

162. 530 U.S. 466 (2000).

163. *Crawford*, 541 U.S. at 68.

164. U.S. CONST. amend. VI.

165. 448 U.S. 56 (1980).

decision, with Justice Scalia writing for the majority, the Court overruled *Roberts*, holding that the only sufficient indicia of reliability for testimony is confrontation.<sup>166</sup>

Justice Scalia's majority opinion is a prime demonstration of Burkean Originalism. His opinion begins by asserting that the Constitution's text alone cannot resolve the case, which triggers an investigation into the Confrontation Clause's original meaning.<sup>167</sup> Parts II and III of the opinion detail the historical background of the clause and discern two founding principles that influenced the outcome of *Crawford*.<sup>168</sup> First, the Sixth Amendment was principally directed at excluding *ex parte* examinations as evidence against defendants.<sup>169</sup> Thus, construing the Confrontation Clause narrowly such that it only applies to in-court testimony ignores the framers concern for out-of-court *ex parte* examinations. Second, the framers would not have allowed testimony from witnesses that did not appear at trial unless they were unavailable and the defendant had already had an opportunity to cross-examine. These two founding principles starkly contrast with the *Roberts* tradition.<sup>170</sup>

In keeping with Burke's jurisprudence, Justice Scalia also assesses the reliability of the originalist evidence. Evidence of these two founding principles is quite robust. English common law traditions dating back to 1555, numerous colonial declarations of rights, and early U.S. constitutional debates and court decisions confirm this specific right to confrontation.<sup>171</sup> Justice Scalia acknowledges the dissent's criticism that the originalist evidence supports the idea that there should be exceptions to hearsay rules.<sup>172</sup> In fact, he concedes that testimonial dying declarations may have been permitted contrary to the founding principles that the

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166. *Crawford*, 541 U.S. at 69.

167. *Id.* at 42-43 (stating that one could plausibly read the Amendment's phrase "witness against" to mean only those who testify at trial, those statements offered at trial, or something in between).

168. *Id.* at 42-56.

169. *Id.* at 50.

170. *Id.* at 51 ("[E]x parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.").

171. *Id.*

172. *Id.* at 69, 73 (Rehnquist, C.J., dissenting) (suggesting that our rules were still undeveloped at the time of the founding such that the Court's opinion is "no better rooted in history than our current doctrine").

majority has articulated.<sup>173</sup> Aside from this one deviation, he explains that the exceptions did not include testimonial statements against defendants and therefore did not run afoul of the framers' intent. This honest and transparent evaluation of the reliability of the historical evidence is essential to Burkean Originalism.

In Parts IV and V (A), Justice Scalia tackles the next Burkean Originalism inquiry: How and why did the Court depart from these founding principles? As it turns out, the bulk of Confrontation Clause cases treat testimonial evidence in accordance with these principles.<sup>174</sup> Even *Roberts's* outcome conformed, since the admitted testimony came from a preliminary hearing in which the defendant had an opportunity to examine the witness.<sup>175</sup> Rather, the departure lay in the *Roberts* test, which extended the *Dutton v. Evans* "indicia of reliability" to testimonial hearsay evidence.<sup>176</sup> There, the Court determined that the function of cross-examination could be fulfilled by a judicial determination that the testimony is reliable.<sup>177</sup>

Finally, in Parts V (B) and (C), Justice Scalia applies the third prong of the Burkean Originalism inquiry to assess the "effects" of the *Roberts* tradition/departure. In a lengthy list of cases, he persuasively demonstrates how lower courts have applied the ambiguous *Roberts* test in troubling and inconsistent ways.<sup>178</sup> Perhaps the most troubling result of *Roberts* is the admission of accomplice confessions. In *Lilly v. Virginia*, the Court suggested that it was "highly unlikely" that these confessions against the accused would survive the *Roberts* test.<sup>179</sup> However, one study suggested that appellate courts admitted these confessions more than a third of the time.<sup>180</sup> Justice Scalia also demonstrated how "*Roberts's* failings were on full display" in the instant case, drawing attention to, *inter alia*, the questionable motives of the witness, veiled threats by police

173. *Id.* at 56 n.6 ("If this exception must be accepted on historical grounds, it is *sui generis*.").

174. *Id.* at 57–60 (reciting a litany of cases that demonstrate this point). Importantly, the Court noted that "reliability factors" had been considered before *Roberts*, but only in connection with nontestimonial hearsay. See *Dutton v. Evans*, 400 U.S. 74, 87–89 (1970) (plurality opinion).

175. *Crawford*, 541 U.S. at 58.

176. *Id.* at 60.

177. *Dutton*, 400 U.S. at 74.

178. *Crawford*, 541 U.S. at 62–65.

179. 527 U.S. 116, 137 (1999).

180. *Crawford*, 541 U.S. at 64.

officers, and inconsistencies in the testimony, none of which prevented the judge from determining that the testimony was reliable.<sup>181</sup>

In light of these three considerations, the originalist evidence, the departure, and the effects of the resultant tradition, the Court disrupted the *Roberts* tradition in favor of a Confrontation Clause interpretation that aligned with founding principles. The dissent adopted a hard traditionalist line: the precedent is fine, and disrupting it would disturb the justice system. But without any meaningful response to Justice Scalia's evidence that *Roberts* produced unacceptable results, the tradition does not sustain its presumption of validity. As Burke said, "Old establishments are tried by their effects,"<sup>182</sup> and "*precedents* merely as such cannot make Law."<sup>183</sup> The majority opinion in *Crawford* is a model Burkean opinion, demonstrating that traditions ought to be assessed with reference to both their effects and their conformity to founding principles.

## 2. *Apprendi v. New Jersey: Anti-Burkean Originalism*

If *Crawford* is a model Burkean opinion, *Apprendi* is the opposite. In a 5–4 decision, the Court ruled unconstitutional a judicial tradition that gave judges the autonomy to enhance criminal sentences for hate crimes.<sup>184</sup> The majority opinion, written by Justice Stevens, relied on weak originalist evidence and superficial analysis of Court precedent to reach the conclusion that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."<sup>185</sup> This case underscores how a Burkean jurisprudence is not a blanket endorsement of originalism; rather, in finding space for consideration of founding principles, the majority critiques the wholesale reliance on those principles that originalist judges tend to exhibit.

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181. *Id.* at 65.

182. BURKE, *supra* note 5, at 292.

183. CANAVAN, POLITICAL REASON, *supra* note 47, at 122–23 (quoting from Burke's notes for a speech).

184. *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000).

185. *Id.* at 490.

On the first of the three Burkean Originalism questions, the majority's opinion in *Apprendi*, unlike *Crawford*, struggles to point to reliable original evidence of founding principles to support its conclusion that facts pertaining to sentencing require proof beyond a reasonable doubt as decided by a jury. As the dissent persuasively demonstrates, the historical evidence is based almost entirely on two statements from a nineteenth-century criminal procedure treatise.<sup>186</sup> Even assuming those two statements truly embodied founding principles, they do not require the rule the majority adopted since the treatise does not even speak to the specific question at all.<sup>187</sup> To Burke, the reliability of historical evidence is essential, as he is inherently skeptical of historical claims that would disrupt established tradition.<sup>188</sup>

Addressing the second Burkean Originalism question, which asks how and why the practice departed from the original meaning of the text, the Court argues that its case law has not departed from these principles until very recently in *Almendarez-Torres v. United States*,<sup>189</sup> and even that departure was largely corrected by its decision in *Jones v. United States*.<sup>190</sup> In Burkean terms, the Court downplayed the entrenchment of any "long-standing tradition" by showing that any tradition that resulted from the *Almendarez-Torres* departure was too recent to be of concern. However, this sleight of hand ignores case law, dating back to 1977, that rejects the rule adopted by the majority.<sup>191</sup> Instead, as the dissent points out, the

186. *Id.* at 526 (O'Connor, J., dissenting). These two statements need not be rehearsed here, but in essence, they state that an indictment must charge and prove the circumstances that warrant a higher sentence than that required by the common law. *Id.* at 480–81 (majority opinion) (quoting J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 51 (15th ed. 1862)). The majority pointed to another category of evidence; common law judges had no discretion in sentencing. *Id.* at 477–81. However, the Court itself dismisses its relevance based on the Court-approved tradition of allowing some judicial discretion. *Id.* at 481–82.

187. *Id.* at 527 (O'Connor J., dissenting) (noting that the specific question involves "when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element"). Justice O'Connor goes on to refute the credibility of the original evidence raised by Justice Thomas's concurrence, which advocates an even broader ruling. *Id.* at 527–29.

188. Mansfield, *supra* note 28, at 703.

189. 523 U.S. 224 (1998).

190. 526 U.S. 227 (1999).

191. *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting); Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 259 (2001) (stating that in the twenty-five years between *Mullaney* and *Apprendi*, the Court never ruled against sentencing factors on constitutional grounds).

majority's rule "casts aside our traditional cautious approach" to such questions, despite "marshal[ing] virtually no authority to support its extraordinary rule."<sup>192</sup> Thus, assuming the majority's founding principles to be correct, the departure occurred in 1977,<sup>193</sup> ushering in "three decades worth of nationwide reform."<sup>194</sup> State legislatures and judiciaries ordered itself around this departure.<sup>195</sup> The new practice quickly became a well-entrenched tradition. Under this theory of Burkean Originalism, the existence of established tradition triggers a presumption in its favor.

Finally, the majority fails to appreciate the effects of disrupting the nearly quarter-century long tradition, which is the third Burkean Originalism question. This oversight is the natural result of failing to acknowledge the existence of a tradition in the first place. Instead, as the dissent forecasts, the broad rule adopted by the Court will result in tremendous disruption of current judicial and legislative practice and impending uncertainty in sentencing conducted in the immediate future.<sup>196</sup> "[The Court's] decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades."<sup>197</sup> In fact, just one year following this decision, forty-eight federal statutes were at risk, considered by some scholars to be just the "tip of the iceberg."<sup>198</sup>

The majority's answers to each of the three Burkean questions fail to justify the conclusion it reached. To the contrary, Justice O'Connor's dissent persuasively discredits the majority's founding principles, substantiates the existence of a long-standing tradition, and displays the negative consequences of disrupting that tradition. Burkean Originalism, therefore, does not distribute wins and losses

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192. *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting) ("Indeed, it is remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today."). To further prove this point, the dissent stated the following: "That the Court begins its review of our precedent with a quotation from a dissenting opinion speaks volumes about the support that actually can be drawn from our cases for the 'increase in the maximum penalty' rule announced today." *Id.* at 529 (quoting *Almendarez-Torres*, 523 U.S. at 251).

193. *See Patterson v. New York*, 432 U.S. 197 (1977).

194. *Apprendi*, 530 U.S. at 550.

195. *Id.*

196. *Id.* at 549–52.

197. *Id.* at 549.

198. Hoffmann, *supra* note 191, at 255.

in the same way traditional originalism does. Outcomes often align with a precedent-based approach, as Professors Strauss and Young suggest a Burkean jurisprudence should.

3. *McIntyre v. Ohio Elections Commission: A Burkean result argued in a not-so-Burkean way*

Some decisions, viewed through a Burkean lens, reach the right result but do not focus on the considerations outlined in this Comment. Consequently, the emphases of the opinion are different. This is true of *McIntyre*, noted in Part II for the debate over originalism and tradition that played in the concurrence and dissent by Justices Thomas and Scalia, respectively.<sup>199</sup> The Court invalidated an Ohio election regulation prohibiting the distribution of anonymous campaign literature, applying strict scrutiny analysis as it would any other law abridging free speech.<sup>200</sup> However, in treating it as any other law,<sup>201</sup> the majority ignores two key contextual facts. First, this regulation is a part of a species of election protection that exists in every state except California and dates back to the late nineteenth century.<sup>202</sup> Second, unlike much free speech regulation, this regulation's validity is vulnerable to originalist arguments.<sup>203</sup> Consequently, the majority opinion contains limited discussion of the key Burkean considerations—namely, the reliability of the originalist evidence and the strength of the established tradition.

In truth, a Burkean opinion would actually combine the considerations of each of the three main opinions. First, Justice Thomas and Justice Scalia (although at odds) engage in a lengthy discussion of the reliability of the original evidence of founding attitudes toward anonymous speech. On one hand, Justice Thomas marshals considerable evidence that the framers employed anonymous speech.<sup>204</sup> On the other, Justice Scalia argues that “to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right.”<sup>205</sup> Still, unable to

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199. *See supra* Part II.

200. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995).

201. *See id.* at 371 (Scalia, J., dissenting) (observing that the majority treats this law as if it were like the Los Angeles municipal ordinance at issue in *Talley v. California*).

202. *Id.*

203. *See generally id.* at 358 (Thomas, J., concurring).

204. *Id.* at 360.

205. *Id.* at 373 (Scalia, J., dissenting).

demonstrate any framer-animus toward anonymous electioneering, Justice Scalia could only emphasize the ambiguity of the speech clause. Clearly, the Framers' use of anonymous speech highlights its value as a founding principle, whether or not it is considered a right.<sup>206</sup> Second, Justice Scalia's dissent sings a somewhat Burkean tune with its presumption in favor of longstanding traditions when the constitutional text is ambiguous.<sup>207</sup> Certainly, Burke would pause before disrupting a century-long tradition. But ultimately, as both the majority and Justice Thomas's concurrence suggest, the effects of disrupting this century-long tradition are not only insubstantial, they are actually positive. Allowing anonymous electioneering speech contributes information that could be essential to voting decisions, especially since it may be the type of speech that may not be expressed if anonymity was forbidden.<sup>208</sup>

As I have demonstrated through these three cases, Burkean Originalism is an approach to judicial decision making that evaluates the weight of originalist evidence, the severity of the departure, and the strength of the established precedent. I make no claim that a systematic consideration of these factors will always yield predictable outcomes, for to do so would be to reject the essence of a true Burkean inquiry. Rather, I have shown that originalism plays a meaningful role in a Burkean approach to these difficult cases, and conservatives should not reject originalism on the basis of Edmund Burke's thought.

*C. Burkean Originalism: A Useful Framework for the Originalist  
Conservatives Deciding N.L.R.B. v. Noel Canning*

In Part II, I explained that the Supreme Court will soon decide the constitutionality of President Barack Obama's recess appointments to the National Labor Relations Board, a case known as *N.L.R.B. v. Canning*.<sup>209</sup> This case puts the primary dilemma of this Comment on full display. The D.C. Circuit's opinion hammers the

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206. Even Justice Scalia concedes this point: "Absent [the long-standing tradition at issue], I would be inclined to agree with the concurrence that a society which used anonymous political debate so regularly would not regard as constitutional even moderate restrictions made to improve the election process." *Id.* at 375.

207. I note that the last part of the corresponding sentence is much less Burkean than the first half.

208. *Id.*

209. *See supra* Part II.

robust originalist evidence that such appointments are restricted to “the Recess,” which could only have meant intersession, not intrasession, appointments.<sup>210</sup> On the other hand, the Eleventh Circuit’s decision, as well as the government’s briefs, have highlighted the very well-established tradition of intrasession appointments, dating back 146 years to 1867.<sup>211</sup> This case provides occasion to consider how justices like Scalia or Thomas may approach this question in a way that does not betray either their originalist or their conservative inclinations. This section analyzes the primary issue in *Canning*, whether the President can use the recess appointment power for intrasession appointments, by considering the three questions outlined at the beginning of Part IV. I conclude that the result reached by the D.C. Circuit is proper under Burkean Originalism.

*1. What founding principles can we reliably discern?*

In other words, what does the evidence of original meaning tell us about the constitutional text? Unfortunately for the government’s position, the evidence of the original meaning of the recess appointment clause is fairly convincing that intrasession appointments were not contemplated by the drafters. The D.C. Circuit’s *Canning* opinion cites a number of founding-era sources, including the 1755 edition of Samuel Johnson’s English dictionary, the Federalist Papers, the actions taken by the First Congress, and the actions of presidents in the first decades following the Constitution’s ratification.<sup>212</sup> Each of these sources demonstrate that the term “the Recess” could only have been understood to authorize intersession appointments.<sup>213</sup> Further, the very first Attorney General opinion to address the question of intrasession appointments found them to be unconstitutional.<sup>214</sup> In 1901, Attorney General Knox decided that the term “recess” permitted only intersession appointments. After marshaling the historical and structural evidence, Knox states that this “conclusion is irresistible

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210. *N.L.R.B. v. Canning*, 705 F.3d 490 (D.C. Cir. 2013).

211. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

212. *Canning*, 705 F.3d at 500–501.

213. *Id.*

214. 23 Op. Att’y Gen. 599 (1901); see also Michael Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1573 (2005).

to me.”<sup>215</sup> The Eleventh Circuit’s *Evans* opinion did not engage the historical evidence as thoroughly. Instead, the court argued that the intrasession conception of the clause is at least permissible (which is much different than saying it is correct),<sup>216</sup> and given a presumption that the President’s interpretations of the Constitution are constitutional, this permissibility is enough to authorize the appointments. As Professor Rappaport concludes in his extensive article on the original meaning of the Recess Appointments Clause, “The intersession interpretation employs an historically grounded reading of the constitutional text and conforms to constitutional structure and purpose.”<sup>217</sup> Further, regarding the intrasession definition, he demonstrates that the “biggest problem” for the intrasession definition currently advanced by the Obama administration is that “it cannot derive its definition of ‘recess’ from the constitutional text.”<sup>218</sup> In sum, concerning the first Burkean Originalism question, there is strong evidence that the original meaning of the text does not support the President’s use of the recess appointment power for intrasession appointments.

## 2. How and why did we depart from this principle?

Twenty years after Attorney General Knox’s opinion, Attorney General Daugherty reversed and adopted a more practical interpretation of the clause.<sup>219</sup> Daugherty points out that there would be “disastrous consequences” if the more strict interpretation prevailed.<sup>220</sup> In full, he explained what was at stake if a practical interpretation were not adopted:

If the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions. I can not bring myself to believe that the

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215. 23 Op. Att’y Gen. at 604.

216. *Evans*, 387 F.3d at 1224 (“In this case, the Senate’s break fits the definition of “recess” in use when the Constitution was ratified: the dictionary definitions that have been called to our attention did not, for example, speak of a minimum time. . . . [T]he Recess,’ originally and through today, could just as properly refer generally to any one . . . of the Senate’s acts of recessing.”).

217. Rappaport, *supra* note 214, at 1573.

218. *Id.*

219. 33 Op. Att’y Gen. 20 (1921); *see also* Rappaport, *supra* note 214, at 1573.

220. 33 Op. Att’y Gen. at 23.

framers of the Constitution ever intended such a catastrophe to happen.

In just twenty years, the priority of the executive branch had changed from strict adherence to the letter of the Recess Appointments Clause to fulfillment of its spirit. The government departed from the founding principles in order to meet the needs of an executive that was much larger in 1920 than in 1789. Thus, in the ensuing years, “[t]welve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require the consent of the Senate.”<sup>221</sup>

3. *What are the practical consequences of disrupting the tradition that has grown from the departure?*

As the D.C. Circuit’s *Canning* opinion suggests, reverting to the more historical interpretation of the Recess Appointments Clause may have disruptive effects. Just within the context of this case, three out of the five appointees to the National Labor Relations Board would no longer validly occupy their positions. This would call into question nearly ever decision made by the NLRB post-dating these individuals’ January 4, 2012 appointment, especially considering 29 U.S.C. 160(f) places no time limit on petitions for review of the board’s decisions.<sup>222</sup> Beyond just these appointments, such a reversion could possibly unsettle other decisions and actions taken by intrasession recess appointees in times past.<sup>223</sup>

In addition, such a decision may have dramatic effects on the ability of future presidents to make appointments necessary to keep the government functioning. The Daugherty opinion warned of catastrophe.<sup>224</sup> And while it is arguable whether the lack of a valid quorum at the N.L.R.B. would impede the government’s function—and a notion with which the Senators who repeatedly blocked President Obama’s nomination would disagree—it is not difficult to imagine a number of positions that, if left vacant because of political stalemate, might paralyze the government significantly.

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221. *Evans*, 387 F.3d at 1226.

222. See *N.L.R.B. v. Canning*, 705 F.3d 490 (D.C. Cir. 2011), *petition for cert. filed*, 81 U.S.L.W. 3629 (No. 12–1281).

223. *Id.*

224. 33 Op. Att’y Gen. at 23.

On the other hand, the elimination of this intrasession recess appointment power would force executives to nominate more politically viable individuals.<sup>225</sup> When faced with a choice between a handicapped government and a less-than-ideal nominee, presidents may decide the latter for fear of the political consequences that would follow the former. Additionally, it is unlikely that the past decisions of improperly appointed officers would be reversed considering the court's unwillingness to allow past decisions to be collaterally attacked.<sup>226</sup>

Having answered these three questions, it is helpful to consider the Burkean Originalism canon I have posited for this Comment: long-standing traditions should be preserved unless evidence of a countervailing founding principle is reliable and the consequences of disrupting the tradition are not substantial. The question presented in *Canning* involves whether to overturn the long-standing tradition of intrasession recess appointment. Burkean Originalism starts by presuming such tradition as valid. But as the answer to the first question suggests, the evidence of a countervailing founding principle, that intrasession appointments were neither contemplated by the founders nor consistent with the structure of the Constitution, is quite reliable. The question ultimately turns on how the originalist conservative jurist views the potentially disruptive effects of reverting to the intersession construction of the clause. In my view, the effects will not be nearly as disruptive as the United States government has asserted in its briefings. In fact, the reversion will force more productive political engagement by forcing executives to nominate more politically viable individuals to fill those positions that require the advice and consent of the Senate. In this way, the originalist, conservative jurist can validate both aspects of his or her jurisprudence. Originalism and conservatism are indeed compatible, but only if judges are willing to ask the right questions as they formulate their opinions.

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225. See generally *Canning*, 705 F.3d at 500–504; Amelia Frenkel, *Defining Recess Appointments Clause “Vacancies”*, 88 N.Y.U. L. REV. 729, 760 (2013); Brian C. Kalt, *Politics and the Federal Appointments Process*, HARV. L. & POL’Y REV. ONLINE (Apr. 5, 2011), <http://hlpronline.com/2011/04/politics-and-the-federal-appointments-process/>.

226. See Rappaport, *supra* note 214, at 1577.

## V. CONCLUSION

In the extreme case, in which incontrovertible evidence of original intent contradicts a firmly established, longstanding tradition, judges who simultaneously espouse conservative and originalist jurisprudences find themselves in a bind. On the one hand, invalidating a well-entrenched tradition flies in the face of conservative respect for gradual development and cautious change. Yet, on the other hand, ignoring counter-evidence of original intent is incompatible with an originalist respect for founding wisdom. Scholars such as Professors David Strauss, Thomas Merrill, and Ernest Young have used this disruption dilemma as a means to persuade against an originalist jurisprudence.

While Burke is considered the father of conservatism, he must not be read as a dogmatic adherent to precedent. Old institutions or precedents deserve a starting *presumption* of legitimacy, but they are not necessarily legitimate by mere duration of time.<sup>227</sup> Instead, tradition is constrained by natural rights, and institutions are legitimate insofar as they conform to the limits and ends that natural rights dictate. Thus, we see that, to Burke, precedent was beholden to something greater than itself, to higher, even original, principles.<sup>228</sup>

Burke's writings reveal an inner conflict, which is at times contradictory, between embracing gradual progression and respecting ancient wisdom. His writings are replete with explicit references to "canonized forefathers," "founding principles," "ancestors," and "antiquity." At the same time, his philosophy demands accepting that established institutions are yet imperfect, that "a state without the means of some change is without the means of its conservation," and that "without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve."<sup>229</sup> Despite the arguments of Professors Strauss, Merrill, and Young, the inner conflict between conservative and originalist values is *inherently* Burkean.<sup>230</sup>

I noted, at the outset, that Burke's writings pose significant interpretive difficulties. Because he never wrote a treatise that

227. *See supra* Part III.C.2.

228. *See supra* Part III.C.1.

229. BURKE, *supra* note 5, at 168.

230. *See supra* Part III.C.3.

coherently explains his philosophy, students of Burke are left to make sense of his twelve volumes of writings and speeches, which contain many inconsistencies and reveal a significant evolution in his thought over time. It seems that many invocations of Burke are weakened by the interpretive difficulty in Burke's writings, and they often imagine an Edmund Burke that is, in fact, far removed from reality. Where such invocations see him as immovably committed to precedent and tradition, the Burke that delivered impassioned speeches before the British House of Commons and penned extensive critiques of the French Revolution held a much more nuanced position. Here, I delved into the writings of Burke to unearth this nuance, and as I have shown, the real Burke looks more like the disparaged originalist conservatives than a one-dimensional progenitor of traditionalism.

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