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# ARTICLES

## TRIMMING

*Cass R. Sunstein*

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# TRIMMING

*Cass R. Sunstein*[*]

*In law and politics, some people are trimmers. They attend carefully to competing positions and attempt to steer between the poles. Trimming might be defended as a heuristic for what is right, as a means of reducing political conflict over especially controversial questions, or as a method of ensuring that people who hold competing positions are not humiliated, excluded, or hurt. There are two kinds of trimmers: compromisers, who follow a kind of "trimming heuristic" and thus conclude that the middle course is best; and preservers, who attempt to preserve what is most essential to competing reasonable positions, which they are willing to scrutinize and evaluate. It is true that in some cases, trimming leads to bad results in both politics and law, including bad interpretations of the Constitution. It is also true that trimmers face difficult questions about how to ascertain the relevant extremes and that trimmers can be manipulated by those who are in a position to characterize or to shift those extremes. Nonetheless, trimming is an honorable approach to some difficult questions in both law and politics, and in some domains, it is more attractive than the alternatives. In constitutional law, there are illuminating conflicts among those who believe in trimming, minimalism, rights fundamentalism, and democratic primacy.*

> Why, after we have played the foole with throwing *Whig* and *Tory* at one another, as boys do snowballs, doe we grow angry at a new name, which by its true signification might do as much to put us into our witts, as the others have been to put us out of them?
>
> This innocent Word *Trimmer* signifieth no more than this, that if men are together in a Boat, and one part of the Company would weigh it down on one side, another would make it lean as much to the contrary, it happneth there is a third Opinion, of those who conceave it would do as well, if the Boat went even, without endangering the Passengers. . . .
>
> . . . .
>
> . . . [T]rue Vertue hath ever been thought a *Trimmer*, and to have its dwelling in the middle, between the two extreams.
>
> — Lord Halifax[1]

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[1] LORD HALIFAX, THE CHARACTER OF A TRIMMER (London 1688), *in* 1 THE WORKS OF GEORGE SAVILE MARQUIS OF HALIFAX 178, 179, 243 (Mark N. Brown ed., 1989) (footnote omitted).

> These innumerable seekers of safety first, and last, who take no risk either of suffering in a good cause or of scandal in a bad one, are here manifestly, nakedly, that which they were in life, the waste and rubbish of the universe, of no account to the world, unfit for Heaven and barely admitted to Hell. They have no need to die, for they 'never were alive.' They follow still, as they have always done, a meaningless, shifting banner that never stands for anything because it never stands at all, a cause which is no cause but the changing magnet of the day. Their pains are paltry and their tears and blood mere food for worms.
>
> — John Sinclair, writing of Dante's "Neutrals" or "Trimmers"[2]

## I. INTRODUCTION

It is easy to imagine three stylized rulings on the relationship between the First Amendment and libel law:

1. "The First Amendment creates a robust right to freedom of expression. The government may interfere with that right only on a compelling showing of necessity. With respect to public figures, no such showing can be made; the First Amendment flatly bans the use of libel law."

2. "The First Amendment protects freedom of speech. But that right is not properly understood to raise doubts about state libel law. The First Amendment is not violated by restrictions on libel."

3. "The First Amendment protects freedom of speech. In this case, the application of libel law violates that freedom. We limit our conclusion to the particular facts. Other questions, involving the precise relationship between libel law and the First Amendment, need not be resolved here."

All three approaches are familiar from multiple domains of constitutional law. Recognizing a capacious individual right, the Court might pursue a course of *rights fundamentalism*. Rejecting such a right, and permitting governments to act as they see fit, the Court might decide in favor of *democratic primacy*.[3] Or refusing to specify the nature and scope of the right, the Court might pursue a course of *minimalism*. Within the Court and in the academic literature, a lively debate can be found about the choice among the three possible approaches.[4]

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[2] John D. Sinclair, *Note on Canto III*, *in* 1 THE DIVINE COMEDY OF DANTE ALIGHIERI: INFERNO 54, 54–55 (John D. Sinclair trans., 1961). Although neither Dante nor Sinclair used the word "trimmers," the "'neutrals' . . . have been retroactively called trimmers." Eugene Goodheart, *In Defense of Trimming*, 25 PHIL. & LITERATURE 46, 46 (2001).

[3] I am assuming here that the law of libel is a product of some kind of democratic judgment, either through state statutes or through implicit acceptance of common law decisions.

[4] *See, e.g.*, RONALD DWORKIN, JUSTICE IN ROBES (2006); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006). Note that the distinctions among the three approaches cut across familiar debates about the sources of constitutional meaning. For example, originalists

There is, however, a fourth approach. Imagine the following ruling:

4. "The right to free speech does impose limitations on use of the law of libel, and the use at issue here is unconstitutional. But the free speech right extends only to situations *A*, *B*, and *C*; it does not include situations *X*, *Y*, and *Z*. In the latter situations, libel law can be used." In this ruling, the Court is quite specific about both *A*, *B*, and *C* and *X*, *Y*, and *Z*.

This approach is distinctive, because it squarely rejects not only rights fundamentalism and democratic primacy but also minimalism. It does so on the ground that the Court should settle a large area of the law and should not leave the fundamental questions undecided.[5]

Oddly, there is no sustained discussion, within the Court or in the academic literature, of this fourth approach.[6] Indeed, we lack a name for it. I shall use the term *trimming*. The term comes from the seventeenth-century Trimmers, who tended to reject the extremes and to borrow ideas from both sides in intense social controversies.[7] Trimmers believed it important to steer between the polar positions and to preserve what is deepest and most sensible in competing positions.[8]

The idea of trimming has become a pejorative. No one marches proudly under the trimmers' banner; no one feels delighted or honored to be called a trimmer. But I shall attempt to show that in many domains, including constitutional law, there are powerful arguments on behalf of trimming, and that in both law and politics, trimming should be taken not as an insult, but as a descriptive term for an approach that often has considerable appeal.[9] Sometimes trimming is a heuristic for what is best; sometimes trimming can be defended as a means of ensuring that no one is excluded, humiliated, or hurt; sometimes trimming is an effort to identify and to preserve the best arguments and

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embrace rights fundamentalism in some domains while embracing democratic primacy in other domains, depending on what the original meaning requires.

[5] In fact the Court's approach in its seminal decision on libel law roughly tracked the fourth approach. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[6] Discussion of overlapping issues can be found, however, in J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969 (2006).

[7] For historical treatments, see H.C. FOXCROFT, A CHARACTER OF THE TRIMMER: BEING A SHORT LIFE OF THE FIRST MARQUIS OF HALIFAX (1946); HENRY HORWITZ, PARLIAMENT, POLICY AND POLITICS IN THE REIGN OF WILLIAM III (1977); Donald R. Benson, *Halifax and the Trimmers*, 27 HUNTINGTON LIBRARY Q. 115 (1964); Mark N. Brown, *Trimmers and Moderates in the Reign of Charles II*, 37 HUNTINGTON LIBRARY Q. 311 (1974); Thomas C. Faulkner, *Halifax's* The Character of a Trimmer *and L'Estrange's Attack on Trimmers in* The Observator, 37 HUNTINGTON LIBRARY Q. 71 (1973). For a valuable discussion, see Goodheart, *supra* note 2.

[8] Goodheart, *supra* note 2, at 48–49.

[9] *See id.*

the deepest convictions on all sides; sometimes trimming helps to reduce social conflict and public outrage.[10] My most ambitious goal is to reverse the valence of the idea of trimming, and to suggest that in important situations, powerful claims — pragmatic, epistemic, and even moral — can be offered on its behalf.

The remainder of this Article comes in six parts. Part II explores foundational questions. It distinguishes between two types of trimmers: those who favor compromise and those who want to preserve the most essential commitments of all sides. Part III investigates the affirmative case for trimming. It contends that trimming might be defended as producing the best outcomes in principle, as responding to judges' lack of information, as respecting precedent, and as reducing a sense of social exclusion or even humiliation. Part IV examines a number of objections to trimming. It shows that trimmers might blunder; that they can be manipulated; that they might be lawless; and that they are sometimes both confused and political (in a pejorative sense). Part V examines the differences between minimalists and trimmers. It shows that despite some superficial similarities, the two camps are fundamentally different. Minimalists want to leave key issues undecided, while trimmers favor clarity. The debate between minimalists and trimmers is closely related to the debate between those who favor standards and those who favor rules. Part VI offers some remarks about the choice among trimming, minimalism, democratic primacy, and rights fundamentalism. It also suggests that sometimes institutions will produce a form of trimming even if they lack trimmers; much of modern legislation can be seen as a kind of "as if" trimming. Part VII is a brief conclusion.

## II. WHY TRIMMERS TRIM

Trimmers follow a particular decision procedure, one that requires close attention to all points of view, including the poles. Like their seventeenth-century predecessors, contemporary trimmers listen carefully to competing positions and are reluctant to repudiate the intensely felt commitments of political or legal adversaries. As a matter of substance, contemporary trimmers, like their seventeenth-century predecessors, tend to end up between the extremes, in a way that makes both believe that they have gained, or not lost, something of importance. The trimmer's instinct is to see what the other side has to say, and to explore whether something might be drawn from it or preserved in it. As we will see, trimmers avoid the extremes, but they re-

[10] For a related discussion, with a skeptical conclusion, see Wilkinson, *supra* note 6. Trimming can be understood as a form of "split-the-difference jurisprudence," but as we shall see, the arguments on its behalf are more appealing than the term suggests.

ject minimalism; they do not bracket hard questions or attempt to leave them undecided. Trimmers want to take on board the deepest commitments of their adversaries, rather than merely failing to repudiate them.

To understand trimming, it will be useful to begin with some brief historical notes. Though the original Trimmers have been largely lost in contemporary political and legal debates, we can learn a great deal from what they had to say.[11]

### *A. Historical Notes*

The first mention of a "Trimmer" in print appears to have been in *The Character of a Trimmer, Neither Whigg nor Tory*, anonymously published in 1682.[12] Trimmers were mentioned frequently in the popular press for the next three years and occasionally thereafter.[13] The most well-known pamphlet on Trimmers was *The Character of a Trimmer*,[14] anonymously circulated in 1684[15] and written by the most influential Trimmer, George Savile, the Marquis of Halifax, who died in 1695.[16]

Trimmers appeared frequently in Roger L'Estrange's widely read *The Observator*, in which political dialogues that had previously involved Whig and Tory were changed in November 1682 to involve Trimmer and Observator.[17] To L'Estrange, anyone who did not follow the strictest of Tory policies could be termed a Trimmer.[18] He summarized the defining Trimmer characteristics as follows:

> *Trim.* And what *Is* a *Trimmer* at last?
>
> *Obs.* Why a *Trimmer* is a *Hundred Thousand Things*; A *Trimmer* I tell ye, is a man of *Latitude*, as well in *Politiques* as *Divinity*: An *Advocate*, both for *Liberty of Practice* in the *State*, and for *Liberty* of *Conscience* in the Church.[19]
>
> *Obs.* But then you must Consider that there are Severall *sorts* of *Trimmers*; as your *State-Trimmer*, Your *Law-Trimmer*; Your *Church-Trimmer*, Your *Trading-Trimmer*, &c.[20]

As we shall see, an important point here is that "there are Severall sorts of Trimmers"; the point applies in the twenty-first century no less

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11 *See* Goodheart, *supra* note 2, at 54.
12 Benson, *supra* note 7, at 118.
13 *Id.* at 131–32.
14 HALIFAX, *supra* note 1.
15 Faulkner, *supra* note 7, at 73.
16 FOXCROFT, *supra* note 7, at 336.
17 Tim Harris, *What's New About the Restoration?*, 29 ALBION 187, 211 (1997).
18 *See id.* at 211–12.
19 Faulkner, *supra* note 7, at 76 (quoting OBSERVATOR, Dec. 3, 1684).
20 *Id.* (quoting OBSERVATOR, Nov. 16, 1682).

than in the seventeenth. Others characterized Trimmers variously as "nonconformists who went to Church,"[21] those who were not sufficiently in favor of punishing Protestant Dissenters,[22] "the more moderate sort of Tories," or "secret Whigs."[23]

Notwithstanding the frequent and explicit references to Trimmers in the late seventeenth century, historians continue to debate the existence of an actual group of thinkers and officials who deserved the label. In the first half of the twentieth century, historians assumed that there was such a group and that it was led by Halifax; even the *Oxford English Dictionary* said that the word "'Trimmer' in its political sense was originally applied to 'Lord Halifax and those associated with him (1680–1690).'"[24] In the 1960s and 1970s, however, some scholars began to question whether Halifax was associated with the Trimmer movement during his lifetime, and even to doubt whether there was an actual Trimmer movement with which to be associated. According to a prominent essay in 1964, "[t]he pamphlets of the Trimmer controversy give no indication that Halifax was identified in any way with the Trimmers during the period. He is not mentioned in the controversy by name or, apparently, by implication."[25] On this view, "[i]t seems unlikely that a Trimmer party was ever more than a fiction of political controversy."[26]

By contrast, a more recent treatment argues that many moderate politicians and clergymen were called Trimmers: "Trimmers . . . were Tories accused of sympathy toward the Whigs or Anglicans similarly accused with respect to Protestant Dissenters. As most Anglicans were Tories, these two definitions are complementary, indeed almost interchangeable."[27] On this view, political Trimmers consisted of those Tories, including Halifax and Lord Keeper Guilford, who believed in subjecting the Crown to the rule of law — moderate or constitutional Tories, as opposed to the "high-flying" Tories who believed in the king's absolute power.[28]

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[21] Harris, *supra* note 17, at 212 (citing THE CHARACTER OF A CHURCH-TRIMMER (London 1683)).

[22] *Id.* at 211–12 (discussing L'Estrange's attacks on Trimmers).

[23] PHILLIP HARTH, PEN FOR A PARTY: DRYDEN'S TORY PROPAGANDA IN ITS CONTEXTS 210 (1993) (emphasis omitted) (quoting JOHN DRYDEN, VINDICATION OF THE DUKE OF GUISE (London 1683), *reprinted in* 7 THE WORKS OF JOHN DRYDEN 135, 182 (Sir Walter Scott ed., rev. ed., Edinburgh, William Paterson 1883)).

[24] Benson, *supra* note 7, at 116 (quoting 11 THE OXFORD ENGLISH DICTIONARY 365 (1st ed. 1933)); *see also* 11 THE OXFORD ENGLISH DICTIONARY 365 (1st ed. 1933) (collecting additional historical uses of the word in this sense).

[25] Benson, *supra* note 7, at 132.

[26] *Id.* at 134.

[27] Brown, *supra* note 7, at 319.

[28] *Id.* at 328–30.

Whatever we make of the controversy, Lord Halifax was indeed a self-identified Trimmer, who argued for "dwelling in the middle, between the two extreams."[29] Halifax rejected the fixed positions of both Tories and Whigs; he believed that the government should make a place both for royal authority and for a strong parliament.[30] He wondered: "What do angry men aile to rayle so against Moderation? Doth it not looke as if they were going to some very scurvy Extream, that is too strong to be digested by the more considering part of mankind?"[31]

For Trimmers, moderation is a signal virtue, and it entails a sympathetic understanding of what is best in and least dispensable to the "extreams."[32] In politics, Halifax favored a balance between the monarchy and the commonwealth, urging that the monarch must be constrained by law, that a constitutional order should protect civil liberties, and that parliaments should play a large role.[33] The Trimmer is especially enthusiastic about the law, seeing legal rules as "the Chaines that tye up our unruly passions."[34] With respect to the rule of law, the Trimmer does not trim. In religion, Halifax sought "a mutuall Calmnesse of mind" between Protestants and Catholics, "overlooking of all veniall faults."[35] With respect to longstanding social divisions, the Trimmer "is not eager to pick out the sore places in History against this or any other party; quite contrary, is very solicitous to find out any thing that may be healing, and tend to an agreement."[36]

As the Revolution of 1688 developed, Halifax insisted on maintaining contacts with both sides.[37] William III, who ascended the throne as a result of the Revolution, practiced trimming by including both Whigs and Tories in government. He said that he wanted to "go upon the bottom of the trimmers" or "form a party between the two extremes."[38]

In an important effort to rehabilitate Halifax, Thomas B. Macaulay wrote with evident sympathy that "[h]e had nothing in common with those who fly from extreme to extreme, and who regard the party which they have deserted with an animosity far exceeding that of consistent enemies. His place was on the debatable ground between the

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[29] HALIFAX, *supra* note 1, at 243.

[30] *See id.* at 184–99.

[31] *Id.* at 240.

[32] *See id.* at 194–95.

[33] *Id.* at 184–99.

[34] *Id.* at 180.

[35] *Id.* at 222.

[36] *Id.*

[37] *See* Mark N. Brown, *Introduction* to 1 THE WORKS OF GEORGE SAVILE MARQUIS OF HALIFAX, *supra* note 1, at 3, 111.

[38] HORWITZ, *supra* note 7, at 35 (quoting 2 H.C. FOXCROFT, THE LIFE AND LETTERS OF SIR GEORGE SAVILE, BART. FIRST MARQUIS OF HALIFAX 230, 229 (London, Longmans, Green and Co. 1898)) (internal quotation marks omitted).

hostile divisions of the community . . . ."[39] In Macaulay's account, Halifax "was, therefore, always severe upon his violent associates, and was always in friendly relations with his moderate opponents. Every faction, in the day of its insolent and vindictive triumph, incurred his censure; and every faction, when vanquished and persecuted, found in him a protector."[40] Note that on this account, Halifax did not trim for strategic reasons; he trimmed on grounds of principle. As we shall see, this understanding of Halifax has close parallels in the approach to law and politics that I mean to describe here.

My goal here, however, is not one of intellectual biography or historical recovery. For purposes of contemporary law and politics, we can obtain inspiration from Halifax and his associates, but trimming is to be made, not found. As the historical evidence suggests, trimming is a political practice, hardly limited to constitutional law, and indeed we could imagine trimming in many domains: religious institutions, the workplace, the family, the university, and many more. My particular focus, however, is on constitutional law, and hence the initial task is to show exactly why judges involved in constitutional disputes might choose to trim. To undertake that task, we must begin by distinguishing between two kinds of trimmers.

### *B. Contemporary Trimming*

*1. Compromisers and Preservers: Definitions.* — Trimming is a decision procedure. By their nature, trimmers follow that procedure, giving careful attention to the opposing positions and attempting to steer between them. But trimmers fall into two different categories.

Some trimmers are compromisers. They identify the extremes and try to compromise.[41] Seeking to reduce social conflict, attempting to avoid public outrage, and believing that the middle position is presumptively best, compromisers try to give something to both sides. Other trimmers are preservers. They attempt to identify and to preserve what is most essential, deepest, most valuable, and most intensely felt in the competing views. Seeking to learn from those views, such trimmers give sympathetic scrutiny to apparent antagonists and seek to vindicate what is most appealing in their positions.

Preservers themselves fall into two different categories. Some of them attempt to discern what they believe, on the basis of their own independent inspection, to be the deepest and most valuable parts of

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[39] 1 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND 185 (Folio Press 1985) (1848).

[40] *Id.* at 185–86.

[41] *See* Wilkinson, *supra* note 6, at 1971 (describing the late Rehnquist Court in the following way: "[T]he Court sought to tackle the most controversial issues before it by splitting the difference. Few courts have ever raised this form of jurisprudence to such an art form.").

opposing positions. Other preservers are concerned not with their own independent judgments but with what is thought, by those who hold opposing positions, to be deepest and most important. These different emphases can press in different directions. Preservers who emphasize what is most essential (in their own independent view) might not end up in the same position as preservers who emphasize what is most intensely felt (in the subjective views of the antagonists).[42]

No one disagrees with the claim that it is important for judges (or others) to listen to people to see if they have a reasonable point. What makes preservers distinctive is that they insist on identifying what is deepest and most appealing in competing positions, with a particular desire to ensure that, to the extent possible, no one is, or feels, rejected or repudiated. At first glance, preservative trimming seems attractive or at least plausible. It is not so easy to identify a principled argument for compromising as such (though I will try).

We can understand trimming as either a characteristic or an activity.[43] Some people, including some judges, are trimmers by general inclination. Confronted with a difficult problem about free speech or sex equality, they seek to trim. Other people, including other judges, trim on some occasions but not on others; they insist that trimming is unsuitable in many domains. They are not trimmers by nature. They might be inclined to trim in the context of an affirmative action dispute, but refuse to trim in the context of a debate over regulation of political speech, perhaps concluding that a form of rights fundamentalism is desirable in that area.

We should also distinguish between ideological moderates and trimmers, even though it will not always be easy to tell them apart in practice, and even though they will often agree. Ideological moderates, unlike trimmers, might simply believe on the merits that commercial speech is entitled to some protection, but less protection than political speech. Such moderates might hold this position in a social vacuum; this happens to be their preferred interpretation of the Constitution, one that makes them moderates under current conditions. These moderates are not trimmers, because they do not follow the trimmers' decision procedure, do not much care about the competing positions, and are not trying to steer between them. They are neither compromisers nor preservers. They might well refuse to compromise with others;

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[42] The choice between the emphases will depend on why a trimmer trims. *See infra* Part III (stressing that trimming might produce the best result in principle (a point that suggests that trimmers must make independent judgments) and also the possibility that trimming will moderate social conflict (a point that suggests that trimmers should attend to the positions that are most deeply felt)).

[43] I am grateful to Richard Fallon for pressing this distinction.

they might have no interest in carefully investigating polar positions to preserve what is deepest and best in them.

For moderates, it might not be at all important to ensure that no one is humiliated or hurt. But some moderates might also turn out to be trimmers. For example, they might be willing to compromise by choosing to sign onto an opinion that takes a position halfway between their moderate position and that of one of the extremists.

*2. Trimming in Contemporary Constitutional Law.* — It is not easy to know, after the fact, whether judges have self-consciously followed the decision procedure favored by trimmers, but in constitutional law, trimming appears to be pervasive. Consider the debate over commercial speech. Some rights fundamentalists are inclined to give such speech the same protection as political speech, on the theory that respect for personal autonomy calls for such protection.[44] By contrast, those who believe in democratic primacy reject the idea that commercial speech should receive any constitutional protection at all.[45] In the midst of this debate, trimmers would be inclined to give some protection to commercial advertising, but less than they would give to political speech.

This approach might be taken as a compromise between competing positions that are intensely held by apparently reasonable people. Alternatively, trimmers might believe that they are preserving what is best and most sensible in the competing positions. They might acknowledge that respect for autonomy calls for protection of truthful commercial speech, but also concede that there is far less reason to fear regulation of false or misleading commercial speech than regulation of false or misleading political speech.[46] For this reason, they trim.

Or consider the modern debate over substantive due process.[47] Rights fundamentalists would authorize judges to give substantive content to the idea of "liberty" through their own moral judgments about that broad concept.[48] By contrast, believers in democratic primacy would like to abandon substantive due process altogether.[49] Rejecting both positions, trimmers believe that the scope of individual

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[44] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment).

[45] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting).

[46] *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995); *Va. State Bd. of Pharmacy*, 425 U.S. at 771–73 & n.24.

[47] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

[48] *Cf.* DWORKIN, *supra* note 4 (examining the various ways in which law and morals are interwoven and how a judge's moral convictions bear on her judgments about what constitutes law).

[49] *See* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Of course, a rejection of substantive due process might be based on multiple grounds, including textual and historical ones.

rights should be defined by reference to traditions.[50] Due process traditionalists steer between the extremes. Some of those who take this approach are likely to be compromisers, thinking (for strategic or other reasons) that their approach is the best that is feasible.[51] On this view, due process traditionalism is a second-best, adopted because the preferred approach is unavailable. Other due process traditionalists are preservers: they attempt to discern what is least indispensable, and most legitimate, about competing views. They trim not to split the difference, but to capture the most plausible convictions of the adversaries. Of course it is an open question whether they have succeeded.

Compromisers and preservers can be found in many other domains. Consider, for example, the views that while campaign contributions may be regulated consistently with the First Amendment, campaign expenditures are immune from regulation;[52] that restrictions on abortion are justified only if they do not amount to an "undue burden"[53] (suitably specified); that discrimination on the basis of sex is subject to intermediate scrutiny;[54] that obscenity is protected unless it runs afoul of a test that pays close attention to community standards and social values;[55] and that the constitutionality of government displays of the Ten Commandments depends on the context.[56]

In some of these cases, the prevailing view might be an effort to compromise. Humble and uncertain about the right result, Justices might attempt to steer between the poles on the ground that such an approach is most likely to be right or least likely to damage important values. The undue burden test is easily understood in this fashion; it preserves the right to choose but it also allows for a degree of reason-

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[50] *See Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting); Michael H. v. Gerald D., 491 U.S. 110, 122–30 (1989) (plurality opinion).

[51] For an intriguing example of an outcome that reflects compromising, in part because of internal disagreement, see *United States v. Booker*, 543 U.S. 220 (2005). In that case, the Court found that certain judicial uses of the Federal Sentencing Guidelines violated the Sixth Amendment, *id.* at 226–27, but that the proper remedy was not to do away with the guidelines, but to use them in an advisory capacity, *id.* at 245. The Court as a whole ended up trimming, with five Justices supporting invalidation, with four of these supporting reduced use of the guidelines — and with five supporting continued use of the guidelines, with four of these supporting validation. *See* Wilkinson, *supra* note 6, at 1975.

[52] Buckley v. Valeo, 424 U.S. 1, 23–59 (1976).

[53] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895, 901 (1992). To the extent that the undue burden standard is left open, it combines trimming (rejecting the poles) with a form of minimalism (leaving key issues undecided).

[54] *See* Craig v. Boren, 429 U.S. 190, 197–99 (1976). For suggestions that this approach is a kind of compromise, see Collin O'Connor Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 527–28 (1996), and Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Thoughts of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17.

[55] Miller v. California, 413 U.S. 15, 24 (1973).

[56] *See* Van Orden v. Perry, 545 U.S. 677, 691–92 (2005).

able regulation. In other domains, the prevailing view may be a product of a principled effort to recognize, and make space for, the most legitimate claims of the competing sides. Reasonable people might well believe that campaign contributions, made by some people to candidates, can be regulated in order to reduce the appearance and reality of corruption, while also believing that campaign expenditures, made directly by a candidate, cannot be regulated for that reason.[57] Reasonable people might also believe that sexually explicit materials should generally be protected from government regulation, but that in some cases, the government has a sufficiently strong justification for imposing bans.

It is important to distinguish here between trimmers about particular issues and trimmers about large questions of interpretation. A dispute about the Equal Protection Clause or the Commander-in-Chief Clause might be solved via trimming; the same might be true about a dispute over originalism. Confronted with a disagreement between originalists and their critics, a trimmer might conclude not that the original understanding is determinative, but that it is entitled to consideration, and that when precedents do not cut the other way, originalism should be followed. For this reason, some trimmers might be inclined to accept a form of "soft originalism," giving weight to the original understanding without being bound by it. Those who favor originalism, but believe that the original meaning should yield to established law, are embracing a form of trimming. Questions of method and interpretation, no less than particular disputes, might be settled by trimming.

We can also identify forms of trimming that are wholly internal to particular schools of interpretation. A committed originalist might refuse to trim as between originalism and the alternatives, but if committed originalists disagree on the proper interpretation of the Second Amendment or the Commander-in-Chief Clause, the originalist might respond to the disagreement with a form of trimming.[58] Those who believe that the meaning of the Equal Protection Clause depends, in part, on contemporary moral judgments[59] will not follow the original understanding (narrowly conceived) of the clause — but if there is a reasonable dispute about contemporary moral judgments, such judges might trim by steering between them.

Rights fundamentalists must decide exactly how fundamentalist to be; if there is an internal debate on that question, they too might trim.

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[57] *Cf. Buckley*, 424 U.S. at 26, 45. I do not mean to suggest that this view is correct.

[58] On some issues, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), adopts what might be seen as a form of originalist trimming. *See id.* at 2799 (suggesting limits on the Second Amendment right).

[59] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW (2002).

Return to the relationship between free speech and libel; one rights fundamentalist might conclude that libel law cannot be used by public figures, while another might conclude that libel law cannot be used by anyone, and as between the two positions, it would be possible to trim. Those who believe in democratic primacy are inclined to uphold legislation against constitutional attack; but they too will confront hard cases under their own framework, and in responding to such cases, they might trim. The "rational basis" standard can be taken as an example.[60]

*3. Problems and Concerns.* — From all of these examples, it should be clear that what counts as the best form of trimming, and what qualify as the poles between which trimmers will steer, will not always be self-evident. Trimmers might strenuously disagree with one another about the proper way to trim; two or more approaches might legitimately count as trimming. In a dispute about the constitutional protection to be given to false statements about public figures, for example, many possible views could be deemed to be trimming, because there is a wide range of options between (say) the view that the Constitution allows states to control false statements as they see fit and (say) the view that the Constitution protects all statements about public figures.[61]

And what are the poles that interest trimmers? Rights fundamentalists and believers in democratic primacy might deliberately stake out quite extreme positions with the goal of moving trimmers in various directions. If influential leaders say that members of a religious group should be exterminated, and other leaders say that such people should be let alone, we would not admire trimmers who conclude that members of that religious group should be allowed to live so long as they are incarcerated. Nor would it make much sense for trimmers to adopt a random or arbitrary compromise by saying, for example, that those members of a despised group whose last names range from A–M must die, while those whose last names range from N–Z may live.

It would seem to follow that sensible trimmers should be prepared to evaluate, and not simply to observe, the competing positions — a view that will lead from compromise to preservation. It might also seem to follow that nearly any position could be characterized as trimming, because any position is likely to be between at least some imaginable poles. I will return to these problems below.

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[60] *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 489–90 (1955). Of course it is true that if the "rational basis" standard means that all legislation will be upheld, it is not a form of trimming.

[61] For some intermediate positions, see *New York Times v. Sullivan*, 376 U.S. 254 (1964).

## III. REASONS TO TRIM

Why would anyone want to trim? We could imagine six reasons. Some of these will appeal to compromisers; others will be invoked by preservers; still others will appeal to both. Recall too that some preservers seek to identify what is best (objectively) in competing positions, whereas other preservers attempt to identify what is most deeply held (subjectively). These different positions point toward different reasons to trim.

### *A. Trimming and Principle*

After sympathetic investigation of the contending positions, a judge might conclude that the best interpretation of the relevant materials calls for steering between the poles. Perhaps such a judge ends up believing, with Justice Powell, that the Constitution requires government to produce strong justifications for any race-conscious program, that rigid quota systems are unacceptable, but that in identifiable circumstances in which race is treated as a mere "factor," those justifications are available.[62] A judge of this kind would produce a form of constitutional trimming for the affirmative action debate. Indeed, affirmative action is an area in which trimming reigns triumphant.[63]

In the same way, a constitutional trimmer might believe that the Equal Protection Clause is not properly read to require courts to treat sex discrimination as skeptically as they treat race discrimination, but that both forms of discrimination should face serious judicial scrutiny.[64] Those who are drawn to this view might trim with the conclusion that the government is permitted to engage in some forms of sex discrimination even if it is flatly forbidden from drawing racial lines.[65]

Judges who reach this conclusion might be moderates rather than trimmers, but we could certainly imagine preservers and even compromisers who end up with this conclusion. Preservers might believe that those who attack sex discrimination are correct to insist that that form of discrimination is usually based on the same kinds of constitutionally illicit motivations that produce racial discrimination. But such preservers might also believe that on admittedly rare occasions, those who defend sex discrimination are able to generate sufficiently reasonable justifications for their actions.[66]

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[62] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–20 (1978) (opinion of Powell, J.).

[63] *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[64] *Cf.* Craig v. Boren, 429 U.S. 190, 197–99 (1976).

[65] *See id.*

[66] As controversial but possible examples, see *Michael M. v. Superior Court*, 450 U.S. 464, 482–83 (1981) (Blackmun, J., concurring), and *Rostker v. Goldberg*, 453 U.S. 57 (1981).

### *B. The Trimming Heuristic*

A humble judge might believe that trimming is a kind of heuristic for what is right.[67] It is here that we can understand why some people are compromisers. Consider the fact that human beings typically demonstrate "extremeness aversion."[68] Confronted with several options (such as dinner selections on a menu) and having incomplete information, many people tend to avoid the poles.[69] Indeed, jurors themselves have been found to trim, in the sense that they steer between the extremes; for this reason, the prosecutor's selection of criminal counts can greatly influence what the jury ends up doing.[70]

At first glance, people's tendencies here might seem puzzling, but under certain assumptions, extremeness aversion is perfectly rational because it reflects a sensible heuristic, above all for those who are unsure how to proceed. Suppose, for example, that a politician is confronted with a problem for which some intelligent people urge one extreme course (say, no increase in the minimum wage), and other intelligent people urge another extreme course (say, a $2 increase in the minimum wage). If the politician is not sure which position is right, she might choose to trim, with the thought that the truth probably lies in between.

In this light, trimming might even have epistemic credentials. Under plausible assumptions about the set of judgments that surround the trimmer, the trimming result is likely to be best,[71] because it reflects "the wisdom of crowds."[72] The Condorcet Jury Theorem shows that if people are better than random guessers, the likelihood that the majority view will be correct increases toward 100 percent as the size of the group expands.[73] The Jury Theorem helps to explain the fact that in large groups, the average view or estimate can be remarkably accurate.[74] In this light, trimming might be defended on epistemic grounds.

Suppose that there is a distribution of views on the relevant question. A judge who is unsure might choose the average position on the

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[67] *See* Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 795–96 (discussing difference splitting).

[68] *See* Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281 (1992); *see also* Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996) (discussing the desirability of options that are seen as compromises).

[69] Kelman et al., *supra* note 68, at 288.

[70] *Id.* at 291–92.

[71] For some theoretical reasons to think that trimmers might be right on this count, see SCOTT E. PAGE, THE DIFFERENCE (2007).

[72] *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004).

[73] *See* CASS R. SUNSTEIN, INFOTOPIA 50 (2006).

[74] *See id.*

ground that it is most likely to be right, at least if those involved do not suffer from a systemic bias. On legal questions, compromising seems arbitrary, but it can claim a genuine epistemic logic, at least if we are able to agree that there are right answers to legal questions.[75] Of course compromisers, far more than preservers, would be drawn to this defense of trimming. And of course the epistemic argument will not work if there is some kind of systemic bias within the relevant "crowd," ensuring that the middle course is itself skewed.

It would be natural to object that even if they seek to trim, courts are institutionally incapable of listening to "crowds." In general, they hear the arguments of the parties before them, with occasional voices from those who produce amicus briefs. Nonetheless, a judge who is inclined to trim might think that the parties reflect the views of large groups, at least in important cases. When one side favors a broad interpretation of the Second Amendment, and another side a narrow one, they do not speak only for themselves; they are reflecting the views of numerous people, to whom the Court is therefore listening. In this sense, it is not entirely artificial to think that even in the context of the judicial process, trimming might reflect the wisdom of crowds.

Perhaps a judge who is disposed to compromise will have the further thought that by trimming, she can avoid the most serious dangers associated with both of the extremes. A risk-averse judge might select trimming if both sides are able to make serious complaints about the hazards and risks that would accompany the course suggested by the other. For those who believe that for contested issues, moderation is usually wiser, less dangerous, or both, trimming makes a great deal of sense.

Those who adopt the "trimming heuristic" might be either compromisers or preservers. If they are compromisers, they might not have the time or the capacity to think carefully about which position is right, or having thought carefully, they might not be sure. If so, trimming might seem to be the prudent course for those who are humble and uncertain.

If they are preservers, trimmers will also ask: On both sides, what commitments are most attractive, or most deeply held, or essential? Return to the context of affirmative action in public universities, where trimmers might accept two propositions: (a) Those who reject affirmative action have given good reasons for their opposition, on constitutional grounds, to rigid quota systems, which fundamentally deny equal treatment. (b) Those who favor affirmative action argue,

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[75] On this point, see CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS (forthcoming 2009).

plausibly, that a university might legitimately seek to obtain a racially diverse student body. Preservative trimmers might believe that the most defensible commitments of both sides can be preserved by a decision that rejects any kind of quota system but that allows race to be considered "as a factor."[76] In that sense, preservers might be inclined to accept the trimming heuristic.

### *C. Strategic Trimming*

A more confident judge might trim for purely strategic reasons. Suppose, for example, that a judge believes that affirmative action is always unconstitutional or that the Constitution does not protect a right to privacy. Such a judge is not a moderate on these issues, but she might conclude that other judges cannot be persuaded to accept her positions. Trimming might be an indispensable method for building a majority on behalf of the best outcome that is realistically possible.[77]

Here, then, we can find a ground for trimming as a form of strategic compromise. The strategic trimmer is trying to obtain the best available result within the constraints produced by practical realities on a multimember court.[78] Coalitions are possible here among moderates, principled trimmers, and their strategic siblings. Some judges may believe that trimming leads to the best result, while others sign on because trimming is the best that they can get.

### *D. Trimming and Precedent*

A judge might believe that trimming is the only way to proceed while respecting the requirements of stare decisis. Both compromisers and preservers might accept this proposition. Indeed, a system based on precedent is likely to produce a doctrine that is replete with a kind of trimming. Suppose that a judge believes that as a matter of principle, it would be best if the First Amendment were not understood to protect commercial advertising at all, or if the Due Process Clause

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[76] Grutter v. Bollinger, 539 U.S. 306, 311 (2003); *see also* Gratz v. Bollinger, 539 U.S. 244 (2003).

[77] I am putting to one side the interesting situations in which internal divisions in the Court produce a trimming solution favored by only one or two members. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978) (opinion of Powell, J.). Many multimember institutions occasionally trim not because a majority favors trimming, but because large groups are divided and a middle position, favored only by a minority, turns out to prevail.

[78] This approach might be distinguished from other forms of strategic compromise, such as the idea that judges might strategically negotiate for votes in a way that moderates opinions. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 69–70 (1998); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 522–24 (1998) (reviewing EPSTEIN & KNIGHT, *supra*).

were not taken to have a substantive component or to create a right to privacy. Confronted with unwelcome precedents, the judge might attempt to limit the protection of commercial advertising to truthful and nondeceptive practices, or might conclude that the substantive component of the Due Process Clause should be limited to those rights, including privacy rights, that are sanctified by tradition. For judges who are drawn to either rights fundamentalism or democratic primacy, a form of trimming might well be inevitable so long as precedents are respected. Judges of this kind might hope to move the law, by degrees, in their preferred directions, but they might have to settle for a high degree of trimming.

We should make a distinction here between (a) intentional trimming by self-conscious trimmers and (b) doctrine that appears to be a product of (a), but that is actually an outcome of an invisible hand process, in which a regime of trimming appears to be the product of a single trimming mind, but is nothing of the kind.[79] Consider, for example, the domain of constitutional takings, which seems to have a great deal of trimming.[80] It is reasonable to suggest that existing doctrine is not a product of the decisions of self-conscious trimmers, but instead evolved through case-by-case judgments joined by many people who would have preferred a different kind of regime.

We should also note that those who accept precedent, and who trim for that reason, are usually not motivated by a concern to ensure that people are not distressed or humiliated. Many of those who respect precedent would resist the claim that they are trimmers. The point is that precedent-respecting judges produce outcomes that they would not choose if they were writing on a clean slate, and in an important sense, they show respect to those with whom they disagree.

### *E. Conflict, Exclusion, and Humiliation*

A judge might or might not have a clear sense of which result is best, but might trim for external reasons, having to do with the public reaction to the court's decision. Even if the trimmer favors result *A*, she might support result *B* in order to minimize social conflict, thinking that trimming is the best way of accomplishing that task. A trimming judge, drawn to preservation, might be particularly concerned

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[79] For a superb discussion of invisible hand mechanisms, see Edna Ullmann-Margalit, *The Invisible Hand and the Cunning of Reason*, 64 SOC. RES. 181 (1997). For examples of these mechanisms at work in the Court, see *supra* note 77.

[80] *See, e.g.*, Lingle v. Chevron U.S.A., 544 U.S. 528 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

about public outrage, in the form of intense objections on the part of identifiable segments of the public.[81]

The trimmer might believe that if the court rejects an individual right to own guns, its decision will cause polarization and agitation, and perhaps have a large public impact, conceivably even affecting the results of presidential campaigns. Alert to the harmful consequences of certain rulings, a trimmer might be seeking to minimize the damage, even if that trimmer otherwise tends to favor a result that would produce it. Or the trimmer might think that if the public would be outraged by one or another decision, perhaps that decision is wrong; the intensely held beliefs of the public offer some clues about what decisions would be wrong or right.[82] If rights fundamentalism or democratic primacy would trigger a significant amount of public outrage, the Court might decide to trim on either consequentialist or epistemic grounds.

It is true that those who are concerned about social conflict and public outrage might support not trimming but two alternative approaches: use of the "passive virtues,"[83] enabling the Court to decline to resolve certain cases at all, or minimalism, in which the Court decides cases while leaving key issues undecided.[84] If public outrage is the fear, trimming might be inferior to any approach that simply brackets the hardest questions and leaves them for another day. But if bracketing turns out to be impossible or for some reason undesirable,[85] a judge might reasonably attempt to trim. If it is possible to reach a resolution that is sensible, or right enough, the judge might seek an outcome that does not cause intense public controversy.

Preservers might even believe that trimming has large advantages over minimalism. While minimalists leave certain questions undecided, and to that extent do not exclude or humiliate people, preservers attempt to accept people's deepest commitments, and in that sense affirmatively include them, in a way that might bring them on board. Consider, for example, a decision that accepts an individual right to have guns for nonmilitary purposes, or a right to engage in commercial advertising, as opposed to a decision that brackets the question whether either right exists. The trimmer can claim that she is not merely refusing to humiliate people by ruling their commitments off limits; she is going much further by offering an account or narrative of constitutional meaning that explicitly includes such people.

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[81] *See* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 159 (2007).

[82] *See id.*

[83] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–33 (1962).

[84] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME 3–6 (1999).

[85] See *infra* section III.F for some explanatory comments on this point.

To the extent that avoiding public outrage is their goal, trimmers might be accused of being weak, passive, or cowardly. Return in this regard to my second epigraph: "They follow still, as they have always done, a meaningless, shifting banner that never stands for anything because it never stands at all, a cause which is no cause but the changing magnet of the day."[86] In some contexts, the accusation is warranted. But we should now be able to see that trimming also has moral foundations, captured in the idea that people should be respected and included, and should be neither humiliated nor hurt. When trimmers attempt to accept the deepest commitments of legal or political adversaries, they are attempting to show respect to all sides — and to ensure that no side feels offended, diminished, or aggrieved. It is here that we can locate some independent moral grounds for trimming.

Consider in this light recent findings of "cultural cognition," a term that is meant to point to the existence of competing foundations for legal and political analysis; those foundations lead to disparate judgments about particular problems.[87] The initial contention here is that people have different cultural "identities"; for example, some people are egalitarians, while others are individualists.[88] Some evidence suggests that these different identities predict people's conclusions about an array of issues in law and politics.[89] Trimmers try to reach results that can be accepted or at least not rejected by people with disparate self-understandings and different foundational commitments. The hope is that trimming can obtain support for people from different "cultures." Of course judicial rulings on some issues will inevitably offend some people, and judges should not trim simply to avoid offense. In striking down school segregation, the Supreme Court did not trim.[90] But if judges can rule in a way that makes people feel respected rather than ridiculed, they should do so; trimming might be their best option on that score.

Insofar as trimmers pay close attention to the views of others, the practice of trimming is part of a large category of cases in which human beings make decisions on the basis of what others think.[91] It

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86 Sinclair, *supra* note 2, at 55.

87 *See, e.g.*, Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150–51 (2006).

88 For a number of discussions, see the papers available at the Cultural Cognition Project at Yale Law School, at http://culturalcognition.net.

89 *See, e.g.*, Kahan & Braman, *supra* note 87, at 158–60.

90 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954). In suggesting the Court did not trim, I mean to say that the Court explicitly rejected the idea of "separate but equal" in education (and eventually elsewhere).

91 *See* GERD GIGERENZER, GUT FEELINGS 217–19 (2007) (discussing the decisionmaking heuristic of doing as the majority does).

would be possible, for example, to follow trusted authorities, as, for example, where people believe that particular litigants or particular judges (Justice Breyer? Justice Scalia?) are generally right, and should be followed for that reason. This kind of approach would lead to very different outcomes from those reached via trimming, but it is in the same family. So too, it would be possible to think that the best approach is to identify a view that is held by a particular person or community, and to take a somewhat more extreme view than is held by that person or community. There are many imaginable variations on this theme. If the views of other people provide a sensible basis for making up one's own mind, trimming is merely a member of a large family of possible approaches.

### *F. Judicial Self-Protection*

Suppose that judges seek to insulate themselves against public backlash or hostility. Perhaps judges fear that public hostility will endanger the Court's role; perhaps they believe that the Court has scarce "political capital," and it should use that capital only in the rarest circumstances. If judges seek to preserve their own legitimacy, they might trim for that reason. Minimalists are often alert to this general concern and respond by pursuing a path of not deciding. But if it is not possible to leave things undecided, or not desirable to do so, judges who are concerned about preserving their own role might prefer to trim.[92]

## IV. AGAINST TRIMMING

Thus defended, trimming runs into five serious objections. First and most fundamentally, trimmers might blunder. This risk seems especially serious in constitutional law, where judges owe a duty of fidelity to the founding document. Second, trimmers may have a hard time specifying the relevant poles. Third, trimmers are manipulable and their decisions are potentially arbitrary; strategic actors can move or characterize the poles in a way that presses trimmers in their preferred directions. Fourth, trimmers take account of considerations that may turn out to be irrelevant in principle. Fifth, it might be thought that trimming is for politicians, not for judges.

### *A. Blundering Trimmers*

The Supreme Court's most important obligation is to interpret the founding document correctly. Much of the time, trimming will violate that obligation. Why — it might be asked — should judges believe

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[92] *See* Wilkinson, *supra* note 6, at 1984.

that trimming will yield the correct interpretation?[93] (Similar questions could be asked of those involved in politics.)

This question could be pressed with equal vigor by skeptics armed with competing accounts of constitutional interpretation. Some people are originalists; they believe that the original understanding of the Constitution settles the document's current meaning.[94] Originalists might well believe that trimming will yield bad interpretations. In their view, judges should not trim; they should construe the founding document consistently with the original understanding.[95] Other people believe that judges should uphold legislative enactments unless the violation of the Constitution is plain.[96] Trimming will often violate this injunction, because it will lead to invalidations when the violation is far from plain.

Still other people believe that the Constitution should be given a "moral reading," in the sense that judges should read the document in light of the best moral principles, consistent with precedent.[97] In many cases, trimming will produce an inferior moral reading. Those who seek moral readings will ask: Why should judges split the difference, rather than interpret the disputed provisions in the morally preferred way? With respect to constitutional law, some people are visionaries: they believe that the document, properly interpreted, calls for significant social change. Outside of constitutional law, visionaries have played an unmistakably large role in American history. Trimmers seem to be an obstacle to desirable change. And whatever our preferred account of constitutional interpretation, we can readily find disputes in which trimming would be unacceptable.

In politics, the problem is not obscure. If some people say that all suspected terrorists should be tortured and other people say that no one should be tortured, we might not be enthusiastic about the view that half of suspected terrorists should be tortured. Or suppose that a judge is presented with these alternatives: (a) strike down school segregation in all circumstances, (b) never strike down school segregation, (c) strike down school segregation only when separate schools are demonstrably unequal. The trimming solution is (c), but (a) is clearly preferable. It would not have been right for the Court to choose (c) in

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[93] See the skeptical remarks of Judge Wilkinson, *id.* at 1989–91, suggesting that efforts to split the difference lead to results that do not properly interpret the founding document.

[94] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 37–41 (Amy Gutmann ed., 1997).

[95] Thus, for example, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), perhaps the most self-consciously originalist opinion in the Court's history, is not fundamentally a form of trimming.

[96] *See, e.g.*, VERMEULE, *supra* note 4, at 230.

[97] *See, e.g.*, DWORKIN, *supra* note 59, at 2–4.

1954, even though reasonable people disputed the constitutional question at the time and even though (a) left many segregationists feeling outraged and not treated with respect.[98]

Or suppose that the alternatives are these: (a) interpret the First Amendment to allow state and federal governments to ban speech that they reasonably believe to be dangerous;[99] (b) interpret the First Amendment to allow the national government to ban speech only if it incites imminent lawless action, but to allow state governments to ban speech that they reasonably believe to be dangerous; (c) allow state and federal governments to ban speech only if it incites imminent lawless action.[100] The trimming solution is (b), but (c) is far better.

The examples could easily be multiplied. They show that trimming is unacceptable when it produces an incorrect or implausible interpretation of the Constitution.[101]

### *B. Confused Trimmers*

What are the extremes that concern trimmers? And what, exactly, is the solution that counts as trimming? Mightn't many solutions qualify? So long as judges are sane, it might seem inevitable that they will trim, in the sense that they will steer between imaginable poles. In this light, how can we know whether judges are trimming?

On a multimember court, we should begin with the suggestion that the relevant judges determine the extremes. If two judges are to the far left (on the tribunal), and if two are to the far right (same parenthetical), then the conscientious trimmer can start to find his bearings. This possibility demonstrates that no court could consist solely of trimmers. The reason is that if all judges are trimmers, then none will be able to find his place; the very practice of trimming depends on a number of actors who are not trimmers at all. Trimmers inevitably

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[98] *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955), with its "all deliberate speed" formula, can easily be understood as a form of trimming, one that recognized both practical realities and intensely felt beliefs on all sides. But it is not at all clear that the Court's approach was defensible for that reason. *See* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970).

[99] *See* Debs v. United States, 249 U.S. 211 (1919).

[100] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[101] *Cf.* Robert F. Kennedy, *Foreword to the Memorial Edition* of JOHN F. KENNEDY, PROFILES IN COURAGE, at xi, xiii (memorial ed. 1964) ("President Kennedy was fond of quoting Dante that 'the hottest places in Hell are reserved for those who, in a time of great moral crisis, maintain their neutrality.'"). The quotation is illuminating but not accurate; see the second epigraph, *supra* p. 1052. The objection to trimming is most obviously correct when the trimmer produces an arbitrary or random result, as in the view that, for example, commercial advertising is protected on Monday–Wednesday, but not on Thursday–Saturday, and on the basis of a coin-flip on Sunday. No sensible trimmer, whether compromiser or preserver, acts in this random fashion, but the risk of error extends well beyond randomness. (I do not mean to say anything here about legitimate controversies involving the uses of randomization.)

operate as free-riders, reaching their conclusions on the basis of others' judgments. Notwithstanding this point, there is a certain logic, at least on the Supreme Court, to focusing on the distribution of views on the tribunal. Suppose that the trimmer believes that those views reflect something important about the relevant distribution of opinions within the community. Perhaps Justices are selected in a way that ensures representation of reasonable positions among specialists. If so, the tribunal is hardly an arbitrary source of relevant points of view.

It is not entirely clear, however, that judicial trimmers should focus on their tribunal. Suppose that the relevant court is to the right or the left of the nation, so that the distribution of opinions within that court is skewed compared to the distribution of opinions within the nation at large. Perhaps the trimmer should look to society as a whole, not to the judiciary. Or suppose that the court is to the right of where it was twenty years ago, and the trimmer believes that the relevant extremes are identified by the range of views in a previous era. Should the trimmer work on the basis of the contemporary range, rather than an earlier one — or should the trimmer think about the range of views that is likely to prevail (say) a decade from now?

The answers to such questions will depend on exactly why the trimmer trims, and also on the distinction between compromisers and preservers. If trimmers seek to diminish public outrage and social conflict, they are likely to look to the range of views in society, not on the court. If trimmers trim because trimming is a good heuristic, and has epistemic credentials, the choice between the tribunal and the public depends on the relevant theory of interpretation. Suppose that the trimmer thinks that constitutional law turns on a mix of pertinent considerations, including the original understanding, precedents, democratic theory, and moral argument. If so, the views of the public may not be especially relevant; what matters is the distribution of views within the group of people who are entrusted with interpreting the Constitution and who therefore have relevant expertise. Even if a trimmer is a compromiser, the relevant compromise might involve the court itself — at least if social conflict and public outrage are not the central considerations.

These points help to answer another question: Isn't any sane position a form of trimming? At first glance, *Brown v. Board of Education* does not appear to count as trimming, because the Court invalidated "separate but equal" across the board. But perhaps *Brown* trimmed after all, because the Court did not adopt a more aggressive principle that would (for example) doom facially neutral laws with discriminatory consequences, or that would mandate affirmative action. Nonetheless, it is false — a kind of debater's point — to say that any position can count as trimming. Trimmers follow a particular decision procedure, and for them, what is relevant is the range of arguments available at the time. With respect to those arguments, *Brown* did not

trim. By contrast, *Brown II*, with its "all deliberate speed" formula,[102] was indeed a form of trimming. Trimming is always relative to the relevant range of arguments, and these are determined by asking what, exactly, people have to say.

It is true, however, that in many cases, more than one position can follow from and be counted as a form of trimming. In the context of a debate over free speech or the right to privacy, we could imagine a crude "civil liberties scale" of -10 to +10, and we could imagine arguments -10, -5, 0, +5, and +10. The trimmer can legitimately choose -5, 0, and +5. The committed compromiser will be inclined toward 0, but legal arguments may not quite line up in so orderly a way, and perhaps 0 makes no sense as a matter of principle.

At this point it must be conceded that if a judge is inclined to trim, she has a decision procedure and a general inclination, but without some investigation, she will not know exactly what she should do. Of course the same points apply to rights fundamentalism, democratic primacy, and minimalism; these too are general inclinations that must be specified. For example, minimalists, no less than trimmers, will have a range of options that are consistent with their method. What exactly will remain undecided? Minimalists do not have an abstract answer to that question. Rights fundamentalists face the same difficulty. What rights qualify as fundamental? Is all of libel law unconstitutional? Only that form of libel law that is invoked by public figures? Only that form of libel law that does not require a showing that speakers have intentionally lied?

### *C. Manipulable Trimmers*

*1. The Problem.* — For both compromisers and preservers, what count as the extremes, and hence what counts as trimming, *depends on the alternatives that are presented*. As Professor Robert Goodin has objected, a procedure of the trimmers' kind "is outrageously sensitive to the choice of endpoints. Tack Aquinas onto the one end or De Sade onto the other and the midpoint shifts wildly."[103]

The point is familiar in marketing: self-interested sellers can exploit extremeness aversion in order to press people in their preferred directions. For example, they might introduce very high-cost items that make a moderately high-cost item seem to be the compromise choice.[104] Alert to extremeness aversion and intent on obtaining a conviction, prosecutors can do the same thing — including an especially severe count as a way of ensuring a conviction on a less severe

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[102] *Brown II*, 349 U.S. at 301.

[103] Robert E. Goodin, *Possessive Individualism Again*, 24 POL. STUD. 488, 489 (1976).

[104] *See* Kelman et al., *supra* note 68, at 288.

one.[105] The upshot is that trimmers are subject to manipulation by those who select or identify the range of options. Indeed, the positions of those who present the options might turn out to be endogenous to the presence of trimmers.

It should be plain in this light that the practice of trimming seems to create highly unfortunate incentives, by encouraging people to exaggerate the intensity of their views and in the process to stir up their adversaries. In the presence of trimmers, rights fundamentalists and believers in democratic primacy might characterize their own views strategically, attempting to move trimmers in their preferred directions. If they are successful, what seems in the abstract to be extreme, even outrageous, can be defined as the trimmers' best option. Those who believe in the abortion right might characterize their view as supporting an unqualified right to choose at any stage of the pregnancy; those who seek to protect commercial speech might urge that they want to give absolute protection to advertisements; those who seek to cabin the privacy right might deny the existence of any form of substantive due process.

The trimmers' approach explicitly lends itself to efforts at manipulation. To put it another way, the existence of trimming actually forces antagonists into a kind of prisoner's dilemma or arms race — even if they would not want, without trimming, to exaggerate the intensity of their own views. It is clear that trimmers have to be self-conscious about this risk; they must take steps to guard against their own vulnerability. We might distinguish here between naïve trimmers, who are easily exploited by others, and sophisticated trimmers, who are alert to others' strategic incentives and whose very alertness diminishes those incentives. Naïve trimmers are especially vulnerable here, and sophisticated ones may have to do a great deal of work to acquire the necessary information.

*2. Credibility Constraints.* — There are, however, reasons to think that this fear is overstated. If people characterize their positions in an extreme way, they may well lose credibility, and even compromisers will be able to see through them. In experimental settings, jurors who are inclined to avoid the extremes are not infinitely manipulable; a credibility constraint limits their interest in finding a "golden mean."[106] And as we have seen, two can play the manipulation game. Suppose that the parties begin at -5 and +5, and the trimmer opts for 0. If the first party then moves to -10, hoping to shift the trimmer to -2.5, the second party will likely move to +10, restoring the status quo.

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[105] *See id.* at 290–95 (showing that experimental jurors' choice of penalty varied in accordance with the options presented).

[106] *See* Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1182 (2008).

Nonetheless, it remains true that compromisers can be manipulated. By contrast, preservers are willing to sift and scrutinize competing views, and hence they are in a much better position. They should be able to see that strategic efforts sometimes yield positions that, on reflection, have no appeal and are not even sincerely held. Because of the risk of manipulation, along with the risk of error, preservative trimming has significant advantages over its compromise-oriented sibling.

*3. Arbitrary Poles?* — Even if preservers can overcome the problem of manipulation, a related problem remains: arbitrariness. What the midpoint is depends on what the endpoints are, and if no independent justification is given for the endpoints, then there is no justification for the midpoint that they establish. If the endpoints are arbitrary, then the midpoints will be arbitrary as well. Preservers are in a position to correct this problem because they will provide some scrutiny to the endpoints, ensuring that they contain something to preserve. Preservers can rule preposterous readings of the Constitution out of bounds — as, for example, in the view that the First Amendment is nonjusticiable or that the President can protect national security however he sees fit. Preservers can treat such readings as uninformative for purposes of trimming.

The problem of arbitrariness seems harder for the compromiser to solve. But suppose that the compromiser believes that the distribution of views, in the relevant place, is no accident and that it was produced by a set of mechanisms that ensure against arbitrary extremes. If the compromiser is concerned about the distribution of views on the Supreme Court, for instance, he might believe that political processes and norms of professionalization ensure that the extremes are not genuinely arbitrary. If he does not believe that, he might consult the distribution of views within the federal courts as a whole, thinking that such views are likely to have an appropriate and reasonable mix. And if he does not believe that, he might consult the nation more generally, believing that in a society that is both free and democratic, the range of opinion is not a bad guide to what is reasonable. Of course preservers might be skeptical on this count.

### *D. Lawless Trimmers*

Trimmers are influenced by a set of concerns whose relevance can be disputed, certainly in the domain of constitutional law and perhaps more generally. True, trimming can reduce social conflict and the intensity of public outrage at judicial decisions. But trimming is often inferior to minimalism on this count, simply because trimmers will not decline to decide. And even if trimming is a good means of reducing

outrage, why should judges care about public outrage?[107] Should they refuse to issue the best interpretation of the Constitution simply because the public would be angered by their decision? It might well seem that judicial trimmers are politicizing constitutional law; perhaps "there is a thin line between the unabashedly pragmatic exercise of splitting differences and the practice of politics itself."[108] It is true that trimming can be defended on strategic grounds. But should judges really be strategic? Should they attempt to persuade their colleagues by pressing for an interpretation of the Constitution that they do not endorse on principle?

Perhaps the least controversial defense of trimming involves stare decisis. Sometimes judges will have to yield in their preferred interpretation in deference to past rulings. A judge might believe, on principle, that affirmative action does not create serious constitutional problems; this belief might be defended on originalist or other grounds.[109] Perhaps such a judge will agree to trim in the sense that he will accept a ruling that is more moderate (given the existing poles) than he would prefer. But this defense is a limited one; it applies only in selected contexts in which stare decisis imposes an obstacle to selection of the favored approach. In some settings, no precedents require trimming; on the Court's view, this was in fact the case in the domain of the Second Amendment.[110] In other settings, the precedents are opaque, and judges can produce their preferred interpretations without trimming.

The best answer to the objection that trimmers are influenced by irrelevant concerns is that compromisers and preservers need not be lawless. Compromisers are seeking to identify the best interpretation of the Constitution, and they compromise in order to achieve that goal. When trimmers attempt to preserve what is deepest and most appealing in the views of the adversaries, they are also attempting to produce the best interpretation of the founding document. To be sure, some trimmers refer to considerations, such as public outrage, that might seem irrelevant to the ascertainment of constitutional meaning. But such trimmers might well respond that in the face of reasonable doubt, avoidance of public outrage, and of a sense of exclusion and humiliation, is indeed pertinent to identification of constitutional meaning.

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107 *See* SUNSTEIN, *supra* note 75.

108 Wilkinson, *supra* note 6, at 1991.

109 *See* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

110 District of Columbia v. Heller, 128 S. Ct. 2783, 2816 (2008) ("We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.").

### *E. Political Trimmers*

On one view, trimming is a quintessentially political act. For all of the reasons given thus far, legislators and other policymakers might want to trim. Indeed, trimming is a pragmatic necessity in the political domain. This point raises a distinctive objection: Why shouldn't judges simply defer to that form of trimming that emerges from politics? And if this question can be answered, another one remains: Why should we think that judges are good at trimming?

It is true that if the political process produces ideal trimming, judges might defer. But what emerges from politics is sometimes challenged, plausibly, on constitutional grounds, and the constitutional complaint raises issues that might not have been adequately handled politically. If so, judges must decide what to do. A distinguished tradition holds that so long as the Constitution is unclear, judges should defer.[111] But this view is highly controversial, and those who reject it might decide to trim. And even those who share this view must decide whether and when the Constitution is unclear; in hard cases, trimming might be appropriate. To the objection that judges lack the competence to trim, the best response is that preservers attempt to obtain the information that would justify their judgments and that compromisers act as they do precisely because of their own humility.

### *F. Taking Stock*

These are formidable objections; they show that it would be foolish to trim in all times and all places.[112] Trimming is best understood and justified as a decision procedure, suitable for some controversies, not as a characteristic or as a virtue suitable for constitutional law in general. But the objections should not be read for more than they are worth. They do not show that trimming has no place in politics or constitutional law. Humble and uncertain about what to do, compromisers have legitimate reasons for trimming. Preservative trimming also has an important place, whether judges are seeking to preserve what is deepest and best (by their lights), or to avoid public outrage, humiliation, or a sense of exclusion (by preserving what both adversaries believe to be most fundamental).

It is true that if judges are confident that the best interpretation of the Constitution forbids trimming, they should not trim. They should endorse the best interpretation. But suppose that judges are not confident about which interpretation is best, and they seek to trim on the ground that trimming is a reasonable heuristic or defensible on epistemic grounds. If so, they should be expected to spend some time on

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[111] *See* VERMEULE, *supra* note 4, at 1.

[112] *See* Goodheart, *supra* note 2, at 49.

the merits to ensure that the result is defensible, that manipulation has not led them astray, and that a reasonable heuristic has not produced an error in the particular case. If they are convinced on those counts, they might do best to trim. The objections to trimming downplay the possibility that judges lack confidence on the right outcome, which might justify trimming, and the force of stare decisis, which might require trimming. It is true that once judges have decided to trim, they will not know what, exactly, to do; several possible approaches might count as trimming. But at least some approaches will be ruled out, and the range of attractive options will be defined.

Because judges are specialists, they should not be mere compromisers, steering between the poles. Some of the best arguments for trimming emphasize preservation of the most essential and deeply held components of competing points of view. Preservers can maintain that they trim not out of cowardice, but on the ground that an investigation of the merits has persuaded them that trimming is best. If the preservative approach also reduces public outrage, and reflects respect for the fundamental convictions of all involved, so much the better. And if trimming ensures that those with competing views do not feel humiliated or hurt, it is better still.

## V. MINIMALISTS VS. TRIMMERS

Trimmers and minimalists seem to be jurisprudential cousins.[113] Both groups seek to reduce social conflict and public outrage, and many of the arguments that support minimalism support trimming as well. No less than trimmers, minimalists try to minimize the harm to losers, in a way that reflects a principle of civic respect. But whereas minimalists leave hard issues for another day, trimmers do no such thing; they reject the most expansive claims on behalf of rights while also recognizing rights of one or another sort. Minimalists celebrate the virtues of not deciding; trimmers want to decide. On the Supreme Court, the standard minimalist concurrence emphasizes the narrowness of a particular ruling and the fact that the Court has left certain issues for another day.[114] By contrast, the standard trimming concurrence stresses that the decision is more moderate than it might seem —

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[113] Judge Wilkinson seems to elide the distinction between the two groups with his exploration of "splitting differences." For example, he suggests that "[s]plitting the difference thus enabled the Rehnquist Court in its final years to craft narrow rulings . . . ." Wilkinson, *supra* note 6, at 1982. The word "narrow" suggests a focus on particulars, or a case-by-case approach, *see id.*, of the sort endorsed by minimalists; trimmers prefer width.

[114] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 66–68 (1999) (O'Connor, J., concurring in part and concurring in the judgment).

for example, because the Court has permitted certain practices that its rationale might be taken to forbid.[115]

It should be clear that insofar as trimmers insist on clear resolution of disputed questions, they are, in one sense, refusing to trim. A consistent trimmer would think: As between clear decisions and not deciding, I will trim. In the abstract, it is not obvious exactly what this means, but perhaps a consistent trimmer would decide some issues but not others. To keep distinctions simple, however, I will treat trimmers as committed to clarity, and minimalists as committed to leaving a great deal unresolved. Let us separate the two approaches and see what might be said on behalf of one or the other.

### *A. Shallow and Narrow*

Minimalists are skeptical of rights fundamentalism, certainly when the Court is initially confronting difficult questions. They fear that expansive conceptions of rights may be confounded by unanticipated situations. Nor do minimalists have much enthusiasm for the idea of democratic primacy; they fear that a wholesale rejection of rights claims will prove embarrassing or worse in the future. Minimalists prefer small steps over large ones. Their preference operates along two distinct dimensions.[116]

First, minimalists want to proceed in a way that is *shallow rather than deep*. In deciding what to do with a disputed constitutional provision, minimalists seek to leave the foundational issues undecided. They want to resolve a controversy over free speech or equal protection without resolving the deepest questions about the meaning of liberty and equality. They hope to produce *incompletely theorized agreements* — agreements on what to do amidst disagreements about exactly why to do it.[117]

Second, minimalists want to proceed in a way that is *narrow rather than wide*. Confronted with a controversy over an affirmative action program or a restriction on the abortion right, they will seek to proceed without resolving other (hypothetical) controversies. Consider in this light Chief Justice Roberts's suggestion that one advantage of unanimous decisions from the Court is that unanimity leads to narrower rulings. In his words, "[t]he broader the agreement among the [J]ustices[,] the more likely it is that the decision is on the narrowest

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[115] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring in the judgment); Lujan v. Defenders of Wildlife, 504 U.S. 555, 579–81 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

[116] I discuss minimalism at length in CASS R. SUNSTEIN, ONE CASE AT A TIME (1999).

[117] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–38 (1995).

possible ground."[118] The nine Justices have highly diverse views, and if they are able to join a single opinion, that opinion is likely to be narrow rather than broad. This, in the Chief Justice's view, is entirely desirable: "If it's not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."[119]

Shallowness and narrowness are distinct from one another. We could imagine a decision that is shallow but wide. Consider, for example, the view that racial segregation is always forbidden, unaccompanied by any deep account of what is wrong with racial segregation. We could also imagine a decision that is deep but narrow. Consider, for example, a ban on censorship of a particular political protest, accompanied by a theoretically ambitious account of the free speech principle, but limited to the particular situation in which censorship has been imposed. Although a decision might be both shallow and narrow or both wide and deep, the two distinctions point in different directions.

It is also important to see that both distinctions are ones of degree rather than kind. In most contexts, minimalists agree that courts should not decide cases without giving reasons, and reasons ensure at least some degree of depth. No one favors rulings that are limited to people with the same names or initials as those of the litigants before the Court. But among reasonable alternatives, minimalists show a persistent preference for the shallower and narrower options, especially in cases at the frontiers of constitutional law.

### *B. Why Shallow? Why Narrow?*

To support that preference, minimalists invoke several considerations. The initial point is pragmatic: as Chief Justice Roberts's comments suggest, no consensus may be possible on a more ambitious ruling. The constraints of group decisionmaking may make minimalism inevitable, at least if the Court seeks a majority opinion with at least five signatories. (As we have seen, the same point may explain the presence of trimming.)

In addition, judges often lack information that would justify confidence in a deep or wide ruling. Judges are neither philosophers nor historians, and an ambitious account of the foundations of some area of constitutional law, or the scope of some rule or principle, may strain judicial capacities. Of course those who embrace different methods of constitutional interpretation will think about minimalism in their own

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[118] John G. Roberts Jr., Chief Justice, U.S. Supreme Court, Commencement Address at the Georgetown University Law Center (May 21, 2006), *in* GEORGETOWN L., Fall/Winter 2006, at 19, 22.

[119] *Id.*

distinctive ways. If an originalist is to embrace minimalism, it might be on the ground that recovery of the original understanding presents hard questions, and it is best not to resolve all of those questions until the need arises.[120] Or suppose that a judge believes in a "moral reading" of the Constitution.[121] Such a judge might embrace minimalism on the ground that the best understanding of "equal protection" requires courts to make exceedingly difficult moral judgments that are best left for another day. And because adjudication typically focuses judges on particulars, a wide ruling may force them to confront factual problems on which they lack relevant knowledge. Originalists, moral readers, and others might favor narrowness for these reasons.

There is an independent point, closely connected with the argument for trimming. Insofar as they are shallow, minimalist rulings show a kind of respect to those with competing commitments on issues of principle and policy. If a ruling can command agreement from people with fundamentally different views, it demonstrates respect to those people, and even shows them a degree of charity. To the extent that judges have a degree of diversity, the respect that they show one another extends to their fellow citizens as well. When judges embrace shallowness, minimalists seek to obtain some of the virtues of the "overlapping consensus" defended in accounts of political liberalism.[122]

Like trimming, minimalism also has the advantage of quieting social controversy, certainly in the short run and possibly in the long run as well. A minimalist approach can therefore claim Burkean virtues insofar as it promotes incremental change.[123] Suppose the Court rules that a particular affirmative action program is valid, without ruling on other affirmative action programs, or that a particular form of discrimination on the basis of sexual orientation is invalid, without ruling that other forms of such discrimination are invalid. A narrow, shallow ruling ensures that losers do not lose the world. Minimalism maintains space for the losers to introduce their deepest convictions into future controversies.

For this reason, minimalists can claim that their approach has democratic advantages as well. A narrow, shallow ruling maintains space for continued discussion and debate. If the Court has not chosen a foundational account of the free speech principle, or the Equal Protection Clause, those with different accounts can press their views in democratic arenas. And if the Court has ruled narrowly — for example, on discrimination on the basis of sexual orientation or detention in

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120 The minimalist features of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), might be defended in this way.

121 *See, e.g.*, DWORKIN, *supra* note 59, at 2–12.

122 *See* JOHN RAWLS, POLITICAL LIBERALISM 133–68 (1996).

123 *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

connection with the war on terror — then participants in democratic processes can debate those issues before constitutional law becomes frozen. A chief goal of minimalists is to maintain democratic space, in large part because of a fear that judges might blunder.

### *C. Deep, Wide, and Trim*

*1. Against Minimalism: On Predictability and Exporting Costs.* — Trimmers will insist that these points do not make out an adequate defense of minimalism in all contexts. In law as well as in life, it is sometimes best to settle on a course of action rather than to rest content with a series of narrow, ad hoc decisions. Minimalism might be easiest in the short run, but in the long run, it can be extremely destructive. It can be destructive in part because it exports the burdens of decision to others, in a way that might produce a great deal of trouble for future courts and litigants.[124] However difficult a large decision may be, it may be best to make it, and sooner rather than later. Wide rulings can reduce the overall burdens of decision; they can also reduce the magnitude and number of mistakes. And if enduring social controversy is a legitimate cause for concern, then width might be defended on the ground that such controversy might be diminished, or muted, if the court settles a range of issues at once.

If democratic space is our focus, we might opt for a decision that explicitly maximizes that space, rather than leaving the constitutional issues unresolved.[125] The Court might rule, for example, that Congress has broad room to act under the Commerce Clause, rather than resting content with a series of narrow decisions that are based on particular facts. A wide ruling to that effect is not a form of trimming, but it would seem to be best on purely democratic grounds, and rulings that involve trimming might well create significant democratic space as well — as, for example, in the idea that Congress can act as it likes under the Commerce Clause except in (explicitly defined) settings *X*, *Y*, and *Z*. All of these points in favor of width can be supplemented by an emphasis on the importance of predictability. Narrow rulings leave litigants, courts, and public officials at sea — a serious problem in domains in which planning is essential.

Shallowness has its virtues, but sometimes it is best to resolve foundational issues. Some cases cannot be decided at all unless judges make relatively large-scale decisions about constitutional method or constitutional substance. Should judges embrace originalism? A dispute over the constitutional status of discrimination on the basis of

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[124] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

[125] *See* VERMEULE, *supra* note 4, at 230–88 (arguing for judicial deference).

sexual orientation will make it necessary to answer that question. Or consider the constitutional legitimacy of bans on same-sex marriage. Resolution of that question may require some ambitious judgments about the commitments that underlie a constitutional guarantee. And even if depth is not, strictly speaking, required, judges may reasonably opt for it. They might conclude that they have enough understanding and experience to offer, right now, an ambitious account of the free speech or equal protection principle. If so, why should they hesitate?

Alert to these objections, trimmers are willing to rule widely, in a way that will minimize confusion and conflict for the future. In especially sensitive areas, they insist that width will simultaneously create more stability and less controversy. They are perfectly comfortable with clear rules, laid down in advance. They are also willing to think hard about the foundations of constitutional law — about the appropriate constitutional method and about the grounds of one or another right. Trimmers refuse to "export" decisions to posterity. In short, trimmers favor width, and they are not at all averse to depth, at least to the extent that depth can be achieved while also trimming.

There is a further point. We have seen that preservers seek to identify and to endorse the deepest and most essential commitments of the adversaries. By contrast, minimalists try not to reject those commitments. Trimmers might argue that their approach has significant advantages insofar as they are able to take deep commitments directly on board, rather than merely not to repudiate those commitments. If we are preservers first and foremost, and trimmers or minimalists because we seek to preserve, then we will often favor trimming over minimalism.

It should now be clear why and when minimalists and trimmers disagree. In a dispute involving affirmative action, a minimalist would be tempted to focus on the particular program, in a way that would leave a great deal undecided. A trimmer, by contrast, would make relevant distinctions in a way that would introduce a high degree of predictability. Consider, as a prominent example of trimming, Justice Powell's separate opinion in *Bakke*, concluding that quota systems are unacceptable but that educational institutions might legitimately use race as a "factor."[126] A committed minimalist would prefer a narrower decision, leaving undecided the question whether and when most affirmative action programs would be upheld. The minimalist would ask the trimmer: "Why decide issues that are not squarely presented?"

The trimmer would respond: "The Supreme Court does not exist to issue fact-specific rulings; one of its most important responsibilities is

[126] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–19 (1978) (opinion of Powell, J.).

to offer clear guidance to lower courts and other institutions."[127] The same response might be offered in cases that involve the relationship between the First Amendment and the law of libel or the power of the Commander-in-Chief. Might it not be better to rule widely in these domains, so as to make the basic rules clear?

*2. Rules and Standards, Trimmers and Minimalists.* — How might this kind of dispute be mediated? The issues are similar to those that divide advocates of open-ended standards from advocates of precise rules.[128] Those who prefer standards are likely to be drawn to minimalism. Consider the "undue burden" standard in the law of abortion,[129] an approach that invites case-by-case rulings under a general concept whose specific content has not been specified in advance. Rule enthusiasts ask: "Why should the Court proceed under the undue burden standard, instead of laying out clear rules that settle all or most issues in advance?" Those who embrace standards are likely to respond that any effort to lay out rules would produce too many blunders. If the Court attempted to specify, in advance, what amounts to an "undue burden," it might itself face an undue burden, and in a way that would guarantee numerous errors as new situations arise. A conventional argument for standards, as opposed to rules, is that standards ensure flexibility for the future, thus reducing the magnitude and number of mistakes.

On the other hand, enthusiasts for rules, such as Justice Scalia, might well object that an open-ended standard of this kind will create many problems.[130] Rules are often better than standards, because they minimize the burden on future decisionmakers and also reduce mistakes on balance. We would probably not want the speed limit law to take the form of a standard rather than a firm rule. In constitutional law, a standard reduces the burden on the Court in the case at hand, but it does so at a high price, because it exports the burdens of decisions to future litigants and courts, in a way that might magnify costs on balance. And if the Court has a degree of confidence in its judgment, a wide rule might produce fewer future errors, on balance, than a narrow one. Suppose, for example, that a flat ban on affirmative action is what the Constitution requires. If so, why proceed case-by-case?

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[127] For valuable discussion, see Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000).

[128] *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953 (1995).

[129] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–79 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[130] *See* Scalia, *supra* note 124.

Much of the trimmer-minimalist debate involves the costs of decisions and the costs of errors. We can easily imagine situations in which either minimalism or trimming is best on those grounds. Trimmers tend to believe that their approach has the key advantage of rules: clear specification of outcomes in advance. Minimalists think that their approach has the key advantage of standards: flexibility in the face of an uncertain future. The choice between the two approaches depends on the context. We could easily imagine a situation in which minimalism should be preferred to trimming because judges lack the information to justify width or breadth; consider novel First Amendment questions raised by contemporary technologies.[131] We could also imagine situations in which trimming should be preferred to minimalism because the problem arises so frequently that uncertainty is intolerable; consider regulation of commercial advertising[132] or sexually explicit speech.[133]

We could also imagine difficult intermediate cases; consider the question of rights under the Second Amendment.[134] On the one hand, minimalism might be defended on the ground that the Court has had little experience with that question and the array of imaginable restrictions cannot be assessed in the context of a first encounter, or even a series of early encounters. Perhaps trimming would do too much too soon. But there are strong counterarguments. Suppose that the Justices are fairly clear, even at an early stage, about the best understanding of the Second Amendment and that they also reject rights fundamentalism and democratic primacy. If so, they might trim on the ground that no one benefits, and many lose, from protracted litigation over that meaning.[135] The difficult experiences of specifying the meaning of the abortion right,[136] and the meaning of the Equal Protection Clause in connection with affirmative action programs,[137] point to the large costs, both economic and political, of a stream of case-by-case rulings focused on particulars. If, as it seems, those costs would be high in the Second Amendment context, and if the Court has a clear sense, right now, of what it is thinking and doing, then it would be much better to trim.

But the debate between trimmers and minimalists is not reducible to the debate between rules and standards. We need to understand

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131 *See, e.g.*, Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996).

132 *See, e.g.*, sources cited *supra* notes 44–46.

133 *See supra* p. 1062.

134 *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

135 In fact the Court's initial decision on the topic, *see id.*, combines a measure of trimming with considerable minimalism. *See* Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism:* Heller *As* Griswold, 122 HARV. L. REV. 246, 267–69 (2008).

136 *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 857–916 (5th ed. 2005).

137 *See id.* at 576–622.

precisely why trimmers trim, and why minimalists favor shallowness and narrowness, and ask whether their arguments apply in the context at hand. We have seen that trimmers attempt to defend their approach on various grounds, including the epistemic value of compromise; the importance of preserving the deepest commitments of the opposing sides; the need to ensure that, to the extent possible, no one feels humiliated or excluded by judicial rulings; and the value of quieting social controversy. Some of these considerations may call for trimming rather than minimalism — as, for example, when trimmers, but not minimalists, are able to endorse the most essential commitments of both sides. Some of these considerations may call for minimalism — as, for example, when a trimming solution will necessarily trigger acute social controversy while minimalism would not. The choice between minimalism and trimming will depend on the weight to be given to the relevant variables in the situation at hand.

*3. The Path of the Law; From Minimalism to Trimming?* — Over time, minimalist rulings might produce a regime of trimming. Return to the problem of affirmative action. Most of the Court's early rulings were both narrow and shallow.[138] The Court focused on particulars and left a great deal undecided. As the precedents accumulated, the law became increasingly clear.[139] The clarity involved trimming, in the sense that the Court rejected rights fundamentalism (in the form of a wholesale rejection of affirmative action programs) and democratic primacy (in the form of carte blanche for such programs).

As cases accumulate, minimalism is highly likely to prove unstable. Width will increase: shallow rulings with respect to obscenity, commercial advertising, and sex equality will eventually produce a degree of width. Depth is also likely to increase: to decide whether one case is analogous to another, judges have to offer reasons, and as problems become more confusing and difficult, those reasons will become more ambitious.[140]

But the movement from minimalism to trimming is not inevitable. Minimalist rulings might culminate in either rights fundamentalism or democratic supremacy. Consider the area of sex equality, which has produced something close to rights fundamentalism, in the form of a near-complete ban on formal sex discrimination.[141] Or consider "rational basis" review in the domain of economic and social rights, in which a series of narrow rulings developed into a regime of democratic

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[138] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); *see also* Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1185–87 (1996).

[139] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[140] *See* DWORKIN, *supra* note 4, at 69.

[141] *See* United States v. Virginia, 518 U.S. 515, 531–34 (1996).

primacy.[142] Trimmers might reject minimalism not only on the ground that it leaves so much undecided, but also on the ground that it creates risks of slipping, by degrees, into one or another of the poles.

## VI. WHEN TRIMMING? WHEN NOT?

We are now in a position to make some general remarks about the domain of trimming, and about the choice among that approach on the one hand and rights fundamentalism, democratic primacy, and minimalism on the other.

### *A. Trimmers vs. Minimalists*

The simplest opposition involves the issues I have just been discussing. Suppose that a judge is choosing between trimming and minimalism. The choice turns largely on the costs of decision, the costs of error, and the importance of predictability. If the area of the law is novel, if judges lack information, and if private and public institutions do not require a clear settlement, minimalism is evidently better. Suppose, for example, that a judge is confronting a question about the constitutionality of sex discrimination in 1971, the constitutionality of discrimination on the basis of sexual orientation in 2002, or the meaning of the Commander-in-Chief power, in connection with the war on terror, in 2008. In such cases, it would be foolish to attempt to provide wide rulings. Minimalism is far better than trimming, simply because courts do not have sufficient information to justify width.

Or suppose that a judge believes, now, that the Equal Protection Clause requires states to recognize same-sex marriages, but that for prudential and institutional reasons, it would be a mistake for federal courts to rule to that effect. Such a judge would not be inclined to find a way to trim — as, for example, by holding that states need not make marriage available but must provide the legal benefits that normally accompany it. If the judge believes that this result would be bad in principle, the judge would do better to leave the fundamental issue undecided.

But we can imagine cases in which trimming is better than minimalism. Suppose that a contemporary judge is confronting a question about regulation of commercial advertising, the relationship between the First Amendment and libel law, or government use of religious symbols. These questions are hardly new, and judges do not lack relevant information. For each of them, predictability is important; for example, it is highly undesirable if litigants and courts are at sea about the legitimate domain of libel law. For this reason, trimming has large

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[142] *See* Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487–88 (1955).

advantages over minimalism. An investigation of the same considerations that underlie the rules-standards debate will help to resolve disagreements between trimmers and minimalists.

Return to the question of Second Amendment rights. It is at least reasonable to think that the Court should trim and thus avoid a long, heated, polarizing, time-consuming series of case-by-case rulings. It would be better, perhaps, for the Court to settle the Second Amendment problem in a way that gives ground, and pays respect, to both sides, instead of embroiling the nation in constant battles within the federal courts over the domain of the relevant right.

### *B. Trimmers, Democratic Primacy, and Rights Fundamentalism*

Of course judges have other options. Sometimes trimming and minimalism lack much appeal. Sometimes there is a difficult question whether a judge should choose to trim.

In the domain of economic regulation, judges generally are committed to democratic primacy, in the sense that legislatures have a great deal of room to maneuver.[143] In the domain of political dissent, the law is governed by a form of rights fundamentalism.[144] In both domains, the Court might have chosen instead to trim, but the Court was correct not to do so. No constitutional provision raises serious questions about maximum hour and minimum wage legislation. No plausible account of the judicial role justifies the most careful judicial scrutiny of the standard forms of economic regulation (short of takings of private property). In that domain, the arguments that sometimes justify trimming are weak. Neither compromise nor preservation has much appeal. There is no good epistemic argument for compromise as such. Nor is there reason to think that with standard forms of economic regulation, some kind of trimming is really necessary to prevent a sense of exclusion or humiliation.

Compare the domain of political dissent, in which trimming has been rejected, and the Court's refusal, in *Brown v. Board of Education*, to adopt that form of trimming that was represented in the regime of "separate but equal." In those domains, the argument for minimalism was weak; the Court had reason for confidence in its conclusions, and these were not novel domains presenting fresh questions of fact or morality. And in those domains, trimming would have been wrong on the merits. The regime of "separate but equal" was a palpable violation of the Equal Protection Clause, properly conceived. A kind of First Amendment trimming might be found in a test that

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143 *See, e.g.*, cases cited *supra* note 142.

144 *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–12 (1982); Brandenburg v. Ohio, 395 U.S. 444 (1969).

would resolve free speech disputes by weighing the costs and benefits of political speech; but such speech should not be regulable merely because it imposes costs that seem greater than its benefits.[145]

Here too, the best arguments for trimming are especially weak, and the most powerful objections are especially strong. The epistemic arguments for compromise are not easily invoked on behalf of "separate but equal" or a cost-benefit test for political censorship. It is true that many people were profoundly unhappy with *Brown*,[146] but their unhappiness was based largely on racial bigotry, and the Court was right not to take that reaction into account, certainly not in its ruling on the merits. For reasons I have given, preservative trimming has an important place, but in *Brown*, the Court did not fail to preserve anything of value.

We can generalize from this discussion. When rights fundamentalism is chosen over trimming, it is because in the relevant areas, the arguments for trimming are not much in play, and the objections have particular force. As we have seen, the arguments on behalf of trimming seem to have considerable power in the domain of Second Amendment rights. In that domain, trimming is a way of bringing on board the moral convictions of millions of Americans who are committed to an individual right to possess guns, while also recognizing that for some gun control restrictions, governments have legitimate and weighty justifications.

Of course I have not said enough to justify any particular conclusion about any particular area, and it is true that judges lack any kind of algorithm or metric here. To resolve reasonable disagreements, there is no way to escape engagement with the arguments for and against trimming. Judgments about particular domains require close attention to the specific constitutional provisions that are involved. It follows that when the Court favors democratic primacy or rejects rights fundamentalism, it is because the best justifications for compromise or preservation seem weak, and because trimmers appear confused, lawless, or both. In this light we might be able to see what those who disagree about trimming are actually disagreeing about.

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[145] Through the middle of the twentieth century, the Supreme Court took the view that the benefits of political speech should be weighed against its costs discounted by their improbability. This balancing approach was taken in *Dennis v. United States*, 341 U.S. 494, 510 (1951); it is defended in Richard A. Posner, *The Speech Market and the Legacy of* Schenck, *in* ETERNALLY VIGILANT 121 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). For a defense of the current approach, which rejects balancing, see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). We could imagine situations in which societies faced grave risks of violence, in which the *Brandenburg* test would have to be rethought, and in which a form of trimming would come to have appeal.

[146] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 385–442 (2004).

### *C. Trimming Without Trimmers? On Institutions that Produce Trimming*

My focus has been on particular judges, asking whether or not they should trim. But as some of the discussion has suggested, trimming might be a product of institutional arrangements rather than of the specific decisions of anyone involved. In a constitutional democracy, we can find trimming without trimmers. It is important to ask whether the legitimate goals of trimmers might often be achieved, not by self-conscious trimming, but by institutions designed to produce outcomes that could have emerged, but did not emerge, from explicit decisions to trim.

The most obvious example is a multimember court. Even if no individual judge would prefer to trim, the need to obtain a majority position might well lead in the direction of trimming in terms of both result and rationale. Any group with heterogeneous views might find itself trimming (just as any such group might find itself ruling narrowly and shallowly). A national legislature is likely to trim, in the sense that much legislation will tend to compromise and to preserve. Those with intensely held views will press their claims aggressively before elected officials, and hence those views are likely to find acceptance in legislation, at least if the actors have sufficient power. And because of the need to accommodate diverse views, a bicameral legislature is especially likely to produce results that appear to trim. Consider in this regard Hamilton's suggestion that the "differences of opinion, and the jarring of parties in [the legislative] department of the government . . . often promote deliberation and circumspection, and serve to check excesses in the majority."[147] Insofar as Hamilton emphasized the check on "excesses in the majority," he is naturally read to suggest that bicameral legislatures will trim.

More generally still, certain constitutional systems are likely to produce outcomes that look like forms of trimming, even if such orders lack trimmers. In a system of checks and balances, with presidential vetoes and judicial review, much of resulting law will be a form of "as if" trimming — that is, it may well resemble what would emerge from self-conscious trimmers. Of course trimmers are not logrollers; they do not believe in unprincipled compromises. But insofar as some constitutional systems tend to steer between the extremes, and to preserve people's deepest commitments, they lead to many results that appeal to self-identified trimmers. Such results will preserve the deepest commitments of all sides, and they will also decrease the likelihood that any group is excluded, humiliated, or hurt.

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[147] THE FEDERALIST NO. 70, at 425 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

With respect to institutions, we can imagine debates similar to those raising the question whether judges should embrace rights fundamentalism, democratic primacy, minimalism, or trimming. In some times and domains, minimalism is best. Perhaps national lawmakers should ensure flexibility and leave key questions undecided; perhaps institutions should be designed so as to allow changes in light of changing circumstances. In other periods, it is crucial to settle a wide range of questions so as to promote predictability, and institutions are created precisely in order to produce clear rules. In still other periods, institutions should be designed so as to facilitate compromise and to bring a range of views on board. In yet other periods, it is important to move in dramatic new directions, even if many people do feel excluded or rejected. Problems of institutional design are often explored with at least implicit attention to questions of this sort.[148]

## VII. CONCLUSION

My purpose here has been to show that trimming is a pervasive practice in law and politics and to understand what might be said in its favor. Many trimmers are compromisers; they think that if we steer between the poles, we will probably do better than if we choose one or another of them. Such trimmers display a form of extremeness aversion, and under certain circumstances, the trimming heuristic makes a great deal of sense. It might even be justified on epistemic grounds.

Other trimmers are preservers. They attempt to identify and to preserve what is deepest, most intensely held, and best in competing positions. Trimmers of this kind can claim a degree of humility, because of their sympathetic attention to all sides. But to the extent that they are preservers, trimmers are willing to scrutinize the poles, not simply to observe them. For that reason, preservers are less subject to manipulation. In the end, they have some reason for confidence that their decision is correct, not merely a way of splitting the difference.

By their very nature, trimmers hope to reduce social conflict, to show a kind of civic respect, and to ensure that no side feels excluded, humiliated, or hurt. We can see here a tension between preservers who attend to what seems, in their independent judgment, to be most appealing in competing positions, and preservers who attend to what seems to be most deeply felt by those who hold those positions.

It is possible, of course, that any form of trimming will produce a bad or even indefensible result. Any judgment on that point will depend on the appropriate theory of constitutional interpretation.

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[148] During the New Deal period, for example, trimming had little appeal, and new institutions were designed to ensure significant movements. For a statement that captures much of the thinking of the era, see JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

Originalists will often reject trimming, as will those who are committed to a moral reading of the Constitution.[149] It is also true that trimmers can be manipulated. If the poles are arbitrary, the trimming solution will be arbitrary too. In some domains, minimalism is preferable. In other domains, rights fundamentalism or democratic primacy is unquestionably better, simply because in those domains, the justifications for trimming lack force, and the objections turn out to be decisive. But I hope that I have said enough to show that trimming is not only a pervasive practice but also an honorable one. In many areas, it is superior to the reasonable alternatives.

[149] Both originalists and moral readers might, of course, endorse trimming within their preferred method — as, for example, when originalists choose to compromise between originalist positions, or to preserve what is most plausible in competing originalist positions.