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Rationalism in Constitutional Law.

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Despite the variety and complexity of constitutional doctrines, a fundamental similarity runs through many of the Supreme Court's "analytic devices." At least some of the words keep changing, but the tune continues to sound suspiciously familiar. A "time, place and manner" restriction on speech must serve a significant governmental interest. The government may restrict commercial speech if its interest is substantial and its regulation directly advances that interest. Programs that aid religions must have a secular legislative purpose. To justify discrimination against a "suspect classification" the government must show that its purpose is substantial and the distinction is necessary for accomplishing that purpose. Gender classifications must serve important objectives and be substantially related to achievement of those objectives. Abortions may be regulated in the second trimester in ways that are reasonably related to protecting maternal health. Whether administrative procedures comply with due process standards depends in part upon the weight of the government's interest. State regulations that restrict interstate commerce must serve a legitimate local purpose and there must not be alternate means for promoting that purpose. In short, across a surprisingly wide array of subject areas[1] the Court strikes the same chord again and again: in varying degrees the government must justify its rules by articulating a sufficiently important purpose and demonstrating that the rule will achieve that purpose.

For the most part, the persistent recurrence of this theme seems to cause the Justices no embarrassment. Perhaps the appropriateness—indeed, the necessity—of demanding this general sort of justification is to them natural and self-evident. Nevertheless, to anyone not inured to the Court's methods, it must be perplexing that constitutional provisions apparently so different substantively should all turn out to have such similar meanings operationally. In-

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1. The full text of the formulae from which these examples are extracted can be found in Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 166-68 nn. 3-18 (1985). For other examples, see Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

deed, the coincidence is sufficiently striking that the uninitiated might wonder how much the Court's "interpretations" could possibly have to do with the document itself.

Scholars have sometimes attempted in sophisticated (and inventive) ways to explain why the means-ends inquiry is relevant to the substance of particular provisions.[2] Whether or not convincing on their own terms, these explanations do not directly address the questions raised by the coincidence that so many of these particular provisions all turn out to have the same essential meaning. One commentator has bravely faced up to this issue. Professor Cass Sunstein attempts to convert the mystery into an intellectual asset; the very fact of coincidence, he suggests, implies the possibility of "a unitary theory of the Constitution."[3] But why should a constitution, presumably designed for many purposes, be amenable to a single theory? Professor Sunstein's answer is that the framers were broadly influenced by a concern that powers be exercised only on the basis of a sense of civic virtue, that is, only on the basis of the common good. Starting from this historical claim, he does not find it surprising that so many provisions are concerned with a demonstrable relationship between laws and identifiable public purposes.

Sunstein's approach is consoling not only jurisprudentially but also psychologically. It enables us to view the myriad judicial formulae as neutral intellectual tools, subject to conscious control and calibration. To the extent that the typical demand for justification is shown to be inapposite to the substance of a specific provision, doctrine can be modified accordingly.[4] The resulting preoccupation with adjusting doctrine is, then, premised on a bracing conception of the Constitution; rather than a collection of compromises or suppressed disagreements or abstract ideals, its provisions are thought of as a series of objectives, to which the judiciary's formulae should be reasonably related. Concentration on the design of means-ends formulations thus permits the satisfaction that comes from a self-contained intellectual system, for the universe of governmental action, including judicial review itself, is to be assessed by a single, overriding criterion.

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2. *E.g.*, Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO St. L.J. 639 (1981); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Perry, *Modern Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977).

3. Sunstein, *supra* note 1, at 1732.

4. Commentators have suggested, for example, that the demand be dropped when the decision under review is "expressive," *see* Bice, *supra* note 2, at 9, or "aesthetic," *see* Leedes, *supra* note 2, at 665.

This orderly vision, for all its obvious appeal, is hard to accept as a realistic description of the Constitution. Although the framers' political theory surely did involve fear of public power used for private ends, the extent to which the demand for means-ends justifications runs through the Court's doctrines cannot adequately be explained on this ground. One reason is the variety that at least apparently characterizes much of the Constitution. It is implausible that provisions as disparate as that authorizing Congress to regulate interstate commerce (adopted as a central part of the original document in order to strengthen the national government) and that prohibiting Congress from abridging freedom of speech (adopted as an amendment because of fears about the strength of the national government) can be anchored in a single generic value that reappears much later in the Civil War amendments.

In explaining the similarity in so many of the Court's doctrines, any appeal to the framers' design is further undermined by the range of uses to which those doctrines are put. Nearly any aspect of public policy turns out to be subject to the Court's preferred method of analysis. Should 65-foot "double" trucks be permitted on state highways? Should physicians be required to inform patients about the "detrimental physical and psychological effects of abortions"? May a community decide to keep posters off telephone poles? May aliens be excluded from the civil service? Should it be considered rape for a woman to have intercourse with an underage male? Should the Air Force permit its personnel to wear yarmulkes? May a state prohibit the distribution of pornographic pictures of children? Should a state automatically provide hearings before removing a child from a foster home? May an agricultural fair confine religious solicitation to a fixed location within the fair grounds? The Court has answered all these questions,[5] and a multi-

5. The Court's conclusions were as follows: The 65-foot "doubles" were not more dangerous than shorter trucks. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 671-74 (1981) (plurality opinion). The abortion disclosure requirement would achieve "the antithesis of informed consent" because it would increase patients' anxiety. Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2180 (1986). The rule against posters was sufficiently related to preventing a "visual assault" on citizens. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984). The civil service exclusion was not related to the important purpose of "having an employee of undivided loyalty." Sugarman v. Dougall, 413 U.S. 634, 641-42 (1973). Punishing only men for statutory rape deterred teenage pregnancy. Michael M. v. Superior Court, 450 U.S. 464, 472-73 (1981). Military uniforms encouraged "the subordination of personal . . . identities in favor of the overall group mission." Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986). The prohibitions against distributing child pornography were related to " 'the protection of children from exploitation through sexual performances.' " New York v. Ferber, 458 U.S. 747, 757 (1982), citing 1977 N.Y. Laws, ch. 910, § 1. Automatic hearings would serve no purpose if "a foster parent . . . does not care enough about the child to contest the removal." Smith v. Organization of Foster Families, 431 U.S. 816, 850 (1977). Confining the location for solici-

tude of others, in large part by assessing the extent to which the government is achieving an articulated public policy.

The pervasive application of the Court's methodology suggests something quite different from adoption of an intellectual tool formulated to achieve the framers' purposes. It suggests a compulsive retreat to familiar mental terrain, a habit of thought more controlling than controlled. It suggests, in short, that modern constitutional law is largely the free-floating application of one version of reason to public issues.[6] What is that version, and what are its implications?

I

The recurrent inquiry required by so much of constitutional doctrine has a name and an identifiable place in modern intellectual history. Michael Oakeshott termed the general approach "rationalism." Rational conduct, according to Oakeshott, is "behaviour *deliberately* directed to the achievement of a *formulated* purpose and governed solely by that purpose."[7] Oakeshott's account is subtle but can be usefully sketched here because his description will be quickly recognizable to anyone coversant with modern constitutional law.

Seeking always to convert moral sensibilities into abstract statements, the rationalist prefers knowledge that is "susceptible of formulation in rules, principles, directions, maxims—comprehensively, in propositions."[8] Although the rationalist knows that knowledge of this kind can be imperfect and in need of correction, he never doubts the possibility or utility of precise formulation.[9] To be sure, "he can imagine a problem which would remain impervious to the onslaught of his own reason. But what he cannot imagine is politics which do not consist in solving problems . . . ."[10] Accordingly, the rationalist sees no alternative but to bring "the social, political, legal and institutional inheritance of his society before the tribunal of his intellect . . . ."[11]

Of course, the methods of rationalism are of some use. And there is no doubt that these methods are to some degree appropriate

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tations would serve the state's interest in the "orderly movement of the crowd . . . ." Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 649-50 (1981).

6. I first suggested this in Nagel, *Book Review*, 127 U. PA. L. REV. 1174 (1979), from which much of the rest of this article is adapted.

7. M. OAKESHOTT, RATIONALISM IN POLITICS 83 (1962) (emphasis in original).

8. *Id.* at 10.

9. *Id.* at 5, 7.

10. *Id.* at 5.

11. *Id.* at 4.

in the enforcement of a Constitution that was itself heavily influenced by precisely this frame of mind. Indeed, so ascendant is rationalism in modern society that a predictable reaction to Oakeshott's description is to ask what alternatives are imaginable for the judiciary or any other conscientious decisionmaker. Attempting to supplement rationalism seems the equivalent of seeking alternatives to intelligence itself.

Despite its currency, rationalism is not a synonym for all methods of moral and intellectual inquiry. It is not the same as insight, creativity, wisdom, vision, instinct, or empathy. Although the Constitution was framed within a rationalist tradition, its design—chiefly, the requirements of electoral accountability and multiple governments—plainly leaves room for the interplay of power exercised on the basis of other types of decisionmaking. The Antifederalists' major contribution to the Constitution was to insist on assurances that the new national government would not be excessively powerful or culturally remote; they demanded that the opportunity for active participation and identification with government be preserved.[12] In response, the Federalists emphasized the variety of opportunities for organization and influence that a large and politically layered nation would provide.[13] The government, they acknowledged, "must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support, those passions, which have the strongest influence upon the human heart."[14] Under the proposed system the variety of immediate personal interests would "form . . . many rivulets of influence running through every part of the society . . . ."[15] Those who created the Constitution understood that power should often be responsive to self-interest and felt preferences.

Given the range of legitimate bases contemplated in the Constitution for the exercise of power, why has the demand for rationalism become pervasive? The simplest explanation begins with the fact that courts so commonly state constitutional values with glorious abstraction. If a value is sufficiently abstract it will necessarily seem to have broad relevance to human affairs, important or petty. In large measure, constitutional interpretation has come to be the identification of a trace of some grand value in a particular provision and then the explosion of the meaning of that provision so that it stands for the grand value itself.

The Court has said, for example, that "if the right of privacy

12. C. KENYON, THE ANTIFEDERALISTS xl, li, liii, 388 (1966).
13. THE FEDERALIST No. 10 (J. Madison), No. 51 (J. Madison).
14. THE FEDERALIST No. 16, at 103 (A. Hamilton) (J. Cooke ed. 1961).
15. THE FEDERALIST No. 17, at 107 (A. Hamilton) (J. Cooke ed. 1961).

means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[16] The equal protection clause invalidates laws that perpetuate "stereotyped view[s]" of men and women.[17] The free speech clause is aimed at insuring that public debate is "uninhibited, robust, and wide-open,"[18] and ultimately it protects "the premise of individual dignity and choice upon which our political system rests."[19]

In its drive to find ever more expansive values in the Constitution, the Court has not been off on a frolic of its own. It is deeply enmeshed in a general intellectual fashion. Scholars have described the purposes of free speech as including "individual self-realization"[20] and "moral growth."[21] The lowly impairment of contract clause has been said to be a limitation on rent-seeking factions and is thus "an essential part of our basic constitutional scheme of limited government."[22] One scholar described the purposes of procedural due process as maintaining "personal dignity and autonomy" and minimizing "subservience and helplessness."[23] Perhaps setting a record even in this highly competitive area, he described the purpose of the right of association as "facilitating the emergence of relationships that meet the human need for closeness, trust, and love . . . without which there can be no hope of solving the persistent problem of autonomy and community."[24]

Constitutional values are stated at exalted levels of abstraction partly because modern sophistication, having liberated judges from the confines of text and history, has liberated constitutional values from the specificity that these can provide. The exalted nature of the values is also a corollary to assumptions about constitutionalism itself: the Constitution necessarily must address the most serious public concerns and must achieve a result that can be seen as virtuous in order to be worthy of its fundamental status. Any imperfections or limitations in the document must be remedied by interpretation. The idea that the fundamental law must be

16. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

17. Mississippi University for Women v. Hogan, 458 U.S. 718, 729 (1982).

18. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

19. Cohen v. California, 403 U.S. 15, 24 (1971).

20. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

21. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 314-15 (1981).

22. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 717, 751 (1984).

23. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 560 (1978).

24. *Id.*, at 988.

omnipresently virtuous is itself one aspect of the method of thinking that has become so confounded with the Constitution. The essence of rationalism, said Oakeshott, is "the imposition of a uniform condition of perfection upon human conduct."[25] To the kind of mind that believes autonomy and community constitute a "problem" that can be "solved," anything is possible; to such a mind even the great dilemmas (although annoyingly persistent) can be expected to yield eventually to proper analysis. "The odd generation of rationalism in politics is by sovereign power out of romanticism."[26]

The coexistence within the constitutional design of rationalism with other forms of decisionmaking is precarious. The Court's resort to the methods of rationalism not only has been but can be expected to be reflexive and arrogantly expansive. It is important, therefore, to consider how other aspects of the constitutional system are jeopardized by excessive reliance on this single strain in the framers' thought.

II

Although rationalism is no doubt compatible with aspects of the framers' thought and with traditional judicial methods, an unconfined demand for rationalism in government is neither desirable nor realistic in a democracy. Treating social choices as a series of intellectual problems is reassuring to many in the educated classes, but it also tends to denigrate important values and to stunt moral and political discourse. At a time when it is increasingly fashionable to rationalize the scope of the Court's power on the basis of the capacity of judges to contribute to public dialogue,[27] it is grimly ironic that the predominant judicial approach is a prescription for avoidance, misunderstanding, and obduracy.

Articulation. Because rationalism emphasizes the conscious evaluation of whether a policy will achieve its objective, policies for which such analysis is inappropriate are unappreciated. If a governmental decision is based on a value that cannot usefully be articulated independently from the decision itself, the exercise of matching means to ends is disappointingly unnecessary. When a policy implements personal taste, for example, the objective is indistinguishable from the policy. In such cases litigants, knowing (and

25. M. OAKESHOTT, *supra* note 7, at 6.

26. *Id.* at 7.

27. *E.g.*, P. BOBBITT, CONSTITUTIONAL FATE THEORY OF THE CONSTITUTION, 182-89 (1982). Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 577 (1985).

perhaps sharing) the intellectual predilections of the Court, desperately generate separate, preferably "hard" objectives. The resulting assessment of the values at stake is often wildly inaccurate. For example, in requiring visual barriers around drive-in movie theaters that show films displaying nudity, a community is plainly expressing a taste as to the kinds of images that will dominate its night sky.[28] This preference, like a preference for quiet parks or for the grandeur of tall buildings, is part of a locality's self-definition. It is a statement best understood on its own terms, not as a proxy for some ulterior purpose. Nevertheless, the Court's evaluation of the barrier requirement solemnly emphasized the low probability that nearby drivers, distracted by some sudden vision on the horizon, might run off the road. In its relentless search for external justifications, the Court was too grave to notice the comic aspects of its own discussion. The foolishness of the community's asserted justification, however, did not demonstrate that the ordinance was wrong, but only that its defenders had been driven to silliness by the Court's inapposite demands for derivative justifications.

This problem is not limited, as is sometimes thought, to aesthetics. In the critical evaluation of any value choice there is virtue in clarity and directness. Public choices must be confronted as assertions of identity and aspiration, as direct embodiments of value. Finding a connection between an independently-stated objective and a "rational" policy yields a satisfying sense of reasonableness, but the policy is not intrinsically better than one that is justified on its own terms. The reason behind the independent objective, after all, is also a matter of preference. At any rate, to the extent that constitutional rationalism forces communities to explain their decisions in terms of relatively remote relationships between policies and objectives, absurd purposes are postulated and important values are unfairly trivialized.

Simplification. Rationalism searches for conclusive answers to questions and "consequently the question must be formulated in such a way that it admits of such an answer."[29] If the values behind a rule are too subtle, intuitive, or varied for easy articulation and measurement, the rationalist will tend to ignore or simplify them. He will characterize the objective in terms that enable him to calculate whether it has been (or is likely to be) attained. This process is endemic in constitutional adjudication. Like a cracked mirror, the Court reflects back to the public a weirdly distorted view of its laws and policies. For instance, when the Court upheld a statutory rape

28. The case was Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

29. M. OAKESHOTT, *supra* note 7, at 84.

statute under which only men could be criminally liable,[30] the justification accepted by the Justices was that, since only women can become pregnant, the discrimination against males was related to the purpose of preventing teenage pregnancy. The opinion at least appeared, then, to rest on sober empiricism. But what of the possible bases for the discrimination that are not related so neatly to physiology? After all, sexual activity has long been believed to have different psychological implications for girls than for boys. It is one thing to deplore sexist double-standards, and quite another to suppose that all such differences are negligible merely because they cannot be proven as easily as the fact that only women can become pregnant. Yet the Court passed quickly over such matters with a brief allusion in the text[31] and a defensive footnote about chastity,[32] returning with relief to the question of where the risk of pregnancy falls. That the constitutionality of this statute could have been argued and decided on the basis of birth control is dismaying. Criminal penalties are, after all, a draconian method of enforcing the objective of planned parenthood. A society that leaps to this defense of its laws and customs is pitiable. Even more dismaying is the fact that the serious grounds for the statutory distinction were avoided because of the understanding, shared by all parties, that before the Court those grounds would inevitably seem frivolous.

Complicated, vague, or sentimental objectives are not necessarily inferior reasons for public policy. Many of the most important interests are pursued indirectly and partially. Constitutional rationalism tends to deprecate or ignore such values. This may distort public discussion even outside the courtroom and thereby make it more difficult for people to understand fully their own purposes. For instance, even among groups that should know better, there is a persistent effort to justify suppressing pornography by linking it with the tangible evil of sexual crime.[33] This effort submerges less definite but no less important issues, such as the debasing effects of pornography on attitudes toward sex and on the quality of our metropolitan environments. Thus the Court's limited version of public regulatory purposes can be self-fulfilling.

Validation. The process of "rational" policy formation requires that alternative means be compared and that policies be justified as promoting some preferred mix of the relevant values. Therefore, courts not only formulate purposes to permit potential

30. Michael M. v. Superior Court, 450 U.S. 464 (1981).
31. *Id.* at 470.
32. *Id.* at 472 n.7.
33. *See generally* Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMM. 147 (1985).

validation; they also often insist that evidence of the efficacy of a policy actually be furnished. The requirement of a "close fit" between ends and means is only one form of the demand for validation. The requirement that a rule be the "least restrictive alternative" for achieving a governmental objective permits courts to speculate about whether (and how effectively) a different policy might achieve the same social goal.

These demands—that decisions be justified by proof of their consequences or by proof that the same consequences could not be achieved in some other way—are sometimes appropriate. But they are not as neutral and inevitable as they sound. They are biased against decisions, laws, and practices with beneficial effects that are difficult to isolate and identify. Important social decisions cannot be limited to those areas where information is readily available and susceptible to conclusive analysis. Indeed, the more important the policy, the more likely that it will have far-reaching impacts that are difficult to measure. In such areas, decisionmakers typically must act without full information. This phenomenon is equally applicable to judicial decisionmaking. In *Craig v. Boren*,[34] the Court demanded hard statistics on the relative frequency of drunken driving by males and females in order to determine whether a gender-based statute on the sale of beer was justified; its own decision, however, was based on speculation about the general degree of congruence between gender and legitimate legislative purposes. Similarly, when courts seek to determine whether alternative means exist for the achievement of governmental objectives, the potentially unlimited number of policy alternatives and consequences renders full information prohibitively expensive. When they engage in such analysis, therefore, courts do not demand actual proof that other policies can achieve the desired goal; instead, they rely on judicial notice and speculation.[35] The difference between courts and other decisionmakers in this regard is that courts often are no longer involved in the controversy when information about the effects of their policies does begin to become available; or, if still involved, courts have special reasons for being unreceptive to the new information.[36] At any rate, requiring a close empirical "fit" between

34. 429 U.S. 190 (1976).

35. For example, in Shapiro v. Thompson, 394 U.S. 618, 637 (1969), the Court opined that states can prevent welfare fraud by "investigations" and "cooperation among state welfare departments."

36. The courts may become uninvolved simply because the "case" has been terminated. Even when new cases are initiated, many characteristics of the judicial process discourage receptivity to the new information. The original decision may have been rationalized as a matter of principle. In addition, the need for decisional consistency discourages acknowledgement of new information even when the original decision was overtly based on empirical

policy and objective can subvert highly important judicial policies, just as it subverts important legislative policies. On precisely those issues where participants in the political process might well consider innovative or risky measures, constitutional rationalism is disabling.

The demand for empirical validation is debilitating to the political process in another way. It skews dialogue away from aspiration. Implicitly it legitimizes a dull and limited view of public policy as being nothing more than a grappling with the present. In *Craig*, for instance, the Court conceived the legislative determination as being only that young females are more likely than males to be responsible drinkers. Like many public decisions, however, the statutory distinction was also an affirmation, no matter how benighted, about a suitable or desirable future. The statute was part of a complex web of legal determinations cumulatively representing judgments about appropriate roles within the family and relations between the sexes. An aspect of the statute's function was to create a reality where young women saw themselves, consistently with the hopes of their political community, as careful and mature. Now, it may well be that this effort to shape the future was unwise or even deeply unfair.[37] Probably the creation of a reality where men and women are equally responsible at all ages would be better. But it is certain that the reason for preferring the latter vision will not be found by examining the data on roadside sobriety tests. Neither those who oppose nor those who support gender differentiation are adequately served by a judicial decision that elides their desire to shape the future. To conceive the issues this way degrades the equal protection clause and retards public understanding of the subtlety and power of public decisionmaking.

Intentionality. A controversial but tenacious idea in modern constitutional law is the proposition that the Court should credit only the "actual" legislative purpose, not purposes supplied with

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information. For example, school desegregation orders are still entered on the premise that separate schooling instills a feeling of inferiority in minority students that affects educational performance, as in Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954), despite the discrediting of the original data upon which that premise was based. See material cited in P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 461 n.20 (1975). Moreover, a single judge or panel of judges provides only limited points of access for new information and a limited number of perspectives (and, therefore, less sensitivity to the importance of new information). For a general discussion of the tendencies of central, unitary decisionmakers to be rigid in their use of new information, see C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY 196-98, 230-31 (1965).

37. The Court's only hint as to why this might be was a cryptic allusion to the "normative philosophy that underlies the Equal Protection Clause . . . ." Craig v. Boren, 429 U.S. 190, 204 (1976).

the benefit of hindsight.[38] Although it sounds like tough realism, this idea is impractical. There are many sound reasons for embarking on an activity before finally formulating an objective. Because the potential consequences of an important program are often unlimited, decisionmakers lack the resources to gather and evaluate all the relevant information.[39] Accordingly, it may be desirable to begin a tentative program and to reformulate incrementally both the objectives and the means chosen for their achievement in light of actual experience. The reformulated objectives can differ dramatically from the original, tentative objective.[40] Thus, constitutionalism that requires a decisionmaker to identify consequences (and relate them to an articulated value) before acting can result in the abandonment of potentially useful activity.

The utility of experimentation is sufficiently obvious that the recurrent judicial insistence on the original articulation of purpose is comprehensible only as an expression of the assumptions of rationalism. The fundamental objective of rationalism is not a rule that is (or turns out to be) wise or fair; the objective is the rational formulation of policy. If the value was not articulated before the policy was adopted, conscious analysis could not have been employed in formulating the policy.

One view of morality holds that moral values cannot be known independently of the activities to which they refer, for "the objects of our desires are known to us in the activity of seeking them."[41] Even if public values sometimes can be adequately stated prior to implementation, it is nevertheless clear that important values can also be discovered during the performance of an activity. Constitutional rationalism disfavors such values and frustrates policies that are no less important for having been justified by experience. The Court's approach belittles political dialogue and participation, for those processes depend on trusting and honoring the reactions of the public to the experience of being governed. The dignity and importance of political involvement does not consist in the formulation of neat intellectual solutions. It consists in trying, failing, and learning.

Originality. In significant parts of constitutional law the identi-

38. Mississippi University for Women v. Hogan, 458 U.S. 718, 730 (1982); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 680 (1981) (Brennan, J., concurring). For academic support for this approach, see L. TRIBE, *supra* note 23, at 1085-86; Bennett, *supra* note 2, at 1057-60; Leedes, *supra* note 2, at 665.

39. C. LINDBLOM, *supra* note 36, at 142, 137-39, 146-47.

40. For a provocative argument on the need to disregard the known costs of an activity in order to discover unknowable potential benefits, see Gilder, *Prometheus Bound*, HARPER'S MAGAZINE, Sept. 1978, at 35.

41. M. OAKESHOTT, *supra* note 7, at 105.

fication of "archaic and stereotypic notions"[42] is a prelude to invalidation. This is to say the courts often operate under the assumption that beliefs which originate in tradition (and thus have the advantage, at least, of being time-tested) are impermissible bases for public policy, unless they can be justified by some rational standard extrinsic to the tradition. The foundation for this hostility to customary attitudes is that traditional policies are seen as being reflexive rather than as being the products of conscious thought. "Like a foreigner or a man out of his social class, [the rationalist] is bewildered by a tradition . . . of which he knows only the surface . . . . And he conceives a contempt for what he does not understand . . . ."[43] The "irrational" quality of reliance on traditional values is so intolerable to the constitutional rationalist that the absence of social change is itself sometimes considered to be evidence that the political system is malfunctioning.[44]

Not surprisingly, the felt interests of those who hold affection for tradition are systematically ignored by constitutional rationalists. The Court once, in effect, declared it impermissible for a government to distribute resources so as to encourage traditional family life.[45] Also notable have been the Court's assertions that neither a fetus' father nor a pregnant girl's parents have any interest in the abortion decision that is distinct from the interest of the state itself.[46] Frequently, judicial disapproval of tradition is only implicit, as when the Court cannot bring itself—perhaps because of embarassment—to state forthrightly or seriously the old-fashioned basis for some statute. Rules that required pregnant school teachers to leave their jobs when they began to "show" had long antecedents in squeamish (but complicated) attitudes towards the physical aspects of pregnancy; in fact, at times it has been customary for women to remove themselves from society during a long period of "confinement."[47] Nevertheless, the Court's stonefaced analysis of a school's pregnancy policy centered on the "modern" justification to the effect that pregnancy might render a teacher incapable of performing her duties.[48]

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42. Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982).

43. M. OAKESHOTT, *supra* note 7, at 31.

44. *E.g.*, L. TRIBE, *supra* note 23, at 1091-92.

45. Impermissible, that is, if the preference for traditional families was linked to a desire to harm "hippie communes," which had been excluded from the food stamp program. U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

46. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67-75 (1976).

47. The highly ambiguous mingling of humiliation, self-indulgence, prudery and idealism that characterized attitudes towards pregnancy during much of the nineteenth century and well into the twentieth is thoughtfully discussed in R. WERTZ, D. WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA 79-81 (1977).

48. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). Only in an entirely

As the example of pregnancy policies suggests, customary ways of thinking should not always prevail in the political process. Some traditions are indeed outmoded and repressive. But to envision the Constitution as requiring a continuing presumptive hostility to the past creates the danger that courts will prevent people from building a coherent knowledge and sense of morality. Even the fact that prudish attitudes about pregnancy have become outdated is something that needs to be brought out, tested, and legitimated through the kind of political debate that is avoided by adjudication. To the extent that adjudication does contribute to political dialogue, the need for change cannot be fully understood if the Court is itself too squeamish about our history to portray sensitively what it is that we are changing from.

It should be equally obvious (although to the rationalist it is not) that traditional ways of thinking are entitled to respect *as such*. It is possible for a person to resist change for no reason other than appreciation of the present;[49] for such a person, to attempt to perpetuate habitual assumptions is not somehow illegitimate, but a normal effort to protect perceived self-interest. That representative government might reflect such preferences is not more objectionable than a majoritarian preference for change.

Habitual denigration of traditional values carries the risk that certain groups will come to see the Constitution as an alien document, used by segments of the educated classes to belittle and undermine their ways of life. Political tolerance and participation presuppose self-respect and self-confidence. If accumulated experiences and perceptions—a person's background and identity—are distrusted in public decisionmaking, an important source of political vitality is threatened.

III

The wide range of issues to which the standards of constitutional rationalism are now routinely applied has troubling implications, not only for political discourse, but also for the legislative process. The danger is that, because of the prestige of constitutional law and its constant use, legislators will begin to think like judges.

Because it is the failure of legislators to act "rationally" that triggers and controls active constitutional scrutiny, it is no wonder that the judiciary has had to be so busy tidying up government. Legislators do not always know or articulate moral objectives before

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dismissive footnote did the Court mention "the possible role of outmoded taboos . . . ." *Id.* at 641, n.9.

49. *See* M. OAKESHOTT, *supra* note 7, at 168-96.

enacting programs and frequently rationalize them to their constituents only afterwards. When legislators do announce values before adopting programs, the announced values are often either concocted or, at least, subject to being altered to reflect subsequent experience with the policy. They attempt to accommodate complex and hopelessly conflicting values in the same policy. After announcing grand objectives, they quickly alter or renounce these goals in subsequent legislation. They respond to wildly irrational arguments and even to power unadorned by intellectual argumentation. No legislator hears from or knows of all the affected interests before a decision. Legislators rarely possess in advance full information about the consequences of a decision, and they do not necessarily pay any attention to the information they do have. Compared to the detached, careful evaluation of briefs and evidence in light of an explicit, consistent set of legal values that is the ideal of the judicial process, the legislative process is a nightmare of irrational decisionmaking.

Legislative "irrationality," however, provides real advantages to a democratic system.[50] If values need not be formally articulated and consistently pursued, legislators can serve many interests at once. They are free to respond to the intensity of constituents' beliefs, so that groups whose values are difficult to formalize or explain, but are nonetheless strongly held, can be accommodated. Even if no one objective is fully achieved, many groups can be partially satisfied and can therefore be expected to retain some sense of loyalty to the governmental process. Because negotiation and trading "across substantive fields" are encouraged, the hard sacrifices that different allocations of resources require are implicitly recognized.[51] In the bartering process, people with widely divergent interests are compelled to deal with each other and to recognize the probable costs that their own preferences will inflict on others; thus new understandings and new values emerge as citizens experience firsthand the processes of self-government. Because compromise is necessary and abstract argument is of limited value, groups are encouraged to find the common ground in their positions, rather than to insist on apparently irreconcilable differences of principle. When legislators are free to act "irrationally," they can act even when full information about the consequences of their decisions is unavaila-

50. The discussion in this paragraph is based heavily on the work of Lindblom, especially chapters 13-15 of THE INTELLIGENCE OF DEMOCRACY. C. LINDBLOM, *supra* note 36, at 192-246.

51. This point is elaborated with regard to environmental decisions in E. HAEFELE, REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT 131 (1973). It is also developed in C. LINDBLOM, *supra* note 36, at 87-101, 151-61, 293-310.

ble. Because values need not be abstractly identified before action, and because legislators can attempt partial effectuation of those values that are identified, government can experiment with possible solutions, retaining the capacity for quick reversal in the face of evidence of failure. Because information is received and evaluated by a large number of individuals (with differing sensitivities), a legislative body can respond rapidly to a wide range of perceived imperfections in the initial policy. The risks of taking action in an imperfectly understood world can thereby be minimized.

The legislative process need not be romanticized. It works imperfectly and looks worse. But to judge it solely by the standards of constitutional rationalism is to undermine much of the usefulness of legislatures in a democracy.

IV

Judges find so many parts of the Constitution to mean essentially the same thing because, in interpreting the document, they mistake their own intellectual habits for its content. The pressures to do this are probably inexorable and are unlikely to diminish with changes in the political complexion of the federal bench. Rationalist judicial habits are part of a larger rationalist culture which includes legal education.[52] Not only is rationalism a powerful influence generally, but the political insulation of the judiciary—often touted as the reason it can contribute usefully to public discourse—ensures excessive, uncritical reliance on one narrow analytic method:

> How appropriate rationalist politics are to the man who, not brought up or educated to their exercise, finds himself in a position to exert political initiative and authority, requires no emphasis. His need of it is so great that he will have no incentive to be skeptical about the possibility of a magic technique of politics which will remove the handicap of his lack of political education. The offer of such a technique will seem to him the offer of salvation itself . . . .[53]

Neither the Justices' education nor their position is likely to encourage doubts about the power of one version of intellect to create a pervasively just society.

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52. Oakeshott wrote that rationalism, as a technique of knowledge,
> can be taught best to those whose minds are empty; and if it is to be taught to one who already believes something, the first step of the teacher must be to administer a purge, to make certain that all prejudices and preconceptions are removed, to lay his foundation upon the unshakable rock of absolute ignorance. M. OAKESHOTT, *supra* note 7, at 12.

53. *Id.* at 23.