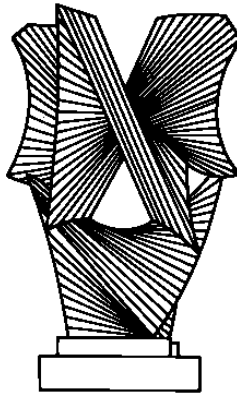


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TRIMMING

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Trimming

Cass R. Sunstein*

Abstract

In law and politics, some people are trimmers. They 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 deepest in and 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 many 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? The 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 conceive 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 extreames.

-- Lord Halifax¹

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¹ Lord Halifax, *The Character of A Trimmer*, in 1 *The Works of George Savile Marquis of Halifax* (Mark Brown ed. 1989).

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 rubble 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 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 the common law of libel. So long as states are applying long-established common law, the First Amendment is not violated."
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*. 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.³

² See comments of John Sinclair, Dante's *Inferno* 49-50 (John Sinclair trans. 1961).

³ See, e.g., Ronald Dworkin, *Justice in Robes* (2007); Adrian Vermeule, *Judging Under Uncertainty* (2006).

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, and 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, on the ground that the Court should settle a large area of the law, and should not leave the fundamental questions undecided.⁴

Oddly, there is no sustained discussion, within the Court or in the academic literature, of this fourth approach. 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.⁵ Trimmers believed it important to steer between the polar positions and to preserve what is deepest and most sensible in competing positions.

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.⁶ 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 the deepest convictions on all sides; sometimes trimming helps to reduce social conflict and public outrage. My most ambitious goal is to reverse the valence of the idea of trimming, and to suggest that in important situations, reasonable practical, epistemic, and even moral claims can be offered on its behalf.

⁴ In fact the Court’s approach, in its seminal decision on libel law, was an unruly mixture of the first, third, and fourth approaches. See *New York Times v. Sullivan*, 376 US 254 (1964).

⁵ For historical treatments, see Donald B. Benson, *Halifax and the Trimmers*, 27 *Huntington Library Q.* 115 (1964); H.C. Foxcroft, *A Character of A Trimmer: Being a Short Life of the First Marquis of Halifax* (1946); Thomas C. Faulkner, *Halifax’s “The Character of A Trimmer” and L’Estrange’s Attack on Trimmers in The Obsevator*, 37 *Huntington Library Q.* (1973); Mark C. Brown, *Trimmers and Moderates in the Reign of Charles II*, 37 *Huntington Library Q.* 311 (1974); Henry Horwitz, *Parliament, Policy and Politics in the Reign of Willima III* (1977). For a valuable discussion, see Eugene Goodheart, *In Defense of Trimming*, 25 *Philosophy and Literature* 46 (2001).

⁶ See Goodheart, *supra* note.

II. Why Trimmers Trim

Trimmers follow a particular method, one that requires close attention to all sides, including the poles. As a matter of procedure, contemporary trimmers, like their seventeenth-century predecessors, listen carefully to competing views 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, the trimmers avoid the extremes, but they reject minimalism; they do not bracket hard questions or attempt to leave them undecided.

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.⁷

A. Historical Notes

The first mention of a “Trimmer” in print was in *The Character of a Trimmer, neither Whigg nor Tory*, anonymously published in 1682.⁸ The text was written by the most influential trimmer, George Savile, the Marquis of Halifax, who left public office in February 1690⁹ and died in April 1695.¹⁰ After the publication of Lord Halifax's essay, Trimmers were mentioned frequently in the popular press for the next three years and occasionally thereafter, until 1689.¹¹ Trimmers appeared frequently in Roger L'Estrange's widely read *The Observer*, in which political dialogues that had previously taken place between Whig and Tory were changed in November 1682 to be between a Trimmer and Observer.¹² To L'Estrange, anyone who did not follow the strictest of Tory policies could be termed a Trimmer.¹³ He summarized the defining Trimmer characteristics as follows:

Trim. And what Is a Trimmer at last?

⁷ See *id.*

⁸ Donald R. Benson, *Halifax and the Trimmers*, 27 HUNTINGTON LIBRARY Q. 115, 118 (1964).

⁹ Mark N. Brown, *Introduction to 1 THE WORKS OF GEORGE SAVILE MARQUIS OF HALIFAX* 1, 147 (Mark N. Brown ed., 1989).

¹⁰ H.C. FOXCROFT, *A CHARACTER OF THE TRIMMER: BEING A SHORT LIFE OF THE FIRST MARQUIS OF HALIFAX* 336 (1946).

¹¹ *Id.* at 131.

¹² Tim Harris, *What's New About the Restoration?*, 29 ALBION: A QUARTERLY JOURNAL CONCERNED WITH BRITISH STUDIES 187, 211 (1997).

¹³ *Id.* (quoting *Observer*, I, 242 (Nov. 16, 1682)).

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.¹⁴

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.¹⁵

As we shall see, an important point here is the suggestion that “there are Severall sorts of Trimmers”; the point applies in the twenty-first century no less than in the seventeenth. Others characterized Trimmers variously as non-conformists who went to church, those who were not sufficiently in favor of punishing Protestant Dissenters, the more moderate sort of Tories, or “secret Whigs.”¹⁶

Notwithstanding the frequent and explicit references to Trimmers in the period, 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 and that it was led by Halifax; even the Oxford English Dictionary gave the definition of “Trimmer” as “Lord Halifax and those associated with him (1680–1690).”¹⁷ 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.”¹⁸ On this view, “it seems unlikely that a Trimmer party was ever more than a fiction of political controversy.”¹⁹

By contrast, a more recent treatment argues that many moderate politicians and clergymen were called Trimmers: “Trimmers, therefore, 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,

¹⁴ Thomas C. Faulkner, *Halifax's “The Character of a Trimmer” and L'Estrange's Attack on Trimmers in “The Observer”* 37 HUNTINGTON LIBRARY Q. 71, 76 (1973) (quoting *Observer*, II, 177 (Dec. 3, 1684)).

¹⁵ *Id.* (quoting *Observer*, I, 242 (Nov. 16, 1682)).

¹⁶ Harris, *supra* note, at 212.

¹⁷ Benson, *supra* note, at 116 (quoting *The Oxford English Dictionary*); *see also id.*

¹⁸ *Id.* at 132.

¹⁹ *Id.* at 134.

indeed almost interchangeable.”²⁰ On this view, political Trimmers included 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.²¹

Whatever we make of the controversy, Lord Halifax was indeed a self-identified Trimmer, who argued for “dwelling in the middle, between two extreams.”²² 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. He wondered: “Why do angry men aile to rayle so against Moderation? Doth it not looke as they were going to some very scurvy Extream, that is too strong to be digested by the more considering part of mankind?”²³

For Trimmers, moderation is a signal virtue, and it entails a sympathetic understanding of what is best in and least dispensable to the “extreams.”²⁴ 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.²⁵ The Trimmer is especially enthusiastic about the law, seeing legal rules as “the Chaines that tye up our unruly passions”²⁶ In religion, Halifax sought “a mutuall Calmnesse of mind” between Protestants and Catholics, “overlooking of all veniall faults”²⁷ 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; on the contrary, is very sollicitious to find out any thing that may be healing, and tend to an agreement”²⁸

As the Revolution of 1688 developed, Halifax insisted on maintaining contacts with both sides.²⁹ William III, who ascended the throne as a result of the Revolution, practiced what he called Trimming by including both Whigs and Tories in government, and he often said that he wanted to “go upon the bottom of the trimmers or [be] the middle party.”³⁰ In an important effort to rehabilitate Halifax, Macauley wrote with

²⁰ Mark N. Brown, *Trimmers and Moderates in the Reign of Charles II*, 37 HUNTINGTON LIBRARY Q. 311, 319 (1974).

²¹ *Id.* at 328–30.

²² See Halifax, *supra* note, at 243.

²³ *Id.* at 240.

²⁴ *Id.* at 243.

²⁵ *Id.* at 184–198.

²⁶ *Id.* at 180.

²⁷ *Id.* at 222.

²⁸ *Id.* at 223.

²⁹ Brown, *supra* note, at 111.

³⁰ Horwitz, *supra* note, at 35.

evident sympathy that “He had nothing in common with those who fly from extreme to extreme and 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 hostile divisions of the community.”³¹ In Mccauley’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 vindicate triumph occurred his censure; and every faction, when vanquished and persecuted, found in him a protector.”³² As we shall see, this conception 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 not be made, not found. The initial task is to show exactly why those in constitutional law (and perhaps elsewhere) might choose to trim. To undertake that task, we must begin by distinguishing between two kinds of trimmers.

B. Compromisers, Preservers, and Moderates

1. *Two kinds of trimmers.* Some trimmers are **compromisers**. They identify the extremes and they attempt to steer between them. 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 intensely felt, and most valuable 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.

No one disagree with the claim that it is important to listen to people to see if they have a point. What makes preservers distinctive is that they insist on identifying what is most reasonable in competing positions, with a particular desire to ensure that, to the extent possible, no one is, or feels, rejected or repudiated. It is thus important to see that preservers care both about judgments that are actually most essential (in their independent judgment) and also about judgments that are most deeply felt (in the subjective views of the antagonists). These different emphases may of course press in different directions; preservers who emphasize what is most essential might not end up in the same position as preservers who emphasize what is most intensely felt.³³ At first

³¹ Thomas Babington Macaulay, *The History of England* 227 (1848).

³² *Id.*

³³ The choice between the emphases will depend on why trimmers trim. See below, stressing that trimming might produce the best result in principle (a point that suggests that trimmers must make an independent

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.³⁴ 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 do in the context of a debate over regulation of political speech, perhaps concluding that a form of rights fundamentalism is desirable in that area.

In constitutional law, trimming is pervasive, but it is not always clear whether particular trimmers are compromisers or preservers. 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.³⁵ By contrast, those who believe in democratic primacy reject the idea that commercial speech should receive any constitutional protection at all.³⁶ 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.³⁷ For this reason, they trim.

Or consider the modern debate over substantive due process.³⁸ Rights fundamentalists would authorize judges to give substantive content to the idea of “liberty” through their own moral judgments about that broad concept.³⁹ By contrast, believers in democratic primacy would like to abandon substantive due process

judgments) and also the possibility that trimming will moderate social conflict (a point that suggest that trimmers should attend to the positions that are most deeply felt).

³⁴ I am grateful to Richard Fallon for pressing this distinction.

³⁵ See 44 *Liquormart, Inc. v. Rhode Island*, 517 US 484, 612 (1996) (Thomas, J., concurring).

³⁶ See *Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 484, 512 (1976) (Rehnquist, J., dissenting).

³⁷ See, e.g., *id.*; *Rubin v. Coors Brewing Co.*, 514 US 476 (1995).

³⁸ See, e.g., *Lawrence v. Texas*, 539 US 558 (2003).

³⁹ Cf. Dworkin, *supra* note.

altogether.⁴⁰ Rejecting both positions, trimmers believe that the scope of individual rights should be defined by reference to traditions.⁴¹ 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. 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 apparent 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 can be regulated consistently with the First Amendment, campaign expenditures are immune from regulation⁴²; that restrictions on abortion are justified only if they do not amount to an “undue burden”⁴³ (suitably specified); that discrimination on the basis of sex is subject to intermediate scrutiny⁴⁴; that obscenity is protected unless it runs afoul of a test that pays close attention to community standards and social values⁴⁵; and that the constitutionality of public displays of the Ten Commandments depends on the context.⁴⁶ In some of these cases, the prevailing view might be an effort to steer a middle course. In others, the prevailing view may be a product of a principled belief that trimming recognizes, and make space for, the most legitimate claims of the competing sides.

It is important to distinguish here between trimmers about particular issues and trimmers about large questions about interpretation. A dispute about the equal protection clause or the Commander-in-Chief power 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, it should be followed. Trimmers might be inclined to accept a form of “soft originalism,” giving weight to the original understanding without being bound by it. Questions of method and interpretation, no less than particular disputes, might be settled by a form of trimming.

⁴⁰ See *Lochner v. New York*, 198 US 45 (1905) (Holmes, J., dissenting). Of course a rejection of substantive due process might be based on multiple grounds, including textual and historical ones.

⁴¹ See *Lawrence*, supra note, 539 US at 588 (Scalia, J., dissenting); *Michael H. v. Gerald D.*, 491 US 505 (1989).

⁴² *Buckley v. Valeo*, 424 US 1 (1976).

⁴³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992).

⁴⁴ *Craig v. Boren*, 429 US 190 (1976).

⁴⁵ *Miller v California*, 413 US 15 (1973).

⁴⁶ See *Van Orden v. Perry*, 545 US 677 (2005).

We can also identify forms of trimming that are 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.⁴⁷ Those who believe that the meaning of the Equal Protection Clause depends, in part, on contemporary moral judgments 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. Rights fundamentalists must decide exactly how fundamentalist to be; if there is an internal debate on that question, they might trim. 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 at all, 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.

2. *Problems and concerns.* From all of these examples, it should also 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.⁴⁸ 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 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.

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

⁴⁷ On some issues, *District of Columbia v. Heller*, US (2008), adopts what might be seen as a form of originalist trimming. See *id.* at (suggesting limits on the Second Amendment right).

⁴⁸ For a spectrum of possible views, see *New York Times v. Sullivan*, 376 US 254 (1964).

be characterized as trimming, because any position is likely to be between at least some imaginable poles. I will return to these problems below.

3. *Moderates vs. trimmers*. It is important to 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. Moderates might simply believe that commercial speech is entitled to some protection, but less so than political speech. 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. Such 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 or lack interest in careful investigation of polar positions to preserve what is deepest and best in them. For moderates, it might not be especially important to ensure that no one is humiliated or hurt. But some moderates might also turn out to be trimmers; for example, they might compromise by choosing to sign onto an opinion that takes a position halfway between their moderate position and that of one of the extremists.

C. Five Reasons to Trim

Why would anyone want to trim? We could imagine five reasons. Some of these will appeal to compromisers; others will be invoked by preservers; still others will appeal to both.

1. *Trimming as best in 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 believes, 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.⁴⁹ A judge of this kind would produce a form of constitutional trimming for the affirmative action debate. Indeed, the Court has taken exactly this approach in that domain; affirmative action is an area in which trimming reigns triumphant.⁵⁰

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

⁴⁹ *Regents of the University of California v Bakke*, 438 US 265 (1978).

⁵⁰ *Grutter v Bollinger*, 539 US 306 (2003); *Gratz v. Bollinger*, 539 US 244 (2003).

judicial scrutiny.⁵¹ 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.⁵² 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. A preserver 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 that on admittedly rare occasions, those who defend sex discrimination are able to generate sufficiently reasonable justifications for their actions.⁵³

2. *The trimming heuristic—and the epistemic case for trimming.* A humble judge might believe that trimming is a kind of heuristic for what is right. It is here that we can understand why some trimmers are compromisers. Consider the fact that human beings typically demonstrate “extremeness aversion.”⁵⁴ Confronted with several options (such as radios or dinner selections on a menu) and having incomplete information, many people tend to avoid the poles.⁵⁵ 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 matter of what the jury ends up doing.⁵⁶

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,⁵⁷ because it reflects “the wisdom of crowds.”⁵⁸ The Condorcet Jury

⁵¹ Craig v Boren, 429 US 190 (1976).

⁵² Id.

⁵³ See, as controversial but possible examples, Michael M. v. Superior Court, 450 US 464 (1981); Rostker v. Goldberg, 453 US 57 (1981).

⁵⁴ See Mark Kelman et al., Context-Dependence in Legal Decision-Making, 25 J Legal Stud 287 (1996).

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ For some theoretical reasons to think that trimmers might be right on this count, see Scott Page, *The Difference* (2007).

⁵⁸ See James Surowiecki, *The Wisdom of Crowds* (2005).

Theorem shows that if people are better than random guessers, the likelihood that the majority view will be correct increases to 100 percent as the size of the group expands.⁵⁹ The Jury Theorem helps to explain the fact that in large groups, the average view or estimate is remarkably accurate.⁶⁰ 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 ground that it is most likely to be right. 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.⁶¹

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 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. 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. 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 education, 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, plausibly, that a university might legitimately seek to obtain a racially diverse student body. Perhaps the commitments of both sides can be preserved by a decision that rejects any kind of reject quota system but that allows race to be considered “as a factor.”⁶²

3. *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 moderate, but she might conclude that other judges cannot be persuaded to accept this position. Trimming might be an indispensable method for building a majority on behalf of the best outcome that is realistically possible.

⁵⁹ See Cass R. Sunstein, *Infotopia* (2006).

⁶⁰ See *id.*

⁶¹ On this point, see Cass R. Sunstein, *A Constitution of Many Minds* (forthcoming 2009).

⁶² *Grutter v. Bollinger*, 539 US 306 (2003); *Gratz v. Bollinger*, 539 US 244 (2003).

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 in light of constraints produced by practical realities on a multimember court. Coalitions are possible here between 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.

4. *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 (what some observers will see as) 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 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 will 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.⁶³ Consider, for example, the domain of constitutional takings, which seems to have a great deal of trimming.⁶⁴ It is reasonable to suggest that existing doctrine was 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 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 only point is that precedent-respecting judges produce outcomes that they

⁶³ For a superb discussion of invisible hand mechanisms, see Edna Ullmann-Margalit, *The Invisible Hand and the Cunning of Reason*, 64 *Social Research* 181 (1997).

⁶⁴ *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002); *Lingle v. Chevron, USA*, 544 US 528 (2005).

would not choose if they are writing on a clean slate, and in an important sense, they show respect to those with whom they disagree.

5. *Social conflict, social exclusion, humiliation, and trimming.* A judge might not know which result is best, and might trim for external reasons, having to do with the public reaction to the Court's decision. The trimmer might seek to minimize social conflict and might conclude that trimming is the best way of accomplishing that task. A trimming judge might be particularly concerned about public outrage, in the form of intense objections on the part of identifiable segments of the public.⁶⁵ The trimmer might believe: 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 result of presidential campaigns. Alert to the harmful consequences of certain rulings, a trimmer might be seeking to minimize the damage. Or the trimmer might think: 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.⁶⁶ If rights fundamentalism or democratic primacy would create a significant public reaction, 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 are most likely to support not trimming but two alternative approaches: use of the "passive virtues,"⁶⁷ enabling the Court to decline to resolve certain cases at all, or minimalism, in which the Court decides cases while leaving key issues undecided.⁶⁸ If public outrage is the fear, trimming seems 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,⁶⁹ a judge might reasonably attempt to trim. If it is possible to reach a resolution that is reasonable, or right enough, the judge might seek an outcome that does not cause intense public controversy.

To that extent that public outrage is their motivation, trimmers might be accused of being weak, passive, or cowardly. Return in this regard to my first epigraph: "They follow still, as they 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."⁷⁰ In some contexts, the accusation is warranted. But trimming can

⁶⁵ See Cass R. Sunstein, *If People Would Be Outraged by Their Decisions, Should Judges Care?*, 60 *Stan L Rev* 155 (2007).

⁶⁶ See *id.*

⁶⁷ See Alexander Bickel, *The Least Dangerous Branch* (1965).

⁶⁸ See Cass R. Sunstein, *One Case At A Time* (1999).

⁶⁹ See *infra* for some explanatory comments on this point.

⁷⁰ See note *supra*.

also be understood to have moral foundations, captured in the idea that people should be respected and included, and should be neither humiliated nor hurt. When trimmers attempt to take on board the deepest commitments of legal or political adversaries, they attempt to show respect to all sides—and to ensure that no side feels offended, diminished, or aggrieved. In some ways, it is here that we can locate the 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.⁷¹ Trimmers hope to reach results that can be accepted or at least not strenuously rejected by people who have different foundational commitments. The hope is that trimming can obtain support for people from different “cultures.” Of course judicial rulings will inevitably offend some people, and judges should not trim simply to avoid offense. In striking down school segregation, the Court did not trim.⁷² But if judges can rule in a way that makes people feel respected rather than ridiculed, they should do so; and trimming might be their best option on that score.

There is a broader point. 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 decide on the basis of what others think.⁷³ It would be possible, for example, to follow trusted others, as, for example, where people believe that particular litigants or particular justices (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 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 some 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.

III. 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,

⁷¹ See, e.g., Dan Kahan and Donald Braman, Cultural Cognition and Public Policy, 24 Yale Law and Policy Review 147 (2006).

⁷² *Brown v. Bd. Of Educ.*, 347 US 483 (1954).

⁷³ See the discussion of the “do what the majority do” heuristic in Gerd Gigerenzer, *Gut Feelings* (2007).

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

This question could be pressed with equal vigor by skeptics armed by competing accounts of constitutional interpretation. Some people are originalists; they believe that the original understanding of the Constitution settles the document's current meaning.⁷⁴ 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.⁷⁵ Other people believe that judges should uphold legislative enactments unless the violation of the Constitution is plain.⁷⁶ 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 invest the document with the best moral principles, consistent with precedent.⁷⁷ In many cases, trimming will produce an inferior moral reading. Those who seek moral readers will ask: Why should judges split the difference, rather than interpreting 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

⁷⁴ See, e.g., Antonin Scalia, *A Matter of Interpretation* (1998).

⁷⁵ Thus, for example, *District of Columbia v. Heller* (2008), perhaps the most self-consciously originalist opinion in the Court's history, is not fundamentally a form of trimming.

⁷⁶ See Adrian Vermeule, *Judging Under Uncertainty* (2006).

⁷⁷ See Ronald Dworkin, *Freedom's Law* (1997).

might not be enthusiastic about the view that half of suspected terrorists should be tortured. Suppose, for example, 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 racial separation is demonstrably unequal. The trimming solution is (c), but (a) is clearly preferable. It would not have been right for the Court to choose (c), even though reasonable people disputed the constitutional question and even though (a) left many segregations feeling humiliated and not treated with respect.⁷⁸ 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.⁷⁹ (c) Interpret the First Amendment to allow the national government to ban speech only on a showing of a “clear and present danger,” 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 on a showing of a “clear and present danger.” The trimming solution is (b), but (c) is far better.⁸⁰

The examples could easily be multiplied. They show that trimming is unacceptable when it produces an incorrect or implausible interpretation of the Constitution.⁸¹

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 operate as free-riders, reaching their conclusions on the basis

⁷⁸ *Brown v. Bd. of Educ.*, 349 US 294 (1955), or *Brown II*, 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 Black, *The Unfinished Business of the Warren Court*, 46 *Wash L Rev* 3, 22 (1970).

⁷⁹ See *Debs v. US*, 249 US 211 (1919).

⁸⁰ See *Brandenburg v. Ohio*, 395 US 444 (1969).

⁸¹ Cf. Robert Kennedy, Foreword, *Profiles in Courage*: “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.’”

of others' judgments. Notwithstanding this point, there is a certain logic, at least on the Supreme Court, in 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 views 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 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 in (say) a decade?

The answers to such questions will depend on why, exactly, 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 the 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 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. Bd. 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 debaters' point, to say that any position can count as trimming. What is relevant is the range of arguments made to the Court. With respect to those arguments, *Brown* did not trim. By contrast, *Brown II*, with its "all deliberate speed" formula, 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 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 to 0, but legal arguments may not quite line up in so orderly a way, and perhaps 0 make no sense. At this point it must be conceded that if a judge is inclined to trim, she has an 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.

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 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.”⁸²

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 relatively high-cost item seem to be the compromise choice.⁸³ Alert to extremeness aversion and intent on obtaining a conviction, prosecutors can do the same thing, identifying an especially severe count as a way of ensuring a conviction on a less severe one.⁸⁴ The upshot is that trimmers can be manipulated by those who select or identify the range of options. Indeed, their own positions might turn out to be endogenous to the presence of trimmers.

It should be plain in this light that the practice of trimming creates highly unfortunate incentives, 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 as they like. If they are successful, what seems

⁸² Robert Goodin, *Possessive Individualism Again*, 34 *Political Studies* 488, 489 (1976).

⁸³ See Kelman et al., *supra* note.

⁸⁴ *Id.*

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 a flat ban on restrictions on the 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 view. 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 in deciding whether to trim, 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 may be overstated. If people characterize their position 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."⁸⁵ 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. Aware of the presence of trimmers, constitutional advocates will act similarly.

Nonetheless, it remains true that compromisers can be manipulated. Because they are willing to sift and to scrutinize competing views, preservers 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, which is 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 is established by them. If the endpoints are

⁸⁵ See Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7* (unpublished manuscript 2008).

arbitrary, then the midpoints are 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. Preposterous readings of the Constitution—as, for example, in the view that the First Amendment is nonjusticiable, or the President can protect national security however he sees fit—can be ruled out of bounds and hence as uninformative for purposes of trimming.

The problem of arbitrariness seems harder for the compromiser to solve. But suppose that the trimmer 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 trimmer is concerned about the distribution of views on the Supreme Court, he might believe that political processes and 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, at least, 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. To be sure, 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 outrage⁸⁶? Why should they refuse to issue the best interpretation of the Constitution, simply because the public would be angered by their decision? It is also 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

⁸⁶ For relevant discussion, see Cass R. Sunstein, *A Constitution of Many Minds* (forthcoming 2009).

grounds.⁸⁷ Perhaps 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.⁸⁸ In other settings, the precedents are opaque, and judges can produce with their preferred interpretations without trimming.

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.⁸⁹ 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; when this decision is made, trimming might be appropriate. To the objection that judges lack the relevant competence, 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. 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.

⁸⁷ See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *Va L Rev* 753 (1985); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U Chi L Rev* 723 (1974).

⁸⁸ *District of Columbia v Heller*, US (2008).

⁸⁹ See Adrian Vermeule, *Judging Under Uncertainty* (2006).

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 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 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 on the basis of their own ignorance. 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 the result of 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.

IV. Minimalists vs. Trimmers

Trimmers and minimalists seem to be jurisprudential cousins. Both groups seek to reduce the most intense social conflict and public outrage, and some of the arguments that support minimalism support trimming as well. No less than trimmers, minimalists seek to minimize the harm to losers, in a way that reflects a principle of civic respect. But while 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; by contrast, the standard trimming concurrence stresses that the decision is more moderate than it might seem.⁹⁰

⁹⁰ See *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992) (Kennedy, J., concurring); *Lujan v. Defenders of Wildlife*, 504 US 55 (1992) (Kennedy, J., concurring).

It should be clear that insofar as trimmers insist on clarity, they are not trimming. A consistent trimmer would think: As between clear decisions and not deciding, I will trim. In the abstract, it is not clear exactly what this means, but perhaps a consistent trimmer would decide some issues but not others. To keep distinctions clear, however, I will treat trimmers as committed to clarity, and minimalists as committed to small steps. 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, and their preference operates along two distinct dimensions.⁹¹

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.⁹² Second, minimalists want to proceed in 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 over (hypothetical) ones. Consider in this light Chief Justice John 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 justices, the more likely it is a decision on the narrowest possible grounds.”⁹³ 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 is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.”⁹⁴

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

⁹¹ I discuss minimalism at length in Cass R. Sunstein, *One Case At A Time* (1999).

⁹² See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733 (1995).

⁹³ Hon. John G. Roberts, Jr., Chief Justice, U.S. Supreme Court, Commencement Address at the Georgetown University Law Center (May 21, 2006).

⁹⁴ *Id.*

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. While 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. As Chief Justice Roberts' 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.

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 constitutional method is crucial to a complete understanding of minimalism. If an originalist is to embrace minimalism, it might be on the ground that recovery of the original understanding presents difficult dilemmas, and it is best not to resolve those dilemmas until the need arises. Or suppose that a judge believes in a "moral reading" of the Constitution.⁹⁵ 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 that reason.

There is an independent point. Minimalist rulings show a kind of respect to those with competing commitments on issues of principle and policy. If a ruling can command

⁹⁵ See Ronald Dworkin, *Freedom's Law* (1999).

consensus 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.⁹⁶

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.⁹⁷ Suppose that 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.

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. Sometimes it is best to settle on a course of action rather than to rest content with a series of small 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.⁹⁸ 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.

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

⁹⁶ See John Rawls, *Political Liberalism* (1996).

⁹⁷ See Cass R. Sunstein, *Burkean Minimalism*, 105 *Mich L Rev* 353 (2006).

⁹⁸ See Antonin Scalia, *The Rule of Law Is A Law of Rules*, 56 *U Chi L Rev.* 1175 (1989).

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 eager 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.

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.”⁹⁹ 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 to offer clear guidance to lower courts and other institutions.”¹⁰⁰ The same response might be offered in cases that involve the relationship between the First Amendment and the law of libel. Might it not be better to rule widely in that domain, 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.¹⁰¹ Those who prefer standards are likely to be drawn to minimalism. Consider the “undue burden” standard in the law of abortion,¹⁰² an

⁹⁹ *Regents of the University of California v Bakke*, 438 US 265 (1978)..

¹⁰⁰ For valuable discussion, see Christopher Peters, *Assessing the New Judicial Minimalism*, 100 *Colum L Rev* 1454 (2000).

¹⁰¹ See, eg., Kathleen Sullivan, *The Justice of Standards and the Justices of Rules*, 106 *Harv L Rev* 22 (1992); Louis Kaplow, *Rules vs. Standards: An Economic Analysis*, 42 *Duke LJ* 557 (1992); Cass R. Sunstein, *Problems With Rules*, 83 *Cal L Rev* 953 (1995).

¹⁰² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992).

approach that invites case-by-case rulings under a general concept whose 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 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. The 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.¹⁰³ Rules are often better than standards, because they minimize the burden on future decisionmakers and also reduce mistakes on balance. True, 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 future errors, on balance, that 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?

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 advantages 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 involves new technologies.¹⁰⁴ 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 advertising¹⁰⁵ or sexually explicit speech.¹⁰⁶

We could also imagine difficult intermediate cases; consider the question of rights under the Second Amendment.¹⁰⁷ 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

¹⁰³ See Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 *U Chi L Rev* 1175 (1989).

¹⁰⁴ *Denver Area Educational Telecommunications Consortium v. FCC*, 518 US 727 (1996).

¹⁰⁵ See note *supra*.

¹⁰⁶ See note *supra*.

¹⁰⁷ See *District of Columbia v. Heller*, US (2008).

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. If so, they might trim on the ground that no one benefits, and many lose, with protracted litigation over that meaning.¹⁰⁸ The long experience of specifying the meaning of the abortion right,¹⁰⁹ and the valid objections to affirmative action programs,¹¹⁰ 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.

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.¹¹¹ The Court focused on particulars and left a great deal undecided. As the precedents accumulated, the law became increasingly clear. The clarity involved trimming, in the sense that the Court rejected rights fundamentalism (in the form a wholesale rejection of affirmative action programs) and democratic primacy (in the form of *carte blanche* for such programs).¹¹²

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 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.¹¹³

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 culminated in something close to rights fundamentalism, in the form of a near-complete ban on formal sex discrimination.¹¹⁴ Or consider "rational basis" review in the domain of economic and social rights, in which a

¹⁰⁸ In fact the Court's initial decision on the topic, see *id.*, combines a measure of trimming with considerable minimalism. See Cass R. Sunstein, *Heller As Griswold (Not Marbury or Lochner)*, *Harv. L. Rev.* (forthcoming 2008).

¹⁰⁹ See Geoffrey R. Stone et al., *Constitutional Law* (2006).

¹¹⁰ See *id.*

¹¹¹ See, e.g., *Fullilove v. Klutznick*, 448 US 448 (1980); Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 *Calif L Rev* 1179 (1996).

¹¹² See note *supra*.

¹¹³ See Ronald Dworkin, *Justice in Robes* (2006).

¹¹⁴ *United States v. Virginia*, 518 US 515 (1996).

series of narrow rulings has produced a regime of democratic primacy.¹¹⁵ 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.

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 it 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, and 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 are motivated, in part, by a desire 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; originalists will often reject trimming, as will those who are committed to a moral reading of the Constitution. It is also true that trimmers can be manipulated; and if the poles are arbitrary, the trimming solution will be arbitrary too. In some domains, rights fundamentalism or democratic primacy is unquestionably better. 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.

Readers with comments should address them to:

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¹¹⁵ See *Ferguson v. Scrupa*, 372 US 726 (1963); *Williamson v. Lee Optical*, 348 US 483 (1955).

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