Determining how to define constitutionally protected “speech” is increasingly problematic for courts as the communication becomes progressively digitalized. Freedom of Speech, which extends to conduct related to speech and symbolic speech, is a prominent foundation in the concept of American liberty. Historically, the scope of constitutionally defining speech has undergone significant interpretational changes in accordance with societal changes.

Freedom of speech is grounded the theory of Natural Law: it was believed that speech was an inherent right borne from the existence of man. The framer’s decision to include the freedom of speech in the Bill of Rights is grounded in this concept of Natural Law. The freedom of speech experienced substantial growth when Chief Justice Earl Warren led the Supreme Court. This underlying Constitutional interpretation philosophy is known as “Judicial Activism,” and while a largely broad term, it is generally considered to be “a significant court-generated change in public policy.”

Contrasting the activist opinions of the Warren Court are those seeking to curtail judicial influence. One of these conflicting theories is a niche described as “Burkean Minimalism.” Burkeans “distrust theoretical ambition” and rely on judges only in their “ability to elaborate the Constitution's text, read in light of society's traditions and practices.” Technological advancement makes it difficult for courts to make broad, widely applicable standards that coincide with activist efforts. The lower federal courts have begun to hear complex freedom of speech cases resulting from technology as the Fourth Circuit recently has with Bland v. Roberts. In light of technological innovation, the natural law foundation of the freedom of speech is more greatly reflected in minimalist interpretation.

This article will follow the changes in how courts approach the constitutional interpretation of freedom of speech in the digital age, and how these changes reflect the influence of natural law. First, it will discuss the natural law theories that the Freedom of Speech arose from. Then, it will discuss how both Warren Court activism preserved the natural law in expanding the constitutional definition of protected speech. Next, it will contrast this and demonstrate how court’s Burkean Minimalism to give respect to the natural law in modern speech analysis. Finally, it follows the judicial changes in constitutional interpretation styles when defining constitutionally protected “speech,” and will analyze how the progression from activism to minimalism preserves the integrity of the natural law.

Natural Law: The Foundation of Freedom of Speech

While the societal and governmental recognition of freedom of speech is relatively new in the scope of recorded history, it is often associated with Natural Law theory. Political theorists, philosophers and other social scholars often assert the theory of “Natural Law” as the origin of human constructs. Natural law consists of...
“supreme normative rules” that exist beyond the bounds of societal structure. These laws are not man-made, but are preexisting notions embedded in the existence of man, deriving from the innate dignity that all men possess. The theories and philosophies of natural law do not detail the minutia of credible laws and regulations, but instead provides greater questions of political and ethical judgment in developing legislation.

The natural law is not merely reflected in how society functions; institutional norms are not validated merely because they are commonly accepted. What is just or “natural” to one person varies significantly, dependent on culture and experiences. Within these paradigms personal and societal perceptions are organic, substantively reflecting change. History reflects the greater culmination of this progress, and embodies the changes in what is considered “natural” or “just.” Thus, “[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject.” This is perhaps where natural law becomes more theoretical than it is a practical means of Constitutional interpretation, resulting in a plethora of theories in approaches to constitutional interpretation.

Preserving The Natural Law Through Activism: The Warren Court

Defining Judicial Activism

Judicial Activism can be loosely defined as the expansion of judicial breadth and influence. The term “activism” is exceptionally vague, but can generally be distinguished by the Court’s failure to duly defer decisions to the other branches of government. These instances can often be identified when a court declares legislation to be unconstitutional, by the court utilizing the “canon of constitutional doubt,” and when judges “construe the statute to do something other than what it says.” Activism is the consideration of judicial review in an “institutional” rather than an “interpretive” way. Because it is commonly assumed that “if restraint is good, then activism must be bad,” people want their challengers, or anyone who does share their opinions, to be restrained. Adversaries seek to label their opposition as “activist” in order to corrupt or diminish their reputation. Accordingly, “activism” is a term frequently used to chastise a justice, or a court, if the opposing party disagrees with their opinion. Activism can therefore refer to the failing to invalidate a statute is unconstitutional, but the same can be said for failing to enforce the statute. Thus, failing to abide by judicial precedent may be labeled as activist, and while one can argue that abiding by “stare decisis is itself activist.” Despite these biased preconceptions, in the context of constitutional interpretation “activism” is the institutional manner of the court’s analysis, not an analysis of the political nature of the opinion.

In the second half of the twentieth century the Supreme Court, under the reign of Earl Warren, focused on the concept of individual rights and equality. The opinions of the era emulated “judicial activism in defense of democracy,” and any transgression of judicial authority was “grounded in respect for democracy.” Even opinions considered to be “analytically weak” by judicial scholars have been applauded for their “exuberant activism.” The activism and opinions of Warren influenced subsequent generations of legal scholars. These new legal professionals were “confident” in their perceptions of and approaches to judicial decision-making because of the strength and unabashed nature of the Warren Court.

The Warren Court’s Expansion Of Protected Speech

The Warren Court was “activist in ... in all the right places,” and gains exceptional notoriety for their expansion for first amendment rights. This activism is in part notable for its adherence to human rights, but also in its ability to recognize that the legislative branch is not always an efficient means of change. In this way, Warren’s activism instituted “realism” as a basis for decision-making.

This generation of activism is noted for the favorable opinions protecting the freedom of speech. Most notably, the Warren Court expanded the overall privileges of the American people by broadening the constitutional definition of “speech” and thus amplified what is protected by the first amendment. For example, the court redefined what is considered “obscene material;” limiting governments from banning only content that which is “patently obscene,” and “utterly without redeeming value.” Similarly, the court broadened the scope of protected speech when it held that radical, revolutionary speech was protected unless it posed “a clear and present danger” to the public. Warren did not make “positive” laws by expanding the freedom of speech, but legitimized the numerous applications of “speech” inherent in the natural law.
Preserving The Natural Law Through Restraint: Burkean Minimalism

The Theory Of Burkean Minimalism

Burkean Minimalism is named for the socially focused English politician Edmund Burke who feared “inconstancy and versatility” in government action, and believed that social change would arise from, and build on, traditions. Burke emphasized that the “experience of generations” from which institutional traditions arise surpass the wisdom of an individual judicially, this interpretive ideology asserts that traditions are “more reliable than individual judges relying on their respective private stocks of reason” and advocates for minimalist decisions that do not disrupt precedent. Under this model of interpretation, judges craft new, circumstantially distinct rulings by incrementally building on precedent.

A Burkean court would not deem legislation unconstitutional because of the “justices’ account of reason... or even because it is inconsistent with evolving or current social norms” but would instead consider whether a “long-standing and deeply held” principle has been violated. Those abiding by these doctrines believe that “the founding generation” understood societal evolution and thus intended for its dogmas to be organic and malleable. Burkeans deemphasize judicial influence, and instead consider how the progress and changes within the community have transformed tradition. Thus, when a minimalist departure from precedent is necessary Burkean judges do not focus on their own “independent moral and political” assumptions, but give great deference to traditional practices. Under this method of interpretation, the scope of judicial review is limited.

Burkean principles differ from other minimalistic interpretation approaches. A “Rationalist” minimalist is “willing to rethink traditions and established practices” in considering societal progression as traditions may simply be “unjust or arbitrary.” Rationalist judges believe that the constitutionality analysis is not clearly defined and reject Burkean traditions that “[reflects] power, confusion, accident, and injustice” rather than truly being indicative of generational wisdom. While Rationalists may be willing to declare a new right in their opinions this directly contradicts Burkean constricted ideals, which regard this as a legislative function.

However, Burkean Minimalism is not merely another conservative theory of constitutional interpretation. Burkean interpretation is noted for its “opposition to ambitious theories” of judicial decision-making. By allowing tradition to be circumstantially and specifically altered Minimalists set themselves apart from other traditional focused approaches. Originalism relies on not only the traditions exemplified in the Constitution, but also the ideals behind their conception, while Constitutional Perfectionism focuses more on most appropriately allocating the liberties afforded in the Constitution. The stringent reliance these theories place on constitutional tradition can result in “dramatic movements in the law” and juxtapose the stability that motivates Burkean opinions.

Burke considers sudden innovation to be “selfish” and “confined” as it rejects the practicality and reliability of historical tradition. Accordingly, to best make only “incremental” change, these decisions are both “narrow,” as focuses solely on the particular dispute, and “shallow” in their ability to appease a large audience. Burkeans believe that when writing an opinion judges have access only to the facts at hand, and often lack a range of information substantial enough to warrant a wide ruling. The shallow nature of incremental decisions “promote social peace” but respecting both sides of the agreement, and is a practical means to addressing...
A Modern Interpretive Approach: Respecting The Natural Law Through Burkean Minimalism

The growth of technology has resulted in new and groundbreaking litigation that relies on judges to rule on complex issues beyond the realm of the founding fathers’ expectations. In response, modern interpretation of constitutionally protected speech favors a Burkean approach in judicial decision-making and precedent setting. An example of this is a circuit court case Bland v. Roberts in which judges had to determine the application of first amendment protection to activity on social media. The court’s decision, and the rationale for the holding, reflects an interest in implementing minimalistic judicial influence.

i. Background of Bland v. Roberts

In 2012 a group of coworkers sued their employer, the local sheriff’s office, claiming that their online activity resulted in adverse employment actions being taken against them. These employees claimed that the Sheriff, who was running for reelection, retaliated against them after they demonstrated their support for his opponent in various forms, including on Facebook. In order to determine if an adverse employment action occurred, the court had to consider whether the various online activities represented constitutionally protected speech. The court considered each act of campaign support separately, and in particular considered whether “liking” a page on Facebook was sufficient conduct to constitute speech. The district court referenced two decisions from other lower courts that had considered the first amendment protected Facebook activity. In the cases cited the plaintiffs had posted “actual statements” that they wrote to their own Facebook pages, and the courts determined that the written text constituted speech. The district court in Bland was not persuaded by these cases. The court found that merely “liking” a page was not analogous to the posting of actual, textual content, which directly embodies the speech of the user. The court stated that it would not “attempt to infer the actual content of [the plaintiff’s] posts from one click of a button on... Facebook” because it lacked the specificity of “substantive statements” that were historically granted constitutional protection. Thus, the district court determined that “liking” a Facebook page did not represent constitutionally protected speech.

On appeal, the Fourth Circuit, in relevant part, reversed the district court’s decision. The court dismantled the procedural process and exigent ramifications of “liking” a Facebook page, and even cited the Facebook guidelines for authority. The court gradually explained how “liking” the page was socially conscious: when a user “likes” a page their photograph and personal information becomes available on that page. Similarly, after “liking” a page the information— the fact that he “liked” it— was then available to everyone that he was “Facebook friends” with. The court then explained how the “thumbs up” appearance of the “like” button indicates the expressive nature of the action and represents “symbolic speech.” The connectivity and user interface of Facebook connects users on an intimate level on which even one click of the mouse notifies your network, and the general Facebook community, about your personal conduct, and what you “like.” The court compared liking a political candidate’s Facebook page to placing the candidate’s campaign sign in one’s front yard as each conveys the message that the individual publically supports that candidate. Publicly supporting a candidate in this tangible way is constitutionally protected “substantive speech.” Thus, the Fourth Circuit found that “liking” a political candidate’s Facebook page was sufficient to constitute speech that is constitutionally protected under the First Amendment.

ii. Burkean Influence Of Bland v. Roberts

Contemporary Burkeans often favor incrementally controversial judicial decisions only in circumstances where the decision evolved by a “case-by-case” process and reflect “social norms.” The opinion and analysis of Bland v. Roberts mirrors Burkean Minimalism ideology in its deference to tradition, and it’s narrow and shallow application of constitutional principles.

First, both of the Bland courts demonstrated Burkean ideals in their reliance on precedent, albeit with different results. The Bland district court considers the opinions and reasoning of other jurisdictions when attempting to form their decision. Here, the judge gave deference to early forms of precedent in referring to the ruling of judges that came before it. The court rejected the tradition only because it did not find that the facts were analogous with the instant circumstances, in classic a Burkean manor. It refused to expand its influence by expanding the scope of defined speech outside of the traditionally accepted definition. Likewise, the circuit court mirrors Burkean ideals when it utilizes precedent in its comparison of Facebook “likes” to the placement of a campaign sign in one’s front yard. The growth here is not an expansion of judicial oversight, but is minimalistic: it is a direct
interpretation of tradition on current societal standards. Burkeans seek the guidance of the wiser old generations, and finds it to be the most compelling authority. Bland’s analogy of online activity to real world concepts demonstrates great deference given to traditional interpretation. Burkeans “respect the demands of stare decisis” in fear that additional departures from tradition will “have unanticipated adverse consequences, especially if existing law is embodied in social practices as well as judicial doctrines. The fourth circuit was clearly mindful of the power of precedent. While they did broaden the definition of “speech” incrementally they not only relied on, by directly analogized to, a traditional case. This reflects the “case-by-case” nature of Burkean judicial decision-making. Bland demonstrates how modern courts have incrementally, and circumstantially, defined the nature of constitutionally protected speech in respect to tradition.

Second, the analysis and ruling in Bland are classically Burkean as they are narrow, in that they focus directly on the issue at hand, and shallow, in that their simplicity and specificity make it likely that they will be uncontroversial. The decision in Bland was narrowly tailored to the specific “like” of a Facebook page. It doesn’t address social media institutions, or activities within social media, as a whole. The decision stipulated that “liking a political candidate’s campaign page” constitutes free speech. The court’s analysis and reasoning was specific to the particular circumstances of not social media activity, nor all Facebook activity, but the “like” of a political figure on one interactive platform. The holding doesn’t provide protection to “likes” for forms of content; it is inherently focused on only the political affiliation (and real-world analogy) of the activity. The opinion is further narrowed to Facebook specific activities. The decision discussed to how a “like” on Facebook affects the user and the public, but social media sites each utilize different platforms in which user activity has varied results.

Here, the decision relies on the social implications specific to Facebook, and therefore may not be applicable across social media. Further, part of the decision was reliant on the expressive nature of the “thumbs up” on the Facebook button. Thus it fails to address whether “liking” something on similar sites, such as Twitter or Instagram, which use different images to correspond with agreement, would satisfy speech. The reasoning in Bland is so fact-specific that the holding is unlikely to heavily impact further litigation.

Decisions like Bland are not merely a representation of minimalism, but display Burkean specific characteristics. The Bland court does not reject tradition, but widely embraces it and analogizes it in their decision. While a Rationalist judge may seek to define a new right, here the court does not take on a legislative function and instead made a decision that narrowly interpreted an existing right. Similarly, the decision is also not merely another form of conservative restraint. While Originalism and Constitutional Perfectionism relies so heavily on tradition that it may result in “dramatic movements” in the law, the Bland decision is too precise to result in drastic judicial change.

From Warren To Burke: Changes In Constitutional Interpretation Of Protected Speech Align With The Fundamentals Of The Natural Law

How The Digital Age Rendered Warren Activism Obsolete

The Warren Court both respected and affirmed the natural law theory of the first amendment by broadening the scope, in interpreting whole definitions, of what constituted protected speech. The “rights-protecting decisions of the Warren and Berger Courts... have now become embedded in national life as a social matter... but also in constitutional doctrine.” The activism affirmed the natural law by not merely stating individual activities that could be protected, but by establishing broad examples of human behavior that are innately protected.

The natural law theory that the First Amendment is grounded in, however, has become increasingly problematic with the digital age. On one end, failing to act is an impractical approach to modern speech analysis that would require the court to simply ignore the influence of the Internet. If a court were to simply “fail to act,” and refuse to rule on the protected nature of speech, it would leave individual vulnerable to legislation resulting in excessive governmental control. Any unnecessary restraint on the freedom of speech would be directly contradicting the fundamentals of the natural law, and by failing to consider digital speech the court would be failing to uphold the natural law that the first amendment in grounded in.

The other polar of activism- acting beyond the judicial scope- could have potentially devastating results on future constitutional analysis. During the Warren era the broad expansion of the freedom of speech reflected the nature of what constituted tangible speech and expression. Warren had to rule on the burning of draft cards, obscene magazines and movies, and radical speech that was outwardly and publically spoken. These circumstances were actual and determinative: the speech, the conduct and the persons were all apparent and definitive. Modern courts do not benefit from such blatant facts and conditions. As technology increases, and much of life becomes virtual, it’s increasingly harder to determine what is “speech.” Under a modern lens the theoretical understanding of the Natural Law is muddied by the complexities of online communication extending across multifaceted platforms and contexts.
**Burkean Minimalism And The Natural Law**

Incremental interpretation is analogized to a shield as it protects traditions, but also to a sword to further societal growth. In this way, Burkean Minimalism is an interpretive approach that offers valuable consideration to both the government and the individual. This is apparent in the *Bland* decision, and aligns with the natural law foundation of the freedom of speech.

The court may utilize a Burkean lens as a “shield” in to uphold unequivocal beliefs if there is a long-standing tradition of that type of government actions. In this was Burkean justices are “sympathetic” to government bodies that seek to maintain tradition and security. This coincides with the framer’s beliefs that some natural law may be forfeited for the sake of an effective society. Burkean Minimalism assures that despite the outcome of the case, the court adhered to the natural law, and if speech must be muted, the government will do so in the least restrictive way. In modern speech litigation Burkes respect the government’s need to regulate society, and appreciates that the influx of technology cannot completely abridge governmental controls.

Conversely, litigants may utilize Burkean Minimalism as a “sword” when asserting that the government has enacted a law that is not aligned with tradition and inconsistent with historical principles. While *Bland* was not interpreting the constitutionality of newly enacted legislation, the plaintiffs utilized a “sword” method of interpretation, and the court validated this approach. The natural law is intrinsic, and persons asserting a restriction of their freedom of speech rely on its innate characteristics. Under Burkean minimalism “the central role of the courts is to protect long-standing practices against renovations based on theories, or passions, that show an insufficient appreciation for those practices.” The “sword” offered to litigants here is the respect offered to the “tradition” and “passion” for the natural law that is grounded in the concept of American liberty. Like with the “shield” defense of Burkean analysis, the “sword” to the public vests in their natural rights.

Burkean Minimalism is more easily applied to modern cases than other restrictive ideologies. In contrasting Burkean minimalism to other theories of conservative interpretation, Burkean minimalism is most readily applied to circumstances where “[first,] originalism would produce unacceptable consequences; [second,] long-standing traditions and practices are trustworthy, or at least trustworthy enough; and [third,] there is great reason to be skeptical of the rule-elaborating and theory-building capacities of federal judges.” Burkean justices are “sympathetic” to government bodies that seek to maintain tradition and security. This coincides with the framer’s beliefs that some natural law may be forfeited for the sake of an effective society. In this way, Burkean justices are “sympathetic” to government bodies that seek to maintain tradition and security.

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**The Movement From Activism To Burkean Minimalism**

During the Warren era, when the scope of speech was broadened, the controversies rested in tangible speech or expression, such as the spoken or written word. The instances of “speech” the court analyzed represented a particular aspect of human communication, such as public speech. These categories were plain and broad, and decisions the court wrote, while expansive, were not widely applicable to other aspects of communications. The Warren Era broadened speech in a way that protected individuals from an overbearing government, as the original framers intended when they wrote the First Amendment. To take this approach to technology cases would not be protecting individuals, but would result in immeasurable influence. If *Bland* had been decided with an activist mindset, and applied more generally to social media, it would be directly impacting technological platforms that have not yet been invented. If using an activist approach digital speech opinions would be relying on normative social structures as they presently exist, instead of relying on the inborn “dignity” of man.

Maintaining the principles of the natural law in the digital age requires judges to be mindful that their decisions control technology that is only beginning to be understood, and impact communication methods that may not yet be developed. Technology changes rapidly, and courts cannot make broad decisions because they do not know how technology will evolve. If courts continued to utilize the Warren approach to determining the scope of speech it would have unforeseen effects on future litigation. By using a minimalist approach in cases like *Bland* the courts are not assuming that these structures, such as constitutionally protecting social media activity, are correct, but merely circumstantial. In utilizing the Burkean approach courts are more mindful of the natural law basis of the First Amendment. Modern courts are aware of the uncertainties of technology and likely have to be more minimalist, in their definitions of speech, because of the rapidly changing communication platforms of present day.
Despite the efforts of the Warren Court to ensure personal freedoms, its decisions are still “subject to the law of unintended consequences.”[99] In retaliation of limitations imposed on states, some states aggressively enacted restrict laws in response to the Court’s decisions.[100] These rebel laws were meant to counteract the era’s activism and allow states to restrain the public in ways that would withstand Warren’s reach. The consequences of the Warren court illustrate the inapplicability to an activist approach in modern free speech cases.

If courts were to make sweeping judicial reforms about technology states may follow history’s example and impose even more technology-based limitations. This legislation could result in a restraint of the freedom of speech, and would also impose more work on courts to determine the constitutionality of the legislation. Burkeans consider the Constitution to be not solely a once written document, but a reflection of unique and “diverse” moments throughout history.[101] While judicial activism can result in unintended consequences, and this penalty is heightened by the uncertainty of technological advancement, minimalistic approaches provide more stability in establishing precedent in “small steps” to prevent “unintended bad consequences” and allow the trier of fact to “preserve their options” in future rulings.[102]

**Conclusion**

As technology becomes increasingly imbedded in daily behavior courts have to reconsider the implications of their rulings.[103] How a judge analyzes and interprets a case of constitutionality will be determined by the judge’s interpretative theory. On one end of the spectrum, a judge may be judicially “active” and make vast decisions that may surpass their traditional role as the trier of fact. On the other end of the spectrum, judges may choose to “restrain” themselves in order to best serve their constitutional role. These two theories, while generally in contrast, each attempts to best interpret the Constitution in order to preserve liberty.


[6] Id. at 389.


[9] Id. at 242.

[10] Id. at 241-250.


[13] Id.


[18] Id. at 1145-146.

Michael J. Gerhardt et al., Constitutional Theory: Arguments and Perspectives 61 (4th ed. 2013).

Id.

Id. at 1401.

Id. at 1401-1402.

Easterbrook, supra note 34 at 1401-1402.

Id.

Prosner, supra note 8 at 551.

Id. at 534.

Id. at 546. Brown v. Board of Education, for example, is considered an “iconic” opinion of the era. Id.


Id. at 514-515.

Whittington, supra note 44 at 510.


Id.

See note 30 supra, and accompanying text

Sunstein, supra note 9 at 370 (Internal quotations omitted).

Id. at 382-383.

Id. 369-370.

Id. at 389.

Id. at 362-364.

Id. at 374.

Id. at 389.

Id. at 366.

Id. at 356.

Id. at 378..

Id. at 380 (quoting Van Orden v. Perry, 125 S. Ct. 2854, 2868-2871 (2005) (Breyer, J. concurring)).
Sunstein, supra note 9 at 385.

Id.

Id. at 366.

Id. at 356-358.

Id.

Id.

Id at 369-370.

Id. at 362-364.

Id. at 364.

Id. at 365.


Id. at 602.

Id. at 603.

See Id. at 603-607.

Id. at 603-604

For information about the cases see note 83, supra.

Bland, 857 F. Supp. 2d at 604.

Id.

Id.

Id. at 385-386.

Id.

Id.

Id. at 386.

Id. at 385-386.

Id. at 386 (citing City of Ladue v. Gilleo, 512 U.S. 43 (1994)).

Bland, 730 F.3d at 386.

Id.

Sunstein, supra note 9 at 393.

See note 61, supra, and accompanying text.

Id. at 402.

Bland, 730 F.3d at 386.
See notes 66-69, supra, and accompanying text.

See notes 70-73, supra, and accompanying text.

Sunstein, supra note 9 at 394.

See Section II, supra.

See notes 39-40, supra, and accompanying text.

See, e.g., notes 106-108, supra, and accompanying text.


Sunstein, supra note 9 at 356.

Id. at 375.

Id.

See notes 18-19, supra, and accompanying text.

Sunstein, supra note 9 at 376.

Id. at 373.

Id. at 361.

Prosner, supra note 8 at 554.

Id.

Sunstein, supra note 9 at 375.

Id. at 362-364.

Another example of this is a District Court in Michigan analyzing whether emoticons have sufficient content to constitute speech. Amanda Hess, Exhibit A: ), Slate (Oct. 26th, 2015, 4:34 PM) (available at http://www.slate.com/articles/technology/users/2015/10/emoticons_and_emojis_as_evidence_in_court.html).

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