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TRADITION AND FEMINISM IN CONSTITUTIONAL RIGHTS ADJUDICATION

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In recent years, "tradition" has been influentially invoked in constitutional rights adjudication and legal scholarship. The Supreme Court, in contexts ranging from abortion to the Second Amendment to freedom of speech, has looked to tradition to illuminate the contours of constitutional rights and the boundaries of permissible government regulation. Some legal theorists have defended "traditionalism" as a way to tether constitutional rulings to the people's customs instead of judges' moral views.

From a feminist perspective, the rise of tradition may be cause for concern, if not alarm. Why integrate into constitutional rights adjudication the practices and understandings of eras in which women were subject to severe political, economic, and social

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subordination? Yet the relationship between feminism and traditionalism depends on the form that traditionalism takes: what it is, how it is justified, and how it responds to moral critique.

This Article unpacks the idea of tradition, and it investigates the interaction between tradition and women's rights in constitutional law. I argue that a concern for tradition, properly understood, contains resources to guide an approach toward constitutional adjudication that can be conducive to, rather than hostile to, women's rights. For example, traditionalists often seek to glean insight from concrete experience rather than relying on abstract principles; they should therefore examine a range of experiences, including those of women. And the traditionalist interest in continuity supports acceptance of the last century's advancements in women's rights rather than attempts to "roll back the clock."

Thus, values integral to traditionalism can support positions favorable to women's rights. I apply this view of tradition to several constitutional questions, including the right to contraception, the permissibility of public single-sex education, pregnancy discrimination, and the scope of the Equal Protection Clause. I also engage in broader reflection about the determinacy of traditionalist analysis and the relationship between traditionalist reasoning and moral evaluation.

INTRODUCTION

"Tradition" has become a notable category in constitutional rights adjudication and scholarship. The Supreme Court stated in the abortion case *Dobbs* that "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973,"[1] and in the Second Amendment case *Bruen* that to regulate firearms, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition."[2] Beyond the pages of the U.S. Reports, some legal scholars have defended "traditions"—understood, in one proponent's words, in terms of "political and cultural practices of substantial duration"[3]—as valuable sources of constitutional insight.[4]

From a feminist perspective, the rise of tradition may be cause for concern, if not alarm. Why turn to tradition in constitutional rights adjudication, especially in cases implicating women's rights issues,

[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253–54 (2022).

[2] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022). For other recent Supreme Court invocations of tradition, see, e.g., Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022) (Establishment Clause); Vidal v. Elster, 144 S. Ct. 1507, 1518–19 (2024) (speech).

[3] Marc O. DeGirolami, The Traditions of American Constitutional Law, 95 Notre Dame L. Rev. 1123, 1125 (2020).

[4] See, e.g., Marc O. DeGirolami, Traditionalism Rising, 24 J. Contemp. Legal Issues 9, 54–56 (2023); Michael W. McConnell, The Right to Die and the Jurisprudence of Tradition, 1997 Utah L. Rev. 665, 681–90; see also Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1554–55 (2023) (referring to "living traditionalism" as "ineliminable, spreading, and increasingly deliberate," though also voicing concerns with the methodology).

when many relevant traditions emerged from periods in which women faced severe political, economic, and social subordination? Tradition may seem starkly at odds with regard for women's equal citizenship stature.

Yet the relationship between tradition and women's status depends on the nature of tradition—what tradition involves, how tradition affects constitutional rights claims, and how moral critiques of tradition are addressed. This Article interrogates the idea of tradition, and it examines the relationship between tradition and women's rights in constitutional adjudication.

I argue that a concern for tradition, properly understood, contains resources to guide an approach toward constitutional adjudication that can be conducive to, rather than hostile to, women's rights. Here are a couple of illustrations. Traditions often embody insights gleaned from concrete experience. Instead of reasoning about topics like contraception and sexual harassment in the abstract, therefore, one should seek to understand the experiences of women whose voices may not be fully captured by dominant narratives. Moreover, traditionalists value continuity rather than avulsive change. This favors acceptance of the last century's advancements in women's rights rather than attempts to "roll back the clock." Accordingly, one should reject readings of the Fourteenth Amendment's Equal Protection Clause that would, in excluding sex discrimination, destabilize decades of prior interpretations. There are doubtless tensions between feminism and certain forms of traditionalist reasoning. But tradition also has egalitarian potential, which this Article seeks to unlock.

To capture the approach to tradition advocated here, I use the term "dialectical traditionalism." At a high level, this view underscores the possibility of productive dialogue between past and present, with the prospect of transforming the past without eliminating its instructive power. Traditions can, indeed must, change over time to ensure continuity in different circumstances. But they can change in ways that preserve a link to the past and reflect openness to the insight to be derived from longstanding practices.

How? Dialectical traditionalists, in addition to drawing on a diverse range of traditions and emphasizing legal continuity (as just proposed), can pursue several other avenues. One is to recognize that practices with troubling roots can evolve over time. For instance, single-sex education may not today reflect detrimental assessments of women in the way it

did historically, and this militates against a ruling that the practice is unconstitutional. A second avenue is to critique certain strands of tradition in light of other customs or collective values—by contending, say, that sex stereotyping in the workplace runs contrary to American meritocratic ideals. A third is to identify resources within traditional views for advancement of women's rights. For instance, the traditional association between pregnancy and gender could undermine the Supreme Court's ruling (in *Geduldig v. Aiello*)[5] that sex-based discrimination does not necessarily encompass pregnancy discrimination. A fourth is to reason in a traditionalist fashion even while breaking with the past. For example, the Supreme Court's Virginia Military Institute ("VMI") decision, which held that VMI could not exclude women,[6] included approving descriptions of VMI's traditional "adversative method."[7] Overall, dialectical traditionalism takes longstanding practices seriously while recognizing that their perpetuation in the current day requires reflection and sometimes critique.

The motivations for undertaking this project are twofold. One aim is to encourage the development of traditionalism in a direction conducive to claims involving women's rights. Tradition is currently a salient form of argument in constitutional rights adjudication, employed by Justices with a range of jurisprudential and ideological views and increasingly discussed in legal scholarship.[8] From a feminist perspective, it is worth drawing attention to lines of traditionalist reasoning that can provide

[5] 417 U.S. 484, 494–97 (1974).

[6] United States v. Virginia, 518 U.S. 515, 558 (1996).

[7] Id. at 520.

[8] See, e.g., City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022) (Sotomayor, J.) (placing weight on "unbroken tradition" of regulating "on-premises" signs differently from "off-premises" signs in a First Amendment case); Timbs v. Indiana, 586 U.S. 146, 149 (2019) (Ginsburg, J.) (explaining that Eighth Amendment protection against excessive fines has "deep roots in our history and tradition" (alterations omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010))); Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (Rehnquist, C.J.) (inquiring into whether the asserted right to physician-assisted suicide "has any place in our Nation's traditions"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in the judgment) (explaining that the First Amendment right of access to trial proceedings "has special force when drawn from an enduring and vital tradition"); Fisher v. United States, 425 U.S. 391, 431 (1976) (Marshall, J., concurring in the judgment) (critiquing the Court for an approach "contrary to the history and traditions of the privilege against self-incrimination both in this country and in England"). For an overview of recent scholarship on tradition, see infra notes 12–14 and accompanying text.

support for women's rights. It may be argued that judicial or scholarly invocations of tradition are unlikely to change. One might, for instance, view current Justices' references to tradition simply as vehicles for promoting certain ideologies. In that case, however, alternative traditionalist perspectives can serve as the basis for critique of existing applications of traditionalist methodology—demonstrating that those applications are not necessary positions for those concerned about tradition to take.

A second motivation emerges from the conviction that a concern for tradition in constitutional rights adjudication is independently valuable. Decision-makers in numerous social and political settings place weight on prior practice and custom. This is true of judicial decision-making as well, and for good reasons. Among these reasons: The values of reliance and settled expectations, familiar from defenses of stare decisis,[9] are both integral to traditionalism and significant to the judicial task. Traditionalism's emphasis on concrete experience permits judges to learn from real-world applications of rights rather than opining in the abstract.[10] Adhering to tradition helps to constitute and maintain a national polity.[11] Accordingly, appeals to tradition are difficult to reject outright. But women's rights are also significant, and analysis of tradition in constitutional rights adjudication ought to grapple with the challenge posed by sexist traditions.

This Article thus takes a deep dive into tradition and its interaction with feminism, highlighting several dimensions of this interaction: tradition's value; the weighty difficulties with traditionalism posed by a concern with women's rights; and the possibility of marshaling tradition's resources in a feminist direction. In bringing together these inquiries—especially in light of very recent Supreme Court decisions—the Article breaks new ground. At the same time, it builds on three main strands of scholarship on tradition.

First, some scholars including Marc DeGirolami and Michael McConnell have advocated for traditionalism as a method of constitutional interpretation that, in DeGirolami's words, "signals the presumptive influence of political and cultural practices of substantial

[9] See, e.g., Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 597–98 (1987).
[10] See infra Section III.A.
[11] See infra Section III.D.

duration for informing constitutional meaning."[12] Second, some scholars such as Reva Siegel, Melissa Murray, and Cary Franklin have critiqued the current Supreme Court's emphasis on tradition in constitutional rights adjudication from an equality perspective, contending that the Court is elevating traditions that disadvantage women (among others).[13] Third, some scholars—notably Jack Balkin, Katharine Bartlett, Felipe Jiménez, and Dov Fox and Mary Ziegler—have argued in favor of more flexible or "evolving" forms of traditionalism.[14] This Article draws on

[12] DeGirolami, supra note 3, at 1125; McConnell, supra note 4, at 681. For other contributions favorable to tradition, see, e.g., Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029, 1047–55 (1990); Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. Rev. 619, 697–715 (1994); see also id. at 703 (emphasizing resources for change from within tradition). Much of the literature on traditionalism in the past few years emanates from those concerned with the relationship between originalism and tradition. See, e.g., Randy E. Barnett & Lawrence B. Solum, Originalism after *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433 (2023); Jud Campbell, Tradition, Originalism, and General Fundamental Law, 47 Harv. J.L. & Pub. Pol'y 635 (2024); Girgis, supra note 4, at 1487–96.

[13] See, e.g., Cary Franklin, History and Tradition's Equality Problem, 133 Yale L.J.F. 946, 950–51 (2024); Serena Mayeri, The Critical Role of History after *Dobbs*, 2 J. Am. Const. Hist. 171, 190 (2024); Joy Milligan & Bertrall L. Ross II, We (Who Are Not) the People: Interpreting the Undemocratic Constitution, 102 Tex. L. Rev. 305, 339–55 (2023); Melissa Murray, Children of Men: The Roberts Court's Jurisprudence of Masculinity, 60 Hou. L. Rev. 799 (2023); Melissa Murray & Katherine Shaw, *Dobbs* and Democracy, 137 Harv. L. Rev. 728, 772–74 (2024); Reva B. Siegel, How "History and Tradition" Perpetuates Inequality: *Dobbs* on Abortion's Nineteenth-Century Criminalization, 60 Hou. L. Rev. 901, 932–33 (2023).

[14] Jiménez distinguishes between "conservative" and "flexible" traditionalism and draws attention to "legal traditions" that characterize the practice of judicial decision-making. Felipe Jiménez, Tradition in Constitutional Adjudication, 36 Yale J.L. & Humans. 1, 23–30, 44–45 (2025). Fox and Ziegler propose an "[e]volving traditionalism" that "anchors itself in the most recent among those lasting social practices that go back at least decades." Dov Fox & Mary Ziegler, The Lost History of "History and Tradition," 98 S. Cal. L. Rev. 1, 47 (2024). Although I share these authors' interest in appeals to tradition that accommodate criticism of past practices, I do not adopt their particular versions of traditionalism, and I focus on the relationship between traditionalism and women's rights jurisprudence. Jack Balkin has underscored the heterogeneity and complexity of traditions and has urged an "expansion of constitutional memory" to include those not involved in the formal process of constitutional ratification. Jack M. Balkin, Memory and Authority: The Uses of History in Constitutional Interpretation 204, 219 (2024). While I draw on various aspects of Balkin's work—and I share his use of the term "dialectical" to describe tradition, see infra note 135—I devote more specific attention to traditionalism as a method of constitutional interpretation. Further, unlike Balkin, I do not advocate on behalf of any kind of originalism, and I concentrate on feminist challenges to traditionalism. Bartlett, for her part, presents an "integrative view" of tradition that seeks an alternative to either relying wholly on the past or ignoring it. Katharine T. Bartlett, Tradition as Past and Present in Substantive Due Process Analysis, 62 Duke L.J. 535, 572 (2012) [hereinafter Bartlett, Tradition in Substantive Due

insights from all of these scholars while carrying out its distinctive examination of tradition and its relationship to women's rights claims.[15]

Part I lays the groundwork by examining the role played by tradition in case law on constitutional rights. This Part provides a sense of the possible legal functions that tradition could perform. It also clarifies the relationship between traditionalism and originalism, and it addresses the question whether the sources of tradition are legal or cultural.

Part II tackles the conundrums of defining "tradition" and "traditionalism." I characterize traditions as networks of enduring practices and understandings. I conceptualize traditionalism as an approach to constitutional adjudication that values fidelity to the forms of social organization that traditions help to constitute. Part II emphasizes that traditionalists need not adopt an uncritical posture or one dedicated to copying the past; instead, vigorous traditions include elements of contestation and adaptability over time. Such an approach to tradition can be captured by the label "dialectical traditionalism." I respond to the objection that my view is not real traditionalism, at least not in the way that defenders of traditionalism would ordinarily use that term.

Part III addresses the relationship between traditionalism and feminism from a theoretical perspective. It both highlights traditionalism's vulnerability to feminist critique and identifies resources that traditionalism has to offer those concerned about women's rights. In particular, Part III demonstrates that four leading justifications for traditionalism—rooted in concrete experience, reliance, democracy, and national identity—can support versions of traditionalism that favor women's rights.

Process]; see also Katharine T. Bartlett, Tradition, Change, and the Idea of Progress in Feminist Legal Thought, 1995 Wis. L. Rev. 303, 304 [hereinafter Bartlett, Idea of Progress] (arguing that feminists should not adopt an "oppositional stance" toward tradition). Though I share much of Bartlett's general orientation, my account focuses on the implications of traditionalism's underlying rationales and analyzes tradition in light of the recent swell of jurisprudence on "history and tradition" in constitutional law.

[15] Although this Article focuses on constitutional rights rather than structure, tradition and related concepts have also been employed in separation-of-powers disputes, see Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411 (2012), and in federal courts law, see Ernest A. Young, Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law, 58 Wm. & Mary L. Rev. 535 (2016). For discussion of the distinction between practice-based arguments in the structural and individual rights contexts, see Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1413–14 (2017).

Part IV draws out implications of the proposed view of tradition for constitutional rights adjudication. It recommends, for example, drawing on a range of traditions, including traditions of women's resistance to sexist legal arrangements and traditions reflecting women's experiences more generally. I further advocate for openness to the possibility that traditions can change, as well as efforts to shape the contents of tradition by arguing that certain practices—including those embodying injustice toward women—are out of step with more enduring strands.[16] Moreover, it can be beneficial for judges to reason in a traditionalist manner even when they are ruling in accordance with new social understandings.[17] The VMI case mentioned earlier provides an example, as does *Griswold v. Connecticut*, where the Court upheld a right that many would consider novel while stressing the lengthy pedigree of concern for marital privacy.[18] Expressing respect for tradition can be valuable normatively but also pragmatically; it may help to legitimate the ruling even to those skeptical of societal changes.

Part V addresses broader issues surrounding the role of tradition in constitutional jurisprudence. It tackles, for instance, the objection that dialectical traditionalism is indeterminate or merely a vehicle for judges' moral predilections. This Article aims primarily to examine the relationship between tradition and feminism, rather than to offer a full-blown constitutional theory. Nevertheless, the observations in Part V pave the way for future consideration of the function that tradition can serve in constitutional rights jurisprudence as a whole.

[16] Indeed, problematic strands of tradition can help to illuminate the nature of constitutional violations in the current day. For example, the Supreme Court in the 1973 case *Frontiero v. Richardson* held unconstitutional statutes requiring a servicewoman, but not a serviceman, to prove that her spouse was actually dependent on her income to claim him as a dependent for benefits purposes. 411 U.S. 677, 688 (1973) (plurality opinion). The plurality reviewed the history of sex discrimination in the United States and critiqued "gross, stereotyped distinctions between the sexes." Id. at 685. Traditional understandings of women's roles embraced in the past helped the Justices to identify a constitutional violation in the modern day. This method shares features in common with what other scholars have called "negative precedent"—using historical understandings to cast doubt on the legitimacy of current practices. See, e.g., Reva B. Siegel, The Politics of Constitutional Memory, 20 Geo. J.L. & Pub. Pol'y 19, 54 (2022) [hereinafter Siegel, Constitutional Memory]; Mayeri, supra note 13, at 189–90; infra Subsection IV.B.4.

[17] I argue for a presumption that judges should reason in a traditionalist manner even when breaking with tradition; this presumption could be overcome if the customary practices being rejected are sufficiently repugnant from a normative point of view. See infra Section IV.C.

[18] 381 U.S. 479, 485–86 (1965).

A couple of clarifications regarding the scope and presuppositions of the Article are in order. The Article presupposes the moral correctness of feminism in the sense that women ought to have equal civil rights to men and an equal opportunity to participate in the political and economic life of the nation. This conception is meant to be relatively general and to leave room for varying social and moral views.[19]

In addition, some of the arguments about tradition and women's rights considered here would apply not only to cases involving women, but also to cases involving other forms of inequality, such as racial discrimination and discrimination against LGBT individuals.[20] Moreover, adjudicators' understandings of certain traditions and their deficiencies can benefit from considering more than one axis of critique at the same time.[21] Although I refer to other forms of discrimination at certain junctures,[22] the Article does not have space to develop application of its analysis to additional forms of inequality. It is to be hoped, however, that the Article's analysis could be useful to future such projects.[23]

[19] Of course, there are numerous varieties of feminism. For an overview, see Nancy Levit & Robert R.M. Verchick, Feminist Legal Theory: A Primer 11–40 (2d ed. 2016). Although various strains of feminist theory may interact in complex ways with the ideas in this Article, the goal here is to pose the feminist challenge to traditionalism at a relatively high level of generality that can be endorsed by those with different views on the precise content of feminism.

[20] See, e.g., William N. Eskridge, Jr., Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation, 32 Harv. J.L. & Pub. Pol'y 193, 202 (2009) (arguing that tradition "on matters of sexuality as well as race has been evolutive and not static"); Kim Forde-Mazrui, Tradition as Justification: The Case of Opposite-Sex Marriage, 78 U. Chi. L. Rev. 281, 296–97, 330–33 (2011) (urging skepticism about tradition as a justification for restricting marriage to the opposite-sex setting, and discussing interracial marriage as well).

[21] For critiques of the Supreme Court's abortion jurisprudence along axes of both race and gender, for example, see Khiara M. Bridges, Foreword: Race in the Roberts Court, 136 Harv. L. Rev. 23, 42–53 (2022); Michele Goodwin, Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment, 2022 U. Chi. Legal F. 191, 202–08.

[22] See infra, e.g., notes 221–23, 278, 285–87 and accompanying text.

[23] Another clarification: The Article concentrates on the role of tradition in constitutional "adjudication," understood as the activity in which judges are engaged when deciding constitutional cases. That activity is meant to encompass "interpretation" in the sense of an effort to ascertain the contents of the law. For many observers, there is not much left for judges to do once they have engaged in interpretation; for such observers, "judges deciding constitutional cases must enforce the constitutional law." Mitchell N. Berman & Kevin Toh, Pluralistic Nonoriginalism and the Combinability Problem, 91 Tex. L. Rev. 1739, 1740 (2013). As Berman and Toh point out, however, the "issue of what judges should do in

The notion that feminism is anything but flatly contrary to traditionalism may seem counterintuitive. This Article identifies and explores the tensions. But it also seeks to uncover facets of tradition that are consonant with the advancement of women's rights.

I. TRADITION IN CONSTITUTIONAL RIGHTS ADJUDICATION: LAYING THE GROUNDWORK

This Part lays the groundwork for an analysis of the concept of tradition and its proper role in constitutional rights analysis. I draw attention to the variety of uses to which tradition has been put in legal settings especially relevant to women's rights. I then discuss the relationship between tradition and original meaning, as well as the distinction between legal traditions and traditions grounded in society or culture.

A. Tradition's Doctrinal Possibilities

Supreme Court jurisprudence "is marbled through with references to tradition going back to the beginning of the Republic," as Darrell Miller observes.[24] To illustrate the range of doctrines in which tradition has played a role[25]: The Supreme Court has assessed the constitutionality of governmental prayer practices under the Establishment Clause with reference to whether "the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures."[26] The Court's

constitutional disputes" is conceptually "distinct from the legal issue of what the constitutional law is or consists of." Id. at 1745; see also Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1767 (1994) (distinguishing between the scholarly task of "constitutional interpretation" and "actual constitutional decisionmaking"). And one might adopt the opinion that judges have a different task in adjudication than they do in interpretation. For instance, if interpretation yields several viable candidates for the law's contents, the judge *qua* adjudicator might have leeway "to resolve a dispute by determining, amid the clamour of rival claims, what is just." Garrett Barden & Tim Murphy, Law and Justice in Community 132 (2010). I do not take a position on what (if anything) is involved in adjudication beyond determination of the contents of the law. Instead, I highlight rationales for drawing on tradition at any juncture in the constitutional decision-making process. I then argue that, to the extent one is persuaded by these justifications, one ought to take a more receptive approach toward women's rights claims than is commonly presumed.

[24] Darrell A.H. Miller, Falsifying Tradition, 75 Duke L.J. 1311, 1315–16 (2026).

[25] For enumerations of traditionalism's doctrinal manifestations, see Girgis, supra note 4, at 1497–1502; Andrew Koppelman, The Use and Abuse of Tradition: A Comment on DeGirolami's *Traditionalism Rising*, 24 J. Contemp. Legal Issues 187, 188–97 (2023).

[26] Town of Greece v. Galloway, 572 U.S. 565, 577 (2014).

personal jurisdiction jurisprudence, rooted in the Fourteenth Amendment's Due Process Clause, asks whether a lawsuit "offend[s] traditional notions of fair play and substantial justice."[27] The Court's First Amendment speech analysis includes the category of a "traditional public forum—parks, streets, sidewalks, and the like" where the government may not limit speech to the same extent as in a nonpublic forum.[28]

In settings particularly connected to women's rights, tradition serves a variety of functions. Here I analyze three such settings: substantive due process cases, equal protection cases, and cases that do not focus on women's rights explicitly but concern traditions that are especially likely to affect women, such as the 2024 case *United States v. Rahimi* upholding a domestic violence regulation against Second Amendment challenge.[29]

1. Substantive Due Process

"Tradition" in Fourteenth Amendment substantive due process analysis served for much of the twentieth century as a way to safeguard rights not specifically enumerated in the Constitution but nevertheless, as the Supreme Court stated in 1923, "essential to the orderly pursuit of happiness."[30] These rights often involved issues related to childbirth, childrearing, and the structure of the family.[31] For example, *Griswold v. Connecticut* identified in constitutional "penumbra[s]" "a right of privacy older than the Bill of Rights," namely, the right of married couples to use contraceptives.[32] A notable invocation of tradition occurred in *Moore v. City of East Cleveland*, where the Court held that a state violated due process by enacting a single-family housing ordinance that prohibited cohabitation by a grandmother and her cousin grandchildren.[33] Because "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" had "roots equally venerable" to the tradition "uniting the

[27] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945)).

[28] Minn. Voters All. v. Mansky, 585 U.S. 1, 11–12 (2018).

[29] 144 S. Ct. 1889, 1898 (2024).

[30] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[31] See, e.g., Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (invalidating a state law requiring children to attend public school).

[32] 381 U.S. 479, 483, 486 (1965).

[33] 431 U.S. 494, 499–500 (1977) (plurality opinion).

members of the nuclear family," the Court plurality reasoned, the extended-family tradition was "equally deserving of constitutional recognition."[34] In *Griswold* and *Moore*, state regulation at odds with tradition could not withstand constitutional scrutiny.

The mid-twentieth-century view of tradition in substantive due process cases—as pointed out by scholars including Fox and Ziegler, Jiménez, Linda McClain and James Fleming, and Siegel—incorporated an element of dynamism.[35] In dissent in *Poe v. Ullman*—a case on contraception that shortly preceded *Griswold*—Justice Harlan explained that due process "has represented the balance" that "our Nation" has struck between individual liberty and "the demands of organized society," "having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[36] "That tradition," Justice Harlan explained, "is a living thing."[37] The plurality in *Moore* approvingly quoted Justice Harlan's "living thing" view of tradition,[38] as did the Court in *Casey v. Planned Parenthood* while upholding a substantive due process right to abortion.[39]

More recently, however, tradition has often been employed to restrict substantive due process protection in the name of judicial restraint. The leading case is the 1997 decision *Washington v. Glucksberg*, in which the Supreme Court held that the Fourteenth Amendment's Due Process Clause did not safeguard a right to assisted suicide.[40] Substantive due process, the Court stated, covers "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[41] Moreover, substantive due process analysis requires a "careful description of the asserted fundamental liberty interest."[42] "Careful description" implicates debates over the proper level of

[34] Id. at 504.

[35] Fox & Ziegler, supra note 14, at 18–23; Jiménez, supra note 14, at 29; Linda C. McClain & James E. Fleming, Ordered Liberty After *Dobbs*, 35 J. Am. Acad. Matrim. Laws. 623, 624–25, 630 (2023); Reva B. Siegel, The History of History and Tradition: The Roots of *Dobbs*'s Method (and Originalism) in the Defense of Segregation, 133 Yale L.J.F. 99, 126, 133–46 (2023).

[36] 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[37] Id.; see Jiménez, supra note 14, at 29 (referring to Justice Harlan's dissent as "[a] form of flexible traditionalism").

[38] *Moore*, 431 U.S. at 501 (plurality opinion).

[39] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

[40] 521 U.S. 702, 705–06 (1997).

[41] Id. at 720–21 (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

[42] Id. at 721 (internal quotation marks omitted) (citation omitted).

generality at which an unenumerated right is to be understood.[43] For some Justices, notably Justice Scalia, substantive due process analysis ought to "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[44] Although the Supreme Court has not adopted this position, *Glucksberg*'s "careful description" requirement evinces an interest in lowering the level of generality at which a tradition is characterized and thereby limiting tradition's capacity to support a substantive due process right.

In the years since *Glucksberg*, the Supreme Court has adopted varying approaches toward the role of tradition in substantive due process analysis.[45] In *Lawrence v. Texas*—holding that states could not constitutionally ban same-sex relations—the Court adopted a flexible approach toward tradition.[46] First, the Court reasoned about tradition at a high level of generality: "[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[47] Second, the Court emphasized relatively recent traditions: "[W]e think that our laws and traditions in the past half century are of most relevance here."[48] Third, the Court doubted that tradition was the be-all and end-all of substantive due process analysis: "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[49] The last point was picked up in *Obergefell v. Hodges*, in which the Supreme Court recognized a constitutional right to same-sex marriage: "History and tradition guide and discipline [the substantive due process] inquiry but do not set its outer boundaries."[50]

[43] See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1058 (1990); McConnell, supra note 4, at 671.

[44] Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion). For a critique, see Cass R. Sunstein, Against Tradition, 13 Soc. Phil. & Pol'y, Summer 1996, at 207, 223.

[45] For an account of the shifts, see McClain & Fleming, supra note 35, at 629–33. McClain and Fleming "distinguish between two competing conceptions of tradition in the due process inquiry: tradition as historical practices versus tradition as aspirational principles." Id. at 630.

[46] 539 U.S. 558, 578 (2003).

[47] Id. at 574.

[48] Id. at 571–72.

[49] Id. at 572 (alteration in original).

[50] 576 U.S. 644, 664 (2015); see Kenji Yoshino, A New Birth of Freedom?: *Obergefell v. Hodges*, 129 Harv. L. Rev. 147, 162 (2015) ("*Obergefell* transformed the role *Glucksberg* assigned to tradition."). Robin West has argued that even "liberal" versions of tradition are

As of today, however, the Supreme Court seems to have rejected the *Lawrence* Court's view of tradition and substantive due process. The central decision is *Dobbs*, holding that the Constitution does not contain a right to abortion because no such right was "deeply rooted in the Nation's history and traditions."[51] "On the contrary," the Court indicated, "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[52]

Currently, then, substantive due process analysis incorporates tradition in the following way. Governmental interference with certain "fundamental" rights is subject to heightened scrutiny under the Fourteenth Amendment's Due Process Clause even if those rights are not specifically enumerated in the Constitution.[53] Traditional recognition of a right is highly probative of, if not a prerequisite for, that right's "fundamental" status.[54] Moreover, a right must be "deeply rooted" in America's history and tradition, suggesting that relatively recent traditions would not suffice.[55] Fairly general traditions also seem not to pass muster, though there is no clear measure of the mandated level of specificity. Overall, tradition serves as a gatekeeper blocking the constitutionalization of substantive due process claims with too weak a pedigree.

2. Equal Protection

The Supreme Court generally treats tradition less favorably in a second area relevant to women's rights, namely, the Fourteenth Amendment Equal Protection Clause.[56] Modern (that is, post-1960s) doctrine on constitutional sex discrimination has declined to accept

"conservative" in the sense that they vindicate conservative "virtues" of "good judicial decision-making," such as sensitivity to "historical tradition, custom, and precedents." Robin West, The Ideal of Liberty: A Comment on *Michael H. v. Gerald D.*, 139 U. Pa. L. Rev. 1373, 1373, 1388 (1991).

[51] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

[52] Id. at 2253–54.

[53] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[54] See *Dobbs*, 142 S. Ct. at 2242.

[55] The *Dobbs* Court rejected the dissent's suggestion, which drew on Justice Harlan's dissent in *Poe*, that "the 'constitutional tradition' is 'not captured whole at a single moment.'" Id. at 2260 (quoting id. at 2326 (Breyer, Sotomayor & Kagan, JJ., dissenting)).

[56] See DeGirolami, supra note 3, at 1160–61, 1169–70; Girgis, supra note 4, at 1502. For further skepticism that the Equal Protection Clause is fertile ground for traditionalist reasoning, see Koppelman, supra note 25, at 196; Sunstein, supra note 44, at 218.

"traditional, often inaccurate, assumptions about the proper roles of men and women" as adequate justification for gender-based classifications.[57] In explaining why gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause, the Justices noted that the "Nation['s] . . . long and unfortunate history of sex discrimination" has "[t]raditionally" been "rationalized by an attitude of 'romantic paternalism.'"[58] Thus, the Court has cast certain "traditional" views involving gender as either not binding or affirmatively worth rejecting.[59] One function of tradition in equal protection jurisprudence, then, is to serve as "negative precedent," that is, "as a record of past wrongs that the nation strives to remedy and against which the nation defines itself."[60]

Tradition has other functions in equal protection opinions as well. The Court has at times appealed to longstanding practices to uphold differential treatment against equal protection challenge,[61] and some Justices have urged greater adherence to tradition in equal protection cases. Justice Scalia was a leading proponent; for example, in dissent from the Court's decision in the VMI case, he expressed the "view that the Court's made-up tests cannot displace longstanding national

[57] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (invalidating a state statute excluding men from enrolling in state-sponsored nursing school).

[58] Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

[59] In the context of racial discrimination, *Brown v. Board of Education*, 347 U.S. 483, 492–93, 495 (1954), also repudiated reliance on tradition (albeit implicitly). *Brown* overruled *Plessy v. Ferguson*, which had justified its deference to state laws enforcing segregation partially on the basis that a state "is at liberty to act with reference to the established usages, customs, and traditions of the people." 163 U.S. 537, 550 (1896).

[60] Siegel, Constitutional Memory, supra note 16, at 54 (emphasis omitted); see also Miller, supra note 24, at 1319 ("[T]radition can form evidence of a kind of 'anti-canon' against which legal texts are constructed or interpreted.").

[61] E.g., Vacco v. Quill, 521 U.S. 793, 808 (1997) ("By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction."). In the gender context, the Supreme Court upheld the exclusion of women from draft registration in *Rostker v. Goldberg* on the basis that women were excluded from combat, stating that the exclusion from registration "was not the accidental byproduct of a traditional way of thinking about females." 453 U.S. 57, 74 (1981) (internal quotation marks omitted) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam)). The combat exclusion itself was not at issue in *Rostker*. However, in underscoring women's ineligibility for combat, the Court quoted a Senate Report that referred to longstanding practices: "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people." Id. at 77 (quoting S. Rep. No. 96-826, at 157 (1980)).

traditions as the primary determinant of what the Constitution means."[62] At the same time, opinions with results usually deemed "liberal" have not, as Kim Forde-Mazrui puts it, "consistently eschewed tradition."[63] In decisions upholding some use of race in higher education admissions, for example, the Court appealed to "our tradition of giving a degree of deference to a university's academic decisions,"[64] and an influential opinion by Justice Powell reasoned that "our tradition and experience lend support to the view that the contribution of diversity is substantial."[65]

Moreover, Justices have sometimes reasoned in a manner that expresses respect for longstanding institutions even as they reject certain existing practices as inconsistent with equal protection. Examples include Justice Ginsburg's opinion for the Court in the VMI case, positively describing VMI's "adversative method,"[66] and the Supreme Court's odes to marriage in cases like *Loving v. Virginia* ("Marriage is . . . fundamental to our very existence and survival.")[67] and *Obergefell v. Hodges* ("[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").[68]

[62] United States v. Virginia, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting). Justice Scalia may have been less sympathetic to tradition in the context of equal protection race discrimination cases. See Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (arguing that tradition can give "content only to *ambiguous* constitutional text," and the Fourteenth Amendment is not ambiguous in condemning racial discrimination). Beyond Justice Scalia, another example of a Justice advocating traditionalist interpretation in an equal protection case comes from *Mississippi University for Women v. Hogan*, where Justice Powell, dissenting from the Court's decision that men could not be excluded from a state-sponsored nursing school, stated that "the practice of voluntarily chosen single-sex education is an honored tradition in our country." 458 U.S. 718, 744 (1982) (Powell, J., dissenting).

[63] Forde-Mazrui, supra note 20, at 299.

[64] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[65] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (plurality opinion).

[66] Justice Ginsburg's opinion for the Court in *United States v. Virginia* discussed VMI's "endeavor[ing] to instill physical and mental discipline in its cadets," which included an " 'adversative method' modeled on English public schools and once characteristic of military instruction," in highly positive terms. 518 U.S. at 520. I thank Anne Coughlin for highlighting this point.

[67] 388 U.S. 1, 12 (1967). Although the Court praised marriage in the context of addressing a substantive due process claim, it used the point about marriage's fundamentality to critique the racial classifications at issue as "directly subversive of the principle of equality at the heart of the Fourteenth Amendment." Id.

[68] 576 U.S. 644, 669 (2015). The Supreme Court rested its decision on both substantive due process and equal protection grounds. Id. at 672–73.

Tradition, then, has functioned in equal protection cases to highlight the kinship between challenged present practices and a troubling past. But there have also been efforts to marshal tradition to support existing practices, as well as traditionalist forms of reasoning accompanying doctrinal change.

3. Additional Lines of Doctrine

The relationship between tradition and women's rights also crops up in the context of doctrines other than substantive due process and equal protection. In these settings, constitutional rights analysis features references to tradition, and the traditions at stake are especially likely to affect women. A notable example from recent Supreme Court Terms is the 2024 decision *United States v. Rahimi*.[69] There, the Court upheld against Second Amendment challenge a statutory restriction on firearm possession by certain individuals subject to domestic violence restraining orders.[70]

Tradition entered into the *Rahimi* analysis—and into the analysis of Second Amendment precursors to *Rahimi*[71]—in a twofold sense. First, the *Rahimi* Court emphasized the importance of the right to keep and bear arms by appealing to its historical pedigree. The Court stressed that this right was "among the 'fundamental rights necessary to our system of ordered liberty,' " being "[d]erived from English practice and codified in the Second Amendment."[72] Second, the Court drew on tradition to fix the scope of permissible government *regulation* of a right. In the 2022 case *New York State Rifle & Pistol Association v. Bruen*, the Court had held that regulation of the Second Amendment right must be "consistent with this Nation's historical tradition of firearm regulation."[73] There, the Court had concluded that a state permitting regime that "condition[ed] issuance of a [public-carry] license . . . on a citizen's showing of some additional special need"[74] lacked a basis in "an American tradition."[75] In *Rahimi*, by contrast, a statute prohibiting certain individuals subject to

[69] 144 S. Ct. 1889 (2024).

[70] Id. at 1896–97.

[71] See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022); District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

[72] *Rahimi*, 144 S. Ct. at 1897 (quoting McDonald v. City of Chicago, 561 U.S. 742, 778 (2010)).

[73] 142 S. Ct. at 2119.

[74] Id. at 2122.

[75] Id. at 2138.

domestic violence restraining orders from possessing firearms "fit[] comfortably within [the] tradition" of laws "preventing individuals who threaten physical harm to others from misusing firearms."[76] Hence, tradition has served to demarcate a zone of legality into which modern-day regulation must fit to pass constitutional muster.

In *Rahimi*, the domestic violence regulation at issue was particularly likely to implicate women's status. Although the harms of domestic violence are by no means limited to women, domestic violence poses distinctive risks for women and children, as several amici pointed out.[77] The *Rahimi* Court thus faced a choice about how to address traditions rooted in periods with far fewer protections for women against intimate family violence and substantially restricted societal roles for women more generally.[78] Although the majority in *Rahimi* did not emphasize the impact on women of domestic violence restraining orders, the case cast into sharp relief the potential consequences for women stemming from a focus on a regulation's fit with tradition.

Many doctrinal contexts could similarly have ramifications for the relationship between tradition and women's status—for example, cases involving the First Amendment's application to pornography. More generally, tradition serves multiple functions in constitutional rights doctrines that have particular relevance to women's status. Tradition can support the judgment that a right is fundamental (or not) and hence warrants (or does not warrant) constitutional protection. It can serve as a source of "negative precedent" highlighting problems with current arrangements. And it can furnish a basis on which to judge the constitutionality of particular forms of government regulation.

B. Tradition and Original Meaning

The relationship between tradition and original meaning is worth briefly raising, given its contemporary salience.[79] On one view, tradition

[76] *Rahimi*, 144 S. Ct. at 1896–97.

[77] See, e.g., Brief of Professor Mary Anne Franks as Amicus Curiae in Support of Petitioner at 20–21, *Rahimi*, 144 S. Ct. 1889 (No. 22-915); Brief of Amici Curiae National Indigenous Women's Resource Center et al. in Support of Petitioner at 7–15, *Rahimi*, 144 S. Ct. 1889 (No. 22-915); Brief for Amici Curiae Professors of History and Law in Support of Petitioner at 18–19, *Rahimi*, 144 S. Ct. 1889 (No. 22-915). Several of these amici also highlighted distinctive harms for members of racial minorities or tribal nations.

[78] See Joseph Blocher & Reva B. Siegel, Guided by History: Protecting the Public Sphere from Weapons Threats Under *Bruen*, 98 N.Y.U. L. Rev. 1795, 1826–28 (2023).

[79] For a fuller discussion, see Barnett & Solum, supra note 12, at 446–50.

can help to illuminate original meaning. That use of tradition is perhaps clearest when the Court draws on traditions preceding ratification of the relevant constitutional provision. The idea is that these traditions have a plausible claim to be "part of our [Founders'] law."[80]

Even if tradition postdates ratification, it might shed light on original meaning, or at least the contents of "original law."[81] This is one way to understand the Court's periodic invocations of the Madisonian concept of "liquidation" in justifying its reliance on post-ratification history.[82] On this account, "'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases.' "[83] The Court's references to tradition, however, do not neatly fit the mold of Madison's concept of liquidation. For instance, the Court does not necessarily require evidence of "a series of particular discussions and adjudications" settling the meaning of the provision at issue.[84]

Indeed, the Justices may not be seeking to cabin their reliance on tradition to cases of liquidation. One might nevertheless take the view that post-ratification traditions can clarify original meaning, particularly when these traditions are close in time to enactment. The idea is that

[80] *Bruen*, 142 S. Ct. at 2136.

[81] For a defense of "original-law originalism" as the view "that the Constitution should be read according to its *original legal content*," see Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 821 (2015).

[82] E.g., *Bruen*, 142 S. Ct. at 2136–37; Hou. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022).

[83] *Wilson*, 142 S. Ct. at 1259 (quoting Letter from James Madison to Spencer Roane (Sep. 2, 1819), *in* 8 The Writings of James Madison 447, 450 (Gaillard Hunt ed., 1908)).

[84] *Bruen*, 142 S. Ct. at 2155 (emphasis omitted) (quoting The Federalist No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961)). Caleb Nelson characterizes liquidation as follows: "To the extent that a statutory or constitutional provision was ambiguous, a regular course of practice (including but not necessarily limited to court decisions) could settle its meaning for the future." Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 14 (2001); see also William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4 (2019). Baude explains that for James Madison, constitutional text could be deemed liquidated by post-ratification practice when certain criteria were satisfied: "indeterminacy" in the meaning of the Constitution, Baude, supra, at 13, "a course of deliberate practice" including serious consideration of constitutionality by contemporaries, id. at 13, 17–18, and "settlement" in the sense of acquiescence by government officials and acceptance by the public, id. at 13, 18–21. As Girgis observes, appeals to tradition need not, and often do not, meet the prerequisites for liquidation—especially the need for "deliberate debate and resolution of the interpretive question." Girgis, supra note 4, at 1496. For further discussion of liquidation through practice, see Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 39–59 (2020); Richard H. Fallon, Jr., The Many and Varied Roles of History in Constitutional Adjudication, 90 Notre Dame L. Rev. 1753, 1773–75 (2015).

such traditions demonstrate ways in which the public would have expected the Constitution to be interpreted and applied.

Sometimes the Justices have adopted a more freestanding role for tradition in constitutional decision-making—one not tied to the elaboration of original meaning.[85] Justice Kavanaugh seems to be the main proponent of this approach. Identifying "tradition" with "post-ratification history," he has urged resort to tradition when constitutional text and pre-ratification history are unclear.[86]

An example of tradition untethered to original meaning comes from Article III standing. The Supreme Court has held that "history and tradition offer a meaningful guide" to whether plaintiffs have standing to sue in federal court; consequently, a court should "ask[] whether plaintiffs have identified a close historical or common-law analogue for their asserted injury."[87] As instances of "harms traditionally recognized as providing a basis for lawsuits in American courts," the Court in the 2021 case *TransUnion v. Ramirez* (per Justice Kavanaugh) offered the privacy torts "disclosure of private information" and "intrusion upon seclusion,"[88] and reserved decision as to whether intentional infliction of emotional distress ("IIED") could serve as an acceptable historical analogue.[89] Neither the cited privacy torts nor IIED are Founding-era artifacts; they arose in the late nineteenth or twentieth centuries.[90] The Court made no suggestion that the harms safeguarded by these torts were captured by the original meaning of Article III "cases or controversies."

The treatment of traditions as instructive independent of their bearing on original meaning is the source of considerable controversy. Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit has expressed the "fear . . . that traditionalism gives off an originalist

[85] For distinctions between traditionalism and originalism, see J. Joel Alicea, Practice-Based Constitutional Theories, 133 Yale L.J. 568, 587–88 (2023).

[86] See United States v. Rahimi, 144 S. Ct. 1889, 1915–17 (2024) (Kavanaugh, J., concurring); Jonathan Green, Some Traditional Questions About "History and Tradition," 102 Notre Dame L. Rev. (forthcoming) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5170253 [https://perma.cc/4BFN-5XJ6].

[87] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

[88] Id.

[89] Id. at 2211 n.7.

[90] See Danielle Keats Citron, Mainstreaming Privacy Torts, 98 Calif. L. Rev. 1805, 1807 (2010); John J. Kircher, The Four Faces of Tort Law: Liability for Emotional Harm, 90 Marq. L. Rev. 789, 795 (2007).

'vibe' without having any legitimate claim to the originalist mantle,"[91] as it relies on "latter-day-but-still-kind-of-old-ish understandings."[92] Justice Barrett, while not expressing opposition to all uses of tradition, has cautioned against turning to tradition as an "end in itself."[93] Part of the concern is that tradition, rather than being an anchor for constitutional analysis that reduces the impact of judges' moral ideas, is yet another vehicle for the imposition of judges' values. However, traditionalism's relative flexibility may explain part of its appeal to Supreme Court Justices who wish to tether their jurisprudence to the past in general without being tied to the (perhaps unsavory or inscrutable) practices of a specific era. Accordingly, within judicial treatments of tradition, there is ongoing struggle about the relationship between tradition and originalism.

C. Tradition: Law or Society?

A question that arises with respect to judicial invocations of tradition is whether the relevant traditions are *legal* or *social and cultural*. The sources on which the Supreme Court draws to illustrate traditions are usually legal, not only Supreme Court precedent but also state legislation and common law cases.[94] This might suggest that the Justices are most interested in "legal traditions"—a specialized type of tradition that is enshrined in law and consists of the accretion of legal material over time.[95]

At the same time, Supreme Court Justices also appear to be concerned with social and cultural traditions, wellsprings of national sentiment that run deeper than formal law. The plurality opinion in *Moore v. City of East Cleveland* characterized "[t]he tradition of uncles, aunts, cousins,

[91] Kevin C. Newsom, The Road to Tradition or Perdition? An Originalist Critique of Traditionalism in Constitutional Interpretation, 47 Harv. J.L. & Pub. Pol'y 745, 754 (2025).

[92] United States v. Jimenez-Shilon, 34 F.4th 1042, 1051 n.2 (11th Cir. 2022) (Newsom, J., concurring).

[93] Vidal v. Elster, 144 S. Ct. 1507, 1531–32 (2024) (Barrett, J., concurring in part).

[94] See, e.g., Washington v. Glucksberg, 521 U.S. 702, 711–13 (1997); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138–51 (2022); Michael H. v. Gerald D., 491 U.S. 110, 124–30 (1989) (plurality opinion).

[95] See, e.g., *Elster*, 144 S. Ct. at 1519 ("The Lanham Act's names clause has deep roots in our legal tradition."). Jiménez recommends that judges rely on legal traditions when "the law does not clearly dictate an outcome." Jiménez, supra note 14, at 42. By "legal tradition," he appears to mean not legal principles derived from specific case law or legislation, but a form of reasoning based on legal expertise and concepts such as "*stare decisis*, reliance, and the procedural virtues of the rule of law." Id.

and especially grandparents sharing a household along with parents and children" as a product of "the accumulated wisdom of civilization, gained over the centuries."[96] In *Glucksberg*, the Court, though examining "legal traditions," observed that "opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages."[97] In *Griswold*, the Court described privacy in marriage as "older than the Bill of Rights—older than our political parties, older than our school system."[98]

These types of references to tradition depend substantially for their resonance on an appeal to the people's pre-legal commitments.[99] Even in these cases, Justices may turn to legal materials as *evidence* of social and cultural traditions. After all, legal materials are far easier for judges to access than social practices. One might question, however, whether legal materials adequately reflect the people's traditions.[100]

In scholarship on tradition, tradition is often associated with customs and social norms rather than, or in addition to, legal materials.[101] For

[96] 431 U.S. 494, 504–05 (1977) (plurality opinion).

[97] *Glucksberg*, 521 U.S. at 710–11.

[98] Griswold v. Connecticut, 381 U.S. 479, 486 (1965); see also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.").

[99] Indeed, the Court's concern with a range of legal sources extending beyond federal precedent (such as common law cases and state legislation) may suggest an interest in capturing a broad swath of national sentiment.

[100] See infra Section IV.A.

[101] See Barnett & Solum, supra note 12, at 453 (characterizing "Historical Traditionalism" as relying on "historical practice, precedent, or customs and social norms"); DeGirolami, supra note 4, at 40, 55 (describing "the substance of traditionalism" as "enduring political or cultural practices," and emphasizing traditionalism's ground-up, non-elite approach); Girgis, supra note 4, at 1482 (noting that traditionalists read constitutional texts in light of practices of federal or state institutions, "or even ordinary citizens"); Michael P. O'Shea, The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms, 26 Tex. Rev. L. & Pol. 103, 111 (2021) ("[T]raditionalism gives strong weight" to sources "at some distance . . . from the conventional centers of political or cultural power," including "the 'non-governmental' acts and practices of individuals."). McConnell sometimes emphasizes "legal practices and traditions." Michael W. McConnell, Tradition and Constitutionalism Before the Constitution, 1998 U. Ill. L. Rev. 173, 174 [hereinafter McConnell, Tradition and Constitutionalism]; see also Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1748 (2015) ("Longstanding practice looks to the understandings of democratically accountable institutions (legislatures, executives, and common law courts) over time."). However, he also appears to treat widespread and longstanding practices (presumably including legal enactments) as "strong evidence that the practice . . . accords with the spirit and mores of the people," suggesting an

good reason: A powerful basis for constitutional adjudicators to turn to tradition, as explained below, is to benefit from the lessons gained from people's on-the-ground experiences, which may not be enshrined in law.[102]

The interest in social and cultural practices marks a difference between tradition-focused scholarship and writing on "common-law constitutionalism."[103] According to David Strauss, for example, judicial interpretation of the Constitution is—and should be—meaningfully similar to common law judging in the sense of a method whose followers "[r]eason[] from precedent, with occasional resort to basic notions of fairness and good policy."[104] Despite the affinity between a tradition-focused method and common law constitutionalism, the emphasis in Strauss's version of common law constitutionalism is more on judicial precedent than on the social values given a prominent place in scholarly literature on tradition.[105]

In fact, some traditionalists' turn to the people's practices creates overlap between traditionalism and popular constitutionalism, understood as a constitutional system in which the people's role "includes active and ongoing control over the interpretation and enforcement of constitutional law."[106] Popular constitutionalist scholars

interest in popular values. McConnell, supra note 4, at 683. For discussion of how the practices of non-governmental entities could be incorporated into history-and-tradition analysis, see Andrew Willinger, Private Governance and Originalism, 79 Stan. L. Rev. (forthcoming 2027) (manuscript at 33–51), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6207359 [https://perma.cc/4ZV4-QG9H].

[102] See infra Section III.A.

[103] See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 934 (1996); Young, supra note 12, at 688–97.

[104] David A. Strauss, The Living Constitution 43 (2010).

[105] The interest in scholarly writing on tradition of social and cultural practices is also a point of distinction between traditionalism and "historical gloss," which "give[s] weight to post-Founding governmental practice" when adjudicating constitutional disputes. Curtis A. Bradley, Doing Gloss, 84 U. Chi. L. Rev. 59, 59 (2017). Unlike appeals to tradition, moreover, historical gloss is referenced largely in the context of separation-of-powers disputes and other structural constitutional matters, as distinct from "individual rights controversies." Bradley & Morrison, supra note 15, at 416. Some rationales for historical gloss—such as Burkean valuation of longstanding practices and reliance interests, Bradley, supra, at 66–67—are similar to those underlying appeals to tradition in the individual rights setting. Other rationales for historical gloss, such as deference to other governmental actors, id. at 64–65, may have special purchase in the separation-of-powers context.

[106] Larry D. Kramer, Popular Constitutionalism, Circa 2004, 92 Calif. L. Rev. 959, 959 (2004).

may view tradition as more dynamic than most defenders of tradition.[107] Moreover, the concept of tradition is not a sustained focus of analysis in work on popular constitutionalism. But traditionalists and popular constitutionalists share the general notion that the people's practices enter into the formation of constitutional law.

In sum, judicial references to tradition often invoke "legal traditions" but also draw on the power of traditions as practices that exist apart from formal legal enactments. Significant strands of scholarship on tradition focus more directly on social practices and values. Below I argue that traditionalists have affirmative reason not to rely exclusively on formal law—even "decentralized" or nonfederal sources such as common law cases and state legislation[108]—as the basis for claims about the nature and implications of traditions.[109]

II. AN ACCOUNT OF TRADITION

This Part offers an account of tradition and an explanation of what it means for judges to turn to tradition in constitutional rights adjudication. I understand traditions as networks of enduring practices and understandings, and traditionalism as an approach that values fidelity to the forms of social organization that traditions help to constitute.

A. The Nature of Tradition

Tradition, as sociologist Edward Shils observes, "[i]n its barest, most elementary sense," "means simply a *traditum*; it is anything which is transmitted or handed down from the past to the present."[110] When we think of traditions, we may think of specific actions that we habitually take: having a special dinner for a child's birthday or holding graduation ceremonies in May. Yet traditions also incorporate the web of social

[107] E.g., Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in *Heller*, 122 Harv. L. Rev. 191, 192 (2008) ("On the popular constitutionalism view, the Court *itself* is deciding whether handgun bans are consistent with the best understanding of our constitutional tradition; the determination is made in the present and responds to the beliefs and values of living Americans who identify with the commitments and traditions of their forbears.").

[108] DeGirolami, supra note 4, at 15; McConnell, supra note 4, at 702.

[109] See infra Section IV.A.

[110] Edward Shils, Tradition 12 (1981); see also J.M. Balkin, Tradition, Betrayal, and the Politics of Deconstruction, 11 Cardozo L. Rev. 1613, 1619 (1990) ("Tradition is the delivery of something into the hands of another . . . .").

understandings that make sense of these actions and give them meaning.[111] The tradition of watching the Super Bowl cannot be characterized accurately by pointing only to behaviors such as ordering wings and inviting friends. Instead, the tradition includes the meanings—perhaps varied and changing—that people associate with these actions: camaraderie, entertainment, even patriotism. To capture the intellectual element of traditions in addition to their physical manifestations, we can speak of traditional "practices and understandings."[112] Moreover, traditions often consist of several interlocking actions and ideas;[113] hence, following Siegel, I refer to "networks" of practices and understandings.[114]

Traditions frequently have a collective aspect.[115] They help to define and constitute the common life of collective entities, from friend groups to educational institutions to religious organizations to ethnic groups to nations.[116] Traditions delineate the boundaries of a group as distinct from the outside world, creating "in-groups" and "out-groups" with the possibilities for both solidarity and conflict entailed therein. In so doing, traditions play a role in forming individual identity. The centrality of any given tradition to an individual's life may vary; compare the role of keeping the Sabbath in a religious person's life to attending the end-of-year work picnic. But traditions can serve a powerful function in identity formation at the collective and individual levels.

"Tradition" is used here to encapsulate both social traditions and "legal traditions"—an example of the latter being the practice of drawing on precedent or state legislation. In my view, the normative power of tradition stems at least partially from its capacity to capture networks of social practices and understandings that are not always faithfully reflected in law. True, understanding tradition to reach beyond "legal traditions" risks creating a disjunction between the analysis of tradition here and analysis of the legal traditions the Supreme Court often cites. But the Court's use of tradition, as earlier noted, is not

[111] See Shils, supra note 110, at 12.

[112] The term "custom" could also be invoked to refer to habitual actions that help structure the patterns of life.

[113] See Bartlett, Idea of Progress, supra note 14, at 330 ("Tradition is not a single integrated thread, but a patchwork of multiple themes and commitments . . . .").

[114] Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 303 (2001).

[115] See Balkin, supra note 14, at 36.

[116] See Shils, supra note 110, at 262–68.

limited to legal tradition;[117] and my aim is to examine tradition as a category in constitutional rights adjudication from a normative perspective rather than to stick to the four corners of Court doctrine.[118]

Tradition has an important temporal dimension. The idea of being "transmitted" implies an element of duration or longevity. There may not be a precise length of time needed for a tradition to come into existence,[119] but a tradition must possess some staying power. The duration aspect of tradition enables it to stabilize people's lives and promote communal cohesion.

Significantly, the temporal dimension of tradition also encompasses an element of *continuity*.[120] A tradition is not a mere snapshot of history frozen in time; rather, it endures under various social conditions and creates a link between generations.[121] To be part of a tradition is to participate in networks of practices and understandings that have

[117] See supra Section I.C.

[118] Philip Bobbitt's "modality of ethical argument . . . denotes an appeal to those elements of the American cultural ethos that are reflected in the Constitution," including "the idea of limited government." Philip Bobbitt, Constitutional Interpretation 20 (1991). This suggests a focus on constitutional traditions, or at least a subset of cultural traditions that find expression in the Constitution. But constitutional traditions need not be embodied in specific constitutional text—for instance, the rule that "Government may not coerce intimate acts," which Bobbitt uses as the basis of an ethical argument supporting *Roe v. Wade*, is not. Philip Bobbitt, Constitutional Fate, 58 Tex. L. Rev. 695, 745–47 (1980).

[119] Shils suggests that two transmissions over three generations would be sufficient. See Shils, supra note 110, at 15.

[120] See DeGirolami, supra note 3, at 1125–26 (characterizing the "duration" element of tradition as "a composite of age and continuity"); McConnell, supra note 4, at 671 (noting that in *Washington v. Glucksberg*, "the Court extended [its] historical inquiry all the way to the present . . . . [T]he opinion implied that even a traditional norm could come to violate substantive due process if it is subsequently abandoned or rejected by a new stable consensus"); see also Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("In light of the unambiguous and *unbroken* history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." (emphasis added)); Burnham v. Superior Ct., 495 U.S. 604, 615–19 (1990) (Scalia, J., plurality opinion) (emphasizing that the practice of jurisdiction based on physical presence is "not merely old," but also "one of the continuing traditions of our legal system"); Alasdair MacIntyre, After Virtue: A Study in Moral Theory 194 (2d ed. 1984) ("To enter into a practice is to enter into a relationship not only with its contemporary practitioners, but also with those who have preceded us in the practice, particularly those whose achievements extended the reach of the practice *to its present point*. It is thus the achievement, and *a fortiori* the authority, of a tradition which I then confront and from which I have to learn." (first emphasis added)).

[121] See Balkin, supra note 14, at 204; Jiménez, supra note 14, at 8–9.

continued, in some form, into the present day.[122] A vital tradition is able to maintain its force over time.

The continuity element of tradition is, perhaps paradoxically, intertwined with a tradition's capacity to change. To maintain their vibrancy during the pendency of political, technological, economic, and social change, traditions must possess a degree of adaptability.[123] As Felipe Jiménez observes, "[r]esponsible participation in a tradition . . . involves a concern for how that tradition might fare in the future . . . ."[124] To adopt a "custodial attitude"[125] toward tradition, one ought to be able to analyze age-old practices in terms of present and future societal imperatives. Continuity and change are thus not opposites, but two sides of the same coin, as no less a traditionalist than Edmund Burke recognized: "A state without the means of some change is without the means of its conservation."[126]

Further, tradition is not a mere factual record of historical practices. Traditions are lived and interpreted by participants in the tradition; they represent collective memory of the past as filtered through the lens of the present.[127] Traditions are digested and thereby perpetuated by people in the current day, with their own social and cultural perspectives. Consequently, participants in a tradition may analyze past practices, seek to understand which aspects of these practices are best suited for the long haul, and engage in reinterpretation and revision.

Not every participant in a tradition will have the same view of the tradition's desired trajectory, and that fact does not dissolve the tradition. As Alasdair MacIntyre observes:

[122] See sources cited supra note 120. Although it is possible to excavate a long-lost tradition, the excavator in these cases seeks to build or extend the bridge between the past and the present—underscoring the link between tradition and continuity.

[123] Shils, supra note 110, at 258 ("Traditions change because the circumstances to which they refer change. Traditions, to survive, must be fitting to the circumstances in which they operate . . . ."); Bartlett, Idea of Progress, supra note 14, at 331 ("[T]he strength of a tradition is not how closely it adheres to its original form but how well it is able to develop and remain relevant under changing circumstances.").

[124] Jiménez, supra note 14, at 8–9; see also Jack M. Balkin, Constitutional Memories, 31 Wm. & Mary Bill Rts. J. 307, 319 (2022) ("When people fight over what they should do in the future, they often fight about what happened in the past.").

[125] Kronman, supra note 12, at 1066.

[126] Edmund Burke, Reflections on the Revolution in France 106 (Conor Cruise O'Brien ed., Penguin Books 1969) (1790).

[127] Balkin, supra note 124, at 315.

> [W]hen a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose.
>
> So when an institution—a university, say, or a farm, or a hospital—is the bearer of a tradition of practice or practices, its common life will be partly, but in a centrally important way, constituted by a continuous argument as to what a university is and ought to be or what good farming is or what good medicine is. Traditions, when vital, embody continuities of conflict.[128]

Tradition's capacity to encompass internal contestation and change over time does not render tradition infinitely malleable. Continuity requires some kind of stability in a tradition's central features.[129] There may be some disagreement about the nature of a tradition's central features, but certain aspects can correctly be characterized as more central than others. For example, changing the length of the halftime show would be less destabilizing to the Super Bowl tradition than eliminating the position of quarterback. Ultimately, the question is whether participants in a tradition who are invested in its survival and flourishing—the tradition's "custodians"[130]—can continue to see their values and commitments reflected in the network of practices and understandings.

In sum, a tradition can be understood as a network of practices and understandings that help to structure collective life and continue across time under varying conditions. Traditions can persist despite—or, perhaps, because of—contestation among participants regarding the tradition's contours and appropriate forms of development.

B. Tradition and Traditionalism

What does it mean for a constitutional theory to be traditionalist? At a high level, traditionalists treat traditions as objects of constitutional

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[128] MacIntyre, supra note 120, at 222; see also Bartlett, Tradition in Substantive Due Process, supra note 14, at 557 ("[T]raditions are multiple and varied, and do not speak with just one voice."); Martin Krygier, Law as Tradition, 5 Law & Phil. 237, 242 (1986) ("For in every complex written tradition, any particular 'present' is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs, and views of the world.").

[129] Shils, supra note 110, at 14.

[130] Id. at 13.

concern. The traditionalist cannot dismiss traditions as irrelevant to the constitutional enterprise. More than that, traditionalism seems intuitively to place some value on tradition. But what kind of value?

In my view, traditionalism is characterized by a certain approach or attitude—one of *fidelity*.[131] The traditionalist exhibits fidelity to the forms of social organization that the traditions at issue help to constitute. In the setting of constitutional adjudication by the Supreme Court, the "American people" or the "nation" is usually the relevant social group. Notably, the traditionalist need not be attached to each individual practice or understanding that forms part of the network structuring collective life. Indeed, the traditionalist may actively seek to change particular practices or to reinterpret them in light of what the traditionalist views as the group's ideals.[132] In these cases, however, the traditionalist advocates for change in the name of strengthening the group's capacity to flourish over time.[133] The meaning of "flourishing" will depend on the group's identity and values. In the context of a commitment to the flourishing of the American polity, one could appeal to (say) values of liberty, equality, or limited government.[134]

I use the term "dialectical traditionalism" to capture this view of tradition. The dialectical traditionalist is open to a process by which traditions are transformed without losing their instructive power. Specific past practices can be critiqued in light of other practices or societal commitments, to ensure the continuity of traditions that are important to preserve. Of course, the dialectical traditionalist is not interested solely in modifying past practices as distinct from

[131] For discussions of fidelity in constitutional theory (and its drawbacks), see generally, e.g., James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms 165 (2015); J.M. Balkin, Agreements with Hell and Other Objects of Our Faith, 65 Fordham L. Rev. 1703 (1997); Michael J. Klarman, Antifidelity, 70 S. Cal. L. Rev. 381 (1997).

[132] In this sense, the traditionalist may undertake an enterprise similar to Ronald Dworkin's view of constructive interpretation, in which the interpreter seeks to understand a given practice in its best light or in light of its justifying principles. See, e.g., Ronald Dworkin, Law's Empire 46–48 (1986). The traditionalist would emphasize that judgments about what counts as a "better" light are to be made with reference to the network of practices and understandings—including normative ideals—that exist in a particular society.

[133] For an argument that "fidelity entails change" in constitutional interpretation, see James E. Fleming, Fidelity, Change, and the Good Constitution, 62 Am. J. Compar. L. 515, 537 (2014).

[134] Young, supra note 12, at 710 ("[W]e can use the aspirational, highly general elements of our tradition—such as 'individual liberty' or 'equality'—to criticize existing social arrangements . . . .").

perpetuating them. She is committed to the continued flourishing of the collective, which requires contextually sensitive judgments about when preservation or change in various practices is appropriate. In making these judgments, the dialectical traditionalist recognizes tension among different strands of tradition; but this tension can play a productive role in maintaining the tradition's vitality.[135] As MacIntyre explains, "an adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present."[136]

It may be asked how much "weight" tradition carries for the dialectical traditionalist. For Marc DeGirolami, for example, "political and cultural practices of substantial duration" have "presumptive influence."[137] For the dialectical traditionalist, traditions understood as enduring networks of practices and understandings have value, for they help to constitute a common life that she finds meaningful and worthy. This does not mean that the dialectical traditionalist attaches normative weight to every given practice. She may see a particular practice as tainted by injustice—with that moral judgment made with reference to other parts of the group's constitutive network of practices and understandings—and thus ineligible for positive weight in the constitutional calculus.[138] At the same time, the dialectical traditionalist recognizes that ways of life are shaped by the accretion of specific practices and ideas over time. She therefore does not lightly discard specific customs. Instead, she is committed to giving them serious consideration.

One way of characterizing the weight afforded to particular practices and understandings is in terms of procedural values. In administrative law, statutes may mandate agency consideration of certain factors, such as environmental impact, without requiring agencies to make certain

[135] Balkin uses the term "dialectical tradition" to refer to "the collection of different views that people have expressed, different practices they have engaged in, and different laws they have enacted or interpreted over the course of the history of a country, nation, people, or group." Balkin, supra note 14, at 200. My concept of "dialectical traditionalism" also encompasses openness to divergent strands of tradition. However, it is meant to refer more specifically to phenomena inspired by Hegelian philosophy: past practices can be recognized as incomplete and transformed into present ones without wholly eliminating their force, and a reconciliation between the past and the present can be effectuated without entirely dissolving the tension between them.

[136] MacIntyre, supra note 120, at 223.

[137] DeGirolami, supra note 3, at 1125.

[138] In this sense, the use of tradition as "negative precedent" can be part of the dialectical traditionalist's analysis. See infra Subsection IV.B.4.

substantive decisions, like calling off a project after preparing an environmental impact statement.[139] The process of considering the factors could well result in mitigation of environmental impact. But it is also meant to inform agency decision-making, to create an opportunity for public engagement, and to serve the expressive purpose of manifesting commitment to the values inherent in the procedural requirement.[140]

Similar rationales apply to tradition in constitutional rights adjudication. Considering enduring practices may improve a modern-day judge's decision-making by exposing the judge to ways of thinking unlike the judge's own—an argument that Deborah Hellman has made in defense of stare decisis.[141] Judges' acknowledgment of their reliance on enduring practices can also facilitate public examination, and it can advance the expressive goal of conveying fidelity to a community's past.

Thus, particular enduring practices and understandings carry weight in the sense that they must be considered as part of the process of forming a constitutional judgment, even if they are ultimately modified or rejected. And traditions more broadly, conceptualized as networks of enduring practices and understandings, have affirmative value for the dialectical traditionalist because they help to structure a communal form of life that the traditionalist finds worthy.

One may also ask how much significance tradition should carry relative to other "modalities" of constitutional interpretation, such as text, original meaning, and pragmatic argument. As explained in Part V, I conceive of tradition as one among multiple important factors that can properly guide constitutional analysis. Endorsing a form of constitutional pluralism, however, gives rise to the question of how judges or scholars should emerge with a single result given the impact of

[139] See Richard Lazarus, The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains, 100 Geo. L.J. 1507, 1514–15 (2012).

[140] See Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1510 (2025); Lazarus, supra note 139, at 1518–19; Robert V. Bartlett & Priya A. Kurian, The Theory of Environmental Impact Assessment: Implicit Models of Policy Making, 27 Pol'y & Pol. 415, 418–19 (1999).

[141] See Deborah Hellman, An Epistemic Defense of Precedent, *in* Precedent in the United States Supreme Court 63, 65–69 (Christopher J. Peters ed., 2013).

multiple factors.[142] I plan to address this question in future work. But my main point about the weight of tradition (a point presented in Part III) is as follows: To whatever extent one is inclined to give weight to tradition in constitutional analysis, one ought to be open to feminist argument about the contents of tradition and their implications.

It may be argued that dialectical traditionalism is not "real" traditionalism, at least in the way that most advocates of traditionalism describe their view. One might relatedly claim that dialectical traditionalism is so watered down as to be universal. Are not all constitutional theorists willing to consider past practices or to accord tradition *some* persuasive power?

In response to the concern about "real" traditionalism: The idea that traditions properly change over time and feature internal contestation is far from alien to the thought of traditionalists in good standing (as the previous Section highlighted).[143] Indeed, Part III argues that a receptive attitude toward certain egalitarian changes follows from tradition's organic values of continuity and concrete experience—thereby advancing the claim that the Article's view of tradition is authentic. More generally, there is a risk of caricaturing traditionalism by insisting that "real" traditionalism consists simply in a strong commitment to maintaining specific longstanding practices. It is easy to reject the interest in "just sticking with the past" as unreflective or morally obtuse. Traditionalism is more nuanced than that portrayal acknowledges. In the end, however, the key point here is not the semantic question of how to define "traditionalism." If one would prefer to call dialectical traditionalism a "theory focused on tradition" or a "tradition-based theory" rather than a "traditional*ist*" theory, one could proceed in that manner. And if one worries that dialectical traditionalism shares nothing

[142] See Mitchell N. Berman, How Practices Make Principles and How Principles Make Rules, 28 J. Ethics & Soc. Phil. 299, 325 (2024); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1193 (1987).

[143] See supra notes 119–27 and accompanying text; see also, e.g., MacIntyre, supra note 120, at 223 (rejecting "conservative antiquarianism" and distinguishing it from "[l]iving traditions," which "continue a not-yet-completed narrative" where the future's character "derives from the past"); Shils, supra note 110, at 258 (describing changes in traditions in response to changes in circumstances); McConnell, Tradition and Constitutionalism, supra note 101, at 174 ("[Traditionalism] views as authoritative the gradually evolving moral principles of the nation."); Young, supra note 12, at 710, 712 (arguing that "we can use the aspirational, highly general elements of our tradition—such as 'individual liberty' or 'equality'—to criticize existing social arrangements," while endorsing "the imperative of slow, cautious, incremental change").

in common with any tradition-oriented theory worthy of the name, then the Article as a whole is written with the hope of persuading readers otherwise.

On the question of whether all constitutional theories are traditionalist at some level: First, it is true that many jurists treat appeals to tradition as persuasive.[144] Yet that is a testament to tradition's widespread power, not a knock against a traditionalist theory. Second, not every approach to constitutional adjudication treats tradition as a significant category. Tradition is not a major category, for example, in Chief Judge Richard Posner's pragmatic understanding of constitutional law.[145] Third, some constitutional theorists view tradition quite negatively. One response to historical injustice is to emphasize the importance of breaking with the past, of rupture as opposed to fidelity.[146] Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer write, in examining the relationship between originalism and race:

> It is one thing for a relatively homogenous polity . . . to look back at "our" traditions, "our" commitments, and "our" past practices, to understand "our" law. It is altogether a different enterprise for a polity with the depth and history of caste subjugation that gave the United States its constitutive identity to look backwards to determine "our" traditions . . . . There is no meaningful "our"; there is no meaningful collective identity.[147]

Dialectical traditionalists may seek to show that their view can incorporate what Charles and Fuentes-Rohwer call "counter-hegemonic understandings"[148] and can account for the deep inequalities that give rise to skepticism about unified American traditions. Yet there remains a division about whether continuity or rupture is the appropriate stance.

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[144] See sources cited supra note 8.

[145] See Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 9 (1998).

[146] See, e.g., Justin Collings, The Supreme Court and the Memory of Evil, 71 Stan. L. Rev. 265, 270 (2019) (describing a mode of addressing evil in America's past that does not seek "to resume a noble tradition," for "[i]ts basic posture is one of repudiation and redress").

[147] Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Race, Originalism, and Skepticism, 25 U. Pa. J. Const. L. 1241, 1274 (2023).

[148] Id. ("To the extent that the enterprise produces outcomes that are consistent with racial equality, it will have to rely on counter-hegemonic understandings. But a counter-hegemonic approach would be, to put it charitably, in deep tension with the original public meaning approach.").

Overall, then, traditionalists exhibit fidelity to the forms of social organization that networks of practices and understandings help to constitute. In its dialectical form, traditionalism is consonant with efforts to critique and revise.

III. TRADITION: JUSTIFICATIONS AND FEMINIST CRITIQUE

Why turn to tradition in constitutional rights adjudication? And do those reasons withstand feminist critique? This Part addresses these questions. I identify key normative rationales supporting traditionalism—concrete experience, democracy, reliance, and national identity. By highlighting the vulnerability of these rationales to feminist critique, I surface tensions between traditionalism and feminism. However, I argue that these rationales can actually justify an approach to constitutional adjudication that takes seriously claims about women's rights.

To set the stage, it is worth enumerating features of the historical treatment of women in the United States that may give rise to skepticism about whether tradition is a promising resource for those concerned about women's rights. From a political perspective, women gained the right to vote nationally only in 1920;[149] they possessed the franchise in just a limited number of states in the late nineteenth century.[150] From a legal perspective, married women for decades after the Founding faced severe restrictions under the doctrine of coverture on their right to enter into contracts, sue or be sued, and own property.[151] Even after states eliminated formal features of coverture from the mid-nineteenth century onwards, women continued to encounter serious barriers to equality inside and outside marriage.[152] They were blocked from attending

[149] See U.S. Const. amend. XIX.

[150] Elizabeth D. Katz, Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office, 33 Yale J.L. & Feminism, no. 2, 2022, at 110, 173–74.

[151] Allison Anna Tait, The Return of Coverture, 114 Mich. L. Rev. First Impressions 99, 99 (2016). Under the common law doctrine of coverture—in Blackstone's words—"the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing." 1 William Blackstone, Commentaries *442.

[152] Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 948, 983 (2002) [hereinafter Siegel, She the People].

numerous educational institutions[153] and from entering certain professions.

In the 1872 case *Bradwell v. Illinois*, the Supreme Court rejected a Fourteenth Amendment challenge to Illinois's denial to a woman of the right to practice law, with Justice Bradley famously reasoning in his opinion concurring in the judgment:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .
>
> . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[154]

Other sources of subordination of women have come from the law on domestic violence, from economics, and from social life. The common law doctrine of chastisement—according to which a husband could subject his wife to corporal punishment—gave way in the nineteenth century, but to legal systems in which authorities remained loathe to intervene in what were viewed as private family matters.[155] From an economic perspective, creditors routinely discriminated against women in extending credit, and married women gained the right to open a credit card in their own name only with the passage of the Equal Credit Opportunity Act of 1974.[156] From a social point of view, women customarily faced cultural assumptions about their proper role, typified by Justice Bradley's assertion that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."[157]

Although many of the practices just described have been eclipsed, notable forms of gender subordination continue into the present day.

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[153] See United States v. Virginia, 518 U.S. 515, 536–38 (1996).

[154] 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment).

[155] Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2140–41, 2174 (1996).

[156] See Susan Smith Blakely, Credit Opportunity for Women: The ECOA and Its Effects, 1981 Wis. L. Rev. 655, 656–62.

[157] *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment).

These include disparities in economic and political power, along with powerful stereotypes about the ways women should behave.[158]

To the extent a traditionalist perspective simply means "thumbs up" to gender-subordinating practices because they started a long time ago and lasted a long time, such a perspective should be rejected. But, as Part II suggested and as the Article continues to demonstrate, that is a severely impoverished vision of what tradition can do in constitutional analysis. Delving into justifications for traditionalism helps to show why.

A. Concrete Experience

An important justification for traditionalism is that it enables us to learn from past experiences instead of acting on the basis of abstractions that do not reflect reality.[159] Traditions embody ways of being in the world, encoding practical insight that may be challenging to express explicitly but is no less valuable for it. Locals who frequently travel certain roads may be better able to traverse shortcuts and obstacles than those relying solely on a map. Likewise, enduring practices and understandings can serve as a "resident's guide" to a particular task, reflecting the aggregated lessons of repeated exposure.

The advantages of concrete experience extend to constitutional adjudication. As Justice Brennan explained in a case on the right to public access to trial proceedings, "a tradition of accessibility implies the favorable judgment of experience."[160] A constitutional provision that might appear beneficial in the abstract might manifest itself quite differently in practice. Although it could seem appealing to declare that every resident of the United States has a constitutional right to "clean air," such a right might have unintended consequences that societal experience could elucidate. It would be helpful to examine the results of clean-air regulation in the United States; to peruse the impact of such provisions in other countries; and to consider the relationship between the proposed right and the existing network of environmental organizations, industry, and government actors. These data points may

[158] See Jill Elaine Hasday, We the Men: How Forgetting Women's Struggles for Equality Perpetuates Inequality 1–2, 195 (2025).

[159] E.g., McConnell, supra note 4, at 683; Girgis, supra note 4, at 1534.

[160] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in the judgment).

be particularly valuable for judges, who operate at a certain remove from many of the practical issues they confront.[161]

Justifications for the value of tradition grounded in concrete experience can take multiple forms. Sometimes they sound in a Hayekian view that practices that have stood the test of time are likely to be socially useful.[162] For instance, McConnell writes:

> The voice of tradition is . . . the voice of humility: the assumption that when many people, over a period of many years, have come to a particular conclusion, this is more reliable than the attempt of any one person (even oneself) or small group of persons (such as the Court) to chart a new course on the basis of abstract first principles.[163]

Tradition is a significant source of insight not only because it reflects the input of many individuals, but because these individuals have lived at different periods of time. Tradition focuses attention on intellectual trends that surfaced during other eras, potentially serving as a corrective to forms of groupthink prone to affect the legal or ideological consensus at any given historical juncture—including our own.[164]

The concrete experience justification for traditionalism emphasizes, in addition to the endurance of traditions, the form of knowledge that they encode: concrete rather than abstract. Here tradition dovetails with an Aristotelian emphasis on the virtues acquired through practice.[165] It is also consonant with the Burkean argument that "[t]he science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *à priori*."[166] Rather, the "science of government" "requires experience, and even more experience than any person can gain in his whole life."[167] Accordingly, in Burke's view, "it is with infinite caution that any man ought to

[161] David A. Strauss, Tradition, Precedent, and Justice Scalia, 12 Cardozo L. Rev. 1699, 1707 (1991) ("Judges . . . are deliberately removed from society," and they "come from an intellectual segment of society that is likely to value abstractions.").

[162] See Friedrich A. von Hayek, The Origins and Effects of Our Morals: A Problem for Science, *in* The Essence of Hayek 328, 330 (Chiaki Nishiyama & Kurt R. Leube eds., 1984) ("At least the general outline of [the morals] we have inherited are an irreplaceable means for keeping alive the number of humans they have called into being."). For discussion, see Cass R. Sunstein, Due Process Traditionalism, 106 Mich. L. Rev. 1543, 1546 (2008).

[163] McConnell, supra note 4, at 684.

[164] See Hellman, supra note 141, at 73. I thank Peter Bozzo for discussion of this point.

[165] See MacIntyre, supra note 120, at 222–23; DeGirolami, supra note 4, at 45.

[166] Burke, supra note 126, at 152.

[167] Id.

venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes."[168]

If the experiential argument for traditionalism is taken to mean that a practice's longevity simply proves its social utility, then it is subject to serious critique, including from a feminist perspective. There are all manner of reasons why a tradition may have endured, including inertia, chance, and the power of certain segments of society invested in maintenance of the status quo.[169] There is strong reason to believe that women's relative lack of power over major political and cultural institutions shaped the development of these traditions in a way that reflects prejudice rather than wisdom. After all, history contains ample evidence of such prejudice.[170]

The impact of power structures on the development of tradition does not mean there is no wisdom to be gleaned from networks of enduring practices and understandings. The tradition of solicitude for elderly people, for example, might contain lessons useful for the current day even if it emerged from a more hierarchical period—and even if younger people were disempowered in the processes that shaped the tradition. Traditions are internally complex; their negative features may be intertwined with their positive features in a way that is challenging to disentangle. Nonetheless, the impact of women's disempowerment on the lessons to be gleaned from societal experience must be taken into account.

The feminist critique provides reason to interrogate the conditions under which traditions were formed, in order to understand how the process of aggregating experiences took place and to what extent this process was influenced by visions of women's roles that the American polity has since repudiated. In other words, adjudicators should be

[168] Id.

[169] Milligan & Ross, supra note 13, at 353; Sunstein, supra note 44, at 220; see also Benjamin N. Cardozo, The Nature of the Judicial Process 174–75 (1921) ("The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place.").

[170] For instance, an argument made against the Nineteenth Amendment was that, if women could vote, women's "personal habit and type" would fundamentally change, so that "[t]he look will be sharp, the voice will be wiry and shrill, the action will be angular and abrupt." Horace Bushnell, Women's Suffrage: The Reform Against Nature 135 (New York, Charles Scribner & Co. 1869); see Siegel, She the People, supra note 152, at 977 n.81.

interested in *why* traditions have endured, not only *that* they have endured. Such an interrogation is consistent with dialectical traditionalism. Dialectical traditionalists are open to gaining insight from enduring practices and understandings, but they are also open to rejecting or modifying these practices and understandings once they are better comprehended.

Thus, certain versions of traditionalism contain resources to accommodate feminist critique of the experiential argument for traditionalism. Most importantly, however, the experiential argument provides affirmative support for responsiveness to claims regarding women's rights—especially if the "concrete" rather than "abstract" dimension of the argument is emphasized.

To explain why: If the traditionalist genuinely seeks to comprehend "facts on the ground" instead of taking a theoretical approach, then the traditionalist must value familiarity with the real-life experiences of a variety of individuals, including those directly affected by a given law or policy.[171] Women's experiences often contain practical insight that could elude an observer if these experiences are ignored. It is one thing to reason from a logical perspective about the impact of restricting contraception, or about the relationship between sexual harassment in the workplace and the subordination of women,[172] or about the message sent to young girls by having powerful women in leadership roles. It is another to live out the reality: grappling with the prospect of pregnancy in various social situations, worrying about how to interpret gendered comments by a supervisor and what (if anything) to do about it, looking up to an admired female figure whose manner of approaching challenging tasks makes them seem more attainable.

To be sure, experiences such as sexual harassment or esteem for role models are not unique to women. Moreover, the category of women is

[171] Hasday, supra note 158, at 176. On diversifying originalism or the "history and tradition" method, see James W. Fox Jr., Counterpublic Originalism and the Exclusionary Critique, 67 Ala. L. Rev. 675, 715–21 (2016); Milligan & Ross, supra note 13, at 363–64; Christina Mulligan, Diverse Originalism, 21 J. Const. L. 379, 412–31 (2018); Christina Mulligan, Diverse Originalism, History & Tradition, 99 Notre Dame L. Rev. 1515, 1530–33 (2024); Fred O. Smith, Jr., The Other Ordinary Persons, 78 Wash. & Lee L. Rev. 1071, 1075–79 (2021).

[172] See, e.g., Catharine A. MacKinnon, Sexual Harassment of Working Women 26, 90 (1979) (arguing that courts had failed to understand the nature of sexual harassment in the workplace and its connection to the societal subordination of women, and advocating that "what *really* happens to women, not some male vision of what happens to women, [be] at the core of the legal prohibition").

far from monolithic; it varies according to race, class, geography, religion, and individual circumstances.[173] One cannot assume that all individuals of any gender feel similar ways about the social structures around them. And those who lack certain experiences on a personal level may be capable of great empathy. But it seems reasonable to believe that women's experiences of various social and legal arrangements likely differed from those of men, and that delving into a diverse array of outlooks could yield a more astute analysis of the arrangements in question. Just as reasoning about the impact of disability accommodations is usefully informed by the perspectives of individuals who are disabled, inquiring into the realities of women's lives helps to shape a more informed understanding.[174] Or, at least, that is the view to which a full-bodied concern with tradition should lead.

Thus, diversifying tradition to incorporate women's views is not alien to the traditionalist enterprise. It follows from that enterprise's premises—in particular, from the argument that traditions are valuable because they embody the lessons of on-the-ground experience.

B. Reliance

Tradition promotes stability and protects reliance interests. People often seek to avoid abrupt jolts from settled patterns.[175] Sudden shifts in legal doctrine upset people's ability to "plan [their] lives and organize [their] affairs confidently, efficiently, and successfully."[176] In constitutional rights adjudication, citizens may rely on the existence of a right. For example, people may construct their expectations around a

[173] See, e.g., Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 152–60 (critiquing feminist legal thought for failing to attend to the distinctive experiences of Black women); see also Hasday, supra note 158, at 176 ("[L]essons should not present white women's experiences as the experiences of all women, with women of color erased.").

[174] Some strains of feminist thought emphasize the connection between women and experiential—as distinct from rational—dimensions of knowledge, while others might deem this supposed connection too essentialist or dismissive of women's rational capacities. See Levit & Verchick, supra note 19, at 15–20. Regardless of which position one takes, one could recognize the possibility of gaining insight from the experiences of women and other subordinated groups.

[175] See Joseph Raz, The Rule of Law and Its Virtue, *in* The Authority of Law: Essays on Law and Morality 210, 220–22 (2d ed. 2009).

[176] Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845, 1850 (2023).

right "to direct the education and upbringing of one's children."[177] People may also rely on the non-existence or non-applicability of a right. They may expect, for instance, that firearms may be banned in "sensitive places" such as schools and government buildings,[178] or that "true threats" of violence will not be protected by the First Amendment.[179] More generally, people may rely on the understanding that long-held rights will continue to be protected and that enduring forms of government regulation will persist. Breaking from tradition upsets such reliance.

The reliance justification for traditionalism has much in common with arguments made in favor of stare decisis, or adherence to judicial precedent.[180] This reflects a substantial degree of affinity between a concern for tradition and a concern for precedent. If one is inclined to value stare decisis, one should at least hesitate before rejecting traditionalism. To be sure, precedent and tradition are not identical.[181] Precedential reasoning may be part of a distinctive legal tradition that does not conform to social and cultural practices.[182] But if one is truly concerned with reliance, one should not abandon this concern outside the realm of stare decisis—given that people frequently rely on norms and customs not set by judicial rulings.

Reliance interests furnish support for an approach to constitutional adjudication that is receptive to claims about women's rights. Though gender inequality persists, women in the United States have made significant gains in the political, economic, and cultural spheres in the past century and a half. These gains have become part of the way that American women (and men) situate themselves in the social world. To reverse these gains would be to pull the rug out from under them in a manner that disrupts settled expectations.

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[177] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[178] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2118 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

[179] Counterman v. Colorado, 143 S. Ct. 2106, 2113 (2023).

[180] See, e.g., Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (describing "the desirability that the law . . . enable [individuals] to plan their affairs with assurance against untoward surprise" as a rationale for stare decisis).

[181] See David Luban, Legal Traditionalism, 43 Stan. L. Rev. 1035, 1043 (1991) (highlighting divergences between adherence to precedent and emphasis on tradition); Strauss, supra note 161, at 1706 (distinguishing a concern for precedent from the kind of traditionalism he associates with Justice Scalia).

[182] See Jiménez, supra note 14, at 42.

The critical element of tradition at work here is *continuity*. It matters for the strength of a tradition that it endure over time, not merely that it once existed. To revive visions of women's roles that have largely been eclipsed in American culture would be out of step with a value integral to tradition, namely continuity. As with the concrete experience rationale, therefore, traditionalist principles themselves can be marshaled in favor of women's equality.

The reliance argument provides reason to maintain understandings of women's rights that have already shifted in a more inclusive direction. From a women's rights perspective, therefore, the reliance argument is most fitting in societies that have changed toward a position more favorable to women. Yet there are many such societies, including the United States. Given the importance that people often attach to settled expectations, it is worth underscoring that these expectations may operate in a manner conducive to women's rights.

But what about reliance on traditions that are troubling from a feminist point of view? According to the concept of "tainted" reliance,[183] when reliance interests are morally wrong, they should not count. It would likely strike us as improper to say that reliance interests provided a reason to keep *Plessy v. Ferguson*, despite segregationists' reliance on the social system upheld in that case.[184] I have suggested elsewhere that the majority in *Dobbs* silently treated the reliance interests involved in the maintenance of *Roe v. Wade* as morally tainted, and therefore not legitimate factors in the stare decisis inquiry.[185] It may be argued that reliance should play no role when the underlying social arrangements are unjust. And if reliance matters only when the relevant traditions are morally appropriate, then moral evaluation is doing all the normative work, not reliance.

In response, first, it is consistent to say that reliance on morally positive or neutral phenomena is normatively valuable but that reliance on morally wrong phenomena is not.[186] This does not mean reliance "drops out" in the sense that it carries no normative weight. It may be a

[183] Rachel Bayefsky, Tangibility and Tainted Reliance in *Dobbs*, 136 Harv. L. Rev. F. 384, 400–02 (2023). For further discussions of tainted reliance and the connected concept of ill-gotten gains, see Varsava, supra note 176, at 1908–11; Richard M. Re, Precedent as Permission, 99 Tex. L. Rev. 907, 941 (2021).

[184] Bayefsky, supra note 183, at 401; Varsava, supra note 176, at 1910; Re, supra note 183, at 941.

[185] Bayefsky, supra note 183, at 401.

[186] On the question of how such moral evaluations are to be made, see infra Part V.

positive good to maintain settled expectations with respect to socially beneficial arrangements, over and above the good involved in bringing these arrangements into existence. The same cannot be said about reliance interests in morally tainted traditions.

Second, reliance interests may have a role to play when the moral status of the underlying social arrangements is unclear. For example, if one is on the fence about moral evaluation of single-sex education,[187] one could properly credit reliance interests in maintaining the practice. Relatedly, moral taint is not an "all-or-nothing" phenomenon. In 1976, the Supreme Court upheld certain tax exemptions that favored widows over widowers, noting that "the financial difficulties confronting the lone woman . . . exceed those facing the man."[188] Reliance on such tax exemptions may have reflected an appropriate recognition of the challenges women faced in the job market, even if these exemptions also helped to fortify a vision of men in the workplace and women at home. Reliance on traditions with multiple elements—some more and some less problematic—should not be treated as entirely wrongheaded.

Third, reliance interests may inform the choice of which pathways to use in changing unjust social arrangements. Judges reluctant to recognize nontraditional constitutional rights still leave open legislative, executive, and state-level avenues for societal evolution.[189] And the fact that many people rely on the stability of certain social arrangements—even if those arrangements are morally troubling—could provide reason to endorse modifications that take place through more representative procedures than constitutional rulings by courts. That way, people attached to the old ways may be more likely to see themselves as included in the process of social change.

One might question whether those seeking to promote women's rights should be concerned with accommodating inegalitarian views through representative processes of social change. One possible response is that social stability in a pluralistic environment sometimes requires more deference to inegalitarian perspectives than would be optimal in the abstract. Another possible response is more pragmatic: Premature

[187] For various arguments on single-sex education, see Levit & Verchick, supra note 19, at 98–117; Rosemary C. Salomone, Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground, 11 Mich. J. Gender & L. 63, 70–73 (2004); see also infra Section IV.C.

[188] Kahn v. Shevin, 416 U.S. 351, 353 (1974).

[189] McConnell, supra note 4, at 690.

judicial entrenchment of constitutional rights risks creating a backlash that thwarts the cause at issue. Then-Judge Ginsburg's critique of *Roe v. Wade* as "ventur[ing] too far in the change it ordered," prompting "the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures,"[190] can be understood in this light. Needless to say, claims about backlash are controversial and empirically complex.[191] Yet reliance interests furnish some reason to prefer avenues of social change other than constitutional judicial rulings, and so they support traditionalism at least when it operates to channel change through those avenues.

There remains tension between concern for reliance and acknowledgment that such reliance may be morally tainted. This provides further reason for constitutional adjudicators to interrogate the relevant expectations to assess their normative status. Such interrogation can go hand in hand with the recognition that reliance on morally salutary social arrangements is beneficial. In this way, reliance interests linked to the value of continuity can bolster women's rights instead of diminishing them.

C. Democracy

Another justification for traditionalism is rooted in democracy.[192] For current purposes, democracy is understood as a system in which "each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy."[193] Many people are involved in the construction and maintenance of traditions (at least, those traditions that rise to the level of social salience). Respect for tradition therefore reflects a concern for a multitude's opinions over

[190] Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 381 (1985).

[191] For discussion of the debate about backlash to *Roe*, see, e.g., Robert Post & Reva Siegel, *Roe* Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 406–24 (2007); Linda Greenhouse & Reva B. Siegel, Before (and After) *Roe v. Wade*: New Questions About Backlash, 120 Yale L.J. 2028, 2071–86 (2011). For a challenge to the backlash thesis in the context of same-sex marriage, see Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. Rev. 1235, 1304–27 (2010).

[192] See, e.g., McConnell, supra note 4, at 672; Marc O. DeGirolami, The Very Idea of Tradition in the Law, 35 Harv. J.L. & Pub. Pol'y: Per Curiam 1, 4 (2024).

[193] Scott Hershovitz, Legitimacy, Democracy, and Razian Authority, 9 Legal Theory 201, 213 (2003); see Stephanie Hall Barclay, Constitutional Rights as Protected Reasons, 92 U. Chi. L. Rev. 1179, 1192 (2025) (adopting this definition).

time. Traditionalists argue that their method thus has a democratic pedigree, particularly when it is contrasted with the alternative of (in McConnell's words) "allowing courts to set social policy" based on their individual philosophical views.[194]

One might counter that rights are not meant to be instruments of democracy; instead, they secure the people's fundamental prerogatives against majoritarian interference.[195] So why should judges deploy a more democratic methodology to adjudicate rights disputes?[196]

In response, a more democratic methodology can prevent rights claims from overly intruding on political decision-making. Rights claims can go too far in thwarting the democratic will, even if democracy is not identical to majoritarianism.[197] Interpreting rights claims using a more democratic methodology shrinks the gap.[198] Moreover, the clash between rights and democracy may be reduced when the right in question is grounded in tradition. The public will can translate imperfectly into formal legislation given inertia, political compromise, and distortions in the electoral process.[199] At times, tradition may have a stronger claim to represent the public will than law on the books. In *Griswold*, the Supreme Court relied on "a right of

[194] McConnell, supra note 4, at 685; see also Young, supra note 12, at 706–07 ("If the open-ended clauses of the Constitution cannot be given content without reference to some sort of moral principles, then it seems more democratic to refer to the morality embodied in societal traditions than to the judge's own beliefs.").

[195] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

[196] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 62 (1980) ("[Tradition's] overtly backward-looking character highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday's majority, assuming it was a majority, should control today's.").

[197] For scholarship critiquing the impact of strong views of rights on democratic governance, see, e.g., Jamal Greene, Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 78–79 (2018); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1369–76, 1386–95 (2006).

[198] For an argument that "courts vindicating modern substantive due process claims were engaged in democracy-promoting judicial review," see Douglas NeJaime & Reva Siegel, Not *Lochner*!: Substantive Due Process as Democracy-Promoting Judicial Review, 113 Calif. L. Rev. 2199, 2212 (2026); Douglas NeJaime & Reva Siegel, Answering the *Lochner* Objection: Substantive Due Process and the Role of Courts in a Democracy, 96 N.Y.U. L. Rev. 1902, 1908 (2021).

[199] See Murray & Shaw, supra note 13, at 763–66; Miriam Seifter, Countermajoritarian Legislatures, 121 Colum. L. Rev. 1733, 1754–77 (2021).

privacy older than the Bill of Rights—older than our political parties, older than our school system."[200] The Court thus appealed to widespread commitments that ran deeper than the legislatively enacted ban on contraceptives and that were not faithfully reflected in legislative action.

Nonetheless, it is true that democracy should not be the only value guiding rights adjudication. Particularly when democracy is conceived in more majoritarian flavors, adjudicators should be alive to the danger that a more "democratic" approach to rights adjudication will run roughshod over minority rights. So the democracy rationale for traditionalism in constitutional rights adjudication should be understood to provide only qualified support for a traditionalist approach.

To whatever extent the democratic rationale for traditionalism is accepted, however, it militates in favor of efforts to integrate women's rights concerns. Why? The logic parallels in some respects the reasoning applicable to concrete experience. If democracy supports traditionalism, then traditionalists ought to put a high premium on making tradition as democratic as possible.[201] They should take seriously the feminist critique that many legal enactments emerged from periods in which women were severely disenfranchised,[202] and that the democratic bona fides of some cultural traditions are also in question, since women's social subordination likely diminished their role in shaping traditions that came to predominate in a large enough segment of society to attract modern-day notice.[203]

To be sure, one cannot assume that all or most women rejected practices that today would strike many as marks of social subordination. In the 1830s, for example, both male and female authors wrote popular literature advocating for women's role as wives and mothers, in which capacity they would "affect the world around [them] by exercising a private moral influence."[204] It is not always easy to distinguish so-called false consciousness and sincere appreciation of facets of women's lives

[200] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[201] See Smith, supra note 171, at 1076–78.

[202] For democracy-based objections to the Supreme Court's recent treatment of tradition, see Miranda McGowan, The Democratic Deficit of *Dobbs*, 55 Loy. U. Chi. L.J. 91, 144–53 (2023); Milligan & Ross, supra note 13, at 347–50; Murray & Shaw, supra note 13, at 772–73.

[203] See Deborah L. Rhode, Association and Assimilation, 81 Nw. U. L. Rev. 106, 110–11 (1986) (describing sex segregation in civic organizations with social influence).

[204] Nancy F. Cott, The Bonds of Womanhood: "Woman's Sphere" in New England, 1780–1835, at 8 (1977).

that may be less compelling today. The mere fact that a cultural practice existed while women were half the population, however, cannot be taken as proof that women were full participants in its formation. This claim seems highly implausible, for instance, when applied to the practice of men's "chastisement" of their wives through physical abuse.

Accordingly, traditionalists ought to seek to democratize tradition, including by identifying those strands that women participated meaningfully in shaping.[205] Examples include historical forms of contraception practiced by women,[206] efforts to enhance women's education early in American history,[207] women's temperance movement organizations that sought to combat domestic violence,[208] and instances of early female entrepreneurship.[209] Attempts to construct a more inclusive network of practices and understandings may not entirely eliminate the impact of inequality on the formation of tradition. But it represents a step forward—and, significantly, one supported by traditionalist premises themselves.

D. National Identity

A fourth rationale for traditionalism is that it helps to constitute and strengthen national identity.[210] On this account, tradition bolsters the stability and cohesion of the American polity over time.

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[205] See Balkin, supra note 14, at 210–12.

[206] See Linda A. Gordon, The Moral Property of Women: A History of Birth Control Politics in America 13 (2007) ("An extensive folklore of birth control was handed down from generation to generation in most traditional societies.").

[207] See, e.g., Kathryn Kish Sklar, The Schooling of Girls and Changing Community Values in Massachusetts Towns, 1750–1820, 33 Hist. Educ. Q. 511, 528–39 (1993) (describing a rise in female schooling in some New England communities, though not others, in the late eighteenth century).

[208] See Elizabeth Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present 49 (1987) ("The temperance movement became the first American reform campaign to depict for the public the cruelty of domestic violence.").

[209] See Susan Ingalls Lewis, More Than Just Penny Capitalists: The Range of Female Entrepreneurship in Mid-Nineteenth-Century US Cities, *in* Female Entrepreneurs in the Long Nineteenth Century: A Global Perspective 243, 250–63 (Jennifer Aston & Catherine Bishop eds., 2020) (describing the wide-ranging activities of businesswomen in the nineteenth-century United States).

[210] See Richard Primus, Why Enumeration Matters, 115 Mich. L. Rev. 1, 6 (2016) ("For better and for worse, American constitutional law is not only about the mechanics of government. It is also about the construction of national identity.").

Traditions enable identity formation by connecting us not only with currently living individuals, but also with the past.[211] Anthony Kronman argues that "a traditionalism which honors the past for its own sake" makes human beings into participants in a "world of culture,"[212] extending backward to prior generations that have bequeathed us a world in trust and forward to future generations on which we depend for the furtherance of our projects, as in the "construction of the great cathedrals of medieval Europe."[213] To Kronman, participating in the "world of culture" is a distinctive characteristic of human beings, permitting us to rise above the biological limitations of our lifespan and to become more than (in Burke's phrase) "flies of a summer."[214]

A sense of historical continuity and obligation to the past often plays a powerful role in the identity formation of a particular society.[215] Allegiance to one's predecessors is a way to define a group, including a national community. To be sure, historical narratives that become prevalent in a nation may be more or less "imagined."[216] But tradition enables people to situate themselves within a community that has its own distinctive past, present, and future.

In the setting of federal constitutional rights adjudication, at least by the Supreme Court, the "[n]ation" or the American people is the collective entity the traditions of which are typically at issue.[217] Although many traditions vary by region, national traditions are most relevant to analysis of federal constitutional rights by a judicial institution with national reach.

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[211] See Shils, supra note 110, at 262–69.

[212] Kronman, supra note 12, at 1068.

[213] Id. at 1052. For a critique of Kronman, see Luban, supra note 181, at 1050–57.

[214] Kronman, supra note 12, at 1049, 1051 (quoting Burke, supra note 126, at 193).

[215] Catherine R. Ligioso, Interpreting Substantive Due Process: What Does "History and Tradition" Really Mean?, 57 Cal. W. L. Rev. 153, 163 (2020). At the same time, the concept of an "inheritance" from our predecessors, to be held in trust for our successors, is not *necessarily* particularistic. Environmentalists can employ similar concepts, for example, to urge people to protect the planet at a global level.

[216] Cf. Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (2d ed. 2006) (referring to the nation as "an imagined political community").

[217] See, e.g., Timbs v. Indiana, 586 U.S. 146, 150 (2019) ("A Bill of Rights protection is incorporated, we have explained, if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010))); Washington v. Glucksberg, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."); DeGirolami, supra note 3, at 1177 ("Traditionalists adopt a view of the American nation and its practices as legally salient for constitutional interpretation.").

It may be argued that American national identity is not traditionalist; instead, Americans see themselves as revolutionary, creative, open to the new.[218] Part of a people's self-conception can indeed be receptiveness to change, and observations about traditionalism in one national context (for instance, England, in Burke's analysis) cannot necessarily be transported to another (the United States). The United States, however, is not exempt from the general point that a recognizably continuous network of social practices and understandings helps to instill the sentiment that people are part of a unified entity extending across time.

The idea that tradition can serve as an engine of national cohesion does not mean that the role of the present-day interpreter is to replicate the past mechanically. To the contrary: The national identity rationale paves the way for negotiation among bearers of a tradition over time. For tradition to bind together members of a polity across the centuries, present-day individuals must be able to see a kinship between the web of practices and ideas they inhabit and those of the past. To the extent the past seems thoroughly foreign or repugnant, current members will not view themselves as heirs to the tradition, as links in a chain of transmission.

In other words, a continuous tradition involves contemporary recommitment to the past. This creates an opening for normative evaluation of longstanding practices. Whether consciously or unconsciously, members of the polity engage in collective consideration of which practices are central or peripheral, which ought to be perpetuated and which ought to be abandoned. They should be receptive to the possibility that practices and understandings emerging from earlier eras ought to be maintained or at least changed in less dramatic ways. But they should also be willing to abandon practices and understandings that do not conform to other strands of tradition or the polity's core values. Such a process is consistent with overarching fidelity to the flourishing of the American polity; for, as earlier noted, the traditionalist need not insist on maintaining each individual practice that forms part of the tradition at a given moment in time.[219] Tradition's

[218] Rebecca L. Brown, Tradition and Insight, 103 Yale L.J. 177, 204 (1993) ("Our heritage is as much about breaking with tradition as it is about following tradition.").

[219] See supra note 132 and accompanying text; see also Peggy Cooper Davis, Neglected Stories and the Lawfulness of *Roe v. Wade*, 28 Harv. C.R.-C.L. L. Rev. 299, 302–03 (1993) (distinguishing the use of history and tradition "to enshrine practices familiar to the

power to bind a community over time demands, perhaps paradoxically, a measure of flexibility. This is what the dialectical traditionalist model prescribes.

Feminist perspectives can and should enter into the evaluation that takes place under the model of traditionalism just described. Past practices that subordinated women ought to be among those that modern-day Americans reconsider. Maintaining these practices would often have the effect of significantly alienating current members of the polity from the nation's past, which would undermine the vitality of tradition. Moreover, feminists analyzing tradition can draw on the past both to identify troubling roots of present practices and to point to precursors to today's feminist arguments.

One might object that dialectical traditionalism is insufficiently critical. If the American polity was historically plagued by injustice toward women, why should current-day Americans, especially women, value the continuity of that polity or their membership in it? As Mary Anne Case asks, were women "a part of We the People in any meaningful sense in the framing of the original Constitution and post-Civil War Amendments?"[220] If not, one might doubt whether we should aim to strengthen bonds between "the people" of now and "the people" of then.

In critiquing originalism's "race problem," Jamal Greene suggests that originalism is "a normative account of national identity," constituted by the claim "that we locate our true values by looking backward rather than laterally or forward."[221] Greene states that originalism's restorationist narrative is "deeply alienating" for him as an African-American: "[W]hat America *has been* is hostile to my personhood and denies my membership in its political community."[222] A similar critique might be made of tradition insofar as it is viewed as an adhesive for national identity.

There may be distinctive features of the race-based critique. Greene notes, for example, that the Constitution emerging from the ratifying

constitutional framers" from its use "to illuminate the *principles* that the framers held and sought to embody in the constitutional text").

[220] Mary Anne Case, The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism, 29 Const. Comment. 431, 453 (2014).

[221] Jamal Greene, Originalism's Race Problem, 88 Denv. U. L. Rev. 517, 520–21 (2011).

[222] Id. at 521; see also Charles & Fuentes-Rohwer, supra note 147, at 1245–47 (discussing tension between racial equality and "originalism's project of defining or redefining American identity").

conventions "preserved and protected both slavery itself and slavery's institutional infrastructure."[223] Nonetheless, the discrimination-based objection to jurisprudential approaches that express fidelity to the past in order to bolster national identity applies to women as well. Perhaps a narrative of rupture is more appropriate than a narrative of fidelity that ties women to unjust historical periods.

The question of how modern-day Americans should conceive of their national identity raises fundamental issues about citizenship, patriotism, collective memory, and the appropriate moral standards to use in judging the past.[224] Without attempting to resolve these issues here, I highlight reasons for those committed to women's rights not to endorse a posture of severance with the past.

First, appeals to a common national past can be part of efforts to mobilize for change. Leaders of the women's movement in the nineteenth century, for instance, "often used the language of the American Constitution" to attack status inequality.[225] For instance, Elizabeth Cady Stanton charged that legislators, by excluding women from the franchise, had "granted titles of nobility to every male voter, making all men rulers, governors, sovereigns, over all women."[226] For such appeals to be effective, the listeners must have some attachment to the polity the principles of which they are being asked to realize more fully.

Second, a narrative of rupture might suggest a clean break between the "bad old days" and an enlightened modern age. But it is worthwhile instead to identify points of connection between past and present injustices. Siegel has argued, for instance, that the societal views underlying coverture did not disappear when legal restrictions on

[223] Greene, supra note 221, at 518–19.

[224] See, e.g., Paul Gowder, Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation, 114 Nw. U. L. Rev. 335, 405–08 (2019); Stephen E. Sachs, Good and Evil in the American Founding: The 2023 Vaughan Lecture on America's Founding Principles, 48 Harv. J.L. & Pub. Pol'y 275, 278–79 (2025); Richard C. Schragger, Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech, 63 Ariz. L. Rev. 45, 47 (2021).

[225] Siegel, She the People, supra note 152, at 990; see also Jack M. Balkin, Living Originalism 84 (2011) ("Not only have mobilizations regularly called upon the constitutional text, they have also called upon the enduring political principles of the generations that went before them, particularly the founding generation.").

[226] Hearing Before the S. Comm. on Woman Suffrage, 50th Cong. 5 (1888) (statement of Elizabeth Cady Stanton).

married women's ability to sue and contract were formally removed.[227] Instead, these views persisted in discourse opposing women's suffrage and in American legal culture more generally.[228] In urging present-day reforms, it is useful to identify similarities to condemnable aspects of an earlier era—to use the past as "negative precedent."[229]

Third, those committed to women's rights may identify with traditions of feminist activism. The American national story includes agitation on behalf of women's rights in addition to sexist practices, on such issues as suffrage, temperance, and the Equal Rights Amendment.[230] From a feminist perspective, one might wish self-consciously to continue these traditions—to use these traditions as "positive precedent."[231] Moreover, one might seek to integrate prior generations of feminist activism more fully into mainstream conceptions of what it means to be an American.

Such an effort would be an exercise in the reshaping of "constitutional memory."[232] As Balkin explains, "[c]onstitutional memory organizes our views about what the law means and why people have authority, what is normal and what is abnormal . . . ."[233] In constitutional debate, various parties "attempt to reshape memory through persuasive narratives and redescriptions."[234] Supporters of women's rights could highlight precursors to today's feminist goals in order to claim authority on behalf of certain ways of reading the Constitution—namely, those more favorable to the equality of women. In so doing, they could present an alternative vision of American national identity.[235]

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[227] Siegel, She the People, supra note 152, at 983.

[228] Id. at 983–87.

[229] Siegel, Constitutional Memory, supra note 16, at 54 (emphasis omitted). For an example based on a critical historical account of abortion restrictions, see Mayeri, supra note 13, at 212–13.

[230] See, e.g., Hasday, supra note 158, at 29–35.

[231] Siegel, Constitutional Memory, supra note 16, at 54 (emphasis omitted).

[232] Balkin, supra note 124, at 307; Siegel, Constitutional Memory, supra note 16, at 46–58; Reva B. Siegel, Foreword: Democratizing Constitutional Memory, 123 Mich. L. Rev. 1011, 1011–12 (2025).

[233] Balkin, supra note 124, at 322.

[234] Id. at 323; see also Jack M. Balkin, Rabbi Akiva and the Crowns: A Parable of Constitutional Fidelity, 104 B.U. L. Rev. 1321, 1347 (2024) (proposing creative interpretation undertaken in a spirit of fidelity as an alternative to "disown[ing] the past").

[235] For analysis of the possibility of reshaping the exclusionary *demos* in the race context, see, e.g., Gowder, supra note 224, at 392–405.

Thus, feminists could appeal to tradition to exhort fellow citizens to live up to their predecessors' principles, to identify points of similarity between past and present injustices, and to underscore the role that feminism has played in constructing the American story. These modes of referencing tradition are considerably more complicated than ancestor-worship, but more fitting if traditionalists are to pursue genuine continuity. Nevertheless, the possibility that rupture rather than fidelity is the most appropriate response to past injustice furnishes an enduring foil to traditionalism. At a minimum, it suggests that traditionalists who derive support from the value of national identity should be open to contestation over the nature of that identity, including from a wide range of individuals in the population.

In sum, tradition's role in bolstering national identity is compatible with—indeed, creates space for—feminist critique of various practices and understandings.

IV. IMPLICATIONS FOR CONSTITUTIONAL RIGHTS ADJUDICATION

This Part identifies implications of the view of tradition presented above for constitutional rights adjudication. It supports diversifying the sources of tradition; maintaining openness to the ability of traditions to change over time; drawing on resources offered by tradition to advance women's rights; analyzing discontinuous traditions to highlight problems with current arrangements; and reasoning in a manner consonant with tradition even while breaking from the past.

A. Sources of Tradition

Traditionalists concerned with both concrete experience and democracy, as earlier argued, ought to seek to diversify the sources of tradition on which they rely.[236] In the wake of *Dobbs*, for example, some expressed concern that the constitutional right to use contraceptives was at risk.[237] An analysis of what "tradition" has to say about contraception should include the habitual practices of women grappling with the prospect of pregnancy and the day-to-day experiences associated with

[236] See supra notes 171, 205–09209 and accompanying text.

[237] See, e.g., Leah R. Fowler & Michael R. Ulrich, Femtechnodystopia, 75 Stan. L. Rev. 1233, 1242–48 (2023).

the long history of birth control.[238] Those traditions are likely to reveal a degree of acceptance that diverges from, say, nineteenth-century discourse condemning birth control.[239]

The project of diversifying tradition ought also to involve attention to traditions of resistance to women's subordination. Organizing by women formed part of the background to passage of the Fourteenth Amendment,[240] and women played an important role in various nineteenth- and twentieth-century social reform movements, including temperance[241] and child labor reform.[242] Constitutional interpretation of the Fourteenth and Nineteenth Amendments should take account of women's struggles for equality; for instance, the Nineteenth Amendment could be understood to contain a broader equality mandate than one focused exclusively on voting.[243] Practices of women's resistance are also part of the network of American tradition.

It may be argued that the effort to diversify tradition, by incorporating the views of marginalized groups like women, misapprehends the nature of tradition. What it *means* to be marginalized, one might claim, is to be excluded from the processes that gave rise to societal (here, American) traditions.[244] To incorporate the experiences of marginalized people is therefore not to draw on tradition, but to reject tradition altogether.

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[238] Gordon, supra note 206, at 32–37; see also id. at 8 (observing that "birth control was widely practiced in pre-agricultural and nomadic societies").

[239] Id. at 36. In the abortion context, Evan Bernick and Jill Wieber Lens have argued that the reality of pregnancy was historically "full of ambiguities." Evan D. Bernick & Jill Wieber Lens, Original Public Meaning and Pregnancy's Ambiguities, 122 Mich. L. Rev. 1443, 1448 (2024). Pregnancy was difficult to diagnose in the early stages; the line between miscarriage and abortion was blurry; and women's understandings of the fetus's personhood were "individualized and contextual." Id. at 1467–83 (emphasis omitted). Debates about traditional views of abortion would be enriched by the historical perspectives of those undergoing pregnancy and its end.

[240] Siegel, She the People, supra note 152, at 968–76 (discussing campaigns for women's suffrage and other changes in women's status in the period surrounding ratification of the Reconstruction Amendments).

[241] Ian R. Tyrrell, Women and Temperance in Antebellum America, 1830–1860, 28 Civ. War Hist. 128, 128–30 (1982).

[242] Lynn Gordon, Women and the Anti-Child Labor Movement in Illinois, 1890–1920, 51 Soc. Serv. Rev. 228, 238–43 (1977).

[243] Siegel, She the People, supra note 152, at 1006–12. For discussion of women's organizing in the wake of the Nineteenth Amendment, see Julie C. Suk, Working Mothers and the Postponement of Women's Rights from the Nineteenth Amendment to the Equal Rights Amendment, 92 U. Colo. L. Rev. 799, 806–10 (2021).

[244] I thank Ben Eidelson for discussion of this point.

It is true that powerful groups often play an outsized role in constructing societal traditions. Yet this does not doom the enterprise of diversifying tradition. First, it is far from incoherent to recognize marginalized people's contributions to societal traditions. When inquiring into American traditions involving contraception, it makes sense to look into women's practices even at a time when women lacked substantial political power and to describe these practices as contributions to societal tradition. Second, values authentic to tradition (concrete experience, reliance, democracy, and national identity) support the interest in drawing on women's experiences and taking account of advances in women's rights—or so this Article argues. If one embraces these values, then one should not shy away from treating women's practices as part of American traditions.

Third, the task for today's traditionalist interpreters is not to identify the contents of American tradition at a fixed point in the past. If that fixed point is constitutional ratification, then traditionalism becomes originalism; and if the fixed point is different, then it becomes arbitrary. The task for today's traditionalist interpreters is instead to identify the contents of living American traditions in the present day. That task requires interpreters to sift through past practices and understandings to determine which have endured and which are consonant with the other practices and understandings that make up the networks of American traditions.[245] Discounting the customs of the marginalized as contributions to societal tradition would hamper interpreters' ability to undertake this task, especially by weakening their capacity to identify continuities between past eras and the present day.

A practical consequence of the need to diversify tradition is as follows: Constitutional adjudicators should be wary of extensive reliance on formal law as the embodiment of American traditions. The concrete experience and democracy rationales for tradition suggest that legislative enactments and common law cases are flawed reflections of "the people's" traditions, given the exclusion of women (and many others) from significant domains of political and cultural power. As earlier noted, Justices often refer to formal legal sources to characterize tradition even when they actually seem to be appealing to popular sentiments running deeper than the "legal tradition."[246] This practice

[245] See supra Part II.
[246] See supra Section I.C.

ought to be rethought. Formal law is one potential source of information about the contents of American tradition, but it has substantial limitations.[247]

One might argue that legal sources are particularly probative when it comes to gauging the scope of a "right," which is a prominent use of traditionalist analysis.[248] On this view, judges should look to formal law (say, the prevalence of certain state regulations) to ascertain whether the people thought they had a right to engage in a given practice, one that state legislatures could not abridge. If the people did not think they had a right, then that right could not be traditional—even if the relevant practice was quite common.[249] In other words, formal legal sources might say more than social custom about whether society embraced a right as part of its network of constitutive practices and understandings.

As an initial matter, however, not all conceptions of rights require them to be enshrined in formal law. For example, Founding-era Americans may have embraced unwritten rights arising from custom rather than emphasizing the written Constitution.[250] More significantly, members of societal groups with less access to political power may not have expressed themselves in the language of rights. But they may still have understood that a certain practice had long been acceptable or approved-of. That understanding can inform assessments of whether a tradition is sufficiently "deeply rooted" to shape the scope of a right.

But how can judges access traditions that are not enshrined in formal legal sources? Judges, after all, are not sociologists. As an initial matter, judges are not categorically unable to observe social patterns. For instance, they could plausibly conclude from general experience that the views undergirding Justice Bradley's opinion in *Bradwell v. Illinois*

[247] See Daniel B. Rice, Tradition Without Text? 75 Duke L.J. Online 79, 83–84 (critiquing reliance on written legislative enactments by practitioners of the "history and tradition" method).

[248] Cf. Stephen E. Sachs, *Dobbs* and the Originalists, 47 Harv. J.L. & Pub. Pol'y 539, 556–58 (2024) (emphasizing the lack of nineteenth-century evidence of a right to abortion that states could not restrict, though not limiting potential evidence of such a right to legal sources).

[249] For critique of this view, see Reva B. Siegel & Mary Ziegler, Abortion's New Criminalization—A History-and-Tradition Right to Health-Care Access After *Dobbs*, 111 Va. L. Rev. 413, 455–62 (2025).

[250] On the American founders' understandings of rights and divergences from modern-day views, see, e.g., Jonathan Gienapp, Against Constitutional Originalism: A Historical Critique 65–116 (2024); Jud Campbell, Determining Rights, 138 Harv. L. Rev. 921, 938–47 (2025).

have lost much ground in the United States.[251] Indeed, the Court's criticisms of sex stereotypes have relied on judgments about society that are not rooted exclusively in the law books.[252] Further, in *Moore v. City of East Cleveland*, the Justices turned to a sociology book, a newspaper article, and census reports—but perhaps, more fundamentally, to common understanding—to conclude that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" had "venerable" roots: "Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it."[253] In fact, the *Dobbs* Court presumably relied at least in part on general observation in noting that "*Roe* and *Casey* have enflamed debate and deepened division."[254]

Of course, there will be cases in which traditions are more difficult to discern from social observation, including ones involving competing claims regarding the existence and strength of traditions. In these cases, judges can make use of procedural and evidentiary tools to regularize the inquiry into tradition. One possibility is to employ expert witnesses on tradition, at least at the trial court level; Miller suggests that courts could use the *Daubert* standard to assess the admissibility and reliability of such testimony.[255] As Miller notes, expert testimony is already "used to establish customs or practices in other areas of law, such as in commercial law" or in admiralty.[256]

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[251] See Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 Corn. L. Rev. 1447, 1469 (2000) (noting that Justice Bradley's opinion has been "repeatedly cited with strong disapproval by the modern Court and commentators").

[252] E.g., Sessions v. Morales-Santana, 582 U.S. 47, 63 (2017) ("Laws according or denying benefits in reliance on '[s]tereotypes about women's domestic roles' . . . may 'creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.' " (quoting Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003))); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (noting that sex discrimination "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

[253] 431 U.S. 494, 504–05, 504 n.14 (1977) (plurality opinion).

[254] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022); see also id. at 2279.

[255] Miller, supra note 24, at 1355; see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993) (providing a standard for assessing the admissibility of expert testimony).

[256] Miller, supra note 24, at 1355.

Another possibility is to rely on party presentation[257] or the input of amici, so that judges do not alone face the practical burdens of identifying social and cultural traditions. To be sure, party presentation may skew the traditionalist inquiry in whichever direction the advocates wish to emphasize, and "amicus facts" may be unreliable.[258] But these critiques are not limited to the search for traditions, and judges may properly decide that the benefits of narrowing the traditionalist inquiry are worth the costs. Judges could also craft simplifying presumptions, such as a doctrine that they will not declare a statute or regulation unconstitutional based on their reading of social and cultural practices absent weighty evidence regarding these practices.

To the extent one still views judicial access to the range of traditions involving women's experiences as beyond judicial competence, one could see the "concrete experience" and "democracy" arguments for traditionalism as a form of *reductio ad absurdum*. If one is genuinely committed to traditionalism, then one will be committed to the diversification of tradition, including through access to nonlegal sources; and if one sees the diversification of tradition as unwieldy in a disqualifying manner, then one should not be concerned with tradition. Reliance on tradition in its nondiversified form, however, should not be treated as a "second-best" solution. For unlike practical shortcuts such as reliance on party presentation, nondiversified tradition is predictably likely to generate inegalitarian distortions of history that skew constitutional rights jurisprudence.

Thus, judges should not ignore traditions involving women's experiences on the basis that it is the best they can do. They could eschew tradition; or, better, they could undertake the hard work of ascertaining what the people's customs truly are.

B. Continuity and Change

Traditionalism has implications related to the intertwined concepts of continuity and change. In this Section, I examine four such implications: the ability to resist avulsive change on traditionalist grounds; the

[257] On party presentation, see United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020); Owen Smitherman, Grounding the Party Presentation Principle, 101 Notre Dame L. Rev. (forthcoming 2026) (manuscript at 6–14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4804849 [https://perma.cc/N6BG-G8WZ].

[258] Allison Orr Larsen, The Trouble with Amicus Facts, 100 Va. L. Rev. 1757, 1761–62 (2014).

recognition that practices and understandings can change over time, with consequences for declarations of unconstitutionality; the possibility of drawing on the resources offered by traditional views to advance women's rights; and the prospect that since-eclipsed practices and understandings can serve as "negative precedent" illuminating constitutional difficulties with present-day arrangements.

1. Tradition and Stability

Traditionalism can support the maintenance of legal arrangements that reflect historical gains for women's equality. Women have made significant gains in the United States in the political, economic, and social spheres over the past century and a half. Attempting to roll back these gains would disrupt important reliance interests and undercut the traditionalist value of continuity. Though one could argue that morally tainted reliance interests should not count (as earlier noted),[259] it would be implausible to argue that the interest in greater equality for women is morally tainted. At least, one would be hard pressed to make such an argument by drawing on generally accepted American customs and values.

The reliance interest in women's equality has doctrinal consequences; here is one. Since the 1970s, the Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment to cover sex discrimination,[260] and it has subjected sex classifications to heightened scrutiny.[261] From an originalist perspective, there is a strong argument that these doctrinal conclusions are incorrect[262]—notwithstanding some efforts, notably by

[259] See supra Section III.B.

[260] See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 638–43, 653 (1975); Reed v. Reed, 404 U.S. 71, 75 (1971).

[261] Craig v. Boren, 429 U.S. 190, 197 (1976).

[262] Case, supra note 220, at 446–48; Michael C. Dorf, Equal Protection Incorporation, 88 Va. L. Rev. 951, 958 (2002); see also Ruth Bader Ginsburg, Sexual Equality Under the Fourteenth and Equal Rights Amendments, 1979 Wash. U. L.Q. 161, 161 ("Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities."); Sachs, supra note 248, at 560 ("It's a complex question how far the principles in the Fourteenth Amendment 'recognize women's rights,' at least in the way the *Dobbs* dissent envisions." (footnote omitted)).

Steven Calabresi and Julia Rickert, to argue that the Fourteenth Amendment forbids sex discrimination as an originalist matter.[263]

To interpret the Equal Protection Clause today not to cover sex discrimination would be a significant doctrinal change with wide-ranging legal ramifications. Traditionalism provides reason not to embark on this path, even when originalism might counsel otherwise (or counsel at a minimum that overruling precedent would be the first-best option).[264] Thus, traditionalism can provide support for constitutional protection for women's rights.

2. Changing Traditions

Constitutional adjudicators ought also to be open to the possibility that traditions can change over time. This is a core part of the dialectical process; tension between particular practices and other strands of tradition, or among traditions, leads to shifts in the network of customs and understandings that constitute the tradition. Recognizing this possibility cautions against premature declarations of unconstitutionality.

An example comes from an unsettled legal question—whether single-sex public education in elementary or secondary schools violates the Equal Protection Clause.[265] Single-sex schooling has nineteenth- and early twentieth-century roots in practices of gender role differentiation that tended to subordinate women; men were educated to take on jobs

[263] Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 Tex. L. Rev. 1, 3 (2011). They do not settle the question of whether the Equal Protection Clause or the Privileges or Immunities Clause of the Fourteenth Amendment is the basis for the relevant equality guarantee. Id. at 23–24.

[264] For discussion of originalism's avulsive potential, see, e.g., Thomas W. Merrill, Bork v. Burke, 19 Harv. J.L. & Pub. Pol'y 509, 516 (1996) (arguing originalism "entails the potential for radical discontinuities in interpretation—and hence unequal treatment and unpredictability"); Koppelman, supra note 25, at 199; Young, supra note 12, at 659–86. On originalism and precedent, see Gamble v. United States, 139 S. Ct. 1960, 1981–82 (2019) (Thomas, J., concurring) (stating that federal judges lack discretion to adhere to "demonstrably erroneous" precedents instead of following original meaning (citing Nelson, supra note 84, at 13 & n.35)). However, the relationship between adhering to originalism and maintaining precedent is complex and contested. For discussion, see, e.g., Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1939–42 (2017); Sachs, supra note 81, at 860–64.

[265] For discussion, see sources cited supra note 187; see also Catharine A. MacKinnon, A Feminist Defense of Transgender Sex Equality Rights, 34 Yale J.L. & Feminism, no. 2, 2023, at 88, 89 ("It may be that women's schools continue to exist largely because no case challenging them has reached the Supreme Court in a very long time.").

associated with greater economic, political, and social power.[266] More recently, however, some have argued for single-sex education based partially on its benefits for girls. The idea is that single-sex education provides opportunities for girls to excel and helps to weaken gender stereotypes about which students are leaders, troublemakers, and so on.[267] Others disagree, arguing that single-sex education reinforces stereotypes about gender differences, fails to prepare students for a mixed workplace, and disserves queer students.[268]

From a traditionalist perspective, the lengthy and continuous history of single-sex education—albeit less strong in public schools[269]—means that the practice should not be briskly dismissed on equal protection grounds. The practice may contain latent insight that modern-day adjudicators ought not disregard. But the traditionalist inquiry does not simply stop there. Instead, adjudicators should examine the web of practices and ideas surrounding single-sex education and evaluate their compatibility with other strands of American customs and values. That inquiry may well result in the conclusion that the tradition of single-sex education has troubling historical connections but the capacity to adapt to a more egalitarian society.

The possibility of adaptation militates against a constitutional rule instituting a blanket ban on single-sex education in public schools under the Equal Protection Clause. Single-sex education would then be subject

[266] Rosemary Salomone, Rights and Wrongs in the Debate over Single-Sex Schooling, 93 B.U. L. Rev. 971, 974 (2013) (noting that public vocational schools established in the early 1900s "offered a highly gendered curriculum, tracking male students into fields like drafting, woodworking, and auto mechanics, and females into lower-paying careers like dressmaking and secretarial work").

[267] See Lettie Rose, Maya Pierce, Juliet Dale, Isabel Miller & Lauren Zong, Single-Sex Education, 24 Geo. J. Gender & L. 787, 801–02 (2023) (describing these arguments). The VMI Court, while barring VMI itself from excluding women, indicated that "it is the mission of some single-sex schools 'to dissipate, rather than perpetuate, traditional gender classifications.'" United States v. Virginia, 518 U.S. 515, 533–34, 534 n.7 (1996) (quoting Brief of Twenty-Six Private Women's Colleges as Amici Curiae in Support of Petitioner at 5, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107)).

[268] For an overview of these arguments, see Rose et al., supra note 267, at 803–05; see also Robert Blake Watson, Applying *Bostock*: The Queer Case Against Public Single-Sex Schooling, 51 J.L. & Educ., no. 2, 2022, at 185, 204–11 (arguing that single-sex education is newly vulnerable following the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

[269] Denise C. Morgan, Anti-Subordination Analysis After *United States v Virginia*: Evaluating the Constitutionality of K-12 Single-Sex Public Schools, 1999 U. Chi. Legal F. 381, 385–86, 388.

to continuing public debate, for instance about the effects on gender stereotypes. Yet the Court would not cut off experimentation with single-sex education. Rather, the public could discern through greater experience whether the practice can further rather than thwart important societal interests, including women's equality.

3. Tradition's Egalitarian Potential

As Part III suggested, it should not be assumed that tradition has little to offer those interested in advancing women's rights. In fact, enduring practices and understandings offer resources to further egalitarian goals.

An example comes from the 1974 case *Geduldig v. Aiello*, where the Supreme Court held that discrimination based on pregnancy was not necessarily discrimination based on sex for equal protection purposes.[270] The Court's reasoning was formalist: The state program at issue, the Court explained, differentiated pregnant from nonpregnant individuals without drawing sex-based lines.[271] From a traditionalist perspective, however, the longstanding cultural associations between pregnancy and gender cannot be ignored. "[D]iscrimination against women," as Justice Ginsburg wrote in a 2012 dissent, "is tightly interwoven with society's beliefs about pregnancy and motherhood."[272]

Thus, traditionalism could provide a basis for recognizing that pregnancy cannot be artificially severed from gender in the context of workplace accommodations.[273] One might lament certain features of the

[270] 417 U.S. 484, 494 (1974). For an explanation of the holding in *Geduldig*, see Neil S. Siegel & Reva B. Siegel, *Struck* by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination, 59 Duke L.J. 771, 793 n.104 (2010).

[271] *Geduldig*, 417 U.S. at 496 n.20. The formalist reasoning of *Geduldig* has recently gained steam. See Katie Eyer, Transgender Equality and *Geduldig* 2.0, 55 Ariz. St. L.J. 475, 477 (2023). The Court cited *Geduldig* in *Dobbs* to assert that abortion regulation was not a sex-based classification, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022), and *Geduldig* has been used to reject the claim that restrictions on transgender medical treatments amount to sex discrimination, United States v. Skrmetti, 145 S. Ct. 1816, 1833 (2025).

[272] Coleman v. Court of Appeals of Md., 566 U.S. 30, 56–57 (2012) (Ginsburg, J., dissenting). To highlight the connection that society has long drawn between pregnancy and gender, it is not necessary to deny that transgender individuals can become pregnant, or to suggest that pregnancy is a defining feature of womanhood (thereby excluding women who never become pregnant). The point is simply that American society has long closely connected pregnancy and womanhood, for better or for worse.

[273] For discussion of linkages between pregnancy discrimination and subordination of women through the enforcement of stereotypes, see Naomi Schoenbaum, Rethinking Sex as Biology Under Equal Protection, 58 U.C. Davis L. Rev. 905, 961 (2024).

traditional connection between pregnancy and womanhood, such as the view that a woman's only destiny is to be a mother or that pregnant women cannot be effective workers. But recognizing the traditional connection can be valuable in arguing that women often face challenges in the childbearing process that ought to be accommodated, and in underscoring the deleterious consequences of forcing women to choose between pregnancy and their careers.

Relatedly, the effort to realize tradition's egalitarian potential may benefit from "immanent critique" of traditionalist premises. For instance, one might argue that traditionalists who emphasize the importance of family life[274] should highly value care work. They ought therefore to be open to "equal pay" arguments that challenge salary disparities between men and women based on the devaluation of "caregiving jobs, such as nursing and social work," that require "knowledge and skills . . . associated with women."[275]

To be sure, traditions will not invariably be fertile ground for egalitarian reasoning, and there may be costs to drawing on traditions in this manner. One might contend that doing so reifies premises of the tradition that are problematic. But the encounter with tradition can lead to insights that further women's rights.

4. Tradition and Negative Precedent

Tradition can also serve as the basis for critique of present-day practices, by illuminating the troubling set of understandings of which these practices form part. At times this can take the form of "genealogical" critique—identifying the problematic historical roots of a practice, or disturbing historical cognates, to reject the practice's current manifestations.[276] For instance, recognizing that differential classifications of dependency for benefits purposes have their origins in

[274] See Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition.").

[275] Levit & Verchick, supra note 19, at 77.

[276] On genealogical and related forms of critique, see Charles L. Barzun, The Genetic Fallacy and a Living Constitution, 34 Const. Comment. 429, 431 (2019); Charles L. Barzun, Impeaching Precedent, 80 U. Chi. L. Rev. 1625, 1633–43 (2013); Charles W. Tyler, Genealogy in Constitutional Law, 77 Vand. L. Rev. 1713, 1716–17 (2024). For discussion of how an earlier discriminatory policy can "taint" a later one, see W. Kerrel Murray, Discriminatory Taint, 135 Harv. L. Rev. 1190, 1194–96 (2022).

"gross, stereotyped distinctions between the sexes"[277] furnishes context that an interpreter can use to identify a modern-day constitutional violation. Understanding traditions that treat women as economic dependents helps to explain why the differential classification is disturbing.[278]

But traditions may shift from their historical roots (as earlier argued),[279] and so the adjudicator who seeks to use tradition as "negative precedent"[280] should explain why the present-day practice is relevantly similar to, or continuous with, the troubling historical associations. To take another sex stereotyping example, now from a statutory context, the Supreme Court, in the 1989 case *Price Waterhouse v. Hopkins*, held that sex stereotyping claims were actionable under Title VII of the Civil Rights Act of 1964.[281] In *Price Waterhouse*, a female candidate for partnership in an accounting firm was counseled that to improve her chances, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[282] To see why sex stereotyping amounts to discrimination based on sex, the interpreter must grasp the force of

[277] Frontiero v. Richardson, 411 U.S. 677, 679–80, 685 (1973) (plurality opinion). On the significance of sex stereotyping claims to the development of constitutional sex equality law, see Jessica A. Clarke, Scrutinizing Sex, 92 U. Chi. L. Rev. 1, 56–58 (2025); Cary Franklin, The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. Rev. 83, 86 (2010); Schoenbaum, supra note 273, at 961.

[278] Sex stereotyping reasoning is also relevant to the argument that discrimination on the basis of sexual orientation or gender identity represents discrimination on the basis of sex. The Supreme Court's decision in *Bostock v. Clayton County*—holding that discrimination based on sexual orientation or transgender status qualifies as discrimination based on sex under Title VII—was grounded largely in the formalist view that "if changing the employee's sex would have yielded a different choice by the employer," then "a statutory violation has occurred." 140 S. Ct. 1731, 1737, 1741 (2020). An alternative more focused on tradition would be to highlight the deeply rooted connection between sex stereotypes and expectations about employees' sexual orientation or gender identity. See Zarda v. Altitude Express, Inc., 883 F.3d 100, 119–22 (2d Cir. 2018) (en banc), *aff'd sub nom.*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

[279] See supra Subsection IV.B.2.

[280] Siegel, Constitutional Memory, supra note 16, at 54 (emphasis omitted).

[281] 490 U.S. 228, 250–51 (1989) (plurality opinion); id. at 272 (O'Connor, J., concurring in the judgment). Some courts of appeals have held that sex stereotyping claims are actionable under the Equal Protection Clause as well. See, e.g., Corbitt v. Sec'y of Ala. L. Enf't Agency, 115 F.4th 1335, 1345 (11th Cir. 2024); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117–22 (2d Cir. 2004).

[282] *Price Waterhouse*, 490 U.S. at 232–33, 235 (plurality opinion) (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989)).

social understandings that judge women primarily based on their attractiveness to men and that link success in the workplace to boldness, thereby placing women in what the Court called a "catch 22": an employer "objects to aggressiveness in women but [its] positions require this trait."[283] The Justices then had to see those understandings as instantiated in the treatment of a female candidate in the 1980s. In other words, continuity in negative historical associations is key.[284]

Another possible way to treat traditions as "negative precedent" is to use the background against which a constitutional provision was enacted to inform the inquiry into which practices the provision proscribes. For instance, scholars such as Michele Goodwin and Dorothy Roberts have argued that the close connection between slavery and Black women's involuntary pregnancy helps to illuminate constitutional problems with abortion bans today.[285] The "social conditions leading to the Thirteenth and Fourteenth Amendments," Goodwin urges, should affect the amendments' scope.[286] To be sure, the connection between rejected traditions and modern-day practices will properly be subject to debate. Yet the possibility of reading constitutional provisions in light of practices that these provisions can be understood to repudiate points to an available role for tradition.

The idea of tradition as "negative precedent" sounds anti-traditionalist, but features of this approach are consonant with the broader thrust of dialectical traditionalism. Drawing on tradition as the basis for critique of present-day understandings requires engagement with traditions and analysis of their premises. The adjudicator must then recognize a divergence between past practices and currently prevailing understandings of women's capacities and entitlements. Further, the adjudicator could underscore that critiques of the relevant practices are

[283] Id. at 251.

[284] For analysis of continuity in the context of "tainted" government practices, see Murray, supra note 276, at 1212–17.

[285] Goodwin, supra note 21, at 202–08; Dorothy Roberts, The Failure of *Dobbs*: The Entanglement of Abortion Bans, Criminalized Pregnancies, and Forced Family Separation, *in* Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abortion 175, 180–83 (Lee C. Bollinger & Geoffrey Stone eds., 2024). I thank Alice Abrokwa for discussion of these issues.

[286] Goodwin, supra note 21, at 218. On Thirteenth Amendment challenges to abortion bans, see Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480, 483–84 (1990); Julie C. Suk, A World Without *Roe*: The Constitutional Future of Unwanted Pregnancy, 64 Wm. & Mary L. Rev. 443, 513–14 (2022).

themselves longstanding.[287] In these senses, the adjudicator does not leave tradition behind.

More broadly, "negative precedent" is but one part of the dialectical traditionalist approach. Other implications of this approach include recognition that troubling practices can change over time, efforts to identify resources within traditional views for advancement of women's rights, and commitment to reasoning in a traditionalist fashion even when breaking with the past. It may be questioned how adjudicators ought to decide whether to treat traditions (or subparts thereof) as negative precedent or to give them a warmer embrace. Below I consider the question of how adjudicators can decide which strands of tradition to privilege, as well as the relationship between this choice and adjudicators' moral views.[288] But regardless of whether adjudicators ultimately endorse or accept specific traditional practices, the overall recommendation is to engage in the dialectical traditional process: carefully accounting for traditions, critically analyzing them, and treating them as meaningfully informing present-day constitutional adjudication.

C. Traditionalist Reasoning

Another implication of traditionalism involves the *reasoning* employed by advocates and judges. Grounding one's reasoning in precursors within a tradition can have both normative and strategic benefits. The normative benefits involve promoting the values of continuity and fidelity, and shaping American traditions to include rather than exclude women. The strategic benefits involve persuading some who might otherwise worry that they must completely give up on tradition to accept gains in women's equality.

With respect to advocacy, modern-day proponents of women's rights can appeal to tradition in a twofold sense. They can refer to American traditions in general, and they can draw on histories of women's rights activism in particular. References to American traditions are part of the tradition of feminist advocacy. Examples include suffragists' comparisons of laws preventing women from voting to "bill[s] of

[287] See, e.g., Goodwin, supra note 21, at 207 (noting criticisms "over 160 years ago . . . of the devastating sexual predations experienced by Black girls").

[288] See infra Part V.

attainder" and "title[s] of nobility."[289] As Jill Hasday recounts, the National Organization for Women held a march in Boston on the bicentennial of the Boston Tea Party demanding "[n]o taxation without equal rights."[290] Today, one might argue that sex discrimination in the workplace is contrary to American ideals of advancement based on talent and effort. Highlighting the disjunction between gender subordination and American values enables women's rights advocates to situate themselves in the network of American practices and understandings and to urge development of national traditions in a more egalitarian direction.

Women's rights advocates can also appeal to traditions of feminist activism. As scholars including Hasday and Mayeri note, mainstream histories and judicial summaries of gains for women's equality often obscure the degree of resistance women faced and the extent of persistent, forceful activism required to overcome this resistance.[291] In fact, there has been a long history of feminist agitation, such as extensive campaigns in favor of the Equal Rights Amendment—as detailed, for example, by Julie Suk.[292]

As a corrective, women's rights advocates can highlight that history and draw attention to feminist precursors in their own organizing and arguments. One example in court comes from an influential brief filed by Ruth Bader Ginsburg in 1971 in the Supreme Court case *Reed v. Reed*.[293] The brief listed Black civil rights activist Pauli Murray as an honorary co-author to acknowledge Murray's impact on the arguments therein.[294] Another example involves deliberate decisions by feminist organizers to hearken back to earlier generations of women's rights activism—relaying a torch from Seneca Falls (site of the 1848 women's

[289] Siegel, She the People, supra note 152, at 990–91 (quoting Hearing Before the S. Comm. on Woman Suffrage, supra note 226, at 5); see Suk, supra note 243, at 804 (describing Elizabeth Cady Stanton's references to the Preamble to the Constitution at the first congressional hearing on the women's suffrage amendment in 1878).

[290] Hasday, supra note 158, at 49.

[291] Id. at 18–43; Serena Mayeri, Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation, 33 Wm. & Mary Bill Rts. J. 519, 520, 522 (2024).

[292] Julie C. Suk, We the Women: The Unstoppable Mothers of the Equal Rights Amendment 1–2 (2020).

[293] 404 U.S. 71 (1971).

[294] Olivia B. Waxman, In Previously Unseen Interview, Ruth Bader Ginsburg Shares How Legal Pioneer Pauli Murray Shaped Her Work on Sex Discrimination, Time (Dec. 12, 2023, at 12:04 ET), https://time.com/5896410/ruth-bader-ginsburg-pauli-murray [https://perma.cc/LDM3-32SW].

rights convention) to the 1977 National Women's Conference; erecting monuments in honor of the Nineteenth Amendment's centennial; and wearing white as an elected female official to evoke a "multigenerational" practice.[295] Traditions can be forces of cohesion in social movements advocating for change.

In drawing on traditions of feminist activism, women's rights advocates should be attentive to the range of women's experiences and the voices of those marginalized along other dimensions, such as race, sexual orientation, and gender identity.[296] For instance, statements hailing passage of the Nineteenth Amendment ought to take account of the fact that many Black women were denied the vote by legal authorities long after 1920.[297] More generally, women's rights advocates can direct attention to the contributions of women of color and LGBT individuals to feminist activism.

Situating women's rights activism within a network of enduring practices and understandings—both feminist precursors and broader American traditions—can help to demonstrate that such activism is not an ephemeral or faddish phenomenon. This is not to say that traditionalist reasoning is the only appropriate form of feminist discourse. Its deployment in any particular circumstance requires contextual judgment. The point is that traditionalist reasoning has a place in feminist advocacy.

Traditionalist reasoning should also figure into the ways that judges explain their decisions to the public. Even when judges are breaking from what some deem traditional understandings, judges ought to ground their rulings in tradition—at least presumptively. That presumption can be overcome when drawing a link to past practices would be sufficiently morally repugnant. Yet in many cases, there are ways for judges to express fealty to tradition without endorsing clearly immoral understandings.

In the VMI case holding that the school could not continue to exclude women, as earlier noted, Justice Ginsburg's opinion for the Supreme Court described VMI's "adversative method" as "modeled on English

[295] Hasday, supra note 158, at 52–53.

[296] See, e.g., Crenshaw, supra note 173, at 152.

[297] See Linda C. McClain, What Becomes a Legendary Constitutional Campaign Most? Marking the Nineteenth Amendment at One Hundred, 100 B.U. L. Rev. 1753, 1759 (2020).

public schools and once characteristic of military instruction."[298] Far from critiquing VMI's martial approach, which hearkened back to previous eras, Justice Ginsburg discussed VMI's methodology in approving terms: "The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course."[299] Praising VMI had the effect of highlighting why Virginia's proposed alternative women's-only school was not an adequate substitute for admitting women to VMI,[300] an important point from a doctrinal perspective. But the Court's positive characterization of VMI also demonstrated the Court's commitment not to "destroy [VMI]" and the traditional understandings that its method of instruction embodied.[301]

Why is it beneficial for judges to reason in a traditionalist fashion? From a normative perspective, this approach helps to promote values of stability and continuity. Judges signal that they are not throwing away the past, and they are expressing fidelity toward the American polity even as they embrace change. Moreover, traditionalist reasoning demonstrates that legal results conducive to women's equality can be integrated into American traditions, rather than standing apart from them.

From a pragmatic perspective, such reasoning may assist in persuading at least some of those skeptical of change that they are not being disregarded.[302] It is important to be able to reassure people that they do not need to repudiate all the values they hold dear to sign on to certain feminist conclusions.[303]

[298] United States v. Virginia, 518 U.S. 515, 519–20 (1996); see supra note 66 and accompanying text.

[299] *Virginia*, 518 U.S. at 520.

[300] Id. at 547–54.

[301] Id. at 558.

[302] Another approach to the task of promoting equality when consensus about the content or desirability of equality is elusive is found in Robert Tsai's work. See Robert L. Tsai, Practical Equality: Forging Justice in a Divided Nation 11 (2019) (urging the development of "a body of justifications and practices that serve as second-best solutions when egalitarianism is unavailable as a consensus rationale").

[303] See Bartlett, Idea of Progress, supra note 14, at 305 ("The tradition/change dichotomy is nonstrategic because it fails to take into account [the] desire for the familiar."). Fleming argues that one of the reasons "for the grip of originalism in our constitutional culture" is "the grip of the aspiration to fidelity." Fleming, supra note 133, at 541. If this is so, then dialectical traditionalism could help to provide an alternative to originalism that maintains the aspiration to fidelity.

As another example, the Court in *Griswold* sounded traditionalist tones. It emphasized the importance of privacy surrounding the marital relationship: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[304] And it underscored the longevity of the marital institution: "We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[305] The Court reasoned in a traditionalist register even while innovating in identifying constitutional protection for an activity (using contraceptives in marriage) that may have struck many as contrary to traditional views about the centrality of childbearing to marriage.[306] The Court's reasoning signaled that it was maintaining commitment to a value—the significance of marriage—that was likely to matter to a substantial share of the population, especially those skeptical of *Griswold*.[307]

It may be argued that traditionalist reasoning in innovative decisions is immoral, duplicitous, or ineffective. On immorality, some would object to the views for which traditionalist reasoning expresses respect. With *Griswold*, for example, one might argue that marriage should not be valorized to the exclusion of other relationships[308] and should not

[304] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[305] Id. at 486.

[306] On those views, see Gordon, supra note 206, at 1; see also Naomi Cahn & June Carbone, The Blue Family Constitution, 35 J. Am. Acad. Matrim. Laws. 505, 510 (2023) ("*Griswold* . . . limited the ability of the state to impose the traditional moral order on intimate relationships."). But see Michael J. Klarman, Fidelity, Indeterminacy, and the Problem of Constitutional Evil, 65 Fordham L. Rev. 1739, 1743 n.33 (1997) (describing *Griswold* as a decision that "constitutionalize[d] a dominant national consensus and deploy[ed] it against a local outlier").

[307] The Supreme Court followed a similar path in *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015), where it recognized a constitutional right to same-sex marriage while quoting the paean to marriage in *Griswold*, id. at 666–67, and explaining that "this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order," id. at 669. Precisely because marriage is so significant, the Court indicated, it should not be denied to gay and lesbian individuals. Id. at 670.

[308] Such critiques were made prominently with respect to *Obergefell*. See, e.g., Melissa Murray, *Obergefell v. Hodges* and Nonmarriage Inequality, 104 Calif. L. Rev. 1207, 1209–10 (2016); Gregg Strauss, What's Wrong with *Obergefell*, 40 Cardozo L. Rev. 631, 635 (2018); see also Tait, supra note 151, at 109 ("*Obergefell* signals a new life for coverture values."). With respect to *Griswold*, however, Janet Dolgin suggests that given societal views of marriage at the time, the disagreements surrounding *Griswold* did not focus on "the Court's invocation of marriage as a 'sacred,' 'intimate,' and 'enduring' state." Janet L.

serve as the basis for a special claim to respect for privacy. Assessing this objection ultimately depends on one's normative stance toward the societal view in question. It would be morally wrong for a court to express respect for the doctrine of chastisement or to present an innovation as a continuation of that doctrine. For many people, expressing respect for the distinctiveness of the marital relationship is not morally wrong in the same way, even if they recognize a range of reasonable opinions regarding the importance of marriage.

To avoid the difficulty of relying on individual judges' moral ideas, one could peg the normative appraisal to a societal benchmark—which longstanding views would most Americans see as worthy of respect, or at least not so morally odious as to warrant clear disapproval? On the whole, however, judges will need to balance the recognition that some find a given tradition immoral with the interest in speaking to those likely to disagree with a case's result. This task requires case-by-case analysis. But in many cases, the balance will weigh in favor of reasoning in a traditionalist manner when the longstanding views in question are not evidently repugnant.

Another critique is that reasoning in a traditionalist way while innovating is duplicitous—a means to hoodwink people into believing that tradition is being respected when the opposite is occurring. For instance, the Supreme Court held seven years after *Griswold* in *Eisenstadt v. Baird* that states could not constitutionally limit the distribution of contraceptives to unmarried persons.[309] "It is true that in *Griswold*," the Court acknowledged, "the right of privacy in question inhered in the marital relationship."[310] Yet "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[311] The decision in *Griswold*, one might therefore argue, was a faux-traditional stepping-stone on the path to rejection of marriage's significance.

In response, traditionalist reasoning coupled with innovative results need not be insincere. A Justice deciding *Griswold* could in good faith

Dolgin, The Family in Transition: From *Griswold* to *Eisenstadt* and Beyond, 82 Geo. L.J. 1519, 1538–39 (1994) (quoting *Griswold*, 381 U.S. at 486).

[309] 405 U.S. 438, 443 (1972).

[310] Id. at 453.

[311] Id. (emphasis omitted).

have taken the position that the high importance traditionally placed on marriage demanded novel constitutional consequences, namely, strong privacy protection against anti-contraception mandates. Further, only three Justices who joined any opinion in *Griswold* approving of the result also joined such an opinion in *Eisenstadt*.[312] These Justices may have viewed *Eisenstadt*'s protection for individual autonomy as inherent in *Griswold*'s protection for marital privacy, even if they did not wish to draw out this consequence in *Griswold*. Justices are not necessarily dishonest when they adopt the minimalist approach of spelling out only some grounds for their decision, as long as those grounds are sufficient to support the outcome.[313] Some Justices may also have come to the view between 1965 and 1972 that individuals rather than married couples were the object of privacy rights. Hence, the charge of duplicity is overblown.[314]

A further critique of traditionalist reasoning in innovative opinions is that it is ineffective. Perhaps those objecting to the decision, far from being mollified, will feel patronized and aggrieved by judicial statements purporting to respect their values. In the VMI case, for instance, Justice Scalia in dissent hardly praised the majority for being solicitous of VMI's educational methods; instead, he charged that the majority "counts for nothing the long tradition, enduring down to the present, of men's military colleges."[315]

The question of how people will react to judicial opinions is empirical, and the answer will vary across the population.[316] At least

[312] That is, Justices Brennan, Douglas, and White. "Opinion . . . approving of the result" includes concurrences and concurrences in the judgment. One reason for the limited overlap is the substantial turnover in Supreme Court membership between *Griswold* and *Eisenstadt* (five Justices). See Justices 1789 to Present, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/7R39-49EM] (last visited Feb. 26, 2026).

[313] See Richard H. Fallon, Jr., A Theory of Judicial Candor, 117 Colum. L. Rev. 2265, 2295 (2017) ("A judge does not breach her obligation of candor by joining an opinion that includes arguments that she regards as weak or possibly even fallacious, provided that the opinion also advances arguments that the judge believes adequately support the judgment.").

[314] Moreover, one could fault the opinion in *Eisenstadt* for failing to make a better case that certain nonmarital relationships warrant privacy just as marital ones do. In reasoning that way, *Eisenstadt* would have created a stronger connection to the reasoning of *Griswold*.

[315] United States v. Virginia, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

[316] On judges' capacity to anticipate public reactions to their rulings, see Cass R. Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 Stan. L. Rev. 155, 175–78 (2007). Of course, very few Americans read judicial opinions. But more consume news stories quoting from opinions or reporting on their tone, and interest groups can filter information about the content of opinions down to their supporters over time.

some chunk of the population, however, would likely find it preferable for an innovating court to express sympathy for their traditional understandings instead of repudiating them outright.[317] Were the *Griswold* Court to have explained that it found the connection between marriage and children to be "benighted nonsense," or were the VMI Court to have castigated VMI for its "backwards educational techniques," more people would probably have been aggrieved. It seems plausible, then, for the Court's emphasis on the significance of traditional practices to have had some effect. The reassuring impact of traditionalist reasoning might be more pronounced for those who are not dead set against the innovative result but are on the fence and concerned not to leave the past completely behind.

Thus, traditionalist reasoning may have a positive impact on recognition of the legitimacy of judicial opinions by those otherwise inclined to disagree. Most significantly, traditionalist reasoning helps to vindicate the value of stability and continuity, and this is a worthy outcome at least when the longstanding practice in question does not warrant clear condemnation.

V. TRADITION AND DETERMINACY

This Part addresses broader questions regarding the place of tradition in constitutional theory, including the critique that traditionalism is indeterminate and the relationship between traditionalism and moral principles.

It may be argued that traditionalism, especially in the dialectical variety, is insufficiently determinate to be valuable in constitutional rights adjudication. Lawyers and judges, as Balkin observes, often seek a "unitary tradition" in the sense of "a single viewpoint or continuous course of conduct."[318] The interest in cabining the range of possible results is surely one reason why.

[317] Cf. Primus, supra note 210, at 5–6 (arguing that a "continuity tender"—"an inherited statement that members of a community repeat in order to affirm their connection to the community's history, even though they may no longer hold the values"—can help to "legitimate the system, ennoble the [constitutional] project, and unite the practitioners").

[318] Balkin, supra note 14, at 201. For discussion of the relationship between tradition and judicial exercises of judgment, see Jonathan Green, Tradition and Discretion, 77 Fla. L. Rev. 1, 14–19 (2025).

As an initial matter, however, determinacy should not be deemed the "first virtue"[319] of a constitutional theory.[320] To take an extreme example, the rule "plaintiff loses" is determinate but obviously inadequate as an approach to judging.[321] Moreover, numerous constitutional theories are regularly charged with failing to lead the judge to a single conclusion and thus leaving room for judicial discretion.[322] Indeed, some originalists have turned away from determinacy as a critical advantage of their theory.[323] The fact that a theory does not yield determinate outcomes should not spell doom.[324] Nonetheless, the interest in imposing some discipline on constitutional inquiry is consequential. Accordingly, I address ways to mitigate the potential indeterminacy in dialectical traditionalism.

From a procedural perspective, traditionalists have legal tools to employ in identifying relevant practices and understandings. They can turn (as noted earlier) to ordinary experience, expert witnesses, parties, or amici.[325] Yet the challenge remains of comparing the influence of

[319] Cf. John Rawls, A Theory of Justice 3 (1971) ("Justice is the first virtue of social institutions, as truth is of systems of thought.").

[320] See Ely, supra note 196, at 62 ("It is never satisfactory to rest one's whole objection to a constitutional theory on grounds of indeterminacy, if only because the implications of *any* nontrivial theory will be open to debate.").

[321] See Sachs, supra note 81, at 886.

[322] See, e.g., Brannon P. Denning, Common Law Constitutional Interpretation: A Critique, 27 Const. Comment. 621, 630–37 (2011) (book review) ("[I]t is not clear, exactly, what is involved in common law constitutional interpretation, or how we are to evaluate whether it is being done well or poorly by judges."); Klarman, supra note 306, at 1753–56 (arguing that a "living Constitution" approach that involves "translating old concepts into modern contexts" "implicate[s]" "unconstrained judicial subjectivity"); Richard Primus, Is Theocracy Our Politics?, 116 Colum. L. Rev. Sidebar 44, 57 (2016) ("Originalist source material is regularly messy, unbounded, and multivocal.").

[323] See, e.g., Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 716 (2011) (arguing that academic originalists have abandoned the promise to constrain judges); William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1140 (2017) ("All else being equal, indeterminacy might be something to avoid; but all else is rarely equal, and legal systems often privilege other goals."); see also Vicki C. Jackson, Exclusionary Originalism as Anti-Constitutionalist: *Dobbs* and *Bruen* as Threats to Constitutionalism, 18 Harv. L. & Pol'y Rev. 221, 256 n.147 (2024) ("[A] number of scholars no longer ground normative arguments for originalism primarily in its possibilities for constraint.").

[324] See Young, supra note 12, at 700–01 (arguing that "the rejection of tradition as too indeterminate to use as a source of law involves" unwarranted nihilism).

[325] See supra notes 255–58 and accompanying text; see also Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice 21 (2004) (claiming that "the nature of the judicial process," including "the call of appropriately positioned parties," helps to "discipline . . . decisions by the constitutional judiciary").

traditions and deciding which ones to privilege.[326] In gauging the strength of various practices and understandings, judges can rely on two sets of criteria: "objective" criteria such as duration, prevalence, and continuity, and "value" criteria involving the fit between the tradition and other principles and commitments animating American national life. The interaction between tradition and other modalities can also inform the "which traditions" question (as explained below).[327]

The "objective" criteria are duration (how long the tradition has lasted), prevalence (how widespread the tradition is), and continuity (the extent to which the tradition endures into the present day). For example, coverture would rank high on duration and prevalence, but low on continuity. Female educators in primary school would rank high on all three criteria. A meaningful degree of continuity, in my view, is a prerequisite for a tradition to figure into the constitutional calculus. If a tradition has fallen into desuetude, it does not have a persuasive claim to be part of the chain of transmission from past into present and future. This provides room for modern interpreters to decline to follow traditions that have not stood the test of time, such as the understandings animating Justice Bradley's opinion concurring in the judgment in *Bradwell v. Illinois*.[328] However, traditions are continuous to varying degrees. Taking continuity, duration, and prevalence into account, adjudicators can create a composite to measure the tradition's strength.[329]

Value criteria are rooted in the fit between a tradition, or strand thereof, and other practices and understandings constituting the American polity's collective life. For example, one might argue that

[326] Eskridge, supra note 20, at 211 ("[I]f academic and judicial critics of a stability-oriented tradition want to insist on a more complicated understanding of tradition as evolutive, they have to grapple with genuine complexity.").

[327] See infra notes 341–43.

[328] 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment).

[329] An analogy can be drawn to customary international law ("CIL"). A rule's status as CIL is affected by several factors, including the longevity, consistency, and generality of state practice. Malcolm N. Shaw, International Law 64 (9th ed. 2021). The identification of such a rule cannot be reduced to a simple formula, but the rule may still come into existence. In fact, given the connection between traditionalism and ideas about general or common law, see Campbell, supra note 12, at 636–38; William Baude, Jud Campbell & Stephen E. Sachs, General Law and the Fourteenth Amendment, 76 Stan. L. Rev. 1185, 1247–53 (2024), the connection between tradition and CIL may be quite direct. For an argument against a revival of the general law in constitutional interpretation, see Joshua C. Macey, Ketan Ramakrishnan & Brian M. Richardson, Against General Law Constitutionalism, 93 U. Chi. L. Rev. 1, 22–61 (2026).

sexual harassment in employment is at odds with equality commitments or with meritocratic criteria of workplace advancement. Value arguments are presented here in terms of "fit" with societal customs, ideas, and principles; the adjudicator is not explicitly tasked with Dworkinian "justification" of these societal data points.[330] Yet moral evaluation is likely to enter the adjudicator's assessment of which strands of American tradition are relevant.[331] The adjudicator who views sexual harassment at work as conflicting with core American values of equality or meritocracy—rather than as a continuation of the time-honored tradition of judging women based on their sexual qualities or permitting employers to mistreat employees—is making a moral choice.

In the end, dialectical traditionalism does not shy away from the necessity of such moral choice. This does not mean endorsing a free-for-all. Adjudicators should make a good-faith inquiry into the existence of traditions and their relative strength. They cannot simply invent traditions out of whole cloth, no matter how morally justified they believe these traditions would be. Instead, they should ground their moral evaluations in networks of enduring practices and understandings. And they can make more and less accurate claims in doing so. It would be highly dubious to say that any references to a deity by a politician are constitutionally proscribed because they are at odds with American traditions of hostility toward theism.

Constitutional theories must be judged relative to available alternatives, and dialectical traditionalism is not alone in enabling judges to engage in moral analysis. Currently, moral judgments often enter traditionalist analysis *sub silentio*, through selection of the level of generality at which the relevant tradition is described.[332] In *Rahimi*, for example, the Court held that the challenged statute—which prohibited certain individuals subject to domestic violence restraining orders from possessing firearms—"fit[] comfortably within" the nation's tradition of laws "preventing individuals who threaten physical harm to others from misusing firearms."[333]

[330] Dworkin, supra note 132, at 66.

[331] Fallon, supra note 142, at 1264 n.297 ("A theory of the community's morality . . . will be informed by the moral commitments of the person developing the theory.").

[332] See Bartlett, Tradition in Substantive Due Process, supra note 14, at 575 ("Values are not avoided by relying solely on a fixed view of tradition; they are simply masked.").

[333] United States v. Rahimi, 144 S. Ct. 1889, 1896–97 (2024).

The result in *Rahimi*, as several commentators noted, was heavily influenced by the Court's choice of the level of generality at which to analyze the tradition of firearm regulation.[334] The Court did not cite historical examples of disarming people suspected of domestic violence, although it cited examples of disarming other dangerous individuals[335] and of requiring "sureties" from abusive husbands.[336] Surety laws, as Justice Thomas explained in dissent, were "a fine on certain behavior. If a person threatened someone in his community, he was given the choice to either keep the peace or forfeit a sum of money."[337] Surety laws are not precisely equivalent to a law disarming people, let alone a law disarming domestic violence offenders specifically. The Court therefore held that the law challenged in *Rahimi* fit within a tradition described at a certain level of generality (disarming those threatening physical harm to others) even though the law lacked a specific precursor if the tradition were characterized at a lower level of generality (disarming suspected domestic violence offenders).[338] The Court did not provide much justification for its choice of level of generality. One suspects, however, that the Justices viewed it as normatively troubling to invalidate a law seeking to protect victims of domestic violence simply because there was no exact analogue centuries ago.[339]

Instead of merely asserting or assuming that a certain level of generality is the correct one, the traditionalist adjudicator ought to identify various pertinent traditions and critically assess them. This analysis should encompass traditions bearing on the status of women, notably the relative lack of public accountability for domestic violence offenders in the nineteenth century on the view that domestic violence was a family matter.[340] Notably, traditionalist analysis should involve an

[334] Joseph Blocher & Brandon L. Garrett, Applying History as Law: The Role of Historical Facts in Implementing Constitutional Doctrine, 104 Tex. L. Rev. 679, 696–97 (2026); Franklin, supra note 13, at 963; Reva B. Siegel, The Levels-of-Generality Game: "History and Tradition" in the Roberts Court, 47 Harv. J.L. & Pub. Pol'y 563, 567 (2024).

[335] *Rahimi*, 144 S. Ct. at 1900–01.

[336] Id. at 1900.

[337] Id. at 1933 (Thomas, J., dissenting).

[338] Id. at 1898–1901 (majority opinion); id. at 1933 (Thomas, J., dissenting). One reason for the lack of a precise historical analogue may be that domestic violence was less frequently committed via firearms in earlier historical eras. Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 151 (2023).

[339] See Franklin, supra note 13, at 952, 961–66.

[340] See Blocher & Ruben, supra note 338, at 151; Siegel, supra note 155, at 2150–70.

attempt to surface women's experiences of traditions relating to domestic violence.

Surfacing these traditions could lead the interpreter to recognize that invalidating the statute in *Rahimi* would risk giving constitutional imprimatur to a state of affairs uncomfortably close to traditions that treated domestic violence as a private issue not fit for public interference—traditions that have lost substantial ground. The interpreter also ought, of course, to address traditions relating directly to the regulation of firearms. But acknowledging the historical context of domestic violence regulation, or lack of such regulation, would help the interpreter to explain *why* surety laws are analogous to restraining orders disarming suspected domestic violence offenders: because they provide a way for individuals to call upon the machinery of the state to address a problem that should not be left purely in private hands. So there would be a *reason* to address the law at issue in *Rahimi* at a higher level of generality.

At any rate, the Supreme Court in *Rahimi* made a moral judgment in characterizing the relevant tradition. Dialectical traditionalism similarly calls upon adjudicators to make moral judgments, but in a manner that is clearer about how traditions are being used and evaluated.

Another potential source of indeterminacy arises from the relationship between tradition and other "modalities"[341]—or "categories" or "factors" or "principles"—that enter into constitutional analysis. Dialectical traditionalism is meant to be a pluralist theory; it is not intended to replace all other forms of argument in constitutional interpretation. How, then, does dialectical traditionalism interact with arguments from text, precedent, original meaning, morality, pragmatics, and so on? This problem is one commonly faced by constitutional "pluralists," who take the view (in Stephen Griffin's terms) that "there are multiple legitimate methods of interpreting the Constitution."[342]

In future work, I plan to address the relationship between tradition and other modalities in depth. As part of this examination, I intend to

[341] The term "modalities" is most associated with the work of Bobbitt, who defined a modality in a technical sense as "the *way* in which we characterize a form of expression as true." Bobbitt, supra note 118, at 11. In constitutional interpretation, modalities "provide the means for making constitutional argument." Id. at 22.

[342] Griffin, supra note 23, at 1753. For discussion of the problem of combining different factors in constitutional reasoning, see Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517, 521 (1998); Berman & Toh, supra note 23, at 1763–64.

argue that other modalities can help the interpreter select a tradition to emphasize. For instance, the recognition that one tradition is completely at odds with the ordinary meaning of the constitutional text, or would burst open the "floodgates of litigation," would be a reason to favor alternative traditions. This process would be part of an effort to seek coherence among the modalities.[343] It would not erase indeterminacy in either the application of tradition or the broader task of constitutional interpretation, but it would allow for a structured analysis of the relationship among modalities.

Two final points on the role of tradition in constitutional adjudication. First, judges face institutional imperatives in addition to interpretive questions. These include concerns about judicial legitimacy and resource constraints.[344] If tradition is viewed as more indeterminate than other factors in constitutional interpretation, and that indeterminacy has negative institutional implications, then judges could take this point into account when deciding which factor to favor. They could, for example, rely on clear precedent to circumscribe the reach of applicable doctrine notwithstanding a contrary tradition. This is another way to discipline the turn to tradition in constitutional analysis. However, one should not arrive at the conclusion that tradition is *more* indeterminate than other modalities without considering various sources of indeterminacy affecting many methods of constitutional interpretation.

Second, the application of tradition could be doctrinally specific. Different legal questions may call for different modes of constitutional interpretation. The question whether the Supreme Court may order the United States to dismantle its nuclear weapons program may call for a pragmatic modality regardless of what tradition teaches.[345] Closer to women's rights issues, some have suggested that the Due Process Clause is a more fertile ground for traditionalist interpretation than the Equal Protection Clause.[346] I simply flag the issue of doctrinal specificity here; the task of applying tradition at a retail level in various

[343] See Fallon, supra note 142, at 1193 ("[T]he implicit norms of our constitutional practice call for a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result.").

[344] Rachel Bayefsky, Judicial Institutionalism, 109 Corn. L. Rev. 1297, 1307 (2024).

[345] Thanks to Philip Bobbitt for highlighting a related example.

[346] See DeGirolami, supra note 3, at 1158–61; Forde-Mazrui, supra note 20, at 295–300.

doctrinal contexts is a significant one for scholars and jurists to tackle in the years ahead.

CONCLUSION

Tradition is an influential category in constitutional rights adjudication and increasingly discussed in legal scholarship. But the invocation of tradition raises concerns from a feminist perspective, as "traditional" views of gender seem to consign women to subordination. This Article has delved into the concept of tradition and explored the intersection between tradition and feminism. It has highlighted tensions between tradition and feminism, ones that proponents of a traditionalist method should confront. It has also sought to demonstrate that tradition—properly understood—can serve as the basis for an approach to constitutional rights adjudication that is conducive to, rather than hostile to, women's rights.

Many theoretical questions remain about tradition as a factor in constitutional rights adjudication, especially with respect to the issue of how tradition intersects with other modalities. And many practical questions remain about how judges will deploy tradition. This Article has shown that there are traditionalist avenues receptive to women's rights claims. Those committed to the genuine benefits of traditionalism should pursue these avenues.