THE TRADITIONS OF AMERICAN CONSTITUTIONAL LAW

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This Article identifies a new method of constitutional interpretation: the use of tradition as constitutive of constitutional meaning. It studies what the Supreme Court means by invoking tradition and whether what it means remains constant across the document and over time. Traditionalist interpretation is pervasive, consistent, and recurrent across the Court's constitutional doctrine. So, too, are criticisms of traditionalist interpretation. There are also more immediate reasons to study the role of tradition in constitutional interpretation. The Court's two newest members, Justices Neil Gorsuch and Brett Kavanaugh, have indicated that tradition informs their understanding of constitutional meaning. The study of traditionalist interpretation seems all the more pressing to understand certain possible jurisprudential moves in the Court's future.

This Article concludes that when the Court interprets traditionally, it signals the presumptive influence of political and cultural practices of substantial duration for informing constitutional meaning. Traditionalist interpretation is thus constituted of three elements: (1) a focus on practices, rather than principles, as informing constitutional meaning; (2) a practice's duration, understood as a composite of its age and continuity; and (3) a practice's presumptive, but defeasible, interpretive influence. Traditionalist interpretation's emphasis on practices that are given tangible form in a people's lived experiences suggests that it is preferable to speak about politically and culturally specific traditions rather than an abstracted concept of tradition. Hence, "the traditions of American constitutional law."

This Article identifies traditionalist interpretation as its own method; shows its prevalence and methodological consistency across the domains of constitutional interpretation; isolates and examines its constituent elements, comparing them against other prominent interpretive approaches; and infers and explains the justifications of traditionalist interpretation from the doctrinal deposit. While there may be some irony about a claim of novelty in an article about tradition, what this Article identifies as new is not the invocation of tradition as such, but the

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isolation of a recurrent and consistent method—traditionalist interpretation—adopted by the Court across its interpretive work. It aims to bring to light an overlooked and yet frequently used interpretive practice, and to understand its structure, situation, and purpose within the Court's constitutional doctrine.

INTRODUCTION

This Article identifies a new method of constitutional interpretation: the use of tradition to constitute constitutional meaning. Traditionalist interpretation has not gone altogether unnoticed. Scholars have spoken of "[h]istorical [g]loss"[1] or "[l]ongstanding custom and tradition"[2] as relevant to the meaning of specific constitutional provisions. Some have identified the "liquidation" of constitutional meaning over a period of time as a method advocated by James Madison.[3] Others have doubted that tradition should ever be an interpretive argument or justification at least as to certain issues.[4] And still others have explored longstanding arrangements or practices in other disciplines such as administrative law.[5]

But no one has studied what tradition signifies across the Supreme Court's interpretation of the Constitution. No one has examined how it might differ from other interpretive techniques (such as reliance on text, history, prudential considerations, moral principle, or precedent). There has been no comprehensive account of the Court's use of tradition or of its reasons for interpreting traditionally.

This Article provides that account. It studies what the Court means by invoking tradition, and whether what it means remains constant across the document and over time. It shows that traditionalist interpretation is pervasive, consistent, and recurrent across the Court's constitutional doctrine. So, too, are the Court's criticisms of traditionalist interpretation. There are more immediate reasons to study the role of tradition in constitutional interpretation as well. The Court's two newest members, Justices Neil Gorsuch and Brett Kavanaugh, have indicated that tradition informs their understand-

1 Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412 (2012).

2 Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1745–46 (2015); *see also* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 670–71 [hereinafter McConnell, *The Right to Die*] (noting the "historical rather than . . . philosophical" quality of the Court's substantive due process analysis as well as the Court's reliance on "longstanding practice" as a justification for the rejection of assisted suicide).

3 *E.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019); *see also* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–14 (2001) (discussing Madison's concept of "liquidation" and its similarity to stare decisis).

4 *See, e.g.*, Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 341–43 (2011).

5 *See, e.g.*, Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1829, 1879–80 (2015).

ing of constitutional meaning.[6] The study of traditionalism therefore seems all the more pressing to understand certain likely moves in the Court's present and future.

This Article concludes that when the Court interprets traditionally, it signals the presumptive influence of political and cultural practices of substantial duration for informing constitutional meaning. Four clarifications, to be pursued later at greater length, may be useful now:

(1) Traditionalist interpretation focuses on practices, rather than abstract principles or general tests, as constituting constitutional meaning. The emphasis on practices that are given tangible form in a people's lived experience suggests that it is preferable to speak about politically and culturally specific traditions rather than an abstracted concept of tradition. Hence, "the traditions of American constitutional law."

(2) What is of interest are political and cultural practices, not judicial precedents or doctrines. Distinguishing the former from the latter marks the difference between traditionalist and precedential interpretation.

(3) A tradition's duration—combining two dimensions of age and continuity—may be understood metaphorically by imagining a ski slope. The slope may be long or short; and it may be smooth or sparse. Sections of the slope that are smooth may be densely packed or coated only with a thin layer. A slope that is too short, or too sparse, cannot be skied. Likewise, a tradition that is too short, or too sparse, lacks interpretive authority.

(4) The interpretive influence of a tradition is presumptive and may be overcome by other considerations. For example, a tradition is authoritative only if it is consistent with constitutional text. Very powerful moral or prudential arguments may overcome the presumption in favor of a tradition as well.

In Part I, this Article discusses various established methods of constitutional interpretation, identifies traditionalist interpretation as its own method, and distinguishes it from others. Part II highlights areas in which traditionalist interpretation has been most powerful in informing constitutional meaning. The survey in Part II is not exhaustive and does not list unreflectively every instance of the Court's use of the word "tradition" or its cognates. Instead, this Article focuses on areas that reveal the Court's use of a consistent, multipart interpretive method across the constitutional domains. In Part III, this Article distills three features of traditionalism that emerge from the doctrine: (1) political and cultural practices; (2) duration,

6 Heller v. District of Columbia, 670 F.3d 1244, 1274–75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA. L. REV. 635, 647–48 (2019); Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1919 (2017) (observing that "[r]equiring judges to focus on history and tradition" might make evaluation of certain legal questions clearer).

understood as a composite of age and continuity; and (3) presumptive, but defeasible, interpretive influence. It also touches on the relationship of traditionalism to prominent varieties of originalism and nonoriginalism.[7] Part IV addresses the "why" of traditionalism—the question of its normative point or purpose. It extracts and synthesizes various purposes, explanations, and justifications from Part II's doctrinal discussion. It concludes that traditionalism reflects the views that actions sometimes speak louder than words—at least words whose meanings are underdetermined; that the national takes priority over the universal; and that constitutional interpretation, rather than constitutional adjudication, is its proper domain.

This Article unearths certain interpretive practices that reflect reasons and values immanent in the Court's jurisprudence, and it describes those reasons and values as the Justices see them.[8] Future work can then better explore such questions as "do *we* like what we see?" or "when is traditionalism justified and when isn't it?"[9] Other projects may follow as well, including comparisons of traditionalism with other methods,[10] or studies measuring the strength of the presumption in favor of traditions in various textual contexts and what that might suggest about traditionalism's interpretive power.

There may be some irony about a claim of novelty in an article about tradition. But what this Article identifies as new is not the Court's invocation of tradition, but the isolation of a recurrent and consistent method—traditionalist interpretation—reflecting recurrent and consistent, even if infrequently articulated, justifications. It brings to light an overlooked and yet frequently used interpretive practice, and it aims to understand its structure, situation, and justification within the Court's constitutional doctrine.

I. TRADITIONALISM AS AN INTERPRETIVE METHOD

In his seminal study of constitutional methodology, Philip Bobbitt proposed a typology of six distinctive "archetypes" of constitutional argument: historical, textual, prudential, structural, doctrinal, and ethical.[11] Bobbitt's premise was that any interpretive theory of the Constitution depends upon actual interpretive practice. Thus, historical argument involves "the original

7 For further comparison of traditionalism and originalism, see Marc O. DeGirolami, *First Amendment Traditionalism*, WASH. U. L. REV. (forthcoming 2020), https://ssrn.com/abstract=3458033.

8 The debate about tradition's merits as a guide for human life—in law and elsewhere—is an ancient one, stretching back at least as far as the rivalry between poetry and philosophy in ancient Greece. *See, e.g.*, EURIPIDES, THE BACCHÆ, *ll.* 200–04, *reprinted in* 1 THE TRAGEDIES OF EURIPIDES 249, 254 (Theodore Alois Buckley trans., London, Henry G. Bohn 1850) ("Our ancestral traditions, and those which we have kept throughout our life, no argument will overturn them; not if any one were to find out wisdom with the highest genius.")

9 *See* Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1151–52 (2013).

10 *See generally* DeGirolami, *supra* note 7 (comparing traditionalism and originalism).

11 PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8, 94 (1982).

understanding of the constitutional provision to be construed."[12] Textual arguments are claims concerning the ordinary meaning that people give the Constitution's words.[13] Arguments from "prudence" authorize the balancing or weighing of the social costs and benefits of any particular decision.[14] Structural arguments are "inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures."[15]

Doctrinal and ethical methods merit slightly more discussion because they relate more closely than the others to the interpretive method explored in this Article. Doctrinal arguments derive constitutional meaning "from those principles which precedent develops."[16] They depend upon the accretion of judicial opinions to inform constitutional meaning.[17] The doctrinal method was once favored by legal process theorists,[18] and continues to attract the notice of constitutional scholars.[19] But all precedential interpretation emphasizes the cumulative force of Supreme Court opinions in the derivation of constitutional meaning.[20]

Finally, there are ethical arguments "whose force relies on a characterization of American institutions and the role within them of the American people."[21] For example, the textual prohibition on "cruel and unusual punishment" in the Eighth Amendment is "evidence of a more general constitutional ethos, one principle of which is that government must not physically degrade the persons for whose benefit it is created."[22] Once the ethical leap

12 *Id.* at 9.

13 *See id.* at 25–26.

14 *See id.* at 60. A decision not to decide a particular matter—for example, to "avoid constitutional decision in order to safeguard the Court's own position and to activate the political processes of the legislature"—is also a form of prudential argument. *Id.* at 63; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 127–28 (2d ed. 1986) (discussing the practical constraints on the Court's ability to exercise jurisdiction).

15 BOBBITT, *supra* note 11, at 74; *see also* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3–32 (1969) (detailing the method of drawing inferences from structure in constitutional interpretation).

16 BOBBITT, *supra* note 11, at 40.

17 *See, e.g.*, Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 2 (1979).

18 *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 163 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994) (1958).

19 See, for example, the different approaches to precedent in RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 4–7 (2017); and DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010).

20 *See, e.g.*, KOZEL, *supra* note 19, at 107; STRAUSS, *supra* note 19, at 33; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–69 (1992) (plurality opinion) ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."). *See generally* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

21 BOBBITT, *supra* note 11, at 94.

22 *Id.* at 143.

to the Eighth Amendment's "nondegradation principle" has been taken, a judge applies the principle back down to a particular factual situation,[23] holding, for example, that a life sentence without the possibility of parole for minors violates the principle. Ethical interpretation proceeds from an abstract principle or *esprit* of "American-ness"—"fairness," "autonomy," "liberty," "nondegradation," or others—to its concrete instantiation.[24]

Bobbitt invited his readers to find more methods[25] and several scholars have added to, refined, or modified Bobbitt's typology over the years. Michael Moore, for example, catalogued "ordinary meaning[ ]," original "intention[ ]," "precedent," and "values" as relevant methods,[26] and other scholars have often emphasized "moral" forms of interpretive argument.[27] Akhil Amar identified "intratextualism" as a distinctive method that "use[s] the Constitution as its own dictionary."[28] Richard Fallon discerned what he called the "constructivist coherence" method, which integrates various methods into a composite and assigns a hierarchical order to resolve problems of incommensurability.[29] Jack Balkin reconceived the project of offering practical "arguments" as one of providing "styles of justification," and offered eleven different justificatory styles.[30] Curtis Bradley and Trevor Morrison distinguished "[h]istorical [g]loss."[31] Jamal Greene descried "pathetic" argument.[32] Ian Bartrum argued that evolution in meaning occurs in blending methods.[33]

In the spirit of Bobbitt's invitation, this Article identifies traditionalist interpretation as a new method. Of course, arguments invoking tradition in constitutional doctrine are not new. What is new is the isolation of a distinctive and consistent interpretive method—traditionalist interpretation—in

23 *See id.* at 142–43.

24 *See id.* at 90 (autonomy), 94 (American-ness), 126 (liberty), 135–36 (fairness), 143 (nondegradation).

25 *Id.* at 8.

26 Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985).

27 *See generally* RONALD DWORKIN, LAW'S EMPIRE 254–58 (1986); JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 73–98 (2015).

28 Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999).

29 Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192–93 (1987); *see also* Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753–54 (1994) (arguing that there are "multiple legitimate methods of interpreting the Constitution"). For Bobbitt's view of the incommensurability of the methods, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 117 (1991).

30 Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 658–60 (2013).

31 *See* Bradley & Morrison, *supra* note 1, at 417.

32 *See* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1395–97 (2013) (identifying "appeals to emotion" as a distinctive argumentative mode).

33 Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157, 160 (2008).

the doctrine. As used in this Article, a tradition is a political or cultural practice of considerable age that endures over time.[34] As Edward Shils has put it, "[e]very human action and belief has a career behind it,"[35] and a tradition represents the reenactment of distinctive political and cultural practices across such a "career." The mere fact of a practice's past occurrence is insufficient, however. That practice must also be deemed an authoritative piece of evidence for present interpretive purposes. It must exert some authority in the legal understanding of a text's meaning.[36] Thus, traditionalism finds the existence of a political or cultural practice to be legally authoritative in some degree for the interpretation of the Constitution today.[37] The older and the more continuous the practice has been across time, the more powerful the argument from tradition becomes, though it never becomes an indefeasible reason for an interpretation.[38]

When the Court interprets traditionally, it focuses on the age and endurance of particular practices rather than on an abstracted idea of tradition. Sometimes the Justices use the existence or absence of a tradition to uphold a law's constitutionality; sometimes to strike it down; and sometimes they simply examine the argument, narrowing or broadening a tradition to include or exclude a practice, or defending or criticizing a tradition's interpretive authority. But traditionalist interpretation appears in a broad range of cases across the constitutional canon. And the Court's reasons for interpreting traditionally also reflect recurrent concerns and purposes.

An initial case may be helpful as an introduction. I have chosen an example from the Court's First Amendment Establishment Clause jurisprudence, in part because it reflects a relatively recent example, but more importantly because the impact of traditionalism as distinguished from other methods is clear.

In *Town of Greece v. Galloway*,[39] the Court evaluated the constitutionality of the practice of legislative prayer. A municipality in northern New York began its town meetings with a prayer by members of local congregations.[40] Thirty years earlier, the Court had concluded in *Marsh v. Chambers* that legislative prayer at the state level was compatible with the Establishment Clause.[41]

The major theme in Justice Kennedy's opinion for the Court reaffirming *Marsh* was the relevance of the practice of legislative prayer for the meaning of the Establishment Clause. The practice, the Court said, has existed contin-

34 For discussion of the relationship of practices and traditions, see ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187–203 (3d ed. 2007).

35 EDWARD SHILS, TRADITION 43 (1981).

36 This is what Martin Krygier has called the "presence of the past." Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 248 (1986).

37 *See id.* at 243.

38 Krygier writes that "transmission" is requisite for a tradition. *Id.* at 250–51.

39 134 S. Ct. 1811 (2014).

40 *Id.* at 1816.

41 Marsh v. Chambers, 463 U.S. 783, 791–92 (1983).

uously over three distinct periods: during the colonial period, at the ratification of the Constitution and the Bill of Rights, and afterward.[42] The Court highlighted both the age of the practice and its continuity. "The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time"[43]—the same Congress that approved the language of the Establishment Clause. Legislative prayer endured in the federal and state governments thereafter, as a "majority of the other States" also maintained the "same, consistent practice."[44] The Court described the practice as "part of our heritage and tradition, part of our expressive idiom"[45]:

> [I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.[46]

Thus, the Court emphasized the age of a political and cultural practice, its duration across several distinctive periods that included the founding but persisted thereafter, and its consequent authority for interpreting the Establishment Clause.

While "*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence," inasmuch as none of the usual Establishment Clause "tests" applied, "[t]he Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause."[47] It is with tradition, rather than with abstract tests or principles, the Court suggested, that Establishment Clause analysis begins, and, under certain circumstances, ends. The Court thus differentiated a rule-based or principled style of interpretation from a practice-dependent approach. The disagreement between the majority and dissent was in the description of the tradition and whether the town's prayer fell within it, but not about the relevance of the method.[48] Narrowing a tradition to exclude, or broadening it to include, the practice under review is common in traditionalist interpretation. It is the way in which the Court can change a tradition; it is traditionalist interpretation's dynamic feature.

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42 *Town of Greece*, 134 S. Ct. at 1818–19, 1823.

43 *Id.* at 1818.

44 *Id.* at 1819.

45 *Id.* at 1825 (plurality opinion).

46 *Id.* at 1819 (majority opinion).

47 *Id.* at 1818 (quoting Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting)).

48 *See id.* at 1841–42 (Kagan, J., dissenting) (agreeing with the approach in *Marsh* "upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer" but finding that the practice in *Town of Greece* should be distinguished from it).

Town of Greece is useful for distinguishing traditionalism from other methods. The decision also depends on precedential argument, since the Court relies on and extends the reasoning in *Marsh v. Chambers*. Its reliance on *Marsh* certainly is an example of argument from precedent, but that does not distinguish *Town of Greece* from any other case where the Court relies on precedent. If the Court in *Marsh* had adopted another Establishment Clause approach—applying the *Lemon* test,[49] the endorsement test,[50] or another test[51]—the Court's reliance on *Marsh* would also have reflected precedential interpretation. But the result in *Town of Greece* is dictated by something more than the bare precedent of *Marsh*: it is the substance of *Marsh*'s reasoning—that an ancient and enduring political and cultural practice is authority for the meaning of the text today—that controls the outcome.[52]

Traditionalism is also different than methods that depend upon principles or moral views (such as ethical argument). It is more like their obverse. Principled interpretation proceeds from an abstract principle derived from an even broader worldview to a conclusion about the meaning of the Constitution.[53] Traditionalist interpretation moves instead from the age and duration of a political or cultural practice to a conclusion about the meaning of the Constitution. It would be an example of principled interpretation to claim that the principle of "separation of church and state" or government "neutrality" as to religion and nonreligion requires the conclusion that legislative prayer violates the Establishment Clause. Traditionalism, by contrast, takes the age and endurance of the concrete practice of legislative prayer to be an ingredient of the meaning of the Establishment Clause.

Indeed, traditionalist and principled interpretation are not only different but also in tension. The Court is motivated by certain concerns or purposes when it interprets traditionally, even if the Justices rarely explain themselves. One can discern these purposes in the Court's observation that any principle or abstract test that cannot account for a political or cultural practice like legislative prayer is suspect and incapable of capturing the full

49 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

50 County of Allegheny v. ACLU, 492 U.S. 573, 593–94 (1989).

51 For discussion of the variety of approaches to interpreting the Establishment Clause, see Marc O. DeGirolami, *The Bloating of the Constitution: Equality and the US Establishment Clause*, *in* THE SOCIAL EQUALITY OF RELIGION OR BELIEF 226 (Alan Carling ed., 2016).

52 John Stinneford observes, rightly I think, that traditionalism was once the model for the common law and that judges engaged in common-law adjudication aimed to reflect longstanding political practices in the law. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745–46 (2008). While this view of the common law may have been powerful in the past, precedential or "common law constitutionalist" approaches today emphasize purely judicial developments and need take no view at all on the interpretive force of political and cultural practices. For further discussion, see *infra* text accompanying notes 375–76.

53 *See, e.g.*, BOBBITT, *supra* note 11, at 159–60 (deriving the conclusion in *Roe v. Wade* from the "ethos" of limited government and the principle that "[g]overnment may not coerce intimate acts").

meaning of the Constitution.[54] Traditionalism often reflects this conflict between practices and principles.[55] The Court interprets traditionally to protect cultural and political practices of long standing against principled arguments or abstract tests that would defeat them. Traditionalist interpreters suppose that arguments from principle often go wrong in failing to account for—and, in consequence, marginalizing—worthwhile, settled, and enduring features of popular, lived experience. When the Court interprets the Constitution traditionally, it is expressing skepticism about principled arguments as exclusive and direct guides to constitutional interpretation.

Some scholars have explored methods of interpretation that appear similar to traditionalism or are perhaps even examples of it. Curtis Bradley and Trevor Morrison, for example, have argued that "historical gloss" is an interpretive method specifically applicable to separation-of-powers issues.[56] They take as their central example of historical gloss Justice Frankfurter's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[57] in which he emphasized the "gloss which life has written upon" the words of Article II, so as to interpret the scope of the executive power more flexibly than a rigorously textual approach would permit.[58] But Professors Bradley and Morrison are explicit that arguments about historical gloss do not encompass claims about tradition in the rights context or in situations where one branch is not acquiescing to the practices of a competitor department. They sharply distinguish "governmental practices" from "general social practices or beliefs."[59]

Yet this limitation has several drawbacks. First, hard distinctions between governmental practices and general social practices can be artificial.[60] It is often possible to describe a political practice as "social," "governmental," and "political." Legislative prayer, state-sponsored religious displays, government speech, tax exemptions for religious institutions, speech restrictions in polling places,[61] and many others are all "governmen-

54 *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014).

55 See MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM (2013), for discussion of the "tragic" conflicts of theory and practice in constitutional interpretation; and see also PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION (2011) (exploring "empathetic" approaches to religious freedom in order to mitigate these conflicts). For a broader exploration of the conflict between theory and practice, see ARTHUR M. MELZER, PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING 168–81 (2014).

56 *See* Bradley & Morrison, *supra* note 1, at 416. For further refinements, see Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 69–79 (2017); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 56–69.

57 Bradley & Morrison, *supra* note 1, at 418 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

58 *Youngstown*, 343 U.S. at 610.

59 Bradley & Morrison, *supra* note 1, at 416.

60 *See* Baude, *supra* note 3, at 50–51 ("Structure was supposed to have the effect of protecting individual rights, and rights sometimes have a structural component." (footnote omitted)).

61 For further discussion of these issues, see *infra* Section II.B.

tal practices." If the Court's justifications for interpreting traditionally remain relatively constant across different sorts of governmental practices, then there is reason to study traditionalism as a unified phenomenon across that range.

Second, the authors claim that relying on historical gloss in the separation-of-powers context "does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas."[62] Here there are two problems. First, those concerns may not always apply in the way the authors fear. Congressional acquiescence to the executive on matters of immigration, to take only one example, may implicate such concerns. Conversely, the Court's reliance on traditions of excluded categories of unprotected speech to vindicate free speech claims may empower minorities. Second, while such worries may be reasons to respond differently to the use of traditionalism in these respective contexts, they may obscure that historical gloss may be only one feature of a larger interpretive approach.

Third, even within the domain of the powers of government, one may observe traditionalist arguments in cases that do not also concern interbranch acquiescence.[63] There does not seem to be any reason to segregate historical gloss arguments in interbranch acquiescence cases from other cases involving traditionalist arguments about the powers of the federal government. They may all be part of the same interpretive method.

Finally, Bradley and Morrison's particular focus prevents them from seeing the full range of reasons for the Court's attraction to traditionalist interpretation. In a part of their paper concerning justifications for historical gloss, they identify "Burkean [v]alues" and the risks of change, the law's legitimacy, and reliance interests of government and institutional actors.[64] But this Article has already noted that in *Town of Greece*, the Court relied on the tradition of legislative prayer as constitutive of the Establishment Clause's meaning for at least three other reasons. First, the Court was thereby expressing skepticism about purely principle- or abstract-test-governed constitutional interpretation.[65] It was protecting a concrete expression of lived experience against what might well have been the practice's invalidation under a principled approach.[66] Second, traditionalist interpreters focus on what they take to be distinctively American practices of long duration.[67] Antitraditionalist interpreters are more open to the contemporary moral and policy views of certain other nations and international bodies. Third, there was a sense that reliance on enduring practices simply is one of the ways in which we come to understand the meaning of unclear text.[68] This is a dis-

62 Bradley & Morrison, *supra* note 1, at 416.

63 *See, e.g.*, *infra* subsection II.A.3 (discussing the Speech or Debate Clause).

64 Bradley & Morrison, *supra* note 1, at 455–61.

65 *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014).

66 For further criticism of "Burkean" justifications, see *infra* Section IV.A.

67 *Town of Greece*, 134 S. Ct. at 1818.

68 *Id.* at 1819.

tinctive justification involving the nature of interpretation. The Court's traditionalist or antitraditionalist interpretation—whether in cases concerning the powers of government or the rights of the individual—often reflects these concerns, ones that are masked by constraining the inquiry to specific separation-of-powers issues.[69]

Other scholars have discussed traditionalist interpretation in discrete areas, most notably Professor Michael McConnell in the Court's substantive due process cases about assisted suicide.[70] Indeed, McConnell has done more than anyone to describe what a traditionalist method might entail in the area of substantive due process, calling it "inductive and experiential" and contrasting it with moral or philosophical interpretive methods.[71] He has argued that the use of longstanding customs to guide the resolution of moral and political disagreement in constitutional law is generally likely to result in "correct" outcomes and is also democratically justified.[72] Yet as penetrating as McConnell's insights about tradition have been, they do not concern traditionalism comprehensively, across constitutional law. Indeed, in early work, McConnell criticized the interpretive method in *Marsh v. Chambers* as "fr[eezing] into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations."[73] But as will be seen, what McConnell describes in the due process context is the same interpretive method that he once objected to in the Establishment Clause context.

In what follows, this Article highlights those areas in which tradition has been most powerful across the domains of constitutional law. Or, more precisely, where the Court has relied on a political or cultural practice of substantial duration presumptively to inform constitutional meaning.

II. The Traditions of American Constitutional Law

This Part creates an initial division of "government powers traditions," "Bill of Rights traditions," and "Fourteenth Amendment traditions," because each of these three components of the Constitution came into being at distinctive historical periods, and age and duration are important features of the traditionalist method. The aim is not to record every use of the word "tradition" in the Court's cases—uses that are sometimes casual or even mis-

69 For further discussion of the "national" and "universal" tension in traditionalist and antitraditionalist interpretation, see *infra* Section IV.B.

70 McConnell, *The Right to Die*, *supra* note 2, at 670–73; *see also* DeGirolami, *supra* note 55, at 3 (describing an approach to religion clause conflict dependent on traditionalist interpretation); Steven D. Smith, *Separation as a Tradition*, 18 J.L. & Pol. 215, 234–73 (2002) (discussing the relevance of tradition in understanding separation of church and state and religious freedom).

71 McConnell, *The Right to Die*, *supra* note 2, at 672.

72 *Id.* at 682–84.

73 Michael W. McConnell, *On Reading the Constitution*, 73 Cornell L. Rev. 359, 362 (1988).

leading.[74] Instead, the Article uncovers when the Court believes there is a genuine political or cultural practice of long and consistent duration that is presumptively constitutive of the meaning of constitutional text.

A. Government Powers Traditions

This Article focuses on Articles I and II of the Constitution, beginning with Article II because the Court has interpreted traditionally most distinctly there. The overlap between precedential and traditionalist methods is sometimes considerable in Article III, and other articles are omitted for the sake of space. While the meat of this Article's evidence for traditionalism comes from the Court's civil rights cases, several government powers cases stand out as especially traditionalist.

1. Article II—Appointment and Removal

Executive branch appointment and removal cases have been dense areas for traditionalism. The Court's most traditionalist appointments decision is *NLRB v. Noel Canning*, concerning whether the phrase "during the Recess" in the Recess Appointments Clause[75] authorized the President to make appointments within congressional sessions or only between formal sessions of Congress.[76] In a 5–4 majority opinion authored by Justice Breyer, the Court concluded that the President may make recess appointments while Congress is in session.[77]

The influence of enduring government practices on the Court's decision was significant. Relying on Chief Justice Marshall's statement in *McCulloch v. Maryland* that the "longstanding 'practice of the government'" must inform the Court's role,[78] the Court emphasized that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."[79] In the Court's first attempt to interpret the Recess Appointments Clause in more than 200 years, it wrote, "we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached,"[80] notwithstanding the strong originalist argument to the contrary.

Once the Court found the text ambiguous,[81] its "broader interpretation" indicated that "three-quarters of a century of settled practice" in which Presi-

74 *See, e.g.*, *infra* text accompanying notes 203–07 (discussing Payton v. New York, 445 U.S. 573 (1980)).

75 *See* U.S. CONST. art. II, § 2, cl. 3.

76 NLRB v. Noel Canning, 134 S. Ct. 2550, 2556 (2014).

77 *Id.* at 2556–57, 2567.

78 *Id.* at 2560 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819)).

79 *Id.* at 2559 (alteration in original) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

80 *Id.* at 2560.

81 An interpreter drawn to traditionalism may be more likely to find textual ambiguity in any given piece of text more quickly and easily than an interpreter who is skeptical of traditionalism.

dents had overwhelmingly favored the broader construction and the Senate had largely acquiesced in that construction "is long enough to entitle a practice" to "great" interpretive weight.[82] In truth, three-quarters of a century is not too long as a traditionalist interpreter measures time. Compare, for example, the age and duration of the practice of legislative prayer in *Town of Greece*. Yet what seems to matter to the Court is not only age but also the preponderance or uniformity of the interpretive preference within the relevant span—its concentration—which the Court emphasized was heavy and consistent.

Justice Scalia argued in his concurrence in the judgment that traditionalist interpretation is unavailing in the face of plain meaning directly to the contrary, for "[p]ast practice does not, by itself, create power."[83] While both the Court and Scalia agree that longstanding practices that directly contravene textual commands are constitutionally invalid, the discretion attending the Court's finding of textual ambiguity introduces an element of uncertainty in traditionalist interpretation. A Court that more readily finds ambiguity will more quickly move to traditionalist methods.

Other writers have claimed *Noel Canning* as an example of "historical gloss"[84] or "liquidation."[85] It is certainly possible to read the decision in those terms: the Court does, for example, refer to one of James Madison's letters to Spencer Roane that included the phrase "liquidate [and] settle."[86] But this Article argues that the approach adopted by the Court in *Noel Canning* is consistent with and a component of a much broader interpretive practice across many constitutional domains, including the Court's decisions interpreting the Bill of Rights and the Fourteenth Amendment.[87] Liquidation and historical gloss are particular expressions or reflections of an interpretive approach that is ubiquitous in the Court's doctrine.

Executive branch removal issues are also susceptible of traditionalist interpretation, in part because of the absence of a specific textual provision governing removal with which a tradition might conflict. In *Myers v. United States*, for example, the Court held that the President alone had the power to remove a purely executive officer, such as a postmaster first class.[88] After

82 *Noel Canning*, 134 S. Ct. at 2560–61, 2564.

83 *Id.* at 2594 (Scalia, J., concurring) (alteration in original) (quoting Medellin v. Texas, 552 U.S. 491, 532 (2008)).

84 *See* Bradley & Siegel, *supra* note 56, at 2.

85 Baude, *supra* note 3, at 49.

86 *Noel Canning*, 134 S. Ct. at 2560 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)).

87 One difference between the method of "liquidation" as described by Professor Baude and traditionalism is that Baude emphasizes the importance of (judicial) rejustifying or rerationalizing liquidated practices each time a court affirms them. Traditionalism eschews that rationalistic premise. *See* Baude, *supra* note 3, at 16–17. For further discussion of Professor Baude's work on liquidation and its relationship to traditionalism, see *infra* note 313.

88 Myers v. United States, 272 U.S. 52, 176 (1926).

examining founding-era evidence concerning the removal power, including long debates resulting in the "decision of 1789," reflecting the view that the removal power was tied to Article II's Vesting Clause and had not been taken away by any constitutional provision, the Court noted that Congress had followed the plenary view of executive removal authority in the Decision of 1789 in legislation "for seventy-four years."[89] Learned commentary in the nineteenth century by Joseph Story, James Kent, and others confirmed this view, as did Supreme Court decisions of the period.[90]

But the practice was not uniform. It was not followed during the post–Civil War era, where President Andrew Johnson and the Reconstruction Congress had "heated political difference[s]" leading to the Tenure of Office Act, which required senatorial consent before removals could be made permanent.[91] This departure was a rough patch in what was otherwise a fairly smooth history of continuity, but the Court marginalized the Johnsonian period as aberrant and one of "extremes," and therefore outside the relevant tradition.[92] Yet this move is instructive because a tradition's authority diminishes as it becomes more difficult to bracket nonconforming evidence.

Some of the Court's subsequent removal decisions have not followed *Myers*'s interpretive lead, opting instead for a balancing test that weighs whether a congressional limitation on the executive removal power "unduly trammels" on the executive's authority.[93] But a more recent removal decision, *Free Enterprise Fund v. PCAOB*, represents a shift back toward traditionalism. There, the Court considered "a new situation not yet encountered"—namely, whether Congress could "layer[ ]" limitations on the executive's removal power, restricting the President's ability to remove an inferior officer, who in turn was restricted in his ability to remove an inferior officer.[94] While the Court recognized that since its 1935 decision in *Humphrey's Executor v. United States*, it had consistently upheld various congressional restrictions on the executive's removal power, it was the "novel[ty]" of Congress's regime that rendered it constitutionally problematic.[95]

The Court's *Free Enterprise Fund* opinion is a strong example of narrowing a tradition to exclude the practice being reviewed. The Court rejected the claim that the pragmatic advantages of technocratic expertise warranted a more flexible approach; quoting then-Judge Kavanaugh, the Court said: "Perhaps the most telling indication of the severe constitutional problem with the [Public Company Accounting Oversight Board] is the lack of historical precedent for this entity. . . . [No one] has located any historical ana-

89 *Id.* at 145.

90 *Id.* at 146–49.

91 *Id.* at 175–76.

92 *Id.* at 175.

93 Morrison v. Olson, 487 U.S. 654, 691 (1988).

94 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010).

95 *Id.* at 493–96 (discussing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

logues for this novel structure."[96] The novelty of the scheme brought it outside the protective ambit of existing congressional limitations on the executive removal power. If a presumption in favor of longstanding cultural and political practices reflects traditionalism's preservationist side, a corresponding presumption against entirely novel political and cultural arrangements reflects its skeptical side.

2. Article II—Inherent Executive Authority

As in the case of removal, when the executive acts in ways not provided in Article II or otherwise authorized by Congress, traditionalist interpretation may be more likely than in cases where the Court is confronted by unambiguous text, though even then, courts inclined toward traditionalism are likely to find ambiguity. Justice Frankfurter's approach in *Youngstown* to interpreting the President's power in these circumstances, which accords substantial weight to "[d]eeply . . . traditional ways of conducting government" and a "systematic, unbroken, executive practice" to which Congress has long acquiesced, speaks explicitly in traditionalist terms.[97]

But an earlier case concerning inherent executive power may be the clearest example of traditionalism in this area. In *United States v. Midwest Oil Co.*, the Court considered whether President Taft could withdraw federal land from development in the face of a statute authorizing its private development.[98] Justice Lamar's majority opinion did not consider whether "as an original question" the executive withdrawal was constitutional because "[t]he case can be determined on other grounds and in light of the legal consequences flowing from a long continued practice to make orders like the one here involved."[99] This executive practice dated "from an early period in the history of the government"[100] and included "[s]cores and hundreds of these orders" over "the past 80 years."[101] It was affirmed in a mid-nineteenth-century decision[102] and ratified repeatedly by executive officials.[103]

In response to the objection that an enduring tradition does "not establish its validity," the Court explained:

96 *Id.* at 505 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

97 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610, 613 (1952) (Frankfurter, J., concurring); *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327–28 (1936) ("A . . . practice . . . evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice . . . .").

98 United States v. Midwest Oil Co., 236 U.S. 459, 459 (1915).

99 *Id.* at 469.

100 *Id.* (quoting Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 381 (1868)).

101 *Id.*

102 *See Grisar*, 73 U.S. (6 Wall.) at 381–82.

103 *See Midwest Oil*, 236 U.S. at 470.

> [G]overnment is a practical affair intended for practical men. . . . [O]fficers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself . . . .[104]

The Court's language highlights a distinctive feature of traditionalism: skepticism that abstract or principled interpretive methods, even if superior in theory and outcome, and even if followed "as an original" matter, should overcome a long-enduring practice. The practice of executive withdrawal of lands from development, enduring for many years and in great concentration, "raise[s] a presumption" of its constitutionality against principled arguments to the contrary.[105]

3. Article I—The Speech or Debate Clause

Article I's Speech or Debate Clause provides that for "any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place," but specifically excepts cases of "Treason, Felony and Breach of the Peace."[106] In interpreting its scope, the Court held in 1966 that there was little precedent on it "because the tradition of legislative privilege is so well established in our polity."[107] The Court's first interpretation of the Clause in 1880, it said, was influenced by a powerful and uniform English tradition of protection to read the Clause broadly,[108] a view the Court reaffirmed in 1951.[109] In reading the Clause to prohibit criminal prosecutions for conspiracy to receive remuneration in exchange for a speech in the legislative chamber, the *Johnson* Court analogized the issue to "the notorious proceedings of King Charles I against Eliot, Hollis, and Valentine [in 1629] . . . [where] the Crown was able to imprison members of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment."[110]

Subsequent Speech or Debate Clause cases sharpened the traditionalist method. In *United States v. Brewster*, the Court held that the longstanding practice of broad protection for statements by legislators did not encompass bribery prosecutions where there was no danger, in the Court's view, of inappropriate inquiry into legislative acts or motivation.[111] Chief Justice Burger's majority opinion narrowed the tradition identified in *Johnson*: "Although the

104 *Id.* at 472–73.
105 *Id.* at 474.
106 U.S. CONST. art. I, § 6, cl. 1.
107 United States v. Johnson, 383 U.S. 169, 179 (1966).
108 *See id.* (discussing Kilbourn v. Thompson, 103 U.S. 168, 204 (1881)).
109 Tenney v. Brandhove, 341 U.S. 367, 378–79 (1951).
110 *Johnson*, 383 U.S. at 181, 184–85.
111 United States v. Brewster, 408 U.S. 501, 512–13, 528–29 (1972).

Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system."[112] *Brewster* is notable in two respects: First, it is a clear example of narrowing to exclude the practice under review from the broader tradition—a common technique of traditionalist interpretation.[113] Second, the Court's emphasis on what it believes is the distinctively "American" character of a tradition, which it contrasts with the practices of other nations, is also a recurrent feature.

4. Article I—The Pocket Veto and Presentment

The pocket veto is the name for the process when a bill does not become a law because the President does not sign it within the ten days allocated to him and Congress adjourns before their expiration.[114] In the *Pocket Veto Case*, the Court held that the President must return the bill to the appropriate house of Congress while it is in session, and not to a designated agent during the adjournment.[115] "No light is thrown," the Court said, "on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention," and no judicial decision had interpreted the particular issue presented to the Court.[116] Originalist and precedential interpretation were unavailing. Instead, the Court's holding "accord[ed] with the long established practice of both Houses of Congress to receive messages from the President while they are in session."[117] Congress's practice after ratification—encompassing more than 400 bills and resolutions and adhered to by all Presidents confronting the issue—had been uniform with only one exception in 1868, where Congress had considered, but ultimately rejected, allowing Presidential return of a bill to an agent.[118] "Long settled . . . practice," the Court concluded, "is a consideration of great weight in a proper interpretation of constitutional provisions of this character,"[119] even where evidence of original meaning is not available.

The Court adopted a similar approach to a different presentment issue in *Missouri Pacific Railway Co. v. Kansas*, where it held that Article I, Section

112 *Id.* at 508.

113 *See, e.g.*, Gravel v. United States, 408 U.S. 606, 626–27 (1972) (narrowing the Clause's scope to exclude protection against immunity from prosecution for private publication of the Pentagon Papers).

114 *See* U.S. CONST. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

115 The Pocket Veto Case, 279 U.S. 655, 684–85 (1929).

116 *Id.* at 675–76.

117 *Id.* at 683.

118 *Id.* at 685–87, 690–91.

119 *Id.* at 689.

7's requirement that "two thirds of that House"[120] must vote to override an executive veto to make it a law only required a quorum of those present.[121] The Court "adversely dispose[d] of [the claim] by merely referring to the practice to the contrary which has prevailed from the beginning."[122] It relied on evidence of the original meaning of the Clause, in which two-thirds of a quorum was the consistent practice adopted for purposes of making amendments and "has governed as to every amendment to the Constitution submitted from that day to this," including an 1898 House vote for what would eventually become the Seventeenth Amendment.[123] But it also "confirm[ed]" its view with much earlier evidence—"by the fact that there is no indication in the constitutions and laws of the several States existing before the Constitution . . . that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law."[124] Finally, the Court emphasized that every state high court to pass on the issue after ratification had accepted the same practice ("the decisions have been without difference").[125] Thus, the continuity of this specific practice for validating the vote—one that endured well before, during, and after constitutional ratification and was uniformly accepted at the federal and state level—was decisive in interpreting the meaning of "that House."[126]

B. Bill of Rights Traditions

The Court's traditionalist interpretation in its Bill of Rights jurisprudence is rich and varied. Four Amendments in particular—the First (in the freedoms of speech and religion), Second, Fourth, and Eighth—offer strong evidence of traditionalism in action or in retreat.

1. First Amendment—The Speech Clause

While the Court has interpreted traditionally in free speech areas involving political patronage,[127] the First Amendment interest in attending one's own trial,[128] legislative recusals,[129] and political pamphleteering,[130] three

120 U.S. CONST. art. I, § 7, cl. 2.

121 Mo. Pac. Ry. Co. v. Kansas, 248 U.S. 276, 285 (1919).

122 *Id.* at 279.

123 *Id.* at 283.

124 *Id.* at 280–81.

125 *Id.* at 284–85.

126 Other areas within Article I reflecting traditionalist interpretation are omitted for the sake of space. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 400–01 (1989) (emphasizing the "traditional ways of conducting government" in interpreting the constitutionality of delegation of lawmaking power (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))).

127 Rutan v. Republican Party of Ill., 497 U.S. 62, 95–114 (1990) (Scalia, J., dissenting); Elrod v. Burns, 427 U.S. 347, 353–60 (1976) (plurality opinion).

128 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–80 (1980) (plurality opinion).

129 Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 122–25 (2011).

Speech Clause contexts stand out: content-based exclusions from free speech protection, public forum doctrine, and government speech.

The Court has repeatedly relied on traditional content-based exclusions to resist the narrowing of free speech protection: "From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas . . . . '[T]he freedom of speech' . . . does not include a freedom to disregard these traditional limitations."[131] The Court emphasizes this range of years because it does not focus on the moment of enactment, but instead on speech practices that have been continuously excluded since enactment. These include obscenity, defamation, fighting words, incitement to violent conduct, fraud, and others.[132] The Court has sometimes narrowed the traditional exclusions, as for obscenity[133] and defamation,[134] and it has very occasionally added new exclusions.[135]

More often, however, the Court has refused, in the face of principled or policy-oriented arguments, to expand the exclusions beyond their traditional ambit.[136] It has rejected as "startling and dangerous" the view that categories of speech "may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation" on the basis of the speech's social worth.[137] Antitraditionalist interpreters take a different view. Justice Alito's concurring opinion in *Brown v. Entertainment Merchants Association*, for example, that the Court should reserve judgment when it faces a new technology whose "important societal implications . . . will become apparent only with time," is not a traditionalist argument.[138] Likewise, Justice Breyer's dissent rejects traditionalism in arguing that the principle of "protection of children" should inform the Court's approach to creating new content-based exclusions.[139]

One recurring question concerns how to define the relevant practice. The Court has often insisted on a highly specific description of it. For example, *acts* of animal cruelty may be excluded notwithstanding their expressive content, because of their "long history [of prohibition] in American law, starting with the early settlement of the Colonies."[140] But "*depictions* of

130 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

131 R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

132 *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

133 Miller v. California, 413 U.S. 15, 27 (1973).

134 Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264, 283 (1964).

135 New York v. Ferber, 458 U.S. 747, 764–66 (1982) (child pornography). Even here, however, it has analogized new categories to existing traditional limitations. *Id.*

136 *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 795–96 (2011).

137 *Stevens*, 559 U.S. at 469–70.

138 *Brown*, 564 U.S. at 806 (Alito, J., concurring). It is useful to highlight Justice Alito's nontraditionalist view in this case since he sometimes interprets traditionally in this and other contexts. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 741–42 (2012) (Alito, J., dissenting).

139 *Brown*, 564 U.S. at 841 (Breyer, J., dissenting).

140 *Stevens*, 559 U.S. at 469.

animal cruelty" are different because "we are unaware of any similar tradition" of exclusion.[141] If the government wishes to regulate a new category, it must identify it as "part of a long (if heretofore unrecognized) tradition of proscription."[142] This is once again the antinovelty side of traditionalist interpretation.

The Court has also interpreted traditionally in its First Amendment public forum doctrine, which specifies rules for different property categories:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[143]

These locations came to be known as "traditional public forum[s]": property where the government cannot regulate speech without a compelling interest in a manner narrowly tailored to achieve that interest.[144] Subsequent cases often narrow the relevant tradition, as in the Court's "sidewalk jurisprudence."[145]

But the most traditionalist "traditional public forum" case is *Burson v. Freeman*, where the Court held that Tennessee's restrictions on vote solicitation and the display or distribution of campaign materials within one hundred feet of the polling place were constitutional.[146] Justice Scalia's concurring opinion, which was necessary to the judgment, fully explained the "traditional public forum":

> If the category of "traditional public forum" is to be a tool of analysis . . . it must remain faithful to its name and derive its content from *tradition*. Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the law] does not restrict speech in a traditional public forum . . . .[147]

The ancient and continuous tradition of government restrictions on speech in polling places, and streets and sidewalks adjacent to them, rendered these locations nonpublic forums. Statutes restricting such speech had been in use "[e]ver since the widespread adoption of the secret ballot in the late 19th

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141 *Id.*; *see also Brown*, 564 U.S. at 795 ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.").

142 *Brown*, 564 U.S. at 792.

143 Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (describing places "which by long tradition or by government fiat have been devoted to assembly and debate").

144 Burson v. Freeman, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment); *accord id.* at 196–97 (plurality opinion).

145 *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 727–28, 731–32 (1990) (plurality opinion); United States v. Grace, 461 U.S. 171, 178–79 (1983).

146 *Burson*, 504 U.S. at 193, 211 (plurality opinion).

147 *Id.* at 214 (Scalia, J., concurring in the judgment).

century" and "[b]y 1900 at least 34 of the 45 States . . . had enacted such restrictions."[148]

Scalia's *Burson* concurrence helpfully distinguished traditionalism from other methods that rely more casually on historical practices. First, he argued that the tradition of government regulation of speech in and around the polling place needed precise articulation. Second, he claimed that traditionalist interpretation was superior to the Court's "time, place, and manner" test because the latter was simply a truncated abstraction of the traditions of government regulation of speech:

> This unquestionable tradition could be accommodated, I suppose, by holding laws . . . to be covered by our doctrine of permissible "time, place, and manner" restrictions upon public forum speech—which doctrine is itself no more than a reflection of our traditions . . . . [But] that . . . would require some expansion of (or a unique exception to) th[at doctrine] . . . . It is doctrinally less confusing to acknowledge that the environs of a polling place, on election day, are simply not a "traditional public forum" . . . .[149]

Scalia's critique of principled or test-driven methods (reminiscent of the Court's language in *Midwest Oil*) is that they are incapable of capturing the lived practice of government exclusions of this type of speech. By contrast, Justice Stevens's *Burson* dissent attacked traditionalism as "confus[ing] history with necessity, and mistak[ing] the traditional for the indispensable."[150] The existence of a tradition, he argued, has nothing to do with its consistency with the principles of free speech, for "traditions sometimes support, and sometimes are superseded by, constitutional rules."[151] For Stevens, supersession occurs where there are "salutary developments," evolution, and moral progress: "Much in our political culture, institutions, and practices has changed since the turn of the century . . . ."[152]

Last, in the area of government speech, the Court has held that the government has a long and continuous tradition of using monuments to convey messages to the public.[153] "Since ancient times," the Court said in *Pleasant Grove City v. Summum*, "kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power."[154] Justice Alito's majority opinion (and his subsequent dissent in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*) emphasized the age and endurance of these practices before and after the founding: from their ancient origins to

148 *Id.* at 214–15.

149 *Id.* at 216.

150 *Id.* at 220 (Stevens, J., dissenting).

151 *Id.* at 227.

152 *Id.* at 222; *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 817–22 (1985) (Blackmun, J., dissenting) (arguing that traditional categorizations of public forums should not be determinative of the guarantees of the First Amendment).

153 Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

154 *Id.*

their American embodiment in the Statue of Liberty, the Washington Monument, and the Lincoln Memorial.[155]

Other government speech cases suggest that the politics of traditionalist interpretation can run in unexpected directions. In a case about whether specialty license plates constitute government speech, the majority and dissenting Justices debated the tradition at issue.[156] But here, Breyer and other liberal Justices on the Court relied on the century-old tradition of the states' practice of using license plates to convey the states' messages.[157] Alito and some of the conservative Justices argued in dissent that the tradition of government use of specialty license plates was a "recent development" and therefore distinguishable from the more ancient tradition of the use of monuments to convey government messages.[158]

2. First Amendment—The Establishment Clause

The First Amendment's Establishment Clause is another fertile area for traditionalism,[159] but this Article again focuses on three areas: state-sponsored religious displays, tax exemptions, and legislative prayer.

As in the government-speech context, the Court's cases concerning state-sponsored religious displays reflect deep engagement with traditionalism, in its favor or against it. In *Lynch v. Donnelly*, the Court upheld a Rhode Island municipality's composite Christmas holiday display that included a crèche against an Establishment Clause challenge.[160] Against the categorical view reflected in a "rigid, absolutist" "test" concerning the scope of the Establishment Clause, the Court argued that "[t]he city, like the Congresses and Presidents, . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday."[161]

This tradition of official, government recognition of Christmas in religious displays, one component of an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," suggested to the Court that the tradition of state-sponsored religious displays reflects a constitutionally unproblematic govern-

155 *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2259 (2015) (Alito, J., dissenting); *Summum*, 555 U.S. at 471.

156 *Walker*, 135 S. Ct. 2239.

157 *See id.* at 2248.

158 *Id.* at 2256, 2259–60 (Alito, J., dissenting).

159 Two other areas, omitted for the sake of space, in which traditionalism has influenced Establishment Clause interpretation concern Bible reading and prayer in public schools, and Sunday closing laws. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 632–36 (1992) (Scalia, J., dissenting); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 267–75 (1963) (Brennan, J., concurring); McGowan v. Maryland, 366 U.S. 420, 431–45 (1961).

160 Lynch v. Donnelly, 465 U.S. 668, 670–71 (1984).

161 *Id.* at 673, 678–80.

mental "acknowledgment of our religious heritage."[162] "It would be ironic," the Court continued, if inclusion of the crèche "as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries," would violate the Establishment Clause.[163] The age of the tradition in combination with its continuous transmission in the United States over time rendered the display constitutional.[164]

Justice Brennan's *Lynch* dissent objected wholesale to traditionalism: "[H]istorical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since . . . 'no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.'"[165] Brennan contrasted traditionalism with what he claimed was a superior, principle- or purpose-driven approach: "Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause . . . ."[166] But he also argued that the tradition in *Lynch*, if any existed, should be drawn more narrowly, and that it must include evidence of the specific practice from the time of textual ratification: "[A]t the time of the adoption of . . . the Bill of Rights, there was no settled pattern of celebrating Christmas, either as a purely religious holiday or as a public event."[167] These two claims—that traditionalism is illegitimate, on the one hand, or that the drawing of a tradition must be narrower, on the other—represent recurring external and internal critiques of traditionalism (though the latter may simply be a purer form of it).

Subsequent religious display cases reflect similar disagreements. In *County of Allegheny v. ACLU*, for example, the Court struck down the display of a crèche inside a county courthouse during the Christmas holiday season.[168] Justice Blackmun's majority opinion acknowledged strong American traditions of official recognition of the country's religious heritage but emphasized that these can never contravene the Establishment Clause's broad "adjudicatory principles that realize their full meaning only after their application to a series of concrete cases."[169] Justice Kennedy's partial concurrence is a perfect contrast: any test adopted by the Court, he argued, must generate results consistent with traditional practices, and any test or principle that would invalidate centuries-old traditions cannot be trusted as the proper reading of the Establishment Clause.[170]

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162 *Id.* at 674, 677.

163 *Id.* at 686.

164 *Id.* at 687.

165 *Id.* at 718 (Brennan, J., dissenting) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)).

166 *Id.* at 719.

167 *Id.* at 720.

168 County of Allegheny v. ACLU, 492 U.S. 573, 601–02 (1989).

169 *Id.* at 606; *see id.* at 604–05.

170 *Id.* at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Most recently, the Court approached a traditionalist method most nearly in *American Legion v. American Humanist Association*, which concerned the constitutionality of a thirty-two-foot cross that local residents in Prince George's County, Maryland, had dedicated in 1925 to honor the county's fallen soldiers in World War I.[171] In upholding the cross against an Establishment Clause challenge, a majority of the Court held that "monuments, symbols, or practices that were first established long ago" are imbued with multiple purposes and meanings.[172] "The passage of time," the Court said, "gives rise to a strong presumption of constitutionality."[173] The plurality opinion as well as Justice Gorsuch's concurrence (which Justice Thomas joined) would have gone further, adopting an approach for state-sponsored religious displays that took a monument's participation within a "tradition long followed" in American government as evidence of its constitutionality or, as Gorsuch put it, "a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago."[174]

American Legion is a fragmented and perplexing decision, in part because though a majority of the Justices expressed some support for an Establishment Clause methodology that looks to history and tradition, they could not reach consensus either about the method's details or its justifications. Nevertheless, it seems that at least some of the Justices are haltingly but steadily moving toward a more fully articulated account of traditionalism, though they have yet to articulate any explanations or justifications for it.

With respect to government funding issues, the Court's most traditionalist decisions have come in the area of tax exemptions for religious institutions. Tax exemptions represent financial benefits to religious institutions and would be problematic if the Establishment Clause required absolute financial separation of church and state or neutrality as to religion. Yet tax exemption has been defended on the basis that it represents ancient and enduring practical arrangements between ecclesial and secular authorities.[175] The Court elaborated this defense in *Walz v. Tax Commission*, but the most thoroughgoing traditionalist defense of tax exemptions for religious institutions appears in an unlikely place: Justice Brennan's concurring opinion arguing that traditions dating to the founding and enduring continu-

171 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2076–77 (2019) (plurality opinion).

172 *Id.* at 2082.

173 *Id.* at 2085.

174 *Id.* at 2088 (quoting Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014)); *id.* at 2102 (Gorsuch, J., concurring in the judgment); *see also id.* at 2092 (Kavanaugh, J., concurring) (describing a new "history and tradition" approach adopted by the Court).

175 *See* DEGIROLAMI, *supra* note 55, at 196–97, 203; *see also* JOHN WITTE JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 257 (2006) (asserting that tradition-based arguments may "bolster a broader rationale for upholding traditional features of a public religion and a religious public," and, in turn, might well justify "[i]nnocuous long-standing practices . . . such as religious tax exemptions").

ously thereafter are of "considerable import" when interpreting "abstract constitutional language."[176]

A final Establishment Clause area worth revisiting is legislative prayer, where the Court has interpreted traditionally as clearly as anywhere.[177] A later circuit court disagreement about how to apply *Town of Greece*'s methodology illustrates some interpretive questions about traditionalist interpretation. A panel of the Ninth Circuit held that a local school board whose open-session meetings included a prayer was operating outside the tradition of legislative prayer recognized in *Town of Greece*.[178] Prayer at a school board meeting could not be a cognizable tradition, in the panel's view, because public schools did not exist at the founding.[179] In connection with a denial of rehearing en banc, Judge O'Scannlain (joined by seven active judges) issued a statement disagreeing that "an unbroken historical pattern of the precise practice at issue" is required;[180] the question was instead whether the practice "*fits within the tradition long followed*."[181]

The disagreement is instructive for two reasons. The first is the now-familiar problem of how broadly or narrowly to define a tradition. The second concerns the relevance of a tradition's existence or absence at the time that its textual source was enacted into law. Political and cultural traditions that are continuous and concentrated before, during, and after ratification are particularly powerful. Traditions with less continuity, or that may not even have been followed at the time their ostensible textual anchors were enacted into law, are more complicated. Whether evidence of the practice at the ratification of a clause is required, or whether the tradition may comprise *exclusively* postratification practices, is uncertain.

3. First Amendment—The Free Exercise Clause

Unlike the Establishment Clause, the Free Exercise Clause has infrequently been interpreted traditionally. Perhaps the best example of traditionalism in the religious exemption context is Justice Harlan's concurrence in *Welsh v. United States*,[182] where the Court concluded that a conscientious

176 Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring); *see id.* at 684–85 (drawing the historical lineage of the practice of tax exemption to the Jefferson administration and Madison's tenure in the Virginia Assembly); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792 (1973) (discussing *Walz* and noting the "apparently universal approval" of tax exemptions before and after the adoption of the First Amendment, while acknowledging that "historical acceptance without more would not alone have sufficed" for constitutional purposes).

177 Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); *see supra* text accompanying notes 39–46.

178 Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir.) (per curiam), *reh'g denied*, 910 F.3d 1297 (9th Cir. 2018).

179 *Id.* at 1148.

180 *Freedom from Religion Found.*, 910 F.3d at 1303 (O'Scannlain, J., respecting the denial of rehearing en banc).

181 *Id.* at 1143 (emphasis added) (quoting *Town of Greece*, 134 S. Ct. at 1819).

182 398 U.S. 333 (1970).

objector's nontheistic views about killing were sufficient to exempt him from military service under a statutory exemption for religious objectors. Harlan argued that the statute's limited exemption for theistic believers violated the Free Exercise Clause: "The policy of exempting religious conscientious objectors is one of longstanding tradition in this country . . . . It dates back to colonial times and has been perpetuated in state and federal conscription statutes."[183] But he also concluded that "[w]hen a policy has roots so deeply embedded in history," courts have a "compelling reason . . . to hazard the necessary statutory repairs"—that is, by "building" on what Harlan took to be a healthy tradition.[184] Harlan thus highlights a dynamic feature of traditionalism: the capacity of judges to build on a tradition by expanding or updating it.[185]

4. Second Amendment

The Second Amendment is more rapidly canvassed than the First, since the Court has only recently begun to interpret it. But the existing doctrine helpfully distinguishes originalism from traditionalism. The seminal case is *District of Columbia v. Heller*, where the Court employed originalist methods to conclude that the Second Amendment protects an individual right to keep and bear arms.[186] Justice Scalia's evidence of the text's original meaning included a comparison to other constitutional provisions using the same language; founding-era dictionaries; Blackstone's *Commentaries* and other learned authorities; state constitutional provisions before and after ratification of the Second Amendment; evidence of founding-era idiomatic meaning; and evidence from the ratification debates.[187]

But the Court also relied on much earlier evidence from the period between the Restoration and the Glorious Revolution of 1688.[188] And it highlighted postratification commentary, caselaw, and legislation through the late nineteenth century that supported the Court's interpretation of the Clause, noting that "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification" is "a critical tool of constitutional interpretation."[189] Finally, it argued that "longstanding prohibitions," developed through the nineteenth and twentieth centuries—such as those on "the possession of firearms by felons and the mentally ill," and on "the carrying of firearms in sensi-

183 *Id.* at 365–67 (Harlan, J., concurring in judgment).

184 *Id.* at 366.

185 The Court has also arguably embraced traditionalism in its ministerial exception doctrine. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–87 (2012).

186 District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

187 *Id.* at 579–86, 598–603.

188 *Id.* at 592. *See generally* Diarmuid F. O'Scannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 NOTRE DAME L. REV. 397 (2019) (providing a detailed preratification history of the "right to bear Arms").

189 *Heller*, 554 U.S. at 605.

tive places such as schools and government buildings"—as well as "laws imposing conditions and qualifications on the commercial sale of arms," were constitutional qualifications of the right.[190] So, too, was the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[191]

The relationship of traditionalism to originalism is complex, since originalism is an umbrella term encompassing several distinctive approaches.[192] Still, one can discern in *Heller* some differences between originalism's emphasis on meaning that may be extracted from sources at (or immediately preceding and postdating) ratification, on the one hand, and meaning that is derived from particular political, legal, or cultural practices that predate and, especially, postdate ratification by a wide margin and continue over time. After *Heller*, a panel of the D.C. Circuit upheld the District of Columbia's narrower ban on most semiautomatic rifles and its firearms registration requirements against a Second Amendment challenge.[193] In dissent, then-Judge Kavanaugh argued that the District of Columbia's registration requirement was not "within the class of traditional, 'longstanding' gun regulations in the United States" postdating ratification and existing in a continuous pattern since then.[194] "[T]radition," Kavanaugh explained, is synonymous with "post-ratification history," and tradition, rather than the Court's more familiar tiers-of-scrutiny approach, was the applicable "test" for evaluating the constitutionality of municipal gun laws.[195]

5. Fourth Amendment—Warrantless Seizures

Fourth Amendment doctrine frequently depends upon on minute particulars and practices. It is therefore highly amenable to traditionalist interpretation, and this Article can only focus on a few representative decisions. Two warrantless seizure cases offer clear examples of traditionalism and direct criticisms of it.

In *United States v. Watson* the Court upheld a federal statute authorizing postal inspectors to make warrantless felony arrests upon probable cause.[196] The Court explored whether that power fit within the "ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."[197] Writing for the Court, Justice White traced the practice back to several state constitutions as well as to nineteenth-century state caselaw and

190 *Id.* at 626–27.

191 *Id.* at 627 (citing sources from 1769 through 1874).

192 *See* Marc O. DeGirolami, *The Vanity of Dogmatizing*, 27 CONST. COMMENT. 201, 217 (2010) (book review).

193 *See* Heller v. District of Columbia, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

194 *Id.* at 1270 (Kavanaugh, J., dissenting).

195 *See id.* at 1272–73, 1274 n.6.

196 United States v. Watson, 423 U.S. 411 (1976).

197 *Id.* at 418.

statutes.[198] He emphasized that "in 1792 Congress invested United States marshals and their deputies with 'the same powers'" of arrest that state sheriffs and their deputies enjoyed in their respective states.[199] Furthermore, the Second Congress's statute "equating the power of federal marshals with those of local sheriffs was several times re-enacted" in 1795, 1861, 1874, and 1935.[200] The warrantless felony arrest on probable cause "appears in almost all of the States in the form of express statutory authorization."[201] The Court therefore declined to constitutionalize a requirement of warrant-backed searches "when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause."[202]

If *Watson* is an exemplar of traditionalism, *Payton v. New York* is quite different. There, the Court held that the Fourth Amendment prohibits the police from making warrantless and nonconsensual entries into a suspect's home, without exigent circumstances, to make a felony arrest.[203] Justice Stevens's majority opinion noted that the "principles reflected in the [Fourth] Amendment . . . 'apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."[204] Thus, notwithstanding substantial evidence—that the common-law practice dating from at least the sixteenth century was to allow constables to make entry into homes for the purpose of arresting suspected felons; that the colonial and founding periods generally followed this practice; that there were no constitutional challenges to the practice throughout the nineteenth century;[205] and that twenty-four of fifty states at the time the Court heard the case continued to permit warrantless entry into the home to arrest[206]—Stevens concluded that "neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."[207]

While the *Payton* Court *used* the word "tradition" to describe the principle of the "sanctity of the home," its method was not traditionalist but ethical or principle driven. It embraced the abstract idea—what it called a "basic principle"—of the "sanctity of the home" said to represent an American ethos to strike down the governmental practice of arrest supported by centuries of continuous history. Justice White's *Payton* dissent, like his *Watson* majority opinion, instead is traditionalist because it traced the continuity and endurance of a practice through the colonial, founding, nineteenth century,

198 *Id.* at 419.

199 *Id.* at 420 (quoting Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795)).

200 *Id.* at 420–21, 421 nn.9–10.

201 *Id.* at 421–22.

202 *Id.* at 423.

203 Payton v. New York, 445 U.S. 573, 576 (1980).

204 *Id.* at 585 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

205 *Id.* at 605–12 (White, J., dissenting).

206 *Id.* at 600 (majority opinion).

207 *Id.* at 601.

and modern period. The lesson of *Payton* is that using the word "tradition" does not necessarily make an opinion traditionalist.

6. Eighth Amendment—The Cruel and Unusual Punishments Clause

The Eighth Amendment's Cruel and Unusual Punishments Clause is worth mentioning briefly because it reflects traditionalism largely in retreat. In its capital punishment cases, for example, the Court focuses first on the "evolving standards of decency that mark the progress of a maturing society."[208] The Court sees its role as making "an assessment of contemporary values concerning the infliction of a challenged sanction,"[209] irrespective of that sanction's historical warrant or duration of use. "[S]tandards of decency," the Court has explained, encompass changes in other countries and international bodies felt by the Court to be persuasive.[210] The Court then evaluates for itself whether the practice accords with "the dignity of man," the "basic concept underlying the Eighth Amendment."[211]

Applying these methods in an opinion for the Court on the constitutionality of capital punishment for offenders under the age of eighteen, Justice Kennedy held that "objective indicia of consensus" suggested that the states had been gradually but steadily abolishing the death penalty within the preceding fifteen years,[212] and that the "civilized nations of the world" and the relevant "world community" were in accord.[213] The Court's "independent judgment" embraced the "principle" that capital punishment must be limited to those who evince the greatest culpability.[214] It relied on certain sociological studies—confirming, in its view, what "any parent knows"—that those under eighteen are comparatively immature, easily influenced, and morally unformed.[215] The American "heritage of freedom," the Court concluded, required striking down this practice.[216]

Thus, in this area, the Court focuses on recent trends it believes it can discern in state law, on a consensus that it believes is justified morally and may be supported by the decisions of other countries and international bodies that it approves, and on social scientific studies that support its evolving moral intuitions and sense of American ideals. None of these doctrinal moves reflects traditionalist interpretation. It is true that the Court's most recent Eighth Amendment case, concerning the constitutionality of a state's lethal injection procedure, reflects a methodology more in line with tradi-

208 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

209 Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion).

210 *See* Roper v. Simmons, 543 U.S. 551, 561, 575–76 (2005).

211 *Trop*, 356 U.S. at 100.

212 *Roper*, 543 U.S. at 564–67.

213 *Id.* at 575 (first quoting *Trop*, 356 U.S. at 102; and then quoting Atkins v. Virginia, 536 U.S. 304, 316–17 n.21 (2002)).

214 *Id.* at 564, 568.

215 *Id.* at 569–71.

216 *Id.* at 578.

tionalism (though arguably reaching an erroneous result under that method), but the case is to this point a methodological outlier.[217]

C. Fourteenth Amendment Traditions

The Fourteenth Amendment is a study in contrasts. Some of the Court's most thoroughly traditionalist opinions appear in its Due Process Clause doctrine. Yet the Court's Equal Protection Clause doctrine is often highly antitraditionalist. While the Court interprets other Amendments traditionally as well,[218] this first attempt at describing traditionalism focuses on the major examples of it, and against it, in the Court's Due Process Clause and Equal Protection Clause jurisprudence.[219]

As early as 1855—in interpreting the Fifth Amendment's Due Process Clause—the Court observed that if a particular legal process does not conflict with the constitutional text, the Court must look to "settled usages and modes of proceeding" in the common and statute law of England to see whether the challenged practice comports with the Constitution's due process protections.[220] In *Murray's Lessee*, the Court evaluated the constitutionality of a particular type of nonjudicial warrant authorized by Congress, holding that since the founding of the English monarchy, summary methods for the recovery of debts due to the Crown had been accepted, practices that had been replicated in the colonies and in the states before and after ratification of the Constitution.[221]

This early example and others holding that due process is satisfied by following legal practices that accord with the "law of the land"[222] suggest that it is better to avoid the relatively recent division of the Due Process Clause

217 *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1122–25, 1128 (2019). For criticism of *Bucklew* on traditionalist grounds, see Samuel Bray, *What Bucklew Doesn't Say*, REASON (Apr. 3, 2019), https://reason.com/2019/04/03/what-bucklew-doesnt-say/ (reproducing comments from Professor John Stinneford).

218 The question arises whether traditionalism becomes less relevant for recently ratified Amendments, since there will be less historical continuity to draw from in their interpretation. Yet the Court's early interpretation of the Fourteenth Amendment's Due Process Clause adopted traditionalist methods, so there is no reason that an Amendment's recency prevents it from being interpreted traditionally.

219 The Full Faith and Credit Clause of the Fourteenth Amendment has also been interpreted traditionally. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 724–29 (1988); *see also id.* at 740–43 (Brennan, J., concurring in part and concurring in the judgment) (criticizing the majority for failing to explain why tradition should allow states to continue to engage in practices that are unfair).

220 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856).

221 *Id.* at 278–80.

222 *See* Hurtado v. California, 110 U.S. 516, 540–41 (1884) (Harlan, J., dissenting) (giving examples of state constitutions defining due process with respect to "the law of the land").

into "procedural" and "substantive" components.[223] Instead, this Article selects five concrete practices—personal jurisdiction, punitive damages, rights of defendants in criminal proceedings, incorporation, and physician-assisted suicide and the rights of intimacy—that illustrate the Court's use of traditionalist interpretation in this area.

1. Due Process Clause—Personal Jurisdiction

Since 1940, the Court has argued that "traditional notions of fair play and substantial justice" set the constitutional limits of a state's power to exercise personal jurisdiction over defendants not physically present in the state,[224] but it was only fifty years later in *Burnham v. Superior Court* that the Court explained what "traditional" contributed to this formulation.[225] There, it evaluated whether a state could always assert personal jurisdiction over a defendant who was physically present within the state.[226] Justice Scalia's plurality opinion traced the power over the defendant's person as far back as the English Year Books of the fifteenth century through the seventeenth-century decision of Lord Coke concerning the Court of Marshalsea's jurisdiction over the king's household and domestics.[227] The *Burnham* plurality argued that when the Court held in *Pennoyer v. Neff* in 1878 that the judgment of a court lacking personal jurisdiction violated the Due Process Clause, that holding was simply continuous with and a ratification of the traditional practice adopted by many states before passage of the Fourteenth Amendment, which was in turn continuous with and a ratification of the tradition in previous English law.[228]

Over a series of twentieth-century decisions, however, the Court steadily relaxed *Pennoyer*'s strict territorial rule of jurisdiction to account for changes in technology, communication, and interstate business activity. But that approach did not apply where a defendant was physically present in the state:

> The distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental . . . . [J]urisdiction based on physical presence alone constitutes due process because it is one of

223 These usages date to the 1930s and 1940s. *See* Snyder v. Massachusetts, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting) ("Procedural due process has to do with the manner of the trial . . . ."); Republic Nat. Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) (designating certain rights of property as ones of "substantive due process").

224 Milliken v. Meyer, 311 U.S. 457, 463 (1940); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (referencing the "traditional conception of fair play and substantial justice" standard).

225 Burnham v. Superior Court, 495 U.S. 604, 618–22 (1990) (plurality opinion).

226 *Id.* at 607–08.

227 *Id.* at 608–09. The Year Books are English law reports spanning the late thirteenth through the early sixteenth centuries.

228 *Id.* at 609 (citing Pennoyer v. Neff, 95 U.S. 714, 722–33 (1878)).

> the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice."[229]

The *Burnham* plurality rejected Justice Brennan's concurring opinion that "contemporary" ideas of "fairness" rather than "traditional" ones should control, responding that "contemporary notions of due process" just exactly are the "*traditional* notions of fair play and substantial justice" that "are generally applied and have always been applied in the United States."[230] The practice's "validation is its pedigree," rendered even more powerful because it was followed by many states.[231]

2. Due Process Clause—Punitive Damages Awards

The Court has used a similar approach to evaluate due process limits on punitive damage awards. In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court held that states that had adopted the common-law method for assessing punitive damage awards—in which "a jury [was] instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct"—had not per se violated the Due Process Clause.[232] The Court observed that "Blackstone appears to have noted" the use of punitive damages, that they were employed by state courts in the late eighteenth century, and that they "have long been a part of traditional state tort law."[233] Because the common-law method was "well established before the Fourteenth Amendment was enacted," and because nothing in the Fourteenth Amendment was meant to change that practice, it was constitutional.[234] But the *Haslip* majority cautioned that "general concerns of reasonableness" might warrant disturbing the common-law rule where a punitive damage award seemed excessive to the Court.[235]

Justice Scalia's *Haslip* concurrence reflects a more committed example of traditionalist interpretation. After providing a more complete historical account of the prevalence of the common-law rule of absolute jury discretion in assessing punitive damages in the period before and after ratification of the Fourteenth Amendment, Scalia critiqued the majority's "decoup[ling]" of the concept of "fundamental fairness" from the prior inquiry about whether the practice at issue was "traditional": "'fairness' in the abstract," and disconnected from the view that traditional practices long approved are themselves fair (provided they do not violate other constitutional provisions), is, Scalia claimed, a contemporary perversion of due process.[236] Yet subse-

229 *Id.* at 619; *cf.* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (arguing that traditional notions of fair play and substantial justice "can be as readily offended by the perpetuation of ancient forms that are no longer justified").

230 *Burnham*, 495 U.S. at 623–27 (plurality opinion).

231 *Id.* at 621.

232 Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991).

233 *Id.* at 15 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984)).

234 *Id.* at 17–18.

235 *Id.* at 18.

236 *Id.* at 34–38 (Scalia, J., concurring in judgment).

quent decisions have emphasized that the traditional practice of punitive damages awards is only presumptive evidence of the scope of the Due Process Clause.[237]

3. Due Process Clause—Rights of Defendants in Criminal Proceedings

The Court has sometimes interpreted traditionally in cases about due process limits concerning the rights of criminal defendants. In the nineteenth century, *Murray's Lessee* involved this category of issue,[238] as did *Hurtado v. California*, where the Court held that arrest and conviction without a grand jury indictment did not violate due process.[239] The *Hurtado* Court explained that while a state that follows a traditional practice always satisfies due process, that did not mean that when a state uses a new conviction practice it fails to accord due process: "[T]o hold that such a characteristic is essential to due process of law, would be to . . . stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."[240] Likewise, in *Ownbey v. Morgan*, the Court held that a state did not violate due process by permitting an out-of-state creditor to attach the property of an in-state debtor without an opportunity to be heard.[241] The Court traced the practice to eighteenth-century England, through the colonial and founding periods, and through to the practices commonly used by states in the nineteenth century: "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law."[242]

Several mid-twentieth-century decisions in this area adopted an antitraditionalist approach, however. In *Gideon v. Wainright*, for example, the Court held that the failure to appoint counsel in certain criminal cases violated the Sixth Amendment as incorporated against the states by the Due Process Clause of the Fourteenth Amendment irrespective of whether the practice of appointing counsel was traditionally followed.[243] Likewise, in *Sniadach v. Family Finance Corp. of Bayview*, a case involving a due process challenge to the practice of prejudgment garnishment of wages without an opportunity to be heard, the practice's long pedigree and continuity were deemed irrelevant.[244] As Justice Douglas cracked: "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to

237 *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426, 429 (2003).

238 *See supra* text accompanying notes 220–21.

239 Hurtado v. California, 110 U.S. 516 (1884).

240 *Id.* at 528–29.

241 Ownbey v. Morgan, 256 U.S. 94, 111–12 (1921).

242 *Id.* at 111; *see also* Corn Exch. Bank v. Coler, 280 U.S. 218, 222–23 (1930) ("The challenged procedure is an ancient one.").

243 Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963); *see also* Mathews v. Eldridge, 424 U.S. 319, 343, 346–47 (1976) (discussing "fairness and reliability" as well as various public policy concerns).

244 *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339–42 (1969).

all property in its modern forms."[245] While in some more recent cases, the Court has veered back toward traditionalism,[246] its use of tradition in this area has been erratic—consistently applied early on, far less frequently in its mid-twentieth-century cases, and more regularly thereafter.

4. Due Process Clause—Incorporation

For purposes of this Article, the Court's use of the Due Process Clause as the vehicle for the incorporation of the Bill of Rights against the states will be taken as settled.[247] Instead, the question is what approach the Court uses in deciding whether to incorporate a provision of the Bill of Rights against the states. When it has interpreted traditionally in this area, the Court has sometimes been less careful than elsewhere.

As early as 1897, the Court argued that the Bill of Rights "[was] not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors."[248] Therefore, when the Court began its "selective incorporation" of the Bill of Rights in the twentieth century,[249] it often assumed the traditional status of the particular practices at issue. It consequently has interpreted the scope of some of these incorporated rights more expansively than was warranted by their traditional scope. So, for example, the Court included some discussion of the practice's nature, age, and continuity when it incorporated the Sixth Amendment right to counsel in capital cases[250] and the Sixth Amendment right to trial by jury in criminal cases.[251] Yet by the Court's own admission, the evidence it marshaled for an expansive right to a jury trial in criminal cases was "skeletal."[252]

However, the Court's two most recent incorporation decisions are highly traditionalist. In *McDonald v. City of Chicago*, incorporating the Second Amendment against the states,[253] the Court inquired whether the right to keep and bear arms was "fundamental to *our* scheme of ordered liberty"—that is "fundamental from an American perspective"[254]—emphasizing that a right "deeply rooted in [our] history and tradition" offers a strong case for

245 *Id.* at 340.

246 *See, e.g.*, Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72 (2009); Montana v. Egelhoff, 518 U.S. 37, 43–45 (1996) (plurality opinion).

247 For debate, see generally CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

248 Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

249 McDonald v. City of Chicago, 561 U.S. 742, 763 (2010).

250 Powell v. Alabama, 287 U.S. 45, 67–69 (1932).

251 Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

252 *Id.* at 153; *see also id.* at 183–92 (Harlan, J., dissenting) (refuting the majority's argument for an expansive right).

253 *McDonald*, 561 U.S. at 750.

254 *Id.* at 767; *id.* at 784 (plurality opinion).

incorporation.[255] The Court focused on ratification debates as well as postratification evidence in the states showing the continuity of the practice—and especially its salience for African Americans after the Civil War.[256] Likewise, in *Timbs v. Indiana*, decided last Term, Justice Ginsburg's opinion for the Court incorporating the Excessive Fines Clause of the Eighth Amendment emphasized its "venerable lineage," tracing its age to Magna Carta and its duration through the Stuart Restoration, the English Bill of Rights, the American colonial period, the state constitutions (where excessive fines were largely proscribed), and the concurrence of thirty-five of thirty-seven states in the nineteenth century—an enduring and dense tradition before and after ratification of both the Eighth and the Fourteenth Amendment.[257] The practice of protection against excessive fines, the Court said, is a "constant shield throughout Anglo-American history."[258]

5. Due Process Clause—Physician-Assisted Suicide and Rights of Marriage/Intimacy

As is well known, the Court began to find new rights of sexual autonomy protected by the Due Process Clause in 1965, when in *Griswold v. Connecticut* it held that states could not prohibit married couples from obtaining contraceptives.[259] In this and subsequent cases, the Court generally has not interpreted traditionally.[260]

But it has done so twice—once concerning the rights of sexual autonomy, and a second time about the right to physician-assisted suicide. First, in *Bowers v. Hardwick*, the Court held that a state statute criminalizing consensual sodomy was constitutional.[261] The Court emphasized that the right to engage in consensual sodomy was not "deeply rooted in this Nation's history and tradition" because it

> was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.[262]

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255 *Id.* at 767–80 (majority opinion) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

256 *Id.* at 768–78.

257 Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019).

258 *Id.* at 689.

259 Griswold v. Connecticut, 381 U.S. 479 (1965).

260 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 118 n.2 (1973) (dismissing evidence that many states in the nineteenth century had statutes similar to Texas's respecting abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972).

261 Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

262 *Id.* at 192–94 (footnotes omitted).

The unwillingness of the *Bowers* Court to "take a more expansive view" of the scope of due process foreclosed it from recognizing a new constitutional right.[263]

Second, in *Washington v. Glucksberg*, the Court articulated a traditionalist framework for evaluating the scope of due process.[264] The case concerned whether a state statute prohibiting assisted suicide violated the Due Process Clause.[265] To determine whether a practice warrants protection, (1) the right must be "objectively, 'deeply rooted in this Nation's history and tradition'"; and (2) the Court must "careful[ly] descri[be]" the practice.[266] The Court described it narrowly. The issue was not whether there is a "right to die," or a "liberty to choose how to die," or a "liberty to shape death," but instead the existence of a right to assistance in committing suicide, in this case by a medical professional.[267] Applying that standard, the Court refused to recognize the right in light of the "consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today . . . . To hold for respondents, [it] would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[268] The Court declined to extend what the respondents urged were "the broad, individualistic principles" reflected in the Court's "liberty jurisprudence."[269] It described *Cruzan v. Missouri Department of Health*,[270] involving the issue of whether competent patients have the right to refuse medical treatment, as a traditionalist rather than a principle-driven decision.[271]

Bowers and *Glucksberg* reflect fundamentally similar methods, and they mirror the Court's approach in other areas where it has interpreted traditionally. Yet the Court rejected *Bowers* in *Lawrence v. Texas*, and, indeed, appeared to reject traditionalism itself, arguing that only laws and views of the last half century are relevant to the Court's due process analysis, and that while deeply rooted traditions may be considered, they neither exhaust the Court's inquiry nor decide its judgment.[272] A moral principle inherent in the word "liberty" overcame the tradition of proscription. While traditionalist interpretation still controls for physician-assisted suicide, the Court has qualified its influence in cases involving what it has described as "other fundamental rights, including marriage and intimacy."[273] The Court's "better

263 *Id.* at 194.

264 Washington v. Glucksberg, 521 U.S. 702 (1997).

265 *Id.* at 705–06.

266 *Id.* at 720–21 (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

267 *Id.* at 722–23 (rejecting the various framings of the issue provided by the Ninth Circuit and respondents).

268 *Id.* at 723.

269 *Id.* at 724.

270 497 U.S. 261 (1990).

271 *Glucksberg*, 521 U.S. at 725.

272 Lawrence v. Texas, 539 U.S. 558, 571–75 (2003).

273 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era," far more than "history and tradition," is the touchstone for due process rights in this area.[274] Thus, while the Court begins with a presumption that traditional practices comport with the Due Process Clause, in the area of "marriage and intimacy," that presumption is easily overcome by principled arguments against the tradition that the Court finds compelling. In other due process areas, the presumption is stronger.

6. Equal Protection Clause

This Article concludes its doctrinal exploration with the Equal Protection Clause because, like the Eighth Amendment, this is also an area notable for antitraditionalist interpretation. As even Justice Scalia acknowledged, the Equal Protection Clause "might be thought to have some counter-historical content."[275] If the Due Process Clause has sometimes been the traditionalist side of the Fourteenth Amendment, the Equal Protection Clause is its radical, even revolutionary, side.

In the area of race-based discrimination, some early cases interpreting the Equal Protection Clause adopted seemingly traditionalist methods. For example, in *Plessy v. Ferguson*, in upholding the constitutionality of racially segregated railway cars, the Court stated a statute's consistency with the Equal Protection Clause depended on the "established usages, customs and traditions of the people"—here, of the southern states.[276] Yet the Court did not trace the age and endurance of segregation from preratification to the late nineteenth century.[277] It acknowledged that many states had adopted differing practices and relied on what it claimed were innate "racial instincts" and "distinctions based upon physical differences."[278]

Later, however, the Court firmly repudiated traditionalist interpretation. *Brown v. Board of Education* relied on prudential, sociological, and moral considerations for doing away with the "separate but equal" rule, not tradition.[279] The Court has "not hesitated to strike down an invidious classification" as violating the Equal Protection Clause "even though it had history and tradition on its side."[280] Its decision in *United States v. Virginia*, striking down Virginia's all-male military academy, rejected Justice Scalia's lone dissenting view, which emphasized the long tradition of men's military colleges existing long before and long after ratification of the Fourteenth

274 *See id.*

275 Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring).

276 Plessy v. Ferguson, 163 U.S. 537, 550 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

277 Some older cases suggest that racial segregation in railway cars was not traditional. *See, e.g.*, R.R. Co. v. Brown, 84 U.S. (17 Wall.) 445, 452 (1873).

278 *Plessy*, 163 U.S. at 551.

279 Brown v. Bd. of Educ., 347 U.S. at 489–95.

280 Levy v. Louisiana, 391 U.S. 68, 71 (1968).

Amendment.[281] In this area, tradition is not a strong justification when confronted with a more powerful principle of equality.[282]

III. Elements of Traditionalism

The previous Part's exploration of traditionalist interpretation in the Court's cases across the domains of constitutional law is only partial, omitting or rapidly referencing many areas where the Court has interpreted traditionally. But it is sufficient to distill three basic elements of traditionalism: (1) a focus on political and cultural practices; (2) the duration of such practices, understood as a composite of age and continuity (to include concentration of usage); and (3) the presumptive, but defeasible, interpretive influence of these practices. This Part discusses these three elements and offers other observations about traditionalism by comparison with other approaches.

A. Political and Cultural Practices

The chief distinguishing feature of traditionalism is its emphasis on political and cultural practices for informing constitutional meaning. Sometimes the government itself (federal or state) is engaging in the relevant practice, as in all government powers traditions, legislative prayer, government speech, tax exemptions for religious institutions, state-sponsored religious displays, warrantless seizures of felons, rights of defendants in criminal proceedings, punitive damages award regimes, and many others. In these situations, when it interprets traditionally, the Court takes the existence of a particular government practice to be in some measure[283] authoritative for interpreting the meaning of the Constitution.

At other times, the Court focuses on the government's regulation of individuals or groups which themselves engage in specific practices. Such cases include people or groups who distribute pamphlets advocating political causes, organize and control the composition of their religious institutions, make decisions concerning physician-assisted suicide, and so on. In these situations, when the Court interprets traditionally, it takes the existence of these practices as, in some degree, authoritative when evaluating whether the government's attempts to regulate them are constitutional. But in either case—whether for government traditions or government regulation of individual or group traditions—it is concrete practices that furnish the raw material for traditionalism.

281 United States v. Virginia, 518 U.S. 515, 556–57 (1996); *see also id.* at 569, 566–70 (Scalia, J., dissenting) ("The all-male constitution of [Virginia Military Institute] comes squarely within . . . tradition.").

282 *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 737–44 (1982) (Powell, J., dissenting) (arguing unsuccessfully for the long tradition of single-sex schooling).

283 "In some measure," because the defeasibility of the presumption in favor of a tradition depends on what the Court takes to be the strength of countervailing factors, such as text, moral principles, pragmatic considerations, and the structural imperatives of the particular constitutional clause in question.

Traditionalism's emphasis on political and cultural practices raises two crucial issues for describing the method—the narrowness or breadth of any given tradition; and the method's relationship to other prominent interpretive approaches.

First, narrowness and breadth.[284] Drawing a tradition too narrowly, as in the Court's traditional public forum "sidewalk jurisprudence,"[285] may limit its interpretive power in subsequent cases. Drawing it too broadly may dilute it, perhaps so much that it begins to look like an idea or principle even if the Court imprecisely or casually calls it a tradition. This terminological slippage occurred in *Payton v. New York*, for example, where the Court called the "sanctity of the home" both a "tradition[ ]" and a "basic principle."[286]

Judges working within a traditionalist framework will often narrow or broaden a tradition with the aim either to exclude or include the practice being reviewed. Justice Kagan in *Town of Greece v. Galloway* and the Ninth Circuit panel in *Freedom from Religion Foundaiton, Inc. v. Chino Valley Unified School District*, for example, argued for a narrowing construction of the tradition of legislative prayer that would exclude the prayer practices in those cases.[287] Likewise, Chief Justice Rehnquist narrowed the tradition of private decisions affecting the end of life and encompassing the specific practice of competent refusals of medical treatment so as to exclude physician-assisted suicide from due process protection.[288] And Justice Brennan argued for a narrowing construction of the tradition of state-sponsored religious displays in *Lynch v. Donnelly* to exclude the practice of displays celebrating the Christmas season.[289]

On the other hand, the *Lynch* majority opted for a broadening construction of the tradition of state-sponsored religious displays.[290] Similarly, Judge O'Scannlain argued for broadening the tradition of legislative prayer even without evidence that the practice of prayer in school board meetings occurred at the founding.[291] Narrowing and broadening are recurrent judicial techniques that introduce some uncertainty into traditionalist interpretation.[292] There is, of course, a direct analogy to the common-law method: just as the holding of a case may or may not be extended to encompass the set of

284 For a subtle treatment of "constitutional narrowing" in the lower courts, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

285 *See supra* note 145 and accompanying text.

286 *See* Payton v. New York, 445 U.S. 573, 586, 601 (1980); *id.* at 608–12 (White, J., dissenting).

287 Town of Greece v. Galloway, 134 S. Ct. 1811, 1842 (2014) (Kagan, J., dissenting); Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1148 (9th Cir. 2018) (per curiam), *reh'g denied*, 910 F.3d 1297 (9th Cir. 2018).

288 Washington v. Glucksberg, 521 U.S. 702, 725–28 (1997).

289 Lynch v. Donnelly, 465 U.S. 668, 718–20 (1984) (Brennan, J., dissenting).

290 *Id.* at 686 (majority opinion).

291 *Freedom from Religion Found.*, 910 F.3d at 1301–03 (O'Scannlain, J., respecting the denial of rehearing en banc).

292 *See supra* notes 131–39 and accompanying text.

facts being reviewed, so, too, may a tradition be narrowed or broadened to encompass or exclude a particular political or cultural practice.

One important question is whether judicial narrowing and broadening introduces so much uncertainty as to render the method overly manipulable or even empty. After all, if judges can simply broaden the tradition to include, or narrow it to exclude, specific practices as they see fit, then perhaps traditionalism offers less interpretive certainty and predictability than is optimal. This is a sensible criticism, but it can be met with at least three responses.

First, traditionalism is not unique in this respect. Many interpretive methods involve a certain degree of underdeterminacy. When courts apply a principle or a test—the principle of "liberty" in a due process case, for example, or the test of "secular purpose" in an Establishment Clause case, for another—judges and scholars debate the scope of the principle or the meaning of the test. Similar problems of underdeterminacy afflict pragmatic or balancing approaches as well, as in the case of the Court's preferred approach to executive removal, for example. Varieties of originalism and nonoriginalism often do not offer determinate answers to questions of application but instead invite interpretive disagreements within the premises of their methods. Uncertainty and disagreement about meaning is simply in the nature of interpretation.

Second, while traditionalism is not alone susceptible to these issues, it may be preferable to methods whose problems of underdeterminacy run deeper. Traditionalism has the advantage that it focuses judges' attention on the concrete. Rather than debating the scope of abstract principles such as "equality," "liberty," or "dignity," judges are compelled to examine practices such as pamphleteering, recess appointments, the regulation of speech in specific locations, and so on. And they are further required to study these practices in historical perspective, relying on a body of evidence that, though it may be contested, actually exists to be interpreted.

Third, the narrowing and broadening of traditions by judges interpreting traditionally is not a methodological flaw. Indeed, it is a healthy feature of the method, inasmuch as it demonstrates traditionalism's suppleness in the face of new facts and practices. Narrowing and broadening are techniques that judges who are otherwise inclined to interpret traditionally can use to adapt or even change traditions, as Justice Harlan emphasized in his *Welsh* concurrence.[293] Narrowing and broadening introduce a dynamic element into traditionalist interpretation, without which the method would be overly static and past-dependent. Without narrowing and broadening, traditionalism might, as the Court said in *Hurtado*, "stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."[294]

293 *See supra* subsection II.B.3.

294 Hurtado v. California, 110 U.S. 516, 529 (1884).

The second issue involves the relationship between traditionalism and varieties of originalism and nonoriginalism. This Article does not study this issue in depth and only offers a few summary observations.[295] Yet it is possible to say that the traditionalist emphasis on practices rather than principles differs from prominent types of both originalism and nonoriginalism.

The principal question many originalists ask today is "what does the text mean?" and they use various techniques to fix its meaning and construct applications of that meaning.[296] The question for most originalists is not "to what specific practices does the text apply?" For traditionalism, by contrast, the focus is on the practices that people before, during, and after the Constitution's drafting did, or did not, believe constituted the meaning of the text. Traditionalist interpreters believe that the meaning of the text—particularly the meaning of text that is itself abstract—is better determined and understood by recourse to concrete practices than to still other abstract principles. Meaning is constituted by practices, though not only by them. New practices may be enfolded into existing traditions by drawing a tradition more broadly or excluded by drawing it more narrowly. There may be some overlap between traditionalism and those varieties of originalism that are receptive to discerning meaning from practices, including postratification practices,[297] but others more interested in the evolution of meaning that categorically disapprove what they call "expected applications" are in greater disharmony with traditionalism.[298] On the specific issue of determinacy of meaning, where the original meaning of a provision is fixed and clear, originalism may be more determinate than what one might get from traditionalist interpretation; this was certainly Justice Scalia's view in his *Noel Canning* concurrence.[299] On the other hand, depending on the variety of originalism

295 For more detailed comparison, see DeGirolami, *supra* note 7 (manuscript at 17–28).

296 *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 7–14 (2018); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458–75 (2013); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–603, 607–13 (2004).

297 *See, e.g.*, John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–31 (2007); Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 939 (2009); *see also* Michael Ramsey, Greece v. Galloway*: The Establishment Clause and Original Expected Applications*, ORIGINALISM BLOG (May 6, 2014), https://originalismblog.typepad.com/the-originalism-blog/2014/05/greece-v-galloway-the-establishment-clause-and-original-expected-applicationsmichael-ramsey.html ("If a very broad consensus at the time of enactment (or shortly after) thought that provision *X* did not ban activity *Y*, that is surely strong evidence that the original public meaning of *X* did not ban activity *Y*.").

298 *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–93 (2007). Traditionalist interpretation is not the same as an originalist approach that emphasizes "expected applications." It is better described as an exercise in retrospective application—drawing on old and enduring practices to make constitutional judgments about the specific practice under review. For further discussion, see DeGirolami, *supra* note 7 (manuscript at 17–22).

299 NLRB v. Noel Canning, 134 S. Ct. 2550, 2600, 2617 (2014) (Scalia, J., concurring).

chosen, originalism may be less clear than traditionalism for more open-ended textual provisions.

As for species of nonoriginalism, these too are sufficiently numerous that this Article can only offer a cursory comparative observation. Since traditionalism takes longstanding and continuous practices to create an authoritative presumption of meaning, varieties of nonoriginalism that prize the evolution of meaning based on the elaboration of a principle or abstract ideal conflict with it. Any interpretive method for which a practice's age and duration offer no reason to perpetuate it is antitraditionalist. Nonoriginalist methods that rely on common-law methods to interpret the Constitution may be more in keeping with traditionalism and may also face similar criticisms of underdeterminacy.[300]

B. Duration

The second element of traditionalism is duration, understood as a composite of age and continuity. Practices derive their interpretive authority on the basis of their duration: the older the practice, and the more continuous the practice before, during, and after the ratification of the Constitution, the more powerful it becomes for constituting the Constitution's meaning.

Age or antiquity is easily understood. On traditionalist premises, the age of a practice is authority for its consistency with the Constitution, just as a practice's recency or novelty renders a traditionalist interpreter more skeptical about it.[301] Generally speaking, the older the better. Sometimes, the Court refers to a practice's "immemorial[ ]" antiquity, or its existence "time out of mind,"[302] or its endurance "[s]ince ancient times,"[303] or more specifically as one "inherited from our English ancestors,"[304] without tracing it to a particular period. At other moments, however, the Court locates a practice's genesis in a specific time and place centuries before the founding era.[305] And at still others, the age of the practice is traced only to the ratification of the constitutional clause at issue.[306] Similarly, antitraditionalist interpreters

300 *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–88 (1996).

301 See the discussion of *Free Enterprise Fund v. PCAOB*, *supra* notes 94–96 and accompanying text; and see also Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72 (2009) ("There is no long history of such a right, and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'" (alteration in original) (quoting Reno v. Flores, 507 U.S. 292, 303 (1993))).

302 Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

303 Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

304 Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

305 *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182 (2012) (Magna Carta); District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (the English Restoration); Burnham v. Superior Court, 495 U.S. 604, 608 (1990) (plurality opinion) (fifteenth century); United States v. Watson, 423 U.S. 411, 419–20 (1976) (eighteenth century).

306 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (tracing First Amendment principles "[f]rom 1791 to the present").

often deprecate the antiquity of a practice as irrelevant and focus on contemporary views and attitudes.[307]

Continuity is somewhat more complicated and may be best understood metaphorically by thinking of a ski slope. The slope may be smooth with good snow for skiing from the beginning to the end; or it may be sparse, with certain snowy sections and others that are bare. Sections of the slope that are smooth may be especially so—densely packed with snow—or they may be coated only with a thin layer. A slope that is too sparse can no longer be skied.

The smoothest type of continuity in traditionalist interpretation is evidence that a practice has been pursued before, during, and after constitutional ratification without significant interruption and in concentrated ways—in the case of a government practice, by the federal government and the majority, or even all, of the states. The practice is then completely smooth, with no sparse patches and with a dense history throughout its duration. Justices interpreting traditionally sometimes have found this sort of continuity and concentration of usage, as in the areas of physical presence for personal jurisdiction, tax exemption for religious institutions, legislative prayer, and others, but perhaps the best example is *United States v. Watson*, where after detailing the history of warrantless felony arrests predating and during the Constitution's ratification, the Court emphasized congressional reauthorization of the practice in 1795, 1861, 1874, and 1935[308] and observed that nearly every state had done the same in statutes spanning the nineteenth and twentieth centuries.[309] Here the practice is very smooth and concentrated.[310] The sparser a tradition of practice becomes, however, the less interpretive authority it can muster. Cases with sparser traditions include *Myers v. United States*, where the Court had to explain away an entirely different practice of executive removal power after the Civil War,[311] as well as some of the Court's incorporation decisions and punitive traditions in the Eighth Amendment context.[312]

Traditionalism's emphasis on duration—and in particular its use of post-ratification evidence of a tradition's continuity—offers another set of similarities and contrasts with originalism. Like originalism, traditionalism examines evidence of meaning at, and sometimes just before and after, ratification of the particular constitutional provision—whether 1789, 1791, or 1868 for the sections of the Constitution examined in this Article. But unlike originalists, traditionalist interpreters take evidence of a practice's endurance

307 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2594–99 (2015); Lawrence v. Texas, 539 U.S. 558, 567–72 (2003).

308 *Watson*, 423 U.S at 418–20, 421 nn.9–10.

309 *See id.* at 421–22.

310 For other smooth and concentrated traditions, see *supra* text accompanying notes 76–80, 120–25, 257–58 (discussing *NLRB v. Noel Canning*, *Missouri Pacific Railway Co. v. Kansas*, and *Timbs v. Indiana*, respectively).

311 Myers v. United States, 272 U.S. 52, 175–76 (1926).

312 For discussion of these issues, see *supra* subsections II.C.4 and II.B.6, respectively.

well before—even centuries before—ratification to be relevant. They also, unlike originalists, rely heavily on a practice's continuity after textual ratification (including well after it) as authority for its constitutionality.[313] This difference appears in the *Pocket Veto Case*, where evidence of meaning at the founding was unavailable,[314] as well as in the Court's *Heller* decision, though Justice Scalia does not distinguish originalist evidence from traditionalist evidence.[315] But it is highlighted helpfully by then-Judge Kavanaugh in his post-*Heller* D.C. Circuit dissenting opinion, which emphasized that postratification evidence is properly individuated as traditionalist.[316]

Thus, traditionalism and originalism might diverge along at least three axes involving the weight each gives to different types of evidence of constitutional meaning over time. First, the weight of evidence of original meaning is less for traditionalism than it is for originalism. Second, the weight of preratification evidence of meaning is greater for traditionalism than for originalism. Third, the weight of postratification evidence of meaning is greater—perhaps comparatively greater than it is along the second axis—for traditionalism than it is for originalism.

When either age or continuity is questionable, the power of traditionalism diminishes. But these two dimensions of duration can also be conceived on a sliding scale. In *Noel Canning*, for example the age of the practice of recess appointments relied on by the Court was not particularly impressive.[317] But the Court nevertheless found a less-than-powerful practice when measured by age alone to control the outcome because of the high concentration of the practice during the relevant period.[318] The ski slope was short

313 William Baude argues that "[l]iquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise." Baude, *supra* note 3, at 4. Professor Baude traces the idea of liquidation to the views of James Madison's *Federalist No. 37*, where Madison argued that a long course of practice could "settle" a constitutional question where the text was indeterminate. *Id.* (citing THE FEDERALIST NO. 37, at 269 (James Madison) (Benjamin Fletcher Wright ed., 1961)).

This Article's project is different from Professor Baude's, since it aims to describe a method as it has existed and currently exists in the Court's interpretive practice, while Baude focuses on a historical argument advanced by Madison and its utility today. *Id.* at 1. Baude claims some of the decisions described here as traditionalist—such as *Noel Canning*—as examples of liquidation, and he largely avoids discussion of what liquidation might mean for the Court's civil rights jurisprudence. *Id.* at 6–7. He also describes "tradition" in a way different than used in this Article, as a pragmatic and principled grounding for liquidation. *Id.* at 44–47. Nevertheless, it is an interesting question whether the Court's long and pervasive use of traditionalist interpretation is consistent with the method Baude describes, or whether liquidation is an example of traditionalist interpretation.

314 *See* The Pocket Veto Case, 279 U.S. 655, 688–91 (1929).

315 District of Columbia v. Heller, 554 U.S. 570, 598–603 (2008).

316 *See* Heller v. District of Columbia, 670 F.3d 1244, 1273–74, 1274 nn.6–7 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

317 NLRB v. Noel Canning, 134 S. Ct. 2550, 2564 (2014) (noting three-quarters of a century of practice).

318 *Id.*

but very densely packed with snow. Something similar occurred in *Midwest Oil*.[319] The components of age and continuity sometimes interact with one another: as evidence for one becomes stronger, evidence for the other need not be quite as strong. But traditionalist interpreters always account for both components of duration in according authority to the practices they believe influence constitutional meaning.[320]

An important open question about duration concerns cases where a tradition, at least when described narrowly, does not exist at all at the time of the constitutional text's ratification but subsequently comes into being. The legislative prayer cases and opinions—the *Town of Greece* dissent, for example, as well as the Ninth Circuit panel opinion and statement by Judge O'Scannlain in *Chino Valley Unified School District*—present such a situation.[321] So does the *Pocket Veto Case*.[322] These cases can be approached by narrowing and broadening the tradition, but they also point to an unresolved issue about duration in traditionalist interpretation: that is, whether particular patches of sparsity in the tradition's duration, such as at the time of ratification, are more significant or damaging to the tradition's authority than other sparse patches before or after ratification.

C. Presumptive but Defeasible Influence

The final component of traditionalism is that a tradition is given a very strong presumption of validity that nevertheless sometimes may be overcome by other considerations. The Court speaks explicitly about this presumption in favor of a tradition in several cases examined in this Article, including *Dames & Moore v. Regan*,[323] *Midwest Oil*,[324] *Haslip*,[325] and *Campbell*.[326]

But in a much larger range of cases, even if the Court or particular Justices interpreting traditionally do not use the word "presumption," they make clear that the interpretive strength of a tradition may be overcome by other weightier considerations. One, of course, is text that directly conflicts with a tradition. Justice Scalia made this point in his *Noel Canning* concurrence (one that was not disputed in principle by the majority, though in practice it

319 *See* United States v. Midwest Oil Co., 236 U.S. 459, 469–72 (1915).

320 Another question not addressed by this Article concerns precisely how much evidence of continuity there must be in order for a practice to become a tradition.

321 *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1845–46 (2017) (Kagan, J., dissenting); Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 910 F.3d 1297, 1301 (9th Cir. 2018) (O'Scannlain, J., respecting the denial of rehearing en banc).

322 *See* The Pocket Veto Case, 279 U.S. 655, 688–91 (1929).

323 453 U.S. 654, 686 (1981).

324 *See supra* text accompanying notes 98–105.

325 *See supra* text accompanying notes 232–35.

326 *See supra* note 237 and accompanying text.

was neatly sidestepped by finding ambiguity rather quickly)[327] as well as in his *Haslip* concurrence, where he explained:

> Let me be clear about the scope of the principle I am applying. It does not say that every practice sanctioned by history is constitutional. . . . [T]he principle I apply today does not reject our cases holding that procedures demanded by the Bill of Rights . . . must be provided despite historical practice to the contrary.[328]

"[N]o practice . . . inconsistent with constitutional protections," as Justice Powell said in his *Watson* concurrence, "can be saved merely by appeal to [historical] acceptance."[329]

What the Court takes to be a particularly strong moral principle can also overcome the presumption in favor of a tradition. For example, the Court's traditionalist interpretation of the scope of due process in *Bowers v. Hardwick* gave way in *Lawrence v. Texas* to what the Court believed was a stronger and more vital constitutional principle of liberty protecting intimate activity.[330] By contrast, the Court in *Glucksberg* deemed the practice of physician-assisted suicide not to warrant due process protection on traditionalist grounds, and it did not find a moral principle strong enough to overcome the presumption.[331] But in *Obergefell*, the Court made clear that traditionalism has no role in its "marriage and intimacy" due process doctrine.[332] Likewise, "general concerns of reasonableness," as the majority put it in *Haslip*, might overcome the presumption in appropriate circumstances.[333] These may be powerful moral principles, but they may also be powerful pragmatic or policy-oriented considerations. In other due process areas not implicating these issues—personal jurisdiction, the rights of defendants in criminal proceedings, and others—the presumption in favor of traditionalism seems stronger.

Outside of areas concerning marital and intimate conduct (where the Court has made its position plain), an important open issue is the relative strength of the presumption in favor of a tradition with respect to the areas studied in this Article. While a comprehensive evaluation of that question must await another study, one salient variable concerns the history and purposes of the specific constitutional clause at issue.

The contrast between the Equal Protection Clause and the Due Process Clause is instructive in this respect. While the Court has determined that the function of the former is progressive and oriented to the abstract idea of equality, it has long observed that the scope of the latter is informed by "[the] law of the land."[334] Invoking tradition as a justification for interpret-

327 NLRB v. Noel Canning, 134 S. Ct. 2550, 2592, 2600 (2014) (Scalia, J., concurring); *see id.* at 2564 (majority opinion).

328 Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring).

329 United States v. Watson, 423 U.S. 411, 430 (1976) (Powell, J., concurring).

330 *See supra* text accompanying notes 261–63, 272.

331 *See supra* text accompanying notes 264–69.

332 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015)

333 *Haslip*, 499 U.S. at 18.

334 *See, e.g.*, Hurtado v. California, 110 U.S. 516, 535 (1884).

ing the Equal Protection Clause is highly controversial, as demonstrated by a current conflict in the circuit courts concerning the constitutionality of municipal regulations of public toplessness that distinguish between men and women.[335] Indeed, it may be that traditionalism has not been identified until now because the Court has sometimes used it in embarrassing and sloppy ways in the Equal Protection Clause context, as it did in *Plessy v. Ferguson*.[336] Constitutional scholars may have missed the larger interpretive method adopted across constitutional law that was right under their noses, preferring to imagine that the Court never interprets traditionally any longer.[337]

Yet the valences of the Due Process Clause, by contrast, are innately traditionalist, rendering it a much more plausible vehicle than the Equal Protection Clause for traditionalism. Something similar may be said for the difference between the Free Exercise Clause and Establishment Clause of the First Amendment. The Court rarely interprets the Free Exercise Clause traditionally, while it does so frequently for the Establishment Clause, and there is an open question about whether the difference reflects something internal about the function of these respective provisions. Other constitutional clauses will have their own structural valences as well.

IV. Explaining Traditionalism

This Article has identified traditionalism as a distinctive method, described it as practiced by the Supreme Court across the constitutional canon, and isolated and examined its essential components. While a complete defense of traditionalism is beyond its scope, this Article attempts in this Part to explain some of the reasons that the Court or its several Justices adopt it. The Justices almost never explicitly defend appeals to tradition. They certainly do not say, for example, that they interpret traditionally because the past must always be followed, or because it is simply what constitutional interpreters do. Sometimes they do not adhere to past practices in discerning constitutional meaning and sometimes they adopt other interpretive methods. Here, too, they rarely explain themselves or justify their choice of methods.

This Part of the Article is in consequence more speculative than the others, inferring certain purposes and justifications from the doctrinal

335 *Compare* Tagami v. City of Chicago, 875 F.3d 375, 379–80 (7th Cir. 2017) (upholding the regulations as consistent with intermediate scrutiny), *reh'g denied*, 875 F.3d 375, *with* Free the Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792, 802–05 (10th Cir. 2019) (striking down the regulations under intermediate scrutiny).

336 *See supra* text accompanying notes 276–78.

337 For analogous observations in a jurisprudential vein, see Dan Priel, *Not All Law Is an Artifact: Jurisprudence Meets the Common Law*, *in* Law as an Artifact 239, 264–65 (Luka Burazin et al. eds., 2018) ("The association of the common law with the political theory of tradition is at least as old as Edmund Burke, if not older. Given this long historical provenance, it is a good question why it has been largely ignored by legal philosophers." (footnote omitted)).

deposit. Yet just as Lon Fuller once observed that explanations of "law" "are not mere images of some datum of experience, but direction posts for the application of human energies,"[338] something similar may be said about interpretive methods for determining constitutional meaning. To understand an interpretive method, one has to explain its purposes—the reasons that interpreters are attracted to it, what it is good for, its justifications.

A. Actions (Can) Speak Louder than Words

Traditionalism contrasts most sharply with interpretive approaches that rely upon the ongoing elaboration of an abstract principle or idea—derived from underdeterminate text—to derive constitutional meaning, whether those methods are described as ethical, moral, principled, or test-based. Judges who have most clearly adopted traditionalist methods—Justice White in *Watson*; Justice Lamar in *Midwest Oil*; Justice Brennan in *Walz*; Justice Kennedy in *Town of Greece*; Chief Justice Rehnquist in *Glucksberg*; Justice Alito in *Summum*; Justice Breyer in *Noel Canning*; Justice Scalia in *Burnham*, *Brown v. Enterntainment Merchants Association*, and *Haslip*; and then-Judge Kavanaugh in *Heller v. District of Columbia*,[339] for example—all demonstrate skepticism about principled, test-driven, or moral approaches to constitutional interpretation that, if applied rigorously, would injure or perhaps destroy a political or cultural practice.

Test- or principle-driven approaches, as Justice Scalia said in his *Burson* concurrence, are often inferior to traditionalist interpretation.[340] Either the test or principle cannot accommodate the tradition; or the test or principle loses its conceptual cogency if it is expanded to encompass a tradition that does not properly fit within it. Traditionalist interpreters strongly sense the conflict between abstract principles and concrete practices, and they adopt traditionalism because they see value in the latter and wish to protect them against the former. They believe that actions can sometimes speak louder than words when it comes to constitutional interpretation, at least when words do not convey a clear and determinate meaning and are instead susceptible of constructed or even invented meanings. Even more, actions and practices are constitutive of the words that they instantiate: we could not have a clear idea about the meaning of the words without recourse to the practices illustrating them.

Similarly, Justices who most clearly reject traditionalism—Justice Stevens in *Burson*; Justice Blackmun in *County of Allegheny*; Justice Breyer in *Brown v. Entertainment Merchants Association*; Justice Brennan in *Lynch* and *Burnham*; Justice Kennedy in *Roper* and *Obergefell*; and Justice Douglas in *Sniadach* and

338 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958).

339 For discussion of these cases, see *supra* text accompanying notes 196–202, 98–105, 176, 39–52, 264–71, 153–54, 75–87, 225–31, 136–42, 232–36, and 193–95, respectively.

340 Burson v. Freeman, 504 U.S. 191, 214–16 (1992) (Scalia, J., concurring).

Levy,[341] for example—argue for the primacy of principles and moral ideals over practices. To depend upon a tradition, as Stevens said in his *Burson* dissent, "confuses history with necessity, and mistakes the traditional for the indispensable."[342] For them, traditions should never defeat principled arguments for the interpretation and expression of the ideals they believe are latent in the Constitution. Theirs is not only an evolutive conception of constitutional meaning, but also one that favors contemporary concerns and their own moral evaluations over enduring practices. They believe that traditions that do not conform to or are outrun by principled evaluation should be abandoned. They are sanguine about the complete union of their favored principles with constitutional interpretation.[343]

The question is how best to explain the traditionalist's skepticism, and the antitraditionalist's enthusiasm, about principled interpretation. Again, the Justices never lay out clearly their justifications for traditionalist interpretation, or the reasons for their high regard for practices over principles, so some informed guesswork is necessary. Whenever tradition is mentioned, legal theorists have a tendency to turn reflexively to the eighteenth-century English politician, Edmund Burke, and to explain appeals to longstanding practices in more broadly "Burkean" terms reflecting a preference for collective wisdom over philosophical ideals or principles.[344] And it is true that Burke contrasted traditional arrangements and abstract theory in politics and law.[345] Indeed, in prior work, I have explored whether Burke's incremental approach to law and politics can help make sense of religion clause theory and jurisprudence.[346]

Whatever may be said of Burke himself,[347] however, many of the most prominent strains of contemporary "Burkeanism" in the legal academy are

341 For discussion of these cases, see *supra* text accompanying notes 146–52, 168–70, 136–42, 160–67, 225–31, 212–16, 273–74, 244–45, and 280, respectively.

342 *Burson*, 504 U.S. at 220 (Stevens, J., dissenting).

343 *See generally* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION 115, 122 (Amy Gutmann ed., new ed. 2018).

344 *See, e.g.*, Bradley & Morrison, *supra* note 1, at 426; Strauss, *supra* note 300, at 891–94; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 686–88 (1994).

345 *See, e.g.*, Edmund Burke, Reform of the Representation of the Commons in Parliament (June 16, 1784), *in* 3 THE SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE 43, 48 (London, A. Strahan 1816); Edmund Burke, Speech on the Petition of the Unitarians (May 11, 1792), *in* 5 THE WORKS OF EDMUND BURKE 367, 367 (Boston, Charles C. Little & James Brown 1839); *see also* Harvey C. Mansfield, Jr., *Introduction: Burke's Theory of Political Practice*, *in* SELECTED LETTERS OF EDMUND BURKE 1, 4 (Harvey C. Mansfield, Jr. ed., 1984) ("If there is one recurrent theme in Burke's letters, speeches, and writings, it is his emphasis on the moral and political evils that follow upon the intrusion of theory into political practice.").

346 *See* DEGIROLAMI, *supra* note 55, at 107–20.

347 For a superb discussion of Burke's traditionalism in the area of church-state relations, see Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393.

highly pragmatic and consequentialist in orientation. Professor Cass Sunstein, for example, has argued that:

> Burkeanism does not rest on a belief that the past has any kind of inherent authority, or on a judgment that people owe some kind of duty to the past, or the notion that we are in some way constituted by our tradition . . . . Burkeanism is best justified in pragmatic terms, on the ground that it is likely to lead to better results than the imaginable alternatives.[348]

Similarly, Professors Bradley and Morrison claim that "Burkean thinking" supports the view that "the fact that the political branches have worked out a particular arrangement through repeated practice over time suggests that it is normatively desirable."[349]

But this second-best, pragmatic, best all-things-considered justification for "Burkeanism" matches up spottily with what one can infer from the Court's use of traditionalism. The Court and its individual Justices often interpret traditionally because they believe that there is a fundamental *conflict* between practice-based and principled constitutional interpretation. This conflict is insoluble and perpetual, and it makes traditionalist interpreters wary of uniting principle extracted from vague constitutional text to constitutional interpretation, lest they disrupt or destroy what they regard as valuable political and cultural practices.

Yet if the Court sees value in traditions, it is worth asking of exactly what sort. Whatever value it sees does not seem primarily result oriented. When the Justices interpret traditionally, they rarely suggest that longstanding practices reflect the best all-things-considered policy today—ones that, for example, a legislator or policymaker would choose independently if starting fresh. To the contrary, the Court sometimes has suggested that a policymaker might *not* choose the practice today if not for its traditional status. Rather, traditionalism reflects the view that theory and practice can never be united and that the compulsion to bring them together damages them both. As Justice Scalia's *Burson* concurrence suggested, the practices of law would become unhealthfully ideologized, while law's principles would become incoherent.[350] Instead, traditionalist interpreters believe that vague or open-ended constitutional text should be tied to the concrete and lived experience reflected in American practices. Conversely, antitraditionalists, as Justice Stevens explained in his *Burson* dissent, view tradition as a distraction from what is necessary.[351] Tradition bestows on what is contingent the *appearance* of necessity, settling all of the truly meaningful questions before they are even raised. Tradition puts principle and reason to sleep.

The traditionalist view, as it is expressed in the Court's jurisprudence, is much older than either Burke or Burkeanism. It is, as Arthur Melzer has

348 Sunstein, *supra* note 344, at 404.

349 Bradley & Morrison, *supra* note 1, at 435.

350 *See supra* note 340 and accompanying text. For further discussion of the conflicts of theory and practice, see DEGIROLAMI, *supra* note 55, at 107–20; MELZER, *supra* note 55, at 109.

351 *See supra* text accompanying notes 150–51.

persuasively argued, a fundamentally premodern view of the relationship of "theory and praxis": "[T]he earlier, especially the classical understanding of theory and praxis, assumed that the philosopher transcended ordinary practical life in a way that put him in tension with it and with the long-standing customs, myths, and prejudices of his society."[352] When it interprets traditionally, the Court is motivated not by pragmatics or expectations of best all-things-considered outcomes and consequences. It is not trying to harmonize principle and practice by subsuming the former to the latter, as suggested by the Burkeans, in an effort to reach the best interpretive outcome that it can under second-best circumstances.

Rather, the Court seems to be motivated by something like fear. There may be a "best," or a second- or third-best interpretation of the Constitution that reflects an objectively true moral and political order; and there may not be. Traditionalists can be agnostic on this question and set it aside. They may believe that traditionalist interpretation reflects, even imperfectly or in a second-best way, the moral and political beau ideal or the truest meaning of the Constitution. Or they may be skeptical about the existence of such a perfect state of affairs, or at least of their own capacity to achieve it. They can abstain from the cardinal question of best worlds.

But they are *not* agnostic about the ordinal question. They have a more definite view about whether there are better and, especially, worse ways to live than they and their society actually have lived and do live. They believe that the traditions of American constitutional law have generally (not always, and with several important exceptions, but at least presumptively) served tolerably well. Traditionalists are particularly worried about worse alternatives to traditionalism.

It is the fear of what completely principled or fully theorized interpretation will do if given free rein: fear of intolerance; fear of the corrosion of lived experience; fear of the distortion and usurpation of text to mirror a certain narrow class of contemporary moral and political views; and fear of a kind of political and legal doctrinairism unleashed by principled interpretation if carried out comprehensively. Traditionalism is a form of defense against those (from a traditionalist perspective, unwelcome) possibilities.[353] The Court or its Justices interpret traditionally because they worry about what they regard as far worse political and moral alternatives that they fear will damage their society if they adopt a fully principled approach to constitutional interpretation.

Antitraditionalist interpreters might at this point well ask why a tradition that cannot be justified on thoughtful, rational, or principled grounds could ever be socially salubrious. Of what social benefit is a thoughtless or unreflective tradition? Is it not better discarded?

One response to this set of questions is that "thoughtful" interpretation in constitutional law has generally meant interpretation that reflects the val-

352 MELZER, *supra* note 55, at 138.

353 Thanks to Steven Smith for helpful discussion of the difference between "believing traditionalists" and "skeptical traditionalists."

ues, principles, and predilections of the educational and social elites in American society. "[T]he thoughtful part of the Nation," as a plurality of the Court once put it in *Planned Parenthood v. Casey*, one of its most antitraditionalist substantive due process opinions, is the part that embraces "applications of constitutional principle to facts as they had not been seen by the Court before."[354] Yet it is often precisely those new principled applications that reflect elite moral and political sensibilities and preferences, and that have been used by the Court to dismantle the existing traditions of nonelites.

Indeed,

> [b]eginning in the mid-twentieth century, the Court inserted itself into [many] cultural and social conflicts—about the nature of the human person, sexual mores, church-state relations, [the nature of freedom and equality,] and many other subjects. It purported to resolve cultural disagreement by [extracting broad principles of liberty and equality from constitutional text,] and it earned a certain . . . prestige for its decisions, [by listening for and] channeling the consensus of an elite constituency.[355]

Traditionalism is generally a constitutional approach more suited to nonelites in American society—those whose longstanding practices, and the moral and political commitments they instantiate, may not conform to the ongoing "thoughtful" reimagination of the Constitution to reflect and impose elite opinion as a national mandate.

This is not to say that traditionalist interpreters never rely on principles at all. Sometimes Justices who interpret traditionally in one context interpret antitraditionally in others. Traditionalists acknowledge, as Professor McConnell put it in his critique of the tradition of legislative prayer, that "like cases are treated alike, and that those governed by the Constitution [must] understand what is required of them."[356] They agree that sometimes principles can be useful in achieving these ends.

But they dissent from McConnell's view that these ends may only be achieved through purely principled interpretation. Sometimes practices serve these rule-of-law ends better than principles; they may be more predictable, and more comprehensible, constitutional guides for the governed—closer to their own experience and more accessible than the airy abstractions of those whose experience of life is quite different than their own. Sometimes practices serve other desirable ends: we may not see clearly what the principled ends of constitutional governance require, and in our zeal for the fulfillment of principled constitutionalism, we may crush or wipe out worthwhile ways of living that do not cohere with them. Traditionalist interpretation thus serves a protective function in the perpetual conflict of practice and principle. The Court uses traditionalism as a shield against the threat of the complete philosophication of law, one that antitraditionalist interpreters

354 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion).

355 Marc O. DeGirolami & Kevin C. Walsh, *Kennedy's Last Term: A Report on the 2017–2018 Supreme Court*, FIRST THINGS, Oct. 2018, at 31.

356 McConnell, *supra* note 73, at 363.

believe is both unnecessary and even positively obstructive and harmful for making the Constitution the best it can be.

B. The National Before the Universal

Running alongside the conflict of concrete practices and abstract principles is another concerning the national and the universal. Traditionalists are interested in what they argue are distinctively *American* traditions as embodied in *American* practices. As the Court emphasized in both *McDonald v. City of Chicago* and *Summum*, it is "our" "American" traditions that matter for interpretation, not the traditions of other countries or international bodies.[357] The Court in *United States v. Brewster* similarly emphasized the distinctively "American" inflection of the older, and broader, English tradition of legislative insulation from legal action for "speech or debate."[358] Justice Scalia stressed the "long usage of *our* people" in his decisive *Burson* concurrence as of particular importance for traditionalism.[359]

Antitraditionalist interpretation, by contrast, is oriented toward the universal. As the Eighth Amendment capital punishment cases suggest, antitraditionalist interpretation is open to—indeed, sometimes greatly solicitous of—the contemporary views (though generally not the historical views) of other nations and international bodies on particular moral or policy matters. True, traditionalist interpreters often explore historical practices in English common law, but this is generally in order to construct the pattern of practice that is the basis for a particularly American national tradition. Antitraditionalist interpreters, by contrast, emphasize universally binding principles and "evolving standards of decency" embraced by all "civilized nations" and respected international bodies.[360] Even in the case of ethical interpretation, which ostensibly attempts to discern an "American" worldview,[361] the focus is rarely on evidence of anything distinctively or historically American but instead on those views the author regards as universally attractive.

The division between the national and the universal might be explained on the basis of democratic politics and institutional dynamics. Traditions—particularly when they are government traditions—often reflect particular democratic choices or arrangements supported by popular approval, acceptance, or, at the very least, inertia. When the democratically unaccountable Court upsets a tradition in favor of a uniform and universal rule that invalidates the tradition, it is arguably acting antidemocratically. So, for example, Professor McConnell has argued that traditional interpretation and a reliance on "settled judgment[s]" enables judges to "keep faith with the democratic postulates of our system" while also exercising a bit of antimajoritarian

357 *See supra* notes 253–56, 155 and accompanying text.

358 United States v. Brewster, 408 U.S. 501, 508 (1972).

359 Burson v. Freeman, 504 U.S. 191, 216 (1992) (Scalia, J., concurring) (emphasis added).

360 *See* Roper v. Simmons, 543 U.S. 551, 561, 575–76 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 101, 102 (1958) (plurality opinion)).

361 *See* BOBBITT, *supra* note 11, at 94.

intervention where government bodies veer wildly from national consensus.[362] There is evidence that traditionalists on the Court sometimes have this purpose in mind, as when Justice Scalia defends traditionalism because it "intrudes much less upon the democratic process" than its competitors.[363]

Yet the emphasis in the Court's doctrine on the distinctively "American" quality of traditionalism—of "our people"—and the parallel emphasis in other cases on the concomitantly distinctive universal or cosmopolitan quality of antitraditionalist interpretation, suggests that there may be more than an appeal to democratic politics or institutional dynamics at play. Traditionalists adopt a view of the American nation and its practices as legally salient for constitutional interpretation. They are especially interested in national limits and national histories as defining the relevant traditions. Antitraditionalists instead think of national practices and histories as, at best, only one indicium of a larger, universally enlightened set of mores, attitudes, and ideals that ought to influence constitutional interpretation. Traditionalists insist on national fixedness and specificity, while antitraditionalists insist on political and cultural fluidity and universality.[364]

Of course, these positions are not rigid, always admit exceptions, and may be overcome by more important considerations. As already noted, the presumption in favor of a tradition is powerful, but it may be defeated by other more powerful concerns—a particularly powerful moral principle, for example, or a pragmatic necessity—just as antitraditionalist interpreters often account for and acknowledge the relevance of state practices in interpreting constitutional text.[365] But these opposing perspectives do influence constitutional interpretation as general outlooks. Traditionalists are more inclined to sense that any society—just in order to be a society—must be in some sense closed, and that closed societies are constituted by the embedded and long-lived practices within national boundaries.[366] As Mark Lilla has put it: "Societies since time immemorial have been closed things. That is what makes them societies."[367] If political and cultural life are often made up of such traditions, then it follows that traditions impact constitutional interpretation as well.

362 McConnell, *The Right to Die*, *supra* note 2, at 685; *see id.* at 682–85.

363 McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring).

364 For related reflections on the multiple understandings of the concept of "human dignity," see Mark L. Movsesian, *Of Human Dignities*, 91 NOTRE DAME L. REV. 1517, 1518–19 (2016).

365 *See, e.g.*, *Roper*, 543 U.S. at 564–65; Atkins v. Virginia, 536 U.S. 304, 313–17 (2002). Other Eighth Amendment capital punishment cases where the Court incorporates state practices also demonstrate this tendency.

366 Joshua Kleinfeld has offered some analogous observations about the socially constitutive function of criminal law in any given society. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1492 (2016) ("Reconstructivism sees criminal law as the defender of a shared moral culture . . . .").

367 Mark Lilla & Michael Ignatieff, *Open Society as an Oxymoron*, *in* RETHINKING OPEN SOCIETY 19, 19 (Michael Ignatieff & Stefan Roch eds., 2018).

Antitraditionalists are by contrast inclined to believe that social and cultural fluidity and flux renders the idea of "American" or "our" traditions artificial, narrow, and perhaps even excessively patriotic or prejudiced. Traditionalism unjustly privileges the national as against the individual. This is particularly objectionable to antitraditionalists in the context of interpreting the scope of individual rights, where the Court is often said to exercise a countermajoritarian function, protecting minority rights against democratic encroachment. But traditionalism also privileges the national against the universal. Many traditions are constructed for some ulterior, chauvinistic, and possibly unfair, illegitimate, or hegemonic purpose that may have had purchase in the distant and less enlightened past ("under a feudal regime," as Justice Douglas put it in *Sniadach*),[368] but no longer should today.

"Much in our political culture, institutions, and practices has changed since the turn of the century," and changed for the better, as Justice Stevens—perhaps the archetypal antitraditionalist—put it.[369] In many cases, what Americans thought were real or important national traditions have been cast aside. Some traditions were complete fabrications anyway. They may have "appear[ed] . . . to be old [but actually were] often quite recent in origin and sometimes invented."[370] At the very least, antitraditionalists see traditions as contingent or inessential elements of constitutional interpretation.

As already noted, it may be that some of these conflicts in outlook have led constitutional theorists to overlook the pervasiveness of traditionalism in the Court's doctrine. "Liquidation," for example, may or may not be an example or a manifestation of traditionalism; but if it is, it has not, contrary to Professor Baude's view, been ignored by the Court since the time Madison wrote.[371] It is everywhere, ubiquitous in the Court's doctrine, and it has been for some time. The Court's clashes over traditionalist interpretation—ones that can be inferred from the doctrine—gesture toward much larger underlying, and perennial, debates about whether political and constitutional morality is truly national or universal.

C. Interpretive Method or Adjudicative Method?

A final somewhat speculative inference from the doctrine is that perhaps the Court or its Justices are mistaken about the reasons that they look to tradition. Even though they believe that they are interpreting the Constitution traditionally, what they are actually doing is something else: adjudicating traditionally. Scholars who distinguish between theories or methods of interpretation and adjudication note that the question of what the document means is different than the question of how the document should be used by

368 Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

369 Burson v. Freeman, 504 U.S. 191, 222 (1992) (Stevens, J., dissenting).

370 Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1, 1 (Eric Hobsbawm & Terence Ranger eds., 20th prtg. 2012).

371 *See* Baude, *supra* note 3, at 69.

judges deciding cases.[372] Certain judicial practices, on this account, have nothing to do with the meaning of the text, but are instead techniques for resolving disputes that are exceptions to the meaning of a text. For example, for those that draw these distinctions, stare decisis is not a feature of constitutional interpretation—the activity of understanding the meaning of the constitutional text—but an exception to it that stabilizes meaning for some other reason.[373] Thus, adjudicative meaning is meaning that judges might themselves recognize as interpretively erroneous but is simply "postulated for the purposes of deciding a case."[374]

The dichotomy between interpretation and adjudication presents the possibility that when the Justices look to the existence and endurance of traditions, they are engaged in an adjudicative rather than an interpretive enterprise. That is, they know or suspect that the Constitution means something different than is suggested by a tradition, but they refuse to resolve the case according to the text's meaning. Perhaps, for example, they are unwilling to upset long-settled or well-grounded expectations about meaning, as they often say they are in following the rule of stare decisis. People have relied on the existence of a tradition for many years, and the Court no more wishes to upend those reasonable expectations than it does in the case of a longstanding precedent unless there are strong reasons to do so.

This is certainly a possible explanation for traditionalism. Setting aside the possibility of intentional misdirection, the Justices simply may not realize just why they rely on tradition, mistaking the activity of case resolution for textual interpretation. But if the Court is actually engaged in adjudication rather than interpretation when it uses traditionalist methods, traditionalist adjudication may nevertheless have significant implications for other prominent theories. Consider Professor David Strauss's "common law constitutionalism," which treats "common law" adjudication as a unified approach to resolving constitutional cases.[375] Strauss claims that "rational traditionalism . . . is the most important part of common law constitutional interpretation," and he argues that his approach validates the constitutionality of "relatively new practices" and "precedents" so long as they have achieved widespread acceptance and are justified on the basis of universal rationality.[376]

But if the approach described in this Article is properly conceived as traditionalist adjudication, then it suggests that Strauss's case-resolution method is not unified at all. It breaks up into discrete approaches depending on the judge's stance on the practices-principles and national-universal dichotomies described above. Traditionalist adjudicators might also favor

372 *See* Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2145 (2017) ("A theory of interpretation is a theory of meaning.").

373 *Id.* at 2155 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 413–14 (2012)).

374 *Id.*

375 Strauss, *supra* note 300, at 888.

376 *Id.* at 879, 892.

common-law constitutionalism if national practices of long duration are presumed constitutional; but they would reject a common-law constitutionalism that emphasized the vanguardism and universal rationalism that Strauss describes as an integral part of his method. Common-law constitutionalism thus would fragment into what could be termed a maintenance or preservationist model and an improvement or progressive model.

Other problems of judicial self-awareness are possible as well. It is possible, for example, that the Justices are influenced by past practices even when they do not acknowledge it in their opinions. Conversely, their conscious and explicit appeal to tradition may be selective, so that even when they purport to be relying on tradition, it is not certain how much influence tradition has actually had on their decisions.[377] It may be that the Justices, or at least some of them, are not entirely clear about how tradition functions in their decisionmaking. Here it may be helpful to contrast Justices who are methodologically self-aware or consistent with others whose methodological preferences are more eclectic or, less positively, erratic. Justice Scalia and Justice Stevens, for example, are relatively consistent in their preference for traditionalist and antitraditionalist interpretation, respectively. Justice Kennedy interprets traditionally at some moments and antitraditionally at others. While the consistency of Scalia and Stevens does not necessarily resolve the interpretation/adjudication question, it is at least notable that Scalia and Stevens take themselves to be engaged in an interpretive exercise.

These are all valuable objections to, and possible alternative explanations of, traditionalism. But this Article's aim has been to describe an interpretive approach as the Court and its Justices believe themselves to be using it, and it takes what they say about what they are doing and why they are doing it at face value. That assumption does not negate the possibility of self-deception. Perhaps the fear of what fully principle-driven interpretation might do leads traditionalist interpreters into a kind of exercise in avoidance, knowing that the Constitution means *X* but interpreting it to mean *Y* for some ulterior reason that the Justices may not even admit to themselves. But this is not the way that the Court typically presents traditionalist interpretation. When it interprets traditionally, the Court takes itself to be interpreting the Constitution, not avoiding the Constitution's true meaning for the sake of some other explicit or subconscious objective.

The discussion in Part II of traditionalism in action suggests that when the Court or its Justices interpret traditionally, they believe that they are offering an account of the Constitution's meaning, rather than resolving a dispute in a fashion that may be inconsistent with that meaning. They think they are adopting a defeasible presumption that a people engaging in a practice for a long time and continuously over that span would not do so—and would not continue to do so—unless it believed that its practice was consistent with the meaning of its foundational political document. That is an

377 This criticism could be made of any interpretive method. The Justices may rely on precedent, moral principle, structure, and other methods even when they do not say so; or they may not rely on them when they say that they do.

exercise in the interpretation of the Constitution's words—an inference about what the words mean derived from how people bound by the document have behaved over time. As the Court put it in *Town of Greece*, this Article's first and perhaps clearest case of traditionalism: "[I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted," because the meaning of the Clause is informed not by abstract principles extracted from vague words, but by practices.[378]

Conclusion

This Article has identified a new interpretive method: the use of tradition to inform constitutional meaning. It has shown the prevalence and consistency of traditionalist interpretation across the domains of constitutional doctrine. It has distilled three elements of traditionalism: a focus on American political and cultural practices; of substantial duration, encompassing both a practice's age and continuity; and carrying a powerful but defeasible presumption of interpretive validity. And it has inferred from the doctrine several explanations or justifications for interpreting traditionally, as well as recurrent judicial criticism of the method.

Traditionalism exists across the Court's constitutional doctrine. Its scope and influence are considerable. Its purposes are rich and complex. And it promises to figure prominently in many constitutional controversies on the near and more distant horizon.

378 Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014).