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The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution

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THE JURISPRUDENCE OF TRADITION AND JUSTICE SCALIA'S UNWRITTEN CONSTITUTION

*J. Richard Broughton**

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Long before living memory our ancestral way of life produced outstanding men, and those excellent men preserved the old way of life and the institutions of their forefathers. Our generation, however, after inheriting our political organization like a magnificent picture now fading with age, not only neglected to restore its original colours but did not even bother to ensure that it retained its basic form and, as it were, its faintest outlines.

- Marcus Tullius Cicero, *The Republic*¹

I. INTRODUCTION

The ancient Greeks called it *nomos*.² The Romans embraced it as *mores majorum*, the ancestral ways that Cicero described.³ Most significantly, Burke championed it as the principle of prescription, the obligation to respect and maintain the “slow and patient product[s] of reason dealing with the evolving complexity of human affairs.”⁴ Whatever its label, tradition has long been a vital ingredient in the creation and development of jurisprudence and the human understanding of law. In like manner, as Tocqueville recognized, the United States Constitution itself bears the imprimatur of centuries of trial and continuity, drawing on the practices and lessons of many great cultures, such as Athens, Rome, and, in particular, London.⁵ Accordingly, the use of tradition as a method for guiding the

¹ MARCUS TULLIUS CICERO, *THE REPUBLIC* 81 (Niall Rudd, trans., Oxford Univ. Press 1998) (54 B.C.) [hereinafter *REPUBLIC*].

² See J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 8 (1992). As explained further *infra*, Part II, Minister Kelly notes that *nomos* ultimately had more than a single connotation but was the most common understanding of “law” as we know it. *Id.*

³ See RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 102 (3d ed. 1991) [hereinafter *ROOTS OF AMERICAN ORDER*]. Professor Kirk’s work in this area is highly regarded, particularly for its revival of Burkean political theory, and this article relies liberally upon it.

⁴ Francis Canavan, S.J., *Kirk and the Burke Revival*, 30 *INTERCOLL. REV.* 43, 45 (1994). See also EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 33-34 (L.G. Mitchell, ed., Oxford Univ. Press, 1993) (1790) [hereinafter *REFLECTIONS*] (detailing Burke’s principle of prescription as applied to political affairs); RUSSELL KIRK, *THE POLITICS OF PRUDENCE* 19 (1993) [hereinafter *POLITICS OF PRUDENCE*] (restating Burke’s principle of prescription and arguing that, as Burke insisted, “[t]he individual is foolish but the species is wise. . . . we do well to abide by precedent and precept and even prejudice, for the great mysterious incorporation of the human race has acquired a prescriptive wisdom far greater than any man’s petty private rationality.”).

⁵ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 113-14 (George Lawrence, trans., Harper Perennial Books 1969) (1848). See also RUSSELL KIRK, *RIGHTS AND DUTIES* 4 (1997) [hereinafter *RIGHTS AND DUTIES*] (“[t]he Constitution of the United States was and is rooted in the experience and the thought of earlier times. . . . Deeply rooted, like some immense tree, the American Constitution grew out of a century and a half of civil social order in North America and more than seven centuries of British experience.”); JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* 60 (C. Gordon Post, ed., Hackett Publishing, 1953) (explaining that “[a] constitution, to succeed, must spring from the bosom of the community and be adapted to the intelligence and character of the people and all the multifarious relations, internal and external, which distinguish one people from another.”). It is true that Calhoun’s *Disquisition*

improvement (albeit gradual) of constitutional law has played an indispensable role in America since the framing.⁶

What are our traditions? Professor Kirk explains that American traditions, few of which originated here, are our “prescriptive social habits, prejudices, customs, and political usages which most people accept with little question, as an intellectual legacy from their ancestors.”⁷ Among these are, for example, belief in a “spiritual order which in some fashion governs our mundane order;”⁸ self-government; the significance of private personal rights; the value of marriage and family.⁹ But tradition is, and may be, much more than these. Traditions, by definition, ought never to be confused with ideology, or abstraction, but rather are the product of prudence.¹⁰ Traditions thus are organic, originating not with the dictates of the sovereign but growing from the mores and continuity of political communities.¹¹ They include social and political practices, including legislative and

included portions designed to advance his defense of slavery. Nevertheless, to appreciate Calhoun’s wisdom as a political thinker and actor, one must go beyond his unfortunate position on slavery, giving careful attention to his thoughtful treatment of human nature, the structure of government, and the development of sound constitutions.

⁶ See THE FEDERALIST PAPERS NO. 6, at 57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]f experience, the least fallible guide of human opinions, be appealed to”); No. 20, at 138 (James Madison and Alexander Hamilton) (“[e]xperience is the oracle of truth”).

⁷ RUSSELL KIRK, BEYOND THE DREAMS OF AVARICE 63 (1991).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* See also Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 786-790 (1992) (explaining the virtue of prudence as an essential element in the development of a coherentist epistemology that rejects foundationalism and instead urges respect for traditions, which are anti-foundationalist cultural constructs).

But see Robert L. Hayman Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 72 n. 1 (1995) (explaining Professor Chow’s theory and concluding that “it is difficult to see how the conservative respect for positive traditions is anything other than foundationalist, even if it is accompanied by the quite unremarkable recognition that traditions are culturally constructed.”). Professor Hayman continues, “[w]hen no better reason is offered – or needed – for following ‘tradition’ other than the declaration that it is, then ‘tradition’ seems to be a foundation just as surely as any metaphysical principle.” *Id.* Professor Hayman’s point is well-taken, and it seems, quite correct. One need not necessarily indulge an assumption, however, that the justifications for tradition are *only* that “it is.” Rather, this is one among many elements of a tradition-based epistemology. As Professor Pelikan explains,

tradition derives some of its vindication from the sheer fact of its existence, “just because its there,” as the cliché about mountain climbing says. Coming to terms with the presence of the traditions from which we are derived is, or should be, a fundamental part of the process of growing up We do, nevertheless, have some choices to make. One . . . is whether to understand our origins in our tradition or merely to let that tradition work on us without understanding it, in short, whether to be conscious participants or unconscious victims. Once understood, the tradition . . . does confront us with a further choice . . . : the choice between recovery and rejection, with a range of possibilities that combine partial recovery with partial rejection.

JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 53 (1984).

¹¹ See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L. J. 1029, 1054 (1990). But see David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040 (1991) (arguing that Professor Kronman’s defense of tradition is indefensible because traditionalism itself is indefensible).

juridical practices,¹² as well as systems of beliefs.¹³ While they can exclude (for example, customs that prevented the races from enjoying equally the privileges of citizenship), they also can harmonize, eschewing moral and social isolation.¹⁴ Traditions evolve and are subject to modification or even rejection,¹⁵ but always serve as reminders that our future improvement is linked inextricably with our past.¹⁶

Thanks in large measure to the interpretational method of one man, in particular – Justice Antonin Scalia – tradition now plays as central a role as ever in the judicial interpretation of our Constitution. Although generally regarded, and in fact described by himself, as a textualist,¹⁷ Justice Scalia nonetheless seeks the guidance of tradition to inform the constitutional text. For Justice Scalia, tradition possesses both a substantive and limiting element as applied to judging. Substantively, tradition places on the constitutional text the imprint of historical context as represented in the gradual accumulation of time-honored practices.¹⁸ Moreover, by linking text and tradition, which for Justice Scalia must be identified at the most specific level available, judges are constrained, less likely to roam in the constitutional field and more likely to defer to republican judgments, to “principles adhered to, over time, by the American people, rather than those favored by the personal . . . philosophical dispositions of a majority of this Court.”¹⁹ Thus, Scalia’s traditionalism both gives life to the Constitution and

¹² On the authority of judicial precedent as a form of tradition-based analysis, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). Schauer offers several justifications for the authority of precedent, including fairness (that all like cases be treated alike); predictability (easing the process of planning and organizing one’s life); “strengthened decision-making” (conserving “decisional resources and “dampening variability”). *Id.* at 595-600. See also Kronman, *supra* note 11, at 1037-38 (explaining Professor Schauer’s view of precedent and explaining that Professor Schauer’s arguments are both utilitarian and deontological).

¹³ See W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* 66-67 (2d ed. 1978) (explaining that knowledge derives from an intricate web of beliefs, and that prudence counsels respect for those beliefs and existing social structures).

¹⁴ See Hayman, *supra* note 10, at 74. Professor Hayman explains that “conventional traditionalism . . . has systematically excluded the voices, perspectives, and counter-traditions of cultural minorities, leaving them at the mercy of past practices, and embedded habits of majoritarian forces.” *Id.*

¹⁵ See PELIKAN, *supra* note 10, at 53-54.

¹⁶ See REFLECTIONS, *supra* note 4, at 33-34.

¹⁷ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (1997) [hereinafter *A MATTER OF INTERPRETATION*].

¹⁸ See, e.g., *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring) (stating, with regard to the due process clauses in particular, “[i]t is precisely the historical practices that define what is ‘due.’”).

¹⁹ *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting). Professors Pritchard and Zywicki describe Justice Scalia’s view of tradition as the Majoritarian Theory. See A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 412 (1999). See also Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 308 (1997) (explaining that “[w]hen Scalia says that it would be a violation of his oath to adhere to decisions which intrude upon the democratic process, that statement is consistent with his belief that judges should be

provides the discipline necessary among those charged with determining its meaning.

But the use of tradition as an interpretative tool, though appealing particularly to Burkeans, is not as an interpretive tool immune from critical inquiry. Others, scholars and judges alike, have cited problems with Justice Scalia's method:²⁰ how is "tradition" to be defined, and at what level of generality must judges identify it to properly embrace its constitutional significance? Are all traditions equal in Justice Scalia's mind, and if so, what must judges do when traditions conflict? Moreover, does the Constitution account for and validate traditions that are obnoxious to principles of justice, freedom, and tolerable order? These are important concerns, deserving of the consideration they have received in the legal academy and the courts. But other questions arise from Justice Scalia's traditionalism as well, questions that come not from the anti-Burkeans but from the Burkeans themselves.²¹ Namely, can a Constitution that values tradition still adapt to a changing, pluralist society? If Scalia is truly a textualist,²² to what value does he ascribe unwritten traditions even when the text is facially unambiguous? Finally,

restrained."); James Edward Wyszynski Jr., *In Praise of Judicial Restraint: The Jurisprudence of Justice Antonin Scalia*, 1 DET. C.L. REV. 117, 120 (1989) (explaining that Justice Scalia's jurisprudence is consistent with his view of restrained judging).

²⁰ See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 97-109 (1991). See also JOHN HART ELY, DEMOCRACY AND DISTRUST 60 (1980) (describing the problem of identifying traditions); Pritchard & Zywicki, *supra* note 19, at 413 (agreeing that Justice Scalia's view is "excessively majoritarian" and insufficiently protective of minority rights).

²¹ See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 623 (1994). Professor Young's piece deftly analyzes Burke's philosophy and writings and concludes that Justice Scalia (along with Judge Robert Bork) does not satisfy Burkean conservative criteria. *Id.* Professor Young's scholarship is graceful and persuasive, and is a substantial contribution to the literature on this jurisprudential subject. The instant humble article does not quarrel with Professor Young's conclusions about Burkean political theory, or his conclusion that some of Justice Scalia's writing raises questions about his conformity to Burke; it departs only from the conclusion that Justice Scalia does not ultimately fit the Burkean mold. As this article attempts to explain, although it is true that some of Justice Scalia's superficially libertarian decisions (for example, his First Amendment decisions) and his writings that appear somewhat hostile to social change, indicate departures from the prudence of Burke, his overall jurisprudential method is nonetheless faithful to Burkean notions of prescriptive rights and duties, to the validation of accumulated practices and lessons. See also DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT 55 (John Wiky & Sons, Inc. 1992) (1993) (describing Justice Scalia's conservative credentials); Chow, *supra* note 10, at 809 (placing Justice Scalia in the Burkean mold); Luban, *supra* note 11, at 1039 (arguing that Justice Scalia's opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), demonstrated "the voice of conservative traditionalism protesting contemporary Enlightenment's penchant for moral revision"). The point being that although Justice Scalia could sometimes be a better Burkean, this is not to deny the powerful existence of certain Burkean attributes in his jurisprudence.

Cf. Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia, and Kennedy*, 49 RUTGERS L. REV. 219, 222 (1996) (explaining that Justices O'Connor, Scalia, and Kennedy "are essential to the conservative majority of the Court"); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1700 (1991) (noting the Burkean criticism of Justice Scalia regarding his "attitude toward precedent". Ultimately, Professor Strauss concludes that "[t]he problem with Justice Scalia is that he is too much of a Burkean, not the opposite." *Id.* at 1701.

²² See A MATTER OF INTERPRETATION, *supra* note 17, at 23. See also Richard B. Saphire, *Constitutional Predispositions*, 23 U. DAYTON L. REV. 278, 285-291 (1998) (examining Justice Scalia's textualism in light of his originalism, and vice versa).

if tradition plays such an important role in defining our constitutional life, what significance must we ascribe to judicial traditions (precedent-making)?²³

This article thus examines Justice Scalia's jurisprudence of tradition and the questions, some just noted, that it raises for constitutional adjudication. Part II provides a brief review of tradition's pedigree in law. It traces the practices of significant ancient and early modern cultures, as well as American constitutionalist views of tradition's role in governing the republic, demonstrating that Justice Scalia's perspective generally has a notable and principled intellectual, political, and social foundation. Part III then examines Justice Scalia's opinions in various areas of constitutional law that highlight his traditionalism. Although it is beyond the scope of this article to cover Justice Scalia's writing in every case in every relevant constitutional category, the cases included herein demonstrate adequately the high regard he has for tradition in interpreting the Constitution. Part IV then provides a critical analysis of Justice Scalia's jurisprudence from the prudentialist's perspective, concluding that Justice Scalia's methodology exists in harmony with an unwritten Constitution of tradition, an unwritten Constitution that, however, differs greatly from that to which modern jurisprudence conventionally refers.²⁴ Justice Scalia's unwritten Constitution is prescriptive, conscious of and not hostile to rights, but nonetheless recognizes the intrinsic value of social order as effectuated through republican political institutions, thus opposing the unwritten Constitution of abstraction – the more aptly named “Living Constitution” – that places the highest value on the human dignity of rights and free choices.²⁵

II. THE PEDIGREE OF TRADITION IN LAW: A HISTORICAL PERSPECTIVE

While the American constitutional regime remains unique, it was not cut

²³ See Strauss, *supra* note 21, at 1701 (explaining the Burkean criticism that Justice Scalia is “too cavalier toward the views of past Justices who have thought carefully about the problems”); David Boling, *The Jurisprudential Approach of Justice Antonin Scalia: Methodology Over Result?*, 44 ARK. L. REV. 1143, 1198 (1991) (questioning Justice Scalia's respect for precedent).

²⁴ See Antonin Scalia, *Is There an Unwritten Constitution*, 12 HARV. J. L. & PUB. POL'Y 1 (1989) [hereinafter *Unwritten Constitution*]. In this brief introductory piece, Justice Scalia notes the controversy over the “unwritten constitution.” He points out that, on the one hand, there is no unwritten constitution because, quite obviously, we are governed by a written instrument. *Id.* On the other hand, “[m]any, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted.” *Id.* Justice Scalia's piece thus foreshadows the conclusion in this article, that Scalia's traditionalism produces an unwritten constitution, though Justice Scalia's other writing does not explicitly endorse an unwritten constitution.

²⁵ For an excellent discussion of the tension between the types of unwritten constitutions, see generally RIGHTS AND DUTIES, *supra* note 5. Of particular importance is Professor Hittinger's introduction, which counters the “facilitative” unwritten constitution of Justice Brennan with Dr. Kirk's, which “vested in concrete society, is the source of genuine though unwritten norms reconciling liberty and authority.” Russell Hittinger, *Introduction to RUSSELL RIGHTS AND DUTIES xxv-xxvi* (1997) [hereinafter *Introduction*]. See also Thomas Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 710 (1975) (explaining the natural rights origins of the Constitution and noting that the pure interpretive model “cannot be reconciled with constitutional doctrines protecting unspecified ‘essential’ or ‘fundamental’ liberties, or ‘fair’ procedure, or ‘decency’”).

from whole cloth. Rather, the Constitution and the Bill of Rights are organic documents that embody centuries of legal and political thought, practice, and experience; in a word, intellectual and social *tradition*. As this section explains, the traditions of the American people (both generally, and in the various American jurisdictions) and of American law *writ large* are much the product of the English experience. It also is important to note in particular the practices of the ancients, as the literate American founding generation relied heavily upon the lessons of the ancients in crafting our fundamental law. Of those various practices and orders, American law has rejected some, while others it has altered for the sake of adapting to America's singular social and political culture. So as we evaluate Justice Scalia's jurisprudence on this subject, it is useful to bear in mind tradition's historical pedigree in law, for it is this pedigree that informs what has become Justice Scalia's unwritten constitution.

A. *Tradition From Athens to London to Burke*

As Professor Kirk explains, the constitutional order of America grew from the legacy left by the political orders of the great western and Judeo-Christian cultures.²⁶ In some, the law developed through divine inspiration, such as the Hebrew tradition, in which Moses revealed the law to the wandering children of Israel through Yahweh's commandments.²⁷ That legacy has informed our nation's moral order, which in turn, has directly influenced its legal order.²⁸ In other civilizations, however, the laws by which the people were governed arose not from divinity directly but through custom, convention, and precept inspired by real experience.

The early Greeks provided an excellent example. The formations of Greek law appear in Homeric epic poetry.²⁹ There arose the notions of *themis*, a sort of divinely-inspired law representing the judgments of the gods, and *dike*, which for Homer appeared to represent an earthly imitation of the heavenly law but which later came to represent justice, in its abstract sense.³⁰ Later, Greek law began to develop on the concept of *nomos*, or custom, which later would evolve also into statutory law.³¹ Although the sophists, using the concept of law as based on mere convention, posited that all law was thus relative and variable (because customs differ from place to place),³² Socrates responded by attaching greater moral weight

²⁶ ROOTS OF AMERICAN ORDER, *supra* note 3, at 6.

²⁷ *See id.* at 11-12.

²⁸ *See id.*

²⁹ KELLY, *supra* note 2, at 6.

³⁰ *Id.* at 7. *See generally* HOMER, THE ILIAD (Richmond Lattimore, trans., Univ. of Chicago Press 1951).

³¹ KELLY, *supra* note 2, at 7.

³² *Id.* at 14.

to convention.³³ Indeed, Socrates in the *Crito* identifies custom and convention with the implicit obligations of a citizen to the state.³⁴ Still later, Aristotle in his *Politics* explained that man's tendency to associate with others in civil life grew out of organic experiences, thus demonstrating the connection between accumulated customs and the formation of legal and political order.³⁵ Aristotle, whose philosophy of law grew out of a field of vision that included (but was not limited to) the observation of empirical phenomenon, also identifies the relationship of law to custom and convention in his *Ethics*.³⁶ There he explains the importance of *phronesis*, or prudence, to the state's legal order. More than cautiousness, which is an element but not the sum of prudence, *phronesis* embodies a practical wisdom gained through one's experience, observation, and habit. It is *phronesis*, then, that involves the practical application of concepts, avoids abstract theorizing, and thus serves as a guide to law making and law judging.³⁷ Thus, although the connection is not as firm as would be apparent in English jurisprudence, we can nonetheless see that the ancient Greeks provided a foundation for examining the modern notion of accumulated habitual experiences as a developmental characteristic of positive laws.

So, too, with the Romans. The early Roman republic knew the *ius civile*, or civil law, which "was a complex body of customary laws, not ordinarily promulgated through formal enactment by Senate and People, but rather developing out of long usage among the Romans themselves."³⁸ As Roman power increased and the sphere of its authority extended beyond its limits, the Romans came to know the *ius gentium*, the law of nations, which was a second body of law "founded upon customs more or less common to non-Roman peoples."³⁹ Like Aristotle before them, however, the Romans were concerned that the tension between the *ius civile* and the *ius gentium*, as well as the statutory law generally, might produce injustice.⁴⁰ Led in significant part by Cicero, then, the Romans developed the *ius naturalis*, the natural law, which, guided by rational principles of ethics and justice, would serve to complement, inform, and effectuate the custom-based norms that the other bodies of law prescribed in writing.⁴¹ Thus, for Cicero,

³³ *Id.* at 15-16.

³⁴ See PLATO, FIVE DIALOGUES 53-56 (G.M.A. Grube, trans., Hackett Publishing, 1981)(Dialogue between Socrates and Crito).

³⁵ See ARISTOTLE, POLITICS 36-37 (Carnes Lord, trans., Univ. of Chicago Press, 1984).

³⁶ See ARISTOTLE, ETHICS 213-14 (J.A.K. Thomson, trans., Penguin Books, 1953).

³⁷ *Id.* at 209-210.

³⁸ ROOTS OF AMERICAN ORDER, *supra* note 3, at 108. Kirk notes that development of the *ius civile* was similar to that of the common law in England, described *infra* text and accompanying notes. *Id.*

³⁹ *Id.* at 109.

⁴⁰ *Id.* See also ARISTOTLE, *supra* note 36, at 198-99 (describing Aristotle's view that the law must provide a corrective when injustice results from the application of legislation to particular circumstances).

⁴¹ See REPUBLIC, *supra* note 1, at 68-69. Cicero (though the character of Gaius Laelius) explains that

the natural law, unwritten and a product of right reason, is superior to the civil law, law of nations, and statutory laws, but does not oppose them.⁴² Rather, it “enables us, through reason, to apply customary and statutory law humanely. . . . an instrument of progress, not a weapon for revolution.”⁴³

The most directly influential experience on the American constitutional scheme, however, was that of the English.⁴⁴ Though they, too, built upon the foundations of the Greek and Roman experience, the English developed a comprehensive body of law based on custom, the common law,⁴⁵ and on the ethical norms that must guide a just political regime when an otherwise just law proves unjust in particular application, equity.⁴⁶ The common law of England, unlike its predecessors in some ancient civilizations, developed as unwritten, though it later would be written in the form of court judgments rather than by codification in statute books.⁴⁷ Blackstone described the English common law system as one “built upon the soundest foundations, and approved by the experience of ages,”⁴⁸ and his *Commentaries on the Laws of England* provided a powerful defense of the virtue and wisdom of past institutions and customs.⁴⁹ It was thus organic, borne of

law in the proper sense is right reason in harmony with nature. It is spread through the whole community, unchanging and eternal, calling people to their duty by its commands and deterring them from wrong-doing by its prohibitions. When it addresses a good man, its commands and prohibitions are never in vain; but those same commands and prohibitions have no effect on the wicked. This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. . . . Whoever refuses to obey it will be turning his back on himself.

Id.

See also CICERO, *THE LAWS* 124 (Niall Rudd, trans., Oxford Univ. Press, 1998) (52-51 B.C.) (hereafter *LAWS*) (recapitulating the natural law, which originates from divinity, which is “rightly praised, for it represents the reason and intelligence of a wise man directed to issuing commands and prohibitions); *ROOTS OF AMERICAN ORDER*, *supra* note 3, at 109-10 (describing generally natural law).

⁴² See *REPUBLIC*, *supra* note 1, at 68-69. See also *ROOTS OF AMERICAN ORDER*, *supra* note 3, at 111-112 (explaining that Cicero, “so strongly attached to tradition and precedent, a man of constitutionality and order, was not arguing that we ought to challenge every customary or statutory law on the degree of its conformity to natural law.”).

⁴³ *Id.* at 112

⁴⁴ See *id.* at 183-84.

⁴⁵ See generally JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW* (1996) (describing the customs and principles that led to the development of the English common law). As Professor Hudson explains, “[c]ustoms are not simply neutral statements of what usually happens; rather, they are prescriptions of established and proper action, prescriptions which carry authority.” *Id.* at 6.

⁴⁶ See *id.* at 187.

⁴⁷ *Id.* at 184.

⁴⁸ I WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *5.

⁴⁹ See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 72-74 (1941). Boorstin’s classic work posits that Blackstone recognized two types of appeal to the past, both of which informed the growth and improvement of the common law: primitivism and traditionalism, the latter tempering the former. *Id.* In the context of this existing structure of past institutions, then, Blackstone thus believed that traditions were deserving of respect. *Id.* at 73. “Indeed,” Boorstin writes, “all the virtues of tradition seemed inherent in the very definition of the English common law because, after all, the common law was rooted in custom.” *Id.* (emphasis added).

national customs and precedents, of the doctrine of *stare decisis* (let the precedent stand).⁵⁰ The common law therefore was not the singular creation of judges or kings but a source of their power.⁵¹ In this sense, it also protected the interests of the people it governed: the common law recognized a right to be free from self-incrimination and from unreasonable searches; the writ system gave English people access to justice; the jury system ensured that sanctions could not be imposed upon a citizen without the concurrence of fellow citizens, thus protecting them from arbitrary or capricious state action.⁵² Indeed, in Blackstone's *Commentaries* "rights always held the center of the stage,"⁵³ most especially those of security, liberty, and property.⁵⁴ Thus as Professor Kirk explains, "[t]he common law is empirical law: that is, based upon men's experience over many generations, a good test of practicality."⁵⁵

The English practice of equity also reflected the nation's reverence for tradition. While Cicero's *ius naturalis* informed the development of the common law, it also guided the English courts' equitable jurisdiction, providing a moral and philosophical basis for establishing justice.⁵⁶ Equity thus "chastened and corrected" the common law, both of which ultimately were used to improve the English civil social order by recognizing the tension between order and freedom that the English experience had demonstrated.⁵⁷ Indeed, many of the civil liberties that the common law guarded found their way, deliberately, into the American Bill of Rights, linking inextricably the English understanding of ordered freedom with American

See also 1 BLACKSTONE, COMMENTARIES *5 (explaining that "it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages"); 3 BLACKSTONE, COMMENTARIES *268 (explaining, with regard to remedial laws, that the English have inherited "an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant"); *id.* at *436 (explaining that courts of law and equity in "matters of positive right" must "submit to and follow those ancient and invariable maxims, 'quae relicta sunt et tradita.'")

⁵⁰ *See* HUDSON, *supra* note 45, at 21.

⁵¹ *See* ROOTS OF AMERICAN ORDER, *supra* note 3, at 184. Professor Hudson also described the protections for individual rights in the common law, as well as in Magna Carta, itself an embodiment of English custom. *See* HUDSON, *supra* note 45, at 226 ("Typically, Magna Carta established law on the stated grounds of recording good custom").

⁵² *See* ROOTS OF AMERICAN ORDER, *supra* note 3, at 186-87.

⁵³ BOORSTIN, *supra* note 49, at 162. Boorstin further explains that "[i]n every discussion, rights were considered primary, while duties were treated as secondary or merely negative. . . . [t]he whole structure of the Commentaries was built around the concept of rights." *Id.*

⁵⁴ *See* 1 BLACKSTONE, COMMENTARIES *125-36. Blackstone regarded life, liberty, and property as the absolute rights. He stated that the right to natural life cannot be "disposed of or destroyed by any individual" on his or her own authority. *Id.* at 129. He also explained that "next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals." *Id.* at 130. Finally, Blackstone noted that the right of property was "inherent in every Englishman. . . . The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right." *Id.* at 134.

⁵⁵ ROOTS OF AMERICAN ORDER, *supra* note 3, at 188.

⁵⁶ *See* REPUBLIC, *supra* note 1, at 68-69.

⁵⁷ ROOTS OF AMERICAN ORDER, *supra* note 3, at 191.

constitutionalism.⁵⁸

Likewise, the prominence of tradition in English law found expression in a number of figures who proved important not only to the English themselves but to generations of American lawyers and lawgivers. Hume, whose *History of England* gained notoriety in America, demonstrated through his *Treatise on Human Nature* and *An Inquiry Concerning the Principles of Morals* the fallacy of abstraction in political life;⁵⁹ his refutation of Lockean social contract theory thus appealed to the practical politics of the American Framers.⁶⁰ Blackstone's *Commentaries*, which practically codified the common law, were read and cited widely in the American founding generation;⁶¹ he is cited by both Publius⁶² and Brutus.⁶³ Moreover, the writings of judges Coke and Hale informed significantly the American ideas of jurisprudence.⁶⁴ But it was Burke who proved to be the chief intellectual and

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See *id.* at 187.

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See David Hume, *A Treatise of Human Nature*, in DAVID HUME, POLITICAL WRITINGS 47-51 (Stuart D. Warner & Donald W. Livingston, eds., Hackett Publishing, 1994) (1739); DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 23 (Charles W. Hendel, ed., Prentice Hall Publishing 1957) (1751) (arguing that "[h]istory, experience, reason sufficiently instruct us in this natural progress of human sentiments and in the gradual enlargement of our regards to justice").

60

See Thomas S. Engeman, *The Federalist*, in THE AMERICAN EXPERIMENT 80 (Peter Augustine Lawler & Robert Martin Shaefer, eds., 1994). Professor Engeman admits that the Framers were influenced by the English (though not the French) Enlightenment and by Locke's conclusion that "man's passionate nature could not be changed." *Id.* He further argues, however, that

Publius seems to have been influenced by the even more traditional liberalism of David Hume and other thinkers of the Scottish Enlightenment, and by Baron de Montesquieu. Unlike John Locke, who argued that men could make governments anew based on consent and natural rights – life, liberty, and the pursuit of property (or happiness in the Declaration of Independence), David Hume argued that rights and liberties could safely (or really) develop only in practice, through political experience. In Hume's view, the historical practice of political societies determines their politics, not a theoretical formulation of the political good.

Id.

Cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 278 (Peter Laslett, ed., Cambridge University Press 1988) (1690) (arguing that man exists in a state of nature until he consents to enter into civil society, whereby he forms a social compact with the state). This article adheres to the position that the Constitution's Framers, while well-versed in Enlightenment political thought, did not incorporate much Enlightenment theory into the original Constitution; rather, they took such figures as Cicero, Hume, and Montesquieu as their guides. See Engeman, *supra* this note, at 80. There is substantial academic disagreement, however, concerning the influence of the Enlightenment thinkers, particularly Locke, on the Framers. For more on the arguments about Locke and Enlightenment political thought in the early American republic, compare RIGHTS AND DUTIES, *supra* note 5, at 95-109 (rejecting the view that Locke primarily influenced the constitutional order) with Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 268 (1995) (arguing that among the responses to Burkean constitutional theory is the fact that "our tradition in America is much more Lockean than it is Burkean").

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See generally BLACKSTONE, COMMENTARIES.

62

See THE FEDERALIST NO. 69, at 418-419 (Alexander Hamilton); NO. 84, at 512 (Alexander Hamilton) (referring to Blackstone as "judicious").

63

See THE ANTI-FEDERALIST PAPERS, JAN. 31, 1788, at 295 (Ralph Ketcham, ed. 1986); FEB. 14, 1788, at 303.

64

See ROOTS OF AMERICAN ORDER, *supra* note 3, at 191; EDWARD COKE, INSTITUTES; MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND.

political expositor of custom, convention, and continuity, as well as of natural law, in England, and his influence is still felt in American constitutional law⁶⁵ (today, in the jurisprudence of Justice Scalia, in particular). As Professor Kronman explains, “[I]f a person were inclined . . . to swim against the current by taking the claims of traditionalism seriously, both in the law and outside it . . . one place to begin . . . is the work of Edmund Burke. . . . [N]o one since Burke has defended the claims of traditionalism with more vigor and intelligence.”⁶⁶

Burke, a contemporary of the Framers and an ardent defender of English custom-centered common law and constitution, urged a “custodial attitude” toward the past, creating duties among generations to preserve right customs and practices, for it is the lamp of experience that will guide social improvement.⁶⁷ In his *Reflections on the Revolution in France*, Burke explains that,

[a] spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors. Besides, the people of England well know, that the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement.⁶⁸

Thus for Burke, the principle of prescription – the unwritten principle that binds immemorial usage to legal norms – guided Burke’s views on politics and law, including his opposition to abstraction and zealotry, unlinked to experience and context, against which he so eloquently inveighed in the *Reflections*.⁶⁹ Burke, ever cognizant of the dangers inherent in rapidly undoing old orders, continued,

[o]ne of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of an habitation – and teaching these succesors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this

⁶⁵ See ROOTS OF AMERICAN ORDER, *supra* note 3, at 383.

⁶⁶ See Kronman, *supra* note 11, at 1047.

⁶⁷ See REFLECTIONS, *supra* note 4, at 33. The comparisons to Blackstone are inevitable and Boorstin does it well and often: “Blackstone, like Burke after him, was saying that institutions, from the mere fact that they had long existed, had some claim to reverence and to preservation.” BOORSTIN, *supra* note 49, at 73.

⁶⁸ REFLECTIONS, *supra* note 4, at 33.

⁶⁹ See Canavan, *supra* note 4, at 44.

unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies and fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.⁷⁰

None of this is to suggest that Burke opposed change; quite the contrary. For Burke, change in the state and in the laws is necessary to the preservation of both.⁷¹ Human societies, ever mortal, decay over time and demand renewal, lest they go the way of the summer's flies.⁷² But a prudent system of law resists speedy and unthinking changes, for such alterations threaten the stability and continuity of institutions that, at their best, rely upon experience to establish a healthy tension between freedom and authority.⁷³ Change, for Burke and other defenders of tradition, must "always occur within a framework that emphasizes the value of existing institutions."⁷⁴

Thus, a tradition of tradition, so to speak, has developed in law from the great civilizations of the west, from the human laws, directly effectuating social and political customs, to the natural law, preserving moral traditions embodied in the ethical norms of people and their communities. As we shall see, particularly with regard to the English tradition, America's Constitution, and those who have framed and described it, owes much to this legacy.

B. *Tradition in American Constitutional History*

Just as tradition as an instrument of law was not new to America's English predecessors, neither was it new to Americans. Professor Kirk explains, for example, Burke's influence on the American Constitution.⁷⁵ First, consistent with Burke, the Constitution "did not break with established institutions and customs of the American people."⁷⁶ Second, it effectuated the historical experience of England.⁷⁷ Third, it abhors *a priori* government.⁷⁸ As Sir William Holdsworth

⁷⁰ REFLECTIONS, *supra* note 4, at 95.

⁷¹ *See id.* at 34.

⁷² *See id.* at 95.

⁷³ *See* POLITICS OF PRUDENCE, *supra* note 4, at 24-25. Kirk explains that [c]hange is essential to the body social . . . just as it is essential to the human body. A body that has ceased to renew itself has begun to die. But if that body is to be vigorous, the change must occur in a regular manner, harmonizing with the form and nature of that body; otherwise, change produces a monstrous growth, a cancer, which devours its host.

Id.

⁷⁴ Chow, *supra* note 10, at 787.

⁷⁵ *See* RIGHTS AND DUTIES, *supra* note 5, at 119-125.

⁷⁶ *Id.* at 119.

⁷⁷ *See id.*

observed, “[t]he founders . . . recognized with Burke that such theories, however well they might be suited to a period of revolution, were of very little help in a period of reconstruction. They therefore abandoned the democratic theories of Paine and Rousseau, and went for inspiration to that eighteenth century British constitution with which they were familiar.”⁷⁹ Finally, like its English counterpart that Burke so often defended, it restrains power, avoids centralization, and expressly endorses Burke’s view that the members of the national legislature be representatives of judgment, not delegates sent to serve as a mere mouthpiece for public opinion.⁸⁰ In addition, Burke’s traditionalism ultimately took hold in America’s intellectual legal climate, notably in Justice Story’s *Commentaries on the Constitution* and Chancellor Kent’s *Commentaries on American Law*.⁸¹ True, Burke’s influence upon the American Constitution is limited. The Framers did not endorse his theory of cabinet government, nor did they initially approve of political parties,⁸² which Burke defended in his *Thoughts on the Cause of the Present Discontents*.⁸³ Nonetheless, Burke specifically, and the previously described English experience generally, had much to do with the development, and success, of American constitutionalism, written and unwritten.⁸⁴

In like manner, the Supreme Court has routinely referred to social and political traditions and customs when explaining the meaning of the constitutional text. As this article explains, the commitment to tradition as informing constitutional values and norms has reached a new height during the Rehnquist Court era.⁸⁵ Nonetheless, the pre-Rehnquist Court case law bears out a certain methodology of traditionalism in a number of areas of constitutional law. In the

⁷⁸ See *id.* at 120.

⁷⁹ 9 WILLIAM HOLDSWORTH, *THE HISTORY OF ENGLISH LAW* 137 (1938).

⁸⁰ See RIGHTS AND DUTIES, *supra* note 5, at 120. See also Edmund Burke, *Letter to the Sheriffs of Bristol*, in EDMUND BURKE: *SELECTED WRITINGS AND SPEECHES* 187 (Peter J. Stanlis, ed., Regnery Publishing, 1963) (1777) (offering a classic expression of the doctrine of representation as opposed to delegation). Burke explained in his acceptance speech upon election to Parliament:

[Your representative’s] unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure – no, nor from the law and the Constitution. . . . Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

Id. at 224. To see how Burke’s representation doctrine influenced the American Constitution, see generally THE FEDERALIST NOS. 10, 51 (James Madison).

⁸¹ See RIGHTS AND DUTIES, *supra* note 5, at 124 (explaining that these works were “of Burke’s mode of thought”).

⁸² See *id.* at 120-121.

⁸³ See Edmund Burke, *Thoughts on the Cause of the Present Discontents*, in EDMUND BURKE, *SELECTED WRITINGS AND SPEECHES* 121 (Peter J. Stanlis, ed., Regnery Publishing, 1963) (1770).

⁸⁴ See RIGHTS AND DUTIES, *supra* note 5, at 123.

⁸⁵ See *infra* Sections III and IV.A. text and accompanying notes.

area of equal protection, for example, the Court in *Plessy v. Ferguson*⁸⁶ stated “[the state] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”⁸⁷

Of course, *Plessy*'s example points to one common problem with a tradition-bound approach, that tradition may often be used to justify what many others (clearly not, however, the *Plessy* majority or the Louisiana Legislature of the late nineteenth century) view as an intolerable order, thus raising the question of whether such customs ought to have constitutional validity in a regime of rights. But the Court's reliance on tradition has not always produced such problematic results. In the area of justiciability, for example, Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*⁸⁸ attempted to ground the standing requirement in the English common law tradition.⁸⁹ And in the area of religious liberty, the Court in *Zorach v. Clauson*⁹⁰ recognized the vitality of America's religious traditions, stating “[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people. . . .”⁹¹

The cases explicating the meaning of “due process” and the early incorporation controversy provide even more powerful examples. Before adoption of the Fourteenth Amendment, Justice Curtis (known also for his powerful dissent in *Dred Scott v. Sanford*),⁹² in *Murray v. Hoboken Land & Improvement Company*,⁹³ described the scope of the Due Process Clause of the Fifth Amendment by relying upon the English experience. He explained that due process of law was “undoubtedly intended to convey the same meaning as the words ‘by the law of the land’ in Magna Carta.”⁹⁴ Justice Curtis further explained, “[we] must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on them

⁸⁶ 163 U.S. 537, 550 (1896).

⁸⁷ See *id.*

⁸⁸ 341 U.S. 123, 150 (1951)(Frankfurter, J., concurring).

⁸⁹ See *id.* (“[federal courts must] not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was . . . the business of the Colonial courts and the courts of Westminster when the Constitution was framed.” For an excellent discussion of constitutional standing and its relationship to English practice, see Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997).

⁹⁰ 343 U.S. 306 (1952).

⁹¹ *Id.* at 314-15.

⁹² See 60 U.S. (19 How.) 393 (1857) (Curtis, J., dissenting).

⁹³ 59 U.S. (18 How.) 272 (1856).

⁹⁴ See *id.* at 276.

after the settlement of this country.”⁹⁵ The Court continued to rely upon English custom and precedent after the Fourteenth Amendment’s Due Process Clause was adopted. This reliance was evident in *Twining v. New Jersey*.⁹⁶ There, although the Court stated that the meaning of the personal rights secured by the Bill of Rights was to be determined ultimately by the nature of such rights in relation to our concept of due process of law, it also conceded that the Court was “accustomed” to looking at such “great instruments” as the Magna Carta and the Petition of Right to determine which rights are fundamental in our constitutional scheme.⁹⁷

But perhaps the Court’s most explicit early reliance upon tradition in the area of due process rights came in the view first expressed by Justice Cardozo in *Snyder v. Massachusetts*,⁹⁸ which rejected a criminal defendant’s claim that due process entitled him to visit the scene of the crime with the jury, then in *Palko v. Connecticut*,⁹⁹ which rejected a Fourteenth Amendment challenge to a state statute permitting the state to appeal in criminal cases.¹⁰⁰ Going beyond mere reliance upon English legal tradition, Justice Cardozo’s view sought meaning in the Due Process Clause by looking to “a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.”¹⁰¹ The Cardozo view, which recognized the Constitution’s reconciliation of order and liberty, long served as the prevalent view in determining the existence of constitutional rights against the states.¹⁰² Indeed, Justice Frankfurter in *Rochin v. California*¹⁰³ referred to Justice Cardozo’s formulation as the “settled conception of the Due Process Clause,”¹⁰⁴ and recognized that “due process of law [is] ‘itself a historical product.’”¹⁰⁵

The modern notion of using tradition to inform the meaning of the law, and more particularly the Constitution, reached its highest expression in the mid-Twentieth Century in the jurisprudence of the second Justice Harlan. Justice Harlan, however, offered a more refined use of tradition than the earlier cases demonstrate, grounding his methodology not only in the historical practices in the body politic but also in the case law itself, which represents the traditions of the

⁹⁵ *Id.* at 277.

⁹⁶ 211 U.S. 78 (1908).

⁹⁷ *Id.* at 107.

⁹⁸ 291 U.S. 97 (1934).

⁹⁹ 302 U.S. 319 (1937).

¹⁰⁰ *See id.*

¹⁰¹ *Snyder*, 291 U.S. at 105.

¹⁰² *See Palko*, 302 U.S. at 325 (stating that the Constitution protects those rights that are “of the very essence of a scheme of ordered liberty”).

¹⁰³ 342 U.S. 165 (1952).

¹⁰⁴ *Id.* at 169.

¹⁰⁵ *Id.* at 168 (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)).

judiciary. Justice Harlan, eminently Burkean in temper and method, thus embraced a common law constitutionalism that marked his prudentially pragmatic judicial character, of which his reverence for tradition was an essential element.¹⁰⁶

Justice Harlan demonstrated that using tradition – either that of society (in the form of customs and practices) or of the Court (in the form of judicial precedents) – in constitutional adjudication has a way of reinforcing the value that the constitutional design places on legitimate governmental authority and the role of the republican political process.¹⁰⁷ Thus, in *Mapp v. Ohio*,¹⁰⁸ which applied the exclusionary rule to state criminal prosecutions, Justice Harlan's dissent chided the majority for its departure from *stare decisis* and thus from established judicial norms.¹⁰⁹ His dissent in *Miranda v. Arizona*¹¹⁰ echoed the same theme. There, dissenting from the Court's decision requiring law enforcement officials to inform criminal defendants of their constitutional rights upon custodial interrogation, Justice Harlan explained that the Court's "utopian" effort to purge the criminal justice system of pressure on criminal suspects "requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains."¹¹¹ Moreover, Justice Harlan noted that the legislatures provided the better forum for criminal justice reform and that the Court would do well to observe the strides that states had been making in this area.¹¹²

Justice Harlan's prudential deference to republican institutions was not limited to criminal law and procedure either, as his dissenting opinions in the legislative reapportionment cases demonstrate. In *Baker v. Carr*,¹¹³ the Court held that challenges to a state's reapportionment scheme on equal protection grounds were justiciable in federal courts.¹¹⁴ Justice Harlan crafted a vigorous dissent that validated societal traditions and, at the same time, rejected the premise that federal court involvement was warranted.¹¹⁵ The reapportionment battles, he explained, were "internal political conflicts," the wisdom or desirability of a particular resolution of which was not the business of the courts to judge.¹¹⁶ Rather, so long as

¹⁰⁶ See generally J. Richard Broughton, *Unforgettable, Too: The (Juris)Prudential Legacy of the Second Justice Harlan*, 10 SETON HALL CONST. L.J. 57, 68 (1999) (comparing the second Justice Harlan to Burke and placing the Justice in the prudential pragmatist school of contemporary jurisprudence).

¹⁰⁷ See *id.* at 81-82.

¹⁰⁸ 367 U.S. 643 (1961) (Harlan, J., dissenting).

¹⁰⁹ See *id.* at 672 (Harlan, J., dissenting).

¹¹⁰ 384 U.S. 436 (1966).

¹¹¹ *Id.* at 505 (Harlan, J., dissenting).

¹¹² See *id.* at 524 (Harlan, J., dissenting).

¹¹³ 369 U.S. 186 (1962).

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 332 (Harlan, J., dissenting).

¹¹⁶ See *id.* at 333 (Harlan, J., dissenting).

a state proceeded rationally, it was entitled to select legislative structures that best fit “the interests, temper, and customs of its people.”¹¹⁷

The same deference to societal customs appeared in Justice Harlan’s dissent in *Wesberry v. Sanders*,¹¹⁸ which invalidated a Georgia reapportionment statute, and a congressional district that it produced, based on the “one man, one vote” principle.¹¹⁹ Concerned seriously that the Court’s intrusion into these matters did great damage to its legitimacy, Justice Harlan argued that the proper venue for political reforms was the political process itself, which was a process that was weakened every time the courts intervened in such essentially political matters.¹²⁰ Thus, what we see from the aforementioned opinions is not merely a backward-looking devotion to simple majoritarianism. Rather, these opinions reflect Justice Harlan’s view that traditions both give meaning to the constitutional text and simultaneously restrain judges, thus legitimating both the republican process and the judicial process. Efforts to effectuate an “Earthly Paradise” through judicial will, in Justice Harlan’s view, were destined to produce a “Terrestrial Hell” that would ruin our vital political and judicial institutions.¹²¹

Justice Harlan also demonstrated, however, that tradition need not always be an instrument for upholding governmental power. Rather, tradition, properly understood, may often validate certain important personal rights, as the English common law experience indicated.¹²² Justice Harlan’s most profound expression of this view appeared in his dissent in *Poe v. Ullman*,¹²³ which held that a challenge to Connecticut’s anti-contraception law was not justiciable where petitioners were not, and had not been threatened to be, prosecuted under the statute.¹²⁴ He proceeded from his assertion that the Constitution sought to balance the claims of liberty and authority, both of which embody tradition.¹²⁵ Indeed, balancing those claims requires reference to traditions from which the nation developed, as well as “the traditions from which it broke.”¹²⁶ Concluding that here the prohibition on contraceptive use violated the petitioners’ liberty pursuant to the Due Process Clause of the Fourteenth Amendment, he explained that “tradition is a living thing. A decision of this Court which radically departs from it could not long survive,

¹¹⁷ *Id.* at 334 (Harlan, J., dissenting).

¹¹⁸ 376 U.S. 1 (1964).

¹¹⁹ *See id.* at 20.

¹²⁰ *See id.* at 48 (Harlan, J., dissenting).

¹²¹ *See id.*

¹²² *See generally supra* note 3, at 190.

¹²³ 367 U.S. 497 (1961).

¹²⁴ *See id.* at 537.

¹²⁵ *See id.* at 539 (Harlan, J., dissenting).

¹²⁶ *Id.* at 542 (Harlan, J., dissenting).

while a decision which builds on what has survived is likely to be sound.”¹²⁷

Under these circumstances, Justice Harlan recognized that a tradition had evolved which gave protection to marital privacy, and he found no countervailing and superseding tradition on the part of the state that would justify violating such privacy.¹²⁸ True to his prudential instincts, however, Justice Harlan was careful to circumscribe his view to prevent unprincipled judicial invalidation of legislation that, unlike the Connecticut contraception prohibition, was grounded in a tolerable tradition of proscription.¹²⁹ He echoed this innovative yet restrained view of tradition in *Griswold v. Connecticut*,¹³⁰ which, only four years later, invalidated the same law after both a Connecticut physician and the executive director of Planned Parenthood League of Connecticut were prosecuted thereunder.¹³¹

Moreover, Justice Harlan's view influenced subsequent substantive due process cases, most notably in *Moore v. City of East Cleveland*,¹³² which held unconstitutional a city ordinance limiting occupancy of any dwelling unit to members of the same narrowly-defined “family.”¹³³ Citing Justice Harlan's *Griswold* concurrence, and the need to reconcile judicial restraint with recognition of important rights, Justice Powell's opinion for the Court noted that precedents “establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . [Ours] is by no means a tradition limited to respect for the nuclear family.”¹³⁴

The same view, though cited extensively, produced a much different result in *Bowers v. Hardwick*,¹³⁵ which held that no tradition existed to validate the claim that “liberty” includes the right to engage in homosexual sodomy.¹³⁶ In *Bowers*, Justice White asserted that because they had “ancient roots,” laws criminalizing homosexual sodomy were not prohibited under either Justice Cardozo's *Pálko* formulation or the formulation that Justice Harlan espoused to justify the right recognized in *Moore*.¹³⁷

¹²⁷ *Id.* at 542 (Harlan, J., dissenting). For a conservative criticism of Justice Harlan's *Poe* dissent and the use of tradition in law generally, see ROBERT H. BORK, *THE TEMPTING OF AMERICA* 231-35 (1990). Judge Bork argues that, despite the appeal to tradition, “[Justice] Harlan's arguments were entirely legislative. . . . [Justice] Harlan's methodology, often admired by advocates of judicial restraint, turns out to offer no protection against judicial imperialism.” *Id.* at 234-35.

¹²⁸ *Poe*, 367 U.S. at 553 (Harlan, J., dissenting).

¹²⁹ *Id.* at 552-53 (Harlan, J., dissenting).

¹³⁰ 381 U.S. 479 (1965) (Harlan, J., concurring).

¹³¹ *See id.*

¹³² 431 U.S. 494 (1977).

¹³³ *See id.*

¹³⁴ *Id.* at 503-04.

¹³⁵ 478 U.S. 186 (1986).

¹³⁶ *See id.*

¹³⁷ *Id.* at 191-92.

Thus, tradition has played an important role not merely in the development of law generally, but particularly in the development of American constitutional law. As an interpretive device, it has served as an instrument for preserving majoritarian prerogatives and for restraining judges.¹³⁸ Tradition also, however, has played a dominant role in explaining the existence of individual rights within the meaning of the constitutional text.¹³⁹ As will be seen, however, the Rehnquist Court, and the jurisprudence of Justice Scalia in particular, has produced an enhanced era of traditionalism in constitutional interpretation that has reiterated the advantages of tradition as an element of law, but that also raises growing concerns about its application in a pluralistic constitutional culture.

III. JUSTICE SCALIA'S JURISPRUDENCE OF TRADITION

As seen, tradition, as a guide for the development of law, has firm roots in historical experience, both in western legal history, generally, and in American constitutional history, specifically.¹⁴⁰ But, as this section explains, what Justice Harlan was for tradition in the Warren Court, Justice Scalia has become in the Rehnquist Court, and much more. For Scalia, the text of the Constitution retains primacy, for it is the text that actually constitutes "law."¹⁴¹ In Justice Scalia's view, however, where the text is ambiguous, judges must look to tradition to give the words meaning.¹⁴² He welcomes the search for original meaning,¹⁴³ but eschews what for him are the fruitless searches for "intent," exemplified in his rejection of legislative history as an interpretive device.¹⁴⁴ For Scalia, motivations and intentions are not law; the text is the law, and the text, by its very nature, often embraces the historical experience of those who selected the words.¹⁴⁵ This section will show that Scalia focuses this theory in two important ways: first, he looks to the most specific tradition available, as specific traditions, as opposed to general ones, better restrain judges; second, he looks for tradition to provide not merely

¹³⁸ See, e.g., *Baker v. Carr*, 369 U.S. 186, 334 (1962) (Harlan, J., dissenting).

¹³⁹ See, e.g., *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

¹⁴⁰ See RIGHTS AND DUTIES, *supra* note 5, at 119.

¹⁴¹ A MATTER OF INTERPRETATION, *supra* note 17, at 17.

¹⁴² See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting). See also Pritchard & Zywicki, *supra* note 19, at 451 (stating that "[t]radition enhances constitutional interpretation when it allows judges to construe ambiguous or unenumerated rights consistently with the underlying purposes of constitutionalism.").

¹⁴³ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) [hereinafter *Originalism*].

¹⁴⁴ See A MATTER OF INTERPRETATION, *supra* note 17, at 17 ("It is the law that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us."). To this extent, Justice Scalia may part company with Judge Bork (to whom he is often compared), who argues for the validity of the search for original intent (though he describes it as the original "understanding"). See BORK, *supra* note 127, at 161.

¹⁴⁵ See *Unwritten Constitution*, *supra* note 24, at 1.

meaning but dated meaning, i.e., the tradition to which we look indicates what the words meant to those who wrote them. In this way, Scalia attempts to reconcile his textualism with a tradition-based analysis.

A. *Due Process*

1. Substantive Due Process

Although Justice Scalia has criticized the doctrine of modern substantive due process by arguing that “process,” by definition, lacks substance,¹⁴⁶ he has nonetheless acquiesced in playing the substantive due process game – but on his terms. *Michael H. v. Gerald D.*,¹⁴⁷ in which Justice Scalia wrote the plurality opinion, represents in some ways Scalia’s most important statement on the role of tradition in interpreting the meaning of “due process of law.” Here, the Court upheld a California statute providing that a child born to a married woman living with her husband is presumed to be a child of the marriage.¹⁴⁸ In *Michael H.*, per Justice Scalia’s plurality opinion, the genetic father’s attempt to prove a liberty interest in establishing paternity depended on whether his interest was one traditionally protected by society.¹⁴⁹ But the case is less relevant for the outcome it produced and more relevant for the debate about tradition in which Justices Scalia and Brennan engage.

In the now infamous Footnote Six, Justice Scalia attempted to clarify his position on tradition’s role by stating that the appropriate level of generality to which the Court must look is the most specific one available.¹⁵⁰ Justice Brennan’s dissent responded by attacking Justice Scalia’s methodology on its merits.¹⁵¹ Justice Scalia’s view of the Constitution, according to Justice Brennan, “ignores the kind of society in which our Constitution exists.”¹⁵² Justice Brennan attacked Scalia’s theory on three grounds: first, identifying the most specific level of tradition is no easy task;¹⁵³ second, specificity, as opposed to generality, appears arbitrary and

¹⁴⁶ See A MATTER OF INTERPRETATION, *supra* note 17, at 142-43.

¹⁴⁷ 491 U.S. 110 (1989).

¹⁴⁸ *Id.* at 113. See CAL. EVID. CODE ANN. § 621 (West Supp. 1989).

¹⁴⁹ *Michael H.*, 491 U.S. at 124 (“[T]he legal issue in this case reduces to whether the relationship between persons in the situation of Michael and Victoria (the child) has been treated as a protected family unit under the historic practices of our society.”).

¹⁵⁰ *Id.* at 127 n.6 (“Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”).

¹⁵¹ *Id.* at 137 (Brennan, J., dissenting) (“Apparently oblivious to the fact that this concept [tradition] can be as malleable and as elusive as ‘liberty’ itself, the plurality pretends that tradition places a discernible border around the Constitution.”).

¹⁵² *Id.* at 141 (Brennan, J., dissenting).

¹⁵³ *Id.* at 137 (Brennan, J., dissenting).

inconsistent with precedent,¹⁵⁴ and third, specific traditionalism is wrong as a constitutional principle, for it defies both the pluralism of our culture and the fact that “times change.”¹⁵⁵ Scalia’s retort, however, justified his position by appealing to the judiciary’s limited role: “general traditions provide such imprecise guidance [that] they permit judges to dictate rather than discern society’s views. . . . a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all.”¹⁵⁶

But Justice Brennan proved to be only one of Justice Scalia’s opponents on this score. Justice O’Connor, in a terse opinion in which Justice Kennedy joined, also refused to accept Justice Scalia’s version of tradition’s importance to adjudication.¹⁵⁷ Concurring in all but Footnote Six of Justice Scalia’s opinion for the plurality, Justice O’Connor concluded that Justice Scalia’s view “may be

¹⁵⁴ *Id.* at 138 (Brennan, J., dissenting).

¹⁵⁵ Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). Herein lies the most powerful language in Justice Brennan’s critical dissent:

[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. . . . The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Id.

¹⁵⁶ *Id.* at 127 n.6. For an excellent critique of the Scalia-Brennan Footnote Six debate, see J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1614-29 (1990). Professor Balkin criticizes Justice Scalia for offering a view of tradition in Michael H. that “assumes that traditions are not only discrete, but presumptively normatively correct.” *Id.* at 1616. In this sense, Professor Balkin argues, Justice Scalia actually betrays tradition. *Id.* at 1620. But Justice Brennan betrays tradition as well, according to Professor Balkin, because Justice Brennan “seeks to use a general concept of tradition to subvert tradition, thus betraying it. . . . And in doing so, Brennan attempts to elevate a countertradition . . . to constitutional importance.” *Id.* at 1625.

See also DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN JR.: THE LAW AND POLITICS OF LIBERTARIAN DIGNITY* 101-04 (1997) (describing the philosophical battle in *Michael H.* between Justices Scalia and Brennan). Professor Marion’s magnificent work explains that, while for Justice Scalia, “the political community brought into being by the Constitution is an entity with well-defined social, economic, and political characteristics, for Brennan it is defined less in terms of essential institutions or practices or traditions and more in terms of the facility it provides for individual expression and self-determination.” *Id.* at 104. Mindful that, for those in the founding generation, political communities were socially constructed, complicated, and often tragic, Professor Marion explains:

the requisites of civilized existence are much less complex for [Brennan] than they were for James Madison or George Washington or Alexis de Tocqueville. Once freedom to shape a way of life for oneself becomes the core of dignified existence, all other consideration of a political, economic, or religious nature can only have a secondary status. *More than this, by casting these considerations as potential threats to freedom, it becomes easier to abstract from them when deciding how to resolve immediate controversies.*

Id. (emphasis added).

¹⁵⁷ *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring).

somewhat inconsistent with our past decisions in this area.”¹⁵⁸ Explaining that the rights found in such cases as *Loving v. Virginia*¹⁵⁹ may not have been drawn from the most specific level of generality available, Justice O’Connor, in a theme that has appeared consistently in her later opinions on the role of tradition, would not “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”¹⁶⁰

Undaunted by the “living” constitutionalism of Justice Brennan and the precedent-based fears of Justice O’Connor, Justice Scalia adhered to his position, particularly to his theory that tradition as an interpretive tool has the added advantage of producing judicial restraint.¹⁶¹ This was made evident in *Cruzan v. Director, Missouri Department of Health*.¹⁶² There, where Nancy Cruzan’s parents sought to have her removed from the artificial nutrition and hydration devices that enabled her to live in a persistent vegetative state, the Court upheld a Missouri evidentiary rule requiring clear and convincing evidence that a terminally ill but incompetent patient desired removal from the devices keeping her alive.¹⁶³ Appealing to history and practice, and citing English common law and Blackstone’s proscription of suicide, Justice Scalia’s concurrence explains that “American law has always accorded the State power to prevent, by force if necessary, suicide.”¹⁶⁴ While the constitutional text surely protects liberty, Justice Scalia noted, it does not do so “*simpliciter*” but only protects liberty from deprivation without “due process of law.”¹⁶⁵ This means, Justice Scalia urged, that a claimant must demonstrate “that the State has deprived him of a right historically and traditionally protected against State interference. That cannot possibly be established here.”¹⁶⁶ Ultimately, Justice Scalia expressed great disappointment that the Court was willing to engage in playing the substantive due process game at all in this case, noting that he “would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field,” precisely *because* of the particular tradition of proscribing suicide.¹⁶⁷ Nevertheless, having acknowledged that the substantive due process game was being played, Justice

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Id.

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388 U.S. 1 (1967) (invalidating state anti-miscegenation law).

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Michael H., 491 U.S. at 132 (O’Connor, J., concurring).

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Id. at 127 n.6 (“Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than to discern society’s views.”).

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497 U.S. 261 (1990).

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Id. at 282.

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Id. at 293 (Scalia, J., concurring). *See also* 4 BLACKSTONE, COMMENTARIES *189 (defining suicide at common law as “deliberately put[ting] an end to [one’s] own existence, or commit[ing] any unlawful malicious act, the consequence of which is [one’s] own death”).

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Cruzan, 497 U.S. at 293 (Scalia, J., concurring).

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Id. at 294 (Scalia, J. concurring).

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Id. at 293 (Scalia, J. concurring).

Scalia continued to add his flourishes to the playbook.

*Planned Parenthood v. Casey*¹⁶⁸ presented the next opportunity for Justice Scalia's defense of tradition, and this time in the most contentious of substantive due process venues: abortion. *Casey* involved a Pennsylvania law containing a number of abortion restrictions, including a requirement of informed consent prior to obtaining an abortion, parental consent where a minor seeks an abortion, and spousal notification where a married woman seeks an abortion.¹⁶⁹ The case addressed the continued legitimacy of *Roe v. Wade*,¹⁷⁰ the Court's 1973 decision recognizing that the right to obtain an abortion proceeded from the constitutional right to privacy, which is found in the substantive component of the Due Process Clause.¹⁷¹ The Court, in a joint opinion by Justices O'Connor, Kennedy, and Souter,¹⁷² invalidated only the spousal notification provision, arguing as a plurality that it placed an "undue burden" in the woman's path to exercising the abortion right,¹⁷³ and recognized for a Court majority as legitimate the "essential holding" of *Roe*,¹⁷⁴ though rejecting as a plurality the *Roe* trimester framework as unnecessary to that central holding.¹⁷⁵ In the course of their opinion, the joint authors as a majority also directly took issue with Justice Scalia's Michael H. rationale, claiming that resort to tradition at its most specific level "would be inconsistent with our law."¹⁷⁶ Citing such examples as *Loving v. Virginia*¹⁷⁷ to illustrate its criticism, the joint opinion argued that Justice Scalia's view of tradition would result in intolerable abuses by state actors, claiming that the tradition that mattered most in constitutional adjudication was the Court's tradition of "reasoned

¹⁶⁸ 505 U.S. 833 (1992). *But see* Gottlieb, *supra* note 21, at 230 (stating that "[d]espite their bow to tradition in *Planned Parenthood v. Casey*, Justices O'Connor, Scalia and Kennedy have seldom been mistaken for traditionalists."). Professor Gottlieb makes an interesting point in a most thoughtful piece. The literature (much of which is cited herein), however, suggests that the point may be better taken with regard to Justices O'Connor and Kennedy than with regard to Justice Scalia. Nonetheless, the reader is invited to view the instant article as, generally speaking, mistaking Justice Scalia for a traditionalist.

¹⁶⁹ *Casey*, 505 U.S. at 844. *See* 18 PA. CONS. STAT. §§3203-3220 (1990).

¹⁷⁰ 410 U.S. 113 (1973).

¹⁷¹ *See generally id.*

¹⁷² Interestingly, the *Casey* joint opinion is one of only four such opinions in the Court's history. The other three are: *Cooper v. Aaron*, 358 U.S. 1 (1958) (all nine justices joining); *Gregg v. Georgia*, 428 U.S. 153 (1976); and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

¹⁷³ *Casey*, 505 U.S. at 895.

¹⁷⁴ *Id.* at 846.

¹⁷⁵ *Id.* at 873.

¹⁷⁶ *Id.* at 847.

¹⁷⁷ 388 U.S. 1 (1967) (invalidating state anti-miscegenation law, despite the fact that interracial marriage was illegal in most states in the 19th century). Recall Justice O'Connor's concurrence in *Michael H.*, referring to *Loving* as an example of how rights may sometimes exist apart from specific traditions. *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring).

judgment.”¹⁷⁸

Justice Scalia, an ardent opponent of the *Roe* holding who surely hoped to be part of a majority to overrule the controversial decision,¹⁷⁹ castigated the authors of the joint opinion for “fabricating” a new version of *Roe* and for perpetuating a view of constitutional rights borne merely of abstraction without reason.¹⁸⁰ In particular, though, Justice Scalia defended his view of tradition against the joint opinion’s rejection of his *Michael H.* rationale.¹⁸¹ Arguing again that the Constitution provides no protection for “‘liberty’ in the absolute sense,” Scalia concluded that the right to obtain an abortion is not a liberty “specially protected by the Constitution . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be legally proscribed.”¹⁸²

Although the joint opinion chastised Justice Scalia’s *Michael H.* opinion for concluding that only specific traditions defined “liberty,” Justice Scalia responded “[t]hat is not what *Michael H.* says” and clarified Footnote Six: “it merely observes that, in defining ‘liberty,’ we may not disregard a specific, ‘relevant tradition protecting, or denying protection to, the asserted right.’”¹⁸³ This statement appears on its face to imply that, for Justice Scalia, the specific tradition at issue should not be meant to preclude other authoritative interpretive tools; rather, the specific tradition simply informs the interpretive process and should not be ignored. The informing function contains two important components which represent the theme of Justice Scalia’s view of tradition: (1) it gives context to the meaning of “liberty” in a way that other methods do not; and (2) it limits the range of interpretive possibilities, thus restraining the judge and maximizing the utility of the political processes rather than the judicial processes.¹⁸⁴ The joint opinion

¹⁷⁸ *Casey*, 505 U.S. at 848-49. Here, the joint opinion relied upon Justice Harlan’s dissent in *Poe* for the proposition that the interpretation of the Due Process Clause could not be “reduced to any formula.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

¹⁷⁹ See *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

¹⁸⁰ *Casey*, 505 U.S. at 982 (Scalia, J., concurring in part and dissenting in part). Justice Scalia wrote: Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying ‘reasoned judgment,’ I do not see how that could possibly have produced the answer the Court arrived at in *Roe v. Wade*. . . . ‘reasoned judgment’ does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the state is protecting is the ‘mere potentiality of life.’ . . . *Roe* was plainly wrong – even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.

Id. at 982-83 (Scalia, J., concurring in part and dissenting in part).

¹⁸¹ *Id.* at 981 (Scalia, J., concurring in part and dissenting in part).

¹⁸² *Id.* at 980 (Scalia, J., concurring in part and dissenting in part).

¹⁸³ *Id.* at 981 (Scalia, J., concurring in part and dissenting in part).

¹⁸⁴ See *Casey*, 505 U.S. at 1000-001 (Scalia, J., concurring in part and dissenting in part) (criticizing the Court’s reasoned judgment as mere “personal predilection and moral intuition,” and arguing that such value judgments “should be voted on, not dictated”).

therefore misses the point, in Justice Scalia's view, for it moves toward "systematically eliminating checks upon its own power; and it succumbs."¹⁸⁵

Justice Scalia's substantive due process traditionalism remained intact in the more recent case of *County of Sacramento v. Lewis*,¹⁸⁶ which involved a civil rights claim against a municipality by the parents of a 16-year-old boy who was killed during a high-speed police chase.¹⁸⁷ Distinguishing legislative from executive action for substantive due process purposes, Justice Souter's opinion for the Court held that a substantive liberty claim could arise when the executive action "shocks the conscience," but not merely when the actor performs negligently or recklessly.¹⁸⁸ Concurring in the judgment, but criticizing the Court's "atavistic" and subjective substantive due process methodology, which he viewed as inherently self-aggrandizing for judges, Justice Scalia explained that "rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert."¹⁸⁹ Moreover, agreeing that the parents had no textual, historical, or precedential support for their assertion, the issue was thus one left to the republican process.¹⁹⁰ "[T]he people of California and their elected representatives," Justice Scalia wrote, "may vote their consciences. But for judges to overrule that democratically adopted policy judgment on the ground that it shocks their consciences is not judicial review but judicial governance."¹⁹¹

Justice Scalia's substantive due process jurisprudence thus provides a defense of tradition in the prudentialist, Burkean mold.¹⁹² He validates time-honored social and political practices; he prefers coherence, coherence with history and with widely held beliefs about the good society, as well as coherence of context, eschewing abstraction; and he remains eminently positivist, preferring deference to the competence of the political branches to validate the customs and beliefs of the body politic, even at the expense of judicial power.¹⁹³ Moreover, despite his assertions that substantive due process doctrine is oxymoronic and thus

¹⁸⁵ *Id.* at 981 (Scalia, J., concurring in part and dissenting in part).

¹⁸⁶ 523 U.S. 833 (1998).

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 847-48.

¹⁸⁹ *Id.* at 862 (Scalia, J., concurring).

¹⁹⁰ *Id.* (Scalia, J., concurring).

¹⁹¹ *Id.* at 865 (Scalia, J., concurring).

¹⁹² *See* Chow, *supra* note 10, at 795 (describing Justice Scalia as a model of prudentialist jurisprudence); Strauss, *supra* note 21, at 1700 (stating that Justice Scalia's problem is that he is "too much of a Burkean"). *See also* Broughton, *supra* note 106, at 97 (comparing Justice Scalia's prudentialism with that of Justice Harlan, a true Burkean). *But see* Young, *supra* note 21, at 623 (concluding that Justice Scalia is not a Burkean).

¹⁹³ *See* Chow, *supra* note 10, at 795-809 (describing the attributes of prudentialism and giving examples of Justice Scalia's conformity to those attributes).

inherently illegitimate,¹⁹⁴ Scalia has at least engaged in the “game” as we have here referred to it; his traditionalism is simply the extratextual method by which he chooses to play (a sort of *textualism-plus*). Presumably, should a particular tradition exist to protect a “new” right (in which case, in reality, the right is not new at all), Scalia would be willing to validate the right and invalidate legislation prohibiting it, for such a right would be necessarily bound by law in the form of a legitimate, cognizable tradition.¹⁹⁵

Finding such a tradition in a value-neutral way, however, is for Justice Scalia the real trick in the game, according to Professors Tribe and Dorf, who conclude that Justice Scalia’s methodology is indefensible.¹⁹⁶ Using *Michael H.* as their foundation, the professors argue that the methodology suffers from three primary flaws: 1) the effort to use tradition to define rights is no more value-neutral than using precedent to do so;¹⁹⁷ 2) there is no “single dimension of specificity” at which a judge can successfully look;¹⁹⁸ and 3) even if judicial neutrality could be achieved in the tradition-based approach, that neutrality would come at “the unacceptably high cost” of rejecting the recognition of important individual rights.¹⁹⁹ Ultimately, then, Professors Tribe and Dorf conclude that “either . . . Justice Scalia’s method is designed to overrule virtually all of the Court’s decisions protecting individual rights – a rather unlikely supposition – or, more likely, that it is a construct to be deployed selectively, allowing judges to define rights more or less abstractly,” depending upon the judge’s own views of the importance of those rights or upon their place on some other “extra-constitutional index.”²⁰⁰

¹⁹⁴ See A MATTER OF INTERPRETATION, *supra* note 17, at 143. See also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n. 247 (1995) (admitting that “the basic linguistic point” that substantive due process is oxymoronic “has great force”).

¹⁹⁵ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J. concurring in part and dissenting in part) (explaining the view that if a specific tradition protected a right, the Court should not disregard that tradition).

¹⁹⁶ See TRIBE & DORF, *supra* note 20, at 98. But see L. Benjamin Young, *Justice Scalia’s History and Tradition: The Chief Nightmare in Professor Tribe’s Anxiety Closet*, 78 VA. L. REV. 581, 586-87 (1992) (lamenting the “hand-wringing” of liberal academics over Justice Scalia’s conservative jurisprudence and urging that liberals wage the jurisprudential battle on the conservatives’ own terms). Cf. Pritchard & Zywicki, *supra* note 19, at 451 (stating that “[i]ndiscriminate use of tradition in constitutional interpretation . . . negates the virtues of tradition and undermines the purposes of constitutionalism.”).

¹⁹⁷ TRIBE & DORF, *supra* note 20, at 98-99 (“[t]he lens of the historical camera, in focusing on one event, necessarily blurs others.”).

¹⁹⁸ *Id.* at 101.

¹⁹⁹ *Id.* at 98 (“[Justice Scalia’s] tradition-bound approach to constitutional interpretation would severely curtail the Supreme Court’s role in protecting individual liberties”). But see *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (recognizing a due process right in a grandmother to have in her home a son and grandson, as well as a second grandson who was the cousin of the first), *cited with approval* in *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989).

²⁰⁰ TRIBE & DORF, *supra* note 20, at 109. Indeed, more recently Justice Souter has offered a similar criticism (and one made clear in the *Casey* joint opinion, as well) of Justice Scalia’s methodology that reflects Justice Souter’s decision-based model of tradition. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See also *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J.,

2. Procedural Due Process

In *Burnham v. Superior Court of California, County of Marin*,²⁰¹ a California resident filed for divorce against her non-resident husband, who was subsequently served with process in that state while there only temporarily on business unrelated to the divorce proceeding. In determining whether the assertion of personal jurisdiction over the husband was consistent with due process, Justice Scalia's plurality opinion remarked that the Court has "long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority."²⁰² Justice Scalia explained that those principles derived from English common law, evolved in early American case law, and are reflected in the continuing practices of the states, thus culminating in the rule that state courts have jurisdiction over nonresidents who had physical presence in the state.²⁰³ Indeed, *International Shoe Co. v. Washington*²⁰⁴ recognized as much in establishing the "traditional notions of fair play and substantial justice" standard.²⁰⁵ The state legislatures are free to reject the traditional rule; meanwhile, the validation of the traditional rule "is its pedigree. . . . [w]here . . . a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is 'no longer justified.'"²⁰⁶

As in *Michael H.*, Justice Brennan disputed Justice Scalia's reliance on tradition as a dispositive factor in due process interpretation.²⁰⁷ In an opinion

concurring). In an important concurring opinion in *Glucksberg*, Justice Souter explained that unenumerated rights are best understood within the context of Justice Harlan's *Poe* dissent. *Id.* at 765 (Souter, J., concurring) See also *Poe v. Ullman*, 367 U.S. 497, 549 (1961)(Harlan, J. dissenting). Pursuant to this methodology Justice Souter argued that his understanding of unenumerated rights "avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level." *Glucksberg*, 521 U.S. at 765 (Souter, J., concurring). The essence of this critique is the demonstration that Justice Scalia's preference for specific traditions commits a different kind of abstraction, but an abstraction nevertheless, and thus mirrors the argument of professors Tribe and Dorf that Justice Scalia's methodology is not really value-neutral.

Since his joining the Court in 1990, Justice Souter and Justice Scalia have often butted heads on a variety of constitutional/interpretational issues. See, e.g., *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994); *Printz v. United States*, 521 U.S. 898 (1997). For a comparison of the prudentialism of both Justice Scalia and Justice Souter, see Broughton, *supra* note 106, at 96-108. See also Pritchard & Zywicki, *supra* note 19, at 436-45 (evaluating Justice Souter's common law theory of tradition and contrasting it with Justice Scalia's majoritarian model).

For further criticism of Justice Scalia's method of using tradition, particularly in the *Michael H.* context, see BORK, *supra* note 127, at 240 (stating that even the search for specific tradition "assumes an illegitimate power" and noting the additional problem of judicial Constitution-making if no specific tradition can be found).

²⁰¹ 495 U.S. 604 (1990).

²⁰² *Id.* at 609.

²⁰³ *Id.* at 611-15.

²⁰⁴ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁰⁵ See *id.* at 316.

²⁰⁶ *Burnham*, 495 U.S. at 621-22.

²⁰⁷ *Id.* at 633 (Brennan, J., concurring).

concurring only in the judgment, Justice Brennan explained,

I do not perceive the need, however, to decide that a jurisdictional rule that 'has been immemorially the actual law of the land' automatically comports with due process simply by virtue of its pedigree. Although I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto*, forever constitutional. Unlike Justice Scalia, I would undertake an 'independent inquiry into the . . . fairness of the prevailing in-state service rule.'²⁰⁸

For Justice Brennan, the tradition that promoted the current personal jurisdiction rule is a relevant factor only insofar as it gives notice to a defendant that he is subject to suit where he is voluntarily present in the jurisdiction.²⁰⁹

Justice Scalia offered a rejoinder in the text of his plurality opinion. The "contemporary notions of due process" that Justice Brennan would apply are those that have developed from "traditional notions of fair play and substantial justice" that *International Shoe* recognized.²¹⁰ Beyond the tradition, the only thing left to which the court may resort is "each Justice's subjective assessment of what is fair and just."²¹¹ Justice Brennan responded by noting that his standard is guided not by his own "subjective assessment" of fairness and justice, but rather by the several factors that the Court has developed to determine whether a particular practice comports with the *International Shoe* traditional notions test.²¹² Moreover, for Justice Brennan, Justice Scalia's rule could possibly operate to the detriment of many transient out-of-staters, who otherwise may seek shelter under the Privileges or Immunities and Commerce clauses.²¹³ In a final rejoinder, Justice Scalia noted, "[t]he notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon society's greedy adherence to its traditions can only be described as imperious."²¹⁴

The pedigree of procedure also had dispositive value for Justice Scalia in

²⁰⁸ *Id.* at 629 (Brennan, J., concurring).

²⁰⁹ *Id.* at 636-37 (Brennan, J., concurring).

²¹⁰ *Id.* at 622-23.

²¹¹ *Burnham*, 495 U.S. at 623.

²¹² *Id.* at 634 n. 7 (Brennan, J., concurring). *See also* *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987) (explaining the factors that Court uses to determine whether the *International Shoe* standard is met).

²¹³ *Burnham*, 495 U.S. at 639 n. 14.

²¹⁴ *Id.* at 627 n. 5.

Pacific Mutual Life Insurance Company v. Haslip,²¹⁵ which questioned whether excessive jury discretion in awarding punitive damages violated due process.²¹⁶ Despite the significant award that the Alabama jury returned in that case, Justice Blackmun's opinion for the Court found that no liberty interest is violated where the jury instructions and appellate process adequately limited the jury's discretion.²¹⁷ Justice Scalia's concurrence criticized the majority, however, for its shoddy treatment of tradition in searching for the asserted right and reviewing the contested procedure.²¹⁸ Although Justice Blackmun found that the Alabama jury practices were consistent with the common law, he explained that such practices did not "insulate [them] from constitutional attack."²¹⁹ Justice Scalia, on the other hand, affirmed "our living tradition" of jury-assessed punitive damage awards and the common law practices,²²⁰ explicated by Coke's explanation of due process in his *Institutes*,²²¹ from which that tradition originated, which tradition "necessarily constitutes 'due' process."²²² That methodology is apparent, he concluded, in a number of the Court's precedents, including *Murray's Lessee v. Hoboken Land & Improvement Co.* and *Hurtado v. California*.²²³ Thus, for Justice Scalia, once the tradition has been ascertained nothing more of the Court is necessary or desirable.²²⁴

Justice O'Connor used her *Haslip* dissent, in which she concluded that Alabama's punitive damages scheme was "void for vagueness,"²²⁵ to reiterate her

²¹⁵ 499 U.S. 1 (1991).

²¹⁶ *See id.*

²¹⁷ *Id.* at 20-21.

²¹⁸ *Id.* at 27-28 (Scalia, J., concurring).

²¹⁹ *Id.* at 18 (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)).

²²⁰ *Id.* at 39 (Scalia, J., concurring).

²²¹ *See* 2 COKE, INSTITUTES *50. As Justice Scalia explained, Coke's view (and hence Justice Scalia's view) proceeded from the *per legum terre* ("by law of the land") clause of Magna Carta, which provided that "[n]o Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land." 9 Hen. III, ch. 29. For Justice Scalia, it was this tradition that the framers of the Bill of Rights codified in the Due Process Clause, which fact is confirmed by the nation's eminent early commentators. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES *661; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *10.

²²² *Haslip*, 499 U.S. at 25 (Scalia, J., concurring).

²²³ *Id.* at 29-31 (Scalia, J., concurring). *See also* *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856) (referring to Coke and the early state constitutions in comparing "due process of law" with the *per legum terre* clause of Magna Carta); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that, although Anglo-American law demonstrated a tradition of following grand jury indictment, a state's refusal to follow that traditional procedure does not necessarily deny due process).

²²⁴ *Haslip*, 499 U.S. at 39-40.

²²⁵ *Id.* at 53 (O'Connor, J., dissenting). *See also* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring the Court in considering what process is due to consider the private interests at stake, the risk of

objections to Justice Scalia's methodology. These criticisms appeared in her brief *Michael H.* concurrence²²⁶ and were formalized even further in the *Casey* opinion that she authored jointly with Justices Kennedy and Souter.²²⁷ Justice O'Connor asserted that Justice Scalia's view was "flatly inconsistent with Mathews," which requires a "flexible" approach to due process analysis.²²⁸ In contrast, she explained, Justice Scalia's view amounted to the conclusion that due process is a notion fixed in time, immunized from constitutional objection, and ultimately ignorant of changes in the law.²²⁹

In addition, Justice Kennedy offered a concurrence in which he lauded Justice Scalia's historical approach, agreeing that the "judgment of history should govern the outcome in the case before us."²³⁰ Nevertheless, he expressed less "confidence" than Justice Scalia in the assertion that traditional practice is dispositive and forecloses further judicial inquiry.²³¹ Thus, although Justice Kennedy has found more jurisprudential common ground with Justice Scalia in other areas (in criminal law and statutory interpretation, for example),²³² he has generally proven reluctant to vindicate tradition to the same extent as Justice Scalia.²³³

The area of criminal law has also offered Justice Scalia an opportunity to explain how tradition informs due process.²³⁴ *Schad v. Arizona*²³⁵ offers a salient

erroneous deprivation of the private interest, and the government interest in avoiding additional procedures).

²²⁶ See *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring).

²²⁷ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-850 (1992).

²²⁸ *Haslip*, 499 U.S. at 60 (O'Connor, J., dissenting).

²²⁹ *Id.* (O'Connor, J., dissenting).

²³⁰ *Id.* at 40 (Kennedy, J., concurring).

²³¹ See *id.*

²³² On criminal law, see, e.g., *Medina v. California*, 505 U.S. 437 (1992). In *Medina*, the Court considered whether a statute requiring that a party asserting the incompetency of a criminal defendant had the burden of proving the incompetency violated due process. Writing for the Court, Justice Kennedy, resisting the temptation to exert "undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order," *id.* at 443, canvassed the common law and concluded that there was "no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process." *Id.* at 448. Indeed, Justice Kennedy's opinion drew a concurrence from Justice O'Connor, who, joined by Justice Souter, rejected the Court's "intimation that the balancing of equities is inappropriate in evaluating whether state criminal procedures amount to due process." *Id.* at 453 (O'Connor, J., concurring).

On statutory interpretation, and Justice Kennedy's own textualism, see, e.g., *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (Kennedy, J., dissenting). See also Chow, *supra* note 10, at 805 (describing Justices Scalia and Kennedy as "two leading textualists" on the Court).

²³³ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., joined by Kennedy, J., concurring).

²³⁴ Although his invocation of "tradition" as such has been less pronounced there, Justice Scalia's reliance on historical practices has also influenced his writing in the area of criminal procedure, particularly in Fourth Amendment jurisprudence. See, e.g., *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) ("the path out of this [Fourth Amendment doctrinal] confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that

example. In *Schad*, the Court upheld against a due process challenge a jury instruction that did not require the jury to agree on a single alternative theory of premeditated and felony murder.²³⁶ Anticipating Justice Scalia's separate opinion, Justice Souter added that despite his reliance on history to adjudicate the instant case, neither "history nor current practice is dispositive;" rather, they are "significant indicators of what we as a people regard as fundamentally fair" but are always open to "critical examination."²³⁷ Justice Scalia, concurring in part and in the judgment, and unsatisfied with Justice Souter's equivocal historical analysis, offered a lesson in the common law history of murder to demonstrate what process our nation has traditionally viewed as "due."²³⁸ "'Fundamental fairness' analysis may appropriately be applied to departures from traditional American conceptions of due process," Justice Scalia explained.²³⁹ "[B]ut when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges."²⁴⁰ He thus concluded, based on the common law rule that "was the norm" in 1787, 1868, and today, "it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide a process which is

the common law afforded."). More recently, Justice Scalia has attempted to redefine the Court's Fourth Amendment jurisprudence in accord with the historical background of that provision. See *Wyoming v. Houghton*, 526 U.S. 295 (1999). In *Houghton*, Justice Scalia, writing for the Court, explained the test thusly:

In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Id. at 299-300 (citations omitted).

In analyzing this statement of the law, one must be struck by Justice Scalia's willingness to acquiesce in a balancing test as a second step in the process. Moreover, one, in looking to Justice Scalia's view of due process in particular, may also be struck by Justice Scalia's willingness to concede that the common law does not always tell us what is "reasonable" under the Fourth Amendment. Indeed, one would have expected under Justice Scalia's view that common law and historical practice would be dispositive of the question, never "yield[ing] no answer." Compare this with the view he expressed above in *Acevedo*.

Nevertheless, Justice Scalia's appeal to the historical understanding of the Fourth Amendment has sometimes led to a vindication of individual rights. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (agreeing that seizure of contraband located in one's pockets violates the Fourth Amendment where the officer manipulates the object in order to ensure that it is contraband, and stating that "I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity.").

²³⁵ 501 U.S. 624 (1991).

²³⁶ See *id.* at 645.

²³⁷ See *id.* at 642-43.

²³⁸ See *id.* at 650 (Scalia, J., concurring).

²³⁹ *Id.*

²⁴⁰ *Schad*, 501 U.S. at 650.

'due.'²⁴¹

Also, in *Herrera v. Collins*,²⁴² the Court considered the case of a Texas death row inmate who, ten years after his conviction for capital murder, sought a federal writ of habeas corpus, claiming that newly discovered evidence demonstrated that he was actually innocent.²⁴³ The prisoner argued that executing an actually innocent person violated both the Eighth Amendment's prohibition of cruel and unusual punishment and the Due Process Clause of the Fourteenth Amendment.²⁴⁴ In an opinion by Chief Justice Rehnquist, the Court held that the prisoner's claim was insufficient to warrant habeas relief because the prisoner had not demonstrated an independent constitutional violation in any of the previous criminal proceedings,²⁴⁵ nor could he demonstrate that Texas's requirement that new trial motions be filed within thirty days of sentencing violated principles of fairness deeply rooted in society's traditions and conscience.²⁴⁶ Therefore, the appropriate avenue of relief for prisoners like Herrera, Chief Justice Rehnquist explained, is executive clemency, not a federal writ of habeas corpus.²⁴⁷

In another short but important concurrence, Justice Scalia explained his view that "[t]here is no basis in text, tradition, or even in contemporary practice (*if that were enough*) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."²⁴⁸ This statement clearly does not reject consideration of modern practices, but merely rejects the notion that modern practice is itself sufficient for

²⁴¹ *Id.* at 651 (Scalia, J., concurring).

²⁴² 506 U.S. 390 (1993).

²⁴³ *See id.* at 397-98. Leonel Torres Herrera had been convicted of murdering one police officer and pled guilty to the murder of a second officer. *See id.* at 393-94. Evidence of his guilt included Herrera's handwritten letter in which he impliedly admitted his guilt. *See id.* at 394-95. Ten years later, on his second federal habeas corpus petition, Herrera offered affidavits, including one from an attorney and former state court judge, claiming that Herrera's now-deceased brother actually committed the murders. *See id.* at 396.

²⁴⁴ *See id.* at 393. As for the due process claim here, Chief Justice Rehnquist decided that the case should be viewed as a procedural rather than substantive due process case. *See id.* at 407 n. 6. The dissenting opinion of Justice Blackmun, however, asserted that Herrera's could also be a substantive due process claim. *See id.* at 437.

²⁴⁵ *See id.* at 400.

²⁴⁶ *See id.* at 411. *See also* TEX. R. APP. PROC. 21.4(a)(1997) (stating that, in order to obtain a new trial based on after discovered evidence, defendant must file a motion for a new trial within 30 days after imposition or suspension of sentence).

²⁴⁷ *See Herrera*, 506 U.S. at 411-412. Chief Justice Rehnquist, offering his own appeal to tradition, stated that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* *See also* TEX. CONST. art. IV, § 11 (providing that the Governor may grant clemency upon the recommendation of a majority of the Texas Board of Pardons and Paroles); 37 TEX. ADMIN. CODE §§ 143.1, 143.57, 143.43, 143.41(a) (West Supp. 1992) (detailing the procedures for granting executive clemency). *But see* Ford v. Wainwright, 477 U.S. 399, 416 (1986) (stating for a plurality of the Court that executive clemency itself is not enough to vindicate Eighth Amendment rights).

²⁴⁸ *Herrera*, 506 U.S. at 427-28 (Scalia, J., concurring) (emphasis added).

determining whether a state has violated the Constitution.²⁴⁹ Again, Justice Scalia's writing reflected his frustration with a constitutional jurisprudence that, in attempting to solve every problem, avoids giving appropriate deference to historical practices, ignores the Court's limited role, and ultimately as a result, ignores the harsh realities of political life.²⁵⁰

Justice Scalia's procedural due process traditionalism is thus an example of the recurrent themes in his defense of tradition generally: deference to historical collective actions and customs and a concomitant limitation on judicial discretion. Professor Greenberger most adequately states the criticism of this position in the procedural due process area:

[T]o assert as Justice Scalia does that traditions are beyond reinterpretation is unacceptable. There is too much about them which may be abhorrent or irrelevant to bind us uncritically. . . . In the context of procedural due process, we should accord historical practices a presumptive validity, but insist that the presumption be readily rebuttable.²⁵¹

What appears most interesting about *Haslip*, *Burnham*, *Schad*, and *Herrera*, however, is Justice Scalia's insistence that it is *not* mere antiquity that vindicates a practice; rather, the true test of a tradition's constitutional relevance is its perpetuation in modernity.²⁵² If such a practice were rejected by a particular jurisdiction in modernity, presumably Justice Scalia would defer to that

²⁴⁹ On this point, query whether Justice Scalia would be equally concerned about the use of only historical practices to the exclusion of contemporary practices. *Cf.* *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (referring to "our living tradition").

²⁵⁰ See *Herrera*, 506 U.S. at 428 (Scalia, J., concurring). Here Justice Scalia explains: I nonetheless join the entirety of the Court's opinion, including the final portion . . . because there is no legal error in deciding a case by assuming, *arguendo*, that an asserted constitutional right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.

Id. See also Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (discussing the problem raised by those who contend that the Constitution was designed to solve all political and legal problems).

²⁵¹ Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1036 (1992). See also Allen R. Kamp, *The Counter-Revolutionary Nature of Justice Scalia's "Traditionalism,"* 27 PAC. L.J. 99 (1995) (describing Justice Scalia's procedural due process traditionalism as "counter-revolutionary" in the Anglican tradition, rather than the Roman Catholic one). *But see* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1316-17 (1990) (describing Justice Scalia's jurisprudence as akin to Roman Catholic theology).

²⁵² See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J. concurring) (referring to "our living tradition"); *Burnham v. Superior Court of California, Marin County*, 495 U.S. 604, 615 (1990) (explaining that the jurisdictional practice at issue "is . . . not merely old; it is continuing").

jurisdiction's collective action, or in other words, its majoritarian countertraditions.²⁵³ Justice Scalia's point appears therefore to be only that once a particular practice has been found in our traditions and not rejected by the jurisdiction involved, the *judicial* inquiry ceases; the tradition *is* the process that is due, and thus is itself a part of the Constitution and not merely an interpretive factor still subject to critical inquiry, as Justice Souter²⁵⁴ and Professor Greenberger²⁵⁵ suggest.

B. *Equal Protection*

Justice Scalia's traditionalism also lurks in the area of equal protection law. In this area, however, "tradition" appears less pronounced and operates not so much to explore the dated meaning of the Fourteenth Amendment's text but rather to identify the view that a tradition of color-blindness lives in American constitutionalism. The Equal Protection Clause reflects this evolving tradition.

Evidence of this phenomena is found in *City of Richmond v. J.A. Croson Company*.²⁵⁶ In *Croson*, the Court held that strict scrutiny applied to a municipal minority set-aside program that awarded a percentage of government contracts to minority business enterprises. Concurring in the judgment only, Justice Scalia rejected the assertion in Justice O'Connor's majority opinion that race could sometimes be used to ameliorate past discrimination.²⁵⁷ He offered a historical basis for his conclusion that the federal courts should be particularly wary of discrimination at the state level, explaining that, as James Madison recognized of faction, "racial discrimination against any group finds a more ready expression at the state and local than at the federal level."²⁵⁸ This expression of discrimination historically affected blacks disproportionately, Justice Scalia wrote, but he felt that this fact without significantly more evidence cannot justify a policy of discrimination against whites today; "[w]here injustice is the game [] turnout is

²⁵³ *But see, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (rejecting the police practice of manipulating an object in a suspect's pocket to ensure that it is contraband). Presumably, then, Justice Scalia would still object to the practice described in *Dickerson* even if a majority of Minnesotans approved of it.

²⁵⁴ *See Schad v. Arizona*, 501 U.S. 624, 643 (1991).

²⁵⁵ *See Greenberger, supra* note 251, at 1035. Professor Greenberger thoughtfully states that to abolish tradition from due process adjudication "would be an overreaction, and a deleterious one. The problem is not with looking to tradition *per se* as a guide to interpretation, which is probably inevitable, but with doing so exclusively." *Id.*

²⁵⁶ 488 U.S. 469 (1989).

²⁵⁷ *See id.* at 520 (Scalia, J., concurring).

²⁵⁸ *Id.* at 523 (Scalia, J., concurring). *See also* THE FEDERALIST PAPERS, NO. 10 at 82-84 (James Madison) (Clinton Rossiter ed. 1961) (explaining Madison's view that in smaller societies, fewer groups will exist and, "the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression."). *Id.* at 83.

not fair play.²⁵⁹

That view, again based less on an express invocation of tradition and more on an implication that race-consciousness is inconsistent with the values of the Equal Protection Clause, appeared in Scalia's brief concurrence in *Adarand Constructors, Inc. v. Peña*.²⁶⁰ In *Adarand*, the Court held that all governmental racial classifications, federal and state alike, must be subjected to strict scrutiny.²⁶¹ Tracking his line of argument from *Croson* espousing the general illegitimacy of race-based policy, Justice Scalia explained his view that

under our Constitution there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual. [The same view] is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of government, we are just one race here. It is American.²⁶²

Note that Justice Scalia makes no specific reference to tradition in this statement. Perhaps for Justice Scalia, like Professor Bickel, the Constitution embraces the evolving moral sense of the American political structure that racial bias of any sort infects our culture. This moral sensibility, enshrined in the Equal Protection Clause, itself constitutes a tradition, or, viewed another way, a superseding historical countertradition (if one accepts the view that discrimination based on race could never have legitimately been an American "tradition").²⁶³

As *Croson* and *Adarand* demonstrate, Justice Scalia's jurisprudential method, when applied to race-consciousness, not only lacks an express reliance upon tradition (as he has expressed that concept in other areas) but also lacks the same degree of deference to political majorities and the concomitant judicial restraint that inevitably accompanies such deference. Such a method may be distinguished from Justice Scalia's due process jurisprudence. Where race consciousness is not at issue Justice Scalia proves much more deferential to social and political custom and convention; instead, he favors a limited judicial role.

In *Romer v. Evans*,²⁶⁴ the Court, pursuant to the Equal Protection Clause, invalidated a Colorado constitutional amendment that prohibited state or local governmental entities from affording legal protections to persons based on "homosexual, lesbian or bisexual orientation, conduct, practices or

²⁵⁹ *Croson*, 488 U.S. at 524 (Scalia, J., concurring).

²⁶⁰ 515 U.S. 200 (1995).

²⁶¹ *Id.*

²⁶² *Id.* at 239 (Scalia, J., concurring).

²⁶³ See *Croson*, 488 U.S. at 521 (Scalia, J., concurring) (indicating agreement with Professor Bickel's assertion that "contemporary history" teaches the immorality and destructiveness of racial discrimination). See also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (explaining the same).

²⁶⁴ 517 U.S. 620 (1996).

relationships.²⁶⁵ In dissent, Justice Scalia returned to the dispositive view of tradition, describing the Colorado amendment as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”²⁶⁶ Although the Court purported to decide the case under the rational basis standard, Justice Scalia explained that the Court ignored its most relevant precedent utilizing such a standard. In *Bowers v. Hardwick*, the Court relied heavily upon custom and tradition to reinforce a social and moral standard opposing homosexual conduct.²⁶⁷ If the state can criminalize homosexual conduct, Justice Scalia explained in *Romer*, surely *a fortiori* it can prohibit special protections for those with homosexual tendencies.²⁶⁸

Ultimately, for Justice Scalia, the case was not about hostility toward homosexuals but rather society’s authority to adopt and enforce a collectively-viewed moral standard.²⁶⁹ Homosexuals, too, can reinforce their own moral sentiments, “[b]ut they are subject to being countered by lawful, democratic countermeasures as well.”²⁷⁰ The Court’s insistence upon disrupting the democratic process amounts to little more than

inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces . . . [and] verbally disparaging as bigotry adherence to traditional attitudes. . . .

Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will.²⁷¹

Justice Scalia used the same strong language in *United States v. Virginia*,²⁷² decided the same term, which represents his most articulate defense of tradition in the equal protection area.²⁷³ Purporting to employ the intermediate scrutiny standard customarily used in gender discrimination cases, but explaining

²⁶⁵ See *id.*

²⁶⁶ *Id.* at 636 (Scalia, J., dissenting).

²⁶⁷ *Id.* at 640 (Scalia, J., dissenting). See also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (relying upon the historical practices of virtually every state in making sodomy a crime).

²⁶⁸ *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

²⁶⁹ *Id.* at 644 (Scalia, J., dissenting).

²⁷⁰ *Id.* at 646 (Scalia, J., dissenting).

²⁷¹ *Id.* at 652-53 (Scalia, J., dissenting).

²⁷² 518 U.S. 515 (1996).

²⁷³ See *id.*

that it required an “exceedingly persuasive” justification from the state, Justice Ginsburg’s opinion for the Court held that the Virginia Military Institute’s (VMI) all-male admission policy violated equal protection.²⁷⁴ The lone dissenter, Justice Scalia employed tradition to defend VMI’s policy, to demonstrate why it satisfied the customary equal protection standard, and to show what he viewed as the error inherent in the Court’s meddling.²⁷⁵

In his dissent, Justice Scalia attacked the majority on the grounds that it ignored the facts and ignored precedent. Scalia felt that the facts of the case demonstrated “gender-based developmental differences,” which justified VMI’s use of the “adversative” method to train only males. He also argued that the majority ignored precedent – “drastically revis[ing] our established standards for reviewing sex-based classifications” – and history – “count[ing] for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.”²⁷⁶

Justice Scalia’s references to tradition are voluminous in *Virginia*. He asserts that it is the Court’s function to “preserve our society’s values regarding (among other things) equal protection, not to revise them.”²⁷⁷ He reiterates the danger inherent in drawing abstract rights from abstract legal “tests,” saying such tests “cannot supersede – and indeed ought to be crafted so as to reflect – those constant and unbroken national traditions that embody the people’s understanding of *ambiguous* constitutional texts.”²⁷⁸ He also explains his view that, while traditions must evolve, develop, and even become modified, it is the place of the nation’s republican institutions to effectuate those changes:

[T]he tradition of having government-funded military schools is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-

²⁷⁴ *Id.* at 534 (citations omitted).

²⁷⁵ *Id.* at 567 (Scalia, J., dissenting). Justice Scalia’s introduction contained these harsh words: [t]o counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: *They left us free to change*. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society’s law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men’s military academy – so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States – the old one – takes no sides in this educational debate, I dissent.

Id. (Scalia, J., dissenting) (emphasis added).

²⁷⁶ *Id.* at 566 (Scalia, J., dissenting).

²⁷⁷ *Id.* at 568 (Scalia, J., dissenting).

²⁷⁸ *Romer*, 517 U.S. at 568 (Scalia, J., dissenting).

smuggled-into-law.²⁷⁹

Scalia's view may be summarized in this case by one simple quote: "the Court's made-up tests cannot displace long-standing national traditions as the *primary determinant* of what the Constitution means."²⁸⁰

Scalia's language suggests that he now views tradition as relevant to *all* interpretive efforts, *even those in which the constitutional text is unambiguous*.²⁸¹ This notion indicates that tradition is more than just a factor in interpretation, as Scalia's *Casey* explanation seems to urge.²⁸² Rather, in *Virginia* Scalia suggests that, when available, tradition is dispositive and gives ultimate meaning to all constitutional language.

If, however, Scalia did not intend in his *Virginia* dissent to assert that tradition is dispositive on the issue of constitutional interpretation, an inconsistency arises. If Scalia believes that the Equal Protection Clause is in fact unambiguous then his view that tradition should be used to establish the "people's understanding of ambiguous constitutional texts" seems misplaced. For if his view is that the Equal Protection Clause *is* unambiguous, then the resort to tradition is superfluous, unnecessary, and, tracking his theory from the due process area, dangerously illegitimate. Conversely, if it is his position that the Equal Protection Clause is ambiguous (as to most of us it is), then his statement in *Virginia* is too broad and should be reconciled with his language in other cases, which suggest that while tradition is *always* useful in examining the structure and development of the Constitution's rights and powers, the Court should use it as an interpretive tool only when the Constitution's meaning is not clear on the face of the text.²⁸³

The *Virginia* dissent also raises broader questions about Scalia's views of tradition in the equal protection arena. If tradition determines constitutional meaning for Scalia, and if the Equal Protection Clause is ambiguous and requires resort to tradition, why is tradition virtually invisible in his race-consciousness jurisprudence? Is the Equal Protection Clause somehow less ambiguous when applied to cases of racial discrimination than when it is applied to cases of gender discrimination? Clearly, where race-based policies are at issue, Justice Scalia is uncomfortable deferring to the political branches. *Romer* and *Virginia*, which address equal protection in the gender and sexual orientation context, however, suggest no such uneasiness.

²⁷⁹ *Id.* at 569 (Scalia, J., dissenting).

²⁸⁰ *Id.* at 570 (Scalia, J., dissenting) (emphasis added).

²⁸¹ *Cf.* *Rutan v. Republican Party*, 497 U.S. 62, 95-96 n. 1 (1990) (Scalia, J., dissenting) (stating "I argue for the role of tradition in giving content only to ambiguous constitutional text; no tradition can supersede the Constitution.").

²⁸² *See* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in part and dissenting in part) (explaining that *Michael H.* stands for the proposition that the Court simply may not "disregard" tradition in defining liberty, though "liberty" may mean more than this tradition indicates).

²⁸³ *See* *Rutan*, 497 U.S. at 95-96 (Scalia, J., concurring).

Perhaps the answer to these questions lies in an unarticulated vision of a color-blind tradition in the Constitution. Certainly, Justice Scalia's opinions regarding racial discrimination suggest this possibility. This view would be consistent with an evolving, morality-centered vision of tradition which has affected America's race-relations since the Civil War. This view must, however, account for a conflicting (though now devolving, thanks to the Court) legislative countertradition that sees remedial racial policy as both legitimate and moral. Furthermore, this view must account for the argument, made most forcefully by Professor Hayman, that traditions of both color-blindness and of affirmative action are themselves illusory.²⁸⁴

C. *Cruel and Unusual Punishment*

Justice Scalia's use of tradition as the "primary determinant of what the Constitution means" tends to produce two practical results: it tends to favor republican (though Justice Scalia most often refers to them as "democratic")²⁸⁵ outcomes adopted in the political branches, and it tends to circumscribe judicial review. This trend is equally clear, if not most clear, in Justice Scalia's Eighth Amendment jurisprudence, in which history and political custom help define the meaning of the phrase "cruel and unusual punishment."²⁸⁶

*Thompson v. Oklahoma*²⁸⁷ involved application of that state's death penalty statute to a young man who, at the age of fifteen, was an active participant in his brother-in-law's grisly murder.²⁸⁸ A plurality of the Court found that our "evolving standards of decency"²⁸⁹ precluded the execution of someone who had committed

²⁸⁴ See Hayman, *supra* note 10, at 73. Professor Hayman explains his view that the problem with "traditions" of "color-blindness," "civil rights," "quotas," "equal opportunity," "affirmative action," and "school busing" "is not merely that they are unknowable; it is that, as coherent entities, they simply do not exist." *Id.*

²⁸⁵ See, e.g., *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) (stating that homosexuals are subject to "lawful, democratic counter-measures").

²⁸⁶ See CHRISTOPHER E. SMITH, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 *DRAKE L. REV.* 593, 603-609 (1995) (explaining Justice Scalia's death penalty jurisprudence). Professor Smith has done much work on Justice Scalia's criminal justice jurisprudence that is well worth consideration. See CHRISTOPHER E. SMITH, *Justice Antonin Scalia and Criminal Justice Cases*, 81 *KY. L.J.* 187 (1992-93); CHRISTOPHER E. SMITH, *Justice Antonin Scalia and The Supreme Court's Conservative Moment* (1993).

Cf. STEVEN G. GEY, *Justice Scalia's Death Penalty*, 20 *FLA. ST. L. REV.* 67, 102 (1992) (concluding, *inter alia*, that Justice Scalia "seems to believe that there are virtually no limits on a state's imposition of the death penalty"); SAMUEL J.M. DONNELLY, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Positions*, 24 *ST. MARY'S L.J.* 1 (1992) (providing an interesting examination of the Court's capital punishment jurisprudence and the philosophical dispositions of the Justices, including Justice Scalia, in this area).

²⁸⁷ 487 U.S. 815 (1988).

²⁸⁸ The evidence demonstrated that Thompson's brother-in-law was shot twice and had his throat, chest, and abdomen cut by four perpetrators, one of whom was Thompson. *Id.* at 819. The victim's body was then "chained to a concrete block and thrown into a river where it remained for almost four weeks." *Id.*

²⁸⁹ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (stating for a plurality that the "evolving standards of

his offense before reaching the age of sixteen.²⁹⁰ Justice O'Connor provided the fifth vote, and in her concurrence purported to prefer deference to "the people's elected representatives" where states, unlike Oklahoma, actually set a minimum age for execution by statute.²⁹¹ But Justice Scalia's vigorous dissent asked whether there existed a national consensus, "sufficiently uniform and of sufficiently long standing," opposing the execution of a defendant under the age of sixteen.²⁹² His answer was that no such convention exists and that, therefore, the Court is unwarranted in interfering with the customs adopted by the people of Oklahoma.²⁹³

Justice Scalia first found persuasive the common law view, enunciated by Blackstone, that persons under age fifteen were not immune from conviction for capital crimes.²⁹⁴ Second, having identified a historical tradition approving of such executions, Justice Scalia sought to determine whether a superseding countertradition had developed.²⁹⁵ To determine whether a countertradition developed, Scalia examined legislation, which he considered the "most reliable objective sign" of society's views about a particular punishment.²⁹⁶ The trend, he noted, was actually to *decrease*, not increase, the age for juvenile liability both for state and federal crimes.²⁹⁷ As for the statistical evidence that the plurality proffered, Scalia felt that the data merely demonstrated that society preferred executions of those under age sixteen to be rare, but not eliminated. Scalia explained that "there is no justification for converting a statistical rarity of occurrence into an absolute constitutional ban."²⁹⁸

Thus, Scalia opined that because a relevant, identifiable tradition existed which approved executing juveniles under the age of sixteen, and because society, as seen in legislative custom, did not oppose the practice, the Court should not interfere in the application of Oklahoma's death penalty statute.²⁹⁹ To do so, as he

decency that mark the progress of a maturing society" are those to which judges should look).

²⁹⁰ Thompson, 487 U.S. at 822-23.

²⁹¹ *Id.* at 857-59 (O'Connor, J., concurring).

²⁹² *Id.* at 859 (Scalia, J., dissenting).

²⁹³ *Id.* (Scalia, J., dissenting).

²⁹⁴ *Id.* at 864 (Scalia, J., dissenting). *See also* 4 BLACKSTONE, COMMENTARIES *23-24 (explaining that at common law children under age seven could not be held capitally liable, while children under age 14 were rebuttably presumed to be immune from capital punishment).

²⁹⁵ Thompson, 487 U.S. at 864-65 (Scalia, J., dissenting).

²⁹⁶ *Id.* at 865 (Scalia, J., dissenting).

²⁹⁷ *Id.* at 867 (Scalia, J., dissenting). Here Justice Scalia noted the provision of the death penalty for many federal death criminal statutes and explained that even if it were appropriate to consider the motivations of lawmakers when passing upon the question of a national consensus, these statutes indicate that "it would be strange to find the consensus regarding criminal liability of juveniles to be moving in the direction the plurality perceives for capital punishment, while moving in precisely the opposite direction for all other penalties." *Id.* at 866 (Scalia, J., dissenting).

²⁹⁸ *Id.* at 870-71 (Scalia, J., dissenting).

²⁹⁹ *See id.* at 873-74 (Scalia, J., dissenting).

expressed in *Romer*, is to indulge only the personal moral sensibilities of the Justices rather than those of the society, who is better-suited to determine what is “cruel and unusual” punishment.³⁰⁰

But vengeance, so to speak, was given to Justice Scalia in the following term. In *Stanford v. Kentucky*,³⁰¹ the Court was faced with the question of whether the Eighth Amendment prohibited the execution of Stanford, who was seventeen years old when he and an accomplice raped and sodomized a twenty-year-old woman during a gas station robbery, finally shooting her pointblank in the face and in the back of her head.³⁰² Justice Scalia, writing for the Court, explained, as he did in *Thompson*, that the determination of what constitutes “cruel and unusual” punishment follows a two step-analysis: first, whether there is an identifiable tradition of imposing a particular punishment that prevailed when the Eighth Amendment was adopted; and second, whether our society has rejected that tradition and developed a superseding countertradition of punishment which reflects *America’s* “evolving standards of decency.”³⁰³

As to the question of the presence of a tradition, Justice Scalia reiterated his conclusion from *Thompson* that the historical record demonstrates approval of capital liability for those age fifteen and above.³⁰⁴ In fact, Scalia noted, because the presumption of incapacity at age fourteen was rebuttable at common law, even a defendant over the age of seven could possibly be executed.³⁰⁵

As to the second question, whether a countertradition had developed, Scalia again considered the most objective means to answer this question was legislation.³⁰⁶ In the United States, Justice Scalia explained, most of the states which authorize the death penalty permit the execution of those age sixteen or

³⁰⁰ *Thompson*, 487 U.S. at 878 (Scalia, J., dissenting) Here Justice Scalia also responded to Justice O’Connor’s suggestion that 15-year-olds must be explicitly named in death penalty statutes to indicate that the legislature intended them to be among the class of death-eligible defendants. If this be so, he wrote, “why not those of extremely low intelligence, or those over 75, or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt?” *Id.* at 877 (Scalia, J., dissenting). Ultimately, he explained, “the concurrence’s approach is a Solomonic solution to the problem . . . Solomon, however, was not subject to the constitutional constraints of the judicial department of a national government in a federal, democratic system.” *Id.* at 878 (Scalia, J., dissenting).

³⁰¹ 492 U.S. 361 (1989).

³⁰² *See id.* at 365.

³⁰³ *See id.* at 368-69. Justice Scalia further enunciated this view in a separate opinion in which he agreed that the Eighth Amendment did not prohibit the execution of a mentally retarded defendant. *See Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part). Justice Scalia explained that if the punishment is not “unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society’s disapproval of it, the punishment is not unconstitutional even if out of accord with theories of penology favored by Justices of this Court.” *Id.*

³⁰⁴ *Stanford*, 492 U.S. at 368.

³⁰⁵ *See id.* at 368. *See also* 4 BLACKSTONE, COMMENTARIES *23-24 (explaining that children over age seven could be held criminally liable at common law).

³⁰⁶ *Stanford*, 492 U.S. at 370.

older.³⁰⁷ Moreover, he felt that it is not the state's burden to prove a national consensus in favor of the punishment, but rather the burden is on the defendant to show a national consensus against it. Merely citing polling data or the views of various interest groups, Scalia stated, cannot prove a national consensus against execution.³⁰⁸ "A revised national consensus," Justice Scalia explained, "must appear in the operative acts (laws and the application of laws) that the people have approved," and be "so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government."³⁰⁹ To place such judgments about contemporary morals merely in the hand of judges, Scalia stated, "is to replace judges of the law with a committee of philosopher-kings."³¹⁰

Much like Justice Harlan before him, Justice Scalia's Eighth Amendment traditionalism indicates a willingness to move beyond social practices with a centuries-long pedigree.³¹¹ Indeed, he accepts the notion that American society's perspectives about the moral connection between crime and punishment evolve to the point that political communities may reject a particular sanction once deemed acceptable.³¹² As *Thompson* and *Stanford* indicate, however, such an evolution of tradition must exist in more than the moral intellect of the Justices themselves; it must rather be reflected in a considered intellectual countertradition enshrined in positive law.³¹³

307 *See id.* at 371.

308 *See id.* at 373.

309 *Id.* at 377.

310 *Id.* at 379. *See also* *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that the Eighth Amendment permits certain punishments even though they may be "out of accord with theories of penology favored by Justices of this Court").

311 *See* *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting) (explaining that "tradition is a living thing"); *see also* Broughton, *supra* note 106, at 97.

312 *See* *Thompson v. Oklahoma*, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) (explaining that the Court should avoid interfering with state sovereignty by requiring a particular form of legislation, thus leaving the states free to restrain the manner in which they execute juveniles or to abolish capital punishment, if the states deem it to be a good idea to do so).

See also *Harmelin v. Michigan*, 501 U.S. 957 (1991) (arguing that in non-capital cases, the Eighth Amendment does not require proportionality). In *Harmelin*, the defendant was sentenced to life in prison under a Michigan mandatory sentencing scheme for possessing more than 650 grams of cocaine. *See id.* at 961. Delivering the Court's judgment, but joined only by Chief Justice Rehnquist for most of the opinion, Justice Scalia traced the history of the English common law, Magna Carta, and the Court's Eighth Amendment precedents, to conclude that the Eighth Amendment did not require proportionality in sentencing. *See id.* at 990. Justice Scalia purported, however, to adhere to the Court's capital precedents, concluding that those cases recognized that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides. *Id.* at 994. "We would leave it there, but will extend it no further." *Id.* *Harmelin* thus is another indicator of the role that history plays in Justice Scalia's determination of what is "cruel and unusual," and how a society's views about a particular punishment can change over time.

313 *Stanford*, 492 U.S. at 378. Justice Scalia writes here, [petitioners] are correct in asserting that this Court has not 'confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.' In determining what standards have 'evolved,' however, we have

D. *The First Amendment*

Although tradition usually plays a limited role in Scalia's First Amendment decisions, where tradition expressly plays a role in Scalia's First Amendment decisions he tends to validate the government's interests. Those who argue that rights always lose in Justice Scalia's constitutional world, however, sometimes fail to acknowledge his decisions under the First Amendment, in which he has vindicated the rights of some unpopular litigants and causes.³¹⁴ For example, Justice Scalia joined the majority in *Texas v. Johnson*,³¹⁵ which recognized that the First Amendment protects the burning of the American flag.³¹⁶ In *R.A.V. v. St. Paul*,³¹⁷ he wrote a majority opinion which invalidated an ordinance Scalia found to be bias-motivated crimes ordinance and so overbroad that it infringed the free speech rights of a defendant who burned a cross on a black family's lawn.³¹⁸ Also, in *Church of the Lukumi Babalu Aye v. City of Hialeah*³¹⁹, he joined in striking down a local ordinance that prohibited live animal sacrifices, concluding that the facially neutral law was covertly directed at a particular religious group and thus violated the Free Exercise Clause.³²⁰ Curiously (particularly in light of his suggestion in *Virginia* that tradition is dispositive when construing the Constitution), however, tradition plays little role in Scalia's written decisions.

In *Rutan v. Republican Party of Illinois*,³²¹ the Court held that the First Amendment prohibits promotions, transfers, and recalls of low-level public

looked not at our own conceptions of decency, but to those of modern American society as a whole.

Id.

³¹⁴

See David Schultz, *Scalia on Democratic Decision Making and Long Standing Traditions: How Rights Always Lose*, 31 SUFFOLK U. L. REV. 319 (1997) (explaining that Justice Scalia's jurisprudence of tradition is always used to reject the recognition of rights). Professor Schultz is correct in his assertion that an explicit defense of tradition has not led Justice Scalia to recognize previously unrecognized constitutional rights. Justice Scalia has, however, cited with approval the Court's use of tradition to do so in some instances. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989), *citing with approval Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing broad rights of family association based on the sanctity of the family in American tradition). Moreover, Justice Scalia recognizes that many of the rights found in the common law tradition have been placed in the text of the Bill of Rights, and most particularly in the Fourth Amendment. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (recognizing the right to be free from intrusive patdown searches); *California v. Acevedo*, 500 U.S. 565 (1991) (stating "I have no difficulty with the proposition that [the reasonableness component of the Fourth Amendment] includes the requirement of a warrant, where the common law required a warrant."). Surely, the common law would be considered a "long standing tradition."

³¹⁵

491 U.S. 397 (1989).

³¹⁶

See *id.*

³¹⁷

505 U.S. 377 (1992).

³¹⁸

See *id.*

³¹⁹

508 U.S. 520 (1993).

³²⁰

See *id.*

³²¹

497 U.S. 62 (1990).

employees based solely on political affiliation and belief.³²² In dissent, Justice Scalia identified a long constitutional history of providing greater deference to the government when it acts as employer rather than as “regulator of private conduct.”³²³ Faced with such a history, Justice Scalia easily concluded that the practice is presumably constitutionally valid.³²⁴ In what Justice Stevens’ concurrence described as a “startling assertion,”³²⁵ Justice Scalia applied to the First Amendment context the Burkean theory that has become familiar to his jurisprudence in other areas of constitutional law:

[t]he provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court’s principles are to be formed. . . . I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.³²⁶

Moreover, in response to Justice Stevens’ concern, Justice Scalia explained in a footnote that this traditionalism did not supersede clear constitutional text.³²⁷ Thus, for example, Justice Stevens’ invocation of *Brown v. Board of Education*³²⁸ to demonstrate the dangerousness of his position is “unsupportable” because: first, the Thirteenth and Fourteenth Amendments make “crystal clear” that the government may not “treat people differently because of their race;” and second, no “tradition of unchallenged validity” existed prior to *Brown*.³²⁹

322 *See id.*

323 *Id.* at 94 (Scalia, J., dissenting).

324 *See id.* at 95 (Scalia, J., dissenting).

325 *See id.* at 80 (Stevens, J., concurring).

326 *Id.* at 95-96 (Scalia, J., dissenting).

327 *Rutan*, 497 U.S. at 95 n. 1 (Scalia, J., dissenting).

328 347 U.S. 483 (1954).

329 *Rutan*, 497 U.S. at 95 n. 1 (Scalia, J., dissenting).

This adherence to tradition, as seen in the substantive due process cases and in *Romer*, also has a way of reinforcing morality—which Scalia believes to justify reliance on tradition in First Amendment jurisprudence as well as in other areas of law.³³⁰ In *Barnes v. Glen Theatre*,³³¹ two Indiana nude dancing establishments invoked the First Amendment to challenge a state public nudity statute which Indiana courts interpreted to require nude dancers to cover their sexual organs.³³² The Court rejected the challenge, holding that the law was content-neutral and not aimed to suppress free expression.³³³ Justice Scalia concurred, recognizing that any suppression of communicative conduct under the statute was merely incidental to the state’s effort to foster other interests.³³⁴ Those interests, he explained, relate to public morality and are based on a long tradition of moral sentiment opposing nudity in public.³³⁵ “Our society prohibits, and all human societies have prohibited,” Justice Scalia wrote, “certain activities not because they harm others but because they are considered in the traditional phrase, ‘*contra bonos mores*,’ i.e., immoral.”³³⁶

Scalia also responded to the assertion in Justice White’s dissent that the purpose of the law, to protect others from moral offense, could not possibly apply where only paying and consenting patrons could see the nude dancing.³³⁷ He stated that “[the] purpose of the Indiana statute [is] to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified.”³³⁸

³³⁰ See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (stating that Amendment 2 was a “modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”).

³³¹ 501 U.S. 560 (1991).

³³² See *id.*

³³³ See *id.* at 567-68.

³³⁴ See *id.* at 573-74 (Scalia, J., concurring).

The views that Justice Scalia expressed in *Barnes* were reiterated recently in another nude dancing case. See *City of Erie v. Pap’s A.M.*, 120 S.Ct. 1382, 1400-02 (2000) (Scalia, J., concurring in the judgment). In *Pap’s*, Justice Scalia argued that “[w]hen conduct other than speech itself is regulated, it is my view that the First Amendment is violated only ‘where the government prohibits conduct precisely because of its communicative attributes.’” *Id.* at 1402 (quoting *Barnes*, 501 U.S. at 577). He continued, “even if one hypothesizes that the city’s object was to suppress only nude dancing, that would not establish an intent to suppress what, if anything, nude dancing communicates.” *Id.* “The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.” *Id.*

³³⁵ See *Barnes*, 501 U.S. at 573 (Scalia, J., concurring) (“Indiana’s statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of “the freedom of speech.”).

³³⁶ *Id.* at 575 (Scalia, J., concurring). See also *Pap’s*, 120 S.Ct. at 1402 (Scalia, J., concurring in the judgment) (explaining his view that the First Amendment did not repeal the “traditional power of government to foster good morals (*bonos mores*)”).

³³⁷ See *Barnes*, 501 U.S. at 590-91 (White, J., dissenting).

³³⁸ *Id.* at 575 (Scalia, J., concurring). In a typically humorous turn of phrase to make a point, Justice

The preservation of public interests through reliance upon long-recognized practices is also an element of Scalia's religious liberty jurisprudence.³³⁹ For example, in *Lee v. Weisman*,³⁴⁰ the Court held that a Jewish Rabbi's invocation at a public school graduation ceremony amounted to an establishment of religion.³⁴¹ Relying upon a narrow construction of the Establishment Clause, Justice Scalia offered a historical lecture on public invocations of religion. He noted such examples as the "history and tradition of our Nation" regarding public prayers of thanksgiving and the traditional practice of opening legislative ceremonies with a chaplain's prayer.³⁴² In addition to the "general tradition of prayer at public ceremonies," Scalia continued, "there also exists a more specific tradition of invocations and benedictions at public-school graduation exercises."³⁴³ These traditions, he concluded, help inform our understanding of the relationship between

Scalia explained that:

there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal – much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.

Id. at 574-75 (Scalia, J., concurring).

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Cf. *Texas Monthly v. Bullock*, 489 U.S. 1, 29 (1989) (Scalia, J., dissenting) (arguing that a state tax exemption for religious books and articles did not violate the Establishment Clause). Justice Scalia, dissenting from the Court's conclusion that the Texas tax exemption amounted to an endorsement of religion, stated:

[t]oday's decision introduces a new strain of irrationality in our Religion Clause jurisprudence. . . . It is not right – it is not constitutionally healthy – that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law.

Id. at 45 (Scalia, J., dissenting). *See also* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring in the judgment) (further criticizing, in a brief but linguistically powerful separate opinion, the Court's Establishment Clause jurisprudence under *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

Another interesting decision that Justice Scalia wrote concerning religious liberty (in the Free Exercise context) that did not explicitly use tradition as its basis is *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, Justice Scalia argued that the Free Exercise Clause does not require religious exemption from neutral, generally applicable laws, such as (as was the case here) criminal prohibitions on the use of peyote, that are designed to advance the legitimate health, safety, and welfare concerns of the people. *Id.* at 879-80. The effect of this decision was the repudiation (though not overruling) of the compelling interest test in Free Exercise cases, enunciated in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith* produced an immediate outcry from religious liberty proponents, civil rights organizations, and Congress. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994) (restoring the compelling interest test), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See also* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 221 (stating that *Smith* "held that every American has a right to believe in a religion, but no right to practice it"); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (arguing that "Smith is contrary to the deep logic of the First Amendment").

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505 U.S. 577 (1992).

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See id.

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Id. at 633 (Scalia, J., dissenting).

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Id. at 635 (Scalia, J., dissenting).

church and state and the pervasive historical acceptance of prayer in American public life.³⁴⁴ Justice Scalia admitted that our constitutional traditions oppose government endorsement of religion where the endorsement is sectarian.³⁴⁵ Those same traditions, Scalia countered, also validate nonsectarian, nondenominational religious invocations in state-sponsored settings.³⁴⁶ Ultimately, Justice Scalia concluded that the Court has merely latched onto abstractions “that are not derived from, but positively conflict with, our long-accepted constitutional traditions.”³⁴⁷

Justice Scalia’s use of tradition in First Amendment case law, then, is similar to his use of tradition in other areas; it demonstrates a preference for positivism and a disapproval of judicial discretion. What appears most interesting, however, is the absence of a strong expression of tradition when he vindicates First Amendment rights. For example, Justice Scalia claims in *Rutan* that identifiable traditions do not supersede unambiguous text.³⁴⁸ But it is unclear whether Scalia feels that the Free Speech Clause is less ambiguous than the Due Process Clause, which he admits requires an examination of tradition for its meaning.³⁴⁹

If applied consistently, one would expect tradition to play as important a role in free speech cases concerning hate-crime ordinances as in those concerning patronage. In *Johnson*, for example, why not defer to America’s long tradition of protecting the flag, as explained in Chief Justice Rehnquist’s dissent in that case?³⁵⁰ If it is because the Free Speech Clause adopted a historical countertradition of political dissent that includes flag burning, why not say so in a separate opinion, for surely that was not the point made by Justice Brennan’s opinion for the Court? In *R.A.V.*, why not vindicate the living American tradition of punishing fighting words as nonspeech, or in punishing hateful conduct (such as burning a cross on one’s lawn) as immoral? If it is because the Free Speech Clause contains a historical countertradition which disapproves of overbroad legislation that targets viewpoint or otherwise protected expression, why not simply admit it?

Generally, Justice Scalia’s traditionalism in other areas, though not wholly accepted by his colleagues, is consistent even though it tends to produce unpopular results.³⁵¹ Its application in the First Amendment (in particular, free speech) area, however, has at times proven inconsistent, if not bewildering, and suggests that one

³⁴⁴ See *id.* at 641-42 (Scalia, J., dissenting).

³⁴⁵ See *id.* at 641 (Scalia, J., dissenting).

³⁴⁶ *Lee*, 505 U.S. 577 at 642 (Scalia, J., dissenting).

³⁴⁷ *Id.* at 644 (Scalia, J., dissenting).

³⁴⁸ See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 65 n. 1 (1990) (Scalia, J., dissenting).

³⁴⁹ See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

³⁵⁰ See *Texas v. Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting) (“For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here”).

³⁵¹ For example, Justice Scalia’s consistency in the substantive due process area is evident in, e.g., *Michael H.*, 491 U.S. at 123, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part).

of two cures may be required: either an admission that the Free Speech Clause is unambiguous and thus does not require resort to tradition; or an explanation that, like the remainder of the Constitution, the text of the Free Speech Clause is ambiguous and is informed by traditions and countertraditions which give it meaning generally and also in particular cases. The latter is preferable and most consistent with his use of tradition in other areas, as well as with his preference for rules; the former is difficult to support.

IV. JUSTICE SCALIA AND THE UNWRITTEN CONSTITUTION

What, then, is one to make of the concept of "tradition" in Justice Scalia's writing? Justice Scalia's use of tradition indicates that, for him, something "more" exists beyond the language of the Constitution. In a brief introductory note to a symposium conducted by the *Harvard Journal of Law and Public Policy*, Justice Scalia addressed the question: *is there an unwritten Constitution?*³⁵² On its surface, Scalia's answer seems ambiguous. On the one hand, he writes, "[o]f course not." No judge, in any court, applying what purports to be a principle of constitutional law that overrides the activities of the legislature or the executive, appeals to anything except the written Constitution.³⁵³ On the other hand, Justice Scalia explains, the answer is "Of course. . . . Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted."³⁵⁴

But what may seem ambiguous about Scalia's explanation merely represents an honest personal assessment of his jurisprudence. It reflects a vision of the constitutional scheme that both appreciates the value of the written word as the primary guide for settling legal disputes in a regime governed by a written Basic Law and by written codes of conduct, as well as the value of looking to beliefs and customs that give context, and content, to positive laws. Scalia's vision admires the organic, symbiotic relationship between the *lex scripta* and our own *mores majorum*.³⁵⁵ As demonstrated in his jurisprudence, then, Justice Scalia's Burkean traditionalism thus adheres to an unwritten Constitution that functions "as a kind of rule and measure of what can or ought to be contrived by and committed to positive law."³⁵⁶

A. *The Unwritten Constitution Examined and Contrasted*

Justice Scalia's jurisprudence of tradition tracks the kind of unwritten

³⁵² *Unwritten Constitution*, supra note 24, at 1.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ See Russell Hittinger, *The Unwritten Constitution and the Conservative's Dilemma*, 30 INTERCOLL. REV. 58, 60 (1994) [hereinafter *The Unwritten Constitution*].

³⁵⁶ *Introduction*, supra note 25, at xx.

Constitution that Professor Kirk defended so eloquently.³⁵⁷ Beginning from the proposition that “an order is bigger than its laws,”³⁵⁸ Professor Kirk explained that the unwritten Constitution, which coexists harmoniously with the written one, consists of the “political compromises, conventions, habits, and ways of living together in the civil social order that have developed among a people over the centuries.”³⁵⁹ Indeed, the unwritten Constitution represents even more. It also refers to the “order that obtains” once the roots of that order – the traditions, long-developed, from which it grew – “are filtered through the practices of an actual people.”³⁶⁰ Thus, the roots of our constitutional, social, and political regime are evidenced in many places, not just in one single abstract theory of government. These roots originate in the Hebrew legal tradition, in the Greek concept of *nomos*, in the development of the tripartite system of law that marked the Roman *mores majorum*, and, most especially, in the development of the common law of England.³⁶¹ What these very different roots have in common, however, is their collective influence upon the creation of order, the delicate balancing of liberty, and authority that underlies both the written and unwritten Constitutions.³⁶²

Traces of this prudential constitutional theory abound in the cases discussed in this article. *Casey* provides a clear example. In *Casey*, Justice Scalia first instructs us that he knows abortion is not a right specially protected by the Constitution because the text of the Constitution “says absolutely nothing about it” and because “the longstanding traditions of the American people have permitted it to be legally proscribed.”³⁶³ If the written document, which is the positive law of the Constitution, is all that mattered, Justice Scalia’s second argument would be superfluous. His willingness to move to the second argument, however, demonstrates that something more is at work in constitutional interpretation than merely viewing the constitutional text as a laundry list of rights and powers subject to *expressio unius est exclusio alterius*³⁶⁴ (which probably proves question-begging in many instances anyway, where the point is to determine what the text means in the first place).

³⁵⁷ See generally RIGHTS AND DUTIES, *supra* note 5, at 249-261 (explaining the virtues of the unwritten Constitution).

³⁵⁸ ROOTS OF AMERICAN ORDER, *supra* note 3, at 5.

³⁵⁹ Introduction, *supra* note 25, at xviii.

³⁶⁰ Introduction, *supra* note 25, at xvii-xix.

³⁶¹ See *supra*, Section II and accompanying notes.

³⁶² See RIGHTS AND DUTIES, *supra* note 5, at 14-15.

³⁶³ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part).

³⁶⁴ Translated, “the expression of one thing means the exclusion of another.” BLACK’S LAW DICTIONARY 581 (6th ed. 1990). For a good general discussion of this doctrine for interpreting written laws, see WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 638-39 (1995). As Professors Eskridge and Frickey note, Justice Scalia has invoked this doctrine in the statutory interpretation arena. See *Chan v. Korean Air Lines*, 490 U.S. 122 (1989).

The point also is made in *Rutan*, where Justice Scalia assures us that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”³⁶⁵ Finally, in *Virginia*, Justice Scalia explains that it is our “longstanding national traditions” that are the “primary determinant of what the Constitution means.”³⁶⁶ Where traditions, conflict, he explains, the people can “change the one tradition, like the other, through democratic processes.” Scalia maintains, however, that it is not for the Court to mandate the change.³⁶⁷

In addition to the cases in which Justice Scalia explicitly uses tradition as an interpretive tool, it is important to note that he sees a tradition of federalism that also enlightens his unwritten Constitution. For example, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,³⁶⁸ a New Jersey bank that markets and sells certificates of deposit to help college students finance their educations sued a Florida agency under the Lanham Act for false advertising concerning the State’s own tuition savings plans. The Florida agency asserted sovereign immunity.³⁶⁹ Justice Scalia’s opinion for the Court held that the federal Trademark Remedy Clarification Act did not abrogate Florida’s sovereign immunity and overruled the constructive waiver doctrine found in *Parden v. Terminal R. Co. of Alabama Docks Department*.³⁷⁰ In closing, Justice Scalia defended state sovereign immunity, specifically, and federalism, generally, with an assertion that “constitutional tradition and precedent” supported the Court’s construction of the Eleventh Amendment.³⁷¹ The “legislative flexibility” approach to federalism in Justice Breyer’s dissent, Justice Scalia noted, was inadequate to constrain federal legislative authority and thus inadequate to preserve federalism.³⁷² “Congressional flexibility is desirable, of course – but only within the *bounds of federal power* established by the Constitution,” Justice Scalia wrote.³⁷³ “Beyond those bounds (the theory of our Constitution goes), it is a menace.”³⁷⁴

³⁶⁵ *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

³⁶⁶ *United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting).

³⁶⁷ *Id.* at 569 (Scalia, J., dissenting).

³⁶⁸ 527 U.S. 666 (2000).

³⁶⁹ *Id.* at 671.

³⁷⁰ *Id.* at 680 (overruling *Parden*, 377 U.S. 184 (1964)).

³⁷¹ *Id.* at 688.

³⁷² *Id.* at 690. Although both he and Justice Scalia appealed to history and practice, Justice Breyer’s dissent took an evolutionary approach to federalist theory and contended that the basic objective of federalism, “the protection of liberty,” was best served by legislative flexibility that could meet the needs of a changing political landscape. *Id.* at 702-703 (Breyer, J., dissenting).

³⁷³ *Id.* at 690.

³⁷⁴ *Id.*

Also, in *Printz v. United States*,³⁷⁵ Justice Scalia's opinion for the Court relied upon a federalism principle – dual sovereignty – to invalidate portions of the Brady Handgun Violence Prevention Act. The Brady Act required state and local law enforcement officials to conduct background checks of prospective handgun purchasers.³⁷⁶ Conceding that the text was ambiguous on the precise question at issue, his opinion considered history (from *The Federalist* to the early Congresses to the Wilson Administration),³⁷⁷ structure, and precedent to conclude that the division of power between the state and federal governments prohibited these portions of the Brady Act.³⁷⁸

Indeed, Justice Scalia noted similar federalism concerns in a terse separate opinion in *Puerto Rico v. Branstad*,³⁷⁹ which allowed Puerto Rico to request delivery of a fugitive from Iowa pursuant to the Extradition Act of 1793. Scalia implied that a different case might have been presented if the parties “asserted the lack of power of Congress to require extradition from a State to a Territory.”³⁸⁰ Although his reference to, and explanation of, tradition in the federalism cases is muted, they necessarily embrace the notion that historically recognized and practiced norms inform the structure and meaning of the Constitution.

One criticism of Justice Scalia's view from advocates of the unwritten Constitution, is that he becomes so enamored with democratic institutions as proper agents of social and political change that he becomes preoccupied with the problem of judicial review.³⁸¹ The basis of this criticism is most dramatically demonstrated in *Virginia*³⁸² and *Romer*,³⁸³ Professor Hittinger describes this problem as one of excessive eagerness “to close off every path of judgment beyond the text of the

³⁷⁵ 521 U.S. 898 (1997).

³⁷⁶ See 18 U.S.C. § 922(s)(2) (1994).

³⁷⁷ *Printz*, 521 U.S. at 907-18. Justice Scalia's invocation of *The Federalist* is particularly interesting, for it drew several critical responses from Justice Souter in dissent. As Justice Scalia read Publius, Congress could not “impose these responsibilities [conscripting state officials to administer certain laws] without the consent of the States.” *Id.* at 910-11. Arguing to the contrary that the federal government could require action of state “auxiliaries,” Justice Souter claimed that “the most straightforward reading of No. 27 is authority for the Government's position here, and . . . this reading is both supported by No. 44 and consistent with Nos. 36 and 45.” *Id.* at 971 (Souter, J., dissenting).

Cf. THE FEDERALIST NO. 27, at 174-77 (Alexander Hamilton) (discussing the national government's authority); *id.* NO. 36, at 217-24 (Alexander Hamilton) (discussing the national government's power of taxation); *id.* NO. 44, at 280-88 (James Madison) (discussing both the Necessary and Proper and Supremacy clauses); *id.* NO. 45, at 288-94 (James Madison) (responding to fears that a strong central government will emerge to consume state power).

³⁷⁸ *Printz*, 521 U.S. at 933.

³⁷⁹ 483 U.S. 219, 231 (1987) (Scalia, J., concurring in part and concurring in the judgment).

³⁸⁰ See *id.*

³⁸¹ See *Introduction*, *supra* note 25, at xxi.

³⁸² See *United States v. Virginia*, 518 U.S. 515, 569 (1996) (Scalia, J., dissenting).

³⁸³ *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

positive law of the Constitution.”³⁸⁴ Hittinger feels “that [judges] can fall inadvertently into a kind of operational positivism, or at least into a myopia that narrows constitutional order to the problem of judicial conduct and theories about it.”³⁸⁵

Granted, as Professor Hittinger notes, the courts have some responsibility for creating this myopia, or at least for creating the circumstances that tend to produce it.³⁸⁶ Nevertheless, the criticism suggests that justice should follow the prudent course and avoid the vice of excess that would leave judges free to make jurisprudence a subterfuge for the importation of abstract, private moral judgment divorced from experience. Another vice to be avoided is one of deficiency, which would abandon the unwritten constitution in favor of a regime where “once it is determined that the Constitution leaves a judgment to the political branches or state governments, the only remaining rule is the fiat (or preferences) of the majority or the fiat of the individual,” which is also divorced from the lamp of experience.³⁸⁷

It is important to note the significant distinctions then, between Justice Scalia’s unwritten Constitution of tradition (should he choose to follow it consistently) and the unwritten Constitution of Justice Brennan and others, which represents the “Living Constitution.”³⁸⁸ The “Living Constitution” is best defined by comparing Justice Scalia’s views and those of Brennan, which Scalia has arguably inveighed.³⁸⁹ Whatever the merits of the “Living Constitution,” it is undeniably different in substance from the unwritten Constitution that governs Justice’s Scalia’s constitutional order.

Both Justice Brennan’s and Justice Scalia’s methodologies embrace written and unwritten norms that, in Calhoun’s words, “spring from the bosom of the community.”³⁹⁰ For Justice Brennan, those norms are not preserved for each

³⁸⁴ See *Introduction*, *supra* note 25, at xxi

³⁸⁵ *Id.*

³⁸⁶ *Id.* See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding an unenumerated right to privacy in the penumbras of the Bill of Rights).

³⁸⁷ *Introduction*, *supra* note 25, at xxi.

³⁸⁸ See *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J. dissenting) (stating that the plurality’s was not “the living charter that I have taken to be our Constitution”).

Cf. Ronald D. Rotunda, *Interpreting an Unwritten Constitution*, 12 HARV. J.L. & PUB. POL’Y 15 (1989) (describing the unwritten Constitution as one that “encompasses those rights and freedoms thought by many people, particularly judges, to be basic to our democratic way of life, but which are not explicitly defined by the written document.”). Professor Rotunda capably argues that academics should try to “divert the Court away from the uncharted expanse of the ‘unwritten Constitution.’” *Id.* at 22. His understanding of the unwritten Constitution, however, and the one that he urges academics and judges to resist, is more akin to the “Living Constitution” that Justice Brennan espouses; it is not the unwritten Constitution that encompasses centuries of custom, convention, and continuity, producing both rights and duties in the body politic. See RIGHTS AND DUTIES, *supra* note 5, at 4.

³⁸⁹ See generally A MATTER OF INTERPRETATION, *supra* note 17, at 41-47 (stating his objections to the “Living Constitution”). Justice Scalia argues that the “Living Constitution” possesses no guiding principle. *Id.* at 44-45. The same charge, however, cannot be leveled against the unwritten Constitution, which uses tradition as its guiding principle.

³⁹⁰ See CALHOUN, *supra* note 5, at 79. See also SAPHIRE, *supra* note 22, at 279 (stating that Justices

generation, thus imposing upon future generations an obligation to innovate only gradually.³⁹¹ Rather, as Brennan writes, “[o]ur Constitution was not intended to preserve a pre-existing society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.”³⁹² As Professor Hittinger explains, Justice Brennan’s *telos* is “the remaking of society generation by generation This method does not exhibit a subtle interplay of written and unwritten constitutions. Instead, the written Constitution is the occasion for, and not the norms of, judgments in favor of social change.”³⁹³

Liberating the individual from society, then, becomes the practical effect of Justice Brennan’s methodology, which is suspicious of relying upon republican institutions to effectuate meaningful change but confident of the judiciary’s unique capacity to protect rights because it is unobstructed by majoritarian politics or practical concerns about incumbency.³⁹⁴ What appears most striking in the comparison, though, is that the “Living Constitution” does not recognize the intrinsic value of civil social order, which is comprised of the inherent tension between the claims of liberty and the claims of authority.³⁹⁵ Rather, “since society is merely ‘facilitative’ of individual choices and well-being, when individual rights are at stake the government may not appeal to the inherent goods of society as a compelling interest.”³⁹⁶

Another critical distinction between the unwritten Constitution of tradition and the “Living Constitution” is an epistemological one, regarding the origin of constitutional values. Both constitutions do embrace the values of constitutional heritage.³⁹⁷ Indeed, it is clear that Justice Brennan’s jurisprudence recognizes the

Brennan and Scalia, despite being “very different kinds of judges,” shared common personal traits).

³⁹¹ See William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). Justice Brennan’s piece was based on a speech he delivered at Georgetown University on October 12, 1985.

³⁹² *Id.* at 438.

³⁹³ *Introduction, supra* note 25, at xxiii.

³⁹⁴ See MARION, *supra* note 156, at 434.

³⁹⁵ See *Introduction, supra* note 25, at xxv (“[t]he liberal differs from the conservative most deeply on the question of whether the social order has inherent value. Thus, Brennan regards the great drama of constitutional history as the struggle between the individual and the power of society (most potently expressed in the law of the state).”).

³⁹⁶ *Id.* Cf. A MATTER OF INTERPRETATION, *supra* note 17, at 41- 42 (concluding that the “Living Constitution” actually does not facilitate social change, though it purports to do so). Justice Scalia writes, the future agenda of constitutional evolutionists is mostly more of the same – the creation of *new* restrictions upon democratic government, rather than the elimination of old ones. *Less* flexibility in government, not *more*. . . . No, the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.

Id. at 42.

³⁹⁷ Compare RIGHTS AND DUTIES, *supra* note 5, at 4, with Michael H. v. Gerald D., 491 U.S. 110, 139 (1989) (Brennan, J. dissenting) (explaining that the Due Process Clause “would seem an empty promise if it did not protect [traditional interests]”).

values of history and tradition.³⁹⁸ His appeal to those values, however, (1) is expressed at a much higher level of abstraction; and (2) must be subordinated to the Constitution's primary value of enabling human beings maximum opportunity to determine the nature and bounds of their own existence, even where that self-determination does not accord with the complex web of practices and beliefs that are expressed in the body politic's legal and juridical traditions.³⁹⁹ Thus, whereas the unwritten Constitution to which Justice Scalia is linked discerns constitutional values in experience (concretely and in historical context),⁴⁰⁰ Justice Brennan's "Living Constitution" discerns those values from abstraction based on principles of justice, dignity, and egalitarianism, and is unlinked to particular customs, habits, and mores of the political community that brought the Constitution into existence.⁴⁰¹

One is left then to wonder of these principles: are these values the judge's own? If not, how is one to be sure that these values belong to society? The "Living Constitution" thus poses an epistemological question for itself that can only be answered (consistently) with mere Cartesian rationalism, i.e., by reference to abstract theorizing about the nature of rights. Such rationalism represents the very epistemological criticism of the "Living Constitution."⁴⁰² As Justice Scalia explains the criticism, "[t]here is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government."⁴⁰³

B. *The Unwritten Constitution and the Problem of Liberty*

Among the criticisms of Justice Scalia's unwritten Constitution (and one likely to come from adherents to the "Living Constitution") is that it insufficiently

³⁹⁸ See, e.g., *Walz v. Tax Commission*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring) (agreeing to uphold a New York property tax exemption for churches). In *Walz*, Justice Brennan, citing the long history of providing property tax exemptions for places of worship, stated:

[t]he existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. . . . The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation.

Id. (emphasis added).

³⁹⁹ See MARION, *supra* note 156, at 104. As Professor Marion explains, for Brennan "[o]nce freedom to shape a way of life for oneself becomes the core of dignified existence, all other consideration of a political, economic, or religious nature can only have a secondary status." *Id.*

⁴⁰⁰ See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95-96 (1990) (stating that "venerable and accepted tradition[s] . . . are themselves the stuff out of which the Court's principles are to be formed.").

⁴⁰¹ See *Introduction*, *supra* note 25, at xxiv-xxvi.

⁴⁰² See *Chow*, *supra* note 10, at 775-77.

⁴⁰³ A MATTER OF INTERPRETATION, *supra* note 17, at 134.

protects liberty.⁴⁰⁴ The response to this criticism is that the unwritten Constitution embraces liberty, where liberty is a product of the organic development and circumstances of a political community.⁴⁰⁵ Indeed, a tolerable political community is marked by a high degree of liberty.⁴⁰⁶ Without liberty, the community devolves into totalitarianism.⁴⁰⁷ In Professor Moore's words, "in any society that cares about liberty, you cannot go very far down the road of making everyone conform to prevalent mores simply because they are prevalent without losing far too much liberty to be tolerated."⁴⁰⁸

But, as Professor Kirk explains, liberty without order is no better than violence.⁴⁰⁹ The unwritten Constitution, like the written one, cautions against extremes of liberty, which dangerously extract rights from legitimate power in favor of abstract rationalism. The unwritten Constitution favors Burke's message:

The extreme of liberty (which is its abstract perfection, but its real fault) obtains nowhere, nor ought to obtain anywhere; because extremes, as well all know, in every point which relates either to our duties or satisfactions in life, are destructive both to virtue and enjoyment. Liberty, too, must be limited to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the aim of every wise public counsel to find out by cautious experiments, and rational, cool endeavors, with how little, not how much, of this restraint the community can subsist; for liberty is a good to be improved, and not an evil to be lessened.⁴¹⁰

The "Living" Constitutionalists would do well to heed Burke's cautions. And if he is to be faithful to the unwritten Constitution's balance between liberty and authority (which counsels more respect for liberty than mere blind deference to political majorities), so too would Justice Scalia.

C. *The Unwritten Constitution and the Problem of Change*

Nor, contrary to another able criticism (invoked by, among others, Judge Bork) that fears the perpetuation of undesirable traditions,⁴¹¹ is the unwritten

⁴⁰⁴ See *TRIBE & DORF*, *supra* note 20, at 98.

⁴⁰⁵ See *ROOTS OF AMERICAN ORDER*, *supra* note 3, at 387-88.

⁴⁰⁶ See *id.* at 6.

⁴⁰⁷ See *id.* at 6-7.

⁴⁰⁸ Moore, *supra* note 60, at 272.

⁴⁰⁹ See *ROOTS OF AMERICAN ORDER*, *supra* note 3, at 6.

⁴¹⁰ Burke, *supra* note 80, at 243.

⁴¹¹ See, e.g., BORK, *supra* note 127, at 235. Judge Bork argues that "not all traditions are admirable,

Constitution hostile to change, which must, as Burke noted, ultimately preserve us.⁴¹² That the past has an authoritative claim upon us is no reason to defer uncritically and absolutely to past practices, particularly when a political community determines that such practices were pernicious or otherwise inconsistent with what a tolerable order requires.⁴¹³ Granted, determining what constitutes a “tolerable order” is no easy task (indeed, it poses a real difficulty for the tradition-based approach to jurisprudence), particularly where those charged with making that determination and governing that order will do so within the context of tradition itself. In other words, can tradition alone really tell us what is “tolerable” in our political order?

The response is that traditions, like the communities they form, are products of collective reason (as opposed to mere private rationalism and on which there are admittedly limits and imperfections).⁴¹⁴ Traditions enable one to recognize man’s imperfect nature, as well as the complex, often costly and tragic, nature of political life.⁴¹⁵ The political community will therefore go *beyond* tradition (though

and none of them confines judges to any particular range of results.” *Id.* See also ELY, *supra* note 20, at 60 (citing the problems with properly identifying traditions).

⁴¹² See REFLECTIONS, *supra* note 4, at 21 (“[a] state without the means of some change is without the means of its conservation.”); Edmund Burke, *Letter to Sir Hercules Langrishe*, in EDMUND BURKE, SELECTED WRITINGS AND SPEECHES 288, 316-317 (Peter J. Stanlis, ed., Regnery Publishing, 1963)(1792). Burke’s letter regarding the Roman Catholics in Ireland explained:

We must all obey the great law of change. It is the most powerful law of Nature, and the means perhaps of its conservation. All we can do, and that human wisdom can do, is to provide that the change shall proceed by insensible degrees. This has all the benefits which may be in change, without any of the inconveniences of mutation. Everything is provided for as it arrives. This mode will, on the one hand, prevent the *unfixing of old interests at once*: a thing which is apt to breed a black and sullen discontent in those who are at once dispossessed of all their influence and consideration. This gradual course, on the other side, will prevent men long under depression from being intoxicated with a large draught of new power, which they always abuse with a licentious insolence. But, wishing as I do, the change to be gradual and cautious, I would, in my first steps, lean rather to the side of enlargement than restriction.

Id.

See also POLITICS OF PRUDENCE, *supra* note 4, at 24 (reminding that “permanence and change must be recognized and reconciled in a vigorous society.”). Professor Kirk explains that, “Change is essential to the body social . . . just as it is to the human body. A body that has ceased to renew itself has begun to die.” *Id.* at 25.

⁴¹³ Consider, for example, the practices of slavery and segregation. As Justice Scalia has noted, neither of these was a venerable, unchallenged tradition. See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n. 1 (1990) (Scalia, J., dissenting). Nevertheless, each was a widespread and (in a particular region) generally accepted practice.

⁴¹⁴ See Canavan, *supra* note 4, at 45. See also ROOTS OF AMERICAN ORDER, *supra* note 3, at 362 (distinguishing reason (with a small “r”) from Reason, which is purely rational). Cf. Moore, *supra* note 60, at 266-69 (explaining Burke’s suspicion of the strength of individual reason (as opposed to collective reason), particularly regarding rights and good government, but that reason nonetheless can be a guide in moving away from pernicious traditions). The distinction between collective reason and private rationality is thus an important one, for “[t]he individual is foolish, but the species is wise.” POLITICS OF PRUDENCE, *supra* note 4, at 19 (emphasis added).

⁴¹⁵ See MARION, *supra* note 156, at 166 (noting that Madison and others of the founding generation recognized the complexity of human affairs and political life, and explaining that a jurisprudence that fails to recognize the tragedy of political existence will compromise the government’s ability to govern the people).

still guided by it), by *combining* the wisdom of right reason – including principles (to which the traditionalist is not at all opposed) of justice, liberty, and decency – with the community’s own collective experiences to determine the norms that ought to prevail as that community engages in necessary reform.⁴¹⁶ Tradition thus becomes, as Burke noted of jurisprudence itself, “the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns.”⁴¹⁷

Participants in a complex and socially-constructed political community therefore must understand that the community will not be perfected, merely improved (hopefully), by reform. The unwritten Constitution that Burke embraced thus merely urges that reform be cautious, sagacious, and mindful of the lessons of experience.⁴¹⁸ To be sure, the unwritten Constitution, unlike the “Living Constitution,” does not affirmatively facilitate change for its own sake. Nor, however, does it deny that a tolerable constitutional order requires its participants constantly to achieve some degree of reform and renewal within prescribed modes of collective action.⁴¹⁹

In this way, tradition can be viewed as an icon, rather than as an idol or a token.⁴²⁰ Professor Pelikan uses this analogy in his remarkable vindication of tradition. An idol, according to Pelikan, embodies the thing it represents, “but it directs us to itself rather than beyond itself.”⁴²¹ A token, by contrast, points beyond itself but does not embody what it represents.⁴²² An icon, on the other hand,

⁴¹⁶ See Gottlieb, *supra* note 21, at 221 n.3 (explaining that “particular principles blended with caution” enables change to occur within a construct of Burkean traditionalism).

⁴¹⁷ REFLECTIONS, *supra* note 4, at 95. See also Canavan, *supra* note 4, at 45 (explaining Burke’s connection of tradition and reason).

⁴¹⁸ See REFLECTIONS, *supra* note 4, at 33. “A spirit of innovation is generally the result of a selfish temper and confined views,” Burke explained. “People will not look forward to posterity who never look backward to their ancestors. . . . the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement.” *Id.* See also Gottlieb, *supra* note 21, at 221 n.3 (explaining Burkean traditionalism’s amenability to change as requiring “particular principles blended with caution”).

⁴¹⁹ See *The Unwritten Constitution*, *supra* note 355, at 60-61. Justice Scalia’s preference for republican (or democratic) decision-making is consistent with this principle, although, as Professor Hittinger explains, that preference may tend to devolve into mere “operational positivism.” See *Introduction*, *supra* note 25, at xxi.

This notion of incremental change also is consistent with the view that the Second Justice Harlan expressed in *Miranda* and the reapportionment cases. See *Miranda v. Arizona*, 384 U.S. 436, 524 (1966) (Harlan, J. dissenting) (describing the advantages of state legislative reform and urging the restoration of criminal justice reform “to those forums where it truly belongs”); *Baker v. Carr*, 369 U.S. 186, 334 (1962) (Harlan, J. dissenting) (arguing that a legislature should be able to select lawmaking structures that best fits “the interests, temper, and customs, of its people”). See also Broughton, *supra* note 106, at 97-104 (comparing Justice Scalia’s and Justice Harlan’s methodologies and their respective preferences for republican institutions).

⁴²⁰ See PELIKAN, *supra* note 10, at 55.

⁴²¹ *Id.*

⁴²² *Id.*

is what it represents; nevertheless, it bids us to look at it, but through it and beyond it, to that living reality of which it is an embodiment. Tradition qualifies as an icon . . . when it . . . present[s] itself as the way that we who are its heirs must follow if we are to go beyond it – through it, but beyond it – to a universal truth that is available only in a particular embodiment, as life itself is available to each of us only in a particular set of parents.⁴²³

Professor Pelikan's defense of tradition is not, therefore, to be understood as an excuse. Rather, it is a "summary, a restatement, and a recovery of some of the deepest elements in the tradition itself."⁴²⁴ The voices within our traditions may be many, they may be diverse, and they may speak with a voice often hostile to tradition itself.⁴²⁵ Those voices, however, remind us of the virtue of living traditions: "the capacity to develop, while still maintaining its identity and continuity."⁴²⁶

This conception of incremental change forged in the furnace of experience guided by right reason is not foreign to Justice Scalia, although there is some question about the extent to which his jurisprudence of tradition enables society to change. In *Virginia*, Justice Scalia lamented the Court's intrusion into VMI's admissions process because such intrusion "forced" Virginia to change and at the same time would chill future democratic decisions to change past practices.⁴²⁷ In the capital punishment cases, Justice Scalia clearly embraced the search for "evolving standards of decency" and the accompanying search for changes in democratic legislative practices that would signal society's changing view of punishments.⁴²⁸

At the same time, however, the affirmative action cases provide a powerful example of Scalia's resistance to democratic change where those efforts to reform society, even if well-meaning, are based on race.⁴²⁹ Thus, Justice Scalia's writing

⁴²³ *Id.* at 55-56.

⁴²⁴ *Id.* at 57.

⁴²⁵ *See id.* at 57-58. *See also* Balkin, *supra* note 156, at 1614-29 (arguing that tradition never speaks with a single voice).

⁴²⁶ PELIKAN, *supra* note 10, at 58.

⁴²⁷ *United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting) ("[t]hese traditions may of course be changed by the democratic decisions of the people, as they largely have been. Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court.").

⁴²⁸ *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 369-373 (1989) (reviewing "enduring" state legislative and jury sentencing practices regarding the imposition of capital punishment upon those who committed their crimes while minors and concluding that the petitioners could not establish a national consensus in their favor).

⁴²⁹ *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring in the judgment) (expressing the view that the Constitution is color-blind and that state efforts to discriminate based on race cannot survive constitutional challenge except in certain limited situations involving a "social emergency").

reflects an expressed, but nonetheless ambiguous and perhaps incomplete, vision of social change in a constitutional system guided by tradition. In this regard, his amenability to change is a weaker element of his Burkeanism and of his unwritten constitutionalism than is his reverence for tradition (which is arguably the strongest element of his Burkeanism and unwritten constitutionalism)

D. The Unwritten Constitution and the Problem of Natural Law

A final criticism regarding claims about the unwritten Constitution of tradition comes from the conservative camp of which Justice Scalia is generally a part.⁴³⁰ Some feel that the unwritten Constitution gives license to the judiciary to ignore the written text in favor of an appeal to extra-constitutional sources, i.e., the familiar preference of natural law to positive law?⁴³¹

Indeed, one may suggest quite persuasively that Justice Scalia's own textualism and positivism raise this problem and discount the role of natural law in constitutional adjudication.⁴³² Professor Kirk responds to this argument. According to Kirk, the Framers, who were well versed in natural law theories, did not give us a natural law document (made evident by their opposition to abstract

⁴³⁰ The question of whether Justice Scalia is actually a conservative has arisen elsewhere in this article, and, presumably, will continue to rage. At any rate, see SAVAGE, *supra* note 21, at 55 (describing Justice Scalia's conservative credentials). *But see* Young, *supra* note 21, at 623 (arguing that Justice Scalia is not a Burkean conservative).

⁴³¹ For an explanation of the problem see generally Russell Hittinger, *Liberalism and the Natural Law Tradition*, 25 WAKE FOREST L. REV. 429 (1990). The instant article is, of course, not designed to provide a comprehensive analysis of natural law theory. For excellent discussions of natural law, however, see generally ROOTS OF AMERICAN ORDER, *supra* note 3; LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

Of course, much of the problem begins with the definition and origin of natural law. As Professor Kirk explains, there are various sources and conceptions of natural law: from divine commandment, right reason given by God, human nature "empirically regarded," abstract Reason, or "from the long experience of humankind in community." Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994) (hereafter *Natural Law*). Of these, we may say the unwritten Constitution generally follows a conception of natural law having its roots in the experiences of various human communities. *See id.* at 1047.

Also of importance to this question is the distinction between natural law and natural rights. *See, e.g.*, Michael P. Zuckert, *Do Natural Rights Derive From Natural Law?*, 20 HARV. J.L. & PUB. POL'Y 695, 731 (1997) (providing an excellent account of Thomistic natural law theory, contrasting it with Lockean natural rights theory, and concluding that natural rights do not derive from natural law); Kirk, *Natural Law*, *supra* this note, at 1037 (stating that natural rights may or may not follow from natural law, but do not do so necessarily).

⁴³² *See* Chow, *supra* note 10, at 816 (arguing that while critical pragmatists combine elements of natural law and positive law, prudential pragmatists like Justice Scalia do not; rather, Justice Scalia relies on positive law for the source of legal norms). Perhaps, here, Professor Chow assumes that natural law and natural rights are synonymous. If so, it is easy to see why Justice Scalia would reject such a normative basis for law. If one assumes that natural rights are distinct from natural law, and that natural law is understood as the web of beliefs that stem from the long experience of humankind, *see Natural Law*, *supra* note 431, at 1036, then perhaps Justice Scalia can be understood as seeing natural law as a normative basis for positive law. *Cf.* Douglas W. Kmiec, *Natural Law Originalism – Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J.L. & PUB. POL'Y 627, 652 (1997) (comparing the virtues of natural law theory to those that Justice Scalia embraces, such as serving as a "check upon the very judicial creation of novel rights that Justice Scalia laments.").

philosophizing in a practical document of governance),⁴³³ instead, positive law dominates our constitutional scheme. Professor Kirk argues, therefore, that the Constitution embodies the inspirational relationship between that positive law and the natural law, charting a sort of middle course between the extremes.⁴³⁴ “What the natural law provides,” he argues, “is the authority for positive law, not an alternative to positive law.”⁴³⁵ If natural law were meant to serve as a substitute for the positive law and its institutional decision-makers, it would, according to Professor Hittinger’s interpretation of Kirkean theory, then “speak with a forked tongue, guiding men to actions in accord with the common good (including the creation of a system of positive law), while providing justification for jettisoning those very actions, laws, and institutions meant to secure that end.”⁴³⁶

It is not clear whether Justice Scalia subscribes to Professor Kirk’s view. But despite his evident positivism and textualism, Justice Scalia’s reverence for tradition, and his particular unwritten constitutionalism to which tradition is so intimately connected, suggest that he may.⁴³⁷ Indeed, to recognize the inspirational relationship between positive law and natural law, between the *lex scripta* and the particular traditions that gave rise to it, is to reaffirm the persuasiveness of the dual answer that Justice Scalia gave to his own question about the existence of an unwritten Constitution.⁴³⁸

V. CONCLUSION

Perhaps in Justice Scalia’s jurisprudence of tradition there is a devotion not merely to the norms described in the text of the Constitution, but also to unwritten norms that serve as the basis to find meaning in those words, or in other words, to give them context and content. Importantly, in his devotion to tradition as well as text, Justice Scalia’s unwritten Constitution recognize the realities of living in a political community. Madison recognized those realities himself, understanding that popular government carries costs – the threat of majority tyranny and “the inefficiencies of coalitional politics”⁴³⁹ – that are “inescapable but, under proper

⁴³³ *Natural Law*, *supra* note 431, at 1039.

⁴³⁴ *Id.* at 1045.

⁴³⁵ *Id.* at 1047.

⁴³⁶ *Introduction*, *supra* note 25, at xxvi-xxvii. *See also* Rotunda, *supra* note 388, at 21 (stating that “[e]ven proponents of a ‘natural law’ theory of the Constitution appreciate that there must be some limitations to judicial power.”). Indeed, the positive law – the written Constitution – sets forth these limitations.

⁴³⁷ *See* Russell Hittinger, *The Natural Law in the Positive Laws*, 55 REV. POL. 5, 22 (1993) (“there is nothing contradictory in arguing, on the one hand, for a natural law basis of government, and indeed of positive law itself, while at the same time holding that judges ought, whenever possible, to be bound by written law.”).

⁴³⁸ *See Unwritten Constitution*, *supra* note 24, at 1.

⁴³⁹ *See* MARION, *supra* note 156, at 166.

management, tolerable costs.”⁴⁴⁰ In like fashion, Justice Scalia practices a constitutional jurisprudence that, unlike the “Living Constitution,” largely accepts the imperfections of our political system and, as Professor Marion aptly describes it, the complex, socially-constructed, and often tragic nature of political life.⁴⁴¹

Still, it would be foolish to deny the problems that inhere in a methodology that relies upon past practices, problems of identifying the existence of such practices, and subsequently, of defining the precise level of generality at which to ascribe constitutional import. But it would be equally foolish to assert that the constitutional text can be understood without considering the particular circumstances, customs, mores, and experiences of those who planted those words in our constitutional ground. The unwritten Constitution recognizes the experience that inspired the planting of those seeds, the traditions drawn from ancient civilizations, from our medieval predecessors, and from the various political communities that shaped the early development of American law and American institutions.

Those traditions cannot solve every problem this nation, this Republic, will face. Nor must these traditions be permitted to prevent the Republic’s growth and development toward a more wise, humane, and innovative existence. What they offer this Republic, however, is an understanding of who we are, from where we have come, and what lessons we have learned from our collective experience. The unwritten Constitution of tradition thus, above all, helps to promote order in the Republic, balancing the needs for freedom and improvement with society’s identity and the continuity that preserves it.

⁴⁴⁰ See *id.* See also THE FEDERALIST NO. 51, at 322 (James Madison) (explaining the difficulties inherent in popular government). Madison wrote eloquently:

[b]ut what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed; and in the next place, oblige it to control itself.*

Id. (emphasis added).

⁴⁴¹ See MARION, *supra* note 156, at 166.