

Tradition in Constitutional Adjudication

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Abstract. The Supreme Court has increasingly relied on the notion of tradition to decide questions about constitutional rights. This approach is not implausible. Constitutional adjudication should be attentive to the history of social practices. But traditions are rarely fixed. They are open-ended, constantly evolving, and subject to normative contestation. Judges, moreover, are part of a distinctive legal tradition with its own standards and commitments. Thus, the idea of tradition should not lead to the inexorable authority of past social practices over contemporary adjudication. It should instead lead to a recognition of the space for normative judgment in the context of constitutional rights adjudication.

We should be troubled by the power of judges to make normative judgments about contested social practices. But we should address that concern directly. An emphasis on the authority of legal reasons and on the role of legal expertise in constraining and guiding judicial decision-making responds to that concern. Moreover, it does so without falling into the Court's denial of interpretive freedom and its embrace of the illusory constraint of history and tradition.

INTRODUCTION

Some scholars argue that the Supreme Court has recently adopted a new *traditionalist* approach in constitutional law.¹ Other theorists disagree. They argue that cases like *Bruen*² and *Dobbs*³—in which the Court held that

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1. See, e.g., Marc DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEG. ISSUES 9 (2023).

2. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

3. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

questions about the status of gun and abortion rights, respectively, turn on history and tradition—do not evince a new approach.⁴ Others argue that a distinct “living traditionalist” orientation has, in fact, long been part of American constitutional law.⁵

Theoretical labels aside, the idea of tradition has been at least quite relevant in cases like *Bruen* and *Dobbs*, as well as in other decisions issued in the past few years.⁶ This will probably continue to be the case, as attested by the Court’s recent decision in *Rahimi*.⁷ The unifying idea seems to be that longstanding political and cultural practices are central to the decision of constitutional questions.⁸ In *Dobbs*, for example, the Court held that a Mississippi abortion ban after the 15th week of pregnancy did not violate substantive due process, reversing both *Roe v. Wade*⁹ and *Planned Parenthood v. Casey*.¹⁰ In justifying its conclusion, the Court argued that a right to abortion is not protected by the 14th Amendment’s Due Process Clause, because it is not deeply rooted in the country’s “history and tradition.”¹¹ In *Bruen*, the Court held that a New York regulation of the right to carry weapons for self-defense violated the Second Amendment. Any such regulation, the Court argued, must be consistent with the country’s historical tradition if it is to be constitutionally acceptable.¹² Gun regulations falling within the Second Amendment can only pass constitutional scrutiny if they are consistent with historical tradition.¹³ And this is precisely how the Court justified its decision, in *Rahimi*, to uphold a federal statutory provision prohibiting individuals subject to a domestic violence restraining order from possessing firearms.¹⁴

Within these cases, the notion of tradition plays a somewhat different role and operates within different doctrinal frameworks.¹⁵ Nevertheless, these

4. Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U.L. REV. 433, 476 (2023). See also William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193, 193–194 (2009) (describing an earlier trend of reliance on the notion of tradition in constitutional adjudication). Noting the different uses of tradition in constitutional reasoning, see Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 178 (1993).

5. See Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023).

6. See DeGirolami, *supra* note 1; R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1 (2022).

7. *United States v. Rahimi*, 602 U. S. 680 (2024).

8. Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1655 (2020).

9. *Roe v. Wade*, 410 U.S. 113 (1973).

10. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

11. *Dobbs* at 22423. For the Court’s supporting analysis, see *Id.* at 2248–2256.

12. *Bruen* at 2126. See also Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 129–30 (2023).

13. *Bruen*, 142 S. Ct. at 2137.

14. *Rahimi* at 693–694.

15. See Andrew Koppelman, Comment, *The Use and Abuse of Tradition: A Comment on DeGirolami’s Traditionalism Rising*, 24 J. CONTEMP. LEG. ISSUES 187, 1877 (2023); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 817 (2023).

cases rely on that notion. And they are evidence of a larger trend.¹⁶

These cases, and particularly *Bruen* and *Dobbs*, have already been the focus of academic criticism—from the perspective of their impact on the underlying issues (abortion and gun policy),¹⁷ the adequacy of their methods of historical inquiry and the accuracy of the resulting historical accounts,¹⁸ and the workability of the doctrinal tests they set out.¹⁹

This Article, which focuses particularly on constitutional rights adjudication, adopts a different perspective.²⁰ It scrutinizes the nature of tradition and the connection between this notion and legal reasoning. As I will explain, the idea that judges ought to pay attention to traditions is reasonable. Judges should understand the actions and practices they make decisions about, and those actions and practices are informed by historical tradition. But a tradition is not a fixed fact about the past. It is an established, ongoing, and cooperative human activity, characterized by historically extended argument about the goods the tradition realizes.²¹ As such, it is subject to change over time, and to do so based on arguments about what the tradition ought to be.²² Attention to tradition need not lead to the inexorable authority of the past over the present.

Moreover, when engaging with social traditions, judges are also operating within a specific *legal* tradition. Constitutional adjudicators are

16. DeGirolami, *supra* note 1; Girgis, *supra* note 5.

17. See, e.g., Human Rights Watch, *Human Rights Crisis: Abortion in the United States After Dobbs*, HUMAN RIGHTS WATCH (Apr. 18, 2023, 12:01 AM), <https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs> (last visited May 2, 2023); The Supreme Court Puts Gun Rights Above the Human Life, THE NEW YORK TIMES (Jun. 25, 2022) <https://www.nytimes.com/2022/06/25/opinion/supreme-court-gun-control-bill.html> (last visited May 2, 2023).

18. See, e.g., Evan D. Bernick & Jill Wieber Lens, *Abortion, Original Public Meaning, and the Ambiguities of Pregnancy*, (Feb. 2, 2023) (unpublished manuscript), <https://papers.ssrn.com/abstract=4342905>; Aaron Tang, *The Supreme Court Flunks Abortion History*, LOS ANGELES TIMES (May 5, 2022, 3 AM), <https://www.latimes.com/opinion/story/2022-05-05/abortion-draft-opinion-14th-amendment-american-history-quickening>.

19. See, e.g., Randy E. Barnett & Nelson Lund, *Implementing Bruen*, LAW & LIBERTY (Feb. 6, 2023), <https://lawliberty.org/implementing-bruen/>; Blocher & Ruben, *supra* note 12; Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023); Girgis, *supra* note 5; Smith, *supra* note 15; Barnett & Solum, *supra* note 4.

20. There are other areas of public law jurisprudence that rely on historical tradition. For instance, in federalism and separation of powers cases, the Court has at times treated the novelty of a legislative enactment as indicative of its unconstitutionality. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). For criticism, see generally Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017). Similarly (and at a more general level), “historical gloss” analyses purport to affirmatively answer constitutional questions by reference to historical practice. On historical gloss, see generally Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017). Many of the arguments here could be brought to bear on these and other uses of history and tradition (with certain adjustments), but I restrict my claims to the domain of constitutional rights adjudication.

21. ALASDAIR MACINTYRE, *AFTER VIRTUE* 187, 222 (3rd ed. 2007).

22. See generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (discussing the role of dissent and contestation within cultural traditions).

thus answerable to the norms and values of the tradition of constitutional law itself. Because of this, there is an additional layer of flexibility built into judicial engagement with traditions. Judges must negotiate the tensions and potential divergences between the values of law and the historical patterns of social activity that law regulates.

The Court's current focus on tradition is not the only way in which American constitutional law has engaged with this notion. An alternative approach, which I call *flexible traditionalism*, is more transparent about the fact that engagement with contested traditions opens a space for interpretive judgment and choice, and has also played an important role in constitutional law.²³ This alternative approach is exemplified by cases like *Lawrence v. Texas* (in which the Court held that a statute criminalizing consensual sexual conduct between two persons of the same sex violated the Due Process Clause)²⁴ and *Obergefell* (in which the Court held that the Fourteenth Amendment requires states to license and recognize same-sex marriage).²⁵

The problem with flexible traditionalism is that, while transparent, it raises serious concerns about judicial power. Indeed, the current Court's own position can be interpreted as an attempt to avoid the judicial discretion that flexible traditionalism embraces. But to the extent we feel uneasy about judges' power to make normative judgments about contested social practices like gun regulation and abortion, we should address that concern directly. Reference to tradition does not solve the problem—if anything, it exacerbates it. The right response is a more thoughtful articulation of judicial power and its mode of exercise.

A correct understanding of tradition, thus, provides additional reasons to question our current system of judicial review. It also suggests we need theories of adjudication that can help us secure judicial restraint in the application of constitutional law and judicial lawmaking, even within the current institutional setup. With this goal in mind, the Article suggests that an emphasis on the authority of legal reasons and the role of legal expertise in constraining and guiding judicial decision-making offers a better approach. This approach preserves the idea of legal restraint, without falling into the Court's denial of interpretive freedom and its embrace of the illusory constraint of history and tradition.

The Article proceeds as follows. Part I, after a brief overview of the Court's engagement with tradition in recent cases, presents the Article's general account of traditions, and why they matter—in general, for human beings, and in particular, for judges. Part II explains why law is itself an institutionalized historical tradition, and how this distinctive legal tradition

23. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 141 (2009).

24. *Lawrence v. Texas*, 539 U.S. 558 (2003).

25. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

grapples with, and is sometimes in tension with, social traditions. Both parts show that judges have a significant degree of interpretive freedom in ascertaining the content of traditions and in negotiating their interaction with law. Part III relies on the previous sections to assess the Court's use of the notion of tradition, and to argue that, as a form of conservative traditionalism, it is seriously flawed. This part also argues that an alternative, *flexible traditionalism*, is already embedded in American constitutional law. As Part IV acknowledges, though, worries about the degree of interpretive freedom that a transparent engagement with contested traditions produces are well-founded. But if we are concerned about this interpretive freedom, we should be wary about relying on tradition as an operative notion in legal doctrine and, more generally, about the distribution of power in our constitutional institutional design. Of course, the problem for judges is that they cannot unilaterally change this institutional architecture. Instead, they need to figure out how to decide cases within it. Part V addresses this issue. It articulates (or, more precisely, sketches) an account of the application and development of constitutional law that avoids both the illusion of restraint from history and tradition *and* the risks of judicial overreach generated by an open embrace of interpretive freedom. This middle ground is achieved by clearly distinguishing between the application and creation of constitutional law, and correctly identifying how this latter activity, when undertaken by judges, is still guided by law.

I. LAW AND TRADITION

This part of the Article describes the Court's use of the notion of tradition (Section A) and provides an account of what traditions are, the implications they have, and their legal significance (Sections B, C, and D). As this part shows, while attention to tradition is warranted, that attention inevitably requires normative evaluation.

A. Law and Tradition in the Court: Bruen, Dobbs, Rahimi

Bruen was a case about the constitutionality of a New York statute that subjected applications for concealed carry licenses to a showing of proper cause or special needs. The Court's decision—which ratified Justice Kavanaugh's interpretation of *Heller* as a circuit judge²⁶—relied on historical tradition to set the limits of states' authority to regulate firearm possession falling within the plain meaning of the Second Amendment.²⁷ Unless the government can prove that its regulation is part of the historical

26. As a judge in the DC Circuit, then Judge Kavanaugh argued that *Heller* did not require a two-step approach (as other courts had interpreted it to do), but simply required judges to look at text, history, and tradition to define the scope of the right protected by the Second Amendment. *Heller v. D.C.*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

27. *Bruen* at 2126, 2129-2130.

tradition, that regulation is deemed unconstitutional.²⁸ As Justice Thomas, writing for the majority, explained:

“[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.”²⁹

According to the Court, then, state regulations must be part of the historical tradition, which sets the limits of the right to keep and bear arms.³⁰ The Second Amendment, the Court argues, is itself the crystallization of a balance struck by the people’s traditions, and courts must defer to that balance.³¹

Quite clearly, *Bruen* places a huge weight on past legislative and regulatory inactivity.³² Indeed, in its decision, the Court relied on what it took to be the lack of any tradition prohibiting publicly carrying guns for self-defense, or limiting it only to individuals demonstrating special needs or circumstances.³³ In other words, questions about the constitutional status of gun regulations are answered by history and tradition, and particularly by whether they contain a record of analogous regulations to those being questioned.

The Court, while still relying on tradition, took a somewhat different approach in *Dobbs*.³⁴ *Dobbs*’s overruling of *Roe* and *Casey* was based on the claim that a right to abortion is not protected by the Due Process Clause of the Fourteenth Amendment, because such a right is not “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³⁵ The majority in *Dobbs* argued that, occasionally, the Court had ignored the limits to its power and engaged in judicial policymaking. To avoid this risk, the Court should be “guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty.”³⁶ Engaging in this analysis, Justice Alito argued that there is an unbroken tradition of criminal prohibition of abortion stretching from the early

28. *Id.* at 2127.

29. *Id.* at 2126 (internal quotation marks omitted).

30. *Id.* at 2127.

31. *Id.* at 2131.

32. Blocher & Ruben, *supra* note 12, at 20; Charles, *supra* note 19, at 71–72; Koppelman, *supra* note 15, at 5.

33. *Bruen*, 142 S. Ct. at 2138. *See also* District of Columbia v. Heller, 554 U.S. 570 (2008).

34. Charles, *supra* note 19, at 73–74 (arguing that the Court took very different approaches in *Bruen* and *Dobbs*).

35. *Dobbs* at 2242.

36. *Id.* at 2248.

common law until 1973.³⁷ That history suggests, according to the majority, that no right to abortion can be recognized under substantive due process.

Dobbs's majority opinion argued that history and tradition are a restraint on judicial power. As Justice Alito wrote, discussing the dissent:

“Because the dissent cannot argue that the abortion right is rooted in this Nation’s history and tradition, it contends that the constitutional tradition is not captured whole at a single moment, and that its meaning gains content from the long sweep of our history and from successive judicial precedents. This vague formulation imposes no clear restraints on what Justice White called the exercise of raw judicial power, and while the dissent claims that its standard does not mean anything goes, any real restraints are hard to discern.”³⁸

The issue of tradition was again addressed by the Court in *Rahimi*, a decision concerned—like *Bruen*—with the Second Amendment. In this decision, the Court held that the historical tradition of firearm regulation in the United States was consistent with restrictions on firearm possession for individuals who are a threat of physical harm to others.³⁹ Historical tradition, according to the majority, clearly distinguishes “citizens who have been found to pose a credible threat to the physical safety of others from those who have not.”⁴⁰

* * *

Thus, while *Bruen*, *Dobbs*, and *Rahimi* rely on tradition, they do so differently. *Bruen* relies on tradition to derive constitutional protection from regulatory inactivity, while *Dobbs* relies on statutory enactments and legal provisions to deny constitutional protection, hoping to rely on the idea of tradition to ensure judicial restraint.⁴¹ *Rahimi* relies on tradition to vindicate, rather than undermine, the constitutionality of a statutory restriction. But, in all these cases, the best interpretation of the role played by tradition is that it is not merely treated as evidence of the meaning of the Constitution or as evidence of the legal content generated by it. Instead, in these cases tradition plays a constitutive role: the content of the relevant constitutional norms is directly determined by facts about the pertinent traditions. These three cases, it must be noted, are just examples of a larger trend. I focus on them because of their salience, their political and legal significance, and the crucial role that the idea of tradition played in the Court’s reasoning in each of them.

37. *Id.* at 2253–54.

38. *Id.* at 2260 (internal citations and quotation marks omitted).

39. *Rahimi* at 690.

40. *Id.* at 700.

41. Charles, *supra* note 19 at 80, 94.

B. *The Idea of Tradition*

Given the Court's emphasis on the idea of tradition, it is important to explore why the notion of tradition is significant in general, and for practical reasoning in particular.

Traditions play important roles in human life. Many of us participate in traditions, and act on the basis of reasons provided by them.⁴² Take the following examples: participation in sports; membership in political organizations; religious life; professional life; family relationships; and friendships. In each of these cases, the relevant forms of social interaction rely on the existence of traditions, and on people acting on the basis of reasons generated by their participation in such traditions.

Second, traditions embody a rational connection between past and present action.⁴³ The reasons provided by traditions are partly reasons to act in certain ways today because others (or we) acted in the same way in the past.⁴⁴ Thus, at a basic level, a tradition is something transmitted from the past to the present.⁴⁵ Within a tradition, the past has an authoritative presence.⁴⁶

Third (and this is more commonly overlooked), traditions also embody a rational connection between present and future action. When we act within an ongoing tradition, what we do today can impact the future of the tradition—thus, the future has a bearing on what we ought to do today.⁴⁷ This is something easily overlooked, particularly by those who rely on the rhetoric of tradition to preserve an idealized past.⁴⁸ Responsible participation in a tradition, thus, involves a concern for how that tradition

42. Samuel Scheffler, *The Normativity of Tradition*, in *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 281, 287 (2012).

43. Here and elsewhere in the Article, my use of *rational* is purely descriptive. When I say that traditions embody a rational connection between past and present, I mean to suggest that they embody a connection between the reasons agents take themselves to have today and what has happened in the past. I am not using *rational* in a commendatory way—i.e., as a positive evaluation of traditions as necessarily based on good reasons.

44. Martin Krygier, *Law as Tradition*, 5 *L. AND PHIL.* 237, 240 (1986). See also Martin Krygier, *Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law*, 9 *U.N.S.W.L.J.* 26, 36 (1986).

45. Jack M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1619 (1990); H. Patrick Glenn, *A Concept of Legal Tradition*, 34 *QUEEN'S L.J.* 427, 430 (2008); EDWARD SHILS, *TRADITION* 12 (1981).

46. Krygier, *Law as Tradition*, *supra* note 44, at 240.

47. As Brandom writes: "Traditions are lived forward and understood backward." ROBERT BRANDOM, *REASON IN PHILOSOPHY: ANIMATING IDEAS* 23 (2009).

48. This is also overlooked by those who want to rely on tradition to empower judges to pursue certain goals they deem valuable. Consider Adrian Vermeule's recent turn towards what he calls the "Western legal tradition" (or rather, Vermeule's particular interpretation of that tradition). While much less interested in judicial restraint than the *Bruen* and *Dobbs* majorities and the mainstream of the conservative legal movement, this view also relies on the authority of an idealized past and downplays the significance of rational continuity with the future. While the Court's majority wants to treat the past as a constraint, Vermeule's common good constitutionalism wants to treat it as an authority for justifying a less restrained approach in the present. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

might fare in the future, and how our actions today can impact that future. Concerns about the future also affect our reconstruction of the past. Thus, the rational continuity of traditions goes both ways. For example, individuals' participation in religious traditions is sensitive both to the history of those religious communities, and to what the impact of their actions today might have on the future development of their religion.

Fourth, traditions are ongoing *social* practices. They depend on shared habits and customs.⁴⁹ Because traditions are ongoing social practices and thus depend on contingent social facts, they are also amenable to change.⁵⁰

Fifth, traditions build on a complex historical record and have a collective dimension. Because of these two facts, traditions are susceptible to different interpretations. A central part of participants' discussions will be about what the tradition ought to be and how it should be understood.⁵¹ The practices surrounding the tradition will thus be partly self-referential; they will involve arguments about what would make the tradition better or worse, and about how it should develop.⁵² This is why traditions allow for a certain degree of internal innovation,⁵³ and their participants are not merely passive recipients of the tradition's past.⁵⁴

C. *The Normativity of Tradition*

The characterization of tradition so far is somewhat abstract. Perhaps this is unavoidable given that tradition is an ambiguous concept.⁵⁵ But the characterization so far has two implications worth highlighting.

First, traditions are normative—they can be a source of reasons for action. This raises the question: Why would it make sense to treat the fact that we or others have done something in certain ways in the past as a reason that bears on what we should do today?⁵⁶ The answer to this question could take several forms.⁵⁷ One could argue that the stability of certain practices over

49. Krygier, *Law as Tradition*, *supra* note 44, at 240.

50. Harold J. Berman, *Introductory Remarks: Why the History of Western Law Is Not Written*, 1984 U. ILL. L. REV. 511, 514 (1984).

51. MACINTYRE, *supra* note 21, at 206.

52. *See* Sunder, *supra* note 22.

53. Martin Krygier, *Thinking Like a Lawyer*, in *ETHICAL DIMENSIONS OF LEGAL THEORY* 67, 68–69 (Wojciech Sadurski ed., 1991); Jarkko Tontti, *Law, Tradition and Interpretation*, 11 INT'L J. FOR THE SEMIOTICS OF L. 25, 30 (1998).

54. ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 12 (1988).

55. Barnett & Solum, *supra* note 4, at 443.

56. There is a more specific variation of this question, which focuses not just on whether traditions give us reasons but on whether we could be *obligated* to act or decide in certain ways simply because those are the traditional ways. My intuition is that such a view would be deeply implausible, and so here I take up the more general question. I want to ask why traditions might give us merely *pro tanto* reasons. On *pro tanto* reasons, *see* John Broome, *Reasons*, in *REASON AND VALUE* 28, 36 (R. Jay Wallace et al. eds., 2004).

57. *See generally* Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008). Similar questions can be raised about reliance on historical evidence in other areas of constitutional law too. *See, e.g.*, Bradley, *supra* note 20.

time and their survival is explained by something like a process of natural selection. Thus, traditions would give us reasons for action because their stability is evidence of their connection to, or ability to foster, aggregate social welfare.⁵⁸ Or perhaps the argument could be more epistemic in nature, and emphasize the wisdom of the many who have inhabited the past.⁵⁹ The argument could also be a conservative claim about the independent value of all traditions as such. It could, following Burke, suggest that we ought to respect the history and value of what we have received,⁶⁰ so that we avoid the “evils of inconstancy and versatility.”⁶¹ Alternatively, we might want to resist the premise of the question: perhaps it doesn’t make sense to treat traditions as normative, and giving weight to tradition is a form of false consciousness. On this view, traditions might subsist over time and be treated as normative simply because they serve the interests of hegemonic groups.

Instead of taking these paths, my argument for the normative significance of traditions here will be more restricted. While open to the possibility that the stability of traditions might be partly explained by ideology or collective mistake, this argument will also attempt to explain their rational force (therefore taking that rational force at face value). Human agency and practical reason partly depend on social practices. Human beings act and deliberate how to act by using the tools—concepts, commitments, conventions, values, and ideas—that their cultural context, with its particular history, makes available to them. Our action and deliberation are shaped by social practices with specific histories.⁶² We judge and act by subjecting ourselves to norms,⁶³ and norms are the products of the history of our social practices.⁶⁴

In other words, our practical reasoning is situated.⁶⁵ The traditions that constitute our particular social practices have normative force because one cannot begin to act and reason within them without using, and therefore at least provisionally accepting, some of the standards that govern these

58. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 44 (2019).

59. *Id.* at 44–45; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–892 (1996). See also Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 683 (1997).

60. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 81 (2003).

61. *Id.* at 82.

62. Sally Haslanger, *Practical Reason and Social Practices*, in THE ROUTLEDGE HANDBOOK OF PRACTICAL REASON 68, 69 (Ruth Chang & Kurt Sylvan eds., 2020).

63. BRANDOM, *supra* note 47, at 33.

64. See HANS-GEORG GADAMER, TRUTH AND METHOD 292 (Joel Weinsheimer & Donald G. Marshall trans., 2004) (emphasizing the interpretive significance of the historical evolution of social practices).

65. Alasdair MacIntyre, *Practical Rationalities as Forms of Social Structure*, in THE MACINTYRE READER 120, 120–121 (Kelvin Knight ed., 1998) (making this claim in the discussion of practical reason).

practices (which are, partly, a function of their past).⁶⁶ Of course, our involvement with the practice might be critical. After careful consideration, we might conclude that some of the standards that govern participation in the practice are morally dubious and engage in speech and action aimed at changing them. We might even decide that we ought to abandon a particular practice. But one cannot act as a moral agent without provisionally adopting at least some of the standards of our surrounding social practices and allowing them to shape and guide our practical deliberation.⁶⁷

Of course, deliberation might not be *fully* dependent on social practices.⁶⁸ And at least some normative principles are correct independently of established and ongoing practices.⁶⁹ The point here is just that practical reasoning is facilitated, conditioned, and constrained by culture and social practices and their specific histories.⁷⁰

This picture of practical reasoning might seem to put every human being under very limiting constraints. But this takes me to a second implication worth highlighting. Traditions are constitutively complex: facts about the past never fully determine the content of the tradition and the reasons they generate. Any tradition is a complex, long-lasting, collective undertaking that sums up multiple actions, decisions, and patterns, and rationally connects past, present, and future. Traditions don't predetermine which specific parts of their past merit preservation, how to interpret that past, or how the future of a tradition bears on present action. In other words, traditions generate normative standards, but the transition from brute historical facts of the past to norms is not automatic. How to characterize a specific tradition and its normative standards will be a complex question, both for participants and for those called to determine their content as external observers. We will disagree about the answer, and we might get it wrong sometimes. More importantly, facts will underdetermine the precise content of the tradition.⁷¹ The need for judgments of relative importance and the associated likelihood of disagreements are not just produced by epistemic limitations. Even with access to all the facts, what to make of a tradition is a complex matter of interpretation and judgment about the tradition's past and its future.⁷² Reference to tradition opens up "room to

66. MACINTYRE, *supra* note 21, at 190.

67. This is, in fact, a common observation about what commonwealth constitutional theory calls "constitutional conventions." See Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1853 (2013).

68. As noted by Haslanger, *supra* note 62, at 68.

69. Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263 (1996); Steven Wall, *Political Morality and the Authority of Tradition*, 24 J. OF POL. PHIL. 137, 142 (2016).

70. Some philosophers would go further and argue that reasoning is, essentially, an ongoing social activity. See ANTHONY SIMON LADEN, *REASONING: A SOCIAL PICTURE* (2012).

71. Ronald Dworkin made much of this in his argument from theoretical disagreement against legal positivism in RONALD DWORIN, *LAW'S EMPIRE* (1986).

72. Krygier, *Law as Tradition*, *supra* note 44, at 242.

maneuver.”⁷³

Thus, as participants in traditions, we must exercise our judgment to decide what to make of the past and its normative impact. Our actions and our deliberation will be guided by normative standards that come, so to speak, from the outside. But these standards will be determined by our critical engagement and our considered judgments regarding the significance of specific facts about the past, as well as about the rational continuity between past, present, and future. Genuine traditions are alive: they are not just about the past constraining what people in the present should do or decide, but also about present people actively using and applying that past and disagreeing about what to make of it.⁷⁴

The same applies to anyone trying to understand the actions of participants in social traditions from the outside. Once we have decided we must focus on a domain of social activity and its historical tradition, we also need to decide how narrowly or broadly to draw that tradition—which will have an impact on how much the tradition can evolve and how much it can constrain.⁷⁵ This means that when we engage with the histories surrounding the practice and regulation of gun ownership and regulation or abortion, to take the practices at issue in *Bruen*, *Rahimi*, and *Dobbs*, we will not be dealing with a purely factual inquiry. The factual inquiry is itself complex, but it is also never sufficient, in and of itself, to fully determine the normative content of the tradition. Not only do we need to ascertain the facts—we also need to decide which of them are significant, which central, which outliers, etc. We thus need to engage in normative evaluation.⁷⁶

D. *The Legal Significance of Tradition*

All of this matters for legal decision-making. All else equal, judges ought to make sure their decisions are based on a grasp of the facts of the case that is as accurate as possible. And one of the most relevant aspects of the cases judges deal with is the human behavior involved in them, which takes place in the context of social practices with specific histories and traditions. Thus,

73. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 60 (1980). This is the old problem of the various levels of generality at which traditions can be defined, and the associated concerns about the manipulability inherent in the notion. See Koppelman, *supra* note 15, at 4; Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1088 (1990).

74. Glenn, *supra* note 45, at 432–433.

75. DeGirolami, *The Traditions of American Constitutional Law*, *supra* note 1, at 28.

76. This point is similar to John Finnis’s views about the theorization of law as a social institution in Chapter I of JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011). It’s also worth noting that my account of social traditions is quite consistent with Ronald Dworkin’s observations about interpretive social practices and the way in which they change in light of interpretations about their point or value. I have certain doubts about how much law and legal traditions fit this model and think that Dworkin should have modified it to fit the distinctive features of law—and particularly the fact that law aims to achieve authoritative settlement and coordination in the face of moral disagreement. But the Dworkinian model fits less formalized social practices and their historical development particularly well. DWORKIN, *supra* note 71, at 46–49.

a judge deciding over any sphere of social activity must—if they want to correctly understand the sphere of activity they are engaging with—consider the history and traditions relevant to that domain.⁷⁷

Courts are governance structures that interact with a specific social domain to regulate it (in a broad sense).⁷⁸ Legal rules and institutions presuppose a specific “regulatory scene.”⁷⁹ When we are concerned with questions about judicial decision-making, we are concerned with the interaction between judicial institutions’ decisions and the specific domains of activities—commerce, religious practice, air travel, healthcare, etc.—they are in charge of regulating. These domains have their own specific traditions. A basic understanding of those traditions is at least highly useful for judicial decisionmakers.

Of course, this does not say anything about the doctrinal tests and implementation devices judges should use in constitutional adjudication. It might very well be the case that tradition ought to be disciplined, limited, or perhaps even effaced—rather than used as an operative test.⁸⁰ More concretely, direct reference to tradition in the adjudication of cases involving contested social practices might open the field so much for divergent applications—as the juxtaposition of *Bruen* and *Dobbs* arguably suggests,⁸¹ and the Court’s disagreements in *Rahimi* confirm—that it might be better to avoid using it as a device in constitutional decision-making.⁸² The argument so far merely suggests that attention to tradition is warranted given that judges should have an adequate grasp of the social practices they evaluate and regulate.

II. LAW AS A TRADITION⁸³

I have drawn a distinction between courts and the social practices they regulate. This picture is, however, too simplistic. First, social practices can have direct constitutional significance.⁸⁴ There is, for instance, a long

77. This still leaves open the question of how attention to history and tradition ought to be integrated within larger theories of constitutional interpretation and adjudication. On this question (from an originalist perspective), see Barnett & Solum, *supra* note 4. For further discussion, see *infra* Parts IV and V.

78. See Lewis Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355, 362 (2004) (characterizing governance structures and functioning institutions).

79. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 931 (2006). See also Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 80 (2003).

80. Concerns about the risks involved in direct references to tradition are not new. See, e.g., Eskridge, Jr., *supra* note 4, at 194.

81. See Charles, *supra* note 19, at 74.

82. See *infra* Part IV.A.

83. Sections of this part build on Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMANITIES 59 (2022).

84. As Robert Post writes, “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.” Post, *supra* note 79, at 8.

tradition of thought in common law legal systems regarding constitutional conventions and their legal significance.⁸⁵

More importantly for my purposes, the picture is simplistic because it assumes that on the other side of the untidy and historically complex patterns of social activities that law regulates, there is a tidy, impersonal, and timeless institutional structure. But law is itself a historical, ongoing tradition of argument. The significance of tradition for constitutional adjudication is thus not limited to the fact that law engages with social traditions. The notion of tradition is significant because law is itself a particularly important institutionalized tradition.

Admittedly, many social traditions that judges engage with involve legal institutions like legislatures and agencies. But here I have in mind the distinctively *internal* legal tradition that characterizes the practice of legal argument by legal experts. It is the tradition of the “internal legal culture:” the culture and practice of lawyers and judges who engage in legal reasoning.⁸⁶

In the following sub-sections, I unpack the idea of law as a distinct tradition. Section A sets out law’s character as a tradition. Section B explains why the fact that judges inhabit this tradition generates further space for choice: cases of conflict between the values embodied in social practices and those reflected in the legal tradition allow judges to exercise judgment and a certain degree of interpretive discretion. Section C moves on to explain that, as a tradition, law is also concerned with the rational connection between present and future. Finally, Section D responds to a potential objection: the idea that judges should just apply the law, independently of any considerations about the impact of their decisions on the future or the desirability of case outcomes.

85. The literature is voluminous. *See, e.g.*, Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional Conventions*, 17 INT’L J. CONST. L. 787 (2019); Nicholas W. Barber, *Laws and Constitutional Conventions*, 125 L.Q. REVIEW 294 (2009); Bradley and Siegel, *supra* note 20; Andrew D. Heard, *Recognizing the Variety among Constitutional Conventions*, 22 CAN. J. POL. SCI. / REVUE CANADIENNE DE SCIENCE POLITIQUE 63 (1989); Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMBRIDGE L.J. 149 (2005); Frederick Schauer, *Constitutional Conventions*, 87 MICH. L. REV. 1407 (1989); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018); Léonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*, 11 OXFORD U. COMMONWEALTH L.J. 29 (2011); Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481 (2018); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013); Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283 (2015); Whittington, *supra* note 67; James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992). For classical treatments, *see* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915); SIR IVOR JENNINGS, THE LAW AND THE CONSTITUTION (1964).

86. LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 223–267 (1975).

A. *The Significance of the Legal Past*

The idea that the past has a particular significance in legal argument has been central to the common law tradition.⁸⁷ More generally, all contemporary legal systems are concerned with maintaining an official record of the past.⁸⁸ Making plausible legal arguments turns, to an important extent, on the consistency of those arguments with the institutional history of the legal tradition.

The significance of the past is not just limited to the fact that legal arguments are typically supported by references to past judicial decisions, statutory enactments, administrative regulations, and so on.⁸⁹ The significance of the past, in fact, extends to cases in which legal reasoning goes “beyond” conventional legal materials. Consider the well-known case of *Riggs v. Palmer*.⁹⁰ That case involved the question of whether Elmer Palmer could inherit under a valid will even though he had murdered his grandfather. The court held that because of the “fundamental maxims of the common law,” including that “no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong,”⁹¹ Elmer could not inherit. This decision was central to Dworkin’s critique of legal positivism.⁹² Decisions like *Riggs*, Dworkin argued, could not be accommodated by legal positivism, according to which legal validity is a matter of social fact.

What matters for us, though, is that even this type of decision, based on normative standards that have not been formally enacted with a canonical formulation, relies on law’s historical record. The principle that “no one should profit from their own wrongdoing” had a long historical legal pedigree. The principle was mentioned, for example, by Sir Henry Finch in the 17th century as one of the principles of common law jurisprudence.⁹³ One can also find precursors of this principle in Roman law.⁹⁴ And *Riggs v. Palmer* itself refers to authorities, including comparative law sources⁹⁵ and American cases,⁹⁶ supporting its contention that no one can successfully

87. See, e.g., David Lieberman, *Law/Custom/Tradition: Perspectives from the Common Law*, in QUESTIONS OF TRADITION (Mark Phillips & Gordon Schochet eds., 2004). Regarding American law, see Brown, *supra* note 4; Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991).

88. Krygier, *Law as Tradition*, *supra* note 44, at 241.

89. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 40 (1978).

90. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

91. *Id.* at 511. For Dworkin’s account, see DWORIN, *supra* note 89, at 23.

92. DWORIN, *supra* note 89.

93. SIR HENRY FINCH, LAW, OR, A DISCOURSE THEREOF: IN FOUR BOOKS 46 (1627), *cited in* Mark D. Walters, *Legal Humanism and Law-as-Integrity*, 67 CAMBRIDGE L.J. 352, 371 (2008).

94. Making this connection, see Laurens Winkel, *The Role of General Principles in Roman Law*, 2 FUNDAMINA 103, 116 (1996).

95. Such as the English case *Holmann v. Johnson* (1775), several civil law codes, and historical antecedents such as the Spanish *Partidas*. *Riggs*, 115 N.Y. at 507.

96. Such as *Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1886), *cited in Riggs v. Palmer*, 115 N.Y. 506, 512, 22 N.E. 188 (1889).

base their cause of action on a fraudulent or illegal act.

These observations do not aim to settle the question about whether Dworkin's argument successfully undermines legal positivism.⁹⁷ My much more limited point is that even legal norms with no canonical formulation or clearly identifiable formal enactment are admissible in legal argument because of their incorporation into law's historical record. What judges should do depends on what other judges and legal officials have done in the past, and even on the implicit reasons that can be found within the legal tradition's history. Judges rely on the patterns of thought and decision that have characterized legal practice in the past even when deciding hard cases.

Participants in the practice of legal reasoning, thus, inhabit a distinctive legal tradition. Constitutional judges in charge of evaluating particular social activities are not just responsible for considering the history and tradition of those activities. These judges are themselves part of a legal tradition with its own norms and standards—and are bound, as judges, by those norms and standards.

B. Divergent Traditions and Interpretive Choices

That constitutional adjudication operates within a legal tradition has at least one important implication. We should be wary of drawing excessive contrasts between legal arguments that rely on tradition and those that rely on legal principles.⁹⁸ Principled arguments are always pursued within a particular tradition,⁹⁹ and both social traditions and the legal tradition are sources of norms and principles. It is certainly possible for judges' interpretations of *social* traditions to conflict with the principles valued by the *legal* tradition. For instance, historical practices based on racial subordination might be inconsistent with the legal system's commitment to a principle of equal concern and respect. But such conflicts are not between tradition and legal principle. Each of these traditions has its own internal standards and norms.

The picture, then, becomes somewhat complicated. Judges engaging in constitutional adjudication must make decisions regarding the social practices of citizens and government—and therefore have reason to consider the history and tradition of those practices. But judges are also participants in a distinctive *legal* tradition. That tradition has its own values, principles, and commitments, which are reflected in its historical record. That historical record is a source of substantive norms, models, concepts, and commitments that legal participants adopt—and ought to adopt—as

97. For what it is worth, I think it does not. See Jiménez, *supra* note 83.

98. See, e.g., DeGirolami, *The Traditions of American Constitutional Law*, *supra* note 1, at 1131–1132. The same applies to too stark distinctions between normative and practice-based arguments. See, e.g., J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 *YALE L.J.* 568 (2023).

99. MACINTYRE, *supra* note 21, at 206–207.

their own.¹⁰⁰ This leads to a certain set of norms and commitments that are specific to lawyers and judges, and that they are subject to and apply when dealing with social traditions.

The interaction between legal institutions and social practices is an old source of puzzles and insights.¹⁰¹ Sometimes, the values and norms of longstanding social practices are at odds with legal values and norms. Some judges will, in these circumstances, be tempted to adopt an ostensibly anti-elitist stance. They will want to claim that they are voicing the ordinary concerns of ordinary people or acting as their “faithful agents,”¹⁰² and that they are preserving or restoring the traditions of the people against the mistakes of legal elites.

But this is not a defensible position. To become a lawyer or a judge is to accept the authority of the legal tradition and to engage with its “shared history, methods, and values.”¹⁰³ In more straightforward terms, our normative judgments as members of the legal community—as judges, as scholars, as lawyers—are partly endogenous. They are partly derived from institutional norms, practices, and traditions.¹⁰⁴ Being a legal expert requires adopting some of these internal standards.¹⁰⁵ When a judge relies on the notions of history and tradition to claim they are privileging the lived experiences of ordinary people or the longstanding traditions of the American people over the legal elite’s values, they are simply privileging one set of substantive values over others. The recognition of the significance of tradition for legal decision-making does not mean that judges *must* privilege the values embodied by social traditions over those embodied by law.

In other words, judges are not compelled to yield to longstanding social practices whenever they conflict with legal standards and precedents. A central part of legal practice and argument involves engaging social practices critically and allowing only some of them to persist unchallenged.¹⁰⁶ Whenever there is a divergence or a conflict between the history and tradition of social practices and the legal tradition, there is an interpretive choice to be made. This is not to say that judges should always privilege the values of the legal tradition in cases of conflict, all things

100. Krygier, *Law as Tradition*, *supra* note 44, at 244. *See also* E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 263 (1975).

101. *See, e.g.*, MARC HERTOCH, *NOBODY’S LAW: LEGAL CONSCIOUSNESS AND LEGAL ALIENATION IN EVERYDAY LIFE* (2018); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990); Sally Engle Merry, *What Is Legal Culture? An Anthropological Perspective*, 5 *J. COMP. L.* 40 (2010).

102. I take the phrase from now Justice Barrett’s work in the context of statutory interpretation. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 *U. CHI. L. REV.* 2193, 2194 (2017).

103. Jessie Allen, *Doctrinal Reasoning as a Disruptive Practice*, 6 *J.L. CT.* 215, 222 (2018).

104. *See* Christopher Kutz, *The Judicial Community*, 11 *PHIL. ISSUES* 442, 448 (2001).

105. *See* Felipe Jiménez, *On Legal Expertise*, 69 *AM. J. JURIS.* 141 (2024).

106. *See* Tribe and Dorf, *supra* note 73, at 1087.

considered. My contention is simply that, in cases of conflict between the values embodied in social practices and those reflected in the legal tradition, judges are not compelled to privilege the former. If anything, as a *legal* matter, judges should at least give significant (and perhaps even decisive) weight to legal reasons and values.

Constitutional judges are thus not just responsible for the specific interpretive choices they make about how they characterize the social practices and traditions of citizens and government. They are also responsible for the interpretive choices they make about the legal tradition, and for the choices they make when there seems to be a conflict between their understanding of ordinary social practices and legal norms and values.¹⁰⁷ This space for interpretive choice is not synonymous with unconstrained judicial discretion. There are better and worse uses of interpretive freedom. From a legal perspective, moreover, the critique of judges who privilege the values embodied by social practices over the values that are part of the legal tradition will always be available.

C. The Weight of the Future

Judges' decisions should be made by considering not just the past and present of social practices and the legal tradition, but also their future. By this, I don't mean to suggest that judges should become, in Richard Posner's terms, "judicial pragmatists," and attempt to make the best decision they can, all things considered.¹⁰⁸ In fact, I don't think this approach makes sense normatively, as an interpretation of our legal practices, or as a strategy to achieve the best aggregate outcome.¹⁰⁹

Instead, what I am arguing for is a sense of responsibility vis-à-vis the legal tradition and the social practices it regulates. This sense of responsibility is not grounded in a consequentialist moral theory, an instrumentalist conception of law, or a pragmatist view of judging. It is grounded in the notion of tradition itself. As I argued above, a tradition is a temporally extended unit. It connects the past to the present, and both of them to the future. This latter aspect is what's important here—and is completely absent from most discussions of tradition in the legal literature, as well as in the Court's approach. The rational continuity between the

107. It's important to emphasize—although this is not my main concern here—that the characterization of the legal tradition itself will be contested, and there will be disagreement about how to characterize its past. For instance, while some see American constitutional law as primarily concerned with limiting power, others see it as paradigmatically committed to popular government. *See, e.g.,* LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

108. *See* Richard A. Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235 (Morris Dickstein ed., 1998); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2005).

109. For the argument in the domain of contract law, *see* Felipe Jiménez, *A Formalist Theory of Contract Law Adjudication*, 2020 *UTAH L. REV.* 1121 (2020).

present and the past is only part of the story. The future—more specifically, the impact we can anticipate our action in the present will have on the future—also has a rational bearing on how we act today. For example, decisions that will have a fundamental impact on how states can regulate the market for guns and on health and safety should take these likely effects into account. These decisions should also be driven by a concern about their impact on the future body of law.

What this means is that a conscientious judge must take the future of the social practices they regulate and of the legal tradition itself into account. A conscientious judge should bear in mind what the future content of social and legal traditions might be, and how their decision might impact them.

Take, first, the future of the legal tradition. As Fred Schauer argues, a system of binding precedential effect involves “the special responsibility accompanying the power to commit the future before we get there.”¹¹⁰ Because of that, consideration of the future effect of the decision a judge has to make is common in legal argument.¹¹¹ This is not a broad and vague concern about the social consequences of the decision. It is a responsibility, incumbent on judges, to think about the impact that their decision will have on the content of the law. The question, from this perspective, is what legal norms the decision will contribute to existing law. A responsible judge whose decisions will have precedential effect acts with an awareness that those decisions will be, to use Mark Greenberg’s phrase, “among the determinants of the content of the law.”¹¹²

Nina Varsava has recently offered a version of this idea. According to Varsava, precedential constraint works both ways: judges are constrained both by previous decisions and by (reasonably foreseeable) future decisions.¹¹³ The interpretive role of the judge would not be merely to offer the best interpretation of the legal tradition so far, but rather to offer the best interpretation of the legal tradition “as a whole” (i.e., including its future).¹¹⁴ And as Varsava further argues, there is a crucial asymmetry between past and future decisions. The judge’s present decision can affect future decisions. As she writes, in this situation, “a judge might reasonably decide a present case with the aim of nudging future adjudication in a direction that will ultimately make for a more coherent and justified body of law overall.”¹¹⁵

110. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987).

111. *Id.* at 574.

112. Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 157 (2004).

113. Nina Varsava, *The Gravitational Force of Future Decisions*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 281 (Timothy Endicott, Hafsteinn Dan Kristjánsson, & Sebastian Lewis eds., 2023).

114. *Id.* at 286–287. Varsava makes this argument by refining Dworkin’s account of judicial interpretation, and particularly his “chain novel” analogy, but the peculiarities of Dworkin’s account need not detain us here. See DWORKIN, *supra* note 71, at 228–232.

115. Varsava, *supra* note 113, at 289.

I am not fully persuaded by the claim that judges have specific duties generated by foreseeable future decisions. But I think Varsava is right in thinking that future legal decisions and the impact of present decisions on the former are, at least, important considerations in responsible judicial decision-making. A responsible judge must think about the impact their decision today will have on the law as a whole. Every judge must acknowledge both the authority of past decisions and the responsibility they have regarding future decisions.¹¹⁶

Now consider the future, not of the law itself, but of the social practices that law regulates. Here, the argument is more limited. Most of the time, judges' decisions, individually considered, will have little impact, if any, on the trajectory of large and complex social practices. A responsible judge need not consider in-existent or negligible consequences. Other times, judges' decisions will have a significant impact, but the impact will be hard to predict. Sometimes, though, judges' decisions will have a significant impact on the trajectory of entire social practices, and at least part of that impact will be reasonably predictable. This type of case is particularly salient in the context of constitutional adjudication by the Supreme Court. In these cases, judges should consider the impact of their decisions on the relevant social practices.

D. Applying the Law

There is a potential objection here. Under a very extended and commonsense view, judges' main duty is just to apply the law. Once the judge has reached a conclusion about what the law requires, that should be the only relevant consideration as to how to decide.¹¹⁷ The impact of the decision on the future of law and of social practices should not matter.¹¹⁸

I think this is, at best, an incomplete account of judicial duty.¹¹⁹ But it is not entirely misguided. In general, judges should indeed strive to apply the law. Still, the "in general" is important. The commonsense view derives its plausibility from run-of-the-mill cases. Many judicial decisions involve legal questions that are relatively easy to answer—cases where we are not facing metaphysical or epistemic indeterminacy.¹²⁰ And most judges do not

116. BRANDOM, *supra* note 47, at 87–88.

117. To put it in Justice Roberts's terms, the duty of judges is to "call balls and strikes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit).

118. I am assuming here (with the potential objector) that the content of the law is determined *independently* from future legal decisions and from the impact of current decisions on the future.

119. It ignores, for instance, cases in which different theories about what the law requires have different implications and judges are not completely certain about which theory is correct. On this issue, see generally Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. 739 (2023).

120. See generally Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

have the formal power to make a significant and outsized contribution to the content of the law or to issue precedent-setting decisions on the constitutional status of entire social practices. The responsible thing to do for these judges—their judicial duty—will be, in most cases, exhausted by the relevant legal considerations.¹²¹

Yet Supreme Court Justices are not “most judges,” and decisions involving the regulation of firearms, abortion, and fundamental rights in general are not “most cases.”¹²² These cases are much more legally indeterminate than run-of-the-mill cases.¹²³ They also involve dramatically important issues on which reasonable people fundamentally disagree. And the Court, when it decides on these issues, acts with the power to make a significant contribution to the content of American constitutional law. In these special circumstances, a mandate to just “apply the law” will not provide guidance and would instead involve a dereliction of responsibility.

There is plenty of debate over the extent to which legal reasons explain and constrain judicial decision-making.¹²⁴ But, when we focus on constitutional adjudication by the Supreme Court, the significance of interpretive freedom and discretion is hard to deny. American constitutional law requires Supreme Court justices to directly interpret broad evaluative standards—contained in a short and relatively old text, to resolve cases with massive political implications, by issuing legal standards that will have general and prospective application.¹²⁵ In this process, judges extend constitutional protections in criminal procedure, recognize (or now,

121. It's important to note that, on any plausible view, the relevant legal considerations are not exhausted by the constitutional text. American constitutional law is, as any observer will recognize, much more than the full communicative content of the text of the constitution. *See generally* John Gardner, *Can There Be a Written Constitution?*, in OXFORD STUDIES IN PHILOSOPHY OF LAW: VOLUME 1 (Leslie Green & Brian Leiter eds., 2011); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

122. Regarding the first point, as Richard Albert notes, “where courts possess the power of judicial review, and where that power is effective, the functionally binding quality of an interpretation of the constitutional text by the national court of last resort approximates the formally binding quality of a written constitutional amendment.” Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U.L.J. 387, 389 (2015).

123. *See* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015). Part of this indeterminacy—but only part—stems from disagreements about interpretive methodology. On this point, *see generally* Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 WM. & MARY L. REV. 1115 (2012).

124. *See, e.g.*, Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. OF LEGAL STUD. 1 (1984); Schauer, *supra* note 120 at 1726–1727; Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); JEFFREY A. SEGAL, HAROLD J. SPAETH & SARA C. BENESH, *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* (2005); Sunstein, *supra* note 57.

125. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW AND CONTEMPORARY PROBLEMS 41, 44 (2002).

jettison) rights to abortion, order the integration of schools, develop standards governing the role of religion in public life, etc.¹²⁶

The explanation for this is not (or, rather, not necessarily) that Supreme Court justices ignore the law and act as a *de facto* legislature. The explanation is, at least to a large extent, provided by the fact that American constitutional law is indeterminate. There is, as Brian Leiter argues, fundamental disagreement about how to interpret the constitutional text, which means that—at least under a conventional legal positivist framework—the legal standards generated by that text are not settled.¹²⁷ Moreover, the Court tends to focus on issues where federal circuit courts disagree.¹²⁸

Leiter's inference from this observation is that most of what the Court does in American constitutional adjudication is straightforward moral and political reasoning. But even those who disagree with the inference should accept his observation that much of what the Court must decide in that domain is not settled by constitutional law. Lawrence Solum, for instance, an originalist who believes the original public meaning of the constitution plays an important role in constitutional adjudication, also argues that the constitutional text contains general and vague provisions that require judges to go beyond it to decide specific cases.¹²⁹ This view is not unique to Solum, but rather representative of a commonly acknowledged reality.¹³⁰

Not only is the law in the domain of constitutional rights relatively unsettled,¹³¹ this is also a domain in which the Court's decisions have massive implications for the future of constitutional law, as well as for the activities and practices over which it decides.

The upshot is that consideration of the impact of current decisions on the future of law and of social practices is entirely appropriate and, in fact, required. Again, in most run-of-the-mill cases, the legal tradition will provide clear answers and judges' decisions will have little, if any, impact

126. *Id.* at 51–52.

127. Leiter, *supra* note 123, at 1605.

128. *Id.* at 1608.

129. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013).

130. *See, e.g.*, Post, *supra* note 79, at 82.

131. Note that even if constitutional law includes (as it must) not just the norms derived from the constitutional text but also Supreme Court precedent interpreting that text, the indeterminacy of American constitutional law subsists. Indeed, just as there is no uncontroversial generally accepted view about how we ought to derive legal norms from the constitutional text, there is also no uncontroversial established view about the grounds, scope, and limits of precedential effect in constitutional law (as *Dobbs* itself reminds us). On this, *see generally* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 *NOTRE DAME L. REV.* 1921 (2017); Gary Lawson, *The Constitutional Case against Precedent*, 17 *HARV. J.L. & PUB. POL'Y* 23 (1994); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 *CONST. COMMENT.* 271 (2005); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *COLUM. L. REV.* 723 (1988); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *CONST. COMMENT.* 289 (2005); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 *HARV. J.L. & PUB. POL'Y* 45 (1994); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 *CARDOZO L. REV.* 1699 (1991).

on the trajectory of important social practices. But, in some cases, the legal tradition will not provide clear answers that can be easily ascertained, *and* judges' decisions will have massive implications on both the content of the law and the social practices implicated in such decisions. Much of what Supreme Court justices do in the domain of constitutional rights adjudication satisfies those conditions. Within this domain, not taking into account the impact of a decision on the future (of both law and of the relevant social practices) is simply irresponsible. It is also at odds with a correct appreciation of the fact that both law and social practices are traditions.

III. THE COURT'S TRADITIONALISM

As I have argued, traditions are normative—they provide reasons for acting in certain ways. Their content is also contested and subject to normative evaluation. Besides social traditions, law is itself a distinct, institutionalized tradition with its own internal norms and standards. These claims provide the basic elements to evaluate the Court's reliance on tradition. They also allow us to explore an alternative approach to tradition also present in the history of American constitutional law that I have already labeled *flexible traditionalism*.

A. Conservative Traditionalism

The Court sometimes purports to rely on tradition as a mechanism for unearthing the true content of the longstanding practices of the American people, even if—and perhaps precisely when—they go against the values and commitments of members of the legal profession. In *Dobbs*, for instance, Justice Alito framed the decision as one that restored the history and tradition of abortion regulation in the United States against *Roe*'s exercise of “raw judicial power,” which “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.”¹³² And, in discussing the dissent, Justice Alito argued that the latter's position would be an imposition “on the people” of a particular view about when personhood begins.¹³³ As Marc DeGirolami—one of the scholars who have theorized and justified the Court's traditionalism—argues, a focus on the traditions of ordinary people would allow judges to avoid “the corrosion of lived experience, and . . . the distortion of text to mirror a particular class of contemporary moral and political views.”¹³⁴

The traditionalist judge, then, wants to avoid the imposition of the values

132. *Dobbs* at 2265 (2022).

133. *Id.* at 2261.

134. DeGirolami, *supra* note 8, at 1656.

and commitments of “elites” at the expense of the traditional practices of the American public.¹³⁵ In this aspect, the Court’s traditionalist focus echoes conservative concerns about judicial activism and the supposed imposition of elite norms on ordinary people. Some of these concerns have been voiced in the past by, among others, former Justice Scalia.¹³⁶ These concerns—and particularly the opposition between the people’s traditions and the legal elite’s values—also resemble the rhetoric of illiberal populism.¹³⁷

This rhetorical opposition between a situated, concrete, and historically conscious grasp of the people’s traditions and the abstract, universalistic and ahistorical “rationalism” of elites is, well, traditional.¹³⁸ But it is misguided. Practical reasoning takes place in the context of, and is enabled and constrained by, specific social practices.¹³⁹ Moreover, traditions contain within them the seeds of their own change and transformation, as well as critical elements that can help us in morally evaluating them. There is no tradition without internal norms or principles, and no argument about principles fully detached from traditions. Reference to tradition does not avoid moral questions—and particularly questions about whether a tradition ought to be kept and followed as such, or whether it is wrong or misguided and should thus be changed or rejected—but simply frames them.¹⁴⁰ Reliance on tradition is thus not a move that determines what we should do but merely the board within which any moves will be made. Even if the historical analyses in *Bruen* and *Dobbs* were right,¹⁴¹ historical exploration—even when correctly executed—is never the end of inquiry.

As a normative matter, we can never be bound to honor the past just because it is the past.¹⁴² This does not mean that deference to tradition is irrational.¹⁴³ But it does mean that one must justify following a particular tradition or recognizing its authority, even if that answer turns partly on the very normative resources that traditions and social practices make available to us.¹⁴⁴ Moreover, traditions are sufficiently complex and subject to

135. *Id.* at 1669–1670.

136. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

137. On populism and its relationship to law, *see, e.g.*, Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283 (2021); Marcela Prieto Rudolph, *Populist Governments and International Law: A Reply to Heike Krieger*, 30 EUR. J. INT’L L. 997 (2019); Marcela Prieto Rudolph, *Populism’s Antagonism to International Law: Lessons from Latin America*, 116 AJIL UNBOUND 346 (2022).

138. James Alexander, *A Systematic Theory of Tradition*, 10 J. PHIL. OF HIST. 1, 7–8 (2016). *See also* Karl Popper, *Towards a Rational Theory of Tradition*, in CONJECTURES AND REFUTATIONS 161, 162 (1963). I should also note that a populist understanding of tradition seems at odds with the Court’s own emphasis on elite decisionmakers when applying the test. The test, at least at times, seems to contrast contemporary elites with past elites. I thank Mary Ziegler for discussion of this point.

139. GADAMER, *supra* note 64, at 293.

140. Strauss, *supra* note 59, at 894–95.

141. Which is debated. *See* Charles, *supra* note 19; Tang, *supra* note 18.

142. Kronman, *supra* note 87, at 1037.

143. *Contra* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 991, 1001 (1897).

144. Krygier, *supra* note 44, at 251–253.

interpretive debates that what to make of that past is itself a matter of reasonable disagreement.¹⁴⁵ We thus need to deliberate about the grounds and scope of any tradition's authority.

In the case of judges, this is even more pressing. As a *legal* matter, the fact that a certain pattern of social activity has this or that history is very far from a complete and sound legal argument. The fact that social practices extend over time shows why understanding them requires a grasp of their history. But making sound legal or constitutional decisions about these practices requires much more. At least, it requires circumspection and responsible judgment in the face of moral and political disagreement, as well as careful reflection about how law and legal institutions ought to engage with them. It also requires serious consideration of—and constraint by—distinctively legal considerations and values, such as the protection of reliance interests.¹⁴⁶ I will return to this point below.¹⁴⁷

Finally, we must recall that the rational continuity of tradition doesn't just encompass past and present. It also extends into the future. Thus, reflection about the future of the relevant traditions will be relevant.¹⁴⁸ Venerating the past simply because it is the past—while refusing to consider the future of the relevant activities and practices—is not a position entailed or even supported by the notion of tradition. It is, instead, an old and rather crude form of conservatism.

It is important to bear in mind, too, that this conservative traditionalism is distinct from originalism. Under Solum's version of originalism, for instance, the latter is a cluster of claims about how the original public meaning of the constitutional text is fixed at ratification; how that content ought to constrain constitutional adjudication; and how not all of constitutional law and doctrine can be reduced to original public meaning.¹⁴⁹

The Court's conservative traditionalism is quite different. While Solum's is one version of constitutional originalism,¹⁵⁰ on any plausible version, the

145. *Id.* at 252. See also Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 *YALE L.J.* 702, 740–741 (2023).

146. See generally Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 *HARV. L. REV.* 1845 (2023).

147. See *infra* Part V.

148. See Schauer, *supra* note 110, at 573.

149. See Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *NW. U.L. REV.* 1243, 1249–1250 (2019).

150. The literature on originalism is massive. For a helpful overview, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013). For a limited selection of different versions of originalism (and different grounding arguments for it), see, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *NW. U. L. REV.* 1455 (2019); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *NW. U.L. REV.* 383 (2007); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 *CONST. COMMENT.* 371 (2007); John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 *NOTRE DAME L. REV.* 919 (2021); Bernadette Meyler, *Towards a Common Law Originalism*, 59 *STAN. L. REV.* 551 (2006); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 *HARV. L. REV.* 777 (2022); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U.*

communicative content of the text of the constitution reigns supreme.¹⁵¹ As such, historical evidence about historical practices can be relevant for, say, determining the original public meaning of the text.¹⁵² But, seen in this light, neither *Bruen* nor *Dobbs* are entirely originalist decisions.¹⁵³ Certainly, both decisions give weight to historical periods before and around constitutional enactment. And the Court's originalist and traditionalist approaches are animated by similar concerns. But traditionalism gives weight to evidence of practices after ratification, and this evidence is supposed to constrain judges even when the communicative content of the constitution runs out. Whether these differences are enough to make constitutional traditionalism a distinct theory of constitutional adjudication is an open question.¹⁵⁴ Perhaps the answer is no. But, while resemblant and connected to at least some forms of originalism, traditionalism is a distinct strategy worth evaluating on its own. And it is a paradigmatically conservative strategy in seeing traditions in purely retrospective terms, binding the future with the dead hand of the past.

B. The Problem with Conservative Traditionalism

Against this conservative outlook, the connection between present and future must be taken into account—particularly by those put in the position of ascertaining and judging a social practice from positions of institutional authority. For those in such position, like the justices who decided *Bruen*, *Dobbs*, and *Rahimi*, choices about what aspects of traditions to emphasize and take as significant and which to discard turn on normative judgment.¹⁵⁵

In light of this fact, responsible decision-makers ought to provide compelling justifications for the choices they make in their characterization of the historical facts that constitute the relevant social practices and their normative content. The justifications might take different forms. Some of them might be purely legal justifications. Others might be based on larger notions of political morality. Others might be based on institutional considerations. While I will come back to this below, what matters here is that it's not enough for judges to assert, matter-of-factly, that the history of a specific social activity—be it gun regulation or the regulation of

CINN. L. REV. 849 (1988); Lee J. Strang, *Originalism's Promise, and Its Limits*, 63 CLEV. ST. L. REV. 81 (2014); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

151. As Justice Barrett explained in her concurrence in *Rahimi*. Rahimi, Barrett, J., concurring, at 737. On some originalist views, the enacted constitution can continue exerting its influence even beyond the reach of its semantic content (within what some originalists call the “construction zone”). See, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

152. See Barnett and Solum, *supra* note 4, at 446–451.

153. *Id.*

154. On this point, see DeGirolami, *supra* note 1; Girgis, *supra* note 5; Barnett and Solum, *supra* note 4.

155. See Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 37 (2022).

abortion—has certain features, and then to move on to conclusions about what ought to be done, as a matter of constitutional law, in light of those alleged facts.

It is crucially important to recall here that judges are also acting within a distinct legal tradition—one that, at least in our context, is committed to values like legality, reliance, predictability, and equality, and that embodies some of those commitments in institutional practices like *stare decisis*.¹⁵⁶ A Supreme Court justice deciding what to make of social traditions like gun regulation and the practice and regulation of abortion, then, is also in charge of deciding what to make of the legal tradition itself and of the relationship between it and the regulated social practices. When the traditions at stake involve complex moral questions, allusion to tradition does not displace but rather highlights the fact that these determinations must involve normative judgments. At least some of those judgments must be based on the values of the legal tradition.¹⁵⁷

I say *values* and not just *rules* or *norms* advisedly. Judges' legal expertise is not reducible to knowledge of formally authoritative legal materials or excellence in particular forms of reasoning.¹⁵⁸ Sound legal argument rests on a grasp of the commitments and values that underlie a particular legal tradition.¹⁵⁹ Those values and commitments might come into conflict with certain social practices and their own histories and traditions. This explains why reverence for social tradition is not inconsistent with a negative attitude towards judicial precedent.¹⁶⁰ But, while not inconsistent, reverence for social tradition, combined with a resistance towards precedential constraint, is not an attitude dictated by the notion of tradition. It is rather a choice to privilege the values of one set of social traditions over the values of a different set of legal traditions.

Put in this position of conflict and choice, it is not sufficient for judges to claim that they are siding with tradition.¹⁶¹ They must explain why they are privileging the values underlying (in their own interpretation) the history and tradition of a specific social practice over the values that underlie the legal tradition. When social traditions, for instance, value the traditional

156. On the connection between the rule of law and *stare decisis*, see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012). I am not the only one to note the potential conflict between deference to tradition and *stare decisis*. See Girgis, *supra* note 5, at 1481. See also Strauss, *supra* note 131.

157. See Reva Siegel, *Memory Games: Dobbs's Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1180–81 (2022) (arguing that even a judge attentive to tradition would have taken different paths in *Dobbs* in light of legally relevant considerations).

158. This paragraph builds on Jiménez, *supra* note 105.

159. On legal argument as an ongoing practice, see Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA L. REV. 937, 940, 987–88 (1990).

160. Regarding Justice Scalia, compare Strauss, *supra* note 131, at 1700 with Michael H. v. Gerald D., 491 U.S. 110, 138 (1989) (Brennan, J., dissenting).

161. Tribe and Dorf, *supra* note 73, at 1087.

marital heterosexual family,¹⁶² or express moral disapprobation of same-sex relationships,¹⁶³ upholding those traditions is a choice to do so—and to protect the specific norms that these traditions so far embody.¹⁶⁴

C. An Already Existing Alternative: Flexible Traditionalism

The Court's recent approach is not the only approach towards tradition in American constitutional law. There is an alternative view available too—which we could call, in opposition to the Court's current conservative traditionalism, *flexible traditionalism*—even if it's currently disfavored by the Court. This flexible traditionalism is exemplified, for instance, by Justice Harlan's dissent in *Poe v. Ullman*,¹⁶⁵ by Justice Souter's concurrence in *Glucksberg*,¹⁶⁶ and by decisions like *Lawrence v. Texas*¹⁶⁷ and *Obergefell*.¹⁶⁸ Flexible traditionalism is more transparent about the inescapability of normative judgments when engaging with social traditions, and more consistent with the resulting responsibility for legal decisionmakers.¹⁶⁹ The *Dobbs* dissent partly tracks this reading of American constitutional law when it argues for an approach that acknowledges that historical tradition “is not captured whole at a single moment,” but rather evolves and grows out of the judicial development of constitutional commitments and values.¹⁷⁰ This type of view acknowledges that reliance on tradition involves judgment about what should be kept and what should be discarded, rather than “a single, straightforward reading of historical evidence.”¹⁷¹

This flexible traditionalism has deep roots in American constitutional law. It echoes aspects of the jurisprudence of two of the most influential judges in American legal history: Holmes and Cardozo. Both Holmes and Cardozo, in different ways, were informed by a certain sensitivity to evolving social norms, to the history and tradition of social practices, and to the historical evolution of law itself.¹⁷² Take, for instance, Justice Holmes's argument in *Gompers v. United States*:

162. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

163. Bowers v. Hardwick, 478 U.S. 186 (1986).

164. See Blocher and Ruben, *supra* note 12, at 122.

165. Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).

166. Washington v. Glucksberg, 521 U.S. 702 (1997) (Souter, J., concurring).

167. Lawrence v. Texas, 539 U.S. 558 (2003).

168. Obergefell v. Hodges, 576 U.S. 644 (2015).

169. For a historical reconstruction of this approach, see generally Dov Fox & Mary Ziegler, *The Lost History of “History and Tradition”* 98 SO. CAL. L. REV. (2023).

170. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 359(2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

171. Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 557 (2012).

172. William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W.L. REV. 227, 249 (1988). This and the following paragraphs rely on Wiecek's own account.

“[T]he provisions of the Constitution are not mathematical formulas . . . they are organic, living institutions . . . Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and . . . growth.”¹⁷³

A similar approach is evinced in Cardozo’s arguments in *Palko v. State of Connecticut*, where he builds upon Holmes.¹⁷⁴ As Cardozo argued in that case, questions about constitutional values must refer to open-ended principles of justice grounded in the traditions and historical evolution of the country.¹⁷⁵

A form of flexible traditionalism also underlies Justice Harlan’s dissent in *Poe* and—more recently—the Court’s decision in *Planned Parenthood v. Casey*.¹⁷⁶ In *Poe*, Justice Harlan argued that the legal implications of the Due Process Clause must be settled by balancing the demands of individual liberty and those of organized social life. This balance can be achieved, according to Harlan, by considering the country’s traditions as living entities, and by exercising judgment and restraint.¹⁷⁷ The purpose is to achieve a reasoned balance between different normative demands by considering history and tradition, without following them blindly.¹⁷⁸

This approach was rejected by the Court in *Glucksberg*, where it argued that, for a right to fall under substantive due process, it had to be deeply rooted in the country’s history and tradition and implicit in the concept of ordered liberty.¹⁷⁹ Nevertheless, a particularly powerful articulation of flexible traditionalism can be found, precisely, in Justice Souter’s concurring opinion in *Glucksberg*.¹⁸⁰

The flexible approach is more recently echoed in *Obergefell*’s emphasis on the variability and contestation inherent in social traditions,¹⁸¹ and was earlier exemplified by Justice Brennan’s dissent in *Michael H. v. Gerald D.* Whereas the plurality opinion in this case insisted that only interests “traditionally protected” by society could receive substantive due process protection,¹⁸² Brennan insisted on the idea that the content of traditions is

173. *Gompers v. United States*, 233 U.S. 604, 610 (1914). See also *State of Missouri v. Holland*, 252 U.S. 416, 433–34 (1920).

174. *Wiecek*, *supra* note 172, at 249.

175. *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937).

176. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

177. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). See also Post, *supra* note 79, at 87–88.

178. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 150 (2015).

179. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997). On how this approach was a departure from the *Poe* dissent, see Post, *supra* note 79, at 91–95; Yoshino, *supra* note 178, at 150.

180. *Glucksberg*, 521 U.S. at 720–21 (Souter, J., concurring). For an insightful reconstruction of Souter’s approach, see Charles L. Barzun, *Justice Souter’s Common Law*, 104 VA. L. REV. 655 (2018).

181. Yoshino, *supra* note 178, at 164.

182. *Michael H. v. Gerald D.*, 491 U.S. 110, 122–23 (1989).

subject to reasonable disagreement.¹⁸³

Flexible traditionalism is preferable to the conservative variant at least from the perspective of transparency. It openly acknowledges that judges must exercise judgment and prudence, precisely because of the normative complexity involved in the relevant social practices.¹⁸⁴ By contrast, the Court's current approach lacks this transparency because it treats historical tradition as a determinate object that can constrain judicial reasoning.

Still, this flexible traditionalism raises important concerns about judicial discretion and lack of restraint. Indeed, the majority opinion in *Dobbs* correctly argues that this type of approach is vague and fails to impose any significant restraints on judicial power.¹⁸⁵ However, the Court's conservative traditionalism raises similar concerns.¹⁸⁶ Indeed, the very same worries about vagueness and judicial flexibility voiced by Alito have been directed against the Court's approach to tradition. As Koppelman argues, in this approach "tradition" is malleable and has no independent role in explaining case outcomes. The "traditionalist method" is, according to Koppelman, really the deployment of traditionalist rhetoric to allow the Court to achieve its goals.¹⁸⁷ We thus seem to get similar risks with either approach, but at least the flexible version is transparent about the need for normative judgment.

IV. TRADITION, RESTRAINT, AND JUDICIAL REVIEW

We have, so far, two possibilities. On the one hand, we can follow the Supreme Court's recent approach and treat tradition as a determinate entity that can settle case outcomes and rigorously constrain judicial decision-making.¹⁸⁸ The shackles of the past would hamper judges of the present.¹⁸⁹ There are plenty of reasons provided by the Court's decisions to think that this hope for constraint is bound to be an unfulfilled promise at best.¹⁹⁰ On the other hand, we can follow the flexible approach sketched in the previous pages. This approach is open about the fact that engagement with tradition requires normative judgment and navigating potential conflicts between social practices and the norms and values of constitutional law. This approach has the virtue of transparency.

Certainly, in the hands of judges one agrees with in substance, flexible

183. *Id.* at 137 (J. Brennan, dissenting). A similar type of contrast can be seen in the majority opinion and Justice Brennan's concurrent opinion in *Burnham v. Superior Ct. of Cal., Cnty. of Marin*, 495 U.S. 604 (1990).

184. Bartlett, *supra* note 171, at 558.

185. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 260-61 (2022).

186. See Fox and Ziegler, *supra* note 169, at 26.

187. Koppelman, *supra* note 15, at 187-88.

188. See EISGRUBER, *supra* note 23, at 127-28.

189. Bartlett, *supra* note 171, at 540.

190. See generally Girgis, *supra* note 5; Koppelman, *supra* note 15.

traditionalism might seem attractive. But the lack of judicial restraint that this approach evinces, and that Justice Alito highlights, is a serious concern. Indeed, this flexible variant of traditionalism is an open acknowledgment of the power of legal interpreters. While transparent, the outcomes produced by the approach will turn on the interpreters we happen to get, and an approach to adjudication cannot be defended on the contingent moral views of the judges employing it. We have examples of how things can go terribly wrong when jurists see adjudication as indissolubly connected to their moral commitments.¹⁹¹ An open acknowledgment of interpretive freedom can also be combined with moral views that dramatically diverge from, say, the liberal egalitarian ideas that characterized decisions like *Roe*, *Lawrence v. Texas*, or *Obergefell*.¹⁹² A transparent acknowledgment of power is still an acknowledgment of power, and it is neutral vis-à-vis the identity and substantive views of those who hold it. The alternative approach, then, takes judicial power for granted, offers very little legal guidance for judges, and might have the effect of further empowering judges to engage in first-order moral reasoning.

There is a long tradition of legal thought concerned about this type of judicial power, and in favor of modes of legal reasoning and institutional design that might constrain it.¹⁹³ I am sympathetic to some of these concerns.¹⁹⁴ We are warranted in worrying about judicial power. But worries about judicial power are primarily worries about the legitimacy of that power and how that power is reflected in any given institutional design.¹⁹⁵ In other words, concerns about the power that engagement with contested social traditions puts in the hands of judges are not unwarranted. But instead of leading us to expect the past to be a constraint it cannot be, these concerns should primarily impact questions of institutional design. They should therefore be part of the debate regarding the institutional

191. On the case of Nazi Germany and the endorsement of nonpositivist views by national socialist jurists, see Oren Gross, *What Both Hart and Fuller Got Wrong*, 11 WAKE FOREST L. REV. ONLINE 54 (2021); HERLINDE PAUER-STUDER, JUSTIFYING INJUSTICE: LEGAL THEORY IN NAZI GERMANY 203–29 (2020).

192. See, e.g., Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC, Mar. 2020, <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

193. See generally (focusing on this tradition in conservative legal thought) Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009).

194. See Felipe Jiménez, *Legal Positivism for Legal Officials*, 36 CAN. J.L. & JURIS. 359 (2023).

195. See, e.g., Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2022); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2006); Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2 (2009). To be clear, this worry is not about how judges decide as a matter of fact—i.e., whether they decide in line with or inconsistently with majority preferences—but rather with the fact that they have the power to decide controversial moral questions in the first place. Thus, empirical observations about the consistency between the majority views and the Court's jurisprudence are not a response to concerns about judicial power. For discussion of the counter-majoritarian difficulty from the perspective of empirical social science, see generally Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

architecture that puts judges in this powerful position regarding fundamental constitutional issues and its potential reforms.¹⁹⁶

The debate about judicial review in American constitutional law has generated an endless literature regarding its historical foundations and normative justification.¹⁹⁷ My aim here is not to offer a full assessment of judicial review, or to argue that we would necessarily be better off without judicial review.¹⁹⁸ Instead, my aim is much more limited. I merely want to show how the idea that constitutional adjudication involves seriously considering the history and tradition of complex social practices and navigating their interaction with the legal tradition should lead us to at least question the adequacy of our current institutional arrangements. This is particularly the case when, as in *Bruen*, *Dobbs*, and *Rahimi*, the Court confronts historical practices characterized by deep and intractable moral and political disagreement.

A. Contested Traditions

As we have seen, traditions do not come with instruction manuals setting out their content or their normative implications. Reasonable people can disagree when they are trying to ascertain both aspects of traditions.¹⁹⁹

196. See generally Presidential Comm'n on the Sup. Ct. of the United States, *Final Report*, WHITE HOUSE (Dec. 2021). See also William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022); Adam Chilton et al., *The Endgame of Court-Packing*, (2023), <https://papers.ssrn.com/abstract=3835502>; Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021); Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2022); Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, YALE L.J.F. 821 (2021); Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077 (2023); Julie C. Suk, *A Constitutional Court for the United States: An Indirect Path to Supreme Court Reform*, (unpublished manuscript).

197. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1991); Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); ELY, *supra* note 73; Richard H. Jr. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2007); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269 (2001); Alon Harel, *Notes on Waldron's Law and Disagreement: Defending Judicial Review*, 39 ISR. L. REV. 13 (2006); KRAMER, *supra* note 107 at 35–74; David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009); William Michael Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455 (2005); Waldron, *supra* note 195; W. J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (2006); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).

198. In fact, I do not think this type of general and abstract argument would be persuasive. The full evaluation of judicial review as a matter of institutional design is inseparable from the peculiar context in which it operates and cannot be pursued in the abstract, without the full consideration of the relevant alternatives and the operation of multiple political institutions and the political system as a whole. See Juan F. Gonzalez Bertomeu, *Against the Core of the Case: Structuring the Evaluation of Judicial Review*, 17 LEGAL THEORY 81 (2011); Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. SOC. SCI. 361 (2008); Sergio Verdugo & Felipe Jiménez, *Ni Función Ni Estructura: Una Respuesta a La Idea de Jurisdicción Constitucional de Fernando Atria*, in *EL DERECHO Y SUS CONSTRUCCIONES: DIÁLOGOS CON LA FORMA DEL DERECHO DE FERNANDO ATRIA* (Javier Gallego Saade ed., 2020).

199. Tribe and Dorf, *supra* note 73, at 1087 (quoting Michael H. v. Gerald D., 109 S.Ct. 2333, at 2349 (Brennan, J., dissenting)).

Reference to tradition will not help us avoid contested value judgments.²⁰⁰

This is particularly the case when the relevant social practices are characterized by deep moral and political disagreement. We disagree about abortion, gun regulation, and affirmative action. We used to disagree about many other things too. References to the history and tradition of our contested social practices will not resolve these disagreements. An examination of the history of these contested social practices will just display the fact of contestation.

This is the main reason why a traditionalist focus cannot produce what its proponents expect. A focus on tradition just reiterates the central fact of democratic politics: even reasonable people acting in good faith disagree.²⁰¹ In light of that disagreement, any judicial decision that treats the history and tradition of contested practices as decisive is either losing sight of, or effacing, part of the relevant history.

There are two problems here. First, the history of a contested social practice will just show us the fact of contestation over time. Different individuals and groups at different points in time will make different and inconsistent claims about, for instance, the propriety of gun regulation or about the legal and constitutional status of different reproductive choices. We can't expect a complex factual pattern characterized by internal inconsistency to produce a simple, consistent decision criterion. An honest inspection of the historical record of a contested tradition will inevitably reflect the fact of contestation.

Second, precisely because of the factual complexity and the surrounding disagreement, judges are likely to get the historical facts wrong—and to get them wrong in ways that merely replicate, and implicate those judges in, the underlying disagreement. Objectivity in academic historiography is hard to achieve. Even in that domain, some have questioned whether it is even possible.²⁰² But in the judicial domain, the problem is magnified. Judges are not trained historians. More importantly, the purpose of their historical inquiry is not historiographic but practical.²⁰³ Indeed, if we treat inquiry into historical tradition as dispositive of case outcomes, the historical inquiry has a clear practical aim. At the same time, we know historical inquiry about contested and complex traditions is unlikely to give us a determinate answer. Given the combination of these two facts, it's very hard to imagine that our contested views about the very subject matter of the inquiry will not impact or bias our judgments about how to conduct the inquiry and what

200. Wright, *supra* note 6, at 4. See also Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 549 (1977) (White, J., dissenting).

201. See generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

202. The literature is endless. See generally Mark Bevir, *Objectivity in History*, 33 HIST. THEORY 328 (1994).

203. I should also note that, unlike judges, historians do not aspire to authoritatively settle a question. The contribution of any historian is just an addition to a broader, collective intellectual project.

to conclude from it. After all, the conclusion of the inquiry is supposed to determine how we decide the case. There will be a natural tendency of the judicial mind towards skewing historical inquiry to generate support for the decisions that strike judges as independently justified.²⁰⁴ Moreover, all of this is compatible with good faith—we haven’t even considered the possibility of deliberate strategic use of historical inquiry to provide an ostensible justification for desired outcomes.

Consider the example of abortion. If we take *Dobbs*’s articulation of its constitutional rationale at face value, a right to abortion can only receive protection under substantive due process if it is implicit in the concept of ordered liberty, and if it is deeply rooted in the country’s history and tradition. Taking the second step (our focus here), constitutional protection will turn on how we characterize the country’s tradition regarding abortion. According to *Dobbs*, analysis of the historical tradition at common law, during the colonial period, during the 19th century, and until *Roe*, shows that “a right to abortion is not deeply rooted in the Nation’s history and traditions.”²⁰⁵ In the context of the 19th century, the Court focused on statutes banning pre-quickening abortion. Scholars have disputed this at a general methodological level—what matters for constitutional questions is not legislative activity but public meaning,²⁰⁶ and from this perspective, statutes banning pre-quickening abortion have no impact on the public meaning of the Due Process Clause of the 14th Amendment.²⁰⁷ Scholars also dispute this at a more concrete level of whether the Court got the history of state abortion bans right.²⁰⁸ According to these scholars, against *Dobbs*, “for as long as America has existed, so too have abortions—in most cases free of any form of criminal punishment.”²⁰⁹

I do not mean to—and I am certainly not qualified to—adjudicate this disagreement. All I wish to note is that inquiry into contested historical traditions will not do the trick of providing reliable, impartial tests for constitutional decision-making—even if judges act in good faith. It will just replicate the underlying disagreements and contestation.

B. Tradition as Fact

The previous argument suggests that, against *Bruen*, *Dobbs*, *Rahimi*, and a long line of cases both within and outside of substantive due process,

204. In other words, inquiry into tradition will probably aggravate the dynamics of coherence-based reasoning. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004).

205. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022).

206. Bernick and Lens, *supra* note 18, at 13.

207. *Id.* at 26–27.

208. Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1127 (2022).

209. Tang, *supra* note 18.

“history and tradition” should not be treated as a dispositive legal test that can answer constitutional questions.

This might seem puzzling. This Article began with the claim that, in order to understand the social activities that the Court must regulate, the Court should also understand their history and tradition. But now I am suggesting that “history and tradition” should not be used as a legal test to answer constitutional questions.

The puzzle is only apparent. History is relevant for understanding the social practices that legal institutions, including courts, regulate. But this is far from the claim that the historical trajectory of social practices should govern judicial decision-making and be treated as constitutive of legal content. And, as I have been suggesting, a good reason why it shouldn't be is that it can't be. Relying on a contested tradition will just replicate contestation. Traditions matter because getting the facts right matters. They don't have to matter as part of dispositive legal tests or decision procedures.

Sometimes, judicial decisions aim at changing the fabric of social life in the name of constitutional norms. These provisions and decisions that aim to break with the past are at odds with social traditions. And, in light of these conflicts, these traditions might persist in opposition to the relevant legal enactments. But if the Court takes social traditions as determinants of legal content, then it will be inevitably beholden to these illegal or unconstitutional traditions.²¹⁰ The persistence of practices that encroach upon a right does not prove that such a right is not constitutionally protected.²¹¹

But even when what we observe is not a direct opposition to legal decisions and enactments, in the case of contested traditions what we will see is that some parts of the social practice are consistent with legal and constitutional norms, and some parts aren't. What parts we deem significant will itself be determined by our independent construal of constitutional rules and principles. There is no escape from making contested judgments about the content of traditions. It might be better to avoid treating the content of traditions as constitutive of constitutional meaning or content.

C. Further Doubts about Judicial Review

Even limiting the consideration of contested traditions to a form of factual—and not legally dispositive— inquiry will not be sufficient if our goal is to constrain judicial power.

As we have seen, serious engagement with traditions requires normative judgment. Because of this, flexible traditionalism is preferable to the traditionalism of *Bruen* and *Dobbs*, at least from the perspective of

210. Koppelman, *supra* note 15, at 187.

211. Tribe and Dorf, *supra* note 73, at 1088.

transparency. But this alternative approach gives us reason to be concerned about judicial power. And even if we avoid treating history and tradition as a dispositive test, the space for judicial power is merely minimized.

This degree of interpretive freedom does not exist in all contexts of legal reasoning. In many such contexts, in fact, judges can decide cases without having to determine the contours of complex social practices, what to make of them, or how to navigate the tensions between them and the legal tradition. In many other contexts, even when judges must consider social practices and their history, the social practices at issue are—unlike abortion and gun regulation—significantly less prone to raise the disputed moral questions raised by constitutional rights.²¹²

But when the relevant social practices are morally contested, we should stop and wonder why things must be like this—why our fundamental moral disagreements, which persist over time, ought to be resolved by judges. We have at least some reasons to be troubled by the interpretive freedom generated by our system of judicial review and the power it gives to judges, at least when it comes to contested social practices.²¹³ *Bruen*, *Dobbs*, and *Rahimi* are reminders of those reasons.

Thus, given that none of the alternatives are fully satisfactory, perhaps we should reject the problem altogether. We might, that is, want to evade the problem by evading its structural enabler: an institutional design that puts judges with life tenure in the position to make contested judgments of political morality, with the very limited constraint of a sparse and old text and a judicial practice that the Court itself is free to refuse to follow. I am not sure how we ought to resolve the balance of considerations bearing on judicial review, particularly given the current democratic deficits of the overall American constitutional order, including its representative institutions. But the notion of tradition provides additional reasons in favor of reconsidering the current institutional structure of judicial review.

V. TOWARDS A BETTER ALTERNATIVE

But what are judges supposed to do? The argument so far seems to suggest that judges can either pretend that historical inquiry significantly constrains them, or they can transparently embrace interpretive freedom in the context of the American system of strong judicial review. As I noted, the latter, while to some extent preferable to the Court's conservative traditionalism, has important drawbacks too. Is there an alternative that doesn't turn on the (improbable) transformation of the current institutional design and the Court's powers of judicial review?

212. For instance, in commercial contract law judges routinely engage with commercial practice and norms and incorporate them within the adjudication of contractual disputes.

213. See Doerfler and Moyn, *supra* note 195; Waldron, *supra* note 195.

This is not the place to offer a full theory of constitutional adjudication. But I do want to offer a few observations that are relevant in the decision of contested constitutional rights cases generally—observations that are prompted, precisely, by reflection on the role of tradition in legal argument. These observations seem to be absent from much contemporary constitutional discourse—both academic and judicial—and strike me as at least leading in the direction of a more attractive conception of the judicial role in this domain. That conception preserves the recognition of space for interpretive freedom, without giving up on the notion that judges should be constrained by law.

Indeed, the few claims I will make here, while not a full theory of adjudication, lead us in a direction that avoids both the illusion of restraint generated by the Court’s reliance on history and tradition, and the risks of judicial overreach generated by the open acknowledgment of interpretive freedom. To some extent, finding a middle ground that both recognizes judicial freedom and acknowledges the desirability of constraint has been the project of non-originalist constitutional theory for a long time. That project includes, among many others, Ronald Dworkin’s moral reading of the American Constitution²¹⁴ (and his interpretivist view of judicial reasoning more generally),²¹⁵ David Strauss’s common law constitutionalism,²¹⁶ Cass Sunstein’s incrementalist minimalism,²¹⁷ and Mitch Berman’s “principled positivism.”²¹⁸ But the observations I will offer are distinct from this tradition, both in their ambitions—they do not purport to vindicate a general theory of constitutional interpretation, and in fact might fit with different general theories—and their substance.

A. Applying Constitutional Law

I noted above that a seemingly straightforward mandate that tells judges merely to apply the law *in every case* will not do the trick in the context of American constitutional law, which is at least to some extent indeterminate.²¹⁹ Nevertheless, as I also noted there, it is plausible to think that judges should see their task as that of *generally* applying the law.²²⁰

This entails that the starting point for constitutional adjudicators must be the content of constitutional law in force at the moment of their decision.

214. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1999).

215. DWORKIN, *supra* note 71.

216. Strauss, *supra* note 59.

217. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (rev. ed., 2001).

218. Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018).

219. *See supra* Part II.

220. For a recent defense of the distinction between law-application and law-creation, *see* PAOLO SANDRO, *THE MAKING OF CONSTITUTIONAL DEMOCRACY: FROM CREATION TO APPLICATION OF LAW* (2022).

That content ought to be understood as a limited domain, grounded (as legal positivists claim) in social facts alone—whatever the merits of legal positivism as a thesis about the nature of law might be.²²¹ In other words, independently of whether valid legal norms are exclusively grounded in social facts or not, judges should see the law in this way. My claim is thus not a metaphysical claim about the nature of law, but rather an argument about how judges should conceive of the law when deciding disputes. The claim, in other words, is not that legal positivism is true but rather that, in the context of adjudication, judges should treat it as such.²²² On this view, applying the law entails applying legal norms derived from valid sources of law.²²³ The law, on this view, has clear limits set out by the set of norms that can be plausibly derived from enacted legal materials, and validity is understood as a matter of social fact.²²⁴

In the context of American constitutional law, this approach entails that judges are in charge of applying, at least, the valid legal norms derived from formally authoritative legal enactments, such as the constitutional text and Supreme Court precedent.²²⁵ This does not deny that constitutional law is to an important extent indeterminate.²²⁶ Nor does it deny—in fact, it explicitly acknowledges—that much of constitutional law has been made by judges. The claim is simply that the starting point for judges deciding constitutional rights cases is the content of the law in force (understood in a positivist manner) at the moment of decision.²²⁷

But why should judges adopt this as their view about the law they ought to apply? I have made the argument for judges' adoption of a positivist conception of law elsewhere.²²⁸ Similar arguments pertain to the notion that

221. For classical articulations of legal positivism in the Anglo-American context, see H.L.A. HART, *THE CONCEPT OF LAW* (2nd ed., 1994); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1983). For a similarly foundational articulation in the content of the civil law tradition, see HANS KELSEN, *PURE THEORY OF LAW* (1967).

222. See Jiménez, *supra* note 194.

223. On sources of law, see generally Giorgio Pino, *Sources of Law*, in OXFORD STUD. PHIL. L. VOLUME 4 (John Gardner, Leslie Green, & Brian Leiter eds., 2021).

224. As in Hart's rule of recognition. See HART, *supra* note 221, at 95, 100.

225. There is a separate question here, about whether the interpretation of these legal materials is itself determined by law (understood positivistically). Constitutional theorists like William Baude and Stephen Sachs argue that this is the case, and that this view would vindicate originalism as (the legally mandated) theory of constitutional interpretation. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Baude and Sachs, *supra* note 150; William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015). For criticism, see Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017); Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105 (2017). Unlike Baude and Sachs, I do not believe that the interpretive approach to the American Constitution is settled by the practices of legal officials. See Jiménez, *supra* note 83.

226. See Leiter, *supra* note 123.

227. I also make no claim about how we should think about the relationship between different sources of constitutional law—such as, for instance, between the constitutional text and Supreme Court precedent. On this issue, see generally Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

228. Jiménez, *supra* note 194.

judges ought to apply the law (understood in the positivist manner), and I will not rehash them here. But the exploration of the idea of tradition and its significance in legal decision-making provides an important argument in favor of this prescription. Judges cannot impartially decide how morally contested social practices should be understood and should continue to evolve. Every reasonable participant in these practices (and therefore every reasonable citizen, when the practices are widespread) is entitled to a view about these matters.²²⁹ At the same time, not everyone is entitled to an authoritative view about what the law requires. In fact, the entirety of our institutional architecture is built on the assumption that judges have the epistemic and practical authority to make these determinations, and that Supreme Court justices (or, more precisely, a majority of them) have the final word on these legal questions. In answering such questions, judges ought to avoid replicating our underlying disagreements about the relevant social practices and making grand pronouncements of political morality, as much as possible. They should also avoid the temptation to see themselves as tribunes of the plebs.²³⁰ They should instead adopt, as their starting point, the much more limited role of working out what the constitutional law in force demands in the particular case, without replicating those disagreements in their identification of the law. For this purpose, a positivist conception of the law, coupled with the commonsense view that judges' primary duty is to apply the law, serves a valuable practical purpose.

If judges ought to apply the law (understood in a positivist manner), whenever the law, thus understood, conflicts with extra-legal social norms and values, the judge's task as a judge is to privilege the legal point of view, giving legal reasons an exclusionary force (in the sense that they exclude from consideration other reasons that would in principle be relevant).²³¹ For the judge as a law-applier, conformity to legal reasons matters more than conformity to other normative orders, including social morality.²³² The judge is in charge of answering the question of how to resolve the particular case, at least, *according to law*.²³³

229. See Sunder, *supra* note 22.

230. See Bernstein and Staszewski, *supra* note 137. This temptation is not exclusive to conservative judges and their claim to vindicate the people's concerns against those of legal elites. See Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U.L. REV. 631 (2022).

231. On exclusionary reasons, see JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–48 (1999).

232. This is not to deny that changes in social morality and social and political movements will have an impact on which cases become salient, on the interpretation of the overall constitutional culture, or on the development of new constitutional law. On the interaction between constitutional culture, social movements, and constitutional law, see Balkin and Siegel, *supra* note 79; Post, *supra* note 79; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

233. On the distinction between the question about how, all things considered, a case should be decided, and the question about how a case should be decided according to law, see Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 3 (1993).

B. Making Constitutional Law

Still, as I noted above, American constitutional law is partly indeterminate. That means that, at least sometimes, it will be impossible to apply the law because there is, in fact, no law to apply.²³⁴ In other cases, the content of the law might be such that its application requires judges to engage in moral reasoning. We should of course acknowledge both possibilities. In these cases, we should also want judges to make the best decisions they can, all things considered. But even here we should still see judges as *legal* decision-makers. What this means is that judges are to make the decision *legally*, by relying on the tools provided by the legal tradition, even when they cannot simply apply the constitutional law in force.

In these situations, judges would indeed engage in a form of law-making. Not all that constitutional judges do is a form of interpretation of the constitutional text.²³⁵ And the related idea that everything judges—or other political actors, for that matter—do in cases not expressly regulated by constitutional law is constructing or “building up” an edifice set in motion by the original constitution is, from this perspective, a fiction.²³⁶ We should openly acknowledge that apex constitutional courts sometimes need to engage in law-making. This law-making is not reducible to construction—i.e., to a working out of the legal content to be derived from the semantic content of the constitutional text.²³⁷ Against Balkin and Barnett and Bernick, it is not just a matter of fulfilling purposes already set out in the constitutional text, to concretize its words, or to implement its spirit.²³⁸ It is a matter of making law anew. And when courts make law, again, they should make the best law they can, all things considered. To be clear, “all things considered” includes, well, all the things that ought to be

234. Similarly (in the European context), JUAN JOSÉ MORESO, LA INDETERMINACIÓN DEL DERECHO Y LA INTERPRETACIÓN DE LA CONSTITUCIÓN 160–161 (2014). Worries about judicial supremacy have led constitutional theorists like John Hart Ely to argue that, while judges “make law all the time,” in the case of constitutional law this is undesirable because—unlike in areas governed by legislation—legislative institutions cannot correct judicial mistakes made when judges engage in judicial lawmaking. ELY, *supra* note 73 at 4–5. Even granting Ely’s premise—that judicial mistakes in constitutional adjudication are not correctable by other branches—the asymmetry seems to go precisely in the opposite direction. Because there is so little legal content that can be derived directly from the constitutional text, judges in a system characterized by judicial review must make law in this area more—rather than less—than in areas governed by statutes. Ely’s claim was, of course, not descriptive but normative. Still, the asymmetry I point to should make us dubious of a prescription that demands what seems—at least in a system like ours—impossible.

235. *Contra* Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 118–123 (1989).

236. Even scholars that acknowledge the limited legal content generated by the constitutional text sometimes endorse this fiction by treating it as a blueprint that is implemented by later courts. *See, e.g.*, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U.L. REV. 549 (2009).

237. On interpretation and construction, *see* Riccardo Guastini, *Interpretación y construcción jurídica*, ISONOMÍA 11 (2015); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U.L. REV. 1095 (1995); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Solum, *supra* note 129.

238. Balkin, *supra* note 236, at 560; Barnett and Bernick, *supra* note 151.

considered—including second-order issues such as the democratic legitimacy and operation of the other branches, securing space for democratic deliberation, being responsive to social demands, and acknowledging the fact of reasonable moral disagreement. The task is not just to make the best first-order moral decision, setting aside all of these (and many other) morally relevant second-order considerations. The task is to engage in law-making in a responsible way.

But the crucial point is that this form of law-making would still be a constrained, *judicial* form of law-making. Here is where we see the contrast with the two major approaches to the notion of tradition in American constitutional law. The current Court's approach relies on tradition in the hope that it will constrain judges and determine the existence and constitutional status of certain rights. The alternative that we find in decisions like *Obergefell*, *Casey*, and in Harlan's dissent in *Poe*, on the other hand, treats tradition as an opportunity for exercising normative judgment and balancing the relevant moral considerations. In between these two extremes, I am suggesting that judges ought to apply constitutional law, openly recognizing when it "runs out" (in contrast to the Court's traditionalism); but that, when it must engage in judicial law-making, it ought to do so *legally*, not acting as a supra-legislature engaging in unconstrained moral reasoning but as a court that decides *legally* even when there is no posited law to apply.²³⁹

What I am suggesting here is that, when judges decide cases that go beyond the limits of valid constitutional law at the time of the decision, they can still decide as judges. When the facially applicable legal materials run out, decision-making can still be guided by legal categories, legal concepts, and doctrinal tools.²⁴⁰ These categories and concepts arise out of legal thought and practice,²⁴¹ and knowledge of them can help judges navigate the complexity of concrete cases even when the outcome of the case is not easily derivable from legal materials.²⁴² Judges thus can rely on the repository of legal arguments, concepts, and categories that are part of the practice and tradition of legal reasoning even when the law is indeterminate.²⁴³

A common view in American constitutional law is that "tradition is

239. As Balkin puts it, "Courts must think and act and in terms of legal forms and practices; they must make legal arguments and write legal opinions." Balkin, *supra* note 236, at 608. In my view, however, Balkin goes too far when he thinks this correct claim is the same as the claim that all judges should do is "interpret and construct law." *Id.* at 609.

240. This is why Francisco Urbina is right when he argues that the usual supposition that legally constrained decision-making and morally optimal decision-making are at odds is unwarranted. FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 154 (2017).

241. *Id.* at 161.

242. *Id.* at 162.

243. *Id.* at 171–172.

valuable as a guide to the exercise of moral judgment.”²⁴⁴ My claim here is that the *legal* tradition is a guide that judges should rely on, even when—and perhaps, precisely when—the law does not clearly dictate an outcome. In cases left unsettled by existing constitutional law, or in which there is no clear answer provided by the constitutional text and a legal answer would only be provided by precedent that the Court could in principle overturn, judges ought to make the best decisions they can *as judges*. This means they ought to rely on their legal expertise and on their knowledge and grasp of legal concepts, norms, commitments, and values—like *stare decisis*, reliance, and the procedural virtues of the rule of law. Judges should use concepts and structures that are already in place in the existing law and that can be extended, restructured, or adjusted to govern constitutionally unregulated cases.

Law does not just encompass legal norms that can be easily derived from formally authoritative enacted texts like constitutions and statutes. Law also contains legal standards of correctness—principles—implicit in the relevant legal materials, including judicial precedents.²⁴⁵ The limited domain of the law contains implicit principles, and these principles can help in the tasks of judicial law-making.²⁴⁶

Unlike non-positivist theorists like Ronald Dworkin, the view I advocate for does not see these principles as moral principles whose correctness depends on moral truths—but as internal normative standards, the force and scope of which derives from distinctively legal considerations.²⁴⁷ These legal principles allow for deciding hard cases, just like principles do under Dworkin’s theory.²⁴⁸ While on Dworkin’s, view these principles are fundamental demands of (true) political morality, on my view, they are internal or mid-level principles²⁴⁹ that don’t morally justify the entirety of the legal system, but are simply implicit normative standards that can be inferred from the set of valid legal materials.²⁵⁰

But while these legal principles are not to be identified with moral truths or facts, they ought to be used by judges in a way that is consistent with morality. This does not mean that the relevant moral considerations are part of the content of the law. It merely means that they are relevant and binding, in fact, for judges (after all judges, too, are moral agents), and that therefore

244. EISGRUBER, *supra* note 23, at 141.

245. The argument in this paragraph relies on Jiménez, *supra* note 109, at 1142–1148.

246. On the principles implicit in the U.S. Constitution, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 19–20 (2012).

247. For the argument, see Jiménez, *supra* note 83.

248. DWORKIN, *supra* note 89, at 81.

249. See Michael D. Bayles, *Mid-Level Principles and Justification*, in JUSTIFICATION 49 (J. Roland Pennock & John William Chapman eds., 1986); Kenneth Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12 L. PHIL. 121 (1993).

250. I elaborate a similar role for legal principles in the context of contractual disputes in Jiménez, *supra* note 109.

judges ought to use law and rely on law, when it doesn't provide a clear and determinate answer, to achieve decisions that are independently morally justifiable.²⁵¹ Thus, constitutional judges who use legal principles to make morally valuable innovations by determining what was previously underdetermined act correctly as judges.²⁵² The distinctively legal norms and standards of constitutional law are a tool for flexibility and innovation as well as for the exercise of practical judgment.

What we see then is a certain continuity between the clear rules that can be easily derived from legal materials like constitutions and pre-existing precedent, and the more implicit normative standards derived from them that can still operate as tools of reasoning in cases of judicial law-making. Hans Kelsen certainly exaggerated when he argued against the distinction between law-creation and law-application.²⁵³ But, at least in the context of constitutional law, there is much more continuity between the constitutional text and judicial creativity than we usually suppose. As John Gardner argues, any constitution that provides for judicial application must by necessity be, to some extent, a living constitution.²⁵⁴ The usual (and mistaken) inference derived from this correct observation is that even the most restrained judge will end up playing a legislative role. Here, I am highlighting a different implication: even when constitutional judges make law, they are also operating within and under the influence of constitutional law.

The maligned idea of a “living constitution”²⁵⁵ is thus an apt metaphor, not just because it suggests that constitutional courts can have a creative role,²⁵⁶ changing the law by interpreting it.²⁵⁷ It is also apt because the norms of the constitutional text, and the concepts, doctrines, and categories that arise out of its development, play a crucial role in guiding creative decision-making.²⁵⁸ In the course of this creative process, constitutional law will be filled out and will come to have a content that significantly exceeds the communicative content of the written constitutional text.²⁵⁹ But then this very normative content will subsequently guide and constrain the future development of constitutional law. In this respect, at least, a judge engaging

251. As Raz writes: “given the impact that constitutional decisions, like many other legal decisions, have on people’s lives, they are justified only if they are morally justified.” Joseph Raz, *On the Authority and Interpretation of Constitutions*, in BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 323, 355 (2009).

252. *Id.* at 365.

253. KELSEN, *supra* note 221, at 234–235.

254. Gardner, *supra* note 121, at 191–192. Similarly, see Albert, *supra* note 122, at 389.

255. See generally William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

256. Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CAN. J.L. & JURIS. 55, 55–56 (2003).

257. MATTHIAS KLATT, MAKING THE LAW EXPLICIT: THE NORMATIVITY OF LEGAL ARGUMENTATION 5 (2008).

258. Kavanagh, *supra* note 256, at 57. Similarly, AMAR, *supra* note 246, at xiii.

259. Gardner, *supra* note 121, at 189.

in the development of constitutional law, beyond the limits of enacted legal texts, is not bound to act like a “conscientious legislator;”²⁶⁰ they are bound to act as a conscientious judicial lawmaker. The creative aspect of constitutional adjudication is still a form of constitutional adjudication.

In his discussion of formalism in *The Concept of Law*, H.L.A. Hart argues that, when courts settle previously indeterminate fundamental constitutional questions, “they *get* their authority to decide them accepted after the questions have arisen and the decision has been given.” In this context, he writes, “all that succeeds is success.”²⁶¹ This is, as far as it goes, a correct observation as a descriptive matter. But one key determinant of what *should* count as success is the extent to which courts determining previously indeterminate questions act *as courts*, relying on legal concepts, doctrines, and standards. Sometimes, the thought has been that, in hard cases, courts must either openly engage in direct, unaided and unconstrained moral reasoning, or pretend to be rigorously constrained.²⁶² This dialectic seems to have driven the majority opinion in *Dobbs*. But it is a dialectic we ought to reject.

C. Constitutional Judges and the Legal Tradition

In all of this, judges should not mislead themselves or the public by thinking or claiming that they are voicing or expressing the traditions of the American people against the values of the legal elite—as the majority did in *Dobbs*. On the contrary, both when they apply clear, pre-existing legal norms grounded in the constitutional text or precedent, or when they develop constitutional law, they are acting as judges, and therefore, as legal experts bound by the norms and standards of the legal tradition.

While we can’t expect judges’ decisions to always coincide with our moral convictions, we can and ought to expect their decisions to be grounded in legal considerations and to be guided by fidelity to legal reasons. Indeed, engaging in legal reasoning is also participating in a practice and adopting certain habits, values, and standards. Even when they go beyond pre-existing legal norms, judges are still supposed to act as legal reasoners that ought to be faithful to law and committed to the values underlying legal culture.²⁶³ Thus, in cases like *Bruen*, *Dobbs*, and *Rahimi*, as in general, judges should decide in ways that are appropriate for *legal* decisionmakers, without relying on an incomplete and partial understanding of social practices to claim the vindication of historical lay sentiment.²⁶⁴

260. HART, *supra* note 221, at 273.

261. *Id.* at 153.

262. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN L. REV. 703, 706 (1975).

263. W. Bradley Wendel, *The Craft of Legal Interpretation*, in INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW 153, 162 (Yasutomo Morigiwa, Michael Stolleis, & Jean-Louis Halperin eds., 2011).

264. Some constitutional theorists argue that the original constitutional text was not committed to

This does not deny that judges do—and, given the power they already have, should—decide hard cases and develop constitutional law by trying to make what strikes them as morally justified decisions. But even here, the determination of what’s morally justified, and the elucidation of the mechanisms for getting there, are to be deployed by legal experts acting as that rather than as imperfect finders of a supposedly clear and constraining historical tradition. Acting in this way, judges might reach legally defensible or praiseworthy decisions even when they are not legally mandated: they might be operating within a sphere of legally permissible decision-making.²⁶⁵

CONCLUSION

Traditionalist theorists have noted, with some irony, that the mere mention of tradition might be perceived as a threat by progressive legal academics.²⁶⁶ Given the outcome of the Court’s engagement with the idea of tradition in some of its recent constitutional decisions, the concern is not surprising.

But a concern with the use of the idea of tradition is not just a knee-jerk, partisan reaction to expected outcomes. It is also a justified concern about the malleability of this notion, and how reliance on it without an open acknowledgment of this malleability can obscure the role of political and moral judgment—as well as the responsibility for the present and future of American constitutional law that the current institutional architecture places on judges.

A fixation with the past that ignores changes in the very practices and traditions judges are dealing with is not a novel approach to constitutional interpretation, but an old political position we already have a name for: conservatism (and a particularly crude version of it). Focusing on a

a distinction between law and politics, and that the historical roots of American constitutionalism were in fact committed to the final interpretive authority of “the people themselves,” as Kramer puts it. KRAMER, *supra* note 107, at 8. Perhaps this is a historically accurate reconstruction of the original constitutional text and its surrounding historical context. But it is certainly not plausible as a reconstruction of the contemporary practice of constitutional law, as Kramer himself would recognize (since his argument is an argument to “recover” this reading of American constitutional history). Kramer is just an exemplar here of a larger way of thinking about constitutions and constitution-making processes. According to this view, the enactment of the constitution and its transformation or amendment *via* political movements is an exercise of constituent power by “the people.” *See, e.g.*, ACKERMAN, *supra* note 197. I believe this type of account has limited purchase on the issues discussed in the context of ordinary constitutional adjudication. For what it’s worth, I also think it is an overly idealized and optimistic interpretation of constitution-making in the United States and elsewhere. On this issue, *see* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992); David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923 (2013). For criticism of the idea of constituent power in general, *see* Sergio Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, 21 INT’L J. CONST. L. 14 (2023). Verdugo discusses Ackerman’s theory and his idealization of the American founding in *Id.* at 58.

265. *See* Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1655 (2023).

266. DeGirolami, *Traditionalism Rising*, *supra* note 1, at 13.

historical tradition is not just about revering its past—or a particular slice thereof—but also about considering its present and the impact of our current actions and decisions on its future. It is also about engaging critically and thoughtfully with the negative aspects of traditions, their disadvantages, and deleterious influence.²⁶⁷

Faced with an existing tradition, we are not bound to uncritically accept it; the other alternative is always to subject it to critical scrutiny.²⁶⁸ If we are uncomfortable with the degree of freedom this opens up for judges, the solution is not to pretend they can be bound by history, but rather to join the voices that worry about judicial power, and to insist that judges ought to use that power responsibly, acting as judges even when the law does not provide a clear answer.

267. Scheffler, *supra* note 42, at 309.

268. Popper, *supra* note 138, at 164.