ARTICLES

TRADITION, CHANGE, AND THE IDEA OF PROGRESS
IN FEMINIST LEGAL THOUGHT

KATHARINE T. BARTLETT

It often seems to me the progress of feminism is very much like that of psychoanalysis. Roughly speaking, there are two parts to analysis. First comes insight—collecting data on the damage within. Then comes extrication from the personality that has developed in response to the damage. The first part is easy, the second part hell. Insight comes in a rush: swift, exciting, dramatic. Extrication is interminable: repetitious, slogging, unesthetic. At least thirty-two times a year for six or seven years the patient repeats original insight as if for the first time. And then, when the analyst can hardly believe it is going to happen again, the patient announces, “Now I see clearly what I have not seen before.” The analyst passes a tired hand across a weary brow and replies, “You saw that clearly last month, and last year, and the year before. When are you going to act on what you see?”

Within feminist thought, there is great anxiety about progress: what it is, whether it is occurring, and how to make more of it happen. This anxiety is manifest in the range of reactions to the current “backlash”

* Professor of Law, Duke University. The initial version of this paper was given as the 1993 Rundell Lecture at the University of Wisconsin Law School on November 1, 1993. It benefited from helpful comments I received at faculty workshops at University of North Carolina-Chapel Hill School of Law, Cornell Law School, and Harvard Law School; at lectures given at Vermont Law School, Dartmouth College, and New York University School of Law (Discourses Speaker Series); and at the 1993 Law and Society Annual Meeting. Much of the initial work for the paper was made possible by the support I received from the Rockefeller Foundation and the Cannon-Bost Faculty Research Fund of Duke Law School, which enabled me to spend the 1992-1993 academic year as a Fellow in the ideal research conditions provided at the National Humanities Center in Research Triangle Park, North Carolina. Special thanks go to Kathy Abrams, Linda Kerber, and Jeff Powell for their thoughtful comments, and to Jennifer Harrod for her research assistance.

against feminism. Some warn that women have asked for too much and weakened their legitimate claims to equality with special pleadings for women that cannot be justified. Others charge that women have asked for too little and that incremental legal reforms within existing paradigms will only reinforce the status quo. Some, among whom I count myself, are frustrated by claims made at both ends of the spectrum. Those worried about women’s special pleadings seem to have missed the central feminist point about how the construction of principles as neutral and special serves systematically to rationalize women’s subordination. Those insisting that incremental reform only reinforces women’s subordination, in turn, undermine the slow and tedious work that might help to alter the social attitudes about gender that sustain it.

My aim in this Article is not to choose between extremes, or even to seek the happy middle between them. It is, rather, to improve the way feminists think about how to produce change—whatever its desired specifications. All too often today, feminists define progress in opposition to tradition and the past. The more “radical” the feminism, the more pervasive and enduring the oppressions of the past are seen to be, and thus the more urgent the need to fully repudiate its traditions.

There is understandable reason for the feminist antipathy to tradition, which represents patriarchal gender role norms, the elimination of which is feminism’s primary goal. Deepening the contemporary feminist hostility toward tradition has been its association with “family values,” invoked in support of such conservative agenda items as state-encouraged prayer in the public schools, the reversal of Roe v. Wade, the privatization of responsibility for family support, the penalization of out-of-wedlock childbirth, and the rejection of purportedly “favored” treatment for women, gay men and lesbians, African-Americans, and third-world “aliens.”

An oppositional stance toward tradition and the past, however, may do more to impede feminist progress than to accelerate it. What I

5. Radical feminists as varied in their approaches as Robin West and Catharine MacKinnon accept this oppositional view. See infra text accompanying notes 73-91.
contend in this Article is that a dichotomous view of change is both inaccurate and nonstrategic. It is inaccurate in the sense that the process of change occurs less in breaks from a fixed and stable past than in extensions of ever-mutating versions of it. The fact that change represents extensions of the past rather than its rejection is not due merely to the exigencies of compromise, cooptation, and the triumph of "special interests." The future brings along the past because, notwithstanding the allure of the brand new, what most individuals seek in their social relations is not something completely different, but rather a different familiar. I propose that the primary impulse for social change seeks reconciliation between the familiar and an evolving sense of what is just and good, rather than a radical break from the past.

The tradition/change dichotomy is nonstrategic because it fails to take into account this desire for the familiar. It sets the sights of reformers on efforts to engineer great leaps of freedom from an oppressive past to a sharply distinct, desirable future, rather than on building the connections essential to that future. In so doing, it increases the distance those who are being asked to change think they must move. This dichotomous view ignores the fact that the seemingly intractable views about gender which feminists seek to change are tied to individual and group identities, formed through the ongoing accretions and syntheses of old and new understandings of self and other. Feminist revelations can have little impact on identities they completely reject. They must make sense in terms of these identities. This requires not the triumph of new over old, but an integration between them that can generate transformed and transforming views about gender.

An approach to progress built on distance from, rather than identification with, the past creates dissonance and conflict. Dissonance and conflict can, of course, be useful in stimulating change. However, not just any dissonance and conflict will do. What feminists require is dissonance and conflict that enrich and extend a set of shared understandings, rather than further entrench old ones. Tradition is a key to identifying and reshaping the base of shared understandings on which desirable change, or progress, can build. It is a concept that feminists cannot afford to ignore.

This Article begins with an analysis of the oppositional view of tradition and change evident in recent Supreme Court decisions limiting the growth of constitutionally protected individual liberties in the family law area. I then demonstrate how feminist responses to these decisions incorporate and reinforce, rather than challenge, the dichotomous view of tradition and change that these decisions reveal, and show how this view is more damaging than helpful to feminist concepts of progress. I go on to lay out alternative views of tradition and change, including a view that sees tradition and change as mutually embodied rather than as opposites.
I contend that the embodiment view supplies the most promising framework for feminist progress. Within this view, tradition is seen as an important component of progress, which in turn is viewed less as a product of revolutionary insight implemented by the newly empowered, than as a product of mundane, necessarily repetitious narratives that reveal, teach about, and improve the ordinary, “traditional” meanings present in this society, including the ordinary meaning of gender. My argument is that although insight and power are necessary to feminist progress, changes in gender role attitudes depend upon the integration of insight and past understandings. These integrations cannot be achieved without, in Gornick’s words, the “repetitious, slogging, unesthetic work[ing]” of these insights into the ordinary and familiar. In this view, strategies consistent with this more integrated approach to tradition and change are more likely to produce a deeper kind of progress—one that both endures and serves as a foundation for future progress—than are strategies based on the tradition/change dichotomy. I end with a review of feminist work from which this more integrated view of tradition and change might build.

I. THE TRADITION/CHANGE DICHOTOMY

A. Tradition and Precedent

Tradition has functioned in different ways in Supreme Court jurisprudence across a diverse set of constitutional contexts. In some cases, the Court has used tradition to refer to social norms and practices that have persisted for some period of time outside, or beyond the reach of, law. These norms and practices act as a limit on state acts that jeopardize these norms or practices6 or as validation of state acts consistent with them.7 In other cases, what is called tradition amounts


7. See, e.g., Ingraham v. Wright, 430 U.S. 651, 657-64 (1977) (upholding corporal punishment in public schools based, in part, on use of such punishment “dat[ing] back to the colonial period”). Evidence of traditional norms and practices can also function as proof of the Bill of Rights drafters’ “original intent” to allow certain challenged rules or practices. See, e.g., Marsh v. Chambers, 463 U.S. 783, 786-88 (1983) (final agreement on language of the Bill of Rights three days after congressional authorization of appointment of paid congressional chaplains sheds light on what the drafters intended the First Amendment religion clauses to mean).
to rules or precedents internal to law, to which the Court refers in justifying continued adherence to these (or similar) rules and practices in the face of challenge by those urging an abandonment of tradition.⁸ It is important to see that both usages function somewhat differently from legal precedent. Tradition and precedent each confer some sort of legitimating power on the past and impose constraints based on that power.⁹ Whereas precedent consists of a holding in one legal case that is deemed to control directly the decision in another case,¹⁰ however, tradition derives from outside of law, imposing limits not yet adjudicated by the courts. Once the legal relevance of a tradition has been adjudicated in a case, it becomes incorporated into a precedent and operates as such, subject of course to later reinterpretations of, or reliance upon, tradition (which might, in turn, alter precedent). A tradition that has become embodied in precedent may continue to operate not only as part of that precedent but as an independent, reinterpretable source of authority for future decisions. When authority functions as tradition, its strength increases with age; as precedent, it gains support from its recency.¹¹

Typically, both precedent and tradition are viewed as constraints on authority, and rightly so. One commonly perceived difference between them is that precedent, especially as it operates in the common law, leaves

---


The distinction between tradition internal to the law and that which is external is prompted by Charles A. Miller's distinction between internal and external history. See Charles A. Miller, The Supreme Court and the Uses of History 20-21 (1969).

⁹. Anthony T. Kronman views precedent as "merely one expression of [the general outlook of traditionalism]," whereby the past has direct, inherent authority to which respect is owed, for its own sake. See Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029, 1043-44 (1990).


room for evolution and change,\textsuperscript{12} while tradition is fixed, stable, and unchanging. Indeed, scholars as noted as Oliver Wendell Holmes have applauded the common law's great responsiveness to changing conditions while deriding the inflexibility, purposelessness, and irrationality of the "merely historical."\textsuperscript{13} This contrast, however, is based on a mistaken view of tradition, which in fact evolves and builds on what precedes it much like the common law. In the next section, I explore this common mistake about the rigidity and unchanging nature of tradition as it has appeared in Supreme Court decisions addressing constitutional rights and liberties relating to matters of family, procreation, and sexuality. It is with respect to matters of the family and sexuality that the Court has most often turned to tradition as a source of "previously unrecognized aspects of . . . liberty,"\textsuperscript{14} and it is in the family law area that the Court, in recent years, has articulated a specific methodology for consulting tradition in adjudicating claims of individual rights and liberties not explicitly enumerated in the U.S. Constitution.\textsuperscript{15} These decisions have provoked feminist critique which, as I will show, mirrors the dichotomous model of tradition and change pressed by Court conservatives. I go on to explain why this model, which is broadly present in feminist thought, provides a poor model for a concept of feminist progress.

\textit{B. Tradition as a "Living Thing"}\textsuperscript{16}

The use of tradition by the Supreme Court as a source of authority against state power began with two decisions challenging the state's power to regulate public education. \textit{Meyer v. Nebraska}\textsuperscript{17} addressed a Nebraska prohibition against teaching a modern language other than English in any school until after the eighth grade. \textit{Pierce v. Society of Sisters}\textsuperscript{18} examined an Oregon referendum initiative mandating that all children attend public, and not private, school. In each case, the Supreme Court

\textsuperscript{12} See Melvin A. Eisenberg, The Nature of the Common Law 1 (1988) (the common law evolves and adapts to the doctrinal and social propositions of the community).

\textsuperscript{13} See Oliver Wendell Holmes, The Path of the Law, in Collected Legal Papers 167, 192 (1920) (also found in 10 Harv. L. Rev. 457, 472 (1897)) (explaining certain doctrines in contract law in which tradition "overrides rational policy"); see also infra note 78.


\textsuperscript{15} See Michael H. v. Gerald D., 491 U.S. 110 (1988). This case is discussed in detail infra text accompanying notes 54-61.


\textsuperscript{17} 262 U.S. 390 (1923).

\textsuperscript{18} 268 U.S. 510 (1925).
held that the state regulation encroached too deeply upon matters which, by tradition over time and in various cultural contexts, had been left up to parents and teachers. In the case of *Meyer*, the relevant tradition was the “supreme importance” with which “[t]he American people have always regarded education and acquisition of knowledge” and the institutional commitment to control over children by parents rather than by a homogeneous community within which the individual’s identity might be submerged. *Pierce* involved the specific tradition of private schools in this country, which have been “long regarded as useful and meritorious.” From these traditions the Court discerned an until then unidentified constitutional interest on the part of parents and guardians in “direct[ing] the upbringing and education of children under their control,” which protected their right to resist state standardization of their children in public schools and to engage a qualified teacher to instruct their children in subjects of their own choosing.

Tradition functioned in both *Meyer* and *Pierce* as a source of liberty and privilege not otherwise explicitly found either in the Constitution or in other legal sources. The long-standing expectations held by parents with respect to the education and upbringing of their children became, by virtue of the depth and fundamental nature of these expectations, a limit on state power to intrude on them. Although this limit has been linked with the natural law of property and contract rights protected in *Lochner* and later discredited in the New Deal era, in *Meyer* and *Pierce* the traditions at issue were not those of a universal higher law of all mankind; they were identified, instead, as peculiarly American practices and expectations. These traditions were at the same time general and specific in scope, drawing from parents’ broad responsibility toward their children’s upbringing to reaffirm specific expectations with respect to what those children should be taught, and by whom.

---

20. *Id.* at 402.
22. *Id.* at 534-35.
23. *Id.* at 535.
27. *Pierce*, for example, spoke of “the fundamental theory of liberty upon which all governments in this Union repose,” which “excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.” 268 U.S. at 535 (emphasis added); *see also* *Meyer*, 262 U.S. at 400 (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”) (emphasis added).
For forty years after Meyer and Pierce, the constitutional project of identifying fundamental liberties entitled to constitutional protection based on what came to be understood as "substantive due process" lay in dormant disrepute.²⁸ It reappeared in Griswold v. Connecticut,²⁹ in which the Court held that the deep-seated societal respect afforded to marriage and the spousal relationship supports a constitutional right for married persons to be free from state control in their decisions about whether to use birth control. At a superficial level, Griswold located the Court's authority to overturn intrusive state legislation in the "penumbra" of more explicit privacy rights found in the First, Third, Fourth, Fifth, and, in a residual sense, Ninth, Amendments to the Constitution, rather than in the Due Process Clause of the Fourteenth Amendment. Fundamentally, however, Griswold was based, no less than Meyer and Pierce, on a set of social practices and expectations in marital intimacy that were seen to predate, and at the same time transcend, existing legal sources.³⁰ The Court was protecting in Griswold a "way of life" that valued highly the privacy and sexual intimacy of a married couple. This way of life was worthy of protection not because it could be placed in a particular location or time, but rather because it could not. It was "older than the Bill of Rights . . . older than our political parties, . . . older than our school system."³¹ Authority for this way of life came from its

²⁸. Perhaps it would be more accurate to say that substantive due process went underground, and was rearticulated through equal protection principles invoked less to protect certain "suspect" classes of individuals than to protect especially important individual rights and liberties. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court held on equal protection grounds that the state could not arbitrarily classify crimes of moral turpitude that would be punished by sterilization. Since the classifications involved in Skinner—e.g., embezzlers and sex offenders—were not worthy of rigorous constitutional scrutiny, it is reasonable to conclude that it was the individual's special substantive (due process) interest in procreation that gave rise to the higher level of review. Similarly, in Loving v. Virginia, 388 U.S. 1 (1967), the Court invalidated anti-miscegenation laws that applied equally to whites and blacks on equal protection grounds, at least in part because of the special constitutional status afforded to marriage. See also Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating Wisconsin statute requiring parent with out-of-custody children to get court permission to marry); Stanley v. Illinois, 405 U.S. 645 (1972) (holding, on a procedural due process theory, that state may not irrevocably presume the unfitness of an unwed father and deprive him of custody of his children); Eisenstadt v. Baird, 405 U.S. 438 (1971) (holding on equal protection grounds that unmarried, as well as married, persons have a constitutional right to access to contraceptives).

²⁹. 381 U.S. 479 (1965).

³⁰. Id. at 486.

³¹. Id.
acceptance and importance in society, which no other type of association could match.\textsuperscript{32}

The reliance upon tradition as a source of constitutional liberty became even more explicit in *Moore v. City of East Cleveland*.\textsuperscript{33} In *Moore*, the Court invalidated a zoning ordinance that defined “family” in such a way as to exclude a grandmother and her two grandchildren from a single-family-only residential district. The decision was based on what the Court’s plurality identified as the “careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’”\textsuperscript{34} As in *Griswold*, no constitutional language or precedent supported the particular right defined by the *Moore* plurality. The source of the right, rather, was the historical fact that millions of citizens have grown up in extended families of “uncles, aunts, cousins and especially grandparents,” and that “the accumulated wisdom of civilization, gained over the centuries and honored throughout our history . . . [supports such a large] conception of the family.”\textsuperscript{35} As in *Griswold*, the Court’s power derived from the fact that the extended family was a living practice generated “[o]ut of choice, necessity, or a sense of family responsibility”\textsuperscript{36} and was “deeply rooted in this Nation’s history and tradition.”\textsuperscript{37}

The organic dimensions of tradition, as well as its interrelationship with precedent, are apparent in each of these decisions. New precedent

\textsuperscript{32} Id. (marriage is “an association for as noble a purpose as any involved in our prior decisions”); see also id. at 491 (Goldberg, J., concurring) (privacy in marriage is protected by the Ninth Amendment because it is “so basic and fundamental and so deep-rooted in our society”). According to Professor Bruce Ackerman, *Griswold* represents the reinterpretation of the Bill of Rights “in a post-New Deal world in which property and contract no longer serve the libertarian functions pre-supposed by the eighteenth century.” See Bruce Ackerman, *Constitutional Politics and Constitutional Law*, 99 Yale L.J. 453, 527, 544 (1989). In emphasizing the right of parents to engage teachers and schools, *Meyer* and *Pierce* might well be seen as the analytical bridges in this new synthesis.

\textsuperscript{33} 431 U.S. 494 (1977). In one intervening case, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court relied heavily on the 300-year tradition of the Amish as a successful and self-sufficient segment of American society, as well as on the general American tradition of parents’ concern for the nurture and upbringing of their children, in holding that the state unreasonably interfered with the liberty of Amish parents when it failed to accommodate their wish to withdraw their children from public schools after the eighth grade. However, the reasoning of the case relies even more heavily on the importance of the religious free exercise interests involved, and thus *Yoder* is more properly seen as a First Amendment case.

\textsuperscript{34} *Moore*, 431 U.S. at 504 (citing *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

\textsuperscript{35} Id. at 505-06.

\textsuperscript{36} Id. at 505.

\textsuperscript{37} Id. at 504.
was created based on social practices and expectations extending back into a historical past. In each case, the state had acted within existing legal parameters but in so doing offended a set of moral values and social expectations deeply embedded within the culture. Insofar as the state legislation at issue in Meyer and Pierce was a response to some perceived emergency or crisis, the Court's action in these cases can be viewed as an effort to protect long-standing, still-existing practices and expectations from inflamed popular prejudices of the moment. Even when the state rule was not a product of momentary legislative passions, however, the Court recognized that such a rule may violate deeply held cultural norms. The zoning ordinance struck down in Moore was at least ten years old, while the statute challenged in Griswold was passed in 1879 and had been challenged unsuccessfully a few years previous to Griswold in Poe v. Ullman. In Loving v. Virginia, the Court struck down on due process grounds a state anti-miscegenation law, notwithstanding the illegality of interracial marriage in most states in the nineteenth century.

This line of cases supports the proposition that a tradition upon which a due process claim could be based does not need to be identical to the claim at issue, fixed at one particular point in the past and continuing unbroken to the present. The tradition is, rather, a norm that has endured in different iterations in different times. It is a source of reasoned reversal—a mid-course correction, so to speak—of a state action which, upon reflection, in light of the sense that can be made of the past, represents excessive control over its citizens. Tradition thereby connects past and present and gives each meaning in terms of the other. It is old, yet in its timelessness acts as a source of new recognitions.

38. The Nebraska statute at issue in Meyer was enacted in response to an "emergency" and fostered in the context of the post-war "aversion toward every characteristic of turbulent adversaries." 262 U.S. 390, 402 (1923). The Oregon statute challenged in Pierce was a new statute enacted under the initiative provision of the state constitution. The voters were responding to "the great increase in juvenile crime in the United States," which was linked to "the great increase in the number of children... who were not attending public schools." 268 U.S. at 524-25. They believed that "religious suspicions" promoted "the separation of children along religious lines during the most susceptible years of their lives", and that "the mingling together... of the children of all races and sexes... might be the best safeguard against future internal dissensions and consequent weakening of the community against foreign dangers." Id. at 525.


41. 388 U.S. 1 (1967).

C. Tradition as a Fixed Source in a Particular Past

In recent years, the concept of tradition used by the Court in evaluating constitutional liberty claims has made a significant turn from the "living" tradition of earlier cases. The shift was stimulated by concerns that the earlier approach permitted judges too much discretion to carve out new constitutional rights based on their individual, subjective preferences. Dissenting in Moore, for example, Justice White fiercely insisted that the Court's approach to extending constitutional protection of rights or liberties based on tradition gave a "far too expansive charter" to the Court. A number of academics also objected to the Court's use of tradition to recognize new constitutional rights and liberties, largely on grounds that judges should not second-guess moral standards and norms set by legislatures. Conservative justices added to the Court in the Reagan years were sympathetic to these objections, and by 1985, the Justice White view was in the majority.

Bowers v. Hardwick involved a challenge to a Georgia criminal statute prohibiting sodomy—a challenge which the Court treated as an attack on the statute as applied only to homosexuals. In addressing the challenge, Justice White did not abandon the concept of tradition, which was too embedded in Court precedent to ignore altogether, but rather began the steps that would transform its meaning. Only rights or liberties "deeply rooted in this Nation's history and tradition" are entitled to

43. See supra note 16.


47. Michael Hardwick was arrested for an act of sodomy with another man. The prosecution was dropped, and Hardwick brought an action challenging the statute, stating that it placed him, and others, in fear of imminent arrest. Id. at 188. For a critical analysis of the Court's decision to treat the case as a challenge to the statute as applied to homosexuals, see Janet E. Halley, Reasoning About Sodomy, Act and Identity in and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1741-42 (1993).
constitutional protection, White declared. The "right to engage in homosexual sodomy" has no such deep roots. To the contrary, anti-sodomy legislation itself has "ancient roots" and existed at a widespread level in the common law, in the laws of the original thirteen states at the time they ratified the Bill of Rights, and in 1868 when the Fourteenth Amendment was passed. Twenty-four states and the District of Columbia still have anti-sodomy laws. In the light of such "traditions," Justice White concluded, the statute implicated no fundamental liberty interest.

The differences between the old and the new traditionalism are fundamental in at least two respects. First, whereas in Meyer, Pierce, Griswold, and Moore, tradition was found in social practices, norms, and expectations external to the law, in Hardwick Justice White invoked a tradition constituted by the continued existence of legal rules and proscriptions that were consistent with those under attack. Although it was the state's authority to prohibit certain sexual practices between consenting adults that was at issue, the exercise of this authority by states provided the yardstick by which this authority was judged. Second, whereas the traditions in the earlier line of cases were important because of the fundamental part they played in a way of life pervasive and still persistent in a long and deep historical chain, the legal rules consulted in Hardwick were important because of their location in specific, discrete pasts—especially the years the Bill of Rights and the Fourteenth Amendment were ratified. Tradition operated for the Hardwick majority not as an evolving continuity with the past but as evidence of the

---

48. Dramatic differences in the articulations of the rights asserted mirror divisions on the Court in defining fundamental rights and liberties entitled to constitutional protection. Thus, for example, while Justice White speaks in Bowers of the "right to engage in homosexual sodomy," Justice Blackmun in his dissenting opinion discusses "the right to be let alone" and "the right to decide for oneself whether to engage in particular forms of private, consensual sexual activity." 478 U.S. at 129. A similar divergence marks the descriptions of the claims at issue in Michael H. and Roe v. Wade. Compare Michael H. v. Gerald D., 491 U.S. 110, 130 (Scalia, J.) (addressing the right of "an adulterous natural father" to obtain rights to his child) and Roe v. Wade, 410 U.S. 113, 179 (1973) (White, J., dissenting) (describing Court's holding as "investing women and doctors with the constitutionally protected right to exterminate [human life]" and describing women seeking abortion right as "those who seek to serve only their convenience") with Michael H., 491 U.S. at 141 (Brennan, J., dissenting) (characterizing the right involved as "the freedom not to conform" and the right of "parenthood" by a father who has a "substantial" relationship with his child) and Roe v. Wade, 410 U.S. at 129, 153 (addressing the right of the pregnant woman "to choose to terminate her pregnancy" and the "right of privacy").


50. Id. at 193-94.

51. 478 U.S. at 192-93.
drafters' "original understanding" of particular relevant constitutional provisions. As such, it was insignificant that, even by Justice White's own account, over half the states since 1961 had overcome the weight of legislative inertia and repealed their sodomy laws, and that the states which had such laws on the books did not enforce them.\textsuperscript{52} No attention was given to what role those laws played in past societies; to what benefits they served then and serve now; to what harms they cause, including the growing violence against gays and lesbians associated with, and implicitly encouraged by, the state endorsement of intolerance toward them;\textsuperscript{53} nor to the actual sexual practices of the people those laws affected, or their currently held expectations about privacy and sexual expression.

Justice White's approach to tradition was refined and expanded by Justice Scalia in \textit{Michael H. v. Gerald D.}.\textsuperscript{54} In \textit{Michael H.}, a biological father, who had lived on and off with his child and her mother, challenged a California statute that conclusively presumed that the husband of a child's mother is the child's father. His challenge was based on earlier Court decisions that protected the rights of fathers who had established functional parent-child relationships with their biological offspring.\textsuperscript{55} Rejecting the application of these earlier precedents, Justice Scalia acknowledged that unmarried fathers may have rights, but only in the context of the "unitary" or marital family. The "adulterous natural father"\textsuperscript{56} is outside the traditionally protected zone, Scalia insisted, and thus has no claim for a chance to demonstrate that continued involvement in his child's life is in her best interests.

The rigidity of Justice Scalia's conception is demonstrated in a number of different ways. First, Justice Scalia reinforced Justice White's supposition that the only appropriate use of tradition is one that limits the "individual predilections" of judges.\textsuperscript{57} Only if the past is viewed as

\textsuperscript{52} Indeed, the state dropped its prosecution in \textit{Hardwick}. \textit{Id.} at 188; see supra note 47.

\textsuperscript{53} This violence and its connection to state criminal statutes are powerfully presented in Kendall Thomas, \textit{Beyond the Privacy Principle}, 92 COLUM. L. REV. 1431 (1992).

\textsuperscript{54} 491 U.S. 110 (1988). Justice Scalia's approach to tradition was joined only by Chief Justice Rehnquist. Justices O'Connor and Kennedy, who otherwise concurred in Justice Scalia's plurality opinion, explicitly rejected his "historical analysis." \textit{Id.} at 132 (O'Connor, J., dissenting).


\textsuperscript{56} 491 U.S. at 120.

\textsuperscript{57} See \textit{Michael H.}, 491 U.S. at 122 n.2 (purpose of Due Process Clause is not "to enable this Court to invent new values"); \textit{see also Hardwick}, 478 U.S. at 191 ("Announcing rights . . . involves much more than the imposition of the Justices' own
fixed, readily ascertainable, and unchanging can it be claimed to serve this function. 58

Second, in *Michael H.*, the Court assumed that *any* remnant of a past practice is sufficient to sustain a state law based on that practice. Just as in *Hardwick*, the Court in *Michael H.* relied on a diminishing body of state law that was rarely, if ever, enforced. For support, Justice Scalia leaned on a desiccated common law presumption and a single 1957 ALR annotation finding no statutes that recognized putative fathers in Michael H.'s position. Only a conception of tradition as fixed at some time, for all time, can support an approach that allows its continued recognition on such slim authority.

The rigidity of Justice Scalia's view of tradition was manifested also by his approach to potentially competing traditions. Unlike Justice White, Justice Scalia acknowledged the possibility of conflicting traditions. His view of tradition as fixed and stable, however, enabled easy resolution of such conflicts; priority must be given to the most specific applicable tradition—in *Michael H.*, the specific tradition of the nuclear family rather than the more general tradition supporting the rights of biological parents. Like Justice White in *Hardwick*, Justice Scalia deemed it unnecessary to justify the traditions relied upon in contemporary terms. Once identified, the relevant traditions took on independent significance—spoke for themselves, in effect. Tradition could be lifted from a specific time to show the intentions of a specific set of individuals and then frozen as a non-negotiable given for all time, without need for justification or explanation. 59 When this was done, other information, subsequent state

58. In fact, as others have noted, Justice Scalia has himself seemed to use tradition in a result-oriented fashion. *See infra* note 70.

59. Justice Scalia in other contexts has been even more explicit about the independent and self-validating significance of past practices. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (Scalia, J., dissenting), for example, he reasoned that political patronage practices were legitimated by their longstanding use:

> [W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized. . . . To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out.

*Id.* at 95-96; *see also* *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (where a rule has traditionally been applied by states, there need be "no independent inquiry into the desirability or fairness of the [rule] leaving that judgment to the legislatures that are free to amend it; for our purposes its validation is its pedigree").
law developments, the Court's own precedent on the rights of unmarried fathers, and actual societal norms and expectations became irrelevant.

There is much to criticize in Justice Scalia's concept of tradition, as many others have pointed out. To treat tradition as a coherent whole, subject to ready ascertainment, retrieval, and replication, and as distinguishable from what is modern is to engage in fictions that ignore some of tradition's most significant features. Traditions are not unitary, coherent, or integrated wholes. They are, as Jack Balkin has written,

a motley collection of principles and counterprinciples, standing for one thing when viewed narrowly and standing for another when viewed more generally. Tradition never speaks with one voice, although, to be sure, persons of particular predilections may hear only one. At any one time in our society, traditions of close-knit family units have coexisted with traditions of family disintegration, violence, and abuse. Traditions of equality have long shared ground with traditions of slavery and oppression. Traditions of conformity and community have cross-cut traditions of resistance and freedom of expression. To say that only

---

60. Justice Scalia pays lip service to the fact that over time "bastardy laws" have become "less harsh" and "the rigid protection of the marital family has in other respects been relaxed." 491 U.S. at 125. These mitigations were treated as irrelevant, however, in the face of the continued existence in some jurisdictions of the type of statute at issue in the case.


62. Frank Michelman presents as one of the central distinctions between Justice Brennan's and Justice Scalia's use of tradition in constitutional decisionmaking that Justice Brennan defines tradition in terms of practices approved by societal norms, whereas Justice Scalia tends to see the practices themselves as sufficient. See Frank I. Michelman, Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought, 77 VA. L. REV. 1261, 1314 (1991); see also Peggy Cooper Davis, Contexted Images of Family Values: The Role of the State, 107 HARV. L. REV. 1348, 1351-53 (1994) (arguing that the tradition upon which the Court should rely in constitutional decisionmaking encompasses the history and principles that produced it).


64. For a recent work addressing the mythology and idealization of the American nuclear family, see Stephanie Coontz, The Way We Never Were: American Families and the Nostalgia Trap (1992).

deeply rooted traditions should be protected presupposes a self-evidence about the content of this society's traditions that defies these diversities, as well as the range of criteria for deciding among them, such as a tradition's age, its degree of continuity, the strength of commitments to it, or how widely it is held. Justice Scalia's effort to solve the problem by looking to the most specific tradition fails, absent criteria for measuring specificity.\(^66\)

Justice Scalia's view of tradition also presupposes an opposition between tradition and change that historians and sociologists have long rejected in describing how traditions are maintained and how change is accomplished. The better view is that tradition and change are frequently "mutually reinforcing, rather than systems in conflict" and that change often strengthens, rather than weakens, tradition.\(^67\) Viewing one as contradictory to the other misdiagnoses both.\(^68\)

Justice Scalia's concept of tradition makes little sense even in terms of traditional conservative principles. Edmund Burke tied the possibility of "conservation" to the ability to change and adapt to existing circumstances, crediting England's ability to maintain its core fabric during the Restoration and Revolution periods, for example, to its ability to regenerate the deficient part of its "constitution" while preserving those parts that were not impaired.\(^69\) Scalia's aims, however, appear related not so much to stability as to the advancement of a particular substantive agenda.\(^70\) For purposes of this agenda, the tradition/change dichotomy


\(^70\) Nor are they tied to the protection of legislative prerogative from unrestrained judicial activism. Evidence that Justice Scalia is at least as "result-oriented" in his use
may be successful, at least to the extent it is able to rationalize a particular set of norms and practices that have been successfully linked with tradition. It is not so clear, as I shall explain, that the dichotomy is as useful to those with a more progressive, feminist agenda.

D. Feminist Theory and the Tradition/Change Dichotomy

Feminists have reacted sharply against the Court’s new traditionalism, as well as against the right’s “family values” agenda more generally. In doing so, however, they have tended to accept the same dichotomous way of viewing tradition and change as the supporters of the agenda they reject. I demonstrate this acceptance, first through an analysis of Robin West’s specific critique of Justice Scalia’s approach in Michael H. I then examine how the dichotomy functions in aspects of feminist thought more generally, showing through the work of Catharine MacKinnon the difficulties the dichotomy causes for feminist theory and practice.

I. ROBIN WEST

The substance of Robin West’s critique of Justice White’s approach in Michael H. is that in requiring a claim of individual rights and liberties to be rooted in tradition, it prevents the reconceptualization of the ideal of liberty essential to progress. Constraining understandings of liberty by their historical associations cramps these understandings and hence human potential for freedom. The alternative, to West, seems clear. Efforts to define liberty should be set free from tradition and undertaken “by reference to some understanding of the ideally free or autonomous individual life.”

of tradition as those whom he accuses of judicial activism is that when the legislation at issue infringes on interests that he deems fundamental, such as the right to the unrestrained private use of one’s own property, he has sought to invoke tradition to invalidate the legislation. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). For examples of inconsistencies in Justice Scalia’s application of tradition analysis which further demonstrate his willingness to manipulate the doctrine to his own ideological purposes, see L. Benjamin Young, Jr., Justice Scalia’s History and Tradition: The Chief Nightmare in Professor Tribe’s Anxiety Closet, 78 VA. L. REV. 581 (1992).

71. See, e.g., Katha Pollitt, Why I Hate Family Values, NATION, July 20, 1992, at 88; Anna Quindlen, Public & Private; Digging a Divide, N.Y. TIMES, June 14, 1992, at 19.


73. Id. at 1374.

74. Id. at 1377.
While West urges a total rejection of tradition rather than its embrace, her reconceptualization casts tradition in the same dichotomous relationship to change as does Justice Scalia's formulation of tradition. For West, as for Scalia, tradition conserves the past and change undermines tradition. The only difference is the normative judgment that follows. For Justice Scalia, tradition is desirable because it means stability; change, represented by the creation of unenumerated constitutional liberties and rights, is undesirable because it lacks legitimacy. For West, conversely, tradition is corrupt, oppressive and conformist; change is liberating. Thus, while Scalia wants to anchor liberty to tradition, West seeks to cut free from tradition altogether, so that the "ideally free or autonomous individual[ist] life" can be imagined without encumbrance.

West's rejection of tradition and the past is so complete that she rejects as well Justice Brennan's synthesis of tradition and change expressed in dissent to Michael H., which continues the dynamic evolution of substantive due process through the line of cases from Meyer to Moore.75 According to Brennan, the Court's precedents protecting the rights of unmarried biological fathers should have been extended in favor of Michael H.76 West argues that Brennan's method of analysis, like Justice Scalia's, is backward-looking—Scalia looks back at tradition, Brennan back at precedent—and as such is inconsistent with progress. Backward-looking approaches, West argues, can only force the individual to protect the oppressions and injustices of the past and prevent contemporaneous or future change.77 Real change, by contrast, requires cutting ties with the past and developing new ideals based on forward-looking considerations.

If Scalia's error is to assume that tradition can supply answers which are not there, West's error is to assume that the past supplies nothing that might assist in building a progressive future. Her out-of-thin-air approach assumes the possibility of absolute truth uncorrupted by history and of liberation from an oppressive, conformist past.78 Such assumptions are

75. See supra text accompanying notes 16-42.
76. See supra note 61.
77. West, supra note 72, at 1378.
78. For other examples of this view, see Helen Garfield, Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner, 61 WASH. L. REV. 293, 336 (1986) (advocating the pursuit of aspirations and principles rather than the prejudices of tradition); see also Anita L. Allen, Autonomy's Magic Wand: Abortion and Constitutional Interpretation, 72 B.U. L. REV. 683, 696 (1992) (praising Court in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), for "refusing to limit constitutional interpretation to text and tradition"); John C. Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. CHI. L. REV. 502, 528 (1964) (arguing on behalf of freedom "from the strictures of the past," although recognizing that knowledge of
as illusory as Scalia’s assumption that the past can be retrieved for the present in its original form. To consider change is to draw upon “storehouses of possible relevant analogies to our present problems, ways of thinking about such problems, and successful and unsuccessful attempts to solve them.” Every resolution can be seen as an alternative arising from, and in relation to, that past, which is why revolutionary ideals often sound so familiar. Thus, Jaroslav Pelikan writes, Thomas Jefferson’s “self-evident truths” about creation, equality, and inalienable rights “were so self-evident at least partly as a consequence of the traditional doctrine of the creation of the human race in the image of God, a doctrine whose roots lie in both Athens and Jerusalem.” While in an important sense tradition can be viewed as constructed or invented by those who interpret and make it their own in the present, every culture has a history that shapes perceptions and analyses, and from which such inventions are drawn. Ignoring this history may be perilous.

2. CATHERINE MACKINNON

I began with West’s analysis of tradition because it directly engages Justice Scalia’s own version of traditionalism. The dichotomous view of tradition and change that West adopts, however, is pervasive, if less explicit, in the work of other feminist writers. The most notable of these writers is Catharine MacKinnon. I have discussed elsewhere my historical continuity is essential in judicial decisionmaking).

79. Martin Krygier, Law as Tradition, 5 LAW & PHIL. 237, 257 (1968). Krygier also writes: “[A]ny particular ‘present’ is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs, and views of the world.” Id. at 242.

Steven Winter, in discussing the constituted and constituting “situated-subject,” uses a similar concept of sedimentation: “The past is . . . the sedimented knowledge with which one interacts with the problems of the present. It is this sedimentation that is preservative of the past. At the same time, this sedimentation is always an interaction with a [sic] incessantly dynamic present.” Steven Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441, 1511 (1990).


82. See Michael Walzer, Exodus and Revolution 134-35 (1985). According to Walzer, these cultural patterns accommodate a broad range of alternatives; if they did not, they would not endure long. Still, different cultures “read [different] books, tell different stories, confront different choices” which provide the organizations of thought and action available to that culture. Id.; see also Michael Schudson, The Present in the Past Versus the Past in the Present, 11 COMMUNICATION 105 (1989) (arguing that although the past is constantly being retold, every culture presents structures which limit the available past from which this retelling can occur).
assessment of MacKinnon's extraordinary contributions to feminist theory, as well as the tensions and contradictions present in this theory.\textsuperscript{83} Here I wish to focus on her theory of feminist change.

MacKinnon's theory of change begins with a system of male oppression of women that she deems "metaphysically nearly perfect."\textsuperscript{84} Because it is a perfect system, anything short of its complete collapse tends only to reinforce it. According to MacKinnon, the very principles that appear to enhance freedom and autonomy most for all individuals are also the ones that are most effective in securing male dominance. Principles of free speech, for example, appear to give everyone the same opportunity to express their own interests and points of view; thus, the protection of free speech appears to be an important tool in furthering underrepresented points of view. However, insofar as men have the power to make their speech more effective than women and have used this power to define women as sexual, otherwise worthless objects for men's pleasure, protection of free speech rights does more to harm than to help women.\textsuperscript{85} Equality doctrine likewise pretends to guarantee that women and men receive equal treatment under the law, but only as to those rules, practices, and accommodations already in place to serve men. Equality neither requires nor permits measures to take account of women's differences from men; to the contrary, it compels the invalidation of rules and practices designed with women in mind. Thus, as with free speech protections, the concept of equality creates the appearance of objectivity and neutrality, but in so doing only obscures, and thus helps to guarantee, that what passes for objectivity and neutrality represents male interests and male norms.\textsuperscript{86}

MacKinnon's one method of escape from the male dominance trap is the feminist method of consciousness-raising, through which women gain insight, and thus power over their own lives, by filtering their personal experiences through the lens of women's collective oppression.\textsuperscript{87} But within MacKinnon's method of consciousness-raising, the oppositional simplicity apparent in her analysis of male dominance reasserts itself. Insight, within this method, is an all-or-nothing proposition—either you get it or you don't. Moreover, insight consists


\textsuperscript{85} See MACKINNON, supra note 4, at 146-62.

\textsuperscript{86} \textit{Id.} at 32-45, 71-74.

\textsuperscript{87} See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83-105 (1989).
of an all-or-nothing break from the past—either you're part of the system of male oppression or you share her insights and opposition to that system. Progress either happens or it doesn't.88

MacKinnon's all-or-nothing approach to progress has helped to highlight the insidious dynamic by which gender oppression is reinforced, but it has also had other, less beneficial effects. It has led to the devaluation of successes made in eliminating sex-based discrimination and to the equation of remaining, still-being-discovered forms of discrimination with those that came before. In so doing, her approach has played into the hands of those engaged in the current backlash against feminism and its accompanying mischaracterizations about what feminists, and feminism, are about. As to those individuals already on the lookout for rationalizations for despising women, the loss is insignificant; no approach is likely to be successful in significantly revising their gender role attitudes. As to others, however, the approach sets a standard more likely to entrench existing attitudes than to change them. The rejection of familiar bedrock principles such as free speech and equality confirms suspicions, all too easily acquired, that feminism is a form of gender imperialism. On a more personal level, individuals who experience as progress their own growth in awareness about gender-based discrimination are offended when instead of being applauded for their changed behaviors and attitudes, they are criticized for other, more subtle behaviors which are equated with the more explicit forms of sex discrimination these individuals thought they had left behind. The process degenerates as gender sophisticates attain heightened awareness of residual, unconscious as well as conscious forms of discrimination and correspondingly raise their expectations.89 The distance between those "in the know" and those who simply "don't get it" increases. The number of people

88. Mary Becker reflects this same all-or-nothing approach to change and progress in her sweeping indictment of the Bill of Rights of the U.S. Constitution. Finding countless examples of the injustices to women that have been perpetuated under, or notwithstanding, this document, Becker goes so far as to wonder "whether other governmental structures and electoral systems would be more democratic." See Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L. Rev. 453, 517 (1992).

89. This same dynamic is apparent in debates over the resilience of racism. See, e.g., Derrick Bell, Faces from the Bottom of the Well (1992); Jerome M. Culp, Jr., Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse, 26 Conn. L. Rev. 209, 220-30 (1993) (analyzing difficulty of getting through to racism of white liberals who hide behind the curtains of their well meaning "goodwill"); Richard Delgado, Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?, 23 Harv. C.R.-C.L. L. Rev. 407, 407 (1988) (arguing that "white people rarely see acts of . . . racism, while minority people see them all the time").
potentially guilty of the more subtle forms of discrimination increases, while those able to spot new forms of discrimination become an increasingly narrow elite vanguard. To those who “get it,” the enemy grows. Those forced off the bus90 become alienated and even hostile.

This unfortunate phenomenon might be called the “no-progress” problem. The no-progress problem results when shifts and reforms are minimized and recast to fit an unchanging narrative of systemic gender oppression. This phenomenon is related to its mirror-image counterpart, identified by Deborah Rhode as the “no-problem” problem.91 The no-problem problem occurs when it is assumed, falsely, that because the most obvious forms of discrimination have been eliminated, gender discrimination no longer exists. These problems are corollaries in that both treat the end of gender discrimination as an all-or-nothing phenomenon rather than a form of oppression which has, literally, no final end. Both are exaggerations, although one view exaggerates the extent of progress, while the other view exaggerates the lack of it.

By identifying the no-progress problem, I do not mean to suggest that feminists are to blame for being misunderstood—only that their interests in correcting the misunderstandings may require new concepts and strategies. Likewise, I do not mean to say that critical analyses of gender bias and the ongoing discovery of newer and more subtle forms of discrimination should stop. Pointing out, for example, the implicit, as well as explicit, coercion present in many sexual relationships, the relationship between dress and appearance expectations and sexual subordination and harassment, and the ways in which gender matters in evaluating employees with respect to their personal styles, their looks, and their sexual preferences are important steps in the feminist project, which is a long way from being completed. Pressing the gender critique into deeper and deeper territory, however, is not aided by exaggerated assessments about the failures to attain incremental feminist goals, however limited progress toward these goals may seem to be. Such assessments are less a product of noticing what needs to be changed than of an oversimplified view of change or progress.

The notion that progress occurs only as a result of those with insight taking power from those without insight is dangerously incomplete. This notion causes feminists to focus primarily on generating new insights and acquiring new power when, as Vivian Gornick recognizes in the opening passage of this essay, the biggest problem for contemporary feminisms is

90. See Tom Wolfe, The Electric Kool-Aid Acid Test 74 (1968) ("You're either on the bus or off the bus.").
the inability to bridge the gap between insight and practice. For Gornick, the dearth of progress in feminism is due not to lack of insight, but to the large gap between insight and extrication. The “radical” feminist view of change assumes that feminists have the necessary blueprint for a better future; all that is lacking is the muscle to enact it. What Gornick suggests is that insight is the easy part. The hard part is integrating that insight into real, lived lives, a messy and often ugly process.

The integration aspect of gender reform requires a different stance toward the past than the oversimplified, oppositional view that feminist theorists have often assumed. In Part II, I sketch out the alternatives to the dichotomous model of tradition and change and recommend a model that sees the two as embodiments of each other rather than as opposites. In Part III, I identify some feminist work that begins to imply a notion of progress compatible with this view, and suggest how closer attention to issues of tradition and change might help to make this work more useful to feminists.

II. PROGRESS, TRADITION, AND CHANGE

A. Three Views of Progress

Historians disagree about the origin of the idea of progress, but acknowledge different conceptual models for understanding the relationships between progress and history. One view, generally attributed to the ancients, though by no means either exclusive to or universally held by them, is that history is circular and repetitious. Within this view progress is impossible and man is doomed to a “perpetual recurrence of the same joys, sorrows and trials.”


93. See VERNON J. BOURKE, WISDOM FROM SAINT AUGUSTINE 194 (1983). Bourke contends that St. Augustine “broke this wheel of fate” with his ideal of the City of God, in which equilibrium and harmony, made possible by Christ’s death and resurrection, were achievable. See id. at 194–95. However, until this ideal, in itself a matter of grace rather than achievement, was attained, original sin doomed man’s efforts to rise above his condition, making progress in the Western sense futile and meaningless. Cyclical views of history did not perish with the ancients. See, e.g., FREDERICK NIEZSCHCE, THE GAY SCIENCE (1974); OSWALD SPENGLER, THE DECLINE OF THE WEST (1928). For a study of cyclic theories of history, see MICHELA ELIADE, THE MYTH OF
appears to be change is, in fact, the playing out of limited available scripts. All eventually return to where they started, only to begin anew.

A competing view is "the idea of progress," which is associated with the Enlightenment assumptions that progress is inevitable, knowledge is infinitely expandable, and civilization is on a steady, upward climb. Within this view, the expansion of knowledge leads inexorably to the more or less continuous movement from the inferior to the superior.

If the cyclical view of history is a closed circle, the idea-of-progress view is a linear arrow reaching out into the indefinite future. Within this ever-onward-and-upward framework, different explanations for progress are possible; some theories stress biological or sociobiological evolution, while others identify rational forces explained by factors that are largely economic, political, or scientific. In each sense, the idea of progress incorporates an evolutionary, forward pressure in the direction of expanded knowledge and improved civilization.

A third view of progress tracks modernist challenges to objectivity, perfectibility, and grand narrative. This view rejects both the cyclical and the linear views of progress, insisting that no unified external measure exists by which it might be said whether change is, or is not, progress. Instead, diverse forces establish normative systems, exert pressure and influence on one another, and maintain their own various courses. The result is a historical organization relying on multiple narratives, local and regional histories, plural perspectives, thick descriptions, and irreducible particularities. Within this methodological framework, sometimes referred to as the "new historicism," progress is not a generalizable phenomenon, but rather a possibility whose accomplishment is judged locally, within communities sharing similar assumptions, stories, and aspirations.

---

94. See Nisbet, supra note 92, at 5.
B. Cycles and Stairs

These views of progress each imply a different role for tradition. Within the ancient, cyclical model, tradition is that to which one inevitably returns—for better or worse. No moment gains in any lasting sense from what has come before nor leads to anything not yet discovered. Within the Enlightenment model of linear and inevitable improvement, tradition is that which one grows out of and discards, as civilization continually betters itself. The modernist view finds tradition neither circular nor linear, but complex and chaotic. There is no single narrative about which generalizations can be made and no transcendent criteria to form the basis of such generalizations. Traditions are plural, multi-layered and internally inconsistent. The part they play in progress depends entirely on particular aspects of the narrative, not the least of which are who is telling the story and why it is being told.

On this oversimplified grid, Justice Scalia’s new traditionalism may be seen as a contemporary version of the cyclical view of history. A return to the past is not inevitable, as it appeared to be in the dominant ancient view, but it is, in important respects, possible. A return to the past is also, for Justice Scalia, desirable. At least as to that past he

debate among historians on objectivity and the nature of the relationship between the historian and her subject was rehearsed decades earlier. Compare Theodore C. Smith, The Writing of American History in America, from 1884 to 1934, 40 AM. HIST. REV. 445 (1935) (expressing allegiance to the ideal of the effort to achieve objective truth) with Charles A. Beard, That Noble Dream, 41 AM. HIST. REV. 74 (1935) (scientific objectivity among historians an illusion); see also Joan C. Williams, Culture and Certainty: Legal History and the Reconstructive Project, 76 VA. L. REV. 713, 715 (1990) (drawing on the new historicism to explore how legal history might be useful in “rethinking justification in a world without absolutes”).


Within legal theory, David Luban has described two directions in which modernism has led, only one of which preserves a positive role for tradition. One strand, which he labels avant-gardism, negates premodernist tradition and wishes to bury the past and “end history.” See David Luban, Legal Modernism, 84 MICH. L. REV. 1656, 1676, 1684 (1990). This strand is represented by certain scholars in the Critical Legal Studies movement, including Duncan Kennedy and Peter Gabel, and in Roberto Unger’s words, is at “perpetual war against the fact of contextuality.” Id. at 1676 (citing ROBERTO M. UNGER, PASSION: AN ESSAY ON PERSONALITY 36 (1984)). The other, neo-Kantian strand questions specific constraints according to specific criteria which are conceded to be contextual and contingent, and seeks “transformation followed by reconstitution,” as opposed to “permanent revolution.” Id. at 1694. It is this latter view which is most compatible with the modernist view I describe above.
chooses to acknowledge, the past has a kind of divine authority, to which the Court (and by extension, the states and the people) must be faithful in its “original” sense, rather than as it has been interpreted and revised over time. 102 As such, Scalia’s view of tradition is, as West implies, a jurisprudence of dominance and submission, in which decisionmakers of the present are required to respect a prior authority and denied active collaboration in reshaping it. 103

Ironically enough, West’s and MacKinnon’s respective critiques of tradition-based politics also adhere to a cyclical model of progress. Within their quite different theories, efforts to improve women’s oppressed position in society are doomed. The system responds to injustice with principles that would appear to address it. Since those principles emanate from the very system that produces the injustice, however, they are not capable of eliminating the injustice and, in this failure, simply legitimize it. Indeed, women themselves are fooled into thinking that their oppression is imaginary, since if it were real, the law would forbid it. There seems no way out of the cycle, except by a kind of grace not entirely unfamiliar to St. Augustine. 104 Even then, those who see the light find their insights appropriated and recycled by those who claim to get it, but don’t.

If the dichotomous view of tradition and change leads to a cyclical view of progress, the approach to tradition represented in the line of cases from Meyer to Moore and in the dissenting opinions of Justices Harlan in Poe v. Ullman, Blackmun in Hardwick, and Brennan in Michael H. is roughly consistent with the Enlightenment idea of progress. These decisions consult the past not so the present can be returned to a purer state of being but so that the future can move forward on a stable foundation. 105 Thus, Justice Harlan writes that every effort to define fundamental rights and liberties must “take ‘its place in relation to what went before and further [cut] a channel for what is to come.’” 106 Change is inevitable and the only question is what direction that change takes. Tradition is also inevitable; “a decision . . . which radically

103. Id. at 1693.
104. See supra note 93.
105. Rebecca L. Brown develops a concept of tradition as insight, which captures this consultative dimension. See Rebecca L. Brown, Tradition as Insight, 103 YALE L.J. 177 (1993).
departs from it could not long survive.”107 Due process must be construed in light of the Constitution’s “deliberately capacious language,” as a “living charter,” and in accordance with its broad principles.108 Accordingly, tradition must not be followed doggedly in its specific detail, but rather must be understood in context, in light of its changing rationales and place in people’s lives.109

Within the Harlan/Brennan evolutionary approach to due process, many factors ruled out of bounds by the White/Scalia fixed view become important. For Harlan in Poe v. Ullman, it is significant that Connecticut “has not chosen to press the enforcement of [its prohibition against use of birth control] against individual users, while it nevertheless persists in asserting its right to do so at any time.”110 For Brennan in Michael H., it is relevant that the tradition of laws denying putative fathers standing to assert paternity is crumbling111 and that the rationale supporting traditional burdens of illegitimacy is no longer valid.112 In both cases, the rules in question, while perhaps once on a firm foundation in social mores and expectations, no longer sit on stable ground. In this circumstance, the Court must step back and look at a particular state “intrusion” from the perspective of the broader, more basic interests at stake, such as marital intimacy (Poe v. Ullman and Griswold), and the sanctity of the parent-child relationship (Michael H.). These broader principles are to be interpreted not in their original context (if such were even possible), but in light of the Court’s more recent, evolving precedents which make it unnecessary to rethink continually the meaning of society’s historical practice, and in light of the current social realities that form the context to such a challenge. Accordingly, Justice Harlan finds his way along the “rational continuum” of these precedents to a liberty interest in marital intimacy,113 and Justice Brennan demonstrates that the right claimed in Michael H. is “close enough to the interests we already have protected to be deemed an aspect of ‘liberty.’”114 In both cases, precedent and tradition work in tandem, tracking and pulling each other along the steady incline.

107. Id. at 542.
111. Michael H., 491 U.S. at 138.
112. Id. at 140.
114. Michael H., 491 U.S. at 142.
C. The Embodiment View of Tradition and Change

A third view of tradition and change, which I will call the embodiment view, follows from the more complicated view of progress associated with post-modernist historical analyses and social critique. This view begins with the interactive account of tradition and change inherent in the idea-of-progress, common law model, but it adds a more complex understanding of the contestability, multiplicity, and social constructedness of the norms by which any claim of progress would have to be evaluated. Within this view, the past, like the present, is always in flux and part of the process of negotiation about who we are, what matters, and what constitutes improvement. It is always “before us,” not behind us,115 and is something “one can never predict.”116

The embodiment view of tradition and change recognizes that to constitute a tradition, a past belief or practice must be transmitted by some individuals, in one time and place, and received by others. Without transmission and reception, a tradition dies. Its transmitted quality means that a tradition is not a static thing in time, but rather something that necessarily changes as the particular individuals who receive the tradition interpret it, integrate it into their own experiences, and make it their own. As it is interpreted, tradition necessarily changes; in fact, tradition is altered by the very act of trying to understand it. Laying claim to a tradition requires work and imagination,117 which again means change. Thus, far from anchoring law to a changeless past, tradition ensures that change is inevitable—all the more so if the tradition is well-worn.

The embodiment view of change and tradition treats the multiplicity of traditions not simply as inconvenient inconsistencies or problems to be solved through a fixed formula, but rather as the creative source of possibilities for the future. Tradition is not a single integrated thread, but a patchwork of multiple themes and commitments, often united only by agreement about what the terms of debate over these themes and commitments will be.118 The question is not whether we choose or reject tradition, but which traditions among this patchwork we will come

115. See SHEILA ROWBOOTHAM, THE PAST IS BEFORE US: FEMINISM IN ACTION SINCE THE 1960s, at xi (1989). Similarly, according to Rowbotham, “the future is behind us.” Id. at 294, 301.

116. I owe this treasure to Kazimierz Grzybowski.

117. T.S. Eliot puts the point as follows: “Tradition . . . cannot be inherited, and if you want it you must obtain it by great labour.” T.S. ELIOT, Tradition and the Individual Talent, in SELECTED ESSAYS 3, 4 (1950). This essay was referred to me by Professor William D. Andrews.

to identify as our "own." Within this shifting and conflicting process, a tradition that stops making sense under existing circumstances will not last. For this reason, it can fairly be said that the strength of a tradition is not how closely it adheres to its original form but how well it is able to develop and remain relevant under changing circumstances.

A critical aspect of the embodiment view of tradition is its recognition of the importance of the relationship between tradition and identity. Tradition might well be defined in terms of the social identities it produces; individuals draw from it what has meaning for them, which in turn is drawn from what others have found meaningful. The relationship is not simply a matter of choice, but of necessity. At the individual level, healthy identity formation requires the absorption of new challenges into the existing identity structure. Without a successful synthesis of new self-understandings with the old, the fragile identity is at risk of disintegration, self-doubt, and an inability to cope with still further challenges. So also at the level of larger social units, tradition functions as an identity structure—one that can not be shoved aside by the new any more than it can be held fixed. Ironically, forward progress—indeed, cultural identity itself—depends on recognizing

119. Insofar as this view suggests that there are many equally sound views about which traditions are good ones, defenders of the Enlightenment view of progress are likely to complain about moral relativism. Some have accompanied such charges with dire predictions about the fall of civilization, ironically foretelling the end of progress, even as they insist that faith in its inevitability is essential. See, e.g., NISBET, supra note 92, at 317-57. Nisbet’s view of progress depends upon certain “objective” entailments of progress, which he finds in decline in the late twentieth century West, including the desire for economic growth, the existence of political elites, and belief in God. Id. To most scholars attracted to a postmodern world view, the point is not that there are no truths, but that the criteria by which we might evaluate them (including Nisbet’s) are local rather than universal. See Katharine T. Bartlett, Minow’s Social-Relations Approach to Difference: Unanswering the Unmasked, 17 LAW & SOC. INQUIRY 437, 463 & n.51 (1992).

120. Jaroslav Pelikan writes on this subject: “It is . . . a mark of an authentic and living tradition that it points us beyond itself.” PELIKAN, supra note 80, at 54. According to Pelikan, when tradition is conserved for its own sake rather than for ends beyond itself, it becomes a false tradition, or idol. Id. at 54-55.


123. The importance of matters of individual and group identity has also been noted in the context of changes in attitudes about race. Gary Peller, for example, has analyzed how choices between two alternative traditions in race discourse—integrationism and nationalism—have been affected by various anxieties about group and self-identity, especially among black moderates and among white liberals and progressives. See Gary Peller, Race Consciousness, 1990 DUKE L.J. 758.
and integrating, rather than ignoring, the past; only the "flies of a summer" can afford otherwise. 124

My purpose in elaborating an alternative view of tradition is not to provide a more determinate method of constitutional decisionmaking relating to matters of family, procreation, and sexuality. 125 My aim, rather, is to improve how feminists understand tradition and change, in order to help develop better strategies for transforming how the culture views gender. With respect to this larger goal, it hardly matters that some feminists are capable of generating visions of progress that break free from the past if, in failing to take account of tradition, they are unable to root these visions in the larger society's imagination.

III. FEMINIST PROGRESS AND TRADITION

R.G. Collingwood states that progress "is not the replacement of the bad by the good, but of the good by the better." 126 This statement reflects a recognition that not all change is for the better, and that progress, when it occurs, is an organic and fluid process rather than a static, either/or choice. The cyclical view of reform and oppression implicated in West's and MacKinnon's analyses of legal change rejects the possibilities of existing good on which the better might build, instead relying on flashes of insight to break free from past and present. The idea-of-progress view recognizes that the process of change is dynamic, but fails to address the possibility that not all change is positive.

A more realistic and useful view of change locates its potential not solely or even primarily in flashes of insight or in some inevitable historical or scientific force, but rather in the tensions and contradictions of a society's values and practices 127—past, present, and future. When

---

124. The image is, of course, Edmund Burke's. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 193 (C. O'Brien rev. ed. 1969) (1790). For a contemporary analysis of this image that distinguishes a state of "circularity and repetition, the endless return of the same," represented by the flies of the summer, from the world of culture in which a liberating progress is possible, see Kronman, supra note 9, at 1048-55, 1064-68.

125. Michael J. Perry concludes that no concept of tradition can provide a basis for determinate decisionmaking. See MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 93-96 (1982). Surely Justice Scalia's concept of tradition restrains judges no better than do the alternatives. See supra note 70. It is not clear, of course, that the goal of restraining judges is a worthy objective of constitutional theory. See H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 252 (1993). In any event, it is not the goal of this Article.


127. Values may conflict with each other or with practices, and vice versa.
these tensions and contradictions are perceived, efforts are made to reconcile them. These efforts at reconciliation produce pressures of their own, stimulating new, possibly more satisfactory, values and practices.

Tradition plays a significant role in this process. Its significance arises, first, because the kinds of contradictions deep or important enough to create serious tensions are those that emerge from settled understandings and expectations. These settled understandings and expectations do not develop overnight; they represent layers of accretions and reconciliations of previous tensions and contradictions. Second, to participate in changes to these understandings and expectations is to engage in the same process—the same tradition, if you will—that produced them. This participation consists of identifying contradictions and offering relief from them, relief sufficiently connected to what has come before—tradition—as to appear to be plausible and acceptable. Third, the process is, at its core, social rather than individual; it occurs through the interactions of individuals, creating new meanings with others from some shared, if often contested, past, even as what is understood as shared is continually renegotiated.

An understanding of the interactive, organic processes of change and progress based on efforts to reconcile existing contradictions and tensions is hardly new. It is present in theories of social change as diverse as those of John Stuart Mill, Roberto Unger, Alasdair MacIntyre, William Connolly, and Martha Minow. Mill’s case for women’s liberation in 1869 was structured around the inconsistency between the liberal value of equality and the fact of women’s legal subordination. Unger’s plea for creative destabilizations requires exploitation of the conflicts between a society’s ideal principles and its actual practices. MacIntyre’s commitment to tradition conceives it as an ongoing reinterpretation and reworking of the incoherences and inconsistencies of a society’s basic principles. Connolly’s program for negotiations of identity in a heterogeneous society relies on the identification of gaps between prevailing perceptions and individual and group experiences. Identifying these gaps creates openings through which an understanding of other

129. See Roberto Unger, LAW IN MODERN SOCIETY 153-54 (1976) ("The deepest root of historical change is manifest or latent conflict between the view of the ideal and the experience of actuality.").
perspectives might be achieved. And Minow's resolution of the problem of human agency in a socially constructed world turns on a process of describing the "nonfit" between experience and the categories a society provides to interpret that experience.

Feminists are good at pointing out the contradictions between society's stated norms and its practices and how existing patterns of gender subordination are sustained by the very forces that purport to oppose it. This is feminist social critique or insight. As to the reconciliations needed to reduce or resolve the contradictions and to upset existing patterns of subordination, however, the feminist project flounders. This floundering is aggravated by the feminist commitment to an anti-tradition, either/or view of progress. Such a commitment discourages reconciliations and obscures passages from past to present. It ignores the reality that new insights cannot be simply substituted for deeply rooted attitudes and understandings to the contrary. Past and present must be reconciled and new challenges integrated within structures of identity, the stability of which is dependent upon the ability to adapt and change.

Individuals attain new understandings of themselves and others by struggling to resolve the incoherence between their deeply ingrained habits and norms and their experiences and insights. These struggles may be resolved either by adjusting one's practices or by adapting one's norms—or, most likely, by altering both. Feminists can help by tapping into this struggle against incoherence, offering ways of thinking that integrate rather than totally reject the most promising of the commitments individuals bring to the table. Reason is often helpful in achieving new and better syntheses and, contrary again to the prevailing dichotomous way of thinking about tradition, is not necessarily antithetical to tradition. As one traditionalist puts it, reason often represents a narration of "how the argument has gone so far." Feminists often appear to have given up the tools of reason as well as tradition. Robin West, for example, argues that commitment and direction for legal reform are moral, and


134. MacIntyre, supra note 130, at 8; see also MacIntyre, supra note 118, at 222 (tradition as argument). For a discussion of the interdependence of reason and tradition, including MacIntyre's views on the subject, see Powell, supra note 125, at 22-24.
must come from experience and narrative rather than from rational argument. This rejection of reason demonstrates the same segmented view of truth and lie as does the rejection of tradition. Both rejections represent a disintegration in ways of thinking about wisdom in light of, rather than in opposition to, recognized identities. It may be true, as John Stuart Mill proposed, that some irrational attachments may be strengthened rather than weakened when the weight of logic is brought to bear against them. This dynamic may say more, however, about the failure to integrate reason and identity rather than about any failure of reason itself.

What an interactive view of tradition and change helps to highlight is that without the right linkage between feminist insight and matters of collective and individual identity—of which tradition and reason are both important components—insights may be wasted. Insight will not “sink in” unless it is integrated into ongoing individual and collective identities. To dissociate oneself from the effort at integration is to fail to participate in the organization of society and time and, thereby, to take oneself out of the process through which a culture is created and maintained. This process is necessarily political, entailing characterizations of past, present, and future which shape how reality is viewed and what choices are seen to exist. It is the kind of process to which Vivian Gornick may have been referring when she described the “interminable, repetitious, slogging, unesthetic” work of feminism.

Historian John Lukacs points out that the best historian is not necessarily the one who makes the original discovery or uncovers an undiscovered truth. Historical thinking, according to Lukacs, is a rethinking of the past, and the great historian is one “who retells the same portion of the past for the twentieth or fiftieth time perhaps, . . . [drawing] attention to it, . . . shed[ding] light on it . . . [and] deepen[ing]

136. See MILL, supra note 128, at 427-28:
   So long as an opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it. For if it were accepted as a result of argument, the refutation of the argument might shake the solidity of the conviction; but when it rests solely on feeling, the worse it fares in argumentative contest, the more persuaded its adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while the feeling remains, it is always throwing up fresh entrenchment of argument to repair any breach made in the old.
138. See supra note 1 and accompanying text.
our understanding perhaps even more than [extending] our information. 139 Feminists could benefit from a model that appreciates the role of rethinking in relation to discovery of “fresh” insight. That rethinking should not proceed through condescension, as if everyone who doesn’t “get it” is a fool. Instead, the process of repetition and rediscovery should be viewed as an opportunity to improve, expand, and regenerate the insights that inform the process, through bridges linking those insights to principles and aspirations that are already part of the cultural identity.

Many traditions are, of course, hopelessly oppressive—irredeemable, from a feminist point of view. 140 This point is terribly important, and it must be conceded that any reliance on tradition legitimates a source that is heavily weighted against the interests of outsider individuals and groups against whom a strong tradition of mistrust and hatred exists. These individuals and groups will have difficulty finding traditions that can be profitably reexpressed and reinterpreted. Gay men and lesbian women are among the most obvious contemporary examples. 141 This phenomenon, however, reflects on the difficulty of change, rather than on the dispensability of tradition in accomplishing change. The fact that many traditions are bad underlines the necessity of distinguishing between the bad and the good, rather than treating all tradition as oppressive.

Accepting the constructive power of the past need not entail embracing all of its aspects. Indeed, a tradition consists of those aspects of the past from which a society has broken, as well as those a society has endorsed and made its own. 142 In defining the aspects of the past from which the present seeks to establish distance, the tradition/change dichotomy may have a strategic value. 143 At the same time, it should

---

139. JOHN LUKACS, HISTORICAL CONSCIOUSNESS OR THE REMEMBERED PAST 34–35 (1968).

140. This is Robin West’s principal point. See West, supra note 72, at 1385. Many others, not all feminists, have made it as well. See, e.g., GARRY WILLS, INVENTING AMERICA, at xii (1978) (paraphrasing Willmoore Kendall); David A. Strauss, Tradition, Precedent, and Justice Scalia, 12 CARDOZO L. REV. 1699, 1711-12 (1991).

141. Notwithstanding the growing evidence that the abhorrence of homosexuality is not as historically pervasive as is usually assumed. See, e.g., JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) (describing medieval practice of gay marriage); JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980) (strong sanctions against sodomy were legal innovations of the twelfth and thirteenth centuries).

142. See Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (The “balance . . . between liberty and the demands of organized society . . . [is struck] having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”).

143. The strategic or ideological value of the dichotomy between tradition and modernity, notwithstanding the profound reliance of modernization on tradition, is
be remembered that inventing concepts of justice and equality that are both free of the past and understandable and acceptable to society is virtually unthinkable. These concepts are bred and nurtured within cultures of understanding and resistance that warrant continual repetition and reexpression. This repetition does not merely affirm but recirculates, displaces, subverts, and undermines existing meanings—meanings which, no matter how universal they may seem, are never complete and can never be totally “correct” or final. It bears emphasizing that the change arising from this process will not necessarily meet one’s particular criteria for progress, nor settle what those criteria ought to be. Such criteria require their own articulation (and rearticulation) and defense (and redefense). My claim in this Article is not that this process of rearticulation assures progress, but rather that progress does not occur without it. If awareness of the inevitable role of tradition in change stimulates better use of tradition to accomplish change, so also should awareness that progress is not guaranteed, and may easily be co-opted, make those engaged in social reform cautious of the dangers and all the more aware of the need to articulate and defend the premises on which they base their claims.

Some feminists in the law have pursued theories of change that recognize the role of reexpressing and reinterpreting the past. For Mary Joe Frug, for example, gender meanings are constantly being remade in relationship to those that preceded it. This remaking is possible because meanings are created through interpretation, through efforts to eliminate dissonance between different meanings or between the received wisdom and one’s experiences, and through spaces that exist within established texts and practices. The relationship between new and old meanings is itself a matter of infinite variation; it could be, for example, a relationship “of opposition, nuanced difference, or an effort at repetition.”

discussed in Gusfield, supra note 67, at 22.

144. The most sophisticated and well-developed feminist exploration of the possibilities of “subversive repetition” is Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (1990). See id. at 29-33, 115-16, 139-50.

145. See Bartlett, Feminist Legal Methods, supra note 83, at 880-88.


climax, or swerving, where the poet seeks to correct an error in the preceding text; tessera, or completion, where the successor fills out lacunae in the predecessor’s work; kinesis, or emptying out, where the iconoclast son demystifies the godlike father by showing him to be as fallible as the son; daemonization, where the successor adopts the antithesis of the precursor;
Frug’s understanding of change is that it cannot come from out of the blue; it comes, rather, from playing around with and reshuffling old meanings and understandings.147

Frug’s approach to change shares some similarity with a more psychoanalytic approach developed by Drucilla Cornell. For Cornell, meaning is established in a chain of signifiers, which can always slide, yielding new meanings.148 This process in which “meaning continually glides to create new meaning” corresponds to Jacques Lacan’s concept of metonymy, which “relies on the endless recreation of the context which results from the juxtaposition to one term with another through contiguity.”149 This process is interrupted, however, when old meanings that have been substituted by new meanings disappear into the unconscious, thus “congealing” a sign so that “the signifier is not free to generate new meanings”; to get beneath these congealed signs, and to reanimate the process of sliding, it is necessary to retrace the “repressed trajectory or passageway through which the congelation of meaning took place.”150

For Cornell, as for Frug, the challenge with respect to gender meanings is to get beneath the culture’s congealed understandings of gender difference, which determinedly see female as the “other” of the Male, and thus the lesser, the lack, or that which is absent or not real. Although it is not clear just exactly how the psychoanalytic process proceeds as to a whole culture whose understanding of gender difference may be stagnated through the suppression of unconscious symbols and fantasies,151 Cornell is clear that the possibility of change frees the patient-culture from “determination by the congealed signifiers expressible only as symptoms.” It is also clear that part of the process of repair is a reimagining of the future, which true to the psychoanalytic dynamic,

\begin{quote}
askeisis, where the poet curtails his gift to truncate the precursor’s achievement in a milder form of kenosis; and apophrades, where the successor so overwhelms the predecessor that he reverses the father-son relationship.
\end{quote}

Kenji Yoshino, \textit{What’s Past Is Prologue: Precedent in Literature and Law}, 104 \textit{Yale L.J.} 471, 474 (1994). Each of these methods is a useful way of thinking about the relationship between precedent and change in the legal context. Others who have explored the tension between creativity and influence (or precedent) and how this tension functions comparatively in law and literature include Paul Gewirtz, \textit{Remedies and Resistance}, 92 \textit{Yale L.J.} 585 (1983), and David Cole, \textit{Agon at Agora: Creative Misreadings in the First Amendment Tradition}, 95 \textit{Yale L.J.} 857 (1986).

149. \textit{Id.}
150. \textit{Id.} at 186.
151. Who, for example, will be the therapist?
requires a reimagining of the past “not as an accurate account, but as the fantasy figures that have come to have significance for us in the way they have concealed our definitions of difference.” 152 The past is important, not as that to which we might return, or as that from which we are trying to distance ourselves, but as “the very process of envisioning ‘what is’ differently.” 153 Recapitulation is not capitulation.

Frug’s and Cornell’s approaches to change seem, as I have described them thus far, highly abstract. It is useful, then, to think about what concrete differences they might make in practice. One example is methodological; understanding the role of repetition and reinterpretation in social change means even greater use of the narrative method. As Robin West herself has argued, narrative helps to reinterpret settled understandings of one’s own conditions and, perhaps more importantly, of the conditions of others. 154 There are healthy questions to be asked about the criteria for evaluating these narratives. 155 Notwithstanding these questions, it can hardly be denied that the narrative method has tremendous potential to blend new meanings into the familiar.

Other possibilities are more substantive. For example, more integrated models of past and present might contribute to fashioning better strategies for addressing “hate speech.” Hate speech regulation represents the exercise of power against oppression, based on the insight that some speech oppresses in ways that undermine the ability of the oppressed to counteract that speech. 156 A focus on the importance of creating new meanings by integrating insight into the familiar, rather than by overpowering those who lack the insight, suggests less regulatory approaches. Ending silencing speech of one kind by silencing another reinforces the process of silencing, when what is crucial to the ultimate end of non-oppressive conversation is trust, openness, and a greater willingness to take risks and expose one’s own viewpoints. Any regulatory scheme that overpowers one form of dominance for another.

152. Id. at 187.
153. Id. at 194.
156. See supra text accompanying note 85.
may rebalance the field, without helping to remake new meanings which substitute the dominance of one side or the other with "the dominance of egalitarian, communicative interaction." 157

An appreciation of how important the processes of repetition and reimagination are to social change also highlights the importance of affirming human agency for women as an everyday phenomenon, rather than as a rare glimpse of feminist insight. Feminist analyses that emphasize women's victimization sometimes ignore this importance. Although the extent to which the women's movement has emphasized and reinforced women's victimization has been wildly exaggerated, the success of this exaggerated criticism should serve as a warning of the pitfalls of victimization themes. Martha Minow explains how "the rhetoric of victimization charts out a limited repertoire of responses . . . 'I didn't do it' and 'I'm the real victim here,'" 158 which makes it unlikely that anyone will either identify with the experiences of others or accept responsibility for their suffering. 159 The dangers are real. Some feminists, such as Elizabeth Schneider and Martha Mahoney, have addressed how victimization rhetoric reinforces women's own sense of powerlessness and how legal issues might be reframed to leave room for women's agency as well. 160 Others have analyzed how, in specific contexts, the processes which victimize women are less total and disempowering than sometimes represented. Susan Etta Keller, for example, questions the coherence some feminists assume among the definition, message, and effect of pornography, urging responses to pornography that take advantage of opportunities to interpret and reinterpret its meanings. 161 Attention must also be given to how victimization approaches up the ante of gender subordination and, accordingly, how they generate backlash and impede opportunities for the kind of boundary-crossing that might actually reduce that subordination.

Increasingly, feminist legal scholars are moving away from offering analyses that create distance between existing legal principles and

159. Id. at 1430-31; see also Susan Wendell, Oppression and Victimization: Choice and Responsibility, in A READER IN FEMINIST ETHICS 279, 287 (Debra Shogan ed., 1992).
women's interests toward approaches that attempt to articulate women's interests in light of these principles, as reformulated to accommodate those interests. Jennifer Nedelsky, for example, rejects the choice between abandoning existing legal principles and buying into them, defining the feminist project as that of "mov[ing] the accepted understandings of concepts and issues in the direction of feminist perspectives." In this spirit, Nedelsky has attempted to "reconceiv[e] autonomy" in light of the feminist critique of liberal individualism and feminist concern for enlarged understandings of public responsibility for human flourishing. Along similar lines, Linda McClain has responded to the feminist trashing of liberalism by reclaiming some of its basic tenets in terms consistent with feminist insights about privacy, responsibility, and care. Ruth Gavison, following up on some piercing, brilliant feminist attacks over the past fifteen years on the public-private dichotomy, has begun to rework the dichotomy in ways that recognize feminist insights about the oppression that comes from privatizing certain realms of activity, while preserving the protections related to privacy that women, as well as men, need to secure their life, liberty, and happiness. These efforts, while hardly the final word on the recurring issues they address, illustrate how feminist approaches might usefully build from, or return to reinterpret, familiar principles in light of feminist insights. They are at the same time pragmatic and feminist, keeping intact the long-range ideals toward which feminists have wanted to work even as those ideals are adjusted in the present to respond temporarily and partially to the real, non-ideal circumstances in which women presently find themselves.

162. Jennifer Nedelsky, The Practical Possibilities of Feminist Theory, 87 NW. U. L. REV. 1286, 1300 (1993). Nedelsky advocates "both the theoretical work of developing alternative conceptions and the practical skill of finding analogies that aid judges to see links between what is familiar to them and what is essential to us." Id.


IV. Conclusion

I am worried about a movement whose identity seems too often connected with a relentless pushing away from a contaminated past. Feminism needs a view of change that combines its critical vantage point on gender subordination with a sensitivity to the need to translate feminist visions of the future into terms that can be transmitted and received as part of a complex, never-ending narrative of change.

But with this worry comes anxiety—anxiety about whether all this represents womanly compromise, about whether I have prescribed a solution ripe for co-optation, and about whether I have taken shots at forefront feminism only to abdicate to a watered-down sell-out.

My response to this anxiety about compromise is, in a sense, still more compromise. First, nothing I argue for undercuts the necessity for a continuing “deep” critique of gender subordination in as many of its various forms as we are able to identify. As the most blatant types of sex discrimination are being eliminated, the need for such critique to reach the more subtle and elusive types of discrimination becomes all the more necessary. I simply resist the either/or view of change that such critiques often unnecessarily incorporate.

Second, it is not necessary to my view of progress that all feminists view change in the way I have described. Nor is it important that all feminists focus on incrementalist, as opposed to revolutionary, strategies. In fact, if the theory of change I wish to promote is accurate, there needs to be both flashes of insight that enable one to spot inconsistencies and contradictions in the existing system and the more slogging, unexciting work of pushing, gently at times, to reconcile the inconsistencies and contradictions in the right direction.

Finally, I believe that my own anxiety about being sufficiently radical reflects the same dichotomous way of thinking about change in opposition to the past—and by extension, the dichotomy between deep-seated radical change and superficial reform—which, in arguing against, I find so hard to shed. If my thesis is correct, my approach is no less radical than the more radical-appearing alternatives. I turn here to an analogy to childrearing. Childbirth, like feminist insight, is a creative act. But once


167. This dichotomy between deep and superficial change is false in the same sense that the distinction between tradition and change is false. While at times rhetorically or strategically useful, it masks complex relations between alternative meanings, past and present, and creates hierarchies of action when multiple actions may be required.
beyond that first dramatic stage, the most difficult work lies ahead. Much of that work, alas, is repetitive and unesthetic. This work nurtures through affirmation, even as it makes clear those practices it deems unacceptable. It fails, repeatedly, and in failure looks to have another try, to start again, each time using the resources available and the lessons learned from previous efforts. Much is compromise. It never stops.