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The Role of Tradition in Classical and Contemporary Argument

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3.1 INTRODUCTION

For centuries, advocates have used arguments grounded in tradition to persuade legal decision-makers. The appeal of tradition – whether "tradition" refers to long-standing cultural practices, the alleged intentions and beliefs of revered historical figures, or a narrative about the historical path of a people – is well-established. What is less well-established is how classical rhetorical structures and concepts of tradition can be used to reflect on and even challenge contemporary social injustices or inequalities. In this chapter, we discuss how advocates on both sides of an issue – even the side challenging the status quo – might effectively use tradition to advance their cause. We explore the role of tradition in forensic Athenian rhetoric and identify similarities in contemporary American legal argument. We then identify specific rhetorical strategies used by advocates in both systems in an effort to shed light on how such tools may be used by advocates, even ones for whom tradition may seem to be an unlikely ally.

We start our journey with the forensic rhetoric of classical Athens. Traditionalism, as a central feature of classical Athenian ideology, was evident in the literary works and political agendas of the period (Dover, 1994, p. 7; Hansen, 1991, pp. 296–297). References to the *patrios politeia* (ancestral constitution) and the achievements of the ancestors were common in the popular and political discourse of classical Athens. Respect for tradition was manifest in the legal system too; the expediency of old laws was unquestionable,[1] as was the authority of lawgivers of the past such as Solon and Draco (Gagarin, 2020a, p. 26). This popular appeal of tradition allowed

[1] The homicide laws of Draco, dated around 632 BCE, were attributed a divine origin (Dem. 23.70; Antiph. 5.48) and, due to their ancestry, they were valued above all other laws at least until the late fourth century (Antiph. 5.14, 87–89; 6.2–4; Dem. 23.70–79.). Note: For readers seeking the original text and the translations of the Attic Orators cited in this chapter, please refer to the index of Abbreviations and Translations provided at the end of this chapter. The numbers in the citations of the works of the Attic Orators refer to the orator's speech and

orators to claim that "the public conduct of a state, like the private conduct of a man, should always be guided by its most honorable traditions" (Dem. 18.95; Aeschin. 1.185; 3.178–183). Making the most of this ideological inclination, litigants frequently evoked tradition to indicate the right course of action; in deciding a case, Athenian dicasts[2] were encouraged to imitate the methodology and practices of their ancestors (Adamidis, 2024). In that respect, speakers referred to Athenian tradition both to argue for the "correct" interpretation of the law and to project a certain *ethos* that allowed them to identify with the audience and alienate the adversary.

Classical rhetoricians understood that systematically identifying types of possible arguments for a particular matter was a critical part of the process of creating persuasive arguments. Aristotle, in his *Rhetoric*, listed a number of *topoi*: lines of argument that could help the advocate invent appropriate arguments and then effectively articulate those arguments to an audience (Aristotle, 2007).[3] For example, a deliberative orator speaking publicly about legislative matters would be well-advised to consider lines of argument focused on "finances, war and peace, national defense, imports and exports, and the framing of laws" (Aristotle, 2007, 1.4.7, 1359b). Contemporary American advocates and jurists have followed Aristotle's lead by identifying common types of argument or common sources from which legal arguments can be formed, and checking to see which type or types may be most helpful in a specific client matter. For example, Wilson Huhn has identified "five types of legal argument," including tradition as well as text, intent, precedent, and policy (Huhn, 2014). Huhn argues that law students and lawyers should recognize these types and assess their strengths and weaknesses for a particular situation, so that advocates can effectively use a combination of types to create persuasive arguments. Tradition is thus a type of argument relied upon by both classical rhetors and contemporary lawyers; for the latter, arguments grounded in tradition and history can be particularly effective, perhaps most notably in the context of constitutional arguments (Balkin, 2013, 2018; Huhn, 2014).

This chapter identifies intersections between forensic Athenian rhetoric and contemporary American legal rhetoric on the use of tradition-based legal arguments and explores the use of tradition on the rhetorical battleground. We argue that advocates, both past and present, have found tradition so compelling that both sides

the section of the speech respectively. For example, reference to Dem. 18.95 refers to Demosthenes' speech 18, *On the Crown*, section 95.

[2] The term dicast (judge/juror) refers to the male Athenian citizen over the age of thirty who was selected by lot as a member of a panel empowered to decide legal cases in the popular courts. In a system without professional judges to regulate what the jury can hear, the vote of dicasts was based upon all questions of fact and law, thus combining the functions of modern judges and jurors.

[3] Aristotle identified both "special topics" or "lines of argument that were especially suited to one type of rhetorical setting" (Herrick, 2009, p. 90), as well as "common topics," rhetorical strategies useful in any setting encompassing "a wide range of arguments and strategies that might be employed in all sorts of debates" (p. 91).

on an issue may use arguments with foundations in tradition, and advocates will use "tradition" both to support long-standing practices *and* to argue that those practices should be overturned. "Tradition" may be broadly construed by the speaker to be long-standing custom or repeated practices, views attributed to historical figures, or even an evolving social identity, depending on what formulation best suits the speaker's argument. In this way, even the Western-centric structure and approach of classical rhetoric may be utilized by modern advocates to challenge – and combat – contemporary social injustices such as discrimination based on sexual orientation. Creative advocates may use tradition to justify outcomes that are, in some sense, truly non-traditional. And jurists wishing to provide rationales for such outcomes are likely to use tradition – in one way or another – to explain why that outcome is consistent with the past even as it achieves societal change.

Intuitively, we might expect that only advocates who support the superficially "traditional" position would rely on long-standing cultural practices, the intentions of respected figures from the past, or historical references, while advocates on the side of progressive causes might be expected to argue that "tradition" should be rejected in favor of policy reasons supporting a change. Certainly, advocates supporting the status quo use tradition-type arguments, and advocates opposing it often rely on policy rationales that compel change. However, rhetors are not necessarily as limited in their approaches as one might initially suspect. In many instances, advocates challenging ingrained social norms have effectively argued that tradition – as they define and explain it – supports their cause. And aligning their position *with* tradition, and not *against* it, can make these arguments stronger in a system that values (perhaps even valorizes) the past. While it is by no means certain that integrating tradition into a progressive argument will guarantee success, the prevalence and desirability of aligning tradition (even if creatively defined) with contemporary legal positions is notable.

Below, we first provide background about the appeal of tradition-type arguments in both systems and identify, in each system, specific examples of how tradition arguments have been used to interpret law and identify rights. With this background and foundation in mind, we then explore how specific rhetorical strategies may be used in connection with tradition-type arguments and identify specific examples of how advocates in each society used those strategies.

3.2 TRADITION AND LEGAL ARGUMENT: ATHENS AND THE UNITED STATES OF AMERICA

It is easy to understand the appeal of tradition in legal argument. A legal system that values tradition supports "predictability and reliability interests" (Mazrui, 2011, p. 293), encourages social stability, and reinforces social and cultural identity. These values and interests were important to classical Athenians and remain important to modern Americans, despite the potential downside of an overreliance on

tradition, which may perpetuate and reinforce a problematic status quo, thus inhibiting progress and change. Similar considerations apply for arguments based on previous decisions of the court. The foundation of a common law system is *stare decisis*, or "letting the decision stand." Stare decisis requires courts to rely on precedential decisions to guide current rulings. The foundational respect for precedent represents a reliance on tradition and a reverence for the past. "Letting the decision stand" accepts the idea that we should be governed by the past and act today as we have acted before. Precedential decisions can be seen as a major cognitive contribution to thinking about current problems, as they act as "storehouses of possibly relevant analogies to our present problems, ways of thinking about such problems, and successful and unsuccessful attempts to solve them" (Krygier, 1986, p. 257).

3.2.1 *The Role of Tradition in Each Society*

The Athenians saw a benefit in interpreting the law in line with earlier decisions and with the intent of the lawgiver, as this served the aim of consistency and predictability of decision-making. Despite the absence of a single formal reasoning for the verdicts (which would be impossible with the several dicasts voting secretly), and the underdevelopment of detailed law reports and systematic records, the importance of public memory, and the audience's knowledge and expertise, should not be underestimated. Precedent was still invoked by Attic forensic speakers (Harris, 2013, pp. 246–273; Lanni, 2004). Dicasts were encouraged to remain consistent with earlier decisions and practices, and litigants expected that the court decisions would set the standards for subsequent behavior.[4] The orators would often rely on their own or logographer's (expert speechwriter's) knowledge and interpretation of previous rulings, but they were careful to refer to famous or recent cases that the experienced audience would be expected to know (Harris, 2013, p. 271).[5]

The tremendous importance and persuasive appeal of tradition means that advocates – then and now – on either side of an issue benefit by claiming that tradition is on their side. Indeed, the draw of tradition is so strong that claiming a practice as a "new tradition" (surely a contradiction in terms) gives weight to the practice (Mazrui, 2011, p. 292). Thus, advocates in both systems – and on both sides

[4] On dicasts, see for example Lys. 26.15; Lys. 30.25. On the precedent as the benchmark of subsequent decisions see, for example, Lys 14.4; cf. Lys. 22.20; 27.7–8; 28.10; 30.23, 35; Aeschin. 1.192; Lyc. 1.9–10, 15, 27, 52–54, 110, 120–122.

[5] The use of precedent included both previous verdicts of the court, when there was uncertainty about the meaning of the law (e.g., Lys. 3.43 on the meaning of "premeditation"), and earlier cases whose facts appear to resemble the factual dispute at hand (e.g., Lys. 16.8; Lys. 22.18; Aeschin. 3.252). In some cases, the use of precedent was to highlight a particular practice of the court that the speaker wants the current panel to implement (e.g., Lys. 3.42–43 on "proportionality"; Lyc. 1.12–13 on "relevance"; Hyp. 4.2 on "impeachment"; Hyp. 4.36 on "just decision-making"; Dem. 19.297 on the "rule of law").

of a given issue – have been motivated to identify traditions that would support their positions. We can observe this phenomenon in classical Athenian speeches. Since tradition was a reference point for the rhetoric of litigants, different versions of it, or even conflicting traditions, were presented by the speakers. For example, in *Against Leocrates*, Lycurgus anticipated that his opponent, Leocrates, would argue that his departure to Rhodes in a time of emergency could not amount to treason because their ancestors had also evacuated Athens in the face of Persian danger before the naval battle of Salamis. Alleging that Leocrates was misrepresenting tradition, Lycurgus replied that the ancestors "did not desert the city but only moved from one place to another as part of their brilliant plan" (Lyc. 1.68–71).

American legal rhetoric developed in reliance on classical rhetoric, and it should come as no surprise that modern American advocates take a similar approach in using tradition to support their legal arguments. "Anyone who studies the classical treatises soon discovers that, with some adaptations for modern taste and modern legal practice, the classical rhetorical principles are as applicable today as they were 2500 years ago" (Frost, 2005, p. vii). Indeed, legal writing scholars are encouraged to familiarize themselves with classic rhetoric in part because modern "[c]ourt rules and common practice for appellate briefs specify the same organizational requirements as those first formulated by Corax of Syracuse" in the fifth century BC (Berger, 2010, p. 50, internal citations omitted). More controversially, recent scholars have asserted that this reliance taints contemporary American legal rhetoric because it "sits on a foundation that is White-supremacist, patriarchal, and elitist" (Berenguer et al., 2020, p. 207).[6] That critique raises challenges for progressive advocates, who (if they accept this critique) may wonder how can they use rhetoric that is ostensibly grounded in injustice and inequality as they work to achieve social justice and equality? How can they integrate tradition into their arguments to change society?

When contemporary American advocates discuss tradition, they carefully identify and frame a tradition that supports their position and desired outcome. For example, when considering relevant "traditions" governing the use of firearms in an effort to interpret the scope of the Second Amendment in a 2008 Supreme Court case, both sides claimed that tradition supported their competing positions. In *District of Columbia v. Heller*, one side pointed to the individual right to self-defense as a traditional aspect of American society, noting that the "natural right" of individuals "to keep arms for their own defence [sic]" was a customary part of colonial society (*District of Columbia v. Heller*, Resp. Brief, 2008, p. 35). The other side drew the reader's attention to a different tradition, asserting that "[t]he Nation's capital has

[6] Berenguer et al. (2020, p. 207) argue that "[t]raditional legal rhetoric derives from Aristotle and Plato, both of whom accepted human hierarchy and inequality in a society that encompassed male domination, slavery, and elitist governance norms." Similarly, scholars such as McMurtry-Chubb (2019, p. 259) assert that contemporary American legal writing is rooted in "Eurocentric ways of knowing and being." Readers interested in a robust discussion of this critique will wish to review Berenguer et al. (2023).

regulated guns for two centuries" (*District of Columbia v. Heller*, Pet'r Brief, 2008, p. 3) and summarizing the Congressional tradition of gun regulation.

The fact that both sides could plausibly claim a relevant tradition to support their positions is not all that odd. After all, there must have been contrasting definitions and conflicting traditions even at the time of enactment. Audiences might well wonder:

> Whose tradition? English, American, African-American, Native-American, city, country, South, North? Tradition as expressed over what duration of time? Since the thirteenth century? Since the sixteenth? The eighteenth? Does the historical evidence relevant to a tradition end in 1791, in 1868, in 1930, or 2016? At what level of abstraction is the tradition to be drawn? And what of conflicting traditions . . .? (Miller, 2016, p. 225)

The value of the rhetorical strategy lies not in its accurate identification of a relevant tradition but in its ethotic appeal to the audience. If the audience is willing to accept the reference to traditional values or beliefs, it can succeed regardless of competing or missing historical evidence to support the claim of a single tradition. For that reason, tradition arguments can be successfully used to support a wide variety of positions. One study of five terms of the Roberts Court concluded that "traditionalism has been used regularly, in many different contexts, and by many different Justices with different jurisprudential viewpoints" (Virelli, 2011, p. 63). The Court's reliance on tradition in the 2021–2022 and 2022–2023 terms underscores its importance.

3.2.2 *Using Tradition to Interpret Laws and Identify Legal Principles: Examples from Athens and the United States*

Tradition, whether combined with precedent or not, has held high value in both systems as a stand-alone basis for persuasive argument. In both systems, arguments grounded in traditional values have been used both to (1) interpret the meaning of legal terms and (2) identify rights and legal principles not specifically articulated in the law.

3.2.2.1 Legal Interpretation

The "open texture" of Athenian law, meaning that quite often the law is intentionally indeterminate and vague (Hart, 1994, pp. 121–127), triggered questions of correct interpretation, a fact that allowed Attic orators to frequently resort to arguments from tradition to persuade the audience for their view as to the meaning and the scope of the law.[7] In cases involving a dispute about the interpretation of a statute, framing an

[7] For application of Hart's concept of "open texture" to Athenian law see Harris (2013, chapters 5–6).

argument in a way which ostensibly aligned with Athenian tradition gave the speaker an advantage based on the belief that a practice continued over time by our ancestors is presumed to have value.

One example is the speech of Lycurgus, *Against Leocrates*. There, the objective facts were more or less undisputed, but whether the defendant's acts satisfied the legal definition of "treason" was unclear. The background behind the speech is this: Shortly after the defeat at Chaeronea in 338 BCE, there was panic in Athens, with the city implementing emergency measures to prepare for what was believed to be an imminent invasion of Attica by Philip of Macedon. At this time, Leocrates sailed to Rhodes, ostensibly for trade. After leaving Rhodes, he settled at Megara, where he resided as a metic (resident alien) for six years before returning to Athens in 331. Upon his return, Lycurgus charged Leocrates and claimed that his desertion amounted to treason.

Lycurgus based his arguments on a creative interpretation of the term "treason," using tradition as the canvas of legal interpretation. He explained that Leocrates' specific acts were not included in the statute simply because the lawgiver could not anticipate such an outrageous scenario, which was far worse than any of the activities he listed in the law (Lyc. 1.9). This fact alone rendered Leocrates liable for the offense. To prove this wide scope of the statute, Lycurgus attempted to discern the Athenian traditional values intentionally betrayed by Leocrates that amounted to treason (Lyc. 1.1–2). These values of "Athenian-ness" were evident in the list of offenses provided in the law and the previous decisions of the court (e.g., Lyc. 1.52), but also in the Athenian tradition: the conduct of the ancestors (Lyc. 1.14, 127), the oaths (Lyc. 1.76, 80), and the literature (e.g., Lyc. 1.100–109). By reference to multiple examples from Athenian history, Lycurgus asked the dicasts to "consider your [their] traditions and opinions on this matter" (Lyc.1.75).[8] He contrasted Leocrates' behavior with their ancestors' in similar circumstances and wondered: "Would any of these men of old have perhaps tolerated such a crime? Wouldn't they have stoned to death the man who brought shame on their own courage?" concluding that: "It would be the most terrible thing of all if your ancestors had the courage to die for your city's reputation, but you do not punish those who cover it in shame" (Lyc. 1. 82). Pointing to the harshness with which previous panels punished these crimes (Lyc. 1. 111), he urged the dicasts not to fall below the standards set by the ancestors (Lyc. 1.116), reminded them that it is not in their "nature or traditions to cast a vote that is unworthy" of them, and urged that it was their "traditional duty" to put Leocrates to death (Lyc. 1. 123).

Lycurgus lost the case by a single vote. However, his innovative interpretation of treason, framed by reference to Athenian tradition, had substantial impact and shows how Athenian orators used tradition and traditional values to interpret a general term and identify specific acts encompassed within that term.

[8] On the use of examples from the past, see Maltagliati (2020).

American advocates have used similar approaches in American constitutional argument. For example, as mentioned above, advocates relied on traditional customs to define the scope of the Second Amendment right to bear arms in *Heller*. The facts in *Heller* revolved around a DC law that prohibited individuals from possessing handguns in the home (*District of Columbia v. Heller*, 2008). A special police officer, who was authorized to carry a handgun while on duty, sought to force the city to allow him to lawfully keep his firearm at his home. The police officer argued that the Second Amendment's right to "bear arms" provided an individual right for a single person to keep and use arms for lawful purposes such as individual self-defense (*District of Columbia v. Heller*, Resp. Brief, 2008); in contrast, opponents argued that the Amendment's language referring to the right to bear arms in the context of "a well-regulated militia" meant that the right should be constrained to connection with service in a militia (*District of Columbia v. Heller*, Pet'r Brief, 2008). If the former were true, then the DC law banning handgun possession in the home had to be evaluated with the level of scrutiny appropriate for a law impinging on Constitutional rights (*District of Columbia v. Heller*, 2008, p. 628). If, instead, the officer's individual Constitutional rights were not impacted, a lesser degree of scrutiny would be appropriate in assessing the law. Both advocates relied on tradition to persuade, although each focused on different aspects and sources within their arguments; those aspects and sources were carefully chosen to show that a decision in their favor would be consistent with tradition as they framed it.

The advocate for the police officer, who ultimately prevailed in this argument, drew the Court's attention to traditional customs. The brief explicitly focused on the idea that an individual right to self-defense was a traditional aspect of American society, noting that the natural right of individuals to keep arms for their own defense was a customary part of colonial society (*District of Columbia v. Heller*, Resp. Brief, 2008). Referring to the Supreme Court's 1997 articulation in *Washington v. Glucksberg* that the fundamental rights protected by the Constitution are those "rooted in the traditions and conscience of our people," the police officer's attorneys argued that interpreting the Second Amendment as an individual right was appropriate because this Amendment, properly interpreted, protects "the most fundamental rights of all – enabling the preservation of one's life and guaranteeing our liberty" (*District of Columbia v. Heller*, Resp. Brief, 2008, p. 57, internal citations omitted).

And these arguments worked, even though (as detailed in the following section) the opposing party *also* argued that tradition supported its position. The Court's opinion, written by Justice Scalia, explicitly accepted not only the officer's position but also the basis for that position as grounded in tradition. The Court agreed that the right of the people to bear arms was protected in the Second Amendment in part because it protected a preexisting traditional right, one that had become "fundamental" by the time of the country's founding (*District of Columbia v. Heller*, 2008, p. 594). The Court referred to both tradition and text, noting that "[t]here seems to

us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms" (p. 595). The Court also relied on specific historical traditions and customs to support the position about the meaning of the words and to provide specific substance to the term "bear arms."[9]

The *Heller* case illustrates how tradition-type arguments can be utilized by each side in the briefs and by the Court in its opinion deciding the case. But it is by no means the only illustration of this point. Advocates asserted similar arguments in the more recent case of *New York State Rifle & Pistol Association v. Bruen* (2022), which was argued before the Supreme Court in November 2021. *Bruen* focused on whether New York's requirement – that those who wished to carry concealed firearms must obtain a special license – improperly burdened Second Amendment rights. There, advocates on both sides similarly argued that tradition and history supported their respective positions.[10] Unsurprisingly, in its decision, the Supreme Court also relied on tradition and history as part of its rule and rationale, even elevating their role beyond what was articulated in *Heller*.[11] The Court in *Bruen* found that the state's regulation did not pass Constitutional muster. But even if it had found in favor of New York, one imagines that the Court's focus would have been on history and tradition, using those forces to explain why relevant traditions of firearm regulation justified the restriction.

3.2.2.2 Identification of a Particular Right or Legal Principle

In addition to using tradition to interpret the meaning of a particular law, speakers in Athenian courts also used tradition to argue that a particular right or privilege existed within the law. For example, Athenian legal tradition provided that no person could be put to death without a trial (Carawan, 1984). Although certain criminal procedures, such as *apagoge* (summary arrest) and *endeixis* (denunciation), appear to have permitted the immediate execution of a criminal caught *in flagrante delicto* and confessing his guilt (Hansen, 1976), by the latter half of the fourth century BCE

[9] Justice Scalia, writing the majority opinion, also discussed the meaning of the Court's prior 1939 decision in *United States v. Miller* and decided that the Second Amendment does not protect weapons "not typically possessed by law-abiding citizens for lawful purposes" because of the "historical tradition prohibiting the carrying of 'dangerous and unusual weapons'" (*District of Columbia v. Heller*, 2008, p. 627).

[10] In *Bruen*, one side asserted the right to carry arms outside the home was a custom of early America that was also enshrined in legislation and judicial decisions (*New York State Rifle & Pistol Association v. Bruen*, Pet'r Brief, 2021, pp. 29–34), while the other argued that restrictions on individuals carrying concealed firearms "have continuously been a part of the AngloAmerican legal tradition" (*New York State Rifle & Pistol Association v. Bruen*, Resp. Brief, pp. 21–31).

[11] In *Bruen*, the Court rejected a two-step framework that "combine[d] history with means–end scrutiny" in favor of a test that when regulating conduct covered by the Second Amendment "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation" (*New York State Rifle & Pistol Association v. Bruen*, 2022, p. 17).

magistrates would have been very reluctant to condemn the accused to death without trial (Carawan, 1984, p. 121), thus acknowledging the sovereign jurisdiction of the courts applying this norm. This right to trial was linked with the democratic tradition and was often contrasted to the oligarchic practice of execution without a hearing.[12]

In *Against Aristocrates* (Dem. 23), the prosecutor, Euthycles, accused the defendant of proposing an illegal decree granting special protection for the general Charidemus. The main ground for the decree's illegality, according to the questionable interpretation offered by the speaker, was that it deprived any person who might kill Charidemus for any reason, even accidentally or lawfully, of the right to a trial, and subjected that person to seizure and immediate retribution by anyone (Dem. 23.22–81). Arguing for the need to provide anyone accused with a fair trial due to the Athenian commitment to the presumption of innocence (Dem. 23.25–26, 29, 36), the speaker analyzed relevant statutes which were directly violated by the decree and, taken together, revealed the underlying principles of Athenian law against which this proposal should be evaluated. Firstly, since homicide was an offense that incurred pollution, namely a traditional religious belief in the impurity of the killer which could bring disaster to his relatives or the community, the lawgiver was "concerned about protecting the city's respect for religion" (Dem. 23.25) and thus granted the right to trial to ensure that the person convicted and put to death is indeed the perpetrator. Secondly, the Athenian commitment to the rule of law precluded the option of taking the law into one's own hands and dictated the surrender of the suspect to the relevant officers; as the speaker suggests, "it certainly makes the greatest difference whether the law or a personal enemy has the power to punish" (Dem. 23.32). Thirdly, the decree attempted to abolish the powers of the most respected Athenian courts with jurisdiction over cases of homicide (Dem. 23.65–81), which had its roots in old stories handed down by oral tradition involving gods and mythical heroes (Dem. 23.66–67, 81). Therefore, ostensibly, by allowing execution without trial, the decree violated not only existing statutes but also the underlying traditional principles of Athenian law. The speaker thus used tradition to identify a substantive right within the law that had not been specifically identified by the law itself.

We can identify a similar use of tradition in the modern American legal system, when advocates and jurists explicitly refer to American traditions to find (or fail to find) a fundamental right, such as a due process right within the Fourteenth Amendment. In many instances, lawyers have relied upon long-standing customs in American society to support an assertion that a fundamental Constitutional right

[12] For example, Lysias, the famous speechwriter whose brother Polemarchus was executed without trial by the Thirty Tyrants (Lys. 12.17), frequently referred to this as an outrageous oligarchic practice deserving the severest penalty (Lys. 12.36). Cf. Lys. 12.81–82; 26.13; Isoc. 7.67; 20.11; Dem. 40.46.

exists. For example, in the 1997 *Washington v. Glucksberg* case, the Court used a "backdrop of history, tradition, and practice" to decide whether there was a fundamental right to assisted suicide (*Washington v. Glucksberg*, 1997, p. 719). Chief Justice Rehnquist noted that that "we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" (*Washington v. Glucksberg*, 1997, pp. 720–721). In *Glucksberg*, the Court refused to find a right to assisted suicide because it found no American custom supporting a tradition of assisting death, even for terminally ill patients. Instead, the Court noted the country's "constant and almost universal tradition that has long rejected the asserted right" (p. 723) and followed that tradition by rejecting the proposed right as well. In contrast, in the 1977 case of *Moore v. City of East Cleveland*, the Court relied upon a "venerable" social custom "of uncles, aunts, cousins, and especially grandparents sharing the household along with parents and children" (*Moore v. City of East Cleveland*, 1977, p. 504) when it found that a city could not constitutionally criminalize multiple generations of a family for living together in a dwelling limited to a "single family." And in the highly controversial 2022 *Dobbs v. Jackson Women's Health Organization* decision, the Court took the unusual step of overturning its prior decisions on abortion, stating its "inescapable conclusion … that a right to abortion is not deeply rooted in the Nation's history and tradition" (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 250).

The intersections between American and Athenian uses of tradition are not limited to using a specific historical custom to interpret the law. Both systems also have asserted original intent of revered historical figures as a persuasive argument, even when that intent may be difficult or even impossible to ascertain and thus may be available to both sides in an argument. In classical Athens, the evocation of the authority of the lawgivers, such as Solon and Draco, sought to reveal the timelessness and merit of Athenian laws, making each verdict an act of historical importance and a continuation of a respected tradition.[13] Lawgivers of the past personified the Athenian traditional norms of behavior and served as the benchmark for the proper conduct of subsequent legislators.[14] A commonplace in Athenian forensic rhetoric provided that the correct meaning of the law in accordance with Athenian traditional values could be discerned by reference to the ostensible intent of the lawgiver

[13] On the historical importance of decisions, see: Aes. 3.6–7, 3.14, 3.108, 3.112, 3.175, 3.178; Dem. 20.12,20. 89–93, 20.135, 20.142, 20.154; 22.35,22. 94–99; 24.38.

[14] For example, Aeschines, in *Against Timarchus*, contrasted the unrestrained behavior of Timarchus to the respectable Solon to prove the former's unworthiness to be a public speaker (Aeschin. 1.25–26). Similarly, Demosthenes devoted a large part of his speech in *Against Timocrates* to comparing the legislative practice of his opponent with Solon's, claiming that Timocrates fell well below the standards set by the Athenian legislative tradition (Dem. 24. 103–115; cf. Aeschin. 3.257–258).

(Adamidis, 2017a, pp. 186–187; Gagarin, 2020b, p. 37).[15] Although discerning the real intent of these historical figures was almost impossible, litigants quite often referred to it as if they knew it (and presented it, persuasively, in a way that supposed that the audience knew the original intent too).[16]

Similarly, to persuade the audience as to the validity of their interpretation of the law, Athenian advocates relied upon the general underlying Athenian values encapsulated in the laws and connected those explicitly to the alleged beliefs of quasi-mythical figures. In the speech *Against Athenogenes*, the speaker Epicrates, in an effort to nullify a contract, contended that the law required that for agreements to be valid they must also be just (Hyp. 3.13). To prove the existence of such an underlying principle, Epicrates offered a series of (remotely relevant) laws.[17] Claiming that this principle is endorsed by the lawgiver, Epicrates concluded that "Solon believed that even a decree that was legally proposed should not override the law; but you [Athenogenes] expect even unjust contracts to override all the laws" (Hyp. 3.22).

In the American system, advocates and jurists similarly refer to the intent of respected historical figures to support their interpretation of constitutional words and phrases. The briefs and opinion in *Heller* provide us with an example of this approach. As noted above, the advocates there on both sides of this case referenced historical customs to bolster their arguments. Both sides also referenced historical figures. The winning brief relied extensively on lawgiver intent, spending considerable time parsing through historical documents to show that "the Framers" supported this interpretation of the Amendment (*District of Columbia v. Heller*, Resp. Brief, 2008, pp. 19–40). And that argument appealed to the Justices in the majority. The Court's majority opinion reviewed a variety of historical sources to identify the meaning of the Second Amendment's words to the public at the time of ratification and through the nineteenth century (*District of Columbia v. Heller*, 2008, pp. 581–619). It also referenced well-known and respected Founding Fathers, including Thomas Jefferson and James Madison. In doing so, the argument invoked the ethical authority of honored heroes of our cultural past.

Advocates' confident assertion of historical intent allows them to persuasively suggest that the audience shares a knowledge of the revered lawgivers' intentions, based upon the traditions of the past. The views of honored historical figures, like identification of longstanding customs, can often be used to support either side of an

[15] On Greek lawgivers, see Szegedy-Maszak (1978). On Solon, see Harris (2010) and Adamidis (2017b).

[16] For example, see Lys. 3.42; Aeschin. 1.183; 3.2, 26, 175; Dem. 21.45–50; Dem. 22.25–32; Dem. 23.30, 51, 79.

[17] Inter alia, the laws presented by Epicrates provided that (i) the seller was forbidden from making false statements in the agora about his products (Hyp. 3.14); (ii) in the case of the sale of a slave, the owner was required by law to inform the buyer of any physical defects the slave might have; otherwise, the buyer could return the slave and demand his money back (3.15); (iii) lawful betrothals are valid and unlawful ones are invalid as "the simple act of betrothal . . . did not satisfy the lawgiver" (3.16), similarly to wills (3.17).

argument. In *Heller*, the losing side similarly relied on writings of historical figures to demonstrate that the Framers intended that the amendment comprise a right of keeping arms only as related to militia service, not as an individual right (*District of Columbia v. Heller*, Pet'r Brief, 2008, pp. 17–35).

Moreover, assertions about the intentions or values of respected historical figures can be made even without specific evidence relating to specific figures.[18] Just as Athenian advocates could probably not have known the true intentions of Solon or Draco, American advocates face a similar situation and employ a similar approach when they make general assertions about what "the Founders" or "the Framers" intended. Rather than attempting to identify a specific intention of a particular historical person, these arguments seek to appeal to the cultural and traditional memory of revered historical figures. Jack Balkin offers, as an example of an argument invoking "cultural memory" (Balkin, 2013, p. 676), the concurring opinion of Justice Louis Brandeis in the 1927 Supreme Court case *Whitney v. California*. There, Justice Brandeis referred to "those who won our independence" (*Whitney v. California*, 1927, p. 375) to support his argument that only speech that presented a "clear and present danger" should be punishable. In referencing "those who won our independence" rather than specific individuals who wrote the Constitution, Brandeis appealed to cultural memory.[19] As Balkin notes, arguments that conflate different groups or "appeal to the Founders and Framers as an undifferentiated whole" (Balkin, 2013, p. 677) are arguments grounded in tradition and American cultural memory rather than actual assertions about specific intent of particular lawgivers. For the purpose of the argument, it does not matter whether "the Founding generation disagreed about protecting politically unpopular speech, whether some of the Founders were selective in their support of free expression, or whether some members of the Founding generation actually wanted to suppress particular dissenters" (Balkin, 2013, p. 678). What matters is the ethos-based appeal to an understanding of cultural memory of the group, a narrative about the origins of the country and the values of the people who founded it, and a sense of tradition of "who we are" as Americans. Advocates' confident assertion of historical intent allows them to persuasively suggest that the audience shares a knowledge of the revered lawgivers' intentions, based upon the traditions of the past.

3.3 TRADITION AND RHETORICAL STRATEGIES

In our work thus far, we have sought to provide foundational information about the relevance and use of tradition-type arguments in classical Athenian and

[18] For ways that this shared knowledge might be used without expressly invoking it, see Tanner's discussion of enthymemes (Chapter 5 in this volume).

[19] Balkin (2013, pp. 676–677) observes that the Framers of the Constitution and the revolutionaries "who won our independence" are "not identical; however, in American cultural memory, the two groups tend to merge into one."

contemporary American systems. In this section, we turn to rhetorical strategies accessible to advocates in classical times and today. In both systems, advocates have used specific rhetorical strategies to effectively develop tradition-based arguments. These strategies include a deliberate focus on shared identity and the development of an attractive narrative integrating the historical arc of the audience's culture. Using these tools creatively and wisely has enabled lawyers and jurists to argue that tradition actually supports apparently non-traditional causes such as same-sex sexual activity, coeducational military education, and even same-sex marriage.

3.3.1 *Rhetorical Strategies: Shared Identity and Narrative*

By highlighting shared identity between the orator and the audience based on shared values and traditions, an advocate can simultaneously forge connections with the audience and, by placing opponents outside that shared identity, marginalize those opponents (Adamidis, 2024).[20] Interestingly, the varying "traditions" that can be identified and exploited result in a rhetorical situation where both sides may claim the "tradition-based" position, even as they argue for different positions. This provides an opportunity for creative modern advocates to use tradition to promote outcomes that might not immediately be identified as tradition, in the sense of long-standing custom. Although the American legal framework, as it evolved and adapted from classical times to the present, has been criticized as inherently Western-centric, patriarchal, and biased,[21] contemporary advocates can find creative ways to use rhetorical techniques for social justice and equality.

The American legal system's foundational reliance on *stare decisis* provides a default preference for tradition, in the sense that precedential decisions govern our current decisions. No court – or lawyer – is starting from scratch in a current case; all must contend with prior rulings on similar questions and build upon them. Advocates know that arguing to *overturn* precedent is much more difficult than arguing that their case is *consistent* with a different view of that precedent, either

[20] The artful creation of shared identity with the audience through rhetoric can be analyzed by reference to the psychological theory of social identity, developed in the 1970s by Tajfel and Turner (1979). Readers who are interested in learning more about the theory of identification would be well advised to consult Kenneth Burke's work in A *Rhetoric of Motives* (1950), because Burke's theory of identification was a significant contribution to modern rhetoric. The work of stressing commonality between a rhetor and an audience requires rhetoricians to be "skilled psychologists or soul-knowers" (Herrick, 2009, pp. 70–71) so that they can effectively assess their audience and determine how to align the audience's interests with those of their client.

[21] Berenguer et al. (2020, p. 211) argue that because American founders held the ideas of the Enlightenment and classical Greco-Roman thinkers in such high esteem, the ideas, which included justification of "violent race-based enslavement" on the Aristotelian belief that "out-group individuals must be ruled and subjugated because they do not have the capacity for deliberative reason" became embedded in the foundation of American law. For a more thorough discussion of this critique, see Berenguer et al. (2023).

because the cases are distinguishable or because the rule of the prior case can be framed in such a way as to allow for a favorable decision in the current matter. Even the Supreme Court, which has the ability to overturn its own decisions as well as those of lower courts, is never eager to do so. While *stare decisis* is not an inexorable command, it is a critical cornerstone of our system. One need only examine the reaction to *Dobbs v. Jackson Women's Health Organization* (2022), in which the Supreme Court overturned two prior rulings on abortion, to understand how unusual such a step was. And one need only review the *Dobbs* opinion to see how painstakingly the Court tried to explain why such action was appropriate.

Just as clever advocates find ways to frame precedential decisions so that they appear consistent with a favorable ruling in the current situation, advocates can also frame "tradition" so that it supports their position. It may be more difficult for advocates promoting change and challenging the status quo to incorporate tradition into their arguments, but it is arguably even more important for them to do so to combat the default preference for the status quo that results from our legal system's structure.

One useful rhetorical strategy for these advocates is what Kenneth Burke (1950) called identification, a tool by which rhetors find "commonality between a rhetor and an audience" (Herrick, 2009, p. 10). Effective advocates assess their audience and determine how to align the audience's interests and values with those of their client; this rhetorical strategy dates back to Plato's recommendations in the *Phaedrus* that a speaker must identify "the kind of discourse suitable for each kind of soul" and "order … and embellish … his discourse accordingly" (Plato, 1921, p. 277). Using tradition allows advocates to create a sense of shared identity between their audiences, honored and respected authorities or practices, and the current client. Of course, if the audience does not "identify with the country's traditions, arguments from ethos and tradition will have little purchase" (Balkin, 2013, p. 673). Thus, the advocate must choose the tradition carefully. For example, an advocate on one side might rely upon a specific cultural custom, while the opposing side favors a broader political concept as the relevant tradition. Each advocate can identify and use a tradition argument, depending on which one supports the client's position and with which one the audience is likely to identify.

In addition to creating shared identity, effective advocates in both systems have constructed narratives that place the past tradition and the current position in a historical story that their audience will be willing to accept (Gagarin, 2003, p. 207). An argument grounded in tradition is, by definition, grounded in history: the story of our past. As such, these arguments are particularly amenable to use of narrative techniques to increase their persuasive appeal (Balkin, 2013, p. 680). A variety of stories can give meaning to a single reality.[22] An effective advocate can construct a

[22] L. H. LaRue points out that the law itself can be viewed as "fiction" because "judicial opinions are filled with 'stories' that purpose to be 'factual' but that are 'fictional'" (LaRue, 1995, p. 8).

narrative that will trigger the audience's recollection of "master stories or myths" and serve as "a template, or path, for a wide variety of other similar stories to follow" (Sheppard, 2009, p. 261).[23] The narrative framework thus infuses meaning into the current situation, as the audience experiences not only the specific story of the case at bar, but also perhaps subconsciously remembers other, similar stories, and experiences the emotional connection from these other stories in a way that can both draw upon and "reinforce traditional, cultural, and societal values" (Sheppard, 2009, p. 262). By identifying people or traditions in the past that the audience will respect, advocates identify the "right side of history, as judged by the present" (Balkin, 2013, p. 684) and suggest that siding with their client today will align the current decision-maker with that right side. And just as identification can connect the audience *to* or *away from* specific cultural practices and connection with a conceptual political tradition, these narratives can be used to show the audience how either *following* or *abandoning* a specific practice may be desirable. For either approach, the advocate can selectively choose honored authorities for further positive identification (Balkin, 2013). Rhetorical choices matter, for both advocates and jurists. For example, progressive Constitutional scholar Kate Shaw, in the podcast *Strict Scrutiny*, noted Justice Ketanji Brown Jackson's rhetorical choice to use the term "'framers,' "without modification" to describe the authors of the reconstruction amendments, reminding us that they should occupy the same place in our kind of constitutional constellation as the people who drafted the original Constitution" (Litman et al., 2023).

Athenian orators used both techniques successfully in classical arguments, and American advocates have followed their lead. Both sets of advocates employed *ethos* as they created shared identity and *pathos* as they employed narrative to argue either that they were acting consistently with historical tradition *or*, more inventively, to identify a narrative in which a broader tradition was evolving and the advocate's position was on the right side of history. The latter approach allows innovative advocates to ostensibly use tradition as they validate outcomes that are inconsistent with – or even contradictory to – long-established social customs.

3.3.2 *Using Tradition as a Rhetorical Tool: Examples from Athens and the United States*

Athenian and American advocates have often evoked tradition to argue that their position is on the right side of the historical narrative with which the audience

Just as legal arguments are not purely logical, as Tanner (Chapter 5 in this volume) illustrates, they may also not be purely "factual" in LaRue's sense of the word. Readers who are intrigued by the role of narrative in legal argument may enjoy LaRue's discussion of stories of limits, growth, and equality in constitutional law, and the literature of legal writing is replete with discussions of narrative in persuasive argument.

[23] Amsterdam and Bruner (2000, pp. 77–109) have thoughtfully analyzed Justice Scalia's opinion in *Michael H. v. Gerald D.* as a narrative of adultery as combat myth.

should align. In the adversarial setting of Athenian courts, tradition arguments were often embedded in the narrative as the focal point of the litigants' speeches, in an effort to create shared identity with the audience and to marginalize the opponent through the projection of a certain ethos.[24] Dicasts expected that the speakers would strictly adhere to widely accepted traditional norms of behavior, and a person who understood himself as an integral part of the community perceived these norms as the benchmark of ethical conduct.[25] Therefore, the speaker whose actions or arguments were artfully presented as consistent with tradition had more chances to persuade the audience of their expediency.

The debate about awarding a crown to Demosthenes offers insight into this use of tradition, namely how the rhetorical presentation of different versions of it provides the benchmark for the evaluation of current practice. In the spring of 336 BCE, an Athenian citizen named Ctesiphon proposed a decree for a golden crown to be conferred by the Athenian people to Demosthenes claiming that he "continually advises and acts in the best interests of the people" (Dem. 18.57).[26] In the ensuing debate about whether Demosthenes should receive such a crown, both Demosthenes and the plaintiff, Aeschines, used different interpretations of tradition to suggest that their position was the correct course of action based on how the historical narrative should flow.

First, Aeschines attacked Ctesiphon's proposed decree. Aeschines focused both on the illegality of the motion and on an assessment of Demosthenes' political career (Aeschin. 3.9–48, 54–167).[27] After a detailed grim review of Demosthenes' disastrous policies which eventually led Athens to its defeat by Macedon, Aeschines contrasted his opponent with the true public benefactors of the past who made Athens great and whose deeds indicate what is the "right side" that the dicasts must take. In light of this, he asked them to be associated with the ancestors, instead of Demosthenes' cowardice, and to imagine that the heroes of the past stand before them on the platform asking for justice against Demosthenes' plotting and treason (Aeschin. 3.247, 257–259).

Demosthenes, in reply, claimed that the right side of history, as indicated by Athenian tradition, was to resist tyranny even against the odds, not to erase the noble and just achievements of the ancestors (Dem. 18.63) by submitting voluntarily to Philip (18.68). Athens always fought for the first prize in honor and glory (18.66) so "the only remaining course of action was to oppose on the side of right everything

[24] According to Aristotle (2007), argumentation from ethos belongs to the *entechnoi* (artful, i.e., invented by the orator) *pisteis* (means of persuasion) (see *Rhet*. 1355b35; cf. *Rhet*. 1356a 10–14).

[25] For example, Aeschines, ostensibly defending the laws of the city and the traditional norms of decency and restraint, advised the dicasts to stand with him, condemn Timarchus and not put at risk the whole moral and education system of Athens (Aeschin. 1.1–2, 34, 192; cf. Aeschin. 2.146–152; Lyc. 1.82–83; 111–123, 127).

[26] Also, see Aeschin. 3.49, 101, 237.

[27] On the legal arguments of both sides, see Harris (2013, pp. 225–233). On Demosthenes' speech, see Yunis (2001).

that he [Philip] did to wrong you [Athenian dicasts]" (18.69). Regardless of the outcome, "both individual citizens and the city as a whole must ever strive to act in accord with the noblest standards of our tradition" (18.95; cf. 96–99, 101, 200). Surrendering "was not part of the Athenian heritage" and "since the beginning of time, no one has ever been able to persuade the city to side with the powerful but unjust and to find safety in servitude" (18.203, 204). Demosthenes' policies resembled "those made by the eminent citizens of the past and have the same goals as did theirs" (18.317). Right from the beginning, the path he chose was "straight and honest: to foster, to enhance, to remain true to the country's honor, power and prestige" (18.322). According to this approach, awarding Demosthenes the crown would be consistent with the desired historical narrative and the continued story of who Athenians were, consistent with the past.

Athenian advocates acknowledged the value of tradition as the benchmark for the evaluation of current practice, and often evoked it as a strong argument for resisting or advocating change (or, more accurately, a return to a more commendable approach taken in the past). In lawsuits against purportedly unlawful legislation, prosecutors argued that they were defending the city's existing laws against fresh statutes which, if endorsed, would undermine the integrity of the legal system and the Athenian traditional values.[28] In fact, contrasting the reverent lawgivers of the past and their well-tried, old-established laws against a current lawgiver introducing a fresh, inexpedient statute was a rhetorical commonplace which reveals the Athenian belief in and the rhetorical force of tradition.[29] In a prosecution against an inexpedient law, Demosthenes contended that the law proposed by Leptines violated the spirit of Solon's old laws (Dem. 20.89–104). Observing that the law is "far removed from the city's character," Demosthenes argued that "it is more advantageous both to you (Athenians) and to Leptines for the city to persuade him to adopt its ways than for it to be persuaded by this man to adopt his ways" (Dem. 20.14; cf. 20.111).

On the other hand, speakers criticized the purported deviation of current practice from tradition and recommended a return to a previous, more expedient, approach. In Aeschines' speech *Against Ctesiphon* and in Demosthenes' speech *Against Aristocrates*, the speakers questioned the current readiness of the Athenians to distribute honors to ostensibly unworthy individuals. Aeschines claimed that the whole practice was discredited by "giving crowns out of habit, not on purpose" as opposed to "those days when distinctions were scarce in our city and the name of virtue was an honor" (Aeschin. 3.178; cf. 3.181–189, 231).[30] Similarly, Demosthenes argued that "[m]en in the past used to grant awards to citizens in a way both noble and in their interest, but we do it in the wrong way" (Dem. 23.199). In the speech

[28] See, for example, Dem. 20.10, 14; 22.76; 23.201, 208–210; 24.142–143, 182–186.

[29] E.g. Dem. 24.137, 139, 142, 153; cf. Dem. 20.8–9, 18.

[30] To this, Demosthenes replies that he should not be compared to the ancestors but with his contemporaries (Dem. 18.314–319).

On the Dishonest Embassy (Dem. 19), Demosthenes encouraged the dicasts to live up to the standards of their ancestors who considered matters of corruption a capital crime (19.269–270). Offering a series of examples showing how "repugnant and harmful" corruption was considered by them, Demosthenes criticized the current lenient approach of the courts (19.275; cf. 23.204–206). By helping the dicasts identify with revered Athenian traditions, these speakers used the rhetorical strategy of creating a shared identity with the audience to further their persuasive arguments.

In addition to being used as a rhetorical tool to highlight the shared identity between the orator and the audience, arguments from tradition could be employed to marginalize the adversary and cast him as an outsider.[31] If a speaker could show that his opponent was breaching Athenian traditional norms, this would be probative of his propensity to break Athenian law. For example, in Aeschines' charge (*dokimasia rhetoron*) against Timarchus, challenging his fitness to address the Athenian Assembly due to having prostituted himself, the speaker framed his arguments within a wider context by reference to the longstanding Athenian values of decency, restraint, shame, and honor. He contrasted Timarchus to the great legislators of the past, Solon and Draco, who showed a "great concern for decency" (Aeschin. 1.6), and alleged that Timarchus' way of life was contrary to all their laws (1.8–32, 37) and Athenian patterns of behavior (1.25–26, 182–184). Consequently, Aeschines told the court that considering "the view of your fathers on the issues of shame and honor" (1.185), it would be unthinkable to "acquit Timarchus, a man guilty of the most shameful practices" (1.185) and, thus, "overturn the whole educational system" (1.187).[32]

Americans have also relied upon shared identity in their tradition-based arguments. In the section above, we noted that American advocates used tradition in arguments that relied upon long-standing customs in American society, or assertions about the historical and traditional meaning of words or the intentions of revered historical figures. Advocates supporting the status quo find natural alignment with tradition-type arguments, and it is not surprising to find tradition-type arguments in the work of those advocates. What may be surprising, however, is to find the

[31] This was a central (and, judging by the result, quite successful) strategy in Demosthenes' masterpiece *On the Crown*, where the orator presented himself as the exponent of the ancestral values to which the present audience was also committed (Dem. 18.72, 101, 206–208, 281, 293), whereas his adversary, Aeschines, was presented as an ethical and political outsider (Dem. 18.200, 280, 282). The marginalization and alienation of the opponent through invective, following the interpellation of the audience by reference to an idealistic view of it, and the creation of a shared identity with the speaker who ostensibly is the protector of venerated traditional values, is a technique commonly employed in populist rhetoric. For further discussion, see Adamidis (2021, 2022).

[32] For examples of similar argumentation, see Aeschin. 3.77–78; Andoc. 1.124–131; Lys. 6.51–54; Lys. 12.17–18; Lys. 30.26–28; Lys. 31.21–23, 31). In Dem. 21, Meidias' impiety and disrespect for Athenian customs and behavioral standards could be used as evidence that he should be held liable for the offense of hubris for assaulting Demosthenes for the purpose of humiliating him during a public religious festival (Dem. 21.51, 55, 61, 66, 69, 79, 98).

instances where advocates use tradition-type arguments to creatively support positions that are not, at least on an obvious level, "traditional" at all. For example, American advocates have effectively employed the concept of tradition in argument grounded in political traditions and a narrative about the historical arc of the country. When focusing on a more concrete, specific, longstanding custom would suggest an undesirable outcome, lawyers and jurists have chosen a more general, overarching principle that could support the desired outcome and yet still be classified as tradition within an evolving historical narrative.[33] Using narrative reinforces the positive identity created: The narratives "explain who Americans are by explaining where they have come from and where they are going" (Balkin, 2013, p. 680). In this way, clever advocates have used the rhetorical tactic of marginalizing the outsider to create arguments that end up bringing "out-groups" into the protection of American anti-discrimination law.

This type of tradition argument, which is less intuitively obvious than the cultural tradition argument, invokes a particular, often evolving, tradition within the political life of the country. The evolving tradition is often more conceptual and broad than a cultural custom (e.g., nondiscrimination or privacy), usually relates to important cultural aspects of American society as reflected in the law, and asks the audience to identify a tradition of who we are as a people moving through history: a more general principle to which Americans are committed, rather than a specific act or practice that has been customary.[34] These tradition arguments "often call for us to remember what 'we' – here a transgenerational subject – fought for, what we stand for, what we promised we would do, and what we promised we would never let happen again" (Balkin, 2013, p. 684). This type of argument encourages the audience to view the past and determine which position ended up on the right side of history and follow the approach and principles of that position. Advocates making such an argument might invoke the views of particular Founding Fathers, if interpreting words of the Constitution (while ignoring the views of others), or might identify with social movements that, even though unpopular at the time, have come to be seen as correct in the present.

This type of narrative tradition-based argument can actually be used to advocate for turning *away* from tradition in the sense of a customary practice. For example, consider the progression of arguments in two Supreme Court cases focused on same-sex activity. In the 1986 *Bowers v. Hardwick* decision, the Court relied on tradition in the form of a long-standing custom to reject a gay rights challenge to state laws criminalizing sodomy. In that case, the Court considered a Georgia statute that criminalized "any sexual act involving the sex organs of one person and the

[33] Cf. Turner (2016), who argues that this approach, as seen in *Obergefell*, is properly viewed as a "generational" interpretation of the due process clause and a rejection of tradition rather than a reframing of it.

[34] Readers who are interested in the question of whether such appeals to an audience actually constitute and create particular identities may wish to review Charland (1987).

mouth or anus of another" (*Bowers v. Hardwick*, 1986, p. 188 n. 1). Michael Hardwick was charged with violating the law. Hardwick's attorneys argued that the statute was unconstitutional because it violated Hardwick's fundamental right to consensual intimate activity; they noted that America's "constitutional traditions have always placed the highest value upon the sanctity of the home against government intrusion or control," particularly with respect to "individuals' most intimate affairs" (*Bowers v. Hardwick*, Resp. Brief, 1986, p. 4). The Court found that the statute was constitutional. In doing so, the Court framed the legal issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time" (*Bowers v. Hardwick*, 1986, p. 190). The Court explicitly noted that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious" (p. 194). Because the court found that the traditional custom was to ban such conduct, it rejected the assertion that individuals had a "a fundamental right to engage in homosexual sodomy" (p. 191).

But less than twenty years later, in the 2003 case *Lawrence v. Texas*, the Court overturned the *Bowers* case – which relied on tradition as a primary rationale for its decision – while still citing tradition as a rationale. The Court considered – and found unconstitutional – a Texas statute criminalizing "deviate sexual intercourse with another individual of the same sex" and defining such "deviate" intercourse as including "any contact between any part of the genitals of one person and the mouth or anus of another person" (*Lawrence v. Texas*, 2003, p. 563). *Lawrence* mirrored *Bowers* in that a man who had been convicted under the law for engaging in consensual same-sex activity in his own home challenged its constitutionality. But the Court now found that this behavior was protected by the Constitution.

How could the Court justify overturning *Bowers*, which relied on long-standing custom to reject a right of same-sex intimate activity in a situation where two consenting adults engaged in such in the privacy of their own homes, in a decision that claimed to be justified by tradition? It could do so in part because its framing of the type of relevant tradition in *Lawrence* was, in important ways, different from the longstanding custom upon which the Court initially relied in *Bowers*. Writing for the Court in *Lawrence*, Justice Kennedy asserted that the *Bowers* Court had "misapprehended the claim of liberty presented to it" (*Lawrence v. Texas*, 2003, p. 567). Although Kennedy did argue that the prior decision may not have been entirely correct in finding a long-standing custom disfavoring same-sex activity,[35] the

[35] Justice Kennedy argued that *Bowers* had been wrong to suggest that there was a longstanding custom against same-sex sodomy "as a distinct matter," instead suggesting that prior laws criminalizing sodomy had been focused on prohibiting "nonprocreative sexual activity more generally" (*Lawrence v. Texas*, 2003, p. 568). Kennedy concluded that "the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate" (p. 571).

Lawrence decision did not simply assert that the prior decision got the tradition wrong. Instead, it suggested that a different and broader tradition was more relevant. Justice Kennedy declined to focus on a particular custom disfavoring same-sex sodomy, but instead noted that "in our tradition the State is not omnipresent in the home" (*Lawrence v. Texas*, 2003, p. 562) and identified as a more general tradition of principle and policy: the traditional right of citizens to be free from government interference in private matters in their homes. Kennedy also identified an *evolving* tradition or "emerging recognition" about intimate relationships generally, noting that the "laws and traditions in the past half century are of most relevance here" (pp. 571–572). Because those more recent traditions "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (pp. 571–572), Kennedy concluded that the traditions upon which the Court relied in 1986 were not dispositive.

One might argue, as Justice Scalia did in his *Lawrence* dissent, that an "emerging awareness" is not a tradition at all, at least by the definition of a long-standing custom (*Lawrence v. Texas*, 2003, pp. 597–598). Justice Kennedy's opinion appeared at some points to concede this point by noting that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" (p. 572, internal citations omitted). But by framing the issue as an "emerging *recognition*" regarding intimate relationships rather than simply a "new practice," Kennedy was able to draw support from history and tradition despite the apparent tension (or even contradiction) inherent in the concept of what might otherwise be framed as a "new tradition."

The contrasting opinions of Justice Ginsburg (writing for the Court majority) and Justice Scalia (dissenting from the Court's decision) in the 1996 case *United States v. Virginia* offer an even clearer example of one type of tradition argument – long-standing custom – pitted against another – narrative historical arc and evolving political identity – with evolving political identity carrying the day for social justice. There, the Court found that Virginia Military Institute's (VMI) practice of excluding females and maintaining single-sex education exclusively for male students violated the Constitution. To reach this decision, Ginsburg's opinion (for the Court majority) had to overcome a tradition argument of the first type: longstanding custom. Justice Scalia, in his dissenting opinion, focused on the "long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal government" (*United States v. Virginia*, 1996, p. 566). Justice Ginsburg, writing for the majority, effectively countered the longstanding cultural tradition of single-sex education by identifying a new and evolving tradition that represented the country's political movement toward equality. First, she identified a negative tradition aligned with the single-sex education endorsed by VMI, noting that "our Nation has had a long and unfortunate history of sex discrimination" (p. 531, internal citations omitted). Then she reviewed the history of other American colleges and

universities (including within Virginia) who had shifted from single-sex to coeducational (pp. 536–538). Towards the end of her argument, she identified the new political tradition, dating from "a generation ago," of equal treatment for men and women as a counter to the longstanding custom of all-male military education (p. 556). "A prime part of the history of our Constitution," Ginsburg concluded, "is the story of the extension of constitutional rights and protections to people once ignored or excluded" (p. 557, internal citations omitted). Justice Ginsburg's identification of the political tradition of non-discrimination thus trumped the cultural tradition argument offered by Justice Scalia.[36] In this view, non-discrimination on the basis of sex represents who Americans are and who they are becoming.

Why, and when, might progressive advocates choose to rely on tradition as a basis for support even as they argue for social change? Reliance on tradition alone might be ineffective or even appear disingenuous in an argument to change laws related to problematic social norms. In some cases (such as certain constitutional inquiries), references to tradition and history are unavoidable because of the legal rules already in place. In others, even if not absolutely necessary, such references may be strategically desirable. Creative advocates understand that weaving multiple types of argument together create a stronger argument overall. Including backward-looking tradition-type arguments alongside forward-looking policy arguments can lessen opposition to action that might otherwise be perceived as unbridled judicial activism or overturning (as opposed to reframing) settled precedent.

Clever advocates in the past have integrated the narrative approach to their advantage while also relying on shared identity. The Commonwealth of Virginia's amicus brief in the 2015 case *Obergefell v. Hodges* demonstrates both these techniques. In advocating on behalf of the petitioners who wished the Supreme Court to find a fundamental right to same-sex marriage, Virginia had to overcome a specific cultural tradition identified by the opposing side: the longstanding custom of marriage as composed of a man and a woman rather than two members of the same sex. To do so, Virginia explicitly identified (and invited the Court to identify) with "the right side of this issue" despite its own prior positions on the "wrong side" of cases such as *Brown* (on school desegregation) and *Loving* (on interracial marriage) (*Obergefell v. Hodges*, Brief of Commonwealth of Virginia, 2015, p. 6). By referencing cases in which a long-standing custom had been cited as sufficient rationale for racial discrimination, Virginia reminded the Court that one type of tradition argument might place the Court in a position that would later be overturned.

[36] Justice Ginsberg's opinion, of course, included much more than these points; the summary here is intended to focus readers' attention on the competing concepts of tradition and not to fully encapsulate all reasoning within the majority opinion. Readers interested in the contrasting views of Justices Scalia and Ginsburg on the appropriate role of tradition in legal interpretation in another Supreme Court case may wish to read Keenan (2023).

> Virginia submits this amicus brief in support of reversal because its experience on the wrong side of *Brown* and *Loving*, and on the right side of this issue, has taught us the truth of what the Court recognized in *Lawrence v. Texas*: "those who drew and ratified … the Fourteenth Amendment" chose not to specify the full measure of freedom that it protected because they "knew [that] times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." (*Obergefell*, Brief of Commonwealth of Virginia, 2015, p. 6)

With that single sentence, the brief told a story of regret and redemption: Virginia had been wrong, had seen the error of its ways, and now sees – and shares – the true path that is aligned with a correct political tradition of non-discrimination. This narrative plays upon a stock story of redemption. If the Court sides with Virginia, it positions itself on the right side of history. Virginia also reminded the Court of past instances where the Court had initially made a decision that it later reversed, by referencing *Lawrence*'s reversal of *Bowers*. And it offered an alternative tradition to the one proposed by the opposing party (the traditional view of marriage as one man and one woman), by framing the traditional right as the right of an individual to marry (*Obergefell v. Hodges*, Brief of Commonwealth of Virginia, 2015, p. 17).[37]

Was it successful? The Court's opinion in *Obergefell* suggests that line of argument was influential. Writing for the Court, Justice Kennedy noted that "[t]he right to marry is fundamental as a matter of history and tradition" (*Obergefell v. Hodges*, 2015, p. 671).[38] His focus on the general right of an individual to marry stood in stark contrast to the tradition invoked by the opponents to same-sex marriage: the tradition of marriage involving a man and a woman rather than two members of the same sex. Once more, a "traditional" argument had prevailed for an outcome that may have seemed, by some definitions, decidedly untraditional.

3.4 CONCLUSION

Incorporating tradition has been and continues to be persuasive as a strategy to enhance an argument's legitimacy and appeal. We can identify intersections between Athenian forensic rhetoric of the fourth century BCE and American rhetoric of the twentieth and twenty-first century in the use of and reliance upon tradition. Both sets of advocates find tradition so compelling that even when they argue against a tradition (in the sense of a longstanding custom), they frame the argument as advancing a tradition (in the sense of a political tradition or principle or

[37] Virginia reminded the Court that "[n]o case before *Loving* involved interracial marriage; no case before *Zablocki* involved betrotheds behind in their child-support obligation; and no case before *Turner* involved marriage to a prisoner. But the Court nonetheless described each case as involving the right to marry, a right 'of fundamental importance for *all* individuals'" (*Obergefell v. Hodges*, Brief of Commonwealth of Virginia, 2015, p. 17).

[38] Note, however, that the Court simultaneously opined that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries" (*Obergefell v. Hodges*, 2015, p. 664).

historical narrative). Both sets of advocates have employed ethos (in establishing shared identity) and pathos (with narrative techniques) as they try to persuade their audiences that tradition supports their position. In both systems, advocates rely upon tradition as a central tenet of persuasive argument and use it as a rhetorical battleground. And for proponents of equality, social justice, and nondiscrimination, tradition can be used as a force to propel society into the future rather than allow it to remain moored in the past. For example, an advocate might strategically choose to establish a specific view of shared communal identity to support a broader view of tradition – one that would encompass progressive views regarding equality and consideration of historically marginalized groups.

The structure inherited from classical rhetoric may not appear to lend itself to these uses. Classical rhetors might have been surprised at the outcomes. But even within a Western-centric structure that has been critiqued as hostile to contemporary notions of equality, the tools of the past can be used to create a new and more egalitarian future. And given the structure in which we operate, an advocate who chooses to neglect these tools does so at their peril; integrating them will not guarantee success, but ignoring them will increase the likelihood of failure. The power and allure of tradition has held fast for centuries and shows no sign of diminishing. Unless and until we see dramatic change in our legal system's operation, we must embrace tradition and find strategies to incorporate it into even "non-traditional" arguments.

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