THE ROAD TO TRADITION OR PERDITION? AN ORIGINALIST CRITIQUE OF TRADITIONALISM IN CONSTITUTIONAL INTERPRETATION

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Good afternoon, everyone. I'd like to begin by thanking the fine folks at the *Harvard Journal of Law & Public Policy* for allowing me to be here—and not just for allowing me to be *here,* but also for allowing me to *be* here. As some of you may know—either from listening to *Advisory Opinions* or otherwise—I recently had a health scare. Short story: I suffered a few weird fainting spells at work one morning, which led to a trip to the ER and, ultimately, to me becoming the proud owner of a Boston Scientific pacemaker. I managed to come back from the first two episodes on my own, but the third, let's just say, required some assistance. Former *JLPP* Articles Chair and current Newsom clerk Kyle Eiswald literally revived me—brought me back to the land of the living—and, with a co-clerk, summoned the paramedics. If Kyle hadn't listed *JLPP* on his resume, I might not have hired him—and if I hadn't hired him, I might have kicked the bucket on the floor of my office that morning. So in a *Palsgraf*-y kind of way, I choose to believe that the *JLPP* is both the actual and proximate cause of my presence here today.

One other prefatory note: anyone with any sense of intellectual modesty wonders from time to time when he or she will be exposed as a fraud. Having listened to the eminent scholars that you've assembled for today's panels, I fear that today just might be my day.

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With that, let me turn to the business at hand. Flash back, if you will, to the spring of 2022. It's pre-*Bruen,* and I'm wrestling with how to decide a case that presented the question whether a federal statute that prohibits illegal aliens from possessing firearms violates the Second Amendment. Writing for the Court, I explained that both the Amendment's text and the English and colonial-era history that led to its adoption confirmed that the "preexisting" right to keep and bear arms that the Constitution codified belonged to what the Brits called "subjects"—and what the new Americans called "citizens"—and thus certainly didn't belong to illegal aliens. Simple enough, really.[1]

I concurred separately in my own opinion—it's a nasty habit of mine—to explain my own view of the appropriate methodology for deciding Second Amendment questions. The two then-existing contenders were (1) what has since become known as the "text, history, and tradition" approach and (2) a more amorphous two-step standard pursuant to which a reviewing court should first determine whether the Second Amendment protects a restricted activity at all and, if so, then engage in some form of interest balancing to determine the restriction's constitutionality. Perhaps not surprisingly, I said that as between the two I much preferred the former, and I urged the Supreme Court to tack in that direction.[2] In support of that recommendation, I quoted then-Judge Kavanaugh's assessment, which he offered in a dissenting opinion in the *District of Columbia v. Heller* case on remand to the D.C. Circuit: *Heller*[3] and *McDonald v. City of Chicago*,[4] he said, "leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[5]

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1. *See* United States v. Jimenez-Shilon, 34 F.4th 1042, 1046–50 (11th Cir. 2022).

2. *Id.* at 1050–51 (Newsom, J., concurring).

3. 554 U.S. 570 (2008).

4. 561 U.S. 742 (2010).

5. Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

I said in my opinion that I "largely agree[d] with [Judge Kavanaugh's] assessment."[6] I went on to explain my caveat this way:

> I say "largely" because it has never been clear to me what work "tradition" is supposed to be doing in the tripartite "text, history, and tradition" formulation. The duly adopted and ratified text of the Second Amendment, as originally (and thus historically) understood, governs the interpretive inquiry. To the extent that "tradition" is meant to stand in for the original (*i.e.,* historical) public meaning of the words on the page, it is duplicative. And to the extent that it is meant to expand the inquiry beyond the original public meaning—say, to encompass latter-day-but-still-kind-of-old-ish understandings—it misdirects the inquiry.[7]

Well, the rest is history—or perhaps I should say, cue the laugh track, *tradition.* As you no doubt know, when the Supreme Court decided *Bruen* a month later, it eschewed interest balancing in favor of a "text, history, *and tradition"* test. I have to confess, though, that I'm no less skeptical today—or at least no less confused—than I was in May of 2022. I'm still not sure what role "tradition" is supposed to be playing in the interpretive analysis. Is it the same thing as history? Or is it somehow different? And if it's different, is it different in kind, degree, chronology? And how, in any event, does "tradition" bear on the meaning of the adopted and ratified constitutional text? As I'll explain, these questions matter, because Second Amendment cases are hardly the only ones in which "tradition" is gaining traction. Even on what is an avowedly originalist Supreme Court, traditionalism is *everywhere,* and seemingly ascendant—so much so, in fact, that you've convened an entire symposium to investigate it.

As I begin to build out my analysis and critique, let me start with *my* first principles. I'm a formalist. That means I'm a textualist, and it means I'm an originalist. And for the record—and I recognize there may be some disagreement about this—I don't take textual-

6. *Jimenez-Shilon,* 34 F.4th at 1051 (Newsom, J., concurring).

7. *Id.* at 1051 n.2 (Newsom, J., concurring).

ism and originalism to denote meaningfully different methodologies. Textualism, in my book, is really just originalism as applied to ordinary written instruments like statutes, regulations, and contracts. And originalism is really just textualism as applied to the extraordinary written instrument that we call the Constitution. Because we're focused here on the methods and tools of constitutional interpretation, I'll frame my remarks in terms of originalism. To be clear, though, both approaches aim to accomplish the same task: to discern (1) the common, ordinary understanding of words on a page (2) at the time of a document's adoption.

So the focus of *any* proper originalist inquiry is the document itself: the duly adopted and ratified text is the only thing that counts as law. But because we care about the common, ordinary meaning of that text at the time of its adoption and ratification, we can and should look to history. But to be precise, originalists don't consult history for its own sake. Rather, we consult history only because—and to the extent that—it actually illuminates the original public meaning of the adopted and ratified text. So, for instance—and most importantly—we investigate how contemporary speakers of American English used the key terms and phrases in the years leading up to the critical juncture. Framing-era dictionaries, judicial decisions, legal treatises, political pamphlets, popular books, newspaper articles—they're all fair game. The key is that in order to inform the meaning of the words on the page—the duly adopted and ratified constitutional text—the historical sources that we consult must of necessity predate or exist contemporaneously with the text itself.

The question I'd like to explore is whether constitutional "tradition"—least as the Supreme Court currently employs it—is consistent with originalism properly done. For reasons I'll try to explain, I don't think that it is.

First things first. What do I mean by "tradition"—or to make it a condition, "traditional*ism*"? To be clear, I think it's different from "liquidation"—I agree with Professor Sherif Girgis about this. At the risk of oversimplifying things, liquidation refers to the idea that courts can look to what political actors in the Founding generation did in the years immediately following ratification to determine

what the Constitution's more open-ended provisions meant. Because I haven't done the work, I don't have a hot take for you about liquidation—but I'll admit some skepticism. Relying on post-ratification practice—even *immediate* post-ratification practice—to determine what the ratified text meant—and thus means—seems to me to be a pretty fraught endeavor. Happily, though, liquidation is limited in two key respects. First, at least as described by its foremost modern exponent, Professor Will Baude, liquidation is limited substantively—it applies only when (1) a provision's meaning was hotly debated, (2) the contestants eventually coalesced around a particular interpretation, and (3) their ensuing liquidating behavior was consistent.[8] Second, liquidation is limited temporally—it applies only to resolutions reached in the years immediately following a provision's ratification.[9]

Traditionalism—again, at least as currently practiced—entails neither such limitation. It seemingly applies to *any* resolution of *any* topic—and, apparently at essentially *any* time. So far as I can discern from the Court's jurisprudence, traditionalism involves the invocation of and reliance on principles and understandings that are vaguely old-ish—and perhaps entirely sensible—but that (1) often have arisen years, decades, or even centuries after a particular provision's ratification and (2) have no demonstrable connection to the original, written text. Accordingly, my contention is that while courts often deploy traditionalist evidence in support of originalist arguments, reliance on post-ratification tradition—however well-founded—is, in fact, fundamentally inconsistent with a rigorous commitment to proper originalism.

Let me provide a few illustrations. Examples aren't hard to come by, as traditionalism has become so ubiquitous. In his pathmarking article, *Living Traditionalism*, Professor Girgis identified some fifty-odd topics with respect to which the Supreme Court has employed

8. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13 (2019).

9. *See* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 29–30.

a traditionalist interpretive methodology.[10] He catalogued cases addressing "the separation of powers between Congress and the President, federal-courts issues, states' rights, and individual rights," and he noted that those cases have "construed provisions in all three Articles defining the three branches, all ten Amendments in the Bill of Rights (minus the Third), and the Fourteenth Amendment."[11]

To take just two recent and high-profile decisions—both of which were billed as monuments to originalism, and which, in fairness, were in part exactly that—the Court invoked post-ratification historical tradition in both *New York State Rifle & Pistol Ass'n v. Bruen*[12] and *Dobbs v. Jackson Women's Health Organization*.[13] In *Bruen*, the Court referred repeatedly to the significance of the "Nation's historical tradition of firearm regulation"[14]—and as part of that inquiry relied, albeit perhaps somewhat reluctantly, on "postratification history."[15] So too in *Dobbs*. Although at its core the Court's opinion there was thoroughly originalist—focusing on the state of abortion law as it existed "when the Fourteenth Amendment was adopted"[16]—the Court also emphasized, in response to the dissenters' critique that a rigorously originalist approach could threaten other contemporary rights, that its survey "of th[e] Nation's tradition extend[ed] well past" the Fourteenth Amendment's ratification—indeed, it boasted, "for more than a century" thereafter.[17]

Rather than living in *Bruen* and *Dobbs* land, though, I'd like to train my focus—and my fire, I suppose—on an area that, as many of you know, is near and dear to my heart, one in which I think the reliance on latter-day "tradition" is even more stark and central to the interpretive inquiry: Article III standing.

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10. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1497–1502 (2023).
11. *Id.* at 1497.
12. 142 S. Ct. 2111 (2022).
13. 142 S. Ct. 2228 (2022).
14. *Bruen*, 142 S. Ct. at 2126.
15. *Id.* at 2128.
16. *Dobbs*, 142 S. Ct. at 2242.
17. *Id.* at 2260.

In a pair of recent decisions, the Supreme Court has fleshed out the standing doctrine's injury-in-fact component—and, in particular, that component's "concreteness" sub-component. In *Spokeo, Inc. v. Robins*[18] and *TransUnion LLC v. Ramirez*,[19] the Court adopted a two-part standard for identifying "intangible" injuries, which many alleged injuries are. Its words: "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles."[20] With respect to the first criterion, the Court emphasized that "*history and tradition* offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."[21] More particularly, *Spokeo* explained that to qualify as a "concrete" injury, the plaintiff's alleged harm must bear a "close relationship to a harm that has *traditionally* been regarded as providing a basis for a lawsuit in English or American courts."[22]

TransUnion seemingly narrowed the frame somewhat—dropping the "English" in favor of a singular focus on "American courts"—and, in so doing, endorsed as examples of sufficiently "traditional" common-law analogues (1) "reputational harms," (2) "disclosure of private information," and (3) "intrusion upon seclusion."[23] Notably, though, the privacy-related torts that the Court highlighted as valid comparators didn't materialize until the late nineteenth century, at the earliest—and in any event *long* after the Founding. Most observers trace their origins to an 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandeis and to a series of ensuing state-court decisions.[24]

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18. 131 S. Ct. 1540 (2016).

19. 141 S. Ct. 2190 (2021).

20. *Spokeo,* 131 S. Ct. at 1549.

21. *TransUnion,* 141 S. Ct. at 2204 (emphasis added).

22. *Spokeo,* 131 S. Ct. at 1549 (emphasis added).

23. *TransUnion,* 141 S. Ct. at 2204.

24. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see also, e.g.,* Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 74–75 (Ga. 1905); Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911); Kunz v. Allen, 172 P. 532, 532–33 (Kan. 1918).

It seems to me that there are two defensible *originalist* approaches to Article III's case-or-controversy requirement—but that *TransUnion*'s "tradition"-based approach isn't one of them. First, there's my own view—which I won't belabor today—that based on the original understanding and early application of the term, "an Article III 'Case' exists whenever the plaintiff has a cause of action."[25] Under this theory, the focus of the inquiry is the constitutional term "Case"—which I think the Framing-era evidence demonstrates simply meant (and means) "'[a] cause or suit in court.'"[26] If a plaintiff has a cause of action—whether it derives from a statute or from the common law, and even if it is newly created—then he has a "Case" within the meaning of Article III.

There's an alternative approach that takes Framing-era history equally seriously but that formulates the issue more granularly. On that view, only the particular common law causes of action that existed at the time of the Founding can serve as valid analogues for modern-day Article III "cases." When people of the Framing generation used the term "Case," the argument would go, they necessarily had in mind the particular sorts of claims that could give rise to a lawsuit *then.* I get that—I don't necessarily agree with it, as I think it frames the inquiry too narrowly,[27] but I get it.

What I don't get is the *TransUnion* Court's compromise traditionalist position, according to which the term "Case" includes post-Founding *common law* causes of action, like the relatively modern privacy torts that the Court featured as exemplars, but at least presumptively excludes new *statutory c*auses of action. If anything, the Court's approach seems to get things exactly backwards. Under it,

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25. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

26. *Id.* at 1123 (quoting *Case,* WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

27. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012) ("Without some indication to the contrary, general words . . . are to be accorded their full and fair scope. They are not to be arbitrarily limited. This is the general-terms canon, which is based on the reality that it is possible and useful to formulate categories . . . without knowing all the terms that may fit—or may later, once invented, come to fit—within those categories.").

state courts—taking their cue from law professors—are empowered to create new causes of action sufficient to confer Article III standing, but the United States Congress is not.

I worry that *TransUnion*'s approach, which looks vaguely to "tradition[]," but not to original, Founding-era understanding, leaves too much to chance—and thus to individual judges' discretion. Consider a hypothetical, which I don't think is all that hypothetical: what about the next case, in which a court is asked to determine whether negligent infliction of emotional distress provides a valid common-law comparator. Is that claim, which has "only emerged as a cognizable, independent cause of action within approximately the last half century,"[28] sufficiently "traditional[]" for Article III purposes? If not, why not—what distinguishes it from the privacy-related torts that the *TransUnion* Court blessed? What warrants drawing the line between torts recognized in the 1890s and those recognized in the 1970s? And if so, is there any limit to traditionalist analysis at all—does it allow judicial lawmaking right down to the present? These questions, to my mind, don't suggest any ready answers, and the slope is slippery indeed. Far better, I think, to tether constitutional doctrine to the objectively verifiable original meaning of the written text.

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Happily, I have some very good company in my skepticism about the use of traditionalist reasoning in avowedly originalist opinions. Justice Barrett—in her characteristically modest, understated way—has likewise expressed reservations. First, in *Bruen*—having concurred in Justice Thomas's thoroughly historical opinion for the Court—she noted, as an "unsettled question[]," "[h]ow long after ratification may subsequent practice illuminate original public meaning?"[29] More recently, and more pointedly, Justice Barrett concurred separately in *Samia v. United States* to critique some of the

28. John J. Kircher, *The Four Faces of Tort Law: Liability of Emotional Harm*, 90 MARQ. L. REV. 789, 807–08 (2007).

29. *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring).

"historical evidence" that the Court used in concluding that a defendant's Confrontation Clause rights hadn't been violated by the introduction of a redacted version of his co-defendant's confession.[30] Most notably for present purposes, she identified what she called a "timing problem."[31] In particular, Justice Barrett tweaked the majority for relying on evidence drawn "largely from the late 19th and early 20th centuries—far too late," she stressed, "to inform the meaning of the Confrontation Clause 'at the time of the founding.'"[32] When the relevant history—which is to say the pre-ratification, Framing-era history—is simply "inconclusive," she said, the reviewing court should simply admit as much.[33] It shouldn't "pick up the thread in 1878," only to "drop it in 1896"—because, she explained, "cases from 1896 [aren't] much more important than cases from, say, the 1940s."[34]

As I suspect you've already guessed, I think Justice Barrett has her finger on something very important. I have two grave concerns, and I'll conclude by trying to explain them briefly.

My first fear is that traditionalism gives off an originalist "vibe" without having any legitimate claim to the originalist mantle. It seems old and dusty—and thus objective and reliable. And maybe it is indeed all those things. But let's be clear: it's not originalism. Remember, originalism is fundamentally a text-based interpretive method. We originalists say that any particular constitutional provision should be interpreted in accordance with its common, ordinary meaning *at the time it was adopted and ratified.* If we really mean that, then by definition, it seems to me, evidence that significantly *post*-dates that provision's adoption isn't just second-best—it's positively *irrelevant.*

Second, and not unrelatedly, I worry that traditionalism provides far too amorphous and manipulable a criterion. As should be clear

30. Samia v. United States, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring).
31. *Id.*
32. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 54 (2004)).
33. *Id.*
34. *Id.*

from *TransUnion*, in which the Court invoked turn-of-the-20th-century torts as benchmarks for the meaning of the term "Case" in Article III, traditionalism has no obvious—or even non-obvious—chronological endpoint. And really, if modern-day innovations are going to be the stuff of which constitutional doctrine is made, what distinguishes traditionalism from living constitutionalism? While it may be different in degree, it is not, I fear, different in kind. The lesson of formalism—which I've tried to make the core of my own judicial philosophy—is that once judges forsake any demonstrable connection to a text's original, as-adopted understanding, all bets are off. The road to tradition, I fear, may be a road to *perdition.*