HARVARD JOURNAL
of
LAW & PUBLIC POLICY

VOLUME 47, NUMBER 3 FALL 2024

SYMPOSIUM

HISTORY AND TRADITION

Keynote

SPEECH

ARTICLES

NOTE

HARVARD JOURNAL
of
LAW & PUBLIC POLICY

THE *HARVARD JOURNAL OF LAW & PUBLIC POLICY* RECEIVES NO FINANCIAL SUPPORT FROM HARVARD LAW SCHOOL OR HARVARD UNIVERSITY. IT IS FUNDED EXCLUSIVELY BY SUBSCRIPTION REVENUES AND PRIVATE CHARITABLE CONTRIBUTIONS.

The *Harvard Journal of Law & Public Policy* is published three times annually by the Harvard Society for Law & Public Policy, Inc., Harvard Law School, Cambridge, Massachusetts 02138. ISSN 0193-4872. Nonprofit postage prepaid at Lincoln, Nebraska and at additional mailing offices. POSTMASTER: Send address changes to the Harvard Journal of Law & Public Policy, Harvard Law School, Cambridge, Massachusetts 02138.

Yearly subscription rates: United States, $55.00; foreign, $75.00. Subscriptions are renewed automatically unless a request for discontinuance is received.

The *Journal* welcomes the submission of articles and book reviews. Each manuscript should be typed double-spaced, preferably in Times New Roman 12-point typeface. Authors submit manuscripts electronically to harvardjlpp@gmail.com, preferably prepared using Microsoft Word. Views expressed are those of the authors and do not necessarily reflect the views of the Society or of its officers, directors, editors, members, or staff. Unless otherwise indicated, all editors are students at the Harvard Law School.

PREFACE

The third and final Issue of the *Harvard Journal of Law & Public Policy*'s Volume 47 is here. It is difficult to convey how grateful I am to everyone who contributed to this Volume. As always, I owe my deepest gratitude to my Deputy Editor-in-Chief, Eric Bush, who has dedicated a tremendous amount of time and effort to editing this Issue. Eric, it has been a pleasure to lead *JLPP* with you for the past year—thank you for always going above and beyond to make *JLPP* great.

* * *

Issue 3 is one of *JLPP*'s most exciting publications to date. The Issue begins with essays and articles from the History and Tradition Symposium, which took place at Harvard Law School in February 2024 and was co-hosted by *JLPP*, the University of Richmond School of Law (Professor Kurt Lash), and the University of Illinois College of Law (Professor Jason Mazzone). At the Symposium, top legal minds engaged in fascinating discussion and debate about the future of "history and tradition" jurisprudence in constitutional law. Writings by Professors Vikram Amar, Stephanie Barclay, Jud Campbell, Kurt Lash, Jason Mazzone, Bradley Rebeiro, Stephen Sachs, and Reva Siegel can all be found in the History and Tradition Symposium portion of this Issue. We were also fortunate to have Judge Kevin Newsom of the United States Court of Appeals for the Eleventh Circuit give the keynote speech at the Symposium. The print version of his speech is included in the Issue.

After the History and Tradition Symposium, Issue 3 features a speech, "Now…This," by Judge Justin Walker of the United States Court of Appeals for the D.C. Circuit. Judge Walker's speech urges us to "choose hope" over "tribalism, cynicism, and burn-it-all-down-ism." It is followed by two articles: *Political Rivalries Among the States, Incommensurability, and the Dormant Commerce Clause* by Professor George Wright and *Rational Nondelegation* by Professor John Yoo. Issue 3 concludes with a Note by our very own Nate Bartholomew, which seeks to harmonize competing theories of the

major questions doctrine. To all the Volume 47 authors and contributors: Thank you for the great effort that went into your speeches, essays, articles, and notes.

* * *

Before signing off for the last time, I want to again give my most sincere thanks to every Volume 47 staff member—without you, none of these publications would be possible. It has been an honor and a privilege to work with each of you this past year.

Hayley Isenberg
Editor-in-Chief

DOBBS AND THE ORIGINALISTS

STEPHEN E. SACHS*

ABSTRACT

Though often hailed as an originalist triumph, Dobbs v. Jackson Women's Health Organization *has also been condemned as an originalist betrayal. To some, it abandoned originalism's principles in favor of a* Glucksberg*esque history-and-tradition test, or even a "living traditionalism"; to others, its use of originalism was itself the betrayal, yoking modern law to an oppressive past.*

This essay argues that Dobbs *is indeed an originalist opinion: if not distinctively originalist, then* originalism-compliant*, the sort of opinion an originalist judge could and should have written.* Dobbs *shows the importance of looking to our original law—to all of it, including lawful doctrines of procedure and practice, and not just to wooden caricatures of original public meaning. As the case was framed, the Court's focus on history and tradition was the correct approach; on the evidence presented, it reached the correct originalist result. Understanding the Fourteenth Amendment as securing old rights, rather than as letting judges craft new ones, leaves more rather than fewer choices for today's voters. In any case, it may be the law we've made, both in the 1860s and today.*

* Antonin Scalia Professor of Law, Harvard Law School.

The author is grateful for advice and comments to Joel Alicea, William Baude, Samuel Bray, Jud Campbell, Taylor Kordsiemon, Kurt Lash, Robert Pushaw, Richard Re, Amanda Schwoerke, Reva Siegel, Owen Smitherman, Aaron Tang, and Mary Ziegler.

INTRODUCTION

Dobbs v. Jackson Women's Health Organization[1] is widely regarded as a "triumph for originalism."[2] For years, many people had assumed that opposing *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] was what it *meant* to be an originalist;[5] to see *Roe* and *Casey* overturned would naturally be an originalist victory.

But almost as soon as *Dobbs* was handed down, critics began to describe it as an originalist betrayal. Some saw it as a betrayal *of* originalism, arguing that the Court hadn't been originalist enough.[6] What was it doing, citing substantive due process cases like *Washington v. Glucksberg*?[7] Why wasn't it throwing *Griswold v. Connecticut*,[8] *Eisenstadt v. Baird*,[9] *Lawrence v. Texas*,[10] or *Obergefell v. Hodges*[11]

---

1. 142 S. Ct. 2228 (2022).

2. Josh Blackman, *On Abortion, Justices Demonstrate Courage Under Fire,* DESERET NEWS (June 24, 2022, 4:14 PM), https://www.deseret.com/2022/6/24/23182049/perspective-on-abortion-justices-demonstrate-courage-under-fire-roe-v-wade-dobbs-samuel-alito-casey [https://perma.cc/48KX-547X]; *accord* J. Joel Alicea, *An Originalist Victory,* CITY J. (June 24, 2024), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/DM5P-JE2A]; David J. Garrow, *Justice Alito's Originalist Triumph,* WALL ST. J., May 5, 2022, at A17.

3. 410 U.S. 113 (1973).

4. 505 U.S. 833 (1992).

5. *Cf.* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2384 (2015) ("Obviously many originalists oppose *Roe;* indeed, some have claimed that people are originalists *because* they oppose *Roe*.").

6. *See, e.g.,* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition,* 118 NW. U. L. REV. 433, 457 (2023); Ilan Wurman, *Hard to Square* Dobbs *and* Bruen *with Originalism,* DENVER POST (July 12, 2022, 5:09 PM), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns [https://perma.cc/3B6V-QCSX]; *cf.* Sherif Girgis, *Living Traditionalism,* 98 N.Y.U. L. REV. 1477, 1485 (2023) (arguing that the *Dobbs* majority "seemed to assume the legitimacy of a more living-traditionalist method" than an originalist one).

7. 521 U.S. 702 (1997), *cited in* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

8. 381 U.S. 479 (1965).

9. 405 U.S. 438 (1972).

10. 539 U.S. 558 (2003).

11. 576 U.S. 644 (2015).

under the bus?[12] Was this "a form of living constitutionalism," or a "living traditionalism," or something more exotic still?[13] Others, meanwhile, portrayed *Dobbs*'s originalism *itself* as the betrayal—decrying the decision as a flawed effort both in process and in substance, one that engaged in bad history to reach bad results.[14]

Both criticisms go awry. *Dobbs* was, in fact, an originalist opinion as a matter of form; on the arguments presented, it was also correct as a matter of originalist substance. True, the *Dobbs* Court cited and applied its modern precedents on substantive due process, and it didn't cite James Madison or John Bingham every other page. In that sense it wasn't a distinctively originalist opinion, the kind that only a faithful originalist could write. But it was an originalism-*compatible* opinion, the kind a faithful originalist *could* write. Indeed, it appears to have been an originalism-*compliant* opinion, the kind a faithful originalist *should* write, reaching the right originalist result for what were essentially the right originalist reasons.

To understand why, though, we have to pay attention to some recent developments in originalist theory. In particular, we have to distinguish specific questions of original meaning from more general (and, here, more relevant) questions of original law—that is, the law of the United States as it stood at the Founding, and as it's been lawfully changed to the present day.[15] That law includes enacted law, such as the Constitution, statutes, and treaties, but it also

12. *See Dobbs,* 142 S. Ct. at 2261 (distinguishing these cases).

13. *See* Barnett & Solum, *supra* note 6, at 492 (describing *Dobbs* as an instance of "Constitutional Pluralism," which is "a form of living constitutionalism," *id.* at 451); Girgis, *supra* note 6.

14. *See generally, e.g.,* Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111; Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation,* 133 YALE L.J.F. 99 (2023); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It,* 133 YALE L.J.F. 65 (2023).

15. *See, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1457 (2019); Stephen E. Sachs, *Originalism Without Text,* 127 YALE L.J. 156, 158 (2017); *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism,* 105 GEO. L.J. 97, 99 & n.2 (2016) (defending an "enduring original-law-

includes unwritten law, such as unabrogated rules of the common law, equity, or admiralty.[16] In particular, it includes common law doctrines of party presentation and of stare decisis,[17] doctrines which might have obliged an originalist Court to rule pretty much as it did. If both parties in *Dobbs* accepted the authority of *Washington v. Glucksberg*,[18] it can't be too surprising that the Court might have gone ahead and *Glucksberge*d.

Once we understand the role of unwritten law, we can also see that something not too far from *Dobbs*'s history-and-tradition test may in fact be what the Constitution commands. Many originalists reject most doctrines of substantive due process, but many also see the Fourteenth Amendment's substantive rights guarantees as relating to the Privileges or Immunities Clause instead.[19] This Clause likely protects a variety of *preexisting* rights defined by general law—rights that we today might call common law rights, but not in the sense of being up to state or federal judges to invent.[20] The Clause obliges us to look to history for these rights, not because the

---

ism," a term "'ugly enough to be safe from kidnappers'" (quoting C.S. Peirce, *What Pragmatism Is*, 15 MONIST 161, 166 (1905))).

16. *See infra* text accompanying notes 27–34.

17. *See infra* text accompanying notes 35–50.

18. *See* Brief for Petitioners at 12, 15, 28, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) [hereinafter Petitioners' Brief]; Brief for Respondents at 18, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) [hereinafter Respondents' Brief].

19. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); *see, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring); *id.* at 691–92 (Thomas, J., concurring in the judgment); McDonald v. City of Chicago, 561 U.S. 742, 808–09 (2010) (Thomas, J., concurring in the judgment); RANDY E. BARNETT & EVAN BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT, at xvi–xvii (2021); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP, at ix–xi (2015); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION 2–5 (2016); William Baude, Jud Campbell, & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1235–36 (2024).

20. Baude, Campbell & Sachs, *supra* note 19, at 1191. On general law, see generally Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921 (2013); Stephen E. Sachs, Life After *Erie* (Nov. 1, 2023), https://ssrn.com/id=4633575 [https://perma.cc/VBZ6-G9AQ].

past must always be preserved inviolate, but because certain past practices are *evidence* of certain past legal rules, and those rules are all the Amendment foists on us today. If the resulting doctrine is narrower than some might like, this just means the Amendment's yoke is easy and its burden light; the remaining decisions are up to us, and to our "elected representatives."[21]

I. THE ORIGINALIST CRITIQUE

A. Was Dobbs *Originalist?*

Start with the originalist critique. *Dobbs* is a substantive due process opinion. It reviews a Mississippi law under the Fourteenth Amendment's Due Process Clause, and it does so under *Glucksberg*'s substantive due process standard—asking whether the law infringed a right "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[22] At first glance, this doesn't look much like an originalist approach. *Dobbs* doesn't cite *Glucksberg* for evidence of original meaning, and *Glucksberg* itself looks beyond original meaning to postratification traditions.[23] If anything, the argument goes, *Dobbs* adopts a "living constitutionalist strategy"[24] (or perhaps "living-traditionalist"[25]) rather than an originalist one. So it might be natural to argue roughly as follows:[26]

(1) Substantive due process is nonoriginalist.
(2) *Dobbs* uses substantive due process.
∴ (3) *Dobbs* is nonoriginalist too.

---

21. *Dobbs,* 142 S. Ct. at 2243.

22. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *accord id.* at 2246 & n.19.

23. *See* Barnett & Solum, *supra* note 6, at 456–57; *id.* at 457 (describing *Dobbs* as "a nonoriginalist decision in its reasoning").

24. *Id.* at 489.

25. Girgis, *supra* note 6, at 1485; *see id.* at 1513–14.

26. *See* Barnett & Solum, *supra* note 6, at 457.

This argument moves too fast, because originalism isn't exhausted by the original meaning of words. Rather, it properly looks to all of our original *law,* not just the part of our law expressed in enacted texts.[27] When we confront a new criminal statute—say, "[w]hoever shall willfully take the life of another shall be punished by death"—we don't read it to displace "the rules of evidence, the elevated burden of persuasion, the jury, and other elements of the legal system";[28] those things might be outside the original meaning of the statute (or, indeed, of any statute), but they're not outside the law, which is why they lawfully affect how the statute may be properly understood and applied. Or when a case falls squarely within the meaning of two different statutes, we might reconcile them through the use of common law rules, rather than pretending that one of those statutes must have meant something different all along.[29]

Originalists often discuss rules of law which the original Constitution's text leaves alone. Rules of sovereign immunity, of removal of officers, or of state borders needn't themselves have been written into the constitutional text for the Constitution to preserve them in operation.[30] If the Constitution denied Congress the power to redraw state borders, say, and if the text says nothing about where those borders are, then the borders stay wherever they *were,* subject to preexisting law about who might have power to change them.[31]

---

27. *See* sources cited *supra* note 15.

28. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited,* 112 HARV. L. REV. 1913, 1913 (1999).

29. *See* Sachs, *Originalism as a Theory of Legal Change, supra* note 15, at 878 & n.238 (discussing Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982)).

30. *See* Sachs, *Originalism Without Text, supra* note 15, at 161, 166 (discussing the removal power and sovereign immunity); Stephen E. Sachs, *Constitutional Backdrops,* 80 GEO. WASH. L. REV. 1813, 1828–34 (2012) (discussing the use of background law in cases concerning state borders); *id.* at 1859–63 (same, concerning the Executive Vesting Clause); *id*. at 1868–75 (same, concerning sovereign immunity).

31. *See* U.S. CONST. art. IV, § 3, cl. 1 (forbidding Congress from forming new states "by the Junction of two or more States, or Parts of States," without their consent); *id.* cl. 2 (providing that "nothing in this Constitution shall be so construed as to Prejudice any Claims . . . of any particular State"); Stephen E. Sachs, Pennoyer *Was Right,* 95 TEX. L. REV. 1249, 1255–69 (2017).

This preexisting law includes not only the local laws of particular states, but rules of *general* law—what Marshall called "that generally recognized and long established law, which forms the substratum of the laws of every State."[32] Whether of common law, equity, admiralty, and so on, such rules are properly applied by federal courts hearing "Cases, in Law and Equity," or "of admiralty and maritime Jurisdiction,"[33] when no applicable source of law overrides them.[34] And as relevant here, they include rules of party presentation and of stare decisis, rules highly relevant to an originalist Court's consideration of *Dobbs*.

In other words, the Court's job in *Dobbs* wasn't just to figure out which party had the better argument; it was mostly to figure out which party *made* the better argument. Our "'adversarial system of adjudication'" follows "'the principle of party presentation,'" which usually instructs a court to "decide a case" in light of what's been advanced "by the parties."[35] Even if you have a knock-down constitutional argument, you can still lose it by failing to raise it at the proper time, such as by waiving it under Rule 12(h) of the Federal Rules of Civil Procedure.[36] Criminal procedure, meanwhile, distinguishes "waiver" from "forfeiture": a "[m]ere forfeiture" by a criminal defendant can be reviewed for plain error on appeal, but

32. United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Circuit Justice).

33. U.S. CONST. art. III, § 2, cl. 1.

34. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance,* 97 HARV. L. REV. 1513, 1575 (1984) (describing these as laws *for,* if not *of,* the United States).

35. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 n.6 (2022) (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)); *cf.* Stephan Landsman, *A Brief Survey of the Development of the Adversary System,* 44 OHIO ST. L.J. 713, 730 (1983) (arguing that "the adversary system had become firmly established" in England and America "by the end of the 1700s"). *But cf.* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial,* 90 CORNELL L REV. 1181, 1210 (2005) (pointing out that in equity proceedings, the court sometimes had authority to engage in factfinding *sua sponte).*

36. *See, e.g.,* Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 40–41 (1st Cir. 2001) (applying FED. R. CIV. P. 12(h)).

not an argument that's been waived, whether deliberately or by operation of law.[37] (A forfeited argument is sick unto death, and only the healing hand of the court can revive it; a waived argument has been taken out back and shot.)

True, parties can't *force* judges to decide an issue by taking other issues off the table; courts aren't "bound to accept, as controlling," the parties' "stipulations as to questions of law."[38] But the fact that courts have some discretion to look past these stipulations coexists with a rule that, in general, they shouldn't: "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[39]

Without fully exhuming the history and development of this party-presentation rule, there's good reason to think that such a rule was already recognized in Founding-era law. (As early as 1796, the Justices openly ignored legal arguments as properly belonging to parties not before them, or not within the scope of a given appeal;[40] they similarly disregarded arguments that counsel had

37. United States v. Olano, 507 U.S. 725, 733 (1993); *see also* United States v. Campbell, 26 F.4th 860, 871–75 (11th Cir. 2022) (en banc); *id.* at 899–902 (Newsom & Jordan, JJ., dissenting); *accord* Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change,* 79 NOTRE DAME L. REV. 1761, 1784 (2004).

38. Est. of Sanford v. Comm'r, 308 U.S. 39, 51 (1939) (citing Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289 (1917)); *accord* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) (stating that a court isn't "limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"); Gary Lawson, *Stipulating the Law,* 109 MICH. L. REV. 1191, 1209 (2011).

39. NASA v. Nelson, 562 U.S. 134, 147 n.10 (2011) (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)); *accord* Lawson, *supra* note 38, at 1217 (describing consensus that courts often have "power" to reach nonjurisdictional issues *sua sponte,* but that use of this power is strongly discouraged).

40. *See* M'Donough v. Dannery, 3 U.S. (3 Dall.) 188, 198 (1796) (noting that as certain claimants to property in the court below hadn't "appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause"); *see also* Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (Story, J.) ("It was his duty at that time to have filed a cross appeal, if he meant to rely on his claim for damages; and not having then done so, it was a waiver of the claim, and a submission to the decree of restitution and costs only."); Morley Constr. Co. v. Md. Cas. Co., 300 U.S. 185, 191 (1937) (describing this "inveterate and certain" rule).

failed to advance, whether before them or in the court below.[41]) Or the rule may well have lawfully emerged since the Founding, whether through legislation or through the lawful development of the common law. Pursuant to statutory authority, for example, the Supreme Court has adopted rules requiring parties to raise issues and to identify relevant constitutional provisions.[42] If the respondents in *Dobbs* didn't find the Privileges or Immunities Clause relevant,[43] the Court didn't have to either.[44] So while the original meaning of the Due Process Clause might have little to do with *Glucksberg*, there's little reason to think that even an originalist judge, one who looks to the original law of the United States as it's been lawfully changed, *must* consider arguments that no party has chosen to raise.

This party-presentation rule has special force as to prior precedents, which enjoy a presumption of correctness under common law doctrines of stare decisis. At the Founding, Caleb Nelson has argued, this presumption could be overcome if the precedents were

41. *See, e.g.*, Freeland v. Heron, Lenox & Co., 11 U.S. (7 Cranch) 147, 150 (1812) ("There was another exception [to the judgment below], but as it was abandoned in the argument by the counsel, it will not be noticed."); Ins. Co. of Valley of Va. v. Mordecai, 63 U.S. (22 How.) 111, 117 (1860) (noting that if "no such question was made on the trial, or presented to the court for decision," then it "therefore cannot be entertained here"); *see also* Owen B. Smitherman, The Party Presentation Principle as General Law (Mar. 1, 2024) (unpublished manuscript) (on file with author) (manuscript at 17–29) (discussing the historical roots of the doctrine).

42. *See* 28 U.S.C. § 2071(a) (authorizing "[t]he Supreme Court and all courts established by Act of Congress . . . from time to time [to] prescribe rules for the conduct of their business"); SUP. CT. R. 24.1 (requiring that a petitioner's "brief on the merits," *id.*, contain "[t]he constitutional provisions . . . involved in the case, set out verbatim with appropriate citation," *id.* 24.1(f), and that it "exhibit[] clearly the points of fact and of law presented and cit[e] the authorities and statutes relied on," *id.* 24.1(i)); *id.* 24.2 (imposing many of the same requirements on a respondent).

43. *See* Respondents' Brief, *supra* note 18, at 1 (listing, as the only relevant constitutional provision, the Fourteenth Amendment's Due Process Clause). *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (noting that it's the Due Process Clause on which *Roe*'s "defenders . . . now chiefly rely"), *with id.* at 2245 (using the Court's discretion to discuss an equal protection argument raised only by *amici)*.

44. *Cf.* SUP. CT. R. 24.1(a) (providing that the Court, "[a]t its option," may consider a plain error "evident from the record and otherwise within its jurisdiction to decide").

demonstrably in error; a 51–49 percent chance of error wouldn't disturb settled case law, even if it might satisfy a preponderance standard.[45] There's good reason to think this feature of the rule remains in force today: note how the Court has rejected past decisions after remarking that they were "poorly reasoned"[46] or "'egregiously wrong' on the day [they were] decided."[47] In *Dobbs*, though, neither party argued that *Glucksberg* was wrong (let alone demonstrably erroneous), which gave the Court even less reason to revisit *Glucksberg sua sponte.* The petitioners explicitly endorsed *Glucksberg*'s history-and-tradition test,[48] while the respondents acknowledged *Glucksberg*'s authority and made no criticisms of its reasoning[49]—arguing, instead, that abortion rights would pass the history-and-tradition test with flying colors.[50]

---

45. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents,* 87 VA. L. REV. 1, 1–3 (2001).

46. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2479 (2018); *see also id.* at 2481 n.25 (arguing that if a past decision's rationale "'does not withstand careful analysis' [that] *is* a reason to overrule it" (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

47. *Dobbs,* 142 S. Ct. at 2265 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part)).

48. *See* Petitioners' Brief, *supra* note 18, at 12, 15, 28.

49. *See* Respondents' Brief, *supra* note 18, at 18.

50. *See id.* at 20–21. On the success of that argument, see *infra* section II.A. *Glucksberg* acknowledged a right to abortion in then-governing precedent, *see* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 822 (1992)). (I am indebted for this point to Reva Siegel.) But this acknowledgment doesn't entail that *Casey* actually *passed* the *Glucksberg* test, only that *Glucksberg* had no cause to revisit the various rights "that *this Court ha[d] identified*," rightly or wrongly, as being "deeply rooted." *Id.* at 727 (emphasis added) (citing *Roe* and *Griswold*, among other cases). By way of comparison, consider how the ostensible requirements of *Grutter v. Bollinger,* 539 U.S. 306 (2003), seriously applied, might well have produced the opposite results on *Grutter*'s own facts. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2165 (2023) (citing *Grutter,* 539 U.S. at 333, 341–42); *id.* at 2168–73; *Grutter*, 539 U.S. at 379–87 (Rehnquist, J., dissenting); *cf.* Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?,* 99 NOTRE DAME L. REV. REFLECTION 113, 114 (2023) (noting "the absence of any nonarbitrary factual difference between *Grutter* and *SFFA*"); *accord id.* at 123–25. Moreover, while the Court later cast doubt on *Glucksberg*'s application to "marriage and intimacy," Obergefell v. Hodges, 576 U.S. 644, 671 (2015), *accord Dobbs,* 142 S. Ct. at 2326 n.4 (Breyer, Sotomayor & Kagan, JJ., dissenting), the *Dobbs* Court impliedly distinguished that limitation on the same grounds that it distinguished *Obergefell* itself. *See infra* note 53 and accompanying text.

An originalist Court, then, would have had good reason in *Dobbs* to ask whether *Roe* and *Casey* were demonstrably in error (or even "egregiously wrong"[51]) on the *Glucksberg* test, even if *Glucksberg* itself might turn out to be mistaken on originalist grounds. While a court can forgive a party's forfeiture, it needs good reason to, and the *Dobbs* Court had no particular need to overthrow substantive due process doctrine as a whole. That's not to say the Court *couldn't* have exercised its discretion to revisit substantive due process (as Justice Thomas would have),[52] just that it reasonably decided not to. That's also why the Court didn't have to revisit other individual-autonomy cases, such as *Obergefell:* not only were they outside the parties' arguments and the question presented, but the Court didn't think any generic right to *individual* autonomy, *Glucksberg*-approved or not, would extend to terminating what might be *another's* life, in what *Roe* had called the "inherently different" context of abortion.[53]

Having asked the egregious-wrongness question and answered it, the Court could then go on to consider reliance. In the traditional sense, under common law doctrines of precedent, this meant *detrimental* individual reliance, when the change in decisions would leave parties "worse off than [they] would have been" had the prior case never been decided,[54] and when it's "not of so much consequence" what rules apply "as that they should be settled and

51. *Dobbs,* 142 S. Ct. at 2265.

52. *See Dobbs,* 142 S. Ct. at 2301 (Thomas, J., concurring); McDonald v. City of Chicago, 561 U.S. 742, 811–13 (2010) (Thomas, J., concurring in part and concurring in the judgment)).

53. Roe v. Wade, 410 U.S. 113, 159 (1973) (describing "[t]he situation therefore [as] inherently different from marital intimacy, . . . or marriage, or procreation"); *see Dobbs,* 142 S. Ct. at 2277 (quoting *Roe*); *id.* at 2261 (distinguishing other autonomy cases not concerning an "interest in protecting fetal life"); *infra* text accompanying notes 106—110. *But see* Goodwin, *supra* note 14, at 114 (accusing the Court of "opportunis[m]" for not addressing substantive due process more generally).

54. Vikram David Amar, *Justice Kagan's Unusual and Dubious Approach to "Reliance" Interests Relating to Stare Decisis,* VERDICT (June 1, 2021), https://verdict.justia.com/2021/06/01/justice-kagans-unusual-and-dubious-approach-to-reliance-interests-relating-to-stare-decisis [https://perma.cc/NCG9-ZH6N] (emphasis omitted).

known."[55] Assuming that this exception traditionally extended beyond "rules of property,"[56] even *Casey* agreed that such detrimental reliance was generally absent here, as the *Dobbs* Court pointed out.[57] (Other, more general claims of reliance—for example, concerning decisions of "whether and how to invest in education or careers"[58]—primarily object to the *substance* of *Dobbs*'s rule rather than to the Court's having changed course over time.[59])

To critique these rules of party presentation, stare decisis, and the like, simply because they're not in the text of the Constitution, gets the whole structure of American law wrong. *Most* of American law isn't in the text of the Constitution. The Constitution is our supreme law, outranking anything else. But it isn't all of our law, or even all of our original law—and that's what a faithful originalist should keep in mind.

B. What Would Originalism Say?

But say that the petitioners had gone in guns blazing—asking the Court in *Dobbs,* as the petitioners had asked in *McDonald v. City of Chicago*,[60] to abandon substantive due process altogether. Had the

---

55. Nelson, *supra* note 45, at 37 (quoting Lessee of Haines v. Witmer, 2 Yeates 400, 405 (Pa. 1798)).

56. *Id.*; *see also id.* at 20–21 & n.62.

57. *See Dobbs,* 142 S. Ct. at 2276 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 822, 856 (1992)).

58. *See id.* at 2344 (Breyer, Sotomayor & Kagan, JJ., dissenting)

59. *See id.* at 2277 (opinion of the Court). These reliance claims also seem more ideological than individual; we have not, for example, seen significant numbers of women personally choosing not to pursue careers or education in light of the potential unavailability of abortion. *See, e.g.*, Samantha Ketterer, *Texas Colleges, Universities Report Gender Gap in Fall Enrollment, Continuing Decades-Long Trend,* HOUS. CHRON. (Oct. 4, 2023, 6:37 a.m.), https://www.houstonchronicle.com/news/houston-texas/education/article/houston-colleges-see-gains-in-female-students-18375553.php [https://perma.cc/8YQ4-MGGH] (reporting "disparately high numbers of female students in [Texas colleges'] freshman classes and overall student bodies this fall, making little progress correcting a pattern that has perplexed administrators over the past couple decades").

60. 561 U.S. 742, 753 (2015); *see also id.* at 758 (opinion of Alito, J.) (finding it unnecessary to reconsider the Court's privileges-or-immunities case law); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with the petitioners).

Court accepted the invitation, the correct originalist analysis might have taken them pretty much where they ended up.

As Justice Alito has suggested, the Court has treated the Due Process Clause as "a refuge of sorts" for constitutional principles "exiled" from where they were "originally intended to reside."[61] These principles may include, as he notes, the individual rights "guaranteed by the Fourteenth Amendment's Privileges [or] Immunities Clause."[62] Indeed, there's good reason to think this Clause protected the fundamental rights of American citizenship, unwritten legal rights recognized as a matter of general law and understood as implicit limits on legislative power.[63] Many of these rights had been codified in federal or state constitutions, but they weren't fundamental because they'd been codified; they'd been codified because they were fundamental.[64] As Senator Howard described them when introducing the Fourteenth Amendment (and quoting a famous formula from *Corfield v. Coryell*[65]), they included those "privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign."[66]

---

61. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2050 (2023) (Alito, J., concurring in part and concurring in the judgment).

62. *Id.*; *accord Dobbs,* 142 S. Ct. at 2248 n.22.

63. *See* Baude, Campbell & Sachs, *supra* note 19, at 1196–1202.

64. *See, e.g.*, Nunn v. State, 1 Ga. 243, 249 (1846) (recognizing a right to keep and bear arms as an unwritten privilege of citizenship); *see also id.* at 251 (describing the first eight Amendments as "beacon-lights to guide and control the action of [the state] legislatures, as well as that of Congress").

65. 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230). On the dating of *Corfield,* see Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019).

66. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (quoting *Corfield,* 6 F. Cas. at 551).

This isn't quite the *Glucksberg* history-and-tradition test, but as *Dobbs* pointed out, it bears a clear family resemblance.[67] Rights "implicit in the concept of ordered liberty"[68] look a lot like those which are in their nature fundamental and belong to citizens of all free governments; rights "deeply rooted in this Nation's history and tradition"[69] look a lot like those which have at all times been enjoyed by American citizens. And this resemblance isn't just happenstance: *Glucksberg*'s standard was an intellectual descendant of *procedural* due process standards that similarly looked to general law.[70] Had the Court not taken a wrong step in the *Slaughter-House Cases*,[71] eviscerating the Privileges or Immunities Clause, it wouldn't have needed due process as a refuge; it could have protected these traditional privileges and immunities under their own names.

Whether these traditions reflect a "living traditionalism" depends on how much weight one puts on the wording of *Corfield*. It's perfectly possible for a fixed constitutional provision to reference a developing common law tradition: think of the term "unusual" in the Eighth Amendment, which may mean "contrary to long usage," asking whether a new punishment departs from practices that have *become* traditional by the time of application.[72] If that's what "privileges or immunities" originally meant, then that's what it meant,

---

67. *Dobbs*, 142 S. Ct. at 2248 n.22 (discussing the *Corfield* standard); *see also* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 691–98 (drawing a similar comparison).

68. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

69. *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

70. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (asking whether a state procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856) (answering a due process question by looking "to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, . . . which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country").

71. 83 U.S. (16 Wall.) 36 (1873).

72. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1815 (2008).

and the originalist answer would be to follow its living-traditionalist command.[73]

But it's also possible, and in my view more likely, that the Fourteenth Amendment was more backward-looking.[74] The *Corfield* rights were rights to which citizens had been entitled "at all times" since the Founding;[75] they were "rights of Englishmen," as Justice Bradley put it in his *Slaughter-House* dissent, "traditionary rights and privileges" which Americans had "inherited . . . from their ancestors."[76] On this account, new rights couldn't be added to the mix; the tradition was a bounded set rather than a growing thing. If so, the Fourteenth Amendment was both a radical and a conservative measure: radical in protecting the citizenship rights of *all* Americans,[77] and conservative in protecting only those rights that American citizenship already guaranteed.

II. THE CRITIQUE OF ORIGINALISM

A. Was Dobbs *Bad Originalism?*

Turn now to the critique *of Dobbs'*s originalism. The Court's critics have been quick to accuse it of getting its history wrong,[78] suggesting that a more careful look would be more sympathetic to abortion rights, even on strict originalist grounds. But some of these critiques, whether made by eminent scholars or by learned societies (such as the American Historical Association, the Organization of American Historians, and the American Society for Legal History),[79] are quite astonishing in their form of argument.

---

73. Baude, Campbell & Sachs, *supra* note 19, at 1247–49.

74. *Id.* at 1249–50.

75 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3230).

76. *Slaughter-House Cases*, 83 U.S. at 114 (Bradley, J., dissenting).

77. *See* U.S. CONST. amend. XIV, § 1 (including as citizens "*All* persons born or naturalized in the United States, and subject to the jurisdiction thereof" (emphasis added)).

78. *See* sources cited *supra* note 14.

79. *See History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the AHA and the OAH,* AM. HIST. ASS'N (July 6, 2022), https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah

Many make some version of the following claim. Prior to 1868, some states still followed the common law rule whereby no indictment lay for an abortion prior to quickening, "that moment when the embryo gives the first physical proof of life."[80] Other states had restricted this practice by statute in the first half of the nineteenth century. Justice Alito argues that more did, his critics say that fewer did, and the debate is rather contentious.[81]

The existence of this debate is puzzling, because *Dobbs*'s critics don't really hang their hats on the quickening rule;[82] "the first physical proof of life"[83] has always come well before viability, and with modern technology it arrives quite early in pregnancy.[84] But what's more puzzling is what's entirely missing from this debate: a coherent explanation of *why any of this quickening business matters*. If chewing gum wasn't prohibited in most states prior to 1868, that doesn't show that a right to chew gum was deeply rooted in this Nation's history and tradition, much less that chewing gum was a fundamental right of citizenship at general law. It just shows that most states chose not to prohibit it at the time. Likewise, burglary was at common law restricted to intrusions at night, but daytime burgling wasn't seen to be a privilege of American citizenship.[85]

[https://perma.cc/FAB4-QUE2] [hereinafter AHA Statement]; *see also id.* (listing signatories). For full disclosure, I am no longer a member of any of the listed groups.

80. Brief for *Amici Curiae* American Historical Ass'n & Organization of American Historians in Support of Respondents at 7, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (quoting State v. Cooper, 22 N.J.L. 52, 54 (1849)); *accord* AHA Statement, *supra* note 79.

81. *Compare, e.g., Dobbs,* 142 S. Ct. at 2252–53, *with* Tang, *supra* note 14, at 78–83.

82. One potential exception may be Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban,* 75 STAN. L. REV. 1092, 1097–98 (2023).

83. State v. Cooper, 22 N.J.L. (2 Zab.) 52, 54 (1849); *accord* Evans v. People, 49 N.Y. 86, 90 (1872) (pointing to "the first clearly marked and well[-]defined evidences of life").

84. *See* Scott Frothingham, *Your 6-Week Ultrasound: What to Expect,* HEALTHLINE (Oct. 20, 2022), https://www.healthline.com/health/pregnancy/6-week-ultrasound [https://perma.cc/CPG2-GBF6] ("Your embryo has not yet developed a fully-formed heart at 6 weeks, but you may hear a cardiac pulse on the ultrasound.").

85. *See* Theodore E. Lauer, *Burglary in Wyoming,* 32 LAND & WATER L. REV. 721, 731–32 (1997); *cf.* Tang, *supra* note 82, at 1112 (rejecting putative rights "to drink through straws, jump rope, [or] write in cursive"). Even a uniform distinction between daytime

In identifying these privileges, what matters isn't just whether states *did* ban chewing gum or daytime burglaries, but whether the American legal system thought they *could*.[86] That is, we'd want to know whether the law regarded chewing gum and daytime burglary as among the inalienable rights of American citizens, "of which no law can divest them,"[87] or among the "fundamental positive rights" that legislatures hadn't been granted power to infringe, akin to "the right to trial by jury," "the rule against ex post facto laws,"[88] or "the freedom of the press."[89] Rights like these might be subject to state regulation, but they were thought to be immune from state abridgment—just as *Meyer v. Nebraska*[90] later understood the rights "to marry, establish a home and bring up children, . . . privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[91]

On this score, the evidence on abortion is so lopsided as to make the current scholarly debate seem perverse. After all, this isn't a case of applying old understandings to new questions never before debated.[92] If the early-nineteenth-century statutes had really infringed a determinate privilege of American citizenship,[93] one

---

and nighttime burglaries might thus be insufficient on its own—as would a "uniform" distinction between pre- and post-quickening abortions. *Id.* at 1113.

86. *See Dobbs*, 142 S. Ct. at 2255; Robert J. Pushaw, Jr., *Defending* Dobbs*: Ending the Futile Search for a Constitutional Right to Abortion*, 60 SAN DIEGO L. REV. 265, 303 (2023) (distinguishing the absence of punishment from the presence of a constitutional right).

87. Jud Campbell, *Natural Rights and the First Amendment,* 127 YALE L.J. 246, 282 (2017) (quoting Congressional Debates (Jan. 21, 1791) (statement of Rep. John Vining), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 340 (William Charles DiGiacomantonio et al. eds., 1995)).

88. *Id.* at 287.

89. *Id.* at 288; *accord id.* at 289–90.

90. 262 U.S. 390 (1923).

91. *Id.* at 399.

92. *E.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (applying the Fourth Amendment to infrared thermal imaging); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (asking how far zoning laws can require household consanguinity); *see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

93. *See generally* Jud Campbell, *Determining Rights,* 138 HARV. L. REV. (forthcoming 2025) (on file with author) (distinguishing determinate from underdeterminate rights).

might expect them to have provoked serious constitutional objections in the states, just like state infringements of the unincorporated right to keep and bear arms.[94] Yet courts applying the common law quickening rule noted that statutes could override it,[95] and courts applying these statutes raised *no* constitutional objections.[96] Had objections been raised elsewhere, such as before legislatures or the legal public, the *Dobbs* Court surely would have heard about them. Yet the majority knew of "no state constitutional provision, no statute, no judicial decision, no learned treatise"[97] objecting on these grounds, and the dissent fared no better.[98]

(One *Dobbs* critic has described this claim as "historically debatable,"[99] offering two counterexamples from 1854: a pseudonymous writer who argued that abortion was wrong but ought to be lawful nonetheless,[100] and a couple whose article in a self-published journal urged that "every woman has the inherent and inalienable right to choose" and that "any law, or constitution that denies, or violates this right, is a despotism and an outrage."[101] The latter is the sort of sentiment we'd need to see in the historical record, though prefer-

94. *See, e.g.*, Nunn v. State, 1 Ga. 243, 249 (1846).

95. *See, e.g.*, State v. Cooper, 22 N.J.L. 52, 58 (1849) ("If the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments . . . ."); *id.* at 55–56 (noting statutory restrictions elsewhere); *cf.* Evans v. People, 49 N.Y. 86, 90 (1872) (understanding what "is punished by the [state's] statute" to track the common law rule).

96. *See, e.g.*, State v. Murphy, 27 N.J.L. 112, 114 (1858) (reading a new statute to apply "whether [the fetus] has quickened or not"); State v. Hyer, 39 N.J.L. 598, 599–600 (1877) (same, after the Fourteenth Amendment's ratification).

97. *Dobbs*, 142 S. Ct. at 2254.

98. *See Dobbs*, 142 S. Ct. at 2323, 2324 & n.3 (Breyer, Sotomayor & Kagan, JJ., dissenting) (offering no examples).

99. *See* Tang, *supra* note 14, at 88 n.128.

100. *See id.* at 88 & nn.129–131, 89 & n.132 (discussing W.C. LISPENARD [EZRA REYNOLDS], DR. W.C. LISPENARD'S PRACTICAL PRIVATE MEDICAL GUIDE (Rochester, N.Y., n. pub. 1854); *cf.* LISPENARD, *supra*, at 204 (advertising "Dr. Lispenard's Italian Hair Invigorator"). Reynolds might be read as asserting a claim about existing law, but more plausibly he asserted "a moral, rather than legal, right." Tang, *supra* note 14, at 88 n.128.

101. Tang, *supra* note 14, at 89 & n.136 (quoting and discussing T.L. Nichols & M.S.G. Nichols, *A New Philosophical Dictionary*, NICHOLS' J., Sept. 9, 1854, at 10, 11).

ably from those whom contemporaries saw as having real legal expertise.[102] So the fact that it was delivered in the course of condemning "the perjury and slavery of marriage,"[103] by a pair of water-cure enthusiasts living in a free-love anarchist utopian community on Long Island,[104] diminishes its force as evidence of a "real public dialogue advocating a woman's right to choose"[105]—let alone evidence of this right's having *already* been the law.)

Alternatively, rather than being a "legally determinate right" on its own, a right to abortion might be inferred from some "underdeterminate"—and therefore more easily regulable—principle of individual autonomy.[106] In modern times, abortion has indeed been defended as part of "the right 'to be let alone,'"[107] or of "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."[108] But such generic privileges, precisely because they weren't "legally determinate," were more subject to legislative regulation for "the health, good order, morals, peace, and safety of society"[109]—a quasi–rational basis review that Mississippi's statute easily satisfies.[110]

In some ways, Justice Alito's efforts to show a widespread prohibition of pre-quickening abortion may have done the Court's opinion a disservice. Rather than making a point necessary to win, it

---

102. *Cf.* William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. LEGAL STUD. 178, 196 (2023) (defining legal experts as "those whose understandings of a community's rules are regarded by its members as good evidence of *their own* commitments and practices").

103. *See* Nichols & Nichols, *supra* note 101, at 11.

104. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 115 (3d ed. 2012).

105. Tang, *supra* note 14, at 91; *see also id.* at 91 n.146 (citing *id.* at 87–90).

106. *See* Campbell, *supra* note 93 (manuscript at 49 n.317); *see also id.* (manuscript at 46–47).

107. Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))

108. *Id.* (italics omitted).

109. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87 (1873) (Field, J., dissenting); *see* Campbell, *supra* note 93 (manuscript at 46–47, 49 n.317).

110. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (2022).

was aimed at making the rubble bounce—showing that pre-viability abortion was so very far from being a *right* as to have often been a *crime*.

But that also goes very far beyond what anyone needs to show. The majority's task in *Dobbs* wasn't to show that "*no one in America* thought of access to abortion as a right,"[111] or that there was "an ironclad consensus of state laws punishing abortion throughout pregnancy, an actual history of enforcing those laws in just that way, and the utter absence of any public complaint that such laws violated a woman's right to have an abortion";[112] this gets the burden of historical proof almost precisely backwards. What the *advocates* of an unenumerated right have to show is that state restrictions of the right were *prohibited,* not just *absent.* That is, they'd have to show the asserted right to be deeply rooted in the nation's history and tradition—or, more accurately, to be a privilege of citizenship, inalienable or protected by fundamental positive law (written or customary), and existing "at all times" since the Founding. While evidence of such customary law can be hard to weigh,[113] we should expect to find not only that state laws generally protected such a right, but also that contrary legislation faced objections from legal authorities concerned about infringing the right. Both the majority and the dissent in *Dobbs* searched for such evidence, and both came up dry.

The point here isn't just to be stingy about rights, but to avoid plain misreadings of old common law rules. If the Court in 1973 had announced a constitutional right to chew gum or to burgle in daylight, we could overturn that decision as egregiously wrong without needing an "ironclad consensus" of states' banning such things. It'd be enough to note the absence of any plausible customary-law consensus that they *couldn't.*

---

111. Tang, *supra* note 14, at 88.

112. *Id.* at 91.

113. *Cf.* William Baude & Robert Leider, *The General Law Right to Bear Arms,* 99 NOTRE DAME L. REV. 1467, 1492–95 (2024) (describing confusion among courts and commentators about the customary-law nature of the inquiry in *N.Y. State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022)).

B. Does Dobbs *Show Originalism To Be Bad?*

This leaves the critique of *Dobbs*'s originalism in substance: that even if its history is largely correct, we shouldn't be bound by that history, which looks back before women could vote, before the Reconstruction Amendments, even before America was founded—perhaps "as far back," the joint dissenters remarked, "as the 13th (the 13th!) century."[114]

But whether we're bound by that history is a passing strange way to describe the outer limits of rules imposed by the past. If the Fourteenth Amendment had never existed, or if it'd said nothing at all about individual rights, then for good or ill our society would plainly be *less,* rather than more, constrained by the hidebound decisions of past generations.

So the dissent in *Dobbs* tries to hedge its bets on originalism. The dissenters correctly distinguish between an original rule and its present applications, arguing that "applications of liberty and equality can evolve" even "while remaining grounded" in old "constitutional principles."[115] As they see it, the Framers of the Fourteenth Amendment didn't "define rights by reference to the specific practices existing at the time," but rather "in general terms, to permit future evolution."[116] That's a standard originalist move: "two Senators from each State includes Hawaii, though Hawaii wasn't a state at the Founding";[117] a "'19th-century statute criminalizing the theft of goods' applies fully 'to the theft of microwave ovens'";[118] and so on. But the success of that move depends on the historical claim of linguistic generality being *true,* and on the benighted Framers fortunately having chosen the *right* principle to fix. If the Amendment's Framers didn't "perceive women as equals,

---

114. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2323 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

115. *Id.* at 2326.

116. *Id.* at 2325.

117. William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto,* 136 HARV. L. REV. 861, 875–76 (2023) (footnote and internal quotation marks omitted).

118. *Id.* at 880 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 323 (1988) (Scalia, J., concurring in part and dissenting in part)).

and did not recognize women's rights,"[119] that might be a good historical *explanation* for why they failed to make more specific provision for them—and why the privileges-of-citizenship principle they *did* enact might have failed to include abortion, even as applied to modern facts.[120]

It's a complex question how far the principles in the Fourteenth Amendment "recognize women's rights,"[121] at least in the way the *Dobbs* dissent envisions. But understanding the Amendment to secure preexisting rights, rather than to encourage judges to create new ones, wouldn't represent any commitment to preserving the past at the future's expense. The first task the Reconstruction Congress faced was to include millions of now-free Americans within existing categories of legal protection, securing rights to which these Americans *already* had a claim by virtue of their U.S. citizenship. Congress had to work hard enough to gather support for rights its members already knew about and liked, let alone for any "charter protecting the right of all persons to enjoy liberty as we learn its meaning."[122]

---

119. *Dobbs,* 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting).

120. Thus, if "most women in 1868 also had a foreshortened view of their rights," *id.*, that might be because they accurately understood the common law to fail to confer certain rights. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140–42 (1873) (Bradley, J., concurring). Or it might be because they and others, "due to outright bigotry and prejudice," Tang, *supra* note 82, at 1119, made "factual errors" about the scope of their rights, *id.* at 1119 n.151. But this widespread-factual-error claim is hard to square with the lighter treatment of pre-quickening abortion's having been "a conscious choice, not inadvertence," *id.* at 1113—or with the much stronger original evidence for other rights no less subject to bigotry and prejudice, such as interracial marriage. *See* David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause,* 42 HASTINGS CONST. L.Q. 213, 216 (2015) (arguing that constitutional protection for interracial marriage was a common position among "Republican officials—including virtually *every* Republican judge to face the question"). On claims that a more general right of autonomy was a privilege of citizenship, and that such autonomy entails abortion rights, see *supra* text accompanying notes 106–110.

121. *Dobbs,* 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see* Baude, Campbell & Sachs, *supra* note 19, at 1241–43 (discussing *Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130 (1873)).

122. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

Of course, if we want to enact new rights, we still can, as the electoral process since *Dobbs* has repeatedly showed.[123] If we don't, we don't. Other countries have changed their laws on abortion through ordinary elections and legislation;[124] if the absence of constitutional abortion rights didn't bind them to the past, why should it bind us? Only if opposition to abortion were somehow politically unreal, if pro-life movements were forever condemned to the role of antediluvian holdovers or shadowy external "forces"[125] and not ordinary present-day political actors, could we see the *absence* of constitutional constraint as the dead hand of the past.

But disagreements in the present, not any errors of the 1860s, are what prevent a nationwide settlement on abortion today. And to the extent that anything can "call[] the contending sides of a national controversy" to "accept[] a common mandate rooted in the Constitution,"[126] as *Casey* infamously suggested, it would be a mandate actually rooted in the Constitution, not one subsequently imposed.

---

123. *Compare* Melissa Murray & Katherine Shaw, Dobbs *and Democracy,* 137 HARV. L. REV. 728, 774–75 (2024) (discussing a variety of pro-choice electoral successes post-*Dobbs*, but suggesting that this evinces public disagreement with the majority's "cramped vision of democracy," *id.* at 774), *with* David B. Rivkin Jr. & Jennifer L. Mascott, Opinion, *The Supreme Court Reclaims Its Legitimacy,* WALL ST. J. (June 24, 2022, 1:54 PM), https://www.wsj.com/articles/supreme-court-reclaims-legitimacy-abortion-roe-v-wade-dobbs-v-jackson-women-health-reproductive-rights-life-originalism-justice-alito-11656084197 [https://perma.cc/ZUT6-FSMV] (emphasizing that "*Dobbs* imposes no policy" but "simply states that abortion is not among those individual rights protected by the federal Constitution" and returns "this contentious issue . . . to the state legislatures).

124. *See, e.g.,* Abortion Act 1967, c. 87 (UK).

125. *Cf.* AHA Statement, *supra* note 79 (discussing "the 19th-century forces that turned early abortion into a crime").

126. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992); *see also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time,* 78 NOTRE DAME L. REV. 995, 1038 (2003) (criticizing *Casey* for depicting "opposition to its entrenchment of *Roe,* to its grand theory, or to the Court, as opposition to the rule of law itself").

THE LEVELS-OF-GENERALITY GAME: "HISTORY AND TRADITION" IN THE ROBERTS COURT

REVA B. SIEGEL*

ABSTRACT

This Article argues that what explains the turn to the past in the history-and-tradition decisions of the Roberts Court is not a method of interpretation, but instead a justification for the Court's turn to the past. In Dobbs v. Jackson Women's Health Organization *and* New York State Rifle & Pistol Ass'n v. Bruen*, the conservative Justices claim that interpreting the Constitution through history and tradition—when described in granular factual detail—best constrains judicial discretion by tethering law to objective criteria separate from the interpreter's policy preferences. Justice Scalia long ago advanced this claim, and began a decades-long debate over "levels of generality" when he urged judges "to adopt the most specific tradition as the point of reference."*

The Article contrasts this belief—that tying constitutional interpretation to history can constrain the expression of judicial values—with an alternative account. An interpreter's appeal to facts about the nation's past in constitutional argument often expresses values—forms of argument I have called "constitutional memory" claims. What appear in constitutional argument as positive, descriptive claims about the past are often normative claims about the Constitution's meaning. In this Article, I show

* Nicholas deB. Katzenbach Professor of Law, Yale Law School. This Article, initially written before the end of the 2023 Term, benefitted from lively discussion at a symposium on "The Future of History and Tradition" at Harvard Law School, and then from presentation in full draft at the Yale Law School Faculty Workshop and the Stanford Law School Faculty Workshop. For a close reading, I thank Robert Post. And for valued conversation and research assistance, I thank Remington Hill and Emma LeBlanc, as well as Griffin Black, Colin Dunkley, and Emma Li.

how my account of constitutional memory identifies the expressive role of conservative historicism, counters the judicial-constraint justification, and offers new perspectives on the levels-of-generality claims associated with it.

The Article opens by examining puzzles of method and justification presented by Dobbs *and* Bruen *during the 2021 Term. It concludes with a late-added section that samples the Justices debating the Article's judicial-constraint and levels-of-generality themes in cases of the 2023 Term—in particular, in the Second Amendment case of* United States v. Rahimi. *The Article's account of* Dobbs, Bruen, *and* Rahimi *demonstrates that we are all living constitutionalists now—but, crucially, not all living constitutionalism is the same. A conclusion identifies reasons why the Justices who present appeal to the past as claims of judicial constraint may engage in anti-democratic forms of living constitutionalism. It contrasts their reasoning with state court judges who interpret liberty guarantees in more democratically inclusive terms than* Dobbs *has.*

INTRODUCTION

Appeal to history and tradition has escalated in the Roberts Court. Why? And why does the Roberts Court appeal to history and tradition in exactly those cases in which it is *changing* the law?

This Article argues that what explains the turn to the past in the history-and-tradition decisions of the Roberts Court is not a *method* of interpretation, but instead a *justification* for the Court's turn to the past.[1] In *Dobbs v. Jackson Women's Health Organization*[2] and *New York State Rifle & Pistol Ass'n v. Bruen*,[3] the conservative Justices claim that interpreting the Constitution through history and tradition—when described in granular factual detail—best constrains judicial discretion by tethering law to objective criteria separate from the interpreter's policy preferences.[4] Justice Scalia long ago advanced this claim,[5] and began a decades-long debate over "levels of generality" when he urged judges "to adopt the most specific tradition as the point of reference."[6] He contended that appeals to the past separate law and politics more authoritatively than forms of doctrine that reason from principle or values, which he pejoratively dismissed as "living constitutionalism."[7]

The Article contrasts this belief—that tying constitutional interpretation to facts about the past can constrain the expression of

---

1. *See infra* Parts II & III.

2. 142 S. Ct. 2228 (2022) (overturning the abortion right).

3. 142 S. Ct. 2111 (2022) (striking down licensing restrictions under the Second Amendment).

4. *See infra* Part III.

5. *See infra* text accompanying notes 67–68.

6. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.) (plurality opinion); *infra* Part III.

7. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 803–05 (2010) (Scalia, J., concurring) (arguing that "the historically focused method" is the "best means available" to "restrain[] aristocratic judicial Constitution-writing"); *id.* at 805 (contending that living constitutionalism "deprives the people of th[e] power [to adopt or reject rights], since whatever the Constitution and laws may say, the list of protected rights will be whatever courts wish it to be"); *infra* text accompanying notes 128–131 (quoting Justice Scalia).

judicial values—with an alternative account. An appeal to facts about the past in constitutional argument can directly or indirectly express values—forms of argument I have called "constitutional memory" claims.[8] In this Article, I show how my account of constitutional memory undermines the judicial-constraint justification for conservative historicism, as well as the levels-of-generality claims associated with it. Once we understand the logic of constitutional memory, we can appreciate how the Court's turn to the past in cases like *Dobbs* or *Bruen* is a mode of expressing value, and not—as the Justices claim—constraining value. Whatever Justice Scalia might have thought when he initially advanced the claim that tying doctrine to "the most specific tradition" would constrain judicial discretion, after decades of debate Justice Scalia came to associate levels of generality with outcomes in culture-war conflict, as he likely did from the beginning.[9]

Drawing on the work of liberal and conservative constitutional law scholars, the Article probes judicial-constraint claims in history-and-tradition cases in several steps. First, it shows that scholars have difficulty identifying a content-independent interpretive method that explains the Court's turn to the past in *Dobbs* or *Bruen*.[10] Second, it shows that these decisions do offer a justification for turning to the past: they claim that tethering doctrine to facts about the nation's past constrains judicial discretion, a first-generation justification for originalism that prominent academic originalists question today.[11] Third, to probe the discretion the turn to the past provides judges, the Article examines the judicial-constraint claim expressed in the decades-long debate over "levels of generality."[12] Changing the level of generality at which judges characterize the past can be outcome-determinative and is one of many forms of

8. *See infra* note 20 (identifying some of the author's recent scholarship on constitutional memory); *infra* Part I.

9. *See infra* text accompanying note 131 (quoting Justice Scalia on the historical method and "the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty").

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part V.

discretion judges have in constructing the past to which they defer. These claims on the past *conceal* more than *constrain* judges' value judgments.[13]

In sum, reasoning from the past in interpreting the Constitution does not insulate judges from making value-based judgments. What appear in constitutional argument as positive, descriptive claims about the past are often normative claims about the Constitution's meaning—that is, constitutional memory claims. The Article opens by illustrating this logic at work in *Dobbs* and *Bruen* during the 2021 Term. It concludes with a late-added section that samples the Justices debating the Article's themes in cases of the 2023 Term—in particular, in the Second Amendment case of *United States v. Rahimi*.[14]

In *Rahimi*, eight members of the Court upheld 18 U.S.C. § 922(g)(8), a federal law disarming persons subject to domestic-violence restraining orders, under the Second Amendment. The Fifth Circuit invalidated the law as inconsistent with tradition under *Bruen*; but the Supreme Court reversed, avoiding the glare of publicity attending that result ("repugnant"[15]) by moving up a level of generality and upholding the federal law as "consistent with the *principles* that underpin our regulatory tradition."[16] The majority then splintered into concurring opinions, with the conservatives resisting the turn to principle they had just sanctioned.[17] The case provides a window on the Justices discussing levels of generality and revising elements of history-and-tradition doctrine with an eye to preserving their discretion to distinguish the *Rahimi* case from future cases on their Second Amendment docket.

In concluding, I reassess the conservatives' claim of methodological superiority. This Article demonstrates that *we are all living*

13. *See infra* Parts IV & V.

14. 144 S. Ct. 1889 (2024); *see infra* Parts I & VI.

15. Paul Waldman, Opinion, *How the Supreme Court's Next Gun Case Could Deal a Blow to Originalism*, WASH. POST (Oct. 4, 2023, 6:00 A.M. EDT), https://www.washingtonpost.com/opinions/2023/10/04/rahimi-supreme-court-guns-domestic-violence [https://perma.cc/A3J8-KY34].

16. *Rahimi*, 144 S. Ct. at 1898 (emphasis added).

17. *See infra* text accompanying notes 147–148.

constitutionalists now[18]—but, crucially, not all living constitutionalism is the same. I identify several ways in which the Justices who present appeal to the past as claims of judicial constraint engage in *anti-democratic* forms of living constitutionalism. To mention only one here: History-and-tradition decisions in which judges deny they are engaged in normative reasoning and tie changes in the law to facts about the past, claiming constraint as they reason from value, lack transparency. Normative reasoning in this form can mislead the public and inhibit democratic oversight.[19] In this critically important sense and in others, the history-and-tradition decisions of the Roberts Court are *less* constrained—and pose a greater threat to democracy—than the cases the Court is attacking.

I. CONSTITUTIONAL MEMORY

In a series of articles that began before *Dobbs* and *Bruen*, I have been writing about claims on the past in constitutional argument as *constitutional memory* claims.[20]

"Constitutional memory" focuses attention on the special roles that claims about the past play in constitutional argument and how they may differ from claims of historical fact. Americans arguing

18. *See infra* note 169 and accompanying text.

19. *See infra* Part VII.

20. For a sampling of these works, see Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. PUB. POL'Y 19 (2022) [hereinafter Siegel, *Politics*]; Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1175 (2023) [hereinafter Siegel, *Memory Games*]; Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 920 (2023) [hereinafter, Siegel, *How "History and Tradition" Perpetuates Inequality*]; and Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99, 127–46 (2023) [hereinafter Siegel, *The History of History and Tradition*]. *See also* Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2025) [hereinafter Siegel & Ziegler, *Comstockery*] (showing how popular mobilization against the Comstock Act helped forge modern understandings of free speech and sexual freedom law, and recovering from these lost constitutional memories a different understanding of the nation's history and traditions).

about the Constitution—on the left and on the right, inside and outside of courts—often make claims on the past *as guides to the future*. These claims on the past in constitutional argument are value-laden: they express views about who we are or how we should live together—ultimately, about what the Constitution requires. In interpreting the Constitution, judges "tell stories about the nation's past experience to clarify the meaning of the nation's commitments, to guide practical reason, and to help express the nation's identity and values."[21] These claims both reflect and produce constitutional memory.

To consider a recent prominent example, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*),[22] the Court justified striking down race-conscious admissions policies in an opinion that focused on the Court's decision to repudiate school segregation in *Brown v. Board of Education*.[23] The majority recalled that "[f]or almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* the separate but equal regime that would come to deface much of America."[24] But in *Brown*, the Court "overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government."[25] This story about the past, the Court argued, led ineluctably to its decision in *SFFA*. "The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education 'must be made available to all on equal terms,'"[26] and so fidelity to *Brown* required invalidating race-conscious admissions at Harvard and UNC.[27] The dissenting Justices challenged the majority's constitutional memory claim. They disagreed that *Brown* rested on the principle

21. Siegel, *Politics*, *supra* note 20, at 21 (emphasis added).
22. 143 S. Ct. 2141 (2023).
23. *Id.* at 2159–63; Brown v. Bd. of Educ., 347 U.S. 487 (1954).
24. *SFFA*, 143 S. Ct. at 2159 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).
25. *Id.* at 2160 (emphasis added) (citing *Brown*, 347 U.S. at 494–95).
26. *Id.* (quoting *Brown*, 347 U.S. at 493).
27. *Id.* at 2175.

of colorblindness. Just as importantly, they insisted that the majority's claim about the past had *selectively* recounted—and whitewashed—American history, minimizing all the ways that race discrimination persisted after *Brown* and entrenched race inequality that, the dissenters argued, needed race-conscious redress.[28] Wherever one comes out in this argument, *SFFA* illustrates how debates over questions of constitutional law can take the form of competing narratives about the nation's past. Parties to these debates point to facts about the past to justify acting one way rather than another.

Claims on the past in constitutional argument, *whether true, false, or selective*, are often value-laden, normative claims: These appeals to the community's memory of the past help guide its path into the future and *legitimate the exercise* of government authority. The *SFFA* majority tells one story, appealing to America's decision to reject racial segregation in *Brown* to justify its decision to invalidate race-conscious admissions. The dissent counters, emphasizing different facts about the past to justify its claim that race-conscious admissions are just and constitutional.

As these brief observations suggest, and I have elsewhere demonstrated, appeals to the past are central to constitutional arguments both on the left and the right.[29] In what follows, I analyze some of the distinctive ways that appeals to the past—to constitutional memory—play a central part in originalism, and in claims about the nation's "history and tradition" in recent cases of the Roberts Court.

---

28. *Id.* at 2225–26 (Sotomayor, J., dissenting). For an account showing how claims about *Brown*'s meaning have diverged, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

29 . Just as conservatives and progressives advance competing constitutional memory claims in the clash over affirmative action, they make competing memory claims in the conflict over abortion. *See, e.g.*, Reva Siegel, Dobbs*, the Politics of Constitutional Memory, and the Future of Reproductive Justice*, BALKINIZATION (Jan. 22, 2023, 9:30 AM), https://balkin.blogspot.com/2023/01/dobbs-politics-of-constitutional-memory.html [https://perma.cc/SG9G-Y6TF] ("Constitutional memory is not only an instrument for justifying repression. It can also enable critique and resistance. And much of the history we have examined can be mobilized to anti-subordination ends."). For a wide-ranging account of the claims on the past in constitutional debates over abortion, see Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 171 (2024).

II. APPEALS TO "HISTORY AND TRADITION" IN THE ROBERTS COURT

As we have seen, claims on constitutional memory play an important role in legitimating the exercise of government power. On the Supreme Court that President Trump helped fashion, an appeal to history and tradition justifies *rupture—dramatic changes*—in doctrine. In *Dobbs*, the Court overturned a half-century of case law protecting the abortion right because the Court declared that right inconsistent with history and tradition—with laws criminalizing abortion in the century before *Roe*.[30] In *Bruen*, the Court rejected a decade of cases that used familiar doctrinal tests to protect the right to self-defense and instead directed judges to determine whether a public safety law burdening the right "is consistent with the Nation's historical tradition of firearm regulation"[31]—an inquiry requiring research into laws at the Founding and reasoning by analogy.

How is it that an appeal to history and tradition justifies radical change in the law? In the two years since the upheavals in the law produced by *Bruen* and *Dobbs*, law professors have been asking: Do the Roberts Court's appeals to history and tradition to change the law rest on any identifiable interpretive method (including, potentially, originalism)? The answer seems to be no, at least no method upon which scholars can agree.

Consider the Court's decision reversing the abortion right. Is the Court's decision to overturn *Roe* and fifty years of case law in *Dobbs* an act of fidelity to the original meaning of the Fourteenth Amendment? Does *Dobbs* ever ask how the Americans who ratified the

---

30. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252–54 (2022) (overturning *Roe* on the grounds that the right it protected is not "deeply rooted in the Nation's history and traditions"); *id.* at 2276–77 (rejecting Americans' reliance interest in a half-century of Supreme Court cases recognizing a woman's right to decide whether to continue a pregnancy free of government coercion).

31. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022); *see also id.* at 2127 (discussing the "historical tradition that delimits the outer bounds of the right to keep and bear arms"). For discussion of the analogical method, see Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795 (2023).

Fourteenth Amendment in 1868 understood the meaning of "liberty" guaranteed by its Due Process Clause? No, and yet the *Dobbs* Court *does* ask how many states banned abortion in 1868, when the Fourteenth Amendment was ratified, and emphasizes that a majority of states did: 28 of 37.[32] We *might* surmise that a count of states banning abortion in 1868 indicates how Americans at the time of the Fourteenth Amendment's ratification expected the Amendment to apply, *but the Court offers no evidence that nineteenth-century Americans in fact drew any connection between then-existing abortion laws and the Constitution*.[33] Another point against the originalist reading: *Dobbs* justifies overturning *Roe* by emphasizing the laws banning abortion in the century *after* the Fourteenth Amendment's ratification and before the Court's 1973 decision in *Roe*—a point that Professor Sherif Girgis analyzes in an article called *Living Traditionalism*.[34] If *Dobbs* is an account of the Fourteenth Amendment's original meaning, why does the Court put great weight on lawmaking in the century *after* the Amendment's ratification? What does a century of *post*-ratification practice prove?

In fact, in *Dobbs* the Court makes no claim to follow the original meaning of the due process liberty guarantee or of the privileges or immunities clause, but instead invokes *Washington v. Glucksberg*[35] to justify overruling *Roe*.[36] Decided in 1997, *Glucksberg* held that

---

32. *Dobbs*, 142 S. Ct. at 2252–53. *Dobbs*'s critics contest this state count. Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65 (2023). The majority itself acknowledges that there may be some ambiguity in the count. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2253 n.34; *id.* at 2259–60.

33. Clarke Forsythe, a long-time *opponent* of *Roe*, observes that "no data—no legislative history, no committee reports, no speeches, no newspaper articles, no memoranda, no personal papers, no letters—have ever been cited to suggest that the sponsors mentioned abortion or the unborn child at any time during the discussion of the 14th Amendment." Clarke D. Forsythe, *The 14th Amendment's Personhood Mistake*, NAT'L REV. (Dec. 21, 2023, 3:43 PM), https://www.nationalreview.com/magazine/2024/02/the-14th-amendments-personhood-myth [https://perma.cc/XY3L-768X].

34. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1485–86 (2023); *id.* at 1513 (pointing out that the *Dobbs* majority rebutted the dissent's charge that it was imperiling other rights by emphasizing that "its 'review of the Nation's tradition extends . . . for more than a century after 1868'" (quoting *Dobbs*, 142 S. Ct. at 2260)).

35. 521 U.S. 702 (1997).

36. *Dobbs*, 142 S. Ct. at 2242.

physician-assisted suicide was not protected by the due process liberty guarantee because the practice was not "objectively, 'deeply rooted in this Nation's history and tradition.'"[37] Though the Court in *Glucksberg* invoked "history and tradition," it made no claim to express the Fourteenth Amendment's original understanding—that is, the *Glucksberg* majority did not offer state law at "the time the Fourteenth Amendment was ratified" as any indication of the Constitution's original meaning.[38] Worse yet, *Glucksberg recognized the abortion right as part of the history and traditions of the American people*.[39] *Dobbs* never mentions this inconvenient fact as it claims that *Glucksberg* requires *Roe*'s overruling.[40]

The *Dobbs* Court insisted its decision did not cast doubt on other substantive due process cases, emphasizing that these cases did not

37. *Glucksberg*, 521 U.S. at 720–21 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

38. *Id.* at 705–07.

39. *Id.* at 720, 726–28; *see* Siegel, *History of History and Tradition*, *supra* note 20, at 133 n.157 ("Part II of the *Glucksberg* opinion, which sets forth the Court's reasoning about the liberty guarantee beyond the case of assisted suicide, begins by listing many rights the Court has recognized in substantive due process cases. The majority . . . specifically cites *Casey*'s abortion right as within America's history and traditions and thus included in 'the "liberty" specially protected' by the Due Process Clause." (quoting *Glucksberg*, 521 U.S. at 720)). Members of the *Glucksberg* majority insisted on language designed to protect prior substantive due process precedent, including *Casey*. *See* Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization: A History-and-Tradition Right to Healthcare Access After* Dobbs *and the 2023 Term*, 111 VA. L. REV. (forthcoming 2025) (manuscript at 39 & n.250), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881886 [https://perma.cc/7L5W-AKM8] (discussing significance of *Glucksberg*'s drafting history); Marc Spindelman, Washington v. Glucksberg*'s Original Meaning*, 72 CLEVELAND ST. L. REV. 981, 1018-19 & n.191 (2024) (describing O'Connor's efforts to protect *Casey* in the drafting of *Glucksberg*). Justice O'Connor led the way in protecting *Casey* in the drafting of *Glucksberg*, as she was replaying a conflict with Chief Justice Rehnquist and Justice Scalia that began almost a decade earlier in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). *See* Joan Biskupic, *The Inside Story of How Sandra Day O'Connor Rebuffed Pressure from Scalia and Others to Overturn* Roe v. Wade, CNN POLS. (Sept. 13, 2024, 11:51 AM EDT), https://www.cnn.com/2024/09/13/politics/abortion-supreme-court-oconnor-scalia-rehnquist/index.html [https://perma.cc/VK3Z-W6GQ].

40. *Dobbs*, 142 S. Ct. at 2242.

concern "abortion," "fetal life," or "'potential life.'"[41] Distinguishing the other cases on these grounds suggested *Dobbs*'s fundamental concern was not historical, but instead moral.

If this sounds confusing, it is because it *is* confusing. Prominent originalists have declared that *Dobbs* is not originalist in method. Professor Lawrence Solum repeatedly called it "living constitutionalism."[42]

Scholars are somewhat more willing to call the Court's Second Amendment decision in *Bruen* originalist in method, but with critical qualifications. *Bruen* requires the government to show that a firearms restriction "is consistent with this Nation's historical tradition of firearm regulation,"[43] that is, to demonstrate by a "historical-analogical method [that] modern [gun] restrictions are 'relevantly similar' to historical forebears."[44] Professors Randy Barnett and Lawrence Solum initially called *Bruen*'s historical-analogue test "nonoriginalist."[45] A published version of their article is more circumspect, asserting that the original meaning of the Second Amendment is "*underdetermina[te]*" and, therefore, that historical analogues are judicial constructions—judge-made standards that

41. *Id.* at 2280 (asserting that "we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion'") (citations omitted); *see id.* at 2261 ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. . . . The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect.").

42. Siegel, *Memory Games*, *supra* note 20, at 1141; Lawrence Solum (@lsolum), TWITTER (May 5, 2022, 5:33 AM), https://twitter.com/lsolum/status/1522162603291643904 [https://perma.cc/92YZ-CUT4] ("Alito's opinion is straight from Scalia's playbook; it is living constitutionalism in its constitutional pluralist flavor from top to bottom."). In this volume, Professor Stephen Sachs argues that *Dobbs* applies *Glucksberg* as an original-law originalist might. Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. & PUB. POL'Y 539, 541–42 (2024).

43. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

44. Blocher & Siegel, *supra* note 31, at 1798 (quoting *Bruen*, 142 S. Ct. at 2132).

45. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition* (unpublished manuscript at 23) (Jan. 26, 2023 version) (on file with author) ("*Bruen* involves both originalist and nonoriginalist elements. The core holding of *Bruen* rests on an originalist foundation, but the historical analogue test is an implementing rule that is not justified by originalist reasoning.").

give the original public meaning of the Second Amendment determinate meaning in particular cases.[46]

But other conservatives dispute the claim that *Bruen* is an example of original-public-meaning originalism.[47] Professor Nelson Lund, an originalist, scathingly points out that the Supreme Court doesn't even pretend to use *Bruen*'s just-announced historical analogue test when, after striking down discretionary "may-issue" gun licensing, *Bruen* affirms that less discretionary "shall-issue" licensing of guns—common in many states—is constitutional.[48] Professor Lund observes "the Court does not provide so much as a shred of evidence that any kind of licensing requirements had ever been imposed on the general population before the 20th century," emphasizing that "the first shall-issue statute was apparently not enacted *until 1961*, whereas discretionary may-issue statutes were enacted *decades earlier*."[49] Lund asks: "Under the Court's announced methodology, how in the world could only the later, rather than the earlier, of two very late 'traditions' reflect the original meaning of the Second Amendment? If there is any plausible answer to that question, it won't be found in the *Bruen* opinion."[50] Justice Breyer's

46. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 448 (2023) ("A direct appeal to history or tradition could also provide a method for constitutional construction in cases of underdeterminacy. For example, in *Bruen*, Justice Clarence Thomas's opinion for the majority used a historical analogue test to determine the validity of contemporary gun control regulations.").

47. Professors Will Baude and Robert Leider contend that the decision is instead an expression of original-law originalism. *See* William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1468–70 (2024).

48. *See* Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 290–300 (2022) (observing that "it's doubtful that the test announced in *Bruen* will prove workable," and a "straightforward approach would have been more creditable, and more workable in future cases, than *Bruen*'s effort to manufacture a historical tradition of gun-free zones out of virtually no historical precedents").

49. *Id.* (emphasis added).

50. *Id.* at 291–92 (emphases added).

dissent spotlights this discrepancy between *Bruen*'s claim to tie law to the nation's historical tradition and its holding.[51]

Critics savaged the *Bruen* Court's frank declaration in footnote 6 that by "historical tradition" the Court does not actually contemplate an inquiry into history as historians understand it. In *Bruen*, the majority brushed away the dissenting justices' objections that judges lack the skills to implement the sweeping historical survey that the majority has declared will replace means-ends scrutiny. With remarkable frankness, the majority explained *that the Court does not actually expect judges to do history as historians do history*. *In making claims about the past, judges will instead do law*: "[I]n our adversarial system of adjudication, we follow the principle of party presentation. Courts are thus entitled to decide a case based on the historical record compiled by the parties."[52] Differently put, the Court reasons from constitutional memory in deciding Second Amendment cases.

A panel of originalist scholars at a recent Federalist Society meeting convened to debate the question "How Originalist is the Supreme Court?"[53] There, Professor Joel Alicea invoked the explanation that Professor Randy Barnett has provided for shifts in the

---

51. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2172 (2022) (Breyer, J., dissenting).

52. *Id.* at 2131 n.6 (majority opinion) (citation and internal quotation marks omitted); *see also* Debra Cassens Weiss, *In 'Scorching' Opinion, Federal Judge Considers Appointing Historian to Help Him in Gun Case*, ABA J. (Nov. 2, 2022, 10:15 AM), https://www.abajournal.com/news/article/in-scorching-opinion-federal-judge-considers-appointing-historian-to-help-him-in-gun-case [https://perma.cc/J4Q4-23WS].

53. How Originalist is the Supreme Court?, Panel at The Federalist Society National Lawyers Convention (Nov. 11, 2023), https://www.youtube.com/watch?v=e7bw1QjWWEM&t=1580s [https://perma.cc/599D-FJK] (featuring: Prof. J. Joel Alicea, Co-Director, Project on Constitutional Originalism and the Catholic Intellectual Tradition, and Assistant Professor of Law, Columbus School of Law, The Catholic University of America; Prof. Randy E. Barnett, Patrick Hotung Professor of Constitutional Law, Georgetown University Law Center, and Founding Director, Georgetown Center for the Constitution; Prof. Richard H. Fallon, Jr., Story Professor of Law, Harvard Law School; Prof. Stephen E. Sachs, Antonin Scalia Professor of Law, Harvard Law School; and Hon. Neomi Rao, U.S. Court of Appeals, District of Columbia Circuit as moderator).

Court's doctrine.[54] Barnett suggests that the Justices might experience themselves as bound (either by their roles or by party presentation) to follow *stare decisis* and yet nevertheless pulled by the "gravitational force" of what they imagine the correct originalist outcome would be, and so change doctrine partly but without completely embracing original-public-meaning originalism.[55]

At this point we can ask: Without any public (much less adversarial) engagement with the historical record, how are judges to "know" what the "correct" "originalist" outcome is in a case that has been briefed under prevailing doctrine, and why might judges feel the pull of an unargued claim so powerfully that it leads them to act in tension with—if not in outright conflict with—their sworn role-obligations as federal officials?

On this account of originalism's "gravitational force," originalism is *not* a value-neutral, content-independent method. Instead, in these circumstances, originalism is a goal-oriented political practice,[56] a way of achieving movement-valued ends.[57] In fact, Professor Joel Alicea has reasoned this way about *Dobbs*: "The goal of overruling *Roe* and *Casey* bound the conservative political movement to the conservative legal movement, and originalism was their common constitutional theory."[58] Alicea is frank that those advocating originalism have goals: Before *Dobbs*, Alicea explained that many conservatives promoted originalism based on what he terms "instrumentalist view[s]," embracing the method as a means to

54. *Id.* at 21:01 (arguing that evaluating "how originalist is the Supreme Court" by "just tak[ing] a look at all the Constitutional cases in [a particular] term and figur[ing] out many of them use originalist methods to get to originalist outcomes" is "actually misguided" despite its "intuitive appeal" "because it overlooks the legitimate role that the party presentation principle and *stare decisis* could play for an originalist Supreme Court").

55. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013); *see also* J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/797Y-L6KU].

56. *See* Siegel, *Memory Games*, *supra* note 20, at 1138–48 (explaining originalism as a goal-oriented political practice).

57. *See id.* at 1141–44.

58. Alicea, *An Originalist Victory*, *supra* note 55.

"achieve various ends."[59] On this reading, *Dobbs* and *Bruen* are the result of the gravitational force of originalism understood as the interpretive practice of goal-oriented, role-constrained, movement-identified judges.[60] *Cases targeted for overturning emerge from movement-party coalitions that appoint judges to the bench.*[61]

In short, scholars on the left and on the right are more confident in characterizing *Dobbs* or *Bruen* as the work of Justices who identify as originalists—as a matter of creed or network—than in agreeing that there is an interpretive method that explains the decisions.

III. CONSERVATIVE HISTORICISM, JUDICIAL CONSTRAINT, AND THE LAW-POLITICS DISTINCTION

In what follows, I argue that what explains the turn to history in these cases is not as an identifiable *method* that directs interpreters how to decide contested constitutional questions but instead a mode of *justification*. Both *Dobbs* and *Bruen* claim that fidelity to the nation's history and tradition in interpreting the Constitution will constrain judicial discretion as traditional forms of doctrine or openly value-based judgment cannot.

In *Dobbs* and *Bruen* the Justices claim that a turn to history constrains judicial discretion by tethering law to "objective" and impersonal criteria that are separate from the interpreter's values and "policy preferences."[62] Quoting *Glucksberg*, *Dobbs* cautioned against

---

59. J. Joel Alicea, Dobbs *and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement [https://perma.cc/LKA2-3RCM].

60. *See* Siegel, *Memory Games*, *supra* note 20, at 1138–61; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 562–68 (2006).

61. For history demonstrating the movement-party roots of *Dobbs*, see Siegel, *Memory Games*, *supra* note 20. For history detailing the movement-party roots of the Court's Second Amendment jurisprudence, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008). For a discussion of the movement roots of the statutes at issue in *Bruen*, see *NRA Achieves Historical Milestone as 25 States Recognize Constitutional Carry*, NRA-ILA INST. LEG. ACTION (Apr. 1, 2022), https://www.nraila.org/articles/20220401/nra-achieves-historical-milestone-as-25-states-recognize-constitutional-carry [https://perma.cc/DG7S-5SLF].

62. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022).

judges allowing "the liberty protected by the Due Process Clause [to] be subtly transformed into the policy preferences of the Members of this Court."[63] "[W]hen the Court has ignored the '[a]ppropriate limits' imposed by 'respect for the teachings of history,' it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner* . . . ." [64] In *Bruen*, the Court urged that historically informed interpretation was more faithful to the Constitution: "*[R]eliance on history to inform the meaning of constitutional text . . . is . . . more legitimate, and more administrable*, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field."[65]

This claim about the turn to the past—that it is a domain of objective facts that offer impersonal constraints on judging—supported originalism's early claims that it could reign in the living constitutionalism of the Warren Court. [66] In *Originalism: The Lesser Evil*,[67] Scalia warned that the "the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for

63. *Id.* at 2247–48 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

64. *Id.* (second alteration in original) (citations omitted) (first quoting Moore v. City of East Cleveland, 431 U. S. 494, 503 (1977) (plurality opinion); and then citing Lochner v. New York, 198 U.S. 45 (1905)).

65. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (second alteration in original) (emphasis added) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010)); *id.* at 2131 (arguing that judges applying "'intermediate scrutiny' often defer to the determinations of legislatures" and "[w]hile that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here"); *see also McDonald*, 561 U.S. at 804 (2010) (Scalia, J., concurring) (arguing that judges looking to history "is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor").

66. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013) ("The first wave of the modern originalist literature came in response to the constitutional decisions of the Warren Court and early Burger Court . . . . The Supreme Court justices were seen as unduly activist—too willing to exercise the power of judicial review and nullify state and federal policies. Originalism was seen by many to be a solution to that problem.").

67. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

the law."[68] For this reason, he observed, an interpretive approach requiring judgments about the Constitution's "fundamental values" risks "judicial personalization of the law"; by contrast, "[o]riginalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[69] This claim that originalism imposes judicial constraints was fundamental to the attack on the Warren and Burger Courts.[70]

Judicial constraint may still be the most politically popular justification for originalism—on the bench and talk radio.[71] But today academic originalists no longer describe their method as promising

---

68. *Id.* at 863.

69. *Id.* at 863, 864.

70. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) ("The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provision and its various amendments."); Whittington, *Originalism: A Critical Introduction*, *supra* note 66, at 391 ("Advocates of originalism during the Reagan era were almost uniformly also advocates of judicial restraint, and the two commitments were often conflated in both scholarly and popular discourse." (footnote omitted)); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 608 (2004) [hereinafter Whittington, *New Originalism*] (discussing early originalists' focus on judicial constraint); *see also* Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (arguing judicial constraint was a key justification of first-generation originalism); *id.* at 717 (observing that "the Old Originalism was characterized by its own proponents as a theory that could constrain judges and preclude them from treading their own policy preferences—most importantly, their own preferred unenumerated rights—into the Constitution.").

71. In 2005 and then again in a rebroadcast in 2021, Rush Limbaugh defined "activist judges" as those "who take their personal policy preferences to the bench, and then they decide cases on the basis of those personal policy preferences and they call that 'law.'" And he contrasted the "originalist" interpreter: "You go back; you look at the original intent. You can find it. It's there. Federalist Papers, numerous discussions, the document itself. . . . So we're having to rewrite the Constitution because we've got a bunch of judges who are ignoring it, plain and simple. That's the definition of an activist judge . . ." *Arrogant Losers Act Like Winners*, RUSH LIMBAUGH SHOW (July 12, 2005), https://www.rushlimbaugh.com/daily/2005/07/12/arrogant_losers_act_like_winners [https://perma.cc/Z284-DAKC]; Premiere Networks, *Rush Tips Us Off to This Tactic: Leftists Intimidate the Supreme Court*, THE RUSH LIMBAUGH SHOW, https://www.rushlimbaugh.com/daily/2021/04/19/rush-tips-us-off-to-this-tactic-leftists-intimidate-the-supreme-court/ [https://perma.cc/QT4N-V8SX].

such determinate answers. The judicial-constraint justification for originalism is now *disowned* by many prominent originalists.

As we have seen in *Bruen*, theorists of original public meaning recognize the Constitution's text is often what they call "under determinate." The text's original meaning does not provide sufficient guidance to resolve controversies, and so requires "construction"[72] by judges and others who guide the text's meaning in practice. As Professor Keith Whittington describes the new originalism, judicial constraint matters less to originalists than other possible justifications for the method.[73] Discussing the constraint justification, Professor Stephen Sachs has observed that "[a]ny number of procedures can restrict judges' decisions: flip a coin, always rule for the defendant, always follow your party's political preferences, . . . and so on. If the only goal is to produce determinate results, there's no reason to pick originalism in particular."[74]

Professor Will Baude is among the many originalists who question originalism's constraint justification, with abundant support, in a 2016 paper honoring Justice Scalia, *Originalism as a Constraint on Judges*.[75] In this essay, Baude emphasizes that it was first-generation originalists like Professor Raoul Berger, Judge Robert Bork, and Justice Scalia who were committed to originalism for its power to constrain judges. Today, he observes, the argument lacks "a clear

---

72. *See supra* notes 45–46 and accompanying text. Professor Solum explains that while "interpretation . . . is the process . . . [t]hat recognizes or discovers the linguistic meaning or semantic content of [a] legal text," "construction . . . is the process that gives a text legal effect (either by translating the linguistic meaning into legal doctrine or by applying or implementing the text)." Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) (emphasis added).

73. Whittington, *New Originalism*, *supra* note 70, at 608 ("The new originalism is less likely to emphasize a primary commitment to judicial restraint."); *id.* at 608–09 ("[T]here seems to be less emphasis on the capacity of originalism to limit the discretion of the judge."); *see also* Whittington, *Originalism: A Critical Introduction*, *supra* note 66, at 391 ("There is nothing like the same level of agreement within the recent originalist literature on the desirability of judicial restraint"); *id.* at 392 ("Limiting judicial discretion has rarely been offered as a compelling justification for the adoption of originalism in the recent literature.").

74. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 886 (2015).

75. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

champion . . . . [M]any modern originalists have tended to de-emphasize the importance of constraining judges, relying instead on other arguments—that originalism is normatively desirable for other reasons, that it is an account of the true meaning of the constitutional text, or that it is required by our law."[76] Baude shows that leading originalists today no longer make the claims of constraint that first-generation originalists did: "[T]he argument that originalism is justified because it will eliminate judicial discretion has been refuted by originalism's critics and abandoned by its defenders."[77] As Professor Barnett explains: "[T]he new originalism that is widely accepted by most originalists today is not an enterprise in constraining judges but an enterprise in determining what the writing really means."[78] At this point, among academic originalists, originalism's claim that it will impose judicial constraints is simply a claim about role morality—not a necessary feature of its methodology. What remains, on Professor Baude's account, is Professor Lawrence Solum's "Constraint Principle"—the "normative argument that original meaning *ought* to constrain constitutional practice, for reasons derived from legitimacy and the rule of law."[79] This normative claim is quite different from Justice Scalia's claim that original understanding is superior to other methods because "it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[80]

This claim of constraint is all the more dilute as one appreciates that the new new-originalists—let's call the third generation of

---

76. *Id.* at 10; *see also* Whittington, *New Originalism*, *supra* note 70, at 609 ("The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.").

77. Baude, *supra* note 75, at 2217; *see id.* at 2216–17 (discussing John McGinnis, Michael Rappaport, Gary Lawson, Chistopher Green, and Randy Barnett).

78. Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 DRAKE L. REV. 897, 909 (2008) (cited in Baude, *supra* note 75, at 2216).

79. Baude, *supra* note 75, at 2217 (citing generally Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (unpublished manuscript at 58–83) (Mar 24, 2017 draft), [https://perma.cc/KN5Y-NDC8].

80. Scalia, *supra* note 67, at 863–64.

originalists Originalism 3.0—no longer understand the Constitution's text as constraining in the ways that the original originalists or even the new originalists did. Professors Baude and Alicea are among those originalists who, like Professors Jud Campbell and Stephen Sachs, interpret the Constitution's text in light of unwritten principles that give the Constitution's text meaning. Reading the Constitution's text as recognizing pre-existing unwritten, natural, or general law further destabilizes originalism's "constraint thesis," whether that claim of constraint is understood as descriptive or prescriptive. Delivering a lecture on natural law at Harvard Law School, Professor Joel Alicea declared that "We need to know whether the Constitution furthers the common good, and that requires knowing what the common good is, which requires knowing something about who the human person is, and how we flourish as the distinctive kinds of beings that we are."[81]

Here is how Josh Hammer defended the amicus brief that Professors John Finnis and Robert George submitted in *Dobbs* claiming that as a matter of original understanding the Fourteenth Amendment prohibited abortion.[82] Hammer argued: "Finnis' argument is adamantly supported if one sheds the strictures of an overly historicist and positivist jurisprudence and embraces what I call 'common good originalism,' which argues that where, as here, there are multiple plausible interpretations of a certain constitutional provision, one should err on the side of the American constitutional order's overarching substantive orientation toward natural justice,

81. *'We Are Living Through a Natural Law Moment in Constitutional Theory,'* HARV. L. TODAY (Apr. 16, 2024), https://hls.harvard.edu/today/we-are-living-through-a-natural-law-moment-in-constitutional-theory-says-scholar-in-vaughan-lecture [https://perma.cc/RYZ6-UWHS].

82. Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392). For an account locating the brief in the conservative legal movement, see Heidi Przybyla, *'Plain Historical Falsehoods': How Amicus Briefs Bolstered Supreme Court Conservatives*, POLITICO (Dec. 3, 2023, 7:00 AM EST), https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497 [https://perma.cc/VJU2-CLVU].

human flourishing and the common good."[83] Common good originalism is a close cousin of gravitational force originalism.

IV. THE LEVELS-OF-GENERALITY GAME: A PAST THAT CONCEALS, RATHER THAN CONSTRAINS, DISCRETION

As this brief review of academic originalists suggests, the Justices engaged in history-and-tradition modes of decision making have more discretion than their own self-accounting suggests. Even Justices who foreswear expressly value-based modes of interpretation may—consciously or unconsciously—move through a series of "shadow decision points"[84] in structuring the inquiry so that it implicitly aligns with their values. For example, the Justices can choose to turn to the deep past as they did in *Dobbs* and *Bruen*, or refuse to base their decision in the deep past as they did in *SFFA* and *Trump v. Anderson*.[85] In addition to deciding whether to look to

---

83. Josh Hammer, *The Case for the Unconstitutionality of Abortion*, NEWSWEEK (Aug. 12, 2021), https://www.newsweek.com/case-unconstitutionality-abortion-opinion-1614532 [https://perma.cc/VW89-F6Z8]; Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 4 HARV. J.L. & PUB. POL'Y 917 (2021); *see also* Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, AMERICAN MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism [https://perma.cc/KQB6-L6SS]. Hammer is adapting originalism in light of Professor Adrian Vermeule's natural-law critique of originalism. *See* Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/YH77-9W49]; ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022).

84. *Cf.* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 126 (drawing attention to "*shadow decision points*: generally unacknowledged, often outcome-determinative choices about how to interpret statutory text that are framed as methodological but that are typically fueled by substantive extratextual concerns").

85. 144 S. Ct. 662 (2024). In *Trump v. Anderson*, the Court addressed the qualifications for holding office set forth in Section 3 of the Fourteenth Amendment, without giving significant weight to the parties' arguments about the original understanding. *See* Lawrence Hurley, *After Trump Ballot Ruling, Critics Say Supreme Court Is Selectively Invoking Conservative Originalist Approach*, NBC News (Mar. 10, 2024, 7:00 AM) https://www.nbcnews.com/news/amp/rcna142020 [https://perma.cc/HC2R-3Y9X] (quoting Evan Bernick saying of the decision, "What struck me is how much attention was devoted to questions of original meaning in the briefing and at oral argument and

the deep past, the Justices can decide, second, whether to focus historical inquiry on evidence generations before or after the Constitution's ratification and, third, can select different kinds of evidence to represent the nation's traditions. Facts may be objective, but the Justices are continuously choosing the facts on which to concentrate, as well as the inferences to draw from them. These choices are plainly not "objective."[86] They are discretionary, value-laden interpretive judgments and show that the Justices in the majority in *Dobbs* and *Bruen* are conservative pluralists[87]—originalists who are "selective" in applying their interpretive method.[88]

Fourth, as I now discuss, the Justices can decide whether to characterize historical traditions that guide interpretation of the Constitution's liberty guarantee at higher or lower levels of generality. When the Court decided *Obergefell*,[89] the same-sex marriage case, Justice Kennedy reasoned about past practice at a high level of generality, recognizing that marriage is an enduring institution with features that evolve in history. The Court presented this

---

how cursory and frankly unpersuasive the discussion of the history was in the published opinion," and J. Michael Luttig calling the decision "a textbook example of judicial activism"); Jill Lepore, *Will the Supreme Court Now Review More Constitutional Amendments*, NEW YORKER (Mar. 10, 2024), https://www.newyorker.com/magazine/2024/03/18/will-the-supreme-court-now-review-more-constitutional-amendments [https://perma.cc/Y62Q-PKSX] (asking "now that the originalists on the Court have recast themselves as consequentialists, will they be willing to revisit *Dobbs*, in light of its consequences . . . ? Or might the Court now reconsider its interpretation of the Second Amendment?").

86. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) (observing that a "fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition'" (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997))).

87. *See, e.g.*, Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 494, 508 (2022) (defining "Constitutional Pluralism" as signifying that "the legal content of constitutional doctrine should be determined by the employment of multiple modalities of constitutional argument").

88. Post & Siegel, *supra* note 60, at 562–68; Girgis, *supra* note 34, at 1479–80; Siegel, *Memory Games*, *supra* note 20, at 1131–34; Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223–25, 230–34.

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

interpretive approach as grounded in the language of the Constitution itself which it understood to sanction change by its very generality:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so *they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning*.[90]

In *Obergefell*, the Court held that the Fourteenth Amendment's great guarantees authorize evolving interpretation and require Americans to keep faith with those guarantees *as we have come to understand them today*, and not—as Justices Scalia and Thomas urged in dissent—as the Constitution was understood in 1868.[91] Justice Kennedy was reaffirming an approach to interpreting the Fourteenth Amendment's liberty guarantee that the Court had employed over the decades.[92]

President Trump's appointments made *Obergefell*'s dissenters into a governing majority.[93] And with this new majority, *Dobbs* departed from *Obergefell*'s holding on levels of generality and adopted the dissenters' point of view. (*Dobbs* discussed stare decisis with

---

90. *Id.* at 664 (emphasis added); *see also id.* at 671 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

91. *Id.* at 715–16 (Scalia, J., dissenting) ("When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as 'due process of law' or 'equal protection of the laws'—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.").

92. For the history of the decades-long levels-of-generality debate between Justices Kennedy and Scalia culminating in *Obergefell*, see Siegel, *History of History and Tradition*, *supra* note 20, at 133–46.

93. *See* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 284–87 (illustrating how President Trump's appointments created the Court that decided *Dobbs* as Justices Gorsuch, Barrett, and Kavanaugh replaced Justices Scalia, Kennedy, and Ginsburg, respectively). In *Dobbs*, the new appointees joined with *Obergefell*'s original dissenters to shape due process law in ways that aligned with views expressed in the *Obergefell* dissent, yet never acknowledged that they were changing due process doctrine.

respect to overturning *Roe*, but never acknowledged that it reasoned about the nation's history and tradition under the liberty guarantee differently than decades of cases before it had.[94])

Rather than reason about the meaning of the liberty guarantee in a fashion that included the perspectives of living Americans, as the *Obergefell* Court had, the *Dobbs* Court dialed down the level of generality and asked whether states banned abortion in 1868. By interpreting the Fourteenth Amendment through history and tradition understood at this low level of generality—through lawmaking at the time of the Fourteenth Amendment's ratification—the *Dobbs* decision threatened the authority of the Court's decision in the same-sex marriage case, and others. If the Court had counted state laws in 1868 to determine whether same-sex couples have the right to marry, they would have no such right. If the Court had counted state laws in 1868 to determine whether interracial couples have the right to marry, they would have no such right. In fact, as I show in *The History of History and Tradition*, the practice of counting state laws in 1868 to determine the reach of the Fourteenth Amendment's guarantees was originally developed by southern states seeking to *limit* the meaning of the Equal Protection Clause and to defend the racial segregation of schools in the argument leading to *Brown*.[95]

Moving from *Dobbs* to the Second Amendment cases, we can also see shifts in levels of generality—*here within individual cases*. Courts reason about the weapons of self-defense covered by the Second Amendment right "to keep and bear arms"[96] at a high level of generality—and so include AR-15s as protected by the Second

94. The Court did explain that it was overturning its decision in *Roe*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022). But in doing so, the Court did not acknowledge that it was changing its approach to enforcing the Fourteenth Amendment's liberty guarantee in substantive due process cases, adopting an approach that diverged from the Court's reasoning in *Obergefell* and even in *Glucksberg*. For accounts of these shifts in the law, see *infra* notes 133–134 and accompanying text. *See generally* Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 57 U.C. DAVIS L. REV. (forthcoming 2025), https://ssrn.com/abstract=4730389 [https://perma.cc/UYE8-W4JJ] (surveying the stealth reversals of the Roberts Court).

95. *See* Siegel, *History of History and Tradition*, *supra* note 20, at 112–20.

96. U.S. CONST. amend. II.

Amendment even though these firearms and many others did not exist at the Founding.[97] Along similar lines, federal courts read *Heller* and *Bruen* as protecting the right of "the people to keep and bear arms" at a high level of generality, as modern Americans would define that term, without restricting "the people" who are entitled to bear arms as the Framers would have.[98] But in determining whether laws that *regulate* guns are permitted by the Second Amendment, courts reason differently. Under *Bruen*, to prove a law regulating guns is consistent with historical traditions of firearm regulation, the lower courts have required the government to identify historical precedents or analogues that have *particular features* of the challenged law.[99] "[A]rms" covered by the Second Amendment are described at a high level of generality—while government may only regulate those weapons through laws that closely resemble past practice, described at a low level of generality.[100]

---

97. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022) ("[E]ven though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.").

98. *See* Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 134 (E.D. Va. 2023) (holding that a ban on 18-20 year-olds purchasing guns infringed on Second Amendment rights, even if at the Founding 21-years old was the age of majority, because "[t]he approach manifest in *Heller* and *Bruen* supports a finding that today's understanding of 'the people' is appropriate when considering the reach of the Second Amendment"); *id.* at 133 ("[T]aken to its full extent, the Government's argument [for limiting gun rights to those who were recognized as 'the people' at the founding] leads to a constitutionally untenable result. It is no secret that the American political community has not always been as inclusive as it is today. *Throughout our Nation's history, the definition of 'the people' has evolved and changed—for the better*." (emphasis added)). *But see* Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437 (2023) (discussing interpretation of 'the people" in Second Amendment cases concerning noncitizens).

99. *See* Blocher & Siegel, *supra* note 31, at 1802–03.

100. *Bruen* does not require shifting levels of generality in this way. *See id.* at 1796 ("*Bruen* does not require the asymmetrical and selective approach to constitutional change practiced by some in its name. Just as *Bruen* extends the right of self-defense to weaponry of the twenty-first century, it also recognizes democracy's competence to protect against weapons threats of the twenty-first century."); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 167 (2023) [hereinafter Blocher & Ruben, *Originalism-by-Analogy*] ("Whatever principles a

In *United States v. Rahimi*, a Second Amendment case before the Supreme Court in the 2023 Term, the Fifth Circuit mixed and matched levels of generality in this way, and did so to justify striking down 18 U.S.C. § 922(g)(8), a federal law that disarms persons subject to domestic-violence restraining orders. In *Rahimi*, the Fifth Circuit assumed the Second Amendment protected the right to carry weapons of a lethality unimaginable at the Founding, yet decided that § 922(g)(8) violated the Second Amendment because it lacked precise analogues at the Founding. The Fifth Circuit recognized that at the Founding there were laws used to restrain violence between intimates—a magistrate could issue a peace warrant marking a perpetrator a threat to public order and requiring him to post a surety bond for good behavior—but, the court observed, these laws were not analogues because they did not *disarm* persons who engaged in domestic violence, that is, they did not regulate arms in the same way that § 922(g)(8) does.[101] This plunge to a lower level of generality emphasized differences in firearm regulation, while devoting no attention to critical technological differences in *firearms* over time: The Fifth Circuit never reckoned with the fact that single-shot, muzzle-loaded long guns that were in common use at the

court selects, the level of generality selected for historical analogy should be applied symmetrically."); Joseph Blocher & Reva Siegel, *Gun Rights and Domestic Violence in* Rahimi*—Whose Traditions Does the Second Amendment Protect?*, BALKANIZATION (Oct. 31, 2023), https://balkin.blogspot.com/2023/10/gun-rights-and-domestic-violence-in.html [https://perma.cc/8C49-HTDQ] (analyzing rights and regulation under the Second Amendment with attention to levels of generality); Brief of Second Amendment Scholars as Amici Curiae in Support of Petitioner at 6–17, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915) [hereinafter *Brief of Second Amendment Scholars*] (same). These shifts in level of generality make little sense: Contemporary weapons of high lethality *pose different threats to public safety precisely because they have different features than single-shot, muzzle loaded long guns that were in common use at the Founding*. Darrell A.H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495, 2510–11 (2022).

101. 61 F.4th 443, 459–60 (5th Cir. 2023). For sources discussing law constraining violence between intimates at the Founding, see Blocher & Siegel, *supra* note 31, at 1827 & n.179. For discussion of peace warrants, see *id.* at 1827 ("On complaint, a magistrate could issue a peace warrant marking the actions of a perpetrator as a potential threat to public order; that individual could post bond for good behavior without incurring criminal penalty unless the individual broke the peace." (footnote omitted)).

Founding were not useful in crimes of passion as handguns are today, so that *legislators at the Founding had little reason to enact a law specifically forbidding firearm possession by domestic abusers, even if they wanted to protect women from such abuse*.[102]

Historians tell us that at the Founding guns were not commonly employed in domestic violence.[103] In the Founding era, "[f]amily and household homicides . . . were committed almost exclusively with weapons that were close at hand," not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists."[104] By contrast, today, "every 14 hours, a woman is shot and killed by a spouse or intimate partner in the United States,"[105] and intimate partner homicides often have multiple victims, including family, children, new dating partners of the victim, friends, and coworkers.[106] While the Fifth Circuit never reckoned with the stakes of its switching levels of generality, critics did[107]—and in oral argument in *Rahimi* before the Supreme Court, Justices began for the first time to consider Second Amendment inquiry in light of levels of generality.[108]

---

102. *Id.* at 1827.

103. Brief of Second Amendment Scholars, *supra* note 100, at 21; Brief for Amici Curiae Professors of History and Law in Support of Petitioner at 23–26, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915).

104. Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 113, 117 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019)

105. Press Release, All. for Gun Resp., Domestic Violence and Firearms: A Deadly Combination (Oct. 4, 2022), https://gunresponsibility.org/press-releases/domestic-violence-and-firearms-a-deadly-combination [https://perma.cc/X7RE-XSFK].

106. Kaitlin Washburn, *Tips for Covering Guns and Domestic Violence: A Lethal Combination*, ASS'N OF HEALTH CARE JOURNALISTS BLOG (Dec. 18, 2023), https://healthjournalism.org/blog/2023/12/tips-for-covering-guns-and-domestic-violence-a-lethal-combination [https://perma.cc/XJ3Q-5GCZ].

107. *See* sources cited *supra* note 100.

108. Discussion of levels of generality arose in different ways throughout oral argument. *See* Transcript of Oral Argument at 17–21, 39–42, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915). Justice Gorsuch seemed directly to confront the levels-of-generality question regarding rights and regulation. *Id.* at 41–42.

V. HOW SELF-CONSCIOUS ARE THE JUSTICES IN MANIPULATING LEVELS OF GENERALITY?

The shifts in levels of generality that I have been describing are not some accident. The changes in history-and-tradition case law that appeared as President Trump reshaped the Court emerged from long-running argument about the exercise of judicial discretion in vindicating rights—the so-called "levels of generality" debate. These shifts in the level of generality are quite *self-conscious*, the fruit of a dispute between constitutional liberals and conservatives that has been running since at least 1980. We can see the Justices engaging in the levels-of-generality debate over the decades, revived most recently in the cases handed down at the end of the 2023 Term.[109]

As early as 1980, Professor Paul Brest spotlighted the levels of generality problem in one of the earliest articles challenging Reagan-era originalists, *The Misconceived Quest for Original Understanding*. Professor Brest observed that claims about original intent "may be conceptualized on different levels of generality."[110] If you enacted an ordinance providing "No vehicles shall be permitted in the park," your intent can be conceptualized at varying levels of generality: "Moving from the abstract to the particular, you might have hoped to protect pedestrians using the park from harm, or from injury caused by vehicles, or from being run into by cars."[111] Shifting to the Constitution, he observed, "[a] moderate intentionalist applies a provision consistent with the adopters' intent at a relatively high level of generality, consistent with what is sometimes called the 'purpose of the provision.' Where the strict intentionalist tries to determine the adopters' actual subjective purposes . . . ."[112] The following year Brest continued, comparing the discretion involved in ascertaining original understanding with the discretion

109. *See infra* Part VI.

110. Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 205, 210 (1980).

111. *Id.* at 209–10.

112. *Id.* at 223.

involved in balancing under standard doctrinal tests: "The indeterminacy and manipulability of levels of generality is closely related, if not ultimately identical, to the arbitrariness inherent in accommodating fundamental rights with competing government interests."[113] For Brest, this was *law, an inherently judgment-filled practice*. "The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decision making can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be 'neutrally derived, defined and applied.'"[114]

In 1985, Judge Robert Bork challenged Brest,[115] and in 1989, Justice Scalia offered an even more ambitious counterargument. In *Michael H. v. Gerald D.*,[116] in a famous footnote joined only by Chief Justice Rehnquist, Justice Scalia claimed that *to avoid "arbitrary decisionmaking" it was necessary "to adopt the most specific tradition as the point of reference*."[117] (The Scalia-Rehnquist footnote in *Michael H.* attacking originalism's critics—published the same year as Scalia published *Originalism: The Lesser Evil*[118]—is a crucial moment on the path to *Bruen* and *Dobbs*.) Professors Laurence Tribe and Michael Dorf countered the counter-attack in a widely cited article the

113. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981).

114. *Id.* at 1091–92 (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971)).

115. Bork, *supra* note 70, at 828 (asserting that "Brest's statement is wrong and . . . an intentionalist can do what Brest says he cannot," contending that "the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support").

116. 491 U.S. 110 (1989).

117. *Id.* at 127 n.6. (joined by Scalia, J., and Rehnquist, C.J.) (plurality opinion) (emphasis added). He went on to argue that "[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate, rather than discern, the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference . . . is well enough exemplified . . . in the present case." *Id.*

118. Scalia, *supra* note 67.

following year.[119] Justice Scalia had *not* "discovered a value-neutral method of selecting the appropriate level of generality," Tribe and Dorf argued.[120] They emphasized that "[t]he selection of a level of generality necessarily involves value choices."[121] "Far from providing judges with a value-neutral means for characterizing rights, [Justice Scalia's proposal] provides instead a method for disguising the importation of values."[122] As Judge Frank Easterbrook explained, "[m]ovements in the level of constitutional generality may be used to justify almost any outcome."[123] But for Justice Scalia there remained a point in a judge *performing* constraint: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."[124]

This debate—which has continued for decades—shows that in deciding cases, the Justices are not simply deferring to the past, but characterizing the past to which they defer, and they do so in the understanding that selecting a level of generality at which to vindicate a right can be outcome determinative. The Justices argued amongst themselves over standards and levels of generality with these concerns in view in *Michael H.* and in *Glucksberg*—where the majority was internally divided about protecting prior case law—

119. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

120. *Id.* at 1058.

121. *Id.*

122. *Id.* at 1059.

123. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992).

124. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

on the path to *Dobbs*.[125] This same conflict unfolded in *McDonald v. City of Chicago*[126] on the path to *Bruen*.

In *McDonald*, a decade before *Bruen* and *Dobbs*, the Court decided whether to incorporate the Second Amendment against the states under the Fourteenth Amendment's Due Process Clause. Because of the incorporation debate, due process standards were very much in play in *McDonald*. *McDonald* contains remarkable debate about the levels of generality problem.

In *McDonald*, Justice Scalia wrote a sole-authored concurring opinion in which he urged the Court to revise *Glucksberg*'s language calling for "'careful description' of the asserted fundamental liberty interest"[127] into a more extreme version of his *Michael H.* footnote; he claimed, in a new formulation, first, that *Glucksberg* required "a careful, *specific* description of the right at issue in order to determine *whether that right, thus narrowly defined, was fundamental*"[128] and,

---

125. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 771 (1997) (Souter, J., concurring) (reasoning from levels of generality and citing Tribe & Dorf, *supra* note 119, at 1091). The *Glucksberg* majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *See id.* at 704. Justice O'Connor played a key role in exercising changes in the language of the *Glucksberg* opinion protecting *Casey* and other substantive due process decisions that allowed the authors of the *Casey* joint opinion to sing. *See supra* note 39.

In the era of *Casey* and *Glucksberg*, Justice Thomas continued the debate in other contexts. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 117–18 (1992) (Thomas, J., dissenting) ("Whatever the exact scope of the fundamental right to 'freedom from bodily restraint' recognized by our cases, it certainly cannot be defined at the exceedingly great level of generality the Court suggests today. There is simply no basis in our society's history or in the precedents of this Court to support the existence of a sweeping, general fundamental right to 'freedom from bodily restraint' applicable to all persons in all contexts." (footnote omitted)); City of Chicago v. Morales, 527 U.S. 41, 106 (1999) (Thomas, J., dissenting) (reasoning from levels of generality); *id.* at 105 n.5 ("[T]he plurality's approach distorts the principle articulated in th[e] cases [on which it relies], stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis.").

126. 561 U.S. 742 (2010).

127. *Glucksberg*, 521 U.S. at 721.

128. *McDonald*, 561 U.S. at 797 (Scalia, J., concurring) (first emphasis added; second emphasis in original); *see also id.* (referring to this new account of the standard as a "threshold step of defining the asserted right with precision"). Observe that in addition to adding requirements of specificity, narrowness, and precision, Justice Scalia changed discussion of a liberty interest into a threshold requirement of identifying a right.

second, that interpreting the Fourteenth Amendment's liberty guarantee to protect only those "specific" and "narrowly defined" "rights" that had been recognized in the past was "much less subjective, and intrudes much less upon the democratic process" than a "living Constitution."[129] (Here Justice Scalia deliberately read "*Glucksberg*" as a cousin of his *Michael H.* footnote and the kind of opinion that Justices Kennedy and O'Connor had refused to sign.[130]) In his *McDonald* concurring opinion, Scalia equated the historical method with outcomes in culture-war cases: "In the most controversial matters brought before this Court—for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty—*any* historical methodology, under any plausible standard of proof, would lead to the same conclusion."[131] Inquiring minds might ask, were these predictable results an accident of Justice Scalia's quest for objectivity, *or its very point*? After decades of argument, positions in the levels-of-generality debate were now associated with outcomes in culture-war conflict.

In his *McDonald* dissent, Justice Stevens countered Justice Scalia's claims systematically and at length, asserting that "a rigid historical methodology is . . . unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs . . . are sufficiently rooted; [and] it countenances the most revolting injustices in the name of continuity."[132]

As I have elsewhere demonstrated in greater detail, *Dobbs* emerged from these long-running debates across cases over the level of generality appropriate for vindicating the Fourteenth

129. *Id.* at 803–04.

130. *See supra* note 125.

131. *Id.* at 804.

132. *Id*. at 876 (Stevens, J., dissenting) (footnote and internal quotation marks omitted).

Amendment's liberty guarantee.[133] *Dobbs* expressly justified its brand of historicism by reference to levels of generality. Justice Alito asserted: "Attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like."[134] This passage in *Dobbs* says the quiet part out loud: *Don't like the result? Dial down the level of generality!* Judges have already employed *Dobbs*'s reasoning about generality to uphold bans on gender-affirming care:[135] As Chief Judge Sutton remarked almost mockingly in upholding such a ban, "[l]evel of generality is everything in constitutional law."[136] In oral argument in *Rahimi*, the Justices and the Solicitor General all reasoned about *Bruen*'s requirements in terms of levels of generality.[137] Historical particularism does not remove judicial discretion: it hides it.

VI. THE LEVELS-OF-GENERALITY DEBATE IN THE 2023 TERM

The decisions of the Court's 2023 Term, handed down during the final editing of this Article, vindicate key features of its analysis. Above all, these decisions demonstrate that the Justices in the conservative majority are "conservative pluralists" who reason from history and tradition, but only selectively, on a case-by-case basis. As their changing modes of interpretation—and open debate about

133. Siegel, *History of History and Tradition*, supra note 20, at 105; *id.* at 136–46 (recounting debate across cases between Justice Kennedy and Justice Scalia).

134. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). At oral argument, Justice Thomas and now-Judge Rikelman had a lengthy exchange wherein Thomas pressed Rikelman to "lower the level of generality" at which she identified the "constitutional right [that] protects the right to abortion." *See* Transcript of Oral Argument at 71–73, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392).

135. Siegel, *History of History and Tradition*, *supra* note 20, at 145 & n. 211 (discussing L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 472-73 (6th Cir. 2023)).

136. *Skrmetti*, 83 F.4th at 475; *see also* Thomas More L. Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring in part and in the judgment) ("Level of generality is destiny in interpretive disputes . . . ."), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519 (2012).

137. *See supra* note 108.

their choices—suggest, the conservative Justices are quite self-conscious in their design of doctrine.

During the 2023 Term, the conservative Justices' selectivity in approach was vividly illustrated in the cases involving the ex-President Donald Trump's qualifications to run for office[138] and his immunity from criminal prosecution.[139] Rather than decide the immunity case on the historical grounds that the parties detailed in the briefing,[140] the Court instead "announced broad and novel principles of presidential immunity from criminal indictment for official acts."[141] (Some compared the Court's decision on immunity—which reasoned about the Constitution's commitments at a high level of generality—to features of the *Roe v. Wade* decision that the Court had maligned in *Dobbs*.[142])

---

138. *See* Trump v. Anderson, 144 S. Ct. 662 (2024).

139. Trump v. United States, 144 S. Ct. 2312 (2024).

140. *See, e.g.*, Brief of Petitioner President Donald J. Trump at 22–24, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) (arguing that "a 234-year unbroken tradition of not prosecuting former Presidents for their official acts, despite ample motive and opportunity to do so," "confirm[s] the existence of criminal immunity"); Brief for the United States at 13–17, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) (asserting that "[h]istory . . . forecloses petitioner's claim that the Constitution grants a former President absolute immunity from criminal prosecution"); Reply Brief of Petitioner President Donald J. Trump at 12–17, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) (contending that historical sources and historical tradition support presidential immunity). For criticism of the Court's failure to engage with the parties' originalist arguments in the *Anderson* case, see *supra* note 85.

141. *See* William Baude, Opinion, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html [https://perma.cc/AZV4-RXTH] (discussing the Court's departure from historical modes of interpretation in both decisions concerning Trump); *see also* Kate Shaw et. al., Opinion, *'The Justices Dropped this Bomb': Three Legal Experts on a Shocking Supreme Court Term*, N.Y. TIMES (July 11, 2024), https://www.nytimes.com/2024/07/11/opinion/supreme-court-term-immunity.html [https://perma.cc/HM2F-3BNV] (quoting Professor Baude on the Court's departure from historical modes of interpretation in the two Trump decisions).

142. Upon beginning to read the syllabus of the presidential immunity decision, I was startled by the form of the Court's claims and immediately thought that the Court was employing modes of constitutional interpretation that *Dobbs* had criticized in *Roe*. Professor Mark Graber drew this comparison and soon developed it in a published account. *See* Mark Graber, Trump v. United States *as* Roe v. Wade, VERFASSUNGSBLOG

The conservative Justices identified no reason for their decision to break from original understanding or tradition in deciding Trump's cases. But in other cases of the 2023 Term, the Justices openly debated interpretive approaches. They argued among themselves about whether to employ history and tradition, in the process making explicit the Justices' self-conscious decisions whether, why, and how to interpret the Constitution through tradition—as well as their choice of the level of generality at which to express fealty to past practice.

When the Court decided the constitutionality of a content-based but viewpoint-neutral trademark restriction in *Vidal v. Elster*,[143] four of the Justices challenged the majority for reasoning from history and tradition to decide First Amendment cases. Justice Barrett, writing with Justices Kagan and Sotomayor, discussed the judge's role in adopting decision rules that focus on tradition. As Justice Barrett put it bluntly: "a rule rendering a tradition dispositive is *itself* a judge-made test."[144] A judge had to weigh reasons for enunciating law as fidelity to history and tradition; she might instead adhere to the longstanding "tradition" of deciding a case by "adopting a generally applicable principle," which she and three other Justices thought disposition of the case required.[145] Justice Sotomayor, writing with Justices Kagan and Jackson, went further, explaining that

---

(July 5, 2024), https://verfassungsblog.de/trump-v-united-states-as-roe-v-wade [https://perma.cc/Z9DL-8YGV]. Professor Akhil Amar also invoked *Roe* in a column criticizing the immunity decision on the grounds that it "turns the Constitution's text and structure inside out and upside down, saying things that are flatly contradicted by the document's unambiguous letter and obvious spirit." Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, ATLANTIC (July 2, 2024), https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877 [https://perma.cc/A3QP-PCUH].

143. 144 S. Ct. 1507 (2024).

144. *Id.* at 1532 (Barrett, J., joined by Sotomayor, Kagan & Jackson, JJ., concurring in part) (emphasis in original).

145. *Id.* (Barrett, J., joined by Sotomayor & Kagan, JJ., concurring in part) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) and explaining the decision as "adopting [a] standard for application of the Necessary and Proper Clause"); *see also id.* ("In the course of applying broadly worded text like the Free Speech Clause, courts must inevitably articulate principles to resolve individual cases. I do not think we can or should avoid doing so here.").

judges had compelling reasons to *avoid* use of the history-and-tradition framework in First Amendment cases: the liberal Justices emphasized "the indeterminacy of the Court's history-and-tradition inquiry, which one might aptly describe as the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends."[146] In disputing use of the method, both the majority and its critics in *Vidal* invoked the Court's debate over the Second Amendment in *Rahimi*.[147]

The Court's decision in *Rahimi* expressed the Court's bitter divisions over historical method, much of it explicitly or implicitly circling around the levels of generality question. The Court divided eight to one, recognizing the government's authority to prohibit gun possession for persons subject to domestic-violence restraining orders; only Justice Thomas dissented, insisting that under *Bruen* the federal law violated the Second Amendment.[148] Chief Justice Roberts's opinion upholding the federal law was joined by seven other Justices, yet accompanied by *five* concurring opinions in which six of the Justices who joined the majority qualified the grounds on which they did so.[149]

The majority opinion squarely rejected the approach to reading Second Amendment precedent the Fifth Circuit employed in *Rahimi*: reasoning about Second Amendment rights of self-defense at a high level of generality, while allowing regulation of those rights only if a law closely resembled particular historical analogues. Chief Justice Roberts objected to this asymmetric approach to levels of generality as lacking in all justification. *Bruen*'s requirement of identifying a historical analogue was:

> not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the

146. *Id.* at 1534 (Sotomayor, J., concurring in the judgment) (citing Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring in the judgment)).

147. *Id.* (citing Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 4–6, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915), for its discussion of "confusion among lower courts applying *Bruen*).

148. *Rahimi*, 144 S. Ct. at 1896–97; *id.* at 1930.

149. *Id.* at 1893.

> founding. . . . By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.[150]

In calling for an analysis of right and regulation at commensurate levels of generality, the Court restated *Bruen*'s holding as a search for principles: *Bruen*'s historical analogue test required showing that the "challenged regulation is consistent with the *principles* that underpin our regulatory tradition."[151] Second, Chief Justice Roberts identified a principle that showed the challenged law was consistent with tradition: "From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. The act of 'go[ing] armed to terrify the King's subjects' was recognized at common law as a 'great offence.'"[152]

Chief Justice Roberts's opinion in *Rahimi* announced an important reading of the *Bruen* standard. But how the opinion will guide Second Amendment cases remains unclear. Those who joined the majority equivocated in separate concurring opinions about whether a tradition can be ascertained in terms of the principles composing it—an equivocation that may encourage judges to continue interpreting *Bruen* asymmetrically, as they were before the Fifth Circuit was reversed by the Court.[153]

---

150. *Id.* at 1897–98 (majority opinion).

151. *Id.* at 1898 (emphasis added).

152. *Id.* at 1899 (citation omitted).

153. Only weeks after *Rahimi*, the Eighth Circuit handed down a decision that quite defiantly continued applying the *Bruen* case much as the Fifth Circuit had in *Rahimi*. In *Worth v. Jacobson*, 108 F.4th 677 (8th Cir. 2024), the Eighth Circuit switched levels of generality to strike down an age-of-majority element in a permit law requiring applicants to be at least 21 years of age. *Id.* at 698. The Eighth Circuit rejected the state's historically based argument that "18 to 20-year-olds are not members of 'the people' protected by the Second Amendment because at common law, individuals did not have rights until they turned 21 years old." *Id.* at 689. Instead, the court reasoned that "[e]ven if the 18 to 20-year-olds were not members of the 'political community' at common law, they are today." *Id.* at 691. But after reasoning about "the people" who have rights protected by the Second Amendment at this high level of generality and rejecting these historical arguments, the court then reasoned at a much lower level of generality in

Why did the Justices vote eight to one to overturn the Fifth Circuit's ruling in *Rahimi*, yet write so many concurring opinions qualifying their views? By striking down a law that disarmed persons subject to a domestic-violence restraining order as *in*consistent with the nation's traditions, the Fifth Circuit invited the charge that *Bruen*'s history-and-tradition approach was "repugnant"[154] because it entrenched inequality and exposed Americans to lethal violence—criticism that members of the Court either credited or believed the American public would. The Justices in the majority seemed eager to dissociate themselves from the Fifth Circuit opinion and to criticize the two-levels-of-generality approach the Fifth Circuit employed to achieve this method-discrediting result. Analyzing weapons regulations permitted under the Second Amendment at a higher level of generality—as consistent with the longstanding principle that people cannot use weapons to harm or menace others—resolved the case without discrediting the history-and-tradition method (and without discussing American law's traditional approach to domestic violence). Nested here was an explosive set of questions about the constitutional values that entrenching past practice promoted.

But in avoiding discussing these underlying normative considerations the conservative majority also, potentially, created a problem for itself. Was the majority prepared to adhere to *Rahimi*'s approach in the next wave of Second Amendment cases? Would it ask whether the challenged regulation is "consistent with the principles that underpin our regulatory tradition"[155] if the approach made it harder to justify striking down bans on high-powered weapons and other gun regulations? Perhaps.

In a concurring opinion focused on the levels-of-generality question, Justice Barrett rejected historical particularism while expressing caution that "a court must be careful not to read a principle at

---

determining what gun regulations the Second Amendment permits. *Id.* at 687, 692–98. Here, it struck down the state's licensing restriction because it lacked historical analogues at the Founding (and in the Reconstruction era). *Id.* at 698.

154. *See supra* note 15 and accompanying text.

155. *Rahimi*, 144 S. Ct. at 1898.

such a high level of generality that it waters down the right"; she was hesitant to pre-commit to an approach to the generality problem beyond the case at issue, which, she concluded, the Court had decided at "just the right level of generality" in recognizing that government may "prevent[] individuals who threaten physical harm to others from misusing firearms."[156]

Responding to the liberal Justices' complaints about the indeterminacies of *Bruen*'s analogical method,[157] Justices Gorsuch and Kavanaugh each wrote concurring opinions that specifically defended historical modes of interpretation and expressed doubt that judges would be faithful to the Constitution if they derived principled commitments from past practice. Each repeated the judicial-constraint claims of first-generation originalists—claims that originalists in the academy have widely repudiated.

Justice Gorsuch's opinion emphasized the judicial-constraint justification for originalism. He explained that originalist judges "respect[] the people's directions in the Constitution—directions that are 'trapped in amber.'"[158] Seeking original meaning "keeps judges in their proper lane . . . . *[P]ermit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule.*"[159] And taking guidance from Justice Scalia, Justice Gorsuch warned against judges who reason at higher levels of generality and try to extract "overarching 'policies,' 'purposes,' and 'values'" from past practices—even as Justice Gorsuch explained his vote upholding the federal law disarming persons subject to domestic-violence restraining orders on the ground that it served the same purposes as a surety law served in the Founding era.[160]

---

156. *Rahimi*, 144 S. Ct. at 1926 & * (Barrett, J., concurring).

157. *See id.* at 1905-06 (Sotomayor, J., joined by Kagan, J., concurring); *id.* at 1928–29 (Jackson, J., concurring); *see also supra* text accompanying note 146 (quoting the liberal Justices in *Vidal v. Elster* criticizing the indeterminacy of history-and-tradition methods).

158. *Id.* at 1908 (Gorsuch, J., concurring) (quoting *Rahimi*, 144 S. Ct. at 1897–98).

159. *Id.* at 1909 (emphasis added).

160. *Id.* at 1908 (observing that the surety law "works in the same way and . . . for the same reasons" as the domestic violence prohibitor).

Justice Kavanaugh also turned to first-generation originalists to defend the Court's practice against the liberal Justices' critique. "To be an umpire," Kavanaugh reasoned, "the judge 'must stick close to the text and the history, and their fair implications,' because"—he argued, quoting Robert Bork—"there 'is no principled way' for a neutral judge 'to prefer any claimed human value to any other.'" [161] "History establishes a 'criterion that is conceptually quite separate from the preferences of the judge himself,'" he argued, quoting Justice Scalia's foundational claim.[162] "A history-based methodology supplies direction and imposes a neutral and democratically infused constraint on judicial decision making."[163] "History is far less subjective than policy," Justice Kavanaugh emphasized, insisting that "reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people."[164]

Like Justice Gorsuch, Justice Kavanaugh wrote without irony, as if he had not heard the explosion of complaints from judges and others about the indeterminacies of *Bruen*'s historical analogue test,[165] or heard the public's response to *Dobbs*. Of course, it may be

---

161. *Id.* at 1912 (Kavanaugh, J., concurring) (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971)).

162. *Id.* (quoting Scalia, *Originalism: The Lesser Evil*, *supra* note 67, at 864).

163. *Id.* at 1922.

164. *Id.* at 1912.

165. *See, e.g.*, *Rahimi*, 144 S. Ct. at 1927 (Jackson, J., dissenting) (reporting objections of lower courts); *id.* at 1929 ("Consistent analyses and outcomes are likely to remain elusive because whether *Bruen*'s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified."); United States v. Daniels, 77 F.4th 337, 358–60 (5th Cir. 2023) (Higginson, J., concurring) (listing many uncertainties in the *Bruen* inquiry); Jacob Gershman, *Why America's Gun Laws Are in Chaos*, WALL ST. J. (Aug. 1, 2023, 5:30 A.M. ET), https://www.wsj.com/articles/why-the-nations-gun-laws-are-in-chaos-587ded3f [https://perma.cc/5G6E-CXCN] ("'There's all this picking and choosing of historical evidence. "This is too early. This is too late. Too small, too big,"' Judge Gerard Lynch of the Second U.S. Circuit Court of Appeals said during a recent argument about a new law in New York that prohibits guns in sensitive places like parks,

that Justice Kavanaugh was *not* in fact speaking "neutrally," but instead speaking *only* to supporters of the Court's history-and-tradition decisions. Otherwise, his remarks are puzzling.

The conservative legal movement is no longer outside the Court criticizing its work; the conservative legal movement is now inside the Court exercising public power. Claims about the objectivity and neutrality of historical interpretation on which the conservative legal movement mobilized against the Warren and Burger Courts will not persuade the Roberts Court's critics to defer to its judgment. Differently put, the Court's authority to speak for the nation—and not only for the conservative legal movement—cannot be established by calling its own work "neutral." Since the Roberts Court reshaped by President Trump began issuing history-and-tradition decisions, public confidence in the Court has significantly declined.[166]

VII. CONCLUSION: JUDICIAL CONSTRAINT AND DEMOCRACY

I conclude these observations with a question: *Could liberal Justices who make constitutional claims about the past be subjected to many of these same critiques?* There is a simple sense in which the answer is *yes*: The decisions of liberal Justices also describe the past selectively and shift levels of generality. But there is a deep and important sense in which the answer is *no*. The conservative Justices have claimed that their method is *superior* to the available alternatives: that the turn to history constrains judges from acting on their values as other interpretive approaches—that openly reason from values and recognize that the meaning of the Constitution's guarantees

---

museums and bars."); *id.* ("'What I don't think I've ever seen elsewhere is a demand by the court that every single difficult case be resolved by a historical record that contains so little information,' said Nelson Lund, a George Mason University legal scholar who has written critically of the Bruen decision.").

166. According to the Pew Research Center, the Court's "favorable rating is 23 percentage points lower than it was in August 2020," when Justice Barrett was appointed in the closing weeks of President Trump's term. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low [https://perma.cc/W8NC-HPXG].

evolve in history—do not. Justice Scalia makes this claim of conservative historicism's methodological superiority to the "living Constitution" at length in *McDonald*, where he claimed that "[t]he traditional, historically focused method" "is much less subjective, and intrudes much less upon the democratic process."[167] And the conservative Justices advance this claim of methodological superiority to justify radical changes in the law in *Dobbs* and in *Bruen*—a claim Justices Gorsuch and Kavanaugh reiterate in *Rahimi*.[168]

It is this claim of methodological superiority that I have challenged, showing that the shift to low levels of generality in the history-and-tradition cases of the Roberts Court is no accident but is instead the expression of a long-running project. The shift to low levels of generality to justify changes in the law *conceals rather than constrains* judicial discretion and values-based reasoning. The constitutional memory claims that naturalize the shift from high to low levels of generality and justify dramatic shifts in the law are yet another form of evolving interpretation, expressed in decisions like *Dobbs* and *Bruen* that justify momentous changes in the law on the basis of granular facts about the nation's past.

The conservative Justices are living constitutionalists, too. "We are all living constitutionalists now."[169]

---

167. McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

168. *See supra* notes 62–65, 158–164 and accompanying text.

169. I refer, of course, to the Justices' continuing debate about whether they are all originalists now. This exchange began at Justice Elena Kagan's 2010 confirmation hearing, in the era of *McDonald*, and accelerated in the wake of *Dobbs*. Throughout, Justice Kagan has argued about original understanding with reference to the levels-of-generality debate. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 61, 62 (2010) (observing that the Framers understood "that the world was going to change" and provided for change in the way that they drafted the Constitution, pointing out "sometimes they laid down very specific rules. Sometimes they laid down broad principles" and concluding that "[e]ither way we apply what they say, what they meant to do. So in that sense, we are all originalists"); *see also* Elena Kagan, Address at Northwestern Law School (Sept. 14, 2022), https://www.c-span.org/video/?522765-1/justice-kagan-speaks-northwestern-law-school (observing that "originalism does not work so well . . . because it is inconsistent with the way the Constitution is written . . . . They wrote in broad terms, and in what you might call vague terms . . . . They didn't list

If judges unavoidably exercise discretion and engage in value-based judgment, then perhaps conservative living constitutionalism is on an equal footing with the living constitutionalism of *Brown* and *Loving*, *Frontiero v. Richardson*[170] and *United States v. Virginia*,[171] *Roe* and *Obergefell*. But I have rejected the view that all living constitutionalism is equivalent, and have termed the political practice of originalism in judicial decisions of the Roberts Court "*anti-democratic* living constitutionalism."[172] In an article on *Dobbs* called *Memory Games*, I show how self-identified originalists in "the conservative legal movement have pursued constitutional change": first, "through specialized judicial appointment practices designed to achieve movement-party goals" and, second, "through constitutional memory work that can justify a new court's doctrinal innovations as restoring the Framers' Constitution."[173] I am not interested in measuring whether liberal or conservative jurists exercise more discretion, but instead focus on the kind of constitutional democracy that conservative judges create *precisely as they are claiming to foreswear discretion*.

Memory Games argues that the ways the conservative Justices perform constraint can "exacerbate[] the Constitution's democratic deficits along three axes."[174] Fidelity to the nation's history and traditions—understood in granular particularity—in a case like *Dobbs*,

---

specific practices. They used . . . those sort of generalities for a reason. Because they knew the country would change."). Justice Alito, in particular, has challenged Justice Kagan. *See* Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html [https://perma.cc/5T59-FKGK] (quoting a speech by Justice Alito criticizing Justice Kagan for joining the majority in *Obergefell*, given that she "must regard herself as an originalist" and "*Obergefell* was the precise opposite of originalism," and lauding Justice Scalia's dissent in *Obergefell*, which attacked the majority through a claim that "[i]n 1868, when the 14th Amendment was adopted, nobody — nobody — understood it to protect a right to same-sex marriage").

170. 411 U.S. 677 (1973).

171. 518 U.S. 515 (1996).

172. *See* Siegel, *Memory Games*, *supra* note 20.

173. *Id.* at 1130.

174. *Id.* at 1194.

first, "restricts and threatens rights that enable equal participation of historically marginalized groups;"[175] second, it "locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies;"[176] and, third, it "presents . . . contested value judgments as expert claims of law and historical fact to which the public owes deference."[177]

The liberal Justices well appreciate the anti-democratic tendencies of history-and-tradition arguments. Dissenting in *Dobbs*, they warned that the conservatives' turn to the past was not "'scrupulously neutral,'"[178] but "instead taking sides" and, by tying the Constitution's meaning to fixed points in the past, legitimated many forms of inequality.[179] For this very reason they called for interpreting the Constitution's great guarantees of liberty and equality at the level of generality at which its text is written[180] (as Justice Kagan has long emphasized[181]) so that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[182]

These views about levels of generality *were the Court's* until President Trump changed its composition,[183] and now primarily appear

175. *Id.* For an in-depth account of how the *Dobbs* decision enforced inequalities of 1868 in Mississippi, see Siegel, *History of History and Tradition*, *supra* note 20, at 150–57.

176. Siegel, *Memory Games*, *supra* note 20, at 1196.

177. *Id.*

178. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2328 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

179. *See id.* at 2325 ("When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."); *see also id.* at 2326 (suggesting *Dobbs*'s approach would also legitimate inequality along lines of race and sexual orientation).

180. *Id.* at 2326.

181. *See supra* note 169 (showing how Justice Kagan's commentary on whether she is an originalist in and after her confirmation hearing focuses almost exclusively on the levels-of-generality question).

182. *Dobbs*, 597 U.S. at 376.

183. *See supra* notes 89–92 and accompanying text (discussing *Obergefell*). *See generally* Siegel, *History of History and Tradition*, *supra* note 20, at 106 ("It was not until after Justice

in dissents[184] and concurring opinions. As Justice Sotomayor, joined by Justice Kagan, emphasized in her *Rahimi* concurrence: "History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy."[185]

Notably, some state judges, concerned that the Supreme Court's history-and-tradition decisions conceal anti-democratic biases in the language of neutrality or fidelity to tradition, interpret their state constitutions differently.[186] These state courts emphasize that fidelity to the past in constitutional interpretation requires understanding the principles to which our forebears were committed—not committing ourselves to live in accordance with our forebears' understanding of these principles "trapped in amber."[187] As the

---

Kennedy's retirement that a Supreme Court constituted to reverse *Roe* and *Casey* attacked prior cases for reasoning about liberty "at a high level of generality" (citations omitted)); *id.* at 126–46 (recapitulating the fight between Justice Scalia and Justice Kennedy over interpretation of the liberty guarantee that reigned for decades, ending with President Donald Trump's appointments to the Supreme Court).

184. The most prominent expression of this view is their dissent in *Dobbs* discussed in text. More recently, in *Department of State v. Muñoz*, Justice Sotomayor, writing for Justices Kagan and Jackson, warned that the Court had analyzed the right to marry at a level of generality that threatened *Obergefell*, objecting that "[t]he majority, ignoring [*Obergefell*], makes the same fatal error it made in *Dobbs*: requiring too '"careful [a] description of the asserted fundamental liberty interest.'" Department of State v. Muñoz, 144 S. Ct. 1812, 1834 (2024) (Sotomayor, J., dissenting) (quoting *Muñoz*, 144 S. Ct. at 1822 (majority opinion) (quoting Washington v. Glucksberg, 521 U.S. 702, 721(1997))).

185. United States v. Rahimi, 144 S. Ct. 1889, 1905 (2024) (Sotomayor, J., concurring) (showing that guns of the Founding era were not effective as instruments of domestic violence, and that authorities were less likely to intervene, so that founding practice is not a reasonable constitutional baseline for our own); *see also id.* at 1929 n.3 (Jackson, J., concurring) (objecting to the "mad scramble for historical records that *Bruen* requires" and observing that "[i]t stifles both helpful innovation and democratic engagement to read the Constitution to prevent advancement in this way").

186. For a powerful example, see Allegheny Reproductive Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808 (Pa. 2024).

187. *See supra* text accompanying notes 158–160 (discussing Justice Gorsuch's reasoning in *Rahimi*); Mayeri, *supra* note 29, at 238–40 (discussing opinions in *Allegheny Reproductive Health Center* that repudiate *Dobbs*'s history-and-tradition analysis and then

Utah Supreme Court recently explained: "Failure to distinguish between principles and application of those principles would hold constitutional protections hostage to the prejudices of the 1890s."[188]

These state judges keep faith with the principles to which our forebears were committed—without adhering to our forebears' understanding of these principles, as Justice Scalia so often urged.[189] Fidelity to the past understood at the most specific level of generality would entrench the "democratic deficits" of constitutions drafted when women and people of color were excluded from participating. In the words of a North Dakota district court judge:

> The reality is that "individuals" did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests. It quite simply was not the "tradition" of the time, and therefore was not reflected in the laws or state constitution.[190]

This judge drew conclusions from history and tradition deeply at odds with the Supreme Court's in *Dobbs*, reasoning "that there was a time when we got it wrong and when women did not have a voice. This does not need to continue for all time, and the sentiments of the past, alone, need not rule the present for all time."[191] Given this

---

reasoning about the state's past in terms of the principles that guide interpretation of state constitution).

188. Planned Parenthood Ass'n of Utah v. Utah, 2024 UT 28, 45 (evaluating constitutionality of Utah abortion ban under Utah Constitution).

189. *See supra* note 91 (quoting Justice Scalia dissenting in *Obergefell*).

190. Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-CV-01608, ¶ 40 (N.D. Dist. Ct. Sept. 12, 2024).

191. *Id.* at ¶ 43. Women judges reasoning about abortion in several of the state cases sound quite different than nineteenth-century legislators and jurists. *See, e.g.*, Johnson v. State, No. 2023-CV-18853, at *34 (Wy. Dist. Ct. Nov. 18, 2024) (ruling that the state has placed "unreasonable and unnecessary restrictions on the right of pregnant women to make their own health care decisions"); *see also* Baylor Spears, *Wisconsin Supreme Court Justices Question Enforcing 1849 Law as an Abortion Ban*, WIS. EXAM'R (Nov. 11, 2024, 5:09 PM), https://wisconsinexaminer.com/2024/11/11/wisconsin-supreme-court-justices-question-enforcing-1849-law-as-an-abortion-ban [https://perma.cc/8LXF-KJYQ] (reporting a lengthy colloquy between two State Supreme Court judges and the Sheboygan District Attorney's attorney about enforcing Wisconsin's 1849 abortion ban).

history, strengthening the constitution's democratic legitimacy required interpretation faithful to the constitution's principles, not to its framers' understanding of them. Building on this decision, a Georgia state court struck down the state's six-week ban, refusing to reason from original public meaning:

> "Liberty" for white women in Georgia in 1861 did not encompass the right to vote (and thus to ratify the State's new constitution). And of course liberty did not exist at all for Black women in Georgia in 1861. Thus, any rooting around for original public meaning from that era would yield a myopic white male perspective on an issue of greatest salience to women, including women of color; certainly that is not what constitutional interpretation of any legitimate stripe ought to do.[192]

In differentiating their states' approach to tradition from the Supreme Court's, these state judges are saying the quiet part out loud. They understand that fidelity to tradition requires the exercise of critical judgment, and pretending otherwise—that traditions are facts to be found—will conceal the real grounds of decisions from the public.

It is on this last observation about the anti-democratic logic of the Roberts Court's new history-and-tradition decisions that I close. The "memory games" through which conservative Justices perform constraint—hiding value-based reasoning behind citations to ancient laws in decisions to which ordinary Americans are supposed to defer because they lack the relevant expertise—threatens danger *to democracy* that the open values-based reasoning of the Warren and Burger Courts did not. A court's open values-based reasoning is more transparent to the public. As Justice Stevens put it in

---

192. Sistersong Women of Color Reproductive Justice Collective v. Georgia, No. 2022CV367796, at *10-11 n.16 (Ga. Super. Ct. Sept. 30, 2024) (ACLU), https://assets.aclu.org/live/uploads/2022/07/Order-enjoining-GA-six-week-ban-9.30.24.pdf [https://perma.cc/BXD4-U9ZY], *stayed by* Order Granting Georgia's Emergency Petition for Supersedeas, No. S25Mr0216 (Ga. Oct. 7, 2024) (ACLU), https://www.aclu.org/documents/stay-order-in-state-of-georgia-v-sistersong-women-of-color-reproductive-justice-collective-et-al [https://perma.cc/G8GS-EA3A]; *see also* Ziva Branstetter, *Georgia Judge Lifts Six-Week Abortion Ban After Deaths of Two Women Who Couldn't Access Care*, PROPUBLICA (Oct. 3, 2024, 5:00 AM EDT), https://www.propublica.org/article/georgia-judge-lifts-six-week-abortion-ban-after-deaths [https://perma.cc/TCQ8-K4A9].

McDonald: "At least with my approach, the judge's cards are laid on the table for all to see, and to critique," in contrast to the conservative Justices' historical method, where, Justice Stevens argued, the judge's "subjective judgments" are "smuggled into" and "*buried* in the analysis."[193]

The history-and-tradition decisions of the Roberts Court evade accountability by presenting normative judgments as if they were factual judgments, as if all traditions are respect-worthy and worthy of deference.[194] Of course that is not so. The Court itself does not believe that all traditions are respect-worthy and worthy of deference. Recall the memory work of *SFFA* where the Court attacked affirmative action by condemning America's traditions of racial segregation and celebrating its decision to reverse *Plessy* in *Brown*. The conservative Justices move from repudiating past wrongs in one case to reasoning as if the Constitution requires deference to past practice in another, without identifying why the Constitution requires deference in some circumstances and not others. In this way, the Court employs selective deference to the past to roll back equality rights without expressing the beliefs about equality that drive its decisions.[195] As I observed before the Term's end: Should

193. McDonald v. City of Chicago, 561 U.S. 742, 908 (2010) (Stevens, J., dissenting) (emphasis in original). Remarkably, Justice Scalia replied: "In a vibrant democracy, usurpation should have to be accomplished in the dark. It is Justice Stevens' approach, not the Court's, that puts democracy in peril." *Id.* at 805 (Scalia, J., concurring in part).

194. In *Dobbs*, the Court proceeded as if judges could resolve the abortion question by deference to facts about the nation's past; the majority attacked at length a historians' brief demonstrating that the record posed an unavoidable normative question. The brief argued that abortion bans of the Civil War era rested on both constitutionally legitimate and *illegitimate* concerns—protecting unborn life, as well as enforcing women's roles as wives and mothers and preserving the religious and ethnic character of the nation. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250–55 (2022). For discussion of *Dobbs* in this light, see Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 20, at 920; and *id.* at 922–24, which shows that the *Dobbs* majority implicitly concedes that finding a tradition for constitutional purposes depends in part on the legitimacy of the practice—that is, the inquiry is normative as well as positive.

195. *See generally* Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 20 (showing how history-and-tradition cases can legitimate inequality); *id.* at 906 ("[T]he conservative Justices have repudiated past practices when those practices

the Court decide that striking down the domestic-violence prohibitor in *Rahimi* would give its history-and-tradition jurisprudence a "bad look," it can adjust levels of generality and impose other doctrinal limits on its decision, without ever articulating the reasons driving these tradition-legitimating adjustments.

There is a democracy problem here. Precisely as judges writing history-and-tradition decisions treat normative questions as questions of historical fact, they fail to explain how they have coordinated the competing values on which their decisions rest. Dispensing with reason-giving—by foreswearing value-based judgments at the very same time that the Court is burying its value-based judgments in a story about deference to the past—offends the rule of law and democracy itself.

With transparency, an aroused public can mobilize to challenge the Court, precisely as the conservative legal movement has in responding to *Brown v. Board*, *Roe v. Wade*, and *Obergefell v. Hodges*. By contrast, concealing value-based reasoning under claims of expertise can prevent the democratic dialogue that gave rise to the conservative legal movement itself. A Court that overturns rights or regulation in an opinion that conceals values-based reasoning behind citations to old laws—an opinion that presents values as facts about the past over which judges claim expertise and an inexpert public must defer—may deceive the public and *disable* democratic oversight. History-and-tradition opinions of this kind could ultimately prove more of a threat to democracy than opinions like *Brown*, *Roe*, and *Obergefell*, which hardly shut down democracy, but instead led to high and sustained forms of democratic engagement.

---

expressed racism or nativism to which the Justices objected. But in *Dobbs*, the conservative Justices embraced past practices as the nation's history and tradition . . . ."); Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 988 (2024) (showing that history-and-tradition cases involve "a lot of maneuvering in the dark—adjusting levels of generality and characterizing historical traditions in ways that silently incorporate (or fail to incorporate) current understandings of equality, while pretending to defer to our ancestors").

TENSION BETWEEN CONSTITUTIONAL MEANING AND CONSTITUTIONAL CONSTRUCTION

STEPHANIE H. BARCLAY*

INTRODUCTION

The counter-majoritarian difficulty of judicial invalidation of democratically enacted laws is well known and frequently discussed.[1] As Robert Alexy has explained, "[t]he judges of the constitutional court have, as a rule, no direct democratic legitimation, and the people have, normally, no possibility of control by denying them re-election."[2] This thus raises the question of whether such judicial activity is "compatible with democracy."[3]

Originalism claims to be a solution to this problem because when judges interpret the original public meaning, they can claim the democratic legitimacy of a super-majoritarian law when invalidating a merely majoritarian policy. Justice Barrett recently reaffirmed this super-majoritarian justification for originalism while giving remarks at Notre Dame Law School.[4]

But of course, this claim rests on the assumption that the judiciary

* Professor of Law at Georgetown Law School, and Faculty Co-Director of the Center for the Constitution. For helpful comments, the author thanks Jud Campbell, Bradley Robeiro, Kurt Lash, Stephen Sachs, Reva Seigel, Lawrence Solum, and other participants at the History and Tradition Symposium hosted by the *Harvard Journal of Law & Public Policy*. For excellent research assistance, the author thanks Nat Deacon.

1. For a discussion of a thin theory of democracy, *see* Scott Hershovitz, *Legitimacy, Democracy, and Razian Authority*, 9 LEGAL THEORY 201 (2003).

2. ROBERT ALEXY, LAW'S IDEAL DIMENSION 136 (2021).

3. *Id.* at 139.

4. Notre Dame Law School, *Competing Approaches to Legal Interpretation—A Conversation Between Justices*, YOUTUBE (Feb. 9, 2024), at 16:10 https://youtu.be/ERtSSJoco4o?si=Ru-hrG7p5upbUrgS [https://perma.cc/DV8E-HH3X].

is actually implementing the original meaning of the Constitution. When the judiciary is operating in what some originalists describe as the "construction zone,"[5] that claim of democratic legitimacy can become more tenuous.

There are a number of reasons, discussed by multiple scholars, why judges often cannot claim to have identified the original communicative content with 100% certainty.[6] Text might be ambiguous, vague, or open-ended, meaning that the content itself may be underdetermined.[7] Or there may be epistemic under-determinacy resulting from things like divergent evidence about the meaning of a word or phrase (that is, evidence that cuts in both directions) or simply very sparse evidence of meaning.[8]

In this article, I will discuss a less focused-on phenomenon: the way in which judges can construct constitutional doctrines, or giving legal effect to communicative meaning, in ways that increase the strain on democratic legitimacy and could be viewed as requiring heightened levels of clarity in original meaning to be justified. I argue that as the tension between the communicative content and legal content of the constitutional text increases, or at least as the probability that the tension increases, the judiciary loses its claim to the mantle of super-majoritarian legitimacy and instead becomes vulnerable to all the original critiques of their counter-majoritarian action in tension with democratic principles. Another way of

5. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–72 (2013); Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 259 (2021); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010); *see also* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 6 (1999).

6. *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 285 (2017).

7. A word or phrase might be ambiguous, in that it "has more than one sense." It might be vague, in that it "refers to situations in which a word or phrase has borderline cases." *Id.* at 286. Words that contain a scalar quality often fall into this latter category.

8. *Id.* Much ambiguity may be liquidated by context. But there is the possibility of "irreducible ambiguity." For example, if constitutional text employs a vague or open-textured term/concept, then the communicative content *is* underdeterminate. For a discussion of these concepts, *see* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 10–11 (2015); Lawrence B. Solum, *Intellectual History As Constitutional Theory*, 101 VA. L. REV. 1111, 1120–22 (2015).

conceptualizing this issue is that the probability increases that the chosen constitutional construction is not faithful to the ends, objects or functions of the relevant object of constitutional interpretation.[9]

In this piece, I will discuss three interpretative issues that increase the risk of construction-interpretation tension. One occurs when a court pays insufficient attention to the level of generality that is most consistent with the original understanding and judicial restraint. A second occurs when a court relies on layered indeterminate meanings to justify a constitutional construction. A third arises when courts issue far-reaching remedies like facial invalidation of laws, as opposed to more modest as-applied remedies. I will close by explaining why simply deciding cases under the banner of "history and tradition," as the Court did in *New York State Rifle & Pistol Ass'n v. Bruen*,[10] does not remove the need to engage in constitutional construction or avoid this tension-increasing risk.

I. DEFINING TERMS

As a preliminary matter, some terminology is in order regarding the types of meaning the judiciary engages with when interpreting the Constitution.[11] Here for simplicity purposes (and space constraints), I largely adopt many of the terms that Lawrence Solum and Keith Whittington use regarding interpretation (the search for the communicative content of constitutional text) and construction (giving legal or practical content to the communicative content of

9. See RANDY BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 9 (2021) (proposing an originalist theory of construction that seeks to effectuate the original "ends, purposes, goals, or objects that the Constitution was adopted to accomplish—its design functions"); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 35 (2018) ("Judges should . . . specify a construction—an implementing doctrine—that resolves the case at hand in a manner that is consistent with the relevant original function, and susceptible of application to future cases of a similar kind.").

10. 142 S. Ct. 2111 (2022). Much of the discussion in this section draws from Stephanie H. Barclay, *Replacing Smith*, 133 YALE L.J. FORUM 436 (2023).

11. For a classic discussion of the ambiguity of "meaning," *see* C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM 305–36 (1923).

the text). Solum defines communicative content as the content that the text conveyed or made reasonably accessible to the public at the time of framing and ratification.[12] For example, "the communicative content of the word 'dollar' as used in the Seventh Amendment refers to the Spanish silver dollar weighing 416 grains."[13] In contrast, legal content "is the content assigned to the text by relevant legal authorities, for example, by the Supreme Court when it gives the Constitution an authoritative legal construction."[14]

According to Keith Whittington, "interpretation is understood to be a more technical activity, concerned with employing a set of analytical tools to unearth the meaning inherent in the constitutional text."[15] And while "constitutional interpretation may be more of a craft than a science, . . . its results are immediately justified in terms that are internal to the Constitution itself. The tools of interpretation" include "aids such as precedent, history, and constitutional structure" as ways of "illuminat[ing] the text" rather than "alter[ing] or add[ing] to it."[16] In contrast, construction is a more "'imaginative'" process[17] that is necessary to "construct a determinate constitutional meaning to guide government practice."[18] This sort of process of construction is always necessary at some point, because "[t]raditional tools of interpretive analysis can be exhausted without providing a constitutional meaning that is sufficiently clear to guide government action."[19] The text may also "specify a principle that is itself identifiable but is nonetheless indeterminate in its application to a particular situation."[20] While Solum highlights ways in which the judiciary engages in the process of construction, Whittington notes that political actors engage in constitutional

12. Solum, *supra* note 6, at 271; Solum, *Original Public Meaning*, 2023 MICH ST. L. REV. 807, 846–47.

13. Solum, *supra* note 6, at 271.

14. *Id.*

15. WHITTINGTON, *supra* note 5, at 6.

16. *Id.*

17. *Id.* (quoting WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 118 (1993)).

18. *Id.*

19. *Id.* at 8.

20. *Id.*

construction as well.[21]

Finally, a word about democracy is in order. This Essay does not purport to focus on one specific conception of democracy, which is a hotly contested topic. Instead, I will refer to democracy in the thin sense as "a class of political systems that are participatory, where each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy."[22] I will assume without defending the proposition that consistency with democratic principles should be a scalar rather than binary assessment, meaning some constitutional constructions could be more (or less) consistent with democratic principles than others.[23] And individual judicial decisions can be assessed on a retail basis for their degree of consistency with democratic principles.

The positive law at issue that the judiciary is assessing, and how the judiciary approaches its task with respect to that law, are also relevant to democratic compatibility. As Scott Hershovitz argues, law in a democracy does not merely "tell us what we may and may not do," but is "how *we decide* what we may and may not do" and thus may "lay[] the greatest claim to participatory development."[24] Given the democratic participation involved in the making of the United States Constitution, this argument also applies to constitutional law. One could argue that the more closely a court's constitutional construction hews to communicative content derived from constitutional interpretation,[25] the more democratically compatible

21. *Id.* at 6–8.

22. Hershovitz, *supra* note 1, at 213. For a discussion of the normative desirability of democracy, see NICHOLAS BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 148–49 (2018); ROBERT DAHL, DEMOCRACY AND ITS CRITICS 164 (1989); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 27–49 (1996); JEREMY WALDRON, LAW AND DISAGREEMENT 8–9 (2001).

23. *See* Larry Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913, 933 (2024) ("Democratic legitimacy is a scalar and not a binary. Institutions can be more or less democratic.").

24. Hershovitz, *supra* note 1, at 209–10 (emphasis added).

25. For another important discussion of interpretation, see Timothy Endicott, *Legal Interpretation*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 109, 112 (Andrei Marmor ed., 2012) (interpretation "comes into play when there is a possibility of argument as to the meaning [of a text]" and is not merely a matter of judgment). *But see*

that task is. On the other hand, the more the law at issue is open-ended and leaves the outcome up to the court's subjective judgment, the less one can link that judicial outcome to participation by citizens in a democratic process. Conversely, one could argue that the bigger interference a court's constitutional construction has on the democratic process, the more clarity the court may need to point to in communicative content to justify the relevant construction.

II. JUDICIAL APPROACHES THAT INCREASE TENSION BETWEEN INTERPRETATION AND CONSTRUCTION

Ideally, a court's constitutional construction would closely reflect the communicative meaning that could be identified through constitutional interpretation. This section explores ways in which a judicial constitutional construction creates a more tenuous link to the communicative content of constitutional text that can be determined through interpretation, and the legal content that results from constitutional construction. A tenuous link between interpretation and construction becomes even more problematic when the construction is of a type that puts more pressure on democratic principles.

A. Insufficient Attention to the Level of Abstraction

The level of generality a court identifies when engaging in constitutional construction is an issue of great relevance to how defensible that construction is.[26] Sometimes, for example, a construction that abstracts communicative content to a very high level makes the link between interpretation and construction more tenuous. This is because the applied legal meaning of the Constitution that results can both depart significantly from any of the original expected applications of the text, and also because at a high level of abstraction it is much easier for legal applications to result in highly divergent

---

Francisco Urbina, *It Doesn't Matter What "Interpretation" Is*, 39 CONST. COMMENT (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4709491.

26. For a discussion of originalism and levels of generality, see LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM (2011). *But see* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017).

outcomes.

Consider the Supreme Court's constitutional construction of meaning in the Establishment Clause context, which has long been subject to significant criticism.[27] This criticism did not begin with the Court's decision in *Lemon v. Kurtzman*,[28] but that infamous case certainly escalated it. Decided in the "bygone era when th[e] Court took a more freewheeling approach to interpreting legal texts," the Court "sought to devise a one-size-fits-all test for resolving Establishment Clause disputes."[29] In that case, the Court acknowledged that it could only "dimly" perceive the communicative content of the Establishment Clause.[30] Instead of using the indeterminate meaning to weigh in favor of a more modest interpretation of the Establishment Clause, the Court arguably did the opposite. It constructed meaning at a very high level of generality, guided by the "evils against which the Establishment Clause was intended to afford protection."[31] Then the Court added another step of construction by noting that the evils only needed to be "respecting" those sorts of forbidden Establishment Clause objectives, even if "falling short" of an actual establishment.[32] From this reasoning, the Court constructed its famous three-part test, under which government action must have a secular purpose, could not have the primary effect of advancing religion, and could not excessively entangle government with religion.[33]

Given this approach, it is no surprise that the Court's application of this rule has identified as "establishments" government activity that bears little resemblance to actual legal establishments at the Founding. For example, before *Lemon*, in nearly two centuries of U.S. history, the Court had never held a public display of religion

27. For one summary of some of this criticism, see *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1603 (2022) (Gorsuch, J., concurring).

28. 403 U.S. 602 (1971).

29. *Shurtleff*, 142 S. Ct. at 1603–04 (Gorsuch, J., concurring) (internal quotation marks omitted) (quoting Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019)).

30. *Lemon*, 403 U.S. at 612.

31. *Id.*

32. *Id.*

33. *Id.* at 612–13.

to constitute an unconstitutional "establishment" of religion.[34] And in fact, such displays were allowed at the Founding.[35] After *Lemon*, Establishment Clause challenges to religious public displays came "fast and furious."[36] With a legal rule so untethered from the communicative content of the Establishment Clause, these court decisions often resulted in conflicting outcomes that created more questions than answers about the legal content of the rule. Courts were split, for instance, on whether and when the government could display nativity scenes, menorahs, or a city seal with a cross.[37]

In *Kennedy v. Bremerton School District*, the Supreme Court made clear that it has now overruled *Lemon*,[38] and plans to return to a more historical approach to constitutional construction.[39] But not all constitutional constructions based on history are equivalent when it comes to removing tension between the communicative content and the legal content of the Establishment Clause.

For example, some scholars have argued that the Court has now adopted a coercion test,[40] perhaps at a high level of abstraction.

---

34. *See* Michael McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 107–09; *see also* C. BROUGHER, CONG. RSCH. SERV., RS22223, PUBLIC DISPLAY OF THE TEN COMMANDMENTS AND OTHER RELIGIOUS SYMBOLS 1–2 (2011); *Religious Displays and the Courts,* PEW RSCH. CTR. (Jun. 27, 2007) https://www.pewresearch.org/religion/2007/06/27/religious-displays-and-the-courts/ [https://perma.cc/KT4R-M8HT] (**"**The Supreme Court first addressed the constitutionality of public religious displays in 1980" in *Stone v. Graham*, 449 U.S. 39 (1980)).

35. "[W]hen designing a seal for the new Nation in 1776, Benjamin Franklin and Thomas Jefferson proposed a familiar Biblical scene—Moses leading the Israelites across the Red Sea. The seal ultimately adopted by Congress in 1782 features 'the Eye of Providence' surrounded by 'glory' above the motto Annuit Coeptis—'He [God] has favored our undertakings.'" Shurtleff v. City of Boston, 142 S. Ct. 1583, 1610 (2022) (Gorsuch, J., concurring) (internal citations omitted).

36. *Id.* at 1604 (Gorsuch, J., concurring).

37. *Id.*

38. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019)).

39. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)) ("In place of *Lemon* and the endorsement test," the Court instructed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'").

40. *See* Noah Feldman, *Supreme Court is Eroding the Wall Between Church and State*, BLOOMBERG (June 27, 2022, 12:05 PM), https://www.bloomberg.com/opinion/articles/2022-06-27/supreme-court-upends-church-state-law-in-case-of-praying-coach

Without more historical trappings than that, such a test risks replacing one amorphous "one-size-fits-all test" with another. Such a move might well simply "tak[e] us right back to the dog's breakfast" that the Court "warned against" when it disregarded *Lemon*.[41]

I argue that the Supreme Court seems to be adopting a more nuanced rule than that—a constitutional construction of legal meaning at a much lower level of generality, focusing on creating specific doctrinal tests from each of the six specific historical hallmarks of an Establishment.[42] And that is a good thing for the democratic legitimacy of the Court's construction of the constitutional text of the Establishment Clause.

Specifically, the Court explained that historically, government action that coerced individuals to participate in a religious exercise on pain of legal penalty "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[43] The use of "among" is important. The Court did not say that coercion, in the abstract, was the new *sine qua non* of historical religious establishments.[44] The Court also concluded that sentence by citing in footnote 5 to Michael McConnell's scholarship that identifies multiple important historical hallmarks of established religions,[45] and by citing approvingly to a concurrence by Justice Gorsuch in a prior case.[46] This

---

[https://perma.cc/VU7X-97X7]; *see also* Ira C. Lupu & Robert W. Tuttle, Response, Kennedy v. Bremerton School District—*A Sledgehammer to the Bedrock of Nonestablishment*, GEO. WASH. L. REV. ON DOCKET (July 26, 2022), https://gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment [https://perma.cc/CM5A-6MQY].

41. This was a quip by Justice Gorsuch in oral argument of *American Legion*, when grappling with what test could replace *Lemon*. *See* Jacob Sullum, *In Giant Cross Case, Justices Struggle to Clean Up a 'Dog's Breakfast' of Confusing Precedents*, REASON (Feb. 28, 2019, 3:30 PM), https://reason.com/2019/02/28/in-giant-cross-case-scotus-struggles-to/ [https://perma.cc/9RYF-Q6ME].

42. *See* Stephanie H. Barclay, *The Religion Clauses after* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2099 (2023).

43. *Kennedy*, 142 S. Ct. at 2429.

44. Barclay, *supra* note 42, at 2104.

45. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–12, 2131 (2003).

46. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1607-11 (2022) (Gorsuch, J., concurring).

concurrence both summarized the distinct historical hallmarks of an establishment and provided guidance about how the communicative meaning of these hallmarks could be given a legal construction at a low level of generality.[47] It states the following:

> Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. *First*, the government exerted control over the doctrine and personnel of the established church. *Second*, the government mandated attendance in the established church and punished people for failing to participate. *Third*, the government punished dissenting churches and individuals for their religious exercise. *Fourth*, the government restricted political participation by dissenters. *Fifth*, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And *sixth*, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.[48]

Notably, some of these hallmarks could themselves be interpreted at higher levels of abstraction or lower ones. For example, at a lower level of abstraction, the denial of political participation by religious dissenters is *sui generis*, and a distinct kind of harm widely understood at the Founding to constitute an establishment of religion, which the First Amendment prohibited the federal government from enforcing. But at a high level of abstraction, one could interpret such a hallmark of an establishment to involve the denial of any important government benefit to religious dissenters. This latter type of legal construction would have far broader implications with applications that likely diverged much more dramatically from expected applications of the text at the Founding, and thus increase the tension between the communicative content of the constitutional text and the legal content. I argue that the former type of construction likely carries far more democratic legitimacy

47. *Id.*

48. *Id.* at 1609 (emphasis added) (internal citations omitted).

and is thus preferable.

In an important recent article by Mark Storslee, he weds insightful historical arguments with some claims about constitutional construction that would increase the level of generality considered under the Establishment Clause and create a more tenuous connection between constitutional meaning and constitutional construction.[49] For instance, he points out that the Founding generation objected to laws mandating government-sponsored attendance to religious worship, even if such laws allowed for exemptions for religious dissenters.[50] From this, he argues that Justices Scalia and Thomas were wrong in the school prayer cases to focus their concern on instances of direct coercion. Storslee argues for a "constitutional construction" operating at a higher level of abstraction that would prohibit government from making any attempt to claim power to enforce religious duties, even if that power is coupled with exemptions that would prevent that power from ever being exercised against religious dissenters.[51] Storslee rightly points out that his "conclusions here proceed by way of analogy—inquiring whether Founding-era convictions, understood at a modest level of generality, reasonably apply to new circumstances like modern, mandatory school prayer" and involving "an act of judgment that history can inform but not ultimately dictate."[52]

While Storslee's argument about construction at a higher level of generality is certainly plausible, let me briefly point to some considerations that point the other way. Storslee points to history showing that "by the time of the Founding, [mandatory attendance] laws contained opt-outs for dissenters, including some that allowed objectors to avoid worshipping altogether," and yet that proved controversial.[53] But while these laws did remove coercion for religious objectors, note that the laws also applied real coercion to members of the relevant church identified in the law. Thus, if

49. Mark Storslee, *History and the School Prayer Cases*, 110 VA. L. REV. 1619, 1628 (2024)
50. *Id.*
51. *Id.* at 1628, 1695.
52. *Id.* at 1697.
53. *Id.*

someone's desire to avoid worship was simply that they did not feel like going to their own faith, there was no protection for them under the conscientious objection sorts of opt-outs. In other words, these laws did in fact involve direct coercion with real penalties for some members of the population, precisely the type that Justices Scalia and Thomas speak to as a relevant hallmark of the Establishment.[54] There is no historical evidence Storslee points to that the Founding generation would have supported judicial enforcement of some of these laws (as opposed to mere political objection to them) by a claimant who had in fact experienced *no* direct coercion at the hands of such a law. In other words, limiting Establishment Clause prohibitions regarding mandated religious observance to contexts with direct coercion and real legal penalties, as Justices Scalia and Thomas argue, is a method of construction consistent with the historical evidence.[55]

The contrasting constitutional construction Storslee offers is a number of steps removed and provides a less clear limiting principle for what would not count as government coercion, thus increasing tension with democratic principles as the judiciary can categorically enforce a much more vague principle.

B. Relying on Layered Meaning

There is another, independent reason why the Court's constitutional construction of the Establishment Clause under *Lemon* was problematic. The Court had to rely on more than one layer of debatable communicative content (and corresponding legal

54. *See* Lee v. Weisman, 505 U.S. 577, 640–42 (1992) Scalia, J., dissenting (discussing "persons required to attend church and observe the Sabbath"); Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("The Framers understood an establishment 'necessarily [to] involve actual legal coercion."' (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29 (2004) (Thomas, J., concurring in the judgment))); Town of Greece v. Galloway, 572 U.S. 565, 610 (2014) (Thomas, J., concurring in part and in the judgment) (similar).

55. Elsewhere I have written about why some of the school prayer cases may be defensible under a separate historical hallmark of established religion, even if they cannot be justified under notions of government coercion. *See* Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2108 (2023).

construction of that content) to ultimately craft its rule under *Lemon*. Specifically, additional debate exists about whether the Establishment Clause was the type of privilege or immunity of citizenship that was understood to be properly incorporated against state and local governments *at all* under the Fourteenth Amendment. Perhaps more than any other protection listed in the Bill of Rights, the Establishment Clause has sparked heated debate about whether incorporation was proper.

Justice Thomas has argued that at the Founding, the Establishment Clause served only to "protec[t] States, and by extension their citizens, from the imposition of an established religion by the Federal Government."[56] And there is "mixed historical evidence concerning whether the Establishment Clause was understood as an individual right at the time of the Fourteenth Amendment's ratification." [57] Under that view, "the Clause resists incorporation against the States" under the Fourteenth Amendment.[58]

Regardless of one's views under either the meaning of the Establishment Clause at the Founding, or the secondary interpretive question of whether it was understood to be incorporated under the Fourteenth Amendment, my point is that a legal construction that relies on compounded questions of communicative content increases the likelihood that there is a tenuous link between the ultimate legal construction and the communicative meaning of the constitutional provision. That is because, at least under a rule along the lines adopted by the Court in *Lemon*, (or the rule that Storslee proposes) one would have to be correct about *both* independent questions of communicative content to have a justified legal

56. Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); *see also, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 604–607 (2014) (Thomas, J., concurring in part and concurring in the judgment); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in judgment).

57. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2264 (2020) (Thomas, J., concurring) (citing *Town of Greece*, 572 U.S. at 604, 607–08); *see* Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1141–1145 (1995); *but cf.* STEVEN SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 50–52 (1995).

58. *Espinoza*, 140 S. Ct. at 2263 (Thomas, J., concurring).

construction. As any statistician could point out, while the probability of flipping heads in one coin toss is 50%, the probability of flipping heads twice in a row is only 25%.[59] So, if the communicative content of both questions is uncertain, the compounded communicative content will be far less certain, increasing the likelihood that there is a tension between interpretation and construction.

Consider this issue in the separate constitutional context of the Supreme Court's Section Five jurisprudence, and its decision in *City of Boerne v. Flores*.[60] There, as with the Establishment Clause, the Court's chosen legal outcome depended on interpreting at least two independent (and layered) constitutional questions: what was the meaning of the First Amendment's Free Exercise Clause, and what was the meaning of Congress's enforcement authority under Section Five of the Fourteenth Amendment?

Under both questions, the communicative content the Court claimed to have identified was dubious. First, the Court referred back to its decision in *Employment Division v. Smith* to affirm its interpretation of the Free Exercise Clause as only prohibiting government discrimination against religion (rather than prohibiting government burdens of religious exercise whether discriminatory or not).[61] But in that earlier opinion, the Court had not claimed to be interpreting the communicative meaning of the Free Exercise Clause. If anything, it was opting to under-enforce the meaning of that text out of concerns relating to institutional competencies of the various branches of government in a democracy.[62] Indeed, the Court admitted in *Smith* that its nondiscrimination interpretation of the Free Exercise Clause was only one of multiple "permissible reading[s]" of the constitutional text.[63]

But the Court's interpretive problems did not end there. In *Boerne*,

---

59. *If I flip a coin twice, what is the probability of getting both heads?*, CUEMATH, https://www.cuemath.com/questions/if-i-flip-a-coin-twice-what-is-the-probability-of-getting-both-heads/ [https://perma.cc/CH9E-2PL6].

60. 521 U.S. 507 (1997).

61. 494 U.S. 872, 883–90 (1990).

62. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 189–92 (1997).

63. *Smith*, 494 U.S. at 878.

the Court next adopted an equally dubious interpretation of Congress's authority under Section Five of the Fourteenth Amendment. To understand why, a bit of background is in order. The Supreme Court's decision in *Smith* received widespread criticism,[64] and there is strong historical evidence suggesting that this interpretation was not the most consistent with the original communicative content of the Free Exercise Clause.[65] Congress responded to *Smith* just three years later in nearly unanimous action by passing the Religious Freedom Restoration Act (RFRA).[66] RFRA offered heightened legislative protection to religious exercise where the Court was no longer offering protection under the judicial constitutional minimum of that right.[67] RFRA again permitted government to substantially burden religious exercise *only* when it was necessary to do so to advance a compelling government interest.[68] And this statute was enacted pursuant to Congress's power under Section Five of the Fourteenth Amendment to pass "appropriate legislation" to

64. *See* Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 260 n.9 (1993) (collecting sources that discuss potential implications of Smith); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting that there are doubts as to whether "the *Smith* rule merits adherence"); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851–56 (2001); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 114 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2–3 (arguing that *Smith* was incorrectly decided based on precedent and original intent); Michael W. McConnell, *Free Exercise Revisionism and the S*mith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("There are many ways in which to criticize the *Smith* decision. . . . *Smith* is contrary to the deep logic of the First Amendment."); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 11–26 (1991). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (questioning the originalist historical evidence in favor of religious exemptions); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending "*Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself").

65. *See, e.g.*, Barclay, *supra* note 10.

66. 42 U.S.C. §§ 2000bb to bb–4; *see also* H.R. 1308, 103rd Cong. (1993) (enacted).

67. For a more detailed exposition of this view of RFRA, *see generally* Mark L. Rienzi & Stephanie H. Barclay, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

68. *See* 42 U.S.C. § 2000bb-1.

"enforce" the provisions of that Amendment.[69]

Yet in a surprising turn of events in *City of Boerne*, the Supreme Court struck down RFRA as an unconstitutional use of Congress's Section Five power.[70] The Court did not just resuscitate *Smith*'s methodological conclusions; it evinced a surprising territoriality about constitutional interpretation itself: "The power to interpret the Constitution in a case or controversy remains in the Judiciary."[71] Put differently, only the Court, and not Congress, can determine rights' bounds—Section 5 notwithstanding. In arrogating to itself not just the power to adjudicate rights claims but also the power to interpret any aspect of the constitutional rights,[72] the Court "adopted a startlingly strong view of judicial supremacy . . . the most judge-centered view of constitutional law since *Cooper v. Aaron*."[73]

There is fairly robust historical evidence to suggest that the Court got it wrong under its interpretation of Congress's Section Five authority. As Michael McConnell has explained,

> It may seem odd to say that the legislative branch can engage in constitutional interpretation, but it should not. The congressional power to interpret the Fourteenth Amendment for purposes of passing Section Five enforcement legislation is one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers . . . . Such situations have occurred, not infrequently, throughout our history."[74]

He also noted that during the Reconstruction Era, "Congress did not consider itself limited to enforcing judicially determined rights under the Fourteenth Amendment. Between 1866 and 1875, Congress engaged in extensive debates over the substantive reach of the

---

69. U.S. CONST. amend. XIV, § 5.

70. *See* City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

71. *Id.*

72. For under *City of Boerne,* it is the judiciary—and the judiciary alone—that draws the class of excluded reasons.

73. McConnell, *supra* note 62, at 163.

74. *Id.* at 171 (internal citation omitted).

various Reconstruction era Civil Rights Acts."[75] Congress did so because it believed that its "interpretation mattered. [Congress was] not content to leave the specification of protected rights to judicial decision."[76]

Regardless of where one comes out on either the interpretive question of the Free Exercise Clause, or the interpretive question of Section Five of the Fourteenth Amendment, the point is that the Court's decision in *Boerne* requires it to have gotten it right under *both* independent questions of constitutional interpretation. And the real uncertainty that the Court got it right under *either* question compounds by layering these questions, thus increasing the likelihood of problematic interpretation-construction tension.

C. Issuing Broad Remedies

Another method of construction that can increase the pressure a constitutional construction places on democratic principles involves the types of constitutional remedies the court issues as part of its constitutional construction.

Here, let us assess two alternative remedial approaches to enforce the meaning of the nondelegation doctrine. The nondelegation doctrine stands for the principle that Congress cannot delegate its legislative powers or lawmaking ability to other entities, which most often involves questions about delegations to the executive branch. The widespread view of American jurists since the Founding is that this doctrine at least imposes *some* limits on Congress's power to delegate its legislative power to other entities, particularly the executive branch.[77] "It will not be contended," Chief Justice John Marshall said, "that Congress can delegate to the Courts, or to any other

---

75. *Id.* at 175.

76. *Id.* at 176; *see generally* DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997).

77. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); Louis Capozzi, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4741118. *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 367 (2021).

tribunals, powers which are strictly and exclusively legislative."[78] Justice Story articulated a similar view.[79] In *Field v. Clark*, the Supreme Court said the nondelegation doctrine was "vital to the integrity and maintenance of the system of government ordained by the Constitution."[80]

Still, the question remains about what type of constitutional construction should be used to enforce this doctrine. And part of that analysis requires determining the proper legal remedy. In the 1930s, the Supreme Court facially invalidated some statutes passed by Congress as impermissible delegations of Congressional authority.[81] But over time, that approach fell out of favor.

More recently, the Court has begun to enforce this constitutional principle through the major questions doctrine. This doctrine operates as a type of clear statement rule, under which courts will not lightly assume that agencies have been delegated power to pass regulations about major questions unless Congress has been clear in that interpretation.[82] Rather than operating to essentially strike down a statute whole cloth, this alternative constitutional construction operates as a form of "clarity tax" on Congress—it prevents potential constitutional violations while also giving Congress the chance to more intentionally decide whether to test constitutional boundaries.[83]

Let me offer two potential arguments as to why the Court's more recent approach to nondelegation remedies is a more defensible constitutional construction than its former approach. First, clear statement sorts of judicial remedies have a much more robust

78. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

79. Shankland v. Washington, 30 U.S. 390, 395 (1831) ("[T]he general rule of law is, that a delegated authority cannot be delegated.").

80. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); *see also* Ga. R.R. v. Smith, 70 Ga. 694, 699 (1883) (insisting on "difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed").

81. Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 418 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23 (1935).

82. Capozzi, *supra* note 77, at 6.

83. John Manning, *Clear Statement Rules and the Constitution,* 110 COLUM. L. REV., 399, 399 (2010).

historical pedigree than facial invalidation, as I along with other scholars have written about elsewhere.[84] Second, the types of remedies the judiciary uses have different consequences for the rule of law in a democracy.

For example, Justice Stevens has described facial remedies as legal sledgehammers to democratic work product.[85] On the other hand, he describes as-applied remedies as legal "scalpel[s]" that attempt to redress constitutional problems in a very targeted way.[86] And clear statement rules operate in similar ways.

These labels are perhaps unhelpful, and the distinction may be less binary and more one of degree. But a facial remedy refers to a situation where the court's reasoning means that no aspect of a statutory provision could be validly applied in any context, and Congress cannot simply pass another version of that same statute. In contrast, a remedy saying a clear statement rule has not been satisfied simply invalidates an executive official's particular interpretation of a statute. It does not prevent Congress from legislating with more clarity in the future. Nor does it prevent the agency from passing the same rule relying on different statutory authority.

The former approach thus arguably has a smaller effect on disrupting the rule of law. Thus, the major questions doctrine is an example of a constitutional construction that creates less of a democratic strain than does a different judicial construction (a facial remedy), even though both constructions derive from the same communicative content of the relevant constitutional text.

III. A HISTORY AND TRADITION APPROACH TO INTERPRETATION DOES NOT AVOID THESE CONSTRUCTION RISKS

Let me close with one brief observation. Some of the defenders of a historical analog approach along the lines the Court adopted in

84. See Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 69–90 (2020); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425-427 (2017).

85. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 399 (2010) (Stevens, J., concurring in part and dissenting in part).

86. *Id.*

New York State Rifle & Pistol Ass'n v. Bruen[87] have argued that we should let the history itself be the constitutional doctrine, rather than rely on constitutional constructions. And they've held out *Bruen* as a model for all constitutional rights.

But I am not convinced that examining Founding-era history can obviate the need for constitutional construction, at least when it comes to the creation of legal doctrine to implement constitutional meaning. *Bruen* is a prime example. There, the Court found no historical practice of government regulation resembling the modern gun-control law at issue in that case. As a result, the Court struck down the gun-control law. But the Court could have just as easily flipped the presumption, and held that unless it found historical analogs of the relevant types of firearms practices at issue, those practices would not receive constitutional protection. It could have also looked not for evidence of government *regulation* of the right, but for government *protection* of the right in order to construct a relevant legal doctrine. Further, a court also engages in constitutional construction under this test when it must decide at what level of generality to identify the historical analog.

My point is not that the historical inquiry is unimportant for seeking to determine the likely communicative content of the constitutional text. My point is that some layer of constitutional construction will almost always be necessary to give that meaning legal content through the creation of legal doctrine. This essay offers some preliminary thoughts about what sorts of considerations ought to guide that construction process in ways that lead to more consistency with democratic principles. But much more work on this topic is warranted.

IV. CONCLUSION: JUDICIAL MODESTY IN THE FACE OF INTERPRETIVE INDETERMINACY

In some ways, one could possibly think of a sliding scale between interpretation and construction. As a constitutional construction's impact on democratic principles increases, one should expect the

87. 142 S. Ct. 2111 (2022).

communicative content of the underlying constitutional provision to similarly increase in clarity in sanctioning the countermajoritarian impact on society. So where a court is enforcing facial remedies against the government in categorical ways, one might expect much stronger evidence of communicative content justifying such an outcome. Conversely, as the certainty about clarity of the communicative content of a constitutional provision decreases, one should expect the judiciary's constitutional construction to evince much more modesty in the types of doctrines created and remedies offered.

This judicial modesty could occur through a construction that hews to a much lower level of abstraction of the most plausible expected constitutional applications of the provision, that is mindful of the compounded uncertainty by layering construction upon construction, and that adopts remedies with less dramatic interruptions on the rule of law in a democracy.

In contrast, the types of constitutional constructions that seem least eligible to claim the mantle of supermajoritarian democratic legitimacy are those that have abstracted the communicative content to a very high level of generality (when not called for by the original meaning), that rely on multiple debatable constitutional constructions layered on one another, and that issue remedies with widespread impacts on democratically-enacted work product.

TRADITION, ORIGINALISM, AND GENERAL FUNDAMENTAL LAW

JUD CAMPBELL*

Judges and scholars have puzzled over the place of tradition within an originalist approach to constitutional interpretation. Traditionalism is increasingly prominent in the Supreme Court's rights jurisprudence,[1] particularly as some originalist Justices express concerns over the longstanding tiers-of-scrutiny framework.[2] But the relevance of tradition to originalism is far from obvious. "[I]t has never been clear to me what work 'tradition' is supposed to be doing" in originalist analysis, Judge Newsom writes.[3] Sherif Girgis concurs, observing that relying on tradition "has no obvious justification in originalist terms," since traditions "reflect neither an attempt to discern original meaning nor an attempt to defer to the constitutional interpretations of past actors."[4] From a modern perspective, traditionalism and originalism are

* Professor of Law and Helen L. Crocker Faculty Scholar, Stanford Law School. The author thanks Vikram Amar, Stephanie Barclay, Will Baude, Sherif Girgis, Larry Lessig, Steve Sachs, and Spencer Segal for helpful comments.

1. *See* Mark DeGirolami, *Traditionalism Rising,* 24 J. CONTEMP. LEGAL ISSUES 9, 10–12 (2024); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance,* 101 TEX. L. REV. 1127, 1130 (2023); Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition,* 118 NW. U. L. REV. 433, 435 (2023).

2. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129 (2022); Ramirez v. Collier, 142 S. Ct. 1264, 1286–88 (2022) (Kavanaugh, J., concurring).

3. United States v. Jimenez-Shilon, 34 F.4th 1042, 1051 n.2 (11th Cir. 2022) (Newsom, J., concurring).

4. Sherif Girgis, *Living Traditionalism,* 98 N.Y.U. L. REV. 1477, 1487–88 (2023); *see* Vidal v. Elster, 144 S. Ct. 1507, 1531-32 (2024) (Barrett, J., concurring in part).

in tension. Traditions are alive, and the Constitution is supposed to be dead.[5]

Yet traditionalism was central to American rights jurisprudence at the Founding and during Reconstruction.[6] In both periods, elites recognized a cross-jurisdictional body of customary "general law,"[7] including rules that were deemed "fundamental."[8] This body of general fundamental law included certain general fundamental rights, which were thought to be part of each jurisdiction's fundamental law.[9] Indeed, the federal Constitution recognized these rights in several

---

5. *See* Michael C. Dorf, *The Undead Constitution,* 125 HARV. L. REV. 2011, 2011 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011) and DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) ("Justice Scalia has repeatedly championed what he calls the 'dead Constitution.'").

6. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution,* 1998 U. ILL. L. REV. 173, 175 (discussing customary law at the Founding); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment,* 76 STAN. L. REV. 1185, 1238 (2024) (discussing the relevance of "principles of customary fundamental law"). For pathbreaking work on how Americans conceptualized the customary constitution in the eighteenth century, see 1 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1987). For a more accessible summary of eighteenth-century customary constitutionalism, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–34 (2004).

7. *See* Caleb Nelson, *The Persistence of General Law,* 106 COLUM. L. REV. 503, 505 (2006) (defining general law as "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions").

8. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present,* 39 L. & HIST. REV. 321, 337–49 (2021) (summarizing views of general fundamental law at the Founding); Baude et al., *supra* note 6, at 1196–99 (summarizing views of general fundamental rights in the nineteenth century). *See generally* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024) (discussing eighteenth-century notions of fundamental law).

9. *See* Jud Campbell, *General Citizenship Rights,* 132 YALE L.J. 611, 635–36 (2023); *see, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3,230). For identification of the date of *Corfield,* see Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019). Justice Washington's opinion in *Corfield* is often described as embracing a "fundamental rights" approach to the Privileges and Immunities Clause, but this description is not quite accurate. The key distinction that Washington drew was between *general* fundamental rights, which the Clause secured, and those rights grounded in *local* law, which the Clause did not reach. *See* Baude et al., *supra* note 6, at 1205–06. Thus, under Washington's approach, a right could be "fundamental" (under *local* law) and yet still not within the scope of the Privileges and Immunities Clause. For a visual depiction of this point, see Campbell, *supra,* at 647.

respects. Article IV required states to reciprocally recognize these rights under the Privileges and Immunities Clause,[10] and the Fourteenth Amendment eventually secured them against abridgment by a citizen's own state under the Privileges or Immunities Clause.[11] The Bill of Rights, too, referred to many of these customary rights.[12]

Although the Constitution recognized and secured general fundamental rights in these various ways, the rights themselves were not thought to be grounded in their enumeration.[13] Rather, the thinking went, these rights already existed under general fundamental law and were thus already part of the fundamental law of each jurisdiction. On this view, the Bill of Rights *declared* the existence of certain rights that circumscribed federal power, but the text was not the source of those limits.[14] Members of the First Congress, for example, treated the underlying rights as binding even prior to the ratification of the Amendments.[15] And before and after the Civil War, Republicans viewed state authority as being circumscribed in the same way.[16] In other words, although the federal and state constitutions often referred to general

10. *See* Campbell, *General Citizenship*, *supra* note 9, at 635–36.

11. U.S. CONST. Amend. XIV, § 1; *see* Baude et al., *supra* note 6, at 1212–25.

12. *See* Jud Campbell, *Determining Rights,* HARV. L. REV. *(*forthcoming 2025).

13. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 94–100 (2011); Baude et al., *supra n*ote 6, at 1199–1202. As Stephen Sachs has argued, "the Constitution often interacts with unwritten law without actually turning it into constitutional law." Stephen E. Sachs, *The Unwritten Constitution and Unwritten Law,* 2013 U. ILL. L. REV. 1797, 1803 (citing Stephen E. Sachs, *Constitutional Backdrops,* 80 GEO. WASH. L. REV. 1813 (2012)).

14. *See* Campbell, *Determining Rights, supra* note 12. In addition to the particular customary rights appearing in the Bill of Rights, the Ninth Amendment recognizes the likely existence of others.

15. *See* Congressional Debates (Jan. 21, 1791) (statement of Rep. Fisher Ames), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 342 (William Charles DiGiacomantonio et al. eds., 1995).

16. Baude et al., *supra* note 6, 1214–15, 1217–21. For earlier work on the so-called "*Barron* contrarians," see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 153–57 (1998); Jason Mazzone, *The Bill of Rights in the Early State Courts,* 92 MINN. L. REV. 1, 32–55 (2007). For further discussion of general fundamental law in the nineteenth century, see Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to* 51 Imperfect Solutions, 2020 U. ILL. L. REV. 1455, 1457–68; Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law,* 74 TUL. L. REV. 1263, 1264–65 (2000).

fundamental rights individually (*e.g.*, "freedom of speech") and collectively (*e.g.*, "privileges and immunities of citizens"), the rights themselves remained grounded in general fundamental law, not in constitutional text.

In light of this history, perhaps traditionalism is more consistent with originalism than it first appears. If those who adopted the Bill of Rights in 1791 and the Fourteenth Amendment in 1868 were referring to a body of general fundamental rights, including customary rights, then maybe originalism requires recourse to traditions, including traditions that continued changing after 1791 and 1868.[17] Perhaps, then, reports of the Constitution's death were premature.

This Essay evaluates how originalists[18] should grapple with the jarring idea that the content of fundamental law was partly constituted by an evolving body of traditions. Although informed by my historical work, this Essay takes for granted that Americans at the Founding and during Reconstruction designed the Bill of Rights and the Fourteenth Amendment to refer to general fundamental rights, including certain customary rights. With that history in view, this Essay focuses on the jurisprudential questions that originalists must confront when evaluating whether and how to rely on traditions.

To begin, Part I frames the jurisprudential problem in terms of specifying the determinants of law. Part II then lays out two distinct "originalist" approaches to identifying the content of fundamental law in the past. These two approaches are "track one" originalism—which uses *modern criteria* for identifying earlier constitutional content—and "track two" originalism—which uses *historical criteria* for identifying earlier constitutional content. Part III then explores potential differences in how "track one" and "track two" originalists should think about general fundamental law, as well as the different conceptual problems that they will face. The point of this Essay is not to

17. *See* Baude et al., *supra* note 6, at 1247–53.

18. Nearly every constitutional approach looks to history to some extent. *See* Larry D. Kramer, *Madison's Audience,* 112 HARV. L. REV. 611, 676 (1999); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409, 1415 (1990). "Non-originalists" of various stripes will thus face similar conceptual problems in wrestling with the issues explored in this Essay. For ease of exposition, however, this Essay refers only to "originalists" and "originalism."

resolve these quandaries. Rather, my goals are to show, first, that shifts in how Americans have approached fundamental law raise a methodological issue that originalists need to consider and, second, that whether traditionalism comports with originalism may depend on how originalists resolve that issue. The Essay ends with a brief conclusion.

I. THE JURISPRUDENTIAL PROBLEM

We often say that judges must interpret legal texts, such as statutes and constitutions.[19] With that framing, the priority of original meaning naturally follows. After all, statutes and constitutions are historically enacted texts. And as historical, linguistic artifacts, they should be construed by discerning (as best we can) the original meaning of their language.[20] Aside from interpreting the fine arts, this is just how communication works.[21]

If only it were that easy. The key problem is the premise. The threshold task of judges is *not* to interpret statutes or constitutions.[22] Rather,

19. *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take,* 82 FORDHAM L. REV. 545, 547 & n.11 (2013).

20. *See, e.g.,* Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism,* 84 NOTRE DAME L. REV. 1607, 1657 (2009) ("[T]he Constitution is a historic textual event, textually expressing meaning at a particular time—the Founding.").

21. Some argue to the contrary, but they are swimming upstream. *See, e.g.,* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 15–16 (2015) (arguing that the First Amendment ought to be read like a poem, focusing on what its words mean *to us*).

22. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation,* 130 HARV. L. REV. 1079, 1083 (2017) ("The crucial question for legal interpreters isn't 'what do these words mean,' but something broader: What law did this instrument make?"); Mitchell N. Berman, *The Tragedy of Justice Scalia,* 115 MICH. L. REV. 783, 787 (2017) ("[T]ext, meaning, and law are distinct concepts and phenomena."); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication, in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 219 (Andrei Marmour & Scott Soames eds., 2011) ("It is uncontroversial that . . . the meaning of a statute's text is highly relevant to the statute's contribution to the content of the law. But it is highly controversial what role the meaning of the text plays in explaining a statute's contribution to the content of the law."); Mark Greenberg, *Legal Interpretation and Natural Law,* 89 FORDHAM L. REV. 109, 127 (2020) (arguing that "legal interpretation [of legal texts]

the initial responsibility of judges is to identify the present-day content of the law, including fundamental law.[23] Of course, virtually everyone agrees that the content of our law *somehow* relates to the meaning of historically enacted texts, including statutes and constitutions. Nonetheless, "law" and "texts" are not the same type of things,[24] and recognizing that distinction is descriptively and normatively significant.

As a descriptive matter, our own practices belie the notion that all of our law is textually grounded.[25] For instance, notwithstanding the reputed death of federal common law in *Erie Railroad Co. v. Tompkins*,[26] common-law rules abound in federal law.[27] The same is true with respect to federal constitutional law, which features unenumerated rules and principles, as originalist Justices have recognized.[28] Of course, interpreters may remain normatively skittish about this fact.[29] But at least descriptively, unwritten law is something that judges routinely

---

seeks legal provisions' contributions to the content of the law"); Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J. L. & PUB. POL'Y 817, 821 (2015) ("What's important about the Constitution of 1788 isn't what it *said,* but what it *did:* the legal rules it added to the American corpus juris, the contribution (to use Mark Greenberg's phrase) it made to the preexisting body of law."); *see also* Lawrence B. Solum, District of Columbia v. Heller *and Originalism,* 103 NW. U. L. REV. 923, 953 (2009) (noting a conceptual distinction between "the meaning of the constitutional text and the content of the rules of constitutional law").

23. *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Berman & Toh, *supra* note 19, at 551 ("[A] normative theory of constitutional interpretation must presuppose a theory of the ultimate determinants or criteria of validity of our law.").

24. *See supra* note 22.

25. *See* William Baude, *Beyond Textualism?,* 46 HARV. J. L. & PUB. POL'Y 1331, 1336 (2023) ("[O]ur legal system relies not just on written texts but also on an unwritten law."); Sachs, *Unwritten Constitution, supra* note 13, at 1798 (noting the existence of "unwritten [law], like rules of common law, equity, and admiralty").

26. 304 U.S. 64 (1938).

27. *See* Nelson, *supra* note 7, at 505; *see also* Baude & Sachs, *supra* note 22, at 1097–1121 (tracing background interpretive principles that the authors call the "law of interpretation").

28. *See, e.g.,* Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485, 1496, 1498 (2019) (holding that "interstate sovereign immunity is preserved in the constitutional design" and noting the existence of "many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice").

29. *See, e.g.,* John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts,* 113 YALE L.J. 1663, 1671 (2004).

apply. And its existence at least demonstrates the conceptual distinction between identifying law and interpreting texts.[30]

As a normative matter, differentiating "law" and "text" is equally important. The threshold task of judging is to identify the law, not to interpret legal texts.[31] Yet when someone instinctively treats "text" and "law" as interchangeable terms, she unwittingly engages in legal analysis by word play—assuming that interpreting the text and identifying the law are the same thing, even though conceptually they are not. Nobody would misidentify University of Richmond students for arachnids, even though they are known as "spiders." Yet interpreters commit precisely the same fallacy when they treat "text" and "law" as interchangeable terms.[32] And that conceptual slippage raises concerns that judges might misidentify law by misunderstanding how law is constituted.[33]

Jurisprudence is difficult, of course, and scholars have offered many ways of identifying the determinants of law, including the particular sources and methods used to identify law.[34] Some prefer a variant of

30. *Accord* Berman & Toh, *supra* note 19, at 571–72 (observing that nontextual determinants of law "are too common across the globe, and are too prominent within our own experience to make plausible that they are incompatible with the very nature of law, of constitutionalism, of democracy, or any such").

31. *See supra* note 23.

32. *See supra* note 22.

33. My point is not that "good judges" need to have a fully theorized account of "law" in order to perform their jobs. *Cf.* Evan D. Bernick, *Eliminating Constitutional Law,* 67 S.D. L. REV. 1 (2022). But judges who apply "law" must at least rely on implicit, ingrained assumptions about what determines law. And we should critically evaluate those assumptions.

34. The determinants of law include *fundamental determinants,* which are the ultimate criteria for identifying law, and *non-fundamental determinants,* which are the particular legal sources and methods recognized as determinants of law by virtue of the fundamental determinants. *See* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standard vs. Fundamental Determinants,* 130 HARV. L. REV. F. 105, 112–14 (2017). For example, the fundamental determinant of law for H.L.A. Hart was the rule of recognition, which might, in turn, point legal actors toward non-fundamental determinants such as statutes and customs. This essay focuses on a particular non-fundamental determinant—legal content in the past.

positivism.[35] Others prefer some normative account.[36] My goal here is not to pick among these, or to say anything particular about how our law is constituted. Any plausible theory would acknowledge the central role of enacted legal texts. But custom could play a role, too. To figure that out, however, a thoughtful judge needs to begin with a jurisprudential theory—an account of what determines legal content.[37]

In identifying the content of *our* law, we are not bound by the jurisprudential theories of ages past.[38] Originalist scholars widely agree on that point,[39] and for good reason. As William Baude and Stephen Sachs put it, "[w]hether and how past law matters today is a question of current law, not one of history."[40] Ultimately, what counts as *our* fundamental law must be governed by *our* jurisprudential choices. So in order to know whether and how traditions are relevant to

---

35. *See, e.g.*, William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. OF LEGAL STUD. 178 (2023); Mitchell N. Berman, *Our Principled Constitution,* 166 U. PA. L. REV. 1325 (2018).

36. *See, e.g.*, Mark Greenberg, *The Moral Impact Theory of Law,* 123 YALE L.J. 1288 (2014).

37. *See* Berman & Toh, *supra* note 19, at 551. Evan Bernick and Chris Green attempt to elide these jurisprudential issues by focusing instead on "a theory of the Constitution itself." Evan D. Bernick & Christopher R. Green, *What is the Object of the Constitutional Oath?,* 128 PENN. ST. L. REV. 1, 25 (2023). According to them, "[a] philosophical tradition of the conceptual boundaries of the word 'law' obviously cannot control the nature of an actual entity, the Constitution." *Id.* at 25–26. But these statements merely illustrate the problem. Bernick and Green are correct that a modern theory of law is not needed to identify the historical features of an eighteenth-century document. That is because "law" and "text" are fundamentally different concepts. But originalists are not in the business of making antiquarian claims about historical texts. Rather, originalism uses the past to identify the content of fundamental law today. And in order to identify the content of fundamental law today, one needs to know (even if implicitly) how that fundamental law is determined.

38. *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning,* 101 BOS. U. L. REV. 1953, 2042 (2021).

39. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 30–31 (rev. ed. 2014) (rejecting the authority of the Founders in establishing constitutional legitimacy); William Baude, *Is Originalism Our Law?,* 115 COLUM. L. REV. 2349, 2352 (2015) (defending originalism using a Hartian positivist theory); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 19 (2013) (defending originalism using a consequentialist theory).

40. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past,* 37 L. & HIST. REV. 809, 810 (2019).

constitutionalism today, we need to wrestle with the basic question of how our fundamental law is constituted.

II. ORIGINALISM'S TWO TRACKS

The previous discussion framed legal and constitutional analysis in terms of identifying *our* law, including *our* fundamental law, using *our* jurisprudential criteria. But recognizing that present-day responsibility does not preclude giving authority to the past. Rather, a modern theory of law can point us backward, treating certain aspects of history and tradition as constitutive of our law. Indeed, all constitutional interpreters put *some* emphasis on the text of the written Constitution and its "original meaning," however defined.[41] And rightly so. Identifying the content of law today often requires identifying the content of law in the past.[42]

Indeed, looking elsewhere is a common feature of choice-of-law analysis. For example, although California judges use California's choice-of-law rules to identify applicable law, they will not always wind up applying California law. Rather, California's choice-of-law rules sometimes point judges elsewhere—perhaps to another state's substantive law, or even to another state's choice-of-law rules. Although identifying the sources of law is *ultimately* a question of California law, state judges sometimes apply another jurisdiction's law. And much in the same way, identifying *our* law often requires looking backward to the law of the past.

Assume that we have consulted our jurisprudential criteria, and those criteria point us backward—requiring us to engage in some form of historical inquiry. For instance, assume that our legal theory instructs that our fundamental law is constituted, at least in part, by the law of the past. At this point, we face an additional jurisprudential choice: *What criteria should we use to identify the law of the past?* In other words: *What sources and methods should we use to identify the law of the*

41. *See supra* note 18. *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

42. *See* Baude & Sachs, *supra* note 40, at 810.

past? It is at this point in the analysis that originalists diverge onto two tracks: "track one" and "track two."[43]

A. Track One

Originalists who opt for "track one" use *our* legal criteria to identify the fundamental law of the past. These originalists, of course, care a great deal about historical facts, such as what the Framers and Ratifiers said about various Clauses. Historical facts matter. But these track-one interpreters evaluate those facts through some *present-day* standard to arrive at conclusions about "the law" of the past, even though those conclusions may not reflect how people at the time actually understood the content of their law.

Suppose, for instance, that an originalist's jurisprudential theory embraces a form of Austinian positivism that conceptualizes "law" as solely produced through commands issued by institutions with law-making authority. On this view, the originalist will look backward to the law of the past to identify the content of present-day law. But in doing so, he will naturally apply an Austinian positivist lens—one that focuses on earlier legal enactments while filtering out legal claims that are inconsistent with the precepts of Austinian positivism.[44] For example, the Austinian positivist might find repeated Founding-Era invocations of natural law, but that evidence would not alter his view that natural law simply does not count as "law"—whether today or at the Founding.

Or return to the choice-of-law analogy. In some situations, Georgia's choice-of-law rules require applying South Carolina law. Importantly, South Carolina judges have embraced the realist account of common-law decisions as "judge-made law," and thus treat holdings of the Supreme Court of South Carolina as definitive statements of South Carolina law. Yet when Georgia's judges apply South Carolina law, they do *not* consider themselves equally constrained by South Carolina

---

43. Part II draws on Jud Campbell, *Originalism's Two Tracks*, 104 B. U. L. REV. 1435 (2024) (reviewing BALKIN, *supra* note 41, and GIENAPP, *supra* note 8).

44. *Cf.* Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001) (explaining that a textualist approach to interpreting a statute was appropriate even though that approach did not reflect the interpretive norms that prevailed when the statute was enacted).

precedents. Rather, Georgia takes an old-school perspective, rejecting the notion that the content of the common law is constituted by whatever the judges in each state say.[45] Instead, Georgia judges make their own assessment of the content of the common law in other states using traditional common-law reasoning.[46] In essence, Georgia imposes its own jurisprudential methods when identifying the common law of other jurisdictions. In much the same way, track-one originalists use *their own* legal criteria to identify the fundamental law of the past.

B. Track Two

Originalists who opt for "track two," by contrast, use *historical* criteria to identify the fundamental law of the past. These originalists care not only about a variety of surface-level historical facts, such as what the Framers and Ratifiers said about various Clauses. They also seek to employ the Founders' own beliefs about the sources of law and the proper methods of construing those sources. To understand the fundamental law that actually existed at the Founding, these originalists would say, we need to use the Founders' criteria for identifying law.

Again, a choice-of-law analogy can help illuminate this approach. In some situations, Wisconsin's choice-of-law rules require looking to Illinois law. Wisconsin courts have mostly rejected the use of legislative history in construing statutes, but Illinois courts have not.[47] Yet in contrast to Georgia's approach to common law, Wisconsin courts that construe Illinois statutes consult legislative history. In this situation, Wisconsin choice-of-law rules recognize that the methods of construing Illinois statutes are not the same as those used in Wisconsin. Yet Wisconsin judges identify Illinois law in the same way as Illinois courts identify that law. In essence, Wisconsin law borrows Illinois's methods rather than imposing its own. Similarly, track-two originalists use *historical* criteria to identify the fundamental law of the past.

---

45. *See* Michael Steven Green, Erie*'s Suppressed Premise,* 95 MINN. L. REV. 1111, 1126–27, 1126 n.89 (2011).

46. This is apparently true regardless of whether the law is deemed general or local in character. *Id.* at 1126 n.89.

47. *Cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism,* 119 YALE L.J. 1750, 1799–1803 (2010).

C. The Originalist Divide

Like other interpreters, originalists are not always transparent about their jurisprudential commitments, so it is often unclear whether originalists operate on track one or track two—or whether they even appreciate the difference. Moreover, originalists may believe that their views about the sources and methods used to identify fundamental law align with the Founders' views, rendering the choice between track one and track two a false conflict. As it turns out, a growing body of historical scholarship disputes that equivalency,[48] but originalists have only just begun to grapple with that work and its implications for originalist theory and practice.

Some originalists, however, recognize the distinction between the two tracks and are explicit about which track they prefer. Although viewing "original meaning" in very different ways, Jack Balkin and Larry Solum are equally candid about being track-one originalists. "[A]rticulating the original public meaning is not a simple job of reporting what happened at a certain magical moment in time," Balkin explains. "It is a theoretical and selective reconstruction of elements of the past, brought forward to the present and employed for present-day purposes."[49] In his own way, Solum agrees. "Inquiry into the founding generation's beliefs about the nature of law is interesting and valuable," he acknowledges. "But it is simply a mistake," he continues, "to equate their beliefs about the nature of law with the actual nature of law in 1787."[50] According to Solum, "original meaning"

48. This is one of the key upshots of my own work as well as the pathbreaking work of Jonathan Gienapp, who has just published the leading account of how Founding-Era constitutional assumptions departed from those that many originalists hold today. *See* GIENAPP, *supra* note 8; *see also* Jud Campbell, *The Emergence of Neutrality,* 131 YALE L.J. 861, 873–74 (2022) ("The early twentieth century witnessed a revolution in views about the nature of rights—where they came from; the identity of their interpretive guardians; their means of enforcement; and their relationship to history, the common law, and morality.").

49. BALKIN, *supra* note 41, at 121.

50. Solum, *supra* note 38, at 2042.

must thus be identified using present-day criteria, which he draws from contemporary linguistic philosophy.[51]

Meanwhile, other originalists operate on track two. John McGinnis and Michael Rappaport, for example, insist that constitutional content should be identified using Founding-Era criteria, which they call "original methods."[52] William Baude and Stephen Sachs similarly explain that in order to understand the law of the past, one needs to account for how earlier generations thought about the determinants of law.[53] As Sachs puts it, "[t]o find out the law that the Constitution made, the relevant way to read the document's text would be according to the rules of the time, legal and otherwise, for turning enacted text into law."[54] Along similar lines, Bernie Meyler's "common law originalism" asserts that common-law concepts enumerated in the

51. *See id.* at 1967–75. To be sure, Solum's theory is "thicker" than Balkin's "thin" account of "original meaning," incorporating eighteenth-century context in various ways that Balkin's account does not. Solum's approach thus bears a closer resemblance to track two than Balkin's approach. Conceptually, however, Balkin and Solum agree on a crucial point—namely, that *modern* criteria specify the sources and methods used to identify "original meaning."

In responding to a related paper, Larry Solum comments that I make "a grave conceptual error" in placing his approach on track one based on his use of modern linguistic philosophy. "Historical linguistics and the philosophy of language," Solum writes, "do not employ 'modern criteria' that are opposed to contextual understanding of history." Larry Solum, *Legal Theory Blog* (Jan. 10, 2025), https://lsolum.typepad.com/legaltheory/2025/01/campbell-on-against-constitutional-originalism-by-gienapp.html [https://perma.cc/BGW2-36N2]. But Solum misapprehends my point. I do not think that using modern techniques to understand earlier communication necessarily distorts the past. *See* Campbell, *supra* note 43, at 1441–42 (rejecting that view). Rather, the reason that Solum's approach belongs on track one is that he identifies the object of his historical inquiry—the original "public meaning" of the written Constitution's text—using modern jurisprudential premises, regardless of how the Founders viewed the determinants of fundamental law.

52. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

53. *See, e.g.*, Baude, *supra* note 39, at 2358 (asking whether rules about determining legal content "have a legal pedigree to the Founding"); *see also* Baude & Sachs, *supra* note 22 (discussing the "law of interpretation").

54. *See* Sachs, *supra* note 22, at 821.

federal Constitution should be viewed using an eighteenth-century approach to common law.[55]

The distinction between track one and track two is somewhat obscured by agreement among originalists that identifying the content of our law is ultimately framed by modern jurisprudential assumptions.[56] The distinction is also obscured by William Baude and Stephen Sachs's appealing but slippery claim that originalists should simply look to the "law of the past," which they characterize as "a highly limited version of the historical inquiry."[57] Yet as we saw in the choice-of-law setting, different methods are available for identifying another jurisdiction's "law," and so too for identifying the "law of the past." One might superimpose modern attitudes about law onto historical evidence (track one), or one might employ historical premises about law and filter the historical evidence through those methods (track two). And because of large gulfs between earlier and present-day views of law, these can turn out to be *very* different approaches.[58] It is thus important to keep our distinctions straight—to identify the appropriate track—and to recognize that operating on track two requires developing familiarity with an unfamiliar legal culture.

---

55. *See* Bernadette Meyler, *Towards a Common Law Originalism,* 59 STAN. L. REV. 551, 556 (2006) (criticizing some versions of originalism for attempting to identify the content of common-law terms while "ignoring the larger framework within which the particular doctrines of the common law functioned"); *see also* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 356 n.17 (2020) ("To the extent there is a disagreement between historians, who seek to understand what actual people believed in the past, and a certain strand of 'New Originalists,' who seek either what they think is the best meaning or that dictated by philosophy of language, I side with the historians.").

56. *See supra* notes 38–40.

57. Baude & Sachs, *supra* note 40, at 813. What makes their claim slippery is that the *usual* process of identifying the law of the past does not account for changes in the determinants of law. *See* Campbell, *supra* note 48, at 873 ("Most doctrinal histories retell the 'official story' in *our terms*—explicitly focusing on Supreme Court opinions and implicitly adopting modern attitudes about the nature of constitutional rights."). In other words, identifying the law of the past *in the track-one sense* is familiar to lawyers and well within their training, but lawyers generally are *not* trained and experienced as intellectual historians, which is the perspective needed to identify the law of the past *in the track-two sense.*

58. The qualifier ("can") is important, because various approaches on track one will bear varying degrees of similarity to track-two originalism. *See supra* note 51.

III. ORIGINALISM AND TRADITION

This Part begins by reintroducing the puzzle of general fundamental law. It then considers how originalists on track one and track two might account for this history, and thus how they might incorporate tradition into their respective approaches. The Part concludes by briefly showing that similar conceptual problems arise with respect to codified traditions.

A. General Fundamental Law

We live in an "age of statutes."[59] The content of our law predominantly comes from enacted legal texts. And interpreters routinely express confusion or disdain about other sources of law.[60]

Yet prior to the early twentieth century, Americans tended to think differently about the sources and methods of identifying law. Theirs was an age of general law. Of course, enacting a legal text was one way of altering law. But legal content routinely came from other sources, too, including tradition.

Importantly, referencing a customary legal rule in a statute or constitution did not necessarily alter its customary grounding. As English jurist Thomas Rutherford explained,

> Every rule of action, which is enjoyned by a civil legislator and committed to writing, does not immediately become a written civil law. Such laws, as are established by long and uninterrupted usage or custom, may certainly be committed to writing, as well as any other: but this does not change them from unwritten into written laws.[61]

59. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–3 (1982).

60. For an extreme case, see Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution,* 81 U. CHI. L. REV. 1385, 1385 (2014) ("Ours is a system of *written* constitutionalism. There are only sound conclusions and inferences—or unsound ones—from the text itself.").

61. 2 THOMAS RUTHERFORD, INSTITUTES OF NATURAL LAW 290 (Cambridge, J. Bentham 1756).

Rather, written instruments could be "declaratory"—stating the existence of a rule or principle that remained grounded elsewhere.[62] Not only was it a mistake to think of texts as the only source of law, it was also a mistake to think that textually enumerated rules necessarily obtained their force or content from their enumeration.[63]

Originalists today tend not to approach constitutional text in this way. When the Constitution refers to another source of law, such as the common law, originalists usually treat the enacted text as having *constitutionalized* the common-law rule—elevating it to constitutional status and freezing its content at the moment of ratification.[64] This, of course, has led to a flurry of scholarship about the "original meaning" of various parts of the Bill of Rights.[65] It has further teed up an intriguing debate over whether those rights should be understood based on their meaning at the time of their original enactment in 1791 or, instead, their subsequent "incorporation" against the states in 1868.[66]

Crucially, however, textualizing rights is not what the people who designed the Bill of Rights and the Fourteenth Amendment thought they were doing. As originally understood, the Bill of Rights and the Fourteenth Amendment *declared* the existence of general fundamental rights that remained grounded in natural and customary law.[67] As the thinking went, these rights did not obtain their force or content from their enumeration. And so, as a historical matter, it is wrong to say that the legal content of these rights was fixed in constitutional amber in

---

62. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND [3] (London, M. Flesher 1644) (noting that a statute could be "introductory of a new law, declaratory of the old, or mixt"); *see also, e.g.*, HENRY FLOOD, THE CELEBRATED SPEECHES OF COLONEL HENRY FLOOD ON THE REPEAL OF THE DECLARATORY ACT 3 (Dublin, C. Campbell 1782) ("It is a first principle of law, that a Declaratory Act only declares the law to be what it was before; that is to say, that it only declares, and that it does not alter the law.").

63. *See* Campbell, *supra* note 12.

64. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 603 (2008).

65. *See, e.g.*, McConnell, *supra* note 18 (exploring the original meaning of the Free Exercise Clause).

66. *See, e.g.*, *Bruen*, 142 S. Ct. at 2138; Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1447–50 (2022); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979, 983–85 (2012).

67. *See* Campbell, *supra* note 12; Baude et al., *supra* note 6.

1791 or 1868. To the extent that these rights were grounded in custom, their legal content could change, just as the common law had evolved over time.[68]

B. General Fundamental Law and the Two Tracks

But what should originalists do with this history? How should they account for earlier notions of general fundamental law? The answer depends largely on whether originalists are operating on track one or track two.

For track-one originalists, traditions cannot determine the content of the law unless *modern* criteria identify tradition as a source of fundamental law. Of course, many customary practices existed in the past, just as they do today, but those traditions are not *constitutionally* relevant unless one's theory of law says so. And it would seem that for most track-one originalists, tradition has little, if any, relevance.[69] To be sure, originalists operating on track one still might look to tradition as a way of resolving constitutional underdeterminacy.[70] Indeed, Justice Scalia sometimes looked to post-ratification traditions, which he thought supplied an objective and administrable way of resolving constitutional uncertainty.[71] And that made sense in an era when originalism was largely meant to discipline judicial discretion. But as originalism has gradually shifted away from a theory of *adjudication*

68. *See* Baude et al., *supra* note 6, at 1248; Meyler, *supra* note 55, at 555.

69. It is hard to prove this claim given how few originalists have identified whether they are operating on track one or track two. But at least Judge Newsom disavows the use of tradition on track one. *See* Judge Kevin Newsom, Keynote Address at the History and Tradition Symposium (Feb. 17, 2024). Judge Newsom's conclusion is consistent with Sherif Girgis's characterization of public-meaning originalism. *See* Girgis, *supra* note 4, at 1487–88 (observing that traditions are often neither probative of original meaning nor reflections of self-conscious "liquidations" of constitutional underdeterminacy). As Girgis aptly observes, however, it is possible for a text to refer to customs that are constitutive of a right. *Id.* at 1512-14.

70. Solum & Barnett, *supra* note 1, at 448, 454–55.

71. *See, e.g.*, McIntyre v. Ohio Elections Comm'n 514 U.S. 334, 371–85 (1995) (Scalia, J., dissenting) (relying on tradition where original meaning is unclear); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.) (defending reliance on tradition because of its constraining effect on judicial judgment).

and more toward a theory of *law*,[72] the basis for looking to post-enactment traditions has substantially eroded.[73] If the original public meaning of the Constitution's text is the exclusive determinant of constitutional law, as originalists often now assert,[74] then what is the point of looking to tradition?[75]

Track-two originalists, however, cannot disclaim the relevance of tradition in this way, using a present-day jurisprudential claim about the determinants of law. Rather, track-two originalists believe that identifying the law of the past requires a deeper form of historical inquiry, locating how the Founders conceptualized their own law. Originalists, Stephen Sachs explains, "need to learn more about [the Founders'] legal system as a whole."[76] And as we have seen, what one learns when looking to the past is that American legal culture previously accepted that fundamental law was partly determined by evolving customs, and not merely by the fixed meaning of enacted texts. Thus, for track-two originalists, certain traditions *are* part of American fundamental law.

Of course, one might think that recognizing an evolving body of constitutional law is the essence of *non*-originalism. Yet as Sachs aptly observes, originalists on track two have a different reason for looking to traditions. "[A]ttention to custom," he explains, can be "determined by the past, not just by the present."[77] For originalists, whether the

---

72. *See* Berman & Toh, *supra* note 19, at 546, 556–60; *see, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022) (defending the view that originalism is best understood, first and foremost, as a claim about the determinants of fundamental law).

73. Insofar as originalism was a method of disciplining judicial judgment, it (arguably) worked in tandem with traditionalism. But insofar as originalism is a claim about legally enacted text as the exclusive determinant of fundamental law, traditionalism is in tension with originalism.

74. *See* GIENAPP, *supra* note 8, at 21–25, 30–32.

75. It bears emphasis that track one is not logically incompatible with treating tradition as a source of fundamental law (if one has sound jurisprudential reasons to do so), just as track two is not logically incompatible with denying tradition as a source of law (if one has sound historical reasons to do so).

76. Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 162 (2017). I am taking liberties with the bracketed portion of the quotations. Sachs was writing of the imagined land of Freedonia.

77. *Id.* at 164.

content of present-day fundamental law includes evolving traditions "depends on [the Founders'] original customs, not current opinion."[78] On this telling, the distinguishing feature of "originalism" is not a commitment to a substantive view about the determinants of fundamental law but is instead a commitment to a historically grounded method for identifying those determinants.[79] Originalists on track two can thus look to tradition so long as the Founders did too.[80]

Not surprisingly, then, originalists on track two have shown a growing interest in general fundamental law. In a recent paper, for example, William Baude and Robert Leider argue that the right to keep and bear arms is a general fundamental right—one recognized and secured but not created by the Second Amendment and the Fourteenth Amendment.[81] And the right should thus be explicated, they insist, in the manner of eighteenth- and nineteenth-century common law—an approach that permits doctrinal development in response to new conditions yet denies judicial authority to make law.[82] In a further nod to the authority of history, Baude and Leider also acknowledge the importance of legislative determinations of fundamental rights.[83] In

78. *Id.*

79. Along similar lines, Evan Bernick and Chris Green distinguish "first-order originalism"—defined as a substantive commitment to textually determined content—from "second-order originalism"—defined as a methodological commitment to following the Founders' views about the determinants of fundamental law. *Cf.* Bernick & Green, *supra* note 37, at 6. Notably, their distinction does *not* replicate the division between "track one" and "track two" originalism, which relates solely to the method for identifying the determinants of fundamental law—that is, track one and track two each relate to what Bernick and Green refer to as the "second-order" issue.

80. Baude, *supra* note 39, at 2358.

81. The Fourteenth Amendment was thought to "secure" preexisting rights by creating a federal forum for their enforcement against states. Prior the Fourteenth Amendment, a state's violation of these rights did not raise a question "arising under" federal law, and therefore federal courts were usually incapable of hearing these claims. *See* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Baude et al., *supra* note 6, at 1202–05.

82. *See* William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1495–98 (2024).

83. Crucially, Baude and Leider recognize that fundamental rights were generally regulable through ordinary legislation, even though this way of conceptualizing fundamental rights eroded substantially in the twentieth century. *See id.* at 1504-05.

short, they argue, judges should return to a historical view of general fundamental law.

C. Codifying Tradition

Even if originalists reject tradition as a determinant of our fundamental law, earlier traditions might still inform how originalists read constitutional text. As Randy Barnett and Larry Solum observe:

> Some constitutional provisions may point to tradition (or something very similar) as the content or substance of the provision. For example, the Preservation Clause of the Seventh Amendment requires that the "right of trial by jury" "at common law" be preserved. The content of the common-law right may be constituted by traditional practices that provide the communicative content of the phrase "trial by jury" in conjunction with "at common law."[84]

On this way of thinking, the *grounding* of fundamental rights is in legally enacted texts, such as the Seventh Amendment, but the *content* of those rights is principally identified by looking to Founding-Era traditions,[85] or perhaps to the "respoken" traditions of the 1860s.[86]

Reliance on traditions that existed at the time a constitutional provision was created and ratified seems uncontroversial, at least from an originalist perspective. After all, such traditions likely informed how the Framers and Ratifiers understood certain terms. Consequently, there is little to say about this use of tradition. But two points are worth flagging.

First, not all traditions are *legally* relevant. Consider, for example, the conflicting traditions of expressive freedom at the Founding. Back then, elites widely acknowledged that seditious libel could be constitutionally punished, so long as the rules were narrowly defined.[87] This approach to press freedom was consistent with a long tradition in Anglo-American law.[88] Yet it is also true that, despite its vituperative

---

84. Barnett & Solum, *supra* note 1, at 447.

85. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

86. *See* Lash, *supra* note 66, at 1441.

87. *See* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 530 n.49 (2019) (collecting sources).

88. *See id.* at 529-30.

character, public discourse in the late-eighteenth century rarely triggered seditious-libel prosecutions.[89]

So which of these traditions did the Speech and Press Clauses embrace? Should we understand the "freedom of speech, or of the press" as a reference to existing *legal* traditions? Or should we rely on the *experiential* traditions of the Founders? Both aspects of history could potentially have informed original meaning. But knowing how to evaluate that context requires a thicker account of what types of facts determine "original meaning." In this way, "original meaning" is not something that we just discover, like a coin on the sidewalk. Rather, it is something that an originalist must reconstruct, as best she can, by filtering historical evidence through some interpretive sieve.[90]

And that leads into the second point: Even if an originalist is considering *textually grounded* fundamental law, she will still run into the same sorts of problems that divided originalists onto track one and track two. That is, an originalist will still have to make jurisprudential choices about how to identify the relevant tradition. And she must decide whether to make those choices using modern criteria (track one) or instead identify the tradition as viewed by the Founders themselves (track two).

Each path presents its own difficulties. On track one, the reconstructed tradition may be anachronistic, bearing little resemblance to how Americans actually understood their own law.[91] Modern interpreters, for instance, might only look to *written* sources of law to identify an earlier tradition, even though Americans in the past generally did not view law in that way.[92] Such an approach might be

89. For scholarship emphasizing this fact, see AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 51-53 (2012); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS xv-xvi (1985); STEPHEN D. SOLOMON, REVOLUTIONARY DISSENT: HOW THE FOUNDING GENERATION CREATED THE FREEDOM OF SPEECH 8-9 (2016).

90. *See* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 82 (2016); Richard H. Fallon, Jr., *The Chimerical Concept of Original Meaning*, 107 VA. L. REV. 1421, 1430–33 (2021).

91. *See* Campbell, *supra* note 57, at 874.

92. *Cf.* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 157-58 (2023) (critiquing *Bruen* for focusing only on

jurisprudentially defensible, but it would risk creating a deeply ahistorical view of "original meaning."

On track two, however, originalists might encounter historical conflicts over how legal traditions were determined. For instance, the Founders did not all agree about how to identify customary law.[93] Indeed, as noted above, there was not even consensus about whether to look to top-down *legal* traditions or bottom-up *experiential* traditions. Originalists on track two attempt to resolve these issues in different ways. Some argue that it is virtually always possible to resolve ambiguities of this sort simply by resorting to the interpretive rules used at the Founding.[94] If so, then track two is sufficient to identify the content of our fundamental law. Others suggest that when the law of the past runs out, we must fall back on *present-day* default rules.[95] On this view, the law of the past does not always tell us everything that we need to know. Either way, though, originalists operating on track two only use *historical* criteria to identify the law of the past.

CONCLUSION

Those who designed the original Constitution, the Bill of Rights, and the Fourteenth Amendment believed that fundamental law could be grounded in tradition, and not just in legally enacted texts. On their view, general fundamental rights formed part of the fundamental law of each jurisdiction, and although the Constitution recognized and

---

sources of law that are readily accessible, particularly "given that most regulation and enforcement was local and therefore less likely to be preserved digitally today.").

93. *See* Meyler, *supra* note 55, at 555–56.

94. John McGinnis and Michael Rappaport argue that a "51-49" rule existed at the Founding that called for the resolution of virtually any difficulty by simply selecting, on balance, the most legally persuasive choice. *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 942 (2021). Thus, while admitting the possibility of legal underdeterminacy, *see* McGinnis & Rappaport, *supra* note 52, at 775 & nn.81–82, they seem to think that the law of the past was almost fully determinate.

95. Baude & Sachs, *supra* note 40, at 816. In this limited context, when track two is insufficient to identify the content of law in the past, Baude and Sachs could be understood to operate on track one. But in my view they are better understood as saying that the law of the past must sometimes be supplemented by the law of the present—not that the law of the past should be identified using modern criteria.

secured those rights in various respects, it generally did not alter their content or their customary grounding. But whether and how originalists should account for earlier ideas of general fundamental law is unclear. Indeed, contemporary originalists are split over whether to approach these questions from a present-day or historical perspective.

Given profound shifts in how Americans view the grounding of fundamental law, the conceptual divide between these two branches of originalism carries significant implications for modern constitutional law, including the status of post-ratification traditions. How originalists respond depends on jurisprudential choices that history alone cannot answer. But the earlier flourishing of general fundamental law, along with its twentieth-century decline, have created a challenge that originalists need to consider.[96]

96. For further discussion, see Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory,* 110 HARV. L. REV. 1785 (1997); Jack Goldsmith, Erie *and Contemporary Federal Courts Doctrine,* 2023 HARV. J.L. & PUB. POL'Y PER CURIAM Spring 2023, art. 17, at 1, https://journals.law.harvard.edu/jlpp/erie-and-contemporary-federal-courts-doctrine-jack-goldsmith/ [https://perma.cc/P3M4-G2Q8]; Lawrence Lessig, *The Brilliance in Slaughterhouse: A Judicially Restrained and Original Understanding of "Privileges or Immunities",* 26 U. PA. J. CONST. L. 1 (2024).

HISTORY, TRADITION, AND FEDERALISM

JASON MAZZONE*

INTRODUCTION

The Supreme Court's invocations of history and tradition for determining the meaning of the federal Constitution have an uneasy—and, so far, under-theorized—relationship to principles of federalism. The Court speaks regularly of "this Nation's history and tradition."[1] Most recently, *Dobbs*, in which the Court overturned *Roe* and *Casey* to hold there is no federal right to abortion, makes clear that in order to be protected from state interference under the Due Process Clause of the Fourteenth Amendment, a right—whether a right protected by the Bill of Rights and incorporated against the states or an unenumerated fundamental right—must be "deeply rooted in our history and tradition and . . . essential to our Nation's scheme of ordered liberty."[2] So, too, in *Bruen*,[3] in which the Court invalidated a New York statute requiring individuals who wished to carry a concealed firearm outside the home to obtain a license based on a showing of "proper cause,"[4] the Court held that "when the Second Amendment's plain text covers an

* Albert E. Jenner, Jr. Professor of Law & Director, Program in Constitutional Theory, History and Law, University of Illinois Urbana-Champaign. I am grateful to Vik Amar and Reva Siegel for their helpful feedback and to Hayley Isenberg and the other members of the Harvard Journal of Law & Public Policy for running an exceptional symposium and for their incisive editorial work.

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

2. *Id.* at 238.

3. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

4. *Id.* at 12.

individual's conduct, the Constitution presumptively protects that conduct" and therefore "to justify its regulation, . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[5] It is not at all clear, though, that the Court really means the *nation's* history and tradition (and its scheme of ordered liberty). For in determining whether or not a claimed right meets the test, the Court's analysis invariably entails an examination of laws and practices of individual *states*. When the Court finds, from its state-by-state review, evidence of history and tradition (or, as in *Dobbs* and *Bruen,* a lack of such evidence),[6] the finding is about the histories and traditions of individual states, one by one, and perhaps even of a large set of individual states, but it is not obviously a finding about the history and tradition of the nation as a distinct entity.

This phenomenon is a near-inevitable product of our system of federalism. The Bill of Rights is widely understood to have codified *pre-existing* rights.[7] State law—and particularly state constitutions and state court decisions interpreting them—therefore serve as an important resource for understanding the Bill of Rights' provisions.[8] Likewise, when (as the Court has instructed) identifying or

---

5. *Id.* at 17.

6. *See Dobbs,* 597 U.S. at 250 ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."); *Bruen,* 597 U.S. at 38-39 ("We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement.").

7. *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 147-56 (1998) (discussing the "declaratory" theory by which provisions of the Bill of Rights are viewed as "declaratory of certain fundamental common-law rights"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 YALE L.J. 1193, 1206 (1992) ("To a nineteenth-century believer in natural rights, the Bill was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed."); Jud Campbell, *Natural Rights and the First Amendment,* 127 YALE L.J. 246, 295 (2017) ("[T]he impetus for a [federal] bill of rights was a desire to enumerate well-recognized rights, not create new ones.").

8. *See* McDonald v. City of Chicago, 561 U.S. 742, 818 (2010) (Thomas, J., concurring in part) (writing that "[a]fter declaring their independence, the newly formed States

construing the scope of a federal right implicates the existence or scope of past legal regulation,[9] and regulatory power is reserved to (or has been exercised primarily by) state governments, it makes considerable sense to examine how each state has regulated. In both instances, though, the approach reflects a conception of 'nation' that is a lumping of the nation's parts. As with all lumping, the approach carries an obvious risk. In imagining our nation[10] from its parts, absent some reliable methodological tool to ensure that only true likes are grouped together, the inquiry risks exaggerating similarities among the states and discounting their differences.[11]

The search for federal meaning in state law is not just in tension with federalist principles supporting variation in and

---

replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage" and that "[s]everal years later, the Founders amended the Constitution to expressly protect many of the same fundamental rights against interference by the Federal Government," such that "[c]onsistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text.").

9. *See Bruen*, 597 U.S. at 24 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

10. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

11. There are reasons, of course, to doubt that litigation in federal court over the meaning of a federal constitutional provision is a sound vehicle for identifying and understanding with nuance the laws, practices, and histories of the states. Federal judges might have experience interpreting and applying the laws of particular states, but they are not experts in the laws of every state. An investigation of state laws through litigation's narrow lens—to ascertain whether there is a history and tradition supporting a claimed right—is not an obvious means to yield nuanced or comprehensive understandings. In *Bruen,* the Court in a footnote breezily advised that because "in our adversarial system of adjudication, we follow the principle of party presentation," judges "are entitled to decide a case based on the historical record compiled by the parties." *Bruen,* 597 U.S. at 25 n.6. That proposition is dubious and inconsistent with the Court's own best source of historical materials: amicus briefs from informed and fair-minded scholars. My concern in this essay, though, is more with the enterprise of using state law to generate federal meaning than with the capacities of judges and the yields of litigation, issues that other authors have explored and for which some useful remedies likely exist.

independence of state government design. It also represents a peculiar treatment of the U.S. Constitution. The Court has never fully explained why the meaning of a federal constitutional provision is to be yoked to state law. Can it be that the federal Constitution only protects rights *already* protected in the states and that it therefore serves, at most, as a clean-up charter to deal with occasional outliers?[12] The history and tradition inquiry presents a perplexing irony: state courts are routinely criticized for lock-stepping,[13] interpreting state constitutional provisions reflexively to mean the same thing as federal provisions, but perhaps the Supreme Court is at fault for failing to give independent meaning to the federal Constitution and instead just following along with a collapsed account of state law.

One possibility is that the Court follows Thomas Cooley,[14] who thought *general* principles of American constitutionalism were discernable through a careful examination of the constitutional law of individual states. As Professor Kahn explains:

> Cooley looked to the cases coming from the different state courts to find the common principles of state constitutionalism–and, ultimately, of American constitutionalism. Just as his

12. This category would include the Court's recent decision in *Timbs v. Indiana,* in which the Court held the excessive fines clause of the Eighth Amendment is incorporated against the states under the Fourteenth Amendment. 139 S. Ct. 682 (2019). In reaching that conclusion, the Court found that the protection against excessive fines was "fundamental to our scheme of ordered liberty" with "deep roots in our history and tradition." *Id.* at 686-87. Supporting that determination, the Court said, was the fact that in 1868 "the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines." *Id.* at 688. Further, the Court explained: "Today, acknowledgment of the right's fundamental nature remains widespread . . . [A]ll 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality." *Id.* at 689. In Indiana, the state supreme court had already instructed that "the state constitution imposes the same restrictions as the Eighth Amendment." *Id.*

13. *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018) (criticizing lock-stepping); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 193-232 (2009) (discussing various criticisms of lock-stepping).

14. *See generally* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

> contemporaries looked to the case law from different jurisdictions to find the common principles of tort or contract, Cooley aimed to describe an American constitutionalism that was the common object of each state court's interpretive effort. The diversity of state courts, each claiming a unique authority, did not prevent their engagement in a common interpretive enterprise.[15]

Whatever the merits of this approach,[16] the Court has never articulated—much less defended—an understanding of history and tradition, for purposes of federal interpretation, that is grounded in general principles "independent of any particular state's formal text, history, and precedents"[17] and of state constitutionalism as a species of the common law. As Judge Kevin Newsom explains, it is not clear how an inquiry into tradition fits with commitments to textualism and originalism.[18] It would seem equally challenging to reconcile a Cooley-inspired approach with those commitments.

If the Court's turn to history and tradition means building federal constitutional law from state law bricks, far more attention is needed to explain and justify the enterprise and to its methodological challenges. This essay highlights and offers commentary on some of the attendant issues. Part I situates the analysis by highlighting some relevant differences between state constitutions and the federal Constitution and between state constitutional law and federal constitutional law. Part II explores challenges in building federal constitutional law from state law sources. Part III discusses state court responses to the Court's uses of state law in the Second

---

15. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism,* 106 HARV. L. REV. 1147, 1163 (1993).

16. There are many critics. *See, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 13 (2023) (in place of merely "'an undifferentiated body of general principles existing independent of any particular constitution,'" urging attention also to "differences in state constitutional text, constitutional history, judicial precedent, . . . [and] judicial philosophy.") (quoting James A. Gardner, *The Positive Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 126-27 (1998)).

17. Kahn, *supra* note 15, at 1163.

18. Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of Traditionalism in Constitutional Interpretation*, 47 HARV. J.L. & PUB. POL'Y 745, 748 (2024).

Amendment cases and in *Dobbs*. A brief conclusion proposes a mechanism for more reliable uses of state law in discerning history and tradition in federal constitutional interpretation.

I. STATE CONSTITUTIONS ≠ CONSTITUTION OF THE UNITED STATES

State constitutions are not equivalent to—they differ significantly from—the federal Constitution. The point might seem obvious, but it bears emphasis. As Professors Bulman-Pozen and Seifter rightly observe, "[a]lthough reams of state constitutional law literature have focused on the few clauses common to the state and federal documents, most state constitutional provisions have no federal analogue, and state constitutions have a different orientation toward individual rights, the relationship between the individual and the community, and the role of government."[19] State constitutions were adopted by different mechanisms than those that led to the adoption of the federal Constitution[20] and they are neither its "miniature versions" nor its "clones."[21]

A. Substance

There are significant substantive differences between state constitutions and the federal Constitution. Such differences have implications for the meaning of state constitutional provisions in ways that may undermine their usefulness for construing and applying the federal Constitution. A state constitution's provisions often reflect a unique history.[22] Compared to the federal Constitution, state

19. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality,* 123 COLUM. L. REV. 1855, 1862 (2023); *see id.* at 1864-78 (surveying how state constitutions list many more rights than does the federal Constitution, protect community-regarding rights, create government duties to protect rights, and secure democratic rights).

20. *See* 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 76 (2006) ("State constitutional provisions owe their legal validity and political legitimacy to the state electorate, not to 'Framers' or state ratifying conventions as is the case with the federal constitution.").

21. WILLIAMS & FRIEDMAN, *supra* note 16, at 39.

22. *See, e.g.,* Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 729 (Va. 2023) (recounting origins of state constitution's religion provision and origins of the First Amendment and writing, "Mixing these provisions together skews their separate histories and

constitutions are far easier to amend and have been amended many more times.[23] State constitutions are far longer than is the federal Constitution, which does not "partake of the prolixity of a legal code,"[24] while state constitutions contain many "policy-oriented" provisions[25] that read like ordinary statutes.

Even when language in a state's constitution might sound similar to that found in the federal Constitution, there are often very significant textual distinctions. State constitutions protect many more rights than does the federal Constitution and contain rights provisions with no federal counterpart. For example, state constitutions specifically protect the right to vote[26] and the right to privacy.[27] Such provisions mean that a narrow focus on state provisions with federal analogs will necessarily give an incomplete account of what the state constitution, as a whole, actually protects.

While the federal Constitution is generally described as a "negative" charter, protecting rights by constraining what government is

---

purposes."). Some state courts have emphasized the importance of state history and tradition (though they have not necessarily found that history and tradition to lead to distinct applications). *See, e.g.*, State v. Smith, 165 N.E.3d 1123, 1130 (Ohio 2020) (rejecting double jeopardy challenge under state constitution and explaining that "[i]n construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions.").

23. *See* SUTTON, *supra* note 13, at 51 ("[S]tate constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter."); Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. F. 191, 194 (2023) ("While roughly 12,000 amendments have been proposed to both the U.S. Constitution and the fifty state constitutions, state constitutions have been amended more than 7,000 times for the U.S. Constitution's twenty-seven.").

24. M'Culloch v. State, 17 U.S. 316, 407 (1819).

25. Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1338 (2001) (distinguishing "policy-oriented" provisions from "framework" provisions).

26. *See, e.g.*, ILL. CONST. art. III, § 1 ("Every United States citizen who has attained the age of 18 or any other voting age required by the United States for voting in State elections and who has been a permanent resident of this State for at least 30 days next preceding any election shall have the right to vote at such election.").

27. *See, e.g.*, FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from government intrusion into the person's private life"); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

permitted to do, state constitutions also contain positive rights and entitlements to government assistance. Indeed, state constitutions often describe in positive terms rights that are protected in the federal Constitution as limitations on government. For example, while the First Amendment says government shall "make no law . . . abridging the freedom of speech," a state constitution provides also that "any citizen may freely speak, write, and publish his sentiments on all subjects."[28] State constitutional rights also tend to be described in much greater detail than are federal protections deemed analogous.[29]

Rights in state constitutions are also often coupled with a recognition of the interests of other people[30] or a more general responsibility to the community.[31] Some state constitutions contain rights that are enforceable against private actors.[32] At the same time that they safeguard rights, many state constitutions identify roles for government in promoting a virtuous citizenry.[33]

---

28. VA CONST. art. I, § 12. *See Vlaming,* 895 S.E.2d at 717 (observing that "[w]hile the First Amendment's prohibition against government restriction speaks solely in the negative . . . the Virginia clause speaks in both negative and affirmative terms").

29. *See, e.g., Vlaming,* 895 S.E.2d at 717 (explaining the need to interpret state constitutional protection for religious liberty independently, quoting paragraph-long provision of Article I, Section 16 of the Constitution of Virginia, and noting that "[t]his fulsome language stands in stark contrast to the single clause in the First Amendment addressing religious liberty").

30. *See, e.g.,* ILL. CONST. art. I, § 4 ("All persons may speak, write and publish freely, being responsible for the abuse of that liberty.").

31. *See, e.g.,* MONT. CONST. art. II, pt. II., § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.").

32. *See, e.g.,* ILL. CONST. art. I, § 17 ("All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property."); N.Y. CONST. art. I, § 11 ("No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.").

33. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 269 (2006) ("[S]tate constitution makers have frequently determined that a polity . . . should take

Especially striking, "[m]ost state constitutions do not contain an 'equal protection' clause" of the kind found in the Fourteenth Amendment, but state constitutions "do contain a variety of equality provisions."[34] These are often detailed in the way the federal Equal Protection Clause is not. For example, the Michigan State Constitution provides more specifically that "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin."[35] Other equality measures take the form of requiring uniformity in taxation, public schooling, and other government programs.[36] These state equality provisions "were drafted differently, adopted at different times, and aimed at different evils"[37] than was the federal Equal Protection Clause.

B. Timing and Methodology

Differences of timing and interpretive methodology also loom large. Use of state constitutions (and other state-law sources) to help determine the public meaning of federal constitutional provisions requires temporal correspondence. If, for instance, the question is the public meaning of "due process of law" in the Fourteenth Amendment, we need evidence from state constitutions as of 1868. As Judge Newsom explains, from an originalist perspective, "evidence that significantly post-dates that provision's adoption isn't just second-best, it's positively irrelevant."[38] But the states did not, of course, all simultaneously ratify state constitutions in 1868 such that we can neatly consult sources of public conversation and engagement at the time of ratification for textual meaning. That leaves, then, contemporaneous pronouncements that do exist—perhaps in

---

active steps to form certain character traits, and that this should be done through constitutional provisions.").

34. WILLIAMSON & FRIEDMAN, *supra* note 16, at 242.

35. MICH. CONST. art. I, § 2.

36. WILLIAMS & FRIEDMAN, *supra* note 16, at 242.

37. *Id.*

38. Newsom, *supra* note 18, at 747.

1868 state court decisions—along with earlier sources whose meaning holds firm across intervening years.

The challenge, though, is that more than half of the states have had *multiple* state constitutions. A state's later constitutions often repeat provisions from its own earlier constitutions. State constitutions are, therefore, "layered"[39] in far more complicated ways than is the federal Constitution, presenting far greater complexities in synthesizing provisions adopted by different people at different points in time. For example, many state courts take the position that if a later constitution repeats language from an earlier constitution, meaning is fixed not at the time that later constitution was ratified but at the time the repeated provision first appeared in a constitution of the state.[40] Such state practices present significant challenges for relying upon state law as a source of federal meaning. One risk is that the federal interpreter just does not understand the backdating practices of the state court and, therefore, fails to see that evidence of meaning at Time 2 is actually evidence of meaning at an earlier Time 1. A second problem is that even if it makes sense to attribute to the ratifiers of a state constitution earlier meaning from a prior constitution of that same state, it is far from evident why such earlier meaning could also be attributed to the ratifiers of a *federal* provision.

More generally, mismatches between federal and state interpretive methodologies might seriously undermine the usefulness of state constitutions (and other sources of state law) for construing federal provisions. Different state courts follow different

---

39. Robert F. Williams, *State Constitutional Law After Dobbs and Bruen*, STATE COURT REPORT (2023), https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-law-after-dobbs-and-bruen.

40. *See, e.g.*, *Vlaming*, 895 S.E.2d at 719 ("When a constitutional provision has remained unchanged throughout Virginia constitutional history, we apply the original meaning of the provision when first adopted."); Elliott v. State, 824 S.E.2d 265, 269 (Ga. 2019) ("[W]e generally presume that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary."). *See generally* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 354-61 (2022) (discussing courts backdating original meaning).

interpretive methods[41] and deem different sources relevant to the interpretive effort.[42] Casual reliance on state court decisions about the meaning of state law, without a clear understanding of the state court's interpretive methodology, does not inspire confidence.[43]

---

41. *Compare* State v. Schneider, 197 P.3d 1020, 1025 (Mont. 2008) ("[W]e . . . conduct an independent review to determine the separate and particular intent of the framers of the Montana Constitution. That intent is first to be determined from the plain meaning of the words used. Where the meaning cannot be determined entirely from the plain wording, we consider the relevant legislative intent, which in the case of constitutional interpretation is the 1972 Constitutional Convention.") *with* O*levik* v. State, 302 Ga. 228, 235 (2017) ("We interpret a constitutional provision according to the original public meaning of its text, which is simply shorthand for the meaning the people understood a provision to have at the time they enacted it.") *and with* Carey v. Morton, 79 N.E.2d 442, 443 (N.Y. 1948) ("It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.").

42. *See* WILLIAMS & FRIEDMAN, *supra* note 16, at 353-96 (surveying state court methods of state constitutional interpretation and sources considered). *But see* Bulman-Pozen & Seifter, *supra* note 19, at 1858 ("While scholars and jurists have debated substantive lockstepping, a subtler but more concerning practice of methodological lockstepping has begun to take hold. Many state courts are deciding cases using techniques developed by federal courts to implement the federal Constitution.").

43. Consider *Heller's* breezy discussion of Massachusetts caselaw:

> The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence . . . ." Pt. First, Art. XVII, in 3 Thorpe 1888, 1892. . . . [I]f one gives narrow meaning to the phrase "common defence" this can be thought to limit the right to the bearing of arms in a state-organized military force. But . . . the State's highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." Commonwealth v. Blanding, 20 Mass. 304, 313–314. The analogy makes no sense if firearms could not be used for any individual purpose at all.

Heller, 554 U.S. at 602. It is inconceivable that in a different sort of case the Court would deem a state court's passing reference in a libel case reliable evidence of the existence and scope of a state constitutional right.

II. STATE LAW AS HISTORY AND TRADITION

Differences of substance, timing, and methodology pose challenges to uses of state law for discerning the meaning of the federal Constitution. This Part takes up two specific issues of interpretation: first, uses of state law for determining the meaning of provisions of the Bill of Rights and, second, more general interpretive challenges that arise from state court interpretations of state constitutional provisions with textual analogs in the federal Constitution.

A. State Law and the Bill of Rights

The Court has often made the observation that the Bill's provisions codified pre-existing rights.[44] That proposition is sound, but only in a very general sense. It does not follow that *all* states protected rights (later codified in the Bill of Rights) in the exact same way as each other, that permissible regulations of rights were consistent across states, or that there is a perfect congruence in either respect between pre-existing state protections and the rights that the Bill of Rights codified. Indeed, and unsurprisingly, even as there exist general similarities between the provisions of the Bill of Rights and pre-existing state-level protections, individual states varied in their protections for and regulations of rights,[45] and provisions of the Bill of Rights matched the practices of some states more closely than others.

Heller illustrates the resulting interpretive challenges. The *Heller* Court stated that its interpretation of the Second Amendment as not limited to keeping and bearing arms as part of a militia was "confirmed by analogous arms-bearing rights in state constitutions that

---

44. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("We look to [the historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing right*."); *id.* at 599 ("[T]he Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a 'right inherited from our English ancestors' . . . .") (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)) (second alteration in original).

45. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1441–42; Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265, 274–82 (2023).

preceded and immediately followed adoption of the Second Amendment."[46] But the state constitutional provisions the Court invoked in support of this conclusion vary considerably and they do not match well the text of the Second Amendment itself.

Of the four state constitutions *preceding* the Bill of Rights that the *Heller* Court cites, two specifically protected a right of the people to "bear arms for the defence of themselves";[47] the two others referred to bearing arms for the common defense or the defense of the state.[48] As for state constitutions after 1791, the *Heller* Court explained that by 1820, nine additional states had adopted what the Court calls "Second Amendment analogues."[49] Again, though, there were considerable differences across these nine—differences that the designation of "analogue" obscures. As the Court itself reports, four states protected a right of the people to "bear arms in defence of themselves and the State," and three gave each individual a "right to bear arms in defence of himself and the State."[50] The *Heller* Court treats all seven provisions to mean the same thing (an individual right): it describes the latter three as simply using "even more individualistic phrasing" than the prior four.[51] "The people . . . themselves" is not obviously an "individualistic" phrase. One might instead conclude that by comparison to "defence of himself," the phrasing is not individualistic at all; we would surely think it odd if the Court said all seven provisions protect only a collective right and "defence of themselves" is an "even more" collective phrasing than is "defence of himself." Two other state constitutions after 1791 referenced only arms-bearing for the "common defence."[52] It is not obvious—and the *Heller* Court doesn't fully explain this point—why "defence of themselves" is in the same

46. *Heller,* 554 U.S. at 601–02.

47. *See id.* at 601 (emphasis omitted) (discussing the founding-era Pennsylvania Declaration of Rights and Vermont constitution).

48. *See id.* at 601–02 (discussing the founding-era North Carolina Declaration of Rights and Massachusetts constitution).

49. *Id.* at 602.

50. *Id.; see also id.* at 584–85 & n.8 (collecting sources).

51. *Id.* at 602.

52. *Id.*

category as "defence of himself" rather than in the same category as "the common defence."

None of this is to say that the Court erred in concluding that the Second Amendment protects an individual right apart from any involvement in the militia. (I happen to think the Court in *Heller* and *McDonald* was correct, though on a Reconstruction-era rather than antebellum rationale.)[53] The point is that the *Heller* Court's use of state constitutions—its flattening of difference, its inattention to nuance—is far from compelling.

Significantly, *Heller* involved the quite straightforward question of whether individuals enjoy the right to keep and bear arms apart from militia service. When even as to that issue, the Court's use of state constitutions falls short, it is hard to be optimistic about reliance upon state constitutions to resolve more complex questions—whether in the Second Amendment context or beyond—about the nature and scope of federal rights.

Context matters also, and here the context is federalism. A significant challenge in invoking state constitutions (and state law more generally) as a basis for construing and applying provisions of the Bill of Rights is that those provisions, when added to the Constitution in 1791, cannot be understand outside of their federalism context. Two factors bear emphasis. First, the provisions of the Bill applied to a national government already limited to its enumerated powers. State governments are very different. Under their state constitutions, state governments (and particularly state legislatures) have general (if not plenary) powers: they "may undertake any action that is not specifically prohibited; they need not look to their constitutions for authorization."[54] Given the very different nature

53. *See* AMAR, *supra* note 7, at 259 ("Creation-era gun bearing was collective, exercised in a well-regulated militia embodying a republican right of the people, collectively understood. Reconstruction gun-toting was individualistic, accentuating not group rights of the citizenry but self-regarding 'privileges' of discrete 'citizens' to individual self-protection.").

54. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law,* 85 CORNELL L. REV. 656, 694 (1999); *see* Whittington v. State, 669 N.E.2d 1363, 1369 n.6 (Ind. 1996) ("[W]hile the Indiana Constitution does not grant unlimited legislative power, neither does it establish a system of expressly enumerated

of federal and state government, it is perhaps misleading even to speak of rights-protecting analogues. Even when textual provisions protecting rights are identical (or close to it), the governments against which those rights are held are not analogous entities. Second, the provisions of the Bill of Rights had at their inception a strong federalism-reinforcing theme.[55] In other words, yes, the provisions secure rights but a good part of the way in which they do that is by limiting the power of the federal government vis-à-vis the state governments. That theme is entirely lacking from the rights provisions of state constitutions.

B. In and Out of Step

Other interpretive challenges quickly emerge when federal courts look to state law to discern the meaning of the federal Constitution. Ordinarily, federal judges *defer* to state supreme courts on the meaning of state law.[56] But in the context of deriving from state law

---

powers. We never probe the terms of the constitution for a source of governmental authority, because power is *generally* vested in the legislature, and the outer boundary of that general power is marked by the requirement that it be exercised to advance peace, safety, and well-being.") (citations and internal quotation marks omitted).

55. *See* AMAR, *supra* note 7, at xii ("Individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations . . . designed to create an educated and virtuous citizenry.").

56. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635–36 (1875). Various attendant doctrines reflect a commitment to the authority of state courts to determine questions of state law. *See, e.g.*, R.R. Comm'n v. Pullman Co., 312 U.S. 496, 499–501 (1941) (instructing that federal courts should abstain to permit a state court to resolve an unsettled question of state law that would make resolution of the federal constitutional issue unnecessary); Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory."); King v. United Ord. of Com. Travelers, 333 U.S. 153, 158 (1948) ("[W]hen the issue confronting a federal court [sitting in diversity] has previously been decided by the highest court in the appropriate state; the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts.").

evidence of a national history and tradition, significant problems arise.

Some state supreme courts give provisions of their state constitutions the *same* meaning the Supreme Court gives to analogous provisions of the federal Constitution[57] (and some state constitutions so require).[58] Other state supreme courts insist that state constitutional provisions are to be construed independently of the federal Constitution.[59]

---

57. Approaches vary. *See* WILLIAMS & FRIEDMAN, *supra* note 16, at 226-41 (discussing different types of lock-stepping). Examples abound. *See, e.g.,* People v. Caballes, 851 N.E.2d 26, 42 (Ill. 2006) ("This court's approach to analysis of cognate provisions in the Illinois and United States Constitutions has been described as 'lockstep.' . . . However, . . . it is an overstatement to describe our approach as being in strict lockstep with the Supreme Court. The approach that this court has taken is more properly described as either an interstitial or perhaps a limited lockstep approach."); City of Chicago v. Alexander, 89 N.E.3d 707, 713 (Ill. 2017) (holding that the right to assemble in the state constitution is to be interpreted in lockstep with the assembly clause of the First Amendment); State v. Johnson, 729 N.W.2d 182, 189 (WI 2007) ("The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protect persons from unreasonable governmental searches and seizures. In general, our cases have ordinarily construed the search and seizure protections of the state and federal constitutions coextensively.").

58. *See, e.g.,* FLA. CONST. art. I, § 17 ("[T]he prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

59. *See, e.g.*, State v. Wilson, 543 P.3d 440, 445 (Haw. 2024) ("The Hawai'i Constitution often offers 'greater protections' than the federal constitution. When the two contain look-alike provisions, Hawai'i has chosen not to lockstep with the Supreme Court's interpretation of the federal constitution. Rather, this court frequently walks another way. Long ago, the Hawai'i Supreme Court announced that an 'opinion of the United States Supreme Court . . . is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by . . . the Hawai'i Constitution.'") (alterations in original) (citations omitted) (first quoting State v. Santiago, 492 P.2d 657, 664 (Haw. 1971); and then quoting State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974)); State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999) ("Although this Court has previously construed [Art. I, § 8 of the state constitution] as 'synonymous with the "due process of law" provisions of the federal constitution,' we have also recognized that 'this Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution.' Thus, we will examine [a U.S. Supreme Court decision] and explain why we reject its analysis.") (citations omitted) (first quoting State *ex rel.* Anglin v. Mitchell, 596 S.W.2d 779, 786 (Tenn. 1980); and then quoting Burford v.

With respect to states in the first category, the federal judge who looks to the state constitution, as interpreted by the state court, in order to decide if there is a relevant history and tradition that supports a federal right, engages in an uncertain exercise. For the state court, authoritative on state law, takes the view that a state constitutional right exists if a federal right exists—the very thing the federal court is seeking to ascertain by looking to state law. Lock-stepping at the state level would seem to render unhelpful such uses of state law.

A particular version of the problem exists for *Heller*-style investigations of early state constitutional analogues to the Bill of Rights. Notwithstanding the Supreme Court's 1833 ruling in *Barron v. Baltimore*[60] that the Bill of Rights did not constrain the states,[61] some antebellum state courts took the view that provisions of the federal Bill or the principles it reflected *did* apply to state governments,[62] or

State, 845 S.W.2d 204, 207 (Tenn. 1992)); Deras v. Myers, 535 P.2d 541, 549 (Or. 1975) (state speech and assembly provisions provide stronger protections than federal Constitution); State v. Briggs, 199 P.3d 935, 942 (UT 2008) ("[W]e do not presume that federal court interpretations of federal Constitutional provisions control the meaning of identical provisions in the Utah Constitution."); Wright v. State, 108 N.E.3d 307, 315 (Ind. 2018) ("This Court has said many times that although Article 1, Section 11 of the Indiana Constitution and the Fourth Amendment to the United States Constitution share vocabulary, they part company in application."); Woirhaye v. Mont. Fourth Jud. Dist. Ct., 972 P.2d 800, 803 (Mont. 1998) ("[W]e have refused to 'march lock-step' with the United States Supreme Court's interpretation of corresponding provisions in the federal constitution") (quoting State v. Bullock, 901 P.2d 61, 75 (Mont. 1995)); State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002) (invalidating under the state constitution pretextual arrests and noting that "[w]e depart from the standards established by the federal courts and rely instead on independent state grounds to determine what, in Arkansas, constitutes unreasonable police conduct warranting suppression"); People v. Haley, 41 P.3d 666, 672–77 (Colo. 2001) (relying on a state constitutional search and seizure provision as providing broader protections than the Fourth Amendment and invalidating as unreasonable a "dog sniff" of an automobile); Powell v. State, 510 S.E.2d 18, 21–26 (Ga. 1998) (striking down a state sodomy law on state constitutional privacy grounds, interpreted more broadly than federal protections).

60. 32 U.S. (7 Pet.) 243 (1833).

61. *Id.* at 250-51 (holding that the Fifth Amendment, like other provisions of the Bill of Rights, was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states").

62. *See, e.g.*, Nunn v. State, 1 Ga. 243, 250 (1846) (invalidating on Second Amendment grounds state statute making it a misdemeanor to sell or carry knives, pistols, and other

informed the meaning of applicable state constitutional protections.[63] Early state court pronouncements on rights were thus not necessarily independent of federal conceptions. That, too, presents a difficulty for construing federal provisions by reference to state sources: the state sources themselves might be infused with federal principles and values.

As for states in the second category, consulting state constitutions—and caselaw construing them—in order to determine federal meaning might end up in some tension with the deference ordinarily given state courts on the meaning of state law. The state court has said that the meaning of the state constitution is independent

---

weapons and explaining that, textually, "[t]he language of the [*S*]*econd* [A]mendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning"); Wells v. Jackson, 17 Va. (3 Munf.) 458, 474 (1811) (opinion of Roane, J.) (invoking the particularity requirement of the Fourth Amendment in finding terms of a warrant inadequate); Larthet v. Forgay, 2 La. Ann. 524, 525 (1847) (in upholding a jury award of $2,000 in damages to the owner of a cigar shop searched during the execution of a warrant that authorized a search only of a neighboring cabaret, invoking the Fourth Amendment as "an affirmance of a great constitutional doctrine of the common law" that "should be enforced in its full spirit and integrity"); Campbell v. Georgia, 11 Ga. 353, 365 (1852) (in discussing relevance of Sixth Amendment to state criminal trials, explaining that the Bill of Rights "was primarily introduced for the purpose of preventing an abuse of power by the Federal Government," its "principles . . . were . . . the 'birthright' of our ancestors, several centuries previous to the establishment of our government" and "[i]t is not likely . . . that any Court could be found in America of sufficient hardihood to deprive our citizens of these invaluable safeguards"); State v. Cheevers, 7 La. Ann. 40, 41 (1852) (stating that while the Double Jeopardy Clause "is not, perhaps, applicable, as a constitutional principle, to offences against a State; yet, it is but the enunciation of a well established common law principle, and, as such, is expressly adopted by [a state statute]").

63. *See, e.g.*, Jackson v. Bulloch, 12 Conn. 38, 43 (1837) (describing a state constitutional provision as "almost a transcript" of the Fourth Amendment); Reynolds v. State, 3 Ga. 53, 63 (1847) (comparing the state double jeopardy provision to the federal provision); Jones v. Robbins, 74 Mass. (8 Gray) 329, 346 (1857) (explaining that while the Fifth Amendment Grand Jury Clause only applies to the national government, it informs the "less precise and explicit terms of our own declaration of rights"); Polly v. Saratoga & Wash. R.R. Co., 9 Barb. 449, 458 (N.Y. Gen. Term 1850) (describing the takings clause of the state constitution as borrowed from the Federal Constitution); Griffin v. Martin, 7 Barb. 297, 300 (N.Y. Gen. Term 1849) (describing the takings clause of the state constitution as derived from the Fifth Amendment); Green v. Allen, 24 Tenn. (5 Hum.) 170, 214–15 (1844) (citing the First Amendment in construing a state constitutional provision protecting religious freedom).

of the meaning of the federal Constitution. Independence does not necessarily lead to difference: the state court might engage in independent interpretation but still end up with an understanding of a state constitutional provision identical to how the Supreme Court understands a comparable provision of the federal Constitution. But the state court might determine that the state provision really does *not* mean the same thing as the federal provision and that the relevant differences matter. The state constitutional provision might do more or do less than the federal Constitution, exist for a different reason, trace to a different history, or reflect the unique traditions of the particular state. The federal court that, unaware of or just ignoring these state admonitions, treats the constitutional law of the state as a source of federal meaning, risks being unfaithful to what the state court has said about its own state's laws.

State courts pay attention, of course, to Supreme Court rulings. If state courts see the Supreme Court describing and using state law in ways that depart from the state court's own understandings, they might respond. The next Part turns to that phenomenon.

III. TALKING BACK

An outgrowth of the new judicial federalism[64] is a recognition of the potential value of dialogue between state and federal courts on constitutional questions.[65] When state courts, especially state

64. The "new judicial federalism" refers to the increased reliance by state courts on state constitutional provisions to protect rights, particularly in more robust ways than the Supreme Court interprets the rights-protecting provisions of the federal Constitution. *See* G. Alan Tarr, *The New Judicial Federalism in Perspective,* 72 NOTRE DAME L. REV. 1097, 1097–98 (1997). An important impetus was Justice William Brennan's 1977 article urging state courts, in the wake of the Supreme Court's pullback from some of the Warren Court's rights precedents, to give the rights provisions of their state constitutions independent and more expansive meaning. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 489 (1977).

65. *See, e.g.*, Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism,* 19 GA. L. REV. 861, 901 (1985). ("[I]n the tradition of cooperative federalism, both state and federal systems have much to gain from institution of a dialogue between the courts of both systems."). For a different perspective, see Kahn, *supra* note 15, at 1156, (rejecting the notion that state constitutional interpretation be limited to state-specific sources and urging a common "interpretive enterprise,"

supreme courts, engage in an independent analysis of the provisions of their state constitutions, they generate approaches and conclusions that can inform and shape how federal courts, and particularly the Supreme Court, interpret and apply the federal Constitution. In other words, state courts interpreting the state constitution can both learn from and provide input for the decisions of the Supreme Court under the federal Constitution.[66] Such dialogue is presumed friendly and polite because the lane markings are clear—the Supreme Court is authoritative on the federal Constitution, the state's highest court on the state constitution—and the exchange need not produce agreement.

A different kind of interaction between state courts and the Supreme Court is evident in the history and tradition context. This involves instead state courts talking back to the Supreme Court: criticizing the Court's uses of state law to generate holdings under the federal Constitution. Examples involving the recent Second Amendment line of cases and *Dobbs* illustrate the phenomenon.

---

involving state and federal courts, to "understand the appropriate role for the rule of law in a democratic order" and recognizing also interpretive diversity). For a critique, see Justin Long, *Intermittent State Constitutionalism,* 34 PEPP. L. REV. 41, 67–68 (2006) ("[T]he project is ultimately hollow. There can be no constitutionalism without a constitution, and no consensus on 'American constitutionalism' will ever be found, no matter how well-reasoned the state courts are in their rebuke of contemporary Federal Supreme Court decisions. The failure of a universal common law as a governing principle in American courts teaches us that much.") (footnote omitted).

66. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism,* 28 HASTINGS CONST. L.Q. 93, 97–98 (2000) ("In acknowledging the value of dialogue, a state court not only honors the authority of its institutional role within the federal scheme, it also engages the U.S. Supreme Court in discourse about the interpretive possibilities inherent in constitutional provisions . . . . Given the Supreme Court's relatively isolated institutional position, such engagement can inform interpretive debates among judges, scholars, and citizens about the meaning of constitutional text, and thereby balance the interpretational judgment of the Supreme Court.") (footnotes omitted).

A. Second Amendment Cases

The Supreme Court of the State of Hawai'i has been particularly critical of the Court's recent Second Amendment decisions. In a 2024 case rejecting challenges under the federal and state constitutions to a state licensing requirement for possession of firearms in public, the Hawai'i court held that *Bruen* did not invalidate licensing requirements under the Second Amendment, and that because the "text of . . . [the state provision], its purpose, and Hawai'i's historical tradition of weapons regulation support a collective, militia meaning," the state constitution protected no right at all to carry firearms in public places.[67] The court's opinion is a vigorous response to the Supreme Court, with two apparent goals: to rebut the Supreme Court's notions of consistent and discernable American traditions in *Heller* and *Bruen*, and to challenge the Court's own textual interpretation of the Second Amendment itself.

The state constitution's arms provision, in article I, section 17,[68] is "nearly identical" in text to the Second Amendment, with differences between the two of just "two commas and three capital letters."[69] In considering both state and federal challenges to the licensing laws, the Hawai'i court, rejecting lock-stepping, said it was proper to "interpret the Hawai'i Constitution before [interpreting] its federal counterpart" and that "[o]nly if the Hawai'i Constitution does not reach the minimum protection provided by a parallel federal constitutional right should this court construe the federal analogue," such that "we . . . may not get to the United States Constitution" at all.[70] But that was a sleight of hand. In construing the state constitution's provision, the court *immediately* turned to the Second Amendment. "Since article I, section 17 imitates the Second Amendment," the court explained, "it is helpful to look at what the

67. State v. Wilson, 543 P.3d 440, 447 (Haw. 2024).

68. The provision reads: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAWAI'I CONST. art I, § 17.

69. *Wilson,* at 447.

70. *Id.* at 445.

Second Amendment's words mean."[71] And the court's ensuing analysis was as much about the Second Amendment as it was about the state provision.

According to the Hawai'i court, *both* the federal and state constitutions "use military-tinged language . . . to *limit* the use of deadly weapons to a military purpose,"[72] and neither contains "words . . . describ[ing] an individual right."[73] Notwithstanding *Heller*, the Hawai'i court wrote that "[t]o English speakers—in 1791, 1868, and now—the first clause [of the Second Amendment] narrows the right that the second clause confers."[74] As to the Hawai'i constitution, the court wrote: "Our framers had options. They could have worded the constitution to plainly secure an individual right to possess deadly weapons for self-defense. But they didn't."[75] The court distinguished the Hawai'i provision—and therefore the Second Amendment—from the constitutions of other states that explicitly provide for an individual right of self-defense.[76] Further, the court claimed, these differing state-level protections for an individual right exist precisely in order to supplement the more limited collective right the Second Amendment secures: "Until *Heller*, the Supreme Court had never ruled that the Second Amendment afforded an *individual* right to keep and bear arms. Because the Second Amendment provided a collective right, most states conferred an individual right through their constitutions."[77] Hawai'i, though, elected no supplemental right. While recognizing that "[f]ederalism principles allow states to provide broader constitutional protection to their people than the federal constitution," the court explained, Hawai'i did not expand upon the Second Amendment.[78] The court wrote:

---

71. *Id.* at 448.
72. *Id.* (emphasis added).
73. *Id.* at 449.
74. *Id.* at 448.
75. *Id.* at 449.
76. *See id.* at 449–50.
77. *Id.* at 450.
78. *Id.*

> Hawai'i chose to use civic-minded language. Article I, section 17 textually cements the right to bear arms to a well regulated militia. Its words confer a right to "keep and bear arms" only in the context of a "well regulated militia." Article I, section 17 traces the language of the Second Amendment. Those words do not support a right to possess lethal weapons in public for possible self-defense.[79]

In sum, the contrast with the text of other state constitutions demonstrated that neither Hawai'i's constitution nor the Second Amendment protected an individual right.

Turning next to the "public purpose" of the state constitution's provision—an element of state constitutional interpretation—the Hawai'i court doubled down on its readings of state and federal arms protections. The court reported that "the authors and ratifiers" of the state constitution "imagined a collective right," one that "align[ed] with what the Second Amendment meant in 1950" when, in adopting its first state constitution, "Hawai'i copied the federal constitution's language"—and subsequently, when the same provision was retained in state constitutional conventions in 1968 and 1978.[80] Indeed, the court explained, the 1950 convention delegates adopted the Second Amendment text more or less unchanged, precisely in order to "preserve the Territory's [existing] firearms regulations."[81] State processes were thus additional evidence of both state and federal constitutional meaning. According to the court:

> When the Hawai'i Constitution was first ratified, courts throughout the nation's history had *always* interpreted and applied the Second Amendment with [a] militia-centric view . . . . This was what everyone thought. . . . State and federal courts had also, with few exceptions, upheld laws regulating firearms use and possession.[82]

The Supreme Court was just wrong. "*Heller* flipped the nation's textual and historical understanding of the Second Amendment"

79. *Id.*
80. *Id.* at 450–51.
81. *Id.* at 450.
82. *Id.* at 451.

based on an historical analysis that "historians quickly debunked."[83] Worse, the Hawai'i court thought the Supreme Court engaged in deliberate distortion. The court wrote:

> History is prone to misuse. In the Second Amendment cases, the Court distorts and cherry-picks historical evidence. It shrinks, alters, and discards historical facts that don't fit. . . . Judges are not historians. Excavating 18th and 19th century experiences to figure out how old times control 21st century life is not a judge's forte. . . . Worse, judges may use history to fit their preferred narratives. . . . History is messy. It's not straightforward or fair. It's not made by most. . . . *Bruen*, *McDonald*, *Heller*, and other cases show how the Court handpicks history to make its own rules.[84]

Further, the Hawai'i court thought that, besides just the wrong way to assess modern gun control laws,[85] the Court's history-and-tradition approach was inconsistent with the *traditional* mode of constitutional interpretation:

> *Bruen* unravels durable law. No longer are there the levels of scrutiny and public safety balancing tests long-used by our nation's courts to evaluate firearms laws. Instead, the Court adlibs a "history-only" standard. The Supreme Court makes state and federal courts use a fuzzy "history and traditions" test to evaluate laws designed to promote public safety. It scraps the

---

83. *Id.* at 453.

84. *Id.*

85. *Id.* at 453–54. The court explained:

> Time-traveling to 1791 or 1868 to collar how a state regulates lethal weapons—per the Constitution's democratic design—is a dangerous way to look at the federal constitution. . . . We believe it is a misplaced view to think that today's public safety laws must look like laws passed long ago. . . . Lethal weapons share little resemblance to weaponry used centuries ago. . . . Gun use has changed, too. A backward-looking approach ignores today's realities. . . . The United States Supreme Court disables the states' responsibility to protect public safety, reduce gun violence, and safeguard peaceful public movement. . . . [I]t makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution.

Id. at 454.

> traditional techniques used by federal and state courts to review laws passed by the People to protect people.[86]

Academics and media commentators routinely disparage the Supreme Court. Nonetheless, for the highest court of a state to accuse Supreme Court justices of "handpick[ing]" evidence in order to make their "own" rules" is remarkable.

As to the nation's history and tradition, the Hawai'i court explained that its state did not fit the Supreme Court's account in *Bruen*. The state's own history and tradition simply did not support any right to carry weapons in public. The court explained that under the laws of the Hawaiian Kingdom (1833–1893), the provisional government (1893–1898), and the territorial government (1898–1959), possession of weapons was "heavily regulated"[87] so as to prohibit possession in public. The court explained that Hawai'i's several pre-state constitutions, beginning in 1840, included provisions drawn from the U.S. Constitution but contained no right at all to keep and bear arms; the state's 1950 constitution itself protects only a militia-specific right.[88] Summarizing the entire record, the court concluded, "Hawai'i's historical tradition excludes an individual right to possess weapons. Hawai'i prohibited the public carry of lethal weapons—with no exceptions for licensed weapons—from 1833-1896. Unlicensed public carry of firearms has been illegal from 1896 to the present. Hawai'i has never recognized a right to carry deadly weapons in public; not as a Kingdom, Republic, Territory, or State."[89] The nation's history and tradition, as set out in *Bruen*, was not that of Hawai'i.

Of course, Hawai'i's record does not instantly unsettle the Supreme Court's assessment of the nation's tradition and history.[90]

---

86. *Id.* at 453 (citation omitted).

87. *Id.* at 456.

88. *Id.* at 458-59.

89. *Id.* at 459.

90. *Wilson* was not the first criticism of the Supreme Court's methodology out of Hawai'i. In a case involving application of the minimum contacts test for personal jurisdiction in state court, Justice Todd Eddins wrote a concurring opinion, ostensibly triggered by Justice Gorsuch's suggestion to revisit *International Shoe,* see City & Cnty. of Honolulu v. Sunoco LP, 537 P.3d 1173, 1208 (Haw. 2023) (Eddins, J., concurring)

The Court has not resolved whether the relevant cut-off point for identifying a tradition relevant to the Second Amendment is 1791 or 1868.[91] But it clearly does not think it is 1950, when Hawai'i adopted its current constitution, or 1959, when, with three amendments to its 1950 constitution (none pertaining to arms), Hawai'i was admitted to the Union as the fiftieth state. A response to the Hawai'i court's protestations might, therefore, simply be that, as is true of the other twelve states admitted after 1868, Hawai'i is bound by the earlier history and traditions of the Union it joined. Still, that perspective might be unduly simple. The Court has insisted in

---

(quoting Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039, (2021) (Gorsuch, J., concurring).), that is highly critical of some of the Court's recent decisions. Eddins complained that at the Court, "[e]nduring law is imperiled," that "[e]merging law is stunted," and that "[a] justice's personal values and ideas about the very old days suddenly control the lives of present and future generations." *Id.* at 1208. In *Dobbs,* Eddins wrote, the Court "erased a constitutional right" and in *Bruen* it "cherry-picked history to veto public safety legislation, disturb the tranquility of public places, and increase homicide." *Id.* In Eddins's view, the Court has rendered "unacceptable" the "[t]raditional methods to interpret the Constitution," illustrated, he said by *Brown*'s refusal to "'turn the clock back to 1868'." *Id.* at 1209 (quoting Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 492–93 (1954)). According to Eddins, the Court's methodology fails to constrain judges and results in a skewed historical record. *Id.* Eddins, writing he is "just a state judge," thought Hawai'i's own approach to constitutional interpretation furnished lessons for the Supreme Court:

> [A] constitutional provision's public meaning at ratification may matter centuries or decades later. . . . But to the Hawai'i Supreme Court, it's not decisive, or the *only* way to interpret a constitution. In Hawai'i, the Aloha Spirit inspires constitutional interpretation. . . . "Aloha" is more than a word of greeting or farewell or a salutation. . . . "Aloha" is the essence of relationships in which each person is important to every other person for collective existence.
>
> The United States Supreme Court could use a little Aloha.

Id. at 1210 (quoting HRS § 5-7.5(a)).

91. *See Bruen,* 597 U.S. at 37 (acknowledging "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)" but declining to address this issue because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.").

other contexts on the "equal sovereignty of the states."[92] The Court has not articulated all of the ways in which states must be treated as equal sovereigns,[93] but perhaps there is something to the Hawai'i court's assumption that *its* traditions should matter along with those of other states. A possible argument, then, for looking past 1868 to discern state practices is that stopping at 1868 fails to treat states as equal sovereigns and that when Hawai'i entered the Union, its traditions became part of those of the nation. Even so, some concepts at least of the nation's history and traditions would allow for variation: there might be an overall national tradition even as some states (how many is subject to debate) were different. In any event, while Hawai'i might be the most distant state—temporally and geographically—the courts of other states have also voiced strong criticism of the Court's methodology in Second Amendment cases.[94]

---

92. *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States.").

93. For academic explorations, see, e.g., Thomas B. Colby, *In Defense of the Equal Sovereignty Principle,* 65 DUKE L.J. 1087, 1170 (2016); Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism,* 120 COLUM. L. REV. 835, 935-40 (2020); Leah M. Litman, *Inventing Equal Sovereignty,* 114 MICH. L. REV. 1207, 1209 (2016).

94. Consider this extraordinary statement by the highest court of Pennsylvania in a case involving a constitutional challenge to a town ordinance prohibiting the discharge of firearms except at designated shooting ranges:

> We close by adding our voice to the ever-growing chorus of courts across the country that have implored the High Court to answer some of the many questions *Bruen* both created and left unresolved—or even to reconsider its path entirely. Our Nation is gripped by a level of deadly gun violence our founders never could have conceived, and, respectfully, some of the Court's actions in recent years have done little to quell the legitimate fears of "the people." Doubtless, the federal Constitution is king, and the heavy burden of interpreting that all-important document falls solely to the head of the federal judiciary. Still, to many, the *Bruen* Court's word that the Second Amendment is meant to be adapted to the various crises of human affairs largely rings hollow since the Court has frozen its meaning in time in the ways that matter most. Worse yet, the Court seemingly moves the goalposts with each new case it takes, most recently by *sua sponte* discarding a test that was uniformly embraced by courts across the country and replacing it with a harsh "history-

B. Dobbs

State courts have also talked back on *Dobbs*. In a recent case involving a challenge to a ban on Medicaid-funded abortion, two members of the Pennsylvania Supreme Court (out of five who heard the case) concluded that the state constitution protects "the fundamental right to reproductive autonomy, which includes a right to decide whether to have an abortion or to carry a pregnancy to term."[95] Justice Christine Donohue (who wrote the majority and lead opinion in the case), joined by Justice David Wecht, located this right in Article I, Section 1 of the state constitution.[96] It provides: "Art. I § 1. Inherent rights of mankind. All men are born equally free and independent, and have certain inherent and indefeasible rights,

---

and-tradition" test no one asked for. We cannot help but wonder (and fear, really): What's next?

Barris v. Stroud Twp., 310 A.3d 175, 215 (Pa. 2024) (internal citation omitted).

Of particular concern to the Pennsylvania court was its perceived lack of guidance in *Bruen* on facial versus as-applied challenges:

> [B]efore us is a facial challenge to the shooting range exception to the Township's discharge ordinance. Ordinarily, a law is facially unconstitutional only where no set of circumstances exist[s] under which [it] would be valid. But *Bruen* teaches that Second Amendment challenges are different, and not subject to the difficult-to-mount standard that typically applies to facial attacks. . . . Indeed, the challengers in *Bruen* also levied a facial challenge. And yet, rather than engage any of its precedents touching upon facial challenges, the *Bruen* Court simply announced it was setting "*the* standard for applying the Second Amendment" without drawing any distinction between facial and as-applied claims . . . (emphasis added).

Id. at 203 (quoting *Bruen*, 597 U.S. at 24) (other quotations omitted). Other examples of state court criticisms include State v. Rumpff, 308 A.3d 169, 176–77 (Del. Super. Ct. 2023) ("Since the Supreme Court's pivotal decisions in *Heller* and *McDonald*, the lower courts have been left to grapple with the outstanding effects of the Supreme Court's failure to apply a set standard of review to Second Amendment cases. . . . [W]hile [in *Bruen*] the Supreme Court addressed how to determine whether *conduct* falls under the Second Amendment, the Supreme Court did not provide clarification as to how the lower courts were to go about determining *who* is entitled to Second Amendment protection.").

95. Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs., 309 A.3d 808, 917 (Pa. 2024) (remanding to lower court to assess funding exclusion under heightened standards governing state equal protection and Equal Rights Amendment claims).

96. *Id.*

among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

Justice Donohue first emphasized the ways in which the state constitution differs from the federal Constitution. In so doing, she depicted the state constitution—and the Pennsylvania court's interpretation of it—as a reliable source of long-standing American rights.[97] That depiction brings *Dobbs* within the crosshairs.

Justice Donohue explained that "[t]he Pennsylvania Constitution, first adopted in 1776, predated the ratification of the United States Constitution;" it "constituted the first overt expression of independence from the British Crown;" it was meant to "reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681;" and that "[u]nlike the Bill of Rights, the Declaration of Rights was an organic part of the Pennsylvania Constitution, appearing in the first iteration of the document."[98] Moreover, the state constitution did not itself create rights: "Article I, Section 1 rights are inherent and indefeasible rights. . . . That the rights are inherent, secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic."[99] According to Donohue, "[t]he most prominent of the inherent rights of Article I, Section 1 is the right to privacy," a right she said that is "rooted in a person's inherent and indefeasible right to liberty and the pursuit of happiness."[100] Central to this right of

97. Donohue explains that "[t]he Federal Constitution has no counterpart to Article I, Section 1" and that while "the United States Supreme Court has, in the past, settled on the Due Process Clause of the Fourteenth Amendment of the United States Constitution as the source of a right to privacy," "[t]here is no similarity between the texts of these two provisions." Specifically, she writes, "Article I, Section 1 secures rights that are inherent and indefeasible, whereas the Fourteenth Amendment's scope is more circumscribed" in that "[a]ccording to the High Court, the Fourteenth Amendment's protections only extend to those rights explicitly mentioned by the text or those that are deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 897 (citing *Dobbs).*

98. *Id.* at 898.

99. *Id.*

100. *Id.* at 899.

privacy is the "right to be let alone"[101] as reflected in "two often overlapping interests: the interest in avoiding disclosure of personal matters and the interest in having independence to make certain kinds of important decisions."[102] A right to "reproductive autonomy" falls within this concept: "Whether or not to give birth is likely the most personal and consequential decision imaginable in the human experience. Any self-determination is dependent on the right to make that decision."[103]

This sounds initially like a discussion just of a state constitutional right. But Donohue turned to the federal Constitution and the Court's use of Pennsylvania law. On the right of decision-making, Donohue invoked Supreme Court cases, running from *Meyer v. Nebraska* to *Loving v. Virginia*, as "longstanding precedent . . . delineating the right to make certain bedrock decisions."[104] Given this line of cases, she observed, "we have not been asked to enforce these rights to make the important decisions based on our own Charter's privacy guarantees" and so "[c]omplacency with the status quo established by the United States Supreme Court jurisprudence applying the federal Constitution stalled development of our Charter's protections in this arena."[105] The court's previous lack of recognition of a state right to abortion also reflected the caselaw of the Supreme Court: "Over the past fifty years, given that [beginning with *Roe*] the right was firmly ensconced in the federal Constitution, there has been no opportunity to address the question of whether our Constitution protects the right to make decisions involving reproductive autonomy until *Dobbs*, when the federal right was retracted."[106]

As to interpreting the state constitution, Donohue wrote that because Article I rights are inherent, the court was not "constrained" in the way the *Dobbs* Court "believed it was" to evaluate whether

101. *Id.* at 901.
102. *Id.*
103. *Id.* at 906.
104. *Id.* at 905.
105. *Id.* at 906.
106. *Id.*

abortion is "deeply rooted in the 'history or traditions of the Commonwealth.'"[107] Donohue observed that such an approach is "not our Constitution's analytical framework since our Article I rights are inherent."[108] Nonetheless, she wrote, "[i]t is helpful to clarify the [historical] status of abortion in Pennsylvania,"[109] which, she wrote, the *Dobbs* Court had "selectively referenced."[110] In a footnote, Donohue added this:

> For instance, *Dobbs* relied on an 1850 Pennsylvania case to disprove arguments that a right to abortion was deeply rooted in the nation's history. *Dobbs*, 142 S. Ct. at 2252 & n.32, 2255 (citing Mills v. Commonwealth, 13 Pa. 631 (1850) as evidence that abortions were criminalized at all points of pregnancy in Pennsylvania and that, in other areas of the law, a fetus was regarded as a "person in being")).[111]

In her own assessment of the state's historical record, Donohue reached a different conclusion. She reported that "[a]lthough we have not uncovered any Pennsylvania specific discussion of the common law from the late eighteenth or early nineteenth century,

---

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* n.120. *See also id.* at 138 (Wecht, J., concurring) (writing that "[w]hat the *Dobbs* Majority got right was counting Pennsylvania among those states that criminalized abortion in the mid-1800s" but observing that the decision "came at the height of the separate spheres doctrine that confined women to strict, socially constructed roles as wives and mothers" and criticizing several aspects of *Mills,* including that in it the court "did not explain itself by way of precedent or otherwise" and went "much further than the facts warranted."). *See also* Members of Med. Licensing Bd. of Indiana v. Planned Parenthood Great Nw., Hawai'i, Alaska, Indiana, Kentucky, Inc., 211 N.E.3d 957, 995 (Ind.) (Goff, J., concurring in part & dissenting) reh'g denied, 214 N.E.3d 348 (Ind. 2023) (criticizing the majority's invocation of *Dobbs* and reference to "Indiana's long history of generally prohibiting abortion as a criminal act" as evidenced by the Indiana Territorial government enacting a receiving statute adopting English law that, through 1803 legislation, criminalized abortion after 'quickening' and explaining that "Indiana's reception statute adopted only the Common Law of England, all statutes or acts of the British Parliament, made in aid of the Common Law, prior to 1607" and that "[b]ecause the English Act of 1803 [criminalizing abortion] came nearly two-hundred years after the cut-off date for receiving English laws, Indiana did not in fact receive it as part of its own law.").

scholars on both sides of the abortion debate have asserted that the quickening doctrine was a settled part of the common law at the opening of the seventeenth century," and "[t]hus at the time our Charter was adopted, abortions were available and performed and the government did not interfere in a woman's pregnancy until quickening."[112] Further, Donohue explained, again evidently in response to the *Dobbs* Court, that "[w]hat the history of the common law in Pennsylvania establishes is that views of morality may change regarding abortion and other practices.[113] In addition, Donohue offered a more general criticism of the use of history. In her view, "that history [of abortion regulation] is not determinative in the resolution of the issue presented in this case" because of a framing problem: "[t]o focus the issue on the abortion procedure itself denigrates the monumental impact on a woman making the decision to carry a pregnancy to birth or not. The constitutional question is whether that decision is the type of important decision that the privacy right protects."[114] In a concurring opinion, Justice David Wecht built on Donohue's analysis to provide an additional, and more strongly worded, criticism of *Dobbs*.[115]

The Pennsylvania court is not the only example of a state court pushing back on the Supreme Court's understanding of history and tradition in *Dobbs*. The Oklahoma Supreme Court has also provided

---

112. *Allegheny Reprod. Health Ctr.*, 309 A.3d at 909.

113. *Id.*

114. *Id.*

115. As to framing, Wecht deemed it "a familiar tactic" to define a right "so narrowly that the right, so defined, will not be found in the applicable constitution" and that in *Dobbs,* the Court "reduced the issue before it to the narrowest possible articulation: the right to abortion, rather than the broader right to personal autonomy." *Id.* at 950 (Wecht, J., concurring). Wecht also criticized the Court's use of history and tradition both for its sources, *see id.* at 983 ("The history represented by Hale and Blackstone is not, as the *Dobbs* Majority seemed to believe, a neutral survey of history."), its selectivity, *see id.* ("The *Dobbs* majority engaged in historical fiction, disregarding evidence that undermined its views"), and its conclusions, *see id.* at 984 ("The deeply rooted history and tradition of every state at the Founding afforded women the liberty to obtain an abortion prior to quickening."). Wecht also encouraged litigants to bring claims for a federal right to abortion based on constitutional provisions other than due process. *See id.* at 964.

an account of its own state's traditions that differs in important respects from the *Dobbs* Court's understanding of those of the nation, and which, the Oklahoma court has concluded, supports an abortion right.[116]

---

116. After *Dobbs,* the Oklahoma Supreme Court held that the state constitution "protects a limited right to an abortion" under the due process clause of Article II, section 7 and the provision of Article II, section 7 protecting "inherent rights." Oklahoma Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1128 (Okla. 2023).

The court observed that since *Roe* it had "followed the U.S. Supreme Court's interpretation of the federal Due Process Clause when deciding issues related to abortion. It was unnecessary for this Court to determine whether there existed an independent right to terminate a pregnancy under the Oklahoma Constitution. Although we have refrained from finding a right to terminate a pregnancy in the Oklahoma Constitution, we have never ruled such right did not exist." *Id.* In interpreting the state constitution, the Court followed (or appeared to follow) a state-level history-and-tradition approach and concluded a limited right to abortion existed. The court wrote:

> If we adopted the *Dobbs* analysis we would have to find a right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. *Dobbs* relied upon various state statutes that criminalized abortion to help determine whether abortion rights were deeply rooted in this nation. Even during the Oklahoma Territory there were laws outlawing certain terminations of pregnancy. . . . Soon after statehood and the adoption of the Oklahoma Constitution these laws persisted and were recodified several times. For many years these laws have been codified in Sections 861 and 862 of title 21 of the Oklahoma Statutes. Section 862 has since been repealed but § 861 still exists . . . . Section 861 provides:
>
> > Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life* shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years. (emphasis added).
>
> This law has changed very little since the days of the Oklahoma Territory. In 1973, the Court of Criminal Appeals of Oklahoma declared that because of the decision in *Roe* both sections are "unconstitutional as being violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution." . . . However, enforcement of § 861 was revived by law when *Dobbs* overruled *Roe* and *Casey*.
>
> In its finding that the various state laws did not support a history or tradition of a national right to an abortion, *Dobbs* focused on the criminal element of

There is some value in such state court responses. They involve more than the state court electing to read the state constitution differently from how the Supreme Court reads the federal Constitution. Instead, they are criticisms of the way in which the Supreme

---

> such statutes. However, that is only half the story in Oklahoma. As much as § 861 had always outlawed abortion it also always acknowledged a limited exception. The law in Oklahoma has long recognized a woman's right to obtain an abortion in order to preserve her life. . . . Our history and tradition have therefore recognized a right to an abortion when it was necessary to preserve the life of the pregnant woman.

Id. at 1129–30.

Given this history and tradition within Oklahoma, the court concluded that the state constitution "creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life," that is, "if . . . the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy." *Id.* at 1130. State laws impairing the right were, the court noted, subject to strict scrutiny. *See id.* The court also noted that it was "mak[ing] no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy, i.e., one made outside of preserving the life of the pregnant woman as we have defined herein." *Id*.

In a subsequent decision, the next year, the Oklahoma Supreme Court tied its finding of a state constitutional right to a more targeted criticism of *Dobbs.* The court wrote:

> *OCRJ I* was this Court's first opinion concerning abortion rights following the United States Supreme Court's holding that there was no longer a right to terminate a pregnancy under the federal Due Process Clause. . . . *Dobbs* held that, in order for a fundamental right to be recognized as a component of the liberty protected in the Due Process Clause, such right must be deeply rooted in our Nation's history and tradition. The Court determined that was not the case when considering abortion had been outlawed in every single state prior to *Roe v. Wade*.. . . . We determined that if this Court were to adopt the *Dobbs* analysis we would have to find a limited right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. Since the days of the Oklahoma Territory and until *Roe,* Oklahoma outlawed abortion; however, such criminal statutes also provided a limited exception to allow an abortion if it was "necessary to preserve her life." We found that *Dobbs* did not account for such exceptions and our history and tradition had long recognized such right. . . . Therefore, we held that the Oklahoma Constitution protects a limited right to an abortion, i.e., one that creates an inherent right of the mother to terminate a pregnancy when necessary to preserve her life.

Oklahoma Call for Reprod. Just. v. Drummond, 543 P.3d 110, 115, (Okla. 2024) (reh'g denied).

Court itself has made use of state law in federal constitutional interpretation.[117] Given that state courts are authoritative on the meaning of state law, the criticisms represent more than disagreement but a correction to what the Supreme Court has said and done.

At the same time, there are at least four potential limits to the significance of the state court responses. First, as responses, they appear after the Supreme Court has already decided the case. That timing likely reduces their impact. When the Court has already decided an issue—after briefing, oral argument, internal deliberations, and the writing of the opinion—it is surely disinclined to recognize error. Even if error is demonstrated by state court responses, the Court is also not likely, soon after a case is decided, to overturn the case or depart significantly from its holding. It is not, for instance, likely at all that a chorus of criticism from state courts will lead the Court to depart from *Dobbs's* holding that there is no federal right to abortion or from the individual rights reading of the Second Amendment in *Heller* and *Bruen*. Second, if only a few state courts offer a correction, the Court has no obvious reason to think it has erred. Instead, the Court might well understand those state courts to represent a minority view (and consider silence from the other state courts as tacit approval of what the Court has done) or to involve practices of particular states that are not representative of the nation as a whole. Third, in order for state court responses to land a punch, they likely must share some significant commonalities. Even if many states air disagreement with the Court, but they all have a different complaint, the multitude of voices is likely to

117. We should distinguish also what might be described as state courts trolling the Supreme Court. *See, e.g.*, LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, WL 656591, at *3 (Ala. Feb. 16, 2024) (in holding that state Wrongful Death Act applies to destruction of frozen embryos, flagging "serious constitutional questions" that would arise if statutory definition of "child" or "person" excluded "extrauterine children" and thus fails to protect "a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment" because the Equal Protection Clause "prohibits states from withholding legal protection from people based on immutable features of their birth or ancestry" and quoting statement in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023) that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

prevent the Court hearing any distinct message that might cause it to rethink its approach or conclusions. Absent some mechanism for coordination among them, there is a significant risk of state courts, if they do talk back, doing so in very different ways. Fourth, there might not be a reliable means to ensure the Court even becomes aware of state court responses. It is not likely that the justices keep tabs on what all fifty state supreme courts decide. State courts might air their criticisms in rulings that (for example, because they are based on independent and adequate state law grounds) the Court does not review or in which review is not sought by a party. State supreme courts have to apply and therefore naturally pay close attention to the decisions of the Supreme Court. Transmitting in the other direction has no comparable built-in mechanism.

CONCLUSION: A PROPOSAL

The symposium for which this essay is prepared aims not just to evaluate the Court's past uses of history and tradition but to look ahead and offer steps for improvement. Consistent with that goal, I end with a proposal. The essay has identified a need for a more fulsome account of the relevance of state law to federal constitutional meaning and it has flagged some of the challenges in drawing upon state law to establish and understand history and tradition. If state law *is* to play a central role in discerning the meaning of the federal Constitution, it is important to get state law right. Mass certification can help.

When a federal court (and in particular the Supreme Court or a court of appeals) confronts an unresolved question of state law, the court is able to certify that question to the highest court of the relevant state.[118] Certification has several benefits. Besides "gaining an

118. *See generally* Vikram David Amar & Jason Mazzone, *The Value of Certification of State Law Questions by the U.S. Supreme Court to the North Carolina Supreme Court in the Pending North Carolina Berger Case: Part One in a Series,* JUSTIA: VERDICT (May 9, 2022), https://verdict.justia.com/2022/05/09/the-value-of-certification-of-state-law-questions-by-the-u-s-supreme-court-to-the-north-carolina-supreme-court-in-the-pending-north-carolina-berger-case [https://perma.cc/X9ZP-2BDR].

authoritative response"[119] on a state law issue, certification may "save time, energy, and resources and [it] helps build a cooperative judicial federalism."[120] Certification is not salvation. Federal courts cannot force a state court to answer a certified question.[121] The availability of certification is a function of state (not federal) law. State law determines when and how state courts receive and respond to certified questions as well as the federal courts from which a state court may even field requests.[122] State courts have discretion as to whether to answer the certified question[123] (sometimes they just refuse to do so and without explanation),[124] and they control the form the answer takes.[125] In addition, state constitutions and other rules might impose justiciability and other constrains that preclude the

119. Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 77 (1997). In some instances, the Supreme Court has deemed it error for a lower federal court not to have certified an issue to the relevant state court. *See, e.g.*, McKesson v. Doe, 592 U.S. 1, 6 (2020) (per curiam) ("[W]e conclude that the Fifth Circuit should not have ventured into so uncertain an area of [state] tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court.). *See also* Carney v. Adams, 592 U.S. 53, 67 (2020) (Sotomayor, J., concurring) (recommending certification in case raising issue of severability of two state constitutional provisions concerning party affiliations of state judges because "federal courts are not ideally positioned to address such a sensitive issue of state constitutional law.").

120. Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974).

121. *See* Vikram David Amar, *Certification to State Court,* 17A FED. PRAC. & PROC. JURIS. § 4248 (3d ed. 2023).

122. *See, e.g.,* 22 NYCRR § 500.27(a) (authorizing the New York Court of Appeals to accept a certified question from the US Supreme Court, a federal circuit court of appeals, or the highest court of another state); OH S. CT. R. 9.01(A) (authorizing the Ohio Supreme Court to accept certified questions from any federal court).

123. *See, e.g.,* Ill. S. CT. R. 20(a) (providing that "[w]hen it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court," the court "may certify such questions of the laws of this State to this court for instructions concerning such questions of State law" and that "which certificate this court, by written opinion, may answer.").

124. *See, e.g.,* Roberts v. Unimin Corp., 2016 Ark. 226, 1 (2016) ("Motion to certify a question of law is denied.").

125. *See, e.g.,* SWN Prod. Co., LLC v. Kellam, 247 S.E.2d 216, 219 (W. Va. 2022) ("[W]e recognize our authority to reformulate questions certified to this Court.").

state court from responding or may shape the response it does give.[126] Every state except North Carolina provides, as a matter of state statutory law, a mechanism for federal court certification in at least some circumstances[127] (although the Missouri Supreme Court has taken the position that it cannot answer certified questions because doing so is akin to issuing an advisory opinion).[128]

Certification ordinarily involves directing a question about the meaning of a single state's laws to the highest court of that state. But there is no reason that a single question cannot be directed to the highest courts of multiple states or of every state. Such mass certification is a means by which a federal court, and particularly the Supreme Court, can obtain reliable information about the laws of states across the land.

The basic idea, then, is that in cases in which state laws are important to discerning the meaning of the federal Constitution, state courts would be asked to provide an authoritative statement about the laws of their own state. For example, had the Court made use of mass certification in *Bruen*, it might have asked all the state courts: "Is there a historical tradition in your state's laws of requiring individuals who wish to carry a firearm in public to show cause for doing so?" Rather than state courts weighing in after the issue

126. *See, e.g.,* Ball v. Wilshire Ins. Co., 184 P.3d 463, 466 (Okla. 2007) (where federal court had certified a question but there existed an outstanding issue of federal jurisdiction, such that "the certification puts us in the position of answering questions which may not be determinative of any issue in the cause," declining to answer the certified question, and invoking discretionary provision of state certification statute as means to "ensure that answers to certified questions do not result in merely advisory opinions.").

127. Amar & Mazzone, *supra* note 118.

128. *See* Grantham v. Missouri Dep't of Corr., No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc) ("Notwithstanding the statutory provision, this Court's general jurisdiction is both established and limited by the Missouri Constitution. . . . Those constitutional provisions do not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts.").

involving state law is decided, state courts would have the opportunity to provide their understandings of state law in advance.

As with any mechanism for identifying the nation's history and tradition, mass certification involves some complexities and challenges. Some state courts will choose not to respond. One reason is that a state court might see little reason to draw heat by weighing in on a contested issue (such as regulation of guns or abortion rights). Another might be that the state court lacks the resources to conduct the necessary research. State courts might answer the certified question but provide no supporting information for their answer. Or they might respond that state law is not clear and there exists evidence that cuts in different directions. State courts might reformulate the question before answering it. Mass certification might also be very slow and produce significant delays in the resolution of a case. The overall set of responses returned might provide no clear picture—leaving the certifying court with the task of making sense of difference and generating coherence.

That said, many of the complexities and challenges of mass certification are likely manageable. One sensible strategy would be for mass certification to be deployable only by the Supreme Court. State courts are likely to be more responsive to the Supreme Court than to lower federal courts. Limited to the Supreme Court, mass certification is likely to occur only occasionally and thus not to involve a significant (or regular) burden for the state courts. Given the control the Supreme Court exercises over its own docket, including its ability to limit review to particular issues, the Court is in a good position to frame a precise question to certify to the state courts. The state courts, in turn, will understand that their responses will be relevant to a ruling with national implications. It remains possible, of course, that some state courts will choose not to respond, and likely that some will respond more fully than others. Compared to the alternative—the Supreme Court itself rooting around in states' laws to find evidence of the nation's history and tradition—even incomplete or otherwise limited input from the state courts is a step forward.

COMMENTARY: SOME THOUGHTS AND QUESTIONS ABOUT FEDERALISM, AND GENERAL FUNDAMENTAL LAW, AS REGARDS HISTORY AND TRADITION IN CONSTITUTIONAL ADJUDICATION

VIKRAM DAVID AMAR*

The contributions to this Symposium by Professors Jud Campbell[1] and Jason Mazzone[2] offer valuable, if sometimes contrasting, insights that point out both the possibilities for and problems concerning the modern Supreme Court's consideration of history and tradition in constitutional adjudication. Professor Campbell's focus is on explaining how history and tradition—particularly ongoing, dynamic traditions—can (notwithstanding some surface tension) be harmonized with conventional approaches to originalism. Professor Mazzone analyzes whether the Court's professed fidelity to history and tradition can be reconciled not with originalism but instead with conventional notions of federalism and respect for state courts. Considered individually and taken together, the two essays advance our analysis of what history and tradition (within the meaning of constitutional doctrine) are (or should be), and how they can (or ought) be helpfully deployed. At the same time, both essays raise (explicitly or implicitly) many important questions that require much more consideration if the Court's use of history and tradition is to be coherent and principled. In the space below, I offer

* Distinguished Professor of Law, UC Davis School of Law; Visiting Professor of Law and former dean, University of Illinois at Urbana-Champaign College of Law.

1. Jud Campbell, *Tradition, Originalism and General Fundamental Law*, 47 HARV. J.L. & PUB. POL'Y 635 (2024).

2. Jason Mazzone, *History, Tradition and Federalism*, 47 HARV. J.L. & PUB. POL'Y, 659 (2024).

just a few reactions/questions that these thoughtful essays triggered as I read and reread them.

Let us turn first to Professor Mazzone's exploration of the ways in which the "Court's invocations of history and tradition for determining the meaning of the federal Constitution have an uneasy—and, so far, under-theorized—relationship to principles of federalism."[3] And let's begin with Professor Mazzone's (implicit) definition of the relevant history and tradition; for Professor Mazzone, the Court's commitment to history and tradition means, in practice, a commitment to respect the "laws and practices of individual *states*."[4] That is, as Professor Mazzone sees things, the Court must examine carefully what the *public policies* in individual states have been to discern some kind of national trend or consensus in these policies, at particularly relevant points in time, so as to help define and enforce national legal norms.

Professor Mazzone is surely correct that this emphasis on the laws and regulatory policies of states accurately describes what the Court seems to be doing these days. For example, in both *Dobbs*[5] and *Bruen*,[6] the Court spent a great deal of its energy discerning and analyzing precisely what various *state laws* forbade and permitted in previous centuries. And this focus on what has been legally forbidden (and what has not) seems to make intuitive sense when one is trying to determine whether particular conduct has historically been considered to be immune from state regulation or punishment. (Of course, that certain conduct has not been legally forbidden in a particular place at a particular time does not necessarily demonstrate belief in that jurisdiction that such conduct could not be subject to legal prohibition, but a widespread absence of regulatory prohibition might nonetheless be somewhat relevant to assessing whether there existed a consensus that certain conduct should be left to individual choice.)

---

3. Mazzone, *supra* note 2, at 659.
4. *Id*. at 660 (emphasis in original).
5. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
6. New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

But the Court, even in recent years, has not always been so careful to limit its focus on what is regulated and what is not, on the one hand, as distinguished from what people actually do, on the other. Take, for example, 2019's *Chiafalo v. Washington*,[7] where the question was whether a state that had appointed presidential electors could punish (or replace) those electors if they tried to cast their electoral college ballots for persons other than the candidates they were expected to support. Writing for the Court (in an opinion joined by, among others, Justices Alito, Gorsuch and Kavanaugh), Justice Kagan

> observed that for almost all of the nation's history, presidential electors themselves have overwhelming followed the wishes of the voters (or legislatures, in the early days before popular presidential elections) of the states. She appeared to infer from this that everyone agreed, as a legal matter, that the electors' job is to do nothing other than ratify and implement the wishes of the people who select them. Maybe electors generally have been quite deferential to the wishes of the selectors (although, as Justice Kagan conceded, there have been hundreds of instances—including in the election of 1796—of elector independence, or "faithlessness," a less flattering term.) But all that necessarily shows is that electors (and others) may have felt there is a moral or prudential duty for electors to defer—not that they could be legally compelled (under pain of penalty or replacement) to defer. Justice Kagan pointed out that many states have been requiring electors to take a pledge to follow the wishes of voters since about 1900, but—at a key but understated moment in her opinion—she observed that state laws seeking to impose punishment upon or replacement of electors who show independence go back only 60 years. That means for the first 170 of the Constitution's 230 years there was no tradition of legal compulsion for electors. Justice Kagan characterized the imposition of punishment as simply an extension of the tradition of requiring pledges (itself something not done for the Constitution's first century), but if the question is whether electors enjoy legal independence or not, then the

7. 140 S. Ct. 2316 (2020).

> relevant tradition ought to focus not on moral-suasion devices but on legal sanctions.[8]

Nor is *Chiafalo* the only prominent case in which the Court's focus on history and tradition has involved individual actions rather than public pronouncements. In one of the Court's earlier explicit invocations of history and tradition as a basis for determining constitutional meaning, the Justices (in both the plurality and concurring opinions) in *Moore v. City of East Cleveland*,[9] observed that "[a]ppropriate limits on substantive due process come not from arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values underlying our society."[10] But in applying this concept to the ordinance in question (which forbade extended-family living arrangements), the plurality did not parse state laws so much as survey American social practices:

> [t]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition. . . . [And] [o]urs is by no means a tradition limited to respect for the bonds uniting members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it.[11]

Justice Brennan (joined by Justice Marshall), concurring, also focused on social practices, rather than legal prohibitions, and pointed out that there is not one social tradition (in the nation or in its states), but rather different traditions among different ethnic

---

8. Vikram David Amar, *A Backward- and Forward-Looking Assessment of the Supreme Court's "Faithless Elector" Cases: Part One*, JUSTIA (July 14, 2020), https://verdict.justia.com/2020/07/14/a-backward-and-forward-looking-assessment-of-the-supreme-courts-faithless-elector-cases) [https://perma.cc/94LQ-LER2].

9. 431 U.S. 494 (1977).

10. *Id*. at 503 (plurality opinion) (internal quotations and citations omitted).

11. *Id*. at 504–05 (plurality opinion).

groups and different socio-economic classes: "In today's America," he wrote, "the 'nuclear family' is a pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. . . . The 'extended' [family] form is especially familiar among black families."[12] Lest he be misunderstood to be making an equal protection invidious-motive argument, Brennan added that the record was devoid of evidence of discriminatory purpose. Instead, he simply wanted to make clear that, when considering the relevant history and tradition, we should not ignore the private decisions that have been "central to a large proportion of our population."[13]

Professor Mazzone is certainly correct that discerning the relevant regulatory histories of each of the states is complicated business for which the U.S. Supreme Court may not be particularly institutionally well-equipped. But the competence question may be even greater than Professor Mazzone suggests; if we extend the relevant inquiry beyond law to social practices, not in each state but within "large proportions of our population," the required inquiry may become less judicially tractable still.

Justice Brennan's reference to "large proportions" of population raises another question: even if traditions and histories (legal or social) are to be discovered and tallied on a state-by-state basis, should all states count equally regardless of population size or instead should larger states count for more in determining whether an adequate national consensus exists? A similar question has arisen in deciding how to determine whether a state's criminal punishment regime is "unusual" within the meaning of the Eighth Amendment.[14] In that setting, in a dissenting opinion in *Atkins v. Virginia*,[15] a case involving the imposition of capital punishment upon developmentally disabled persons, Justice Scalia labels the

12. *Id*. at 508–09 (Brennan, J., joined by Marshall, J., concurring).

13. *Id*. at 510.

14. U.S. CONST. amend. VIII ("cruel and unusual punishments [shall not be] inflicted")

15. 536 U.S. 304 (2002).

population-adjustment notion "quite absurd," and then confidently proclaims that what matters is "a consensus of the sovereign States that form the Union, not a nose count of Americans for and against."[16] It is of course possible that the Eighth-Amendment inquiry might be distinguishable from other constitutional inquiries into history and tradition (as under the substantive due process rubric) because the words "cruel" and "unusual" were borrowed verbatim from the English Bill of Rights of 1689 and early revolutionary state constitutions. Neither of which incorporated a one-locality, one-vote, rule.[17] But given the analytic similarity of the inquiries, in the due process and other settings the question of whether each state stands on equal grounds is one that at least needs to be engaged directly.

Another important issue Professor Mazzone engages is, precisely, how to respectfully discern what the relevant state (regulatory) tradition in each state really is. I am not sure I fully accept Professor Mazzone's suggestion that searching for "federal meaning" by focusing on "state law" is necessarily "in tension with federalist principles supporting variation in and independence of state government design."[18] Notwithstanding the Court's use of the histories and traditions of state regulation in giving meaning to federal rights, states generally speaking do remain free to experiment in different modes of regulation and different structures of state governance, and to confer rights upon their citizens that go beyond a federal constitutional floor. For example, when the Court in *Atkins* looked to state laws and practices concerning capital punishment

16. *Id*. at 346 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Justice Stevens' majority opinion did not purport to attach more weight to the laws of larger states, but it did include in its assessment a federal statute explicitly exempting the mentally retarded from the federal death penalty. And that statute emerged—as do all federal statutes, of course—from a lawmaking process involving greater representation of populous states in both the House and the Presidency (via the electoral college).

17. *See generally* Akhil Reed Amar and Vikram David Amar, *Eight Amendment and Mathematics (Part One)*, FINDLAW (June 28, 2002), https://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-one.html [https://perma.cc/TF9Z-3EXU] (hereafter Amar & Amar).

18. Mazzone, *supra* note 2, at 661-62.

for developmentally disabled persons to determine whether a particular state is imposing "unusual" punishment within the meaning of the Eighth Amendment, I do not see any insult to state autonomy or independence, except insofar as once the Supreme Court announces a federal right based on a sufficient state-law consensus, complicated questions do arise about whether states are ever free to reverse course of if, instead, a one-way rights ratchet is created.

But it *would* be insulting to federalism for the federal courts to *mis*interpret state legal traditions and then use those misinterpretations to construct federal law which in turn will, by virtue of supremacy principles, bind all states. And, as Professor Mazzone points out, when insufficient attention is paid to the nuanced regulatory approaches of different states—each of which, of course, is responding to particular social and demographic conditions that may or may not, were they different, lead to different regulatory schemes—the Court runs the risk of "exaggerating similarities among the states and discounting their differences."[19] At the very least, a careful Supreme Court should aggregate state policies only with full recognition of the policy rationales in each state, and sensitive to the fact that policies that are facially similar in many states may represent only some lesser-included degree of similarity once relevant differences in the actual social problems confronting each of the states are taken into account. In other words, State A may permit Practice X at a given point in time, but only because Condition Y or Demographic Z are present at that moment; were Y or Z to be absent (as they may be in other parts of the country) then A's regulatory decision (and thus its contribution to the history and tradition inquiry) would be different. Such a "greatest common factor" approach to aggregation of state laws for determining the relevant national history and tradition is surely quite complicated,[20] and whether the Court is up to the task is an open question.

---

19. *Id*. at 661.

20. In some instances, the analysis is less complicated than in others. For example, in *Atkins*, surely abolitionist states (those that prohibit all capital punishment) should count if we are tallying states that prohibit capital punishment against developmentally disabled persons. *See* Amar & Amar, *supra* note 17.

This is especially true given that, as the Supreme Court itself acknowledged in *Michigan v. Long*,[21] it is not particularly good about parsing nuanced meanings of state law with which the Justices are "generally unfamiliar."[22] Professor Mazzone offers the creative suggestion of "mass certification"—that is, certification to the state supreme courts, as a group, to ask them to give information to the Court about what the regulatory histories/traditions have been in each of the states on a given question.[23] Certification to state courts may very well be an important step in the right (that is, federalism-respectful) direction, but it may not solve all the big problems. For starters, the success of the certification device in general depends upon the precision and sophistication of the questions that are certified. As noted above, to get a true (legitimate) sense of what a state's actual, relevant legal/historical tradition has been, one needs to take adequate account of all the state-specific factors that explain its regulatory outcome at a particular moment in time. Anticipating and building into the certified questions all of these possible causative components is no mean feat.

Second, the general experience with certification to state courts has shown that sometimes state courts are reluctant to fully cooperate. To the extent that state law at the current moment may not be entirely clear to the casual outside observer (like the U.S. Supreme Court), that opacity may not be accidental, but rather a purposeful decision by the State Supreme Court. If a State high court has been, for political or prudential reasons, reluctant to take on a particular thorny legal question on its own, a request by a federal court to do so may not change its mind too much.

Of course, the precise question posed by the Mazzone-certification device may be different from, and less politically explosive than, the questions posed in the conventional certification setting, because Professor Mazzone wants state courts to weigh in on not necessarily what state law is today with respect to a given question

21. 463 U.S. 1032 (1983).

22. *Id*. at 1039. ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . .")

23. Mazzone, *supra* note 2, at 694.

question but instead what state law *was* (and why) at some prior point in time. The question is, at some level, less about declaring the law as it is about recounting the history. In some instances there may not be much of a difference (if the law hasn't evolved in a state from the point in time the U.S. Supreme Court finds paramount), in which case state supreme courts may be less willing to answer, but to the extent that the state courts can insulate themselves from political backlash by saying they are merely acting as historians of state legal traditions, perhaps they will play ball.

But that raises another big problem. Just as the U.S. Supreme Court Justices are not legal historians, neither are state Supreme Court Justices, even as to the histories in their states. As Professor Mazzone discusses,[24] the Court in *Bruen* acknowledged the institutional limitations of a professionalized federal judiciary, and indicated that the parties would need to fill the expertise void by providing reliable, nuanced accounts of history.[25] This problem plagues the state courts as well, and would seem to do so all the more in the mass-certification setting, where each of the state courts doesn't even have a state litigation (with state-law lawyers) in front of it. In the normal certification case, the parties in the federal proceeding make submissions to the State Supreme Court to which the state-law question(s) have been certified,[26] but can one imagine a party making credible submissions to the state courts of all the 50 states?

---

24. Mazzone, *supra* note 2, at 661 n.11.

25. *See* New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That 'legal inquiry is a refined subset' of a broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties. . . . For example, '[i]n our adversarial system of adjudication, we follow the principle of party presentation.' . . . Courts are thus entitled to decide a case based on the historical record compiled by the parties.") (internal citations omitted).

26. *See, e.g.*, Perry v. Brown, 52 Cal. 4th 1116 (2011) (California Supreme Court accepting request to answer certified questions relating to legal standing of initiative proponents to defend enacted measure, and establishing an expedited briefing schedule for the parties to weigh in)

The *Bruen* Court's reliance on party submissions is problematic for another reason as well. Just as the U.S. Supreme Court has become a group of very able generalists, so too the Supreme Court bar has become more and more chock full of lawyers who are appellate specialists but not deeply knowledgeable in any particular fields of federal law or deeply grounded in state traditions and histories.[27] This vacuum in expertise, both among the bench and the bar, might usefully be filled by principled academic amicus curiae, but the academy needs to do some soul-searching of its own if it is to provide this salutary function.[28]

Putting aside how one discovers the authentic state legal histories/traditions, there is the (large) question of what use this information can legitimately be put to. In this regard I might read the Court's recent pronouncements about the importance of history and tradition a bit more narrowly than does Professor Mazzone. He suggests that the Court's modern approach might be understood to embrace the notion that "the federal Constitution protects only rights *already* protected in the states and that it therefore serves, at most, as a clean-up charter to deal with occasional outliers."[29] I think that *some* rights the federal constitution undeniably protects (and that the modern Court fully embraces) do not involve matters in which only a few outlier states are dissenting. For example, at the time of the Nineteenth Amendment,[30] fewer than 20 (of the 48) states permitted female suffrage on the broad terms called for in the Amendment.[31] Similarly, in the early 1970s, after Congress lowered the voting age for Congressional elections to 18,

---

27. *See generally* Vikram David Amar, *The Edward L. Barrett Jr. Lecture: The Constitution as Client*, U.C. DAVIS. L. REV. 643 (2024). Given that the Supreme Court decides so few cases today (relative to a generation or two ago), much of the judicial processing of history that will need to occur will likely have to be handled by lower courts, who may, given their challenging caseloads, limited resources, and reduced amici input, be even less able to discharge the function adequately.

28. *Id*.

29. Mazzone, *supra* note 2, at 662.

30. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.")

31. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: A CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 186, 206, 214 (2000).

about 17 states refused to lower the voting age for state elections, notwithstanding the logistical difficulties states would encounter in maintaining separate voter-eligibility rolls for state and congressional elections.[32] And this was the backdrop against which the 26th Amendment,[33] forbidding age discrimination in all voting for persons 18 or over, was adopted in 1971.

So history and tradition isn't the only path by which a right can be recognized. But what makes these examples different from *Dobbs*, of course, is the explicit enactment of constitutional text that speaks to the legal question at issue. When the Court has actual words of the Constitution to interpret, the historical understanding of *those terms* is of course key to an originalist (and this is how I believe the Court invoked history in *Bruen*, to discern the understanding of what the "right to keep and bear arms" necessarily involves, rather than whether some *non-textual* right to keep and bear arms exists), but the role that history and tradition play in the identification of a constitutional right is different where specific text is involved than in, say, the substantive due process or Ninth Amendment (or perhaps the privileges and immunities) contexts. Where subject-matter-specific enacted constitutional text is involved, states that may not be "outliers" (after all, 12 out of 50 states can reject a constitutional amendment that becomes part of the Constitution, and it is hard to say 24% of states—or half of a majority—are truly outlier in the way, say, that Connecticut seemed to be in *Griswold v. Connecticut*) may nevertheless be constrained from doing what they want. Thus, as important as broad history-and-tradition analysis may be in constitutional adjudication, no one could credibly argue it is the only means by which rights are discerned.

This last observation, about the appropriate but limited role that history and tradition (even when properly and reliably discerned) can legitimately play in constitution interpretation, brings me to some of the thought-provoking suggestions in Professor

32. THOMAS H. NEALE, *Lowering the Voting Age Was Not a New Idea*, *in* AMENDMENT XXVI: LOWERING THE VOTING AGE 35, 35 (Sylvia Engdahl ed., 2010).

33. U.S. CONST. amend. XXVI (prohibiting denial or abridgement of right to vote on account of age).

Campbell's essay. Professor Campbell (unlike Professor Mazzone) *decouples* history from tradition insofar as he considers the latter to be an ongoing, dynamic concept not fixed into meaning at any particular time (the way contemporaneous public understandings of enacted text might be fixed at the time of enactment). The (or at least a) fundamental question he engages is how, if tradition is ongoing and thus can post-date any particular enactment, can tradition be consistent with originalist precepts?[34] His biggest answer—if the enactors of particular text understood and expected that "general fundamental law" is not fixed in time and must be respected as it continues to evolve in its substantive contours[35]—is, to me, quite convincing. If the normative appeal of originalism is grounded on the understandings of the people who publicly adopted text and made it law, then open-ended provisions whose content was understood and expected to change over time poses no fundamental tension with originalism's starting points. Take, again, the Eighth Amendment—even the most committed originalists would, I think, concede that the use of the word "unusual" in the text of the document meant to condemn not only practices that were unusual in 1791 but also practices that become unusual as legal traditions evolve. So to the extent that Professor Campell invokes "general fundamental law" to protect liberties not specifically mentioned elsewhere in the text of the document, and liberties that can expand over time, his approach fits comfortably, I think, with suggestions of earlier scholars, such as my brother Akhil Reed Amar,[36] who argue that privileges and immunities of national citizenship (or rights protected under the Ninth Amendment) can be understood to include emerging consensuses.[37]

---

34. Campbell, *supra* note 1, at 635.

35. *Id*. at 638.

36. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

37. To the extent Professor Campbell argues that, even in the absence of any text (such as the Ninth Amendment) reflecting the founders' expectations as to general fundamental law, such general fundamental law would still need to be respected, I think the matter is more complicated, and would need a much longer back-and-forth with him to engage that question.

But Professor Campbell's provocative exploration of general fundamental law here (and elsewhere) does raise important questions about exactly where the general-fundamental-law concept could lead.

One is whether such evolving traditions about rights can cut both ways, or whether they operate as a one-way ratchet. For example, if states began to reconsider whether contraception ought to be protected, such that a consensus emerged (but was not adopted into constitutional text) would the result in *Griswold*[38] be in jeopardy? (Similar questions sometimes arise in the Eighth Amendment setting—if a once-unusual punishment becomes more fashionable, can an Eighth Amendment right against its use subside?)[39] To be sure, the Court's recognition of the right in *Griswold* may discourage states from experimenting in this arena (insofar as state enactments prohibiting contraception would not be enforceable as long as *Griswold* remains good law), but notice that plenty of states adopted laws that ran afoul of *Roe*[40] and *Casey*[41] long before those precedents seemed precarious at the Court.

A related question concerns incorporation of the Bill of Rights (or various of its provisions). If federal constitutional rights understood to exist in 1868 no longer satisfy the definition of general fundamental law because of evolving traditions, do they cease to be worthy of protection? Or instead does the enactment of the Fourteenth Amendment, and the expectations of the enactors that certain practices did, at that time, by virtue of their inclusion in the Bill of Rights, constitute privileges and immunities of national citizenship, insulate these liberties from backslide.

Finally (and this question attempts to bring together Professor Campbell's essay with that of Professor Mazzone), what, if anything, does general fundamental law say about the notion that state

38. Griswold v. Connecticut, 381 U.S. 479 (1965).

39. *See* Akhil Reed Amar and Vikram David Amar, *Eighth Amendment Mathematics (Part Two),* FINDLAW (July 12, 2002), https://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-two.html [https://perma.cc/R2N4-WVMH].

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

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

courts are the master interpreters of state law, a principle that Professor Mazzone suggests is bedrock to American federalism? If a tradition evolves to ripen into becoming part of the general fundamental law, can state courts nonetheless reject that tradition in the context of interpreting their own state's enactments? In this regard, I was struck by a passage in the brief of Donald Trump in the *Trump v. Anderson*[42] litigation, in which Trump's lawyers argued:

> There is nothing wrong with a ruling from this [the U.S. Supreme] Court that rejects the Colorado Supreme Court's interpretation of state election law on state-law grounds. There is no federal statute or constitutional provision that bans this Court from reviewing state-law questions . . . or that prohibits this Court from rejecting a state supreme court's construction of state law. This Court has been understandably deferential to state-court interpretations of state law, but that deference has never been absolute, especially when a state-law issue is intertwined with a federal constitutional question. . . . The law of Colorado is what its statutes say, and opinions from the judiciary that interpret those statutes need not be followed if they flout the enacted language and disrupt federal interests of enormous importance.[43]

Is state-court interpretation of state positive enactments beyond the reach of general fundamental law, or does the concept of general fundamental law call for revisiting seminal cases such as *Erie*[44] and *Murdock v. Memphis*?[45]

42. 144 S. Ct. 662 (2024).
43. Brief for Pet'r at 49-50, Trump v. Anderson, 144 S. Ct. 662 (2024) (No. 23-719).
44. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
45. 87 U.S. 590 (1874).

HISTORY, TRADITION, AND NATURAL RIGHTS

BRADLEY REBEIRO*

INTRODUCTION

After its announcement in *Bruen*,[1] the Supreme Court's new text, history, and tradition test (THT) has sent shockwaves across legal academia. Not necessarily because it is something entirely new,[2] but rather due to the misplaced conception among many that the Court would simply adopt originalism as the Court's preferred method of jurisprudence moving forward.[3] When determining rights, THT looks to evidence of rights "deeply rooted in the nation's tradition"[4] or "implicit in the concept of ordered liberty."[5] Such evidence consists of practices across the nation both before and after the Fourteenth Amendment's ratification. Originalism's latest—and most accepted—form is original public meaning originalism (OPM), which posits that judges should interpret the

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. The author would like to thank participants of the "The Future of History and Tradition" symposium for helpful comments and feedback on this essay. The author also gives special thanks to the organizers of the symposium, including Kurt Lash, Jason Mazzone, and Hayley Isenberg, for inviting the author to participate in such a timely and thought-provoking event. And the author expresses his gratitude to the editors of the *Harvard Journal of Law & Public Policy* for their meticulous attention to this essay. All mistakes are the author's own.

1. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).

2. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

3. See, e.g., Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CENTER FOR JUSTICE (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court [https://perma.cc/8H98-S9ZY].

4. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

5. *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

Constitution according to the public's understanding at the time of ratification. This all but precludes post-ratification understandings.[6] With a decidedly conservative majority, now (if ever) seemed to be the time for the Court to etch OPM in jurisprudential stone. Critics have argued that THT as a mode of analysis is even more arbitrary than OPM and provides a mechanism for an activist court to frustrate the democratic process and replace it with the conservative majority's own policy preferences.[7] Even originalists have criticized the Court's latest cases as not adhering to originalism.[8] Whatever THT calls for, one can reasonably conclude that, at least on its face, it has some tensions with OPM. THT may rely on sources that overlap with OPM, but it does not rely exclusively on those sources. Rather, it potentially expands the field of inquiry to include post-ratification practices as a source of meaning.

Though THT—especially as applied in *Bruen*—presents several issues, the *idea* or principle of relying on history and tradition is not entirely meritless. For instance, *Bruen* has drawn criticism for its unworkability, with lower courts arriving at either inconsistent or otherwise surprising results in applying the form of THT adopted in *Bruen*. But that does not mean that the test is without quality or irredeemable. Over time, the Court will have opportunities to refine the test and clarify its contours for more reliable application in the lower courts.[9] And some originalists have already provided a roadmap for what aspects are compatible with OPM and ways in which judges may use THT in the future that are more faithful to the basic tenets of originalism—that the Constitution's meaning is

---

6. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 534–35 (2013); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

7. *See, e.g.*, Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006). Of course, for some, such as Eric Segall, the new test is just more of the same and further proof that the Court is not in fact a court at all. *See* ERIC SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012); Eric Segall, *Foreword II: To Reform the Court, We Have to Recognize It Isn't One*, 2023 WIS. L. REV. 461.

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

9. *See, e.g.*, United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023).

fixed at the time of ratification, and that meaning constrains our understanding of the Constitution today.[10]

Yet THT need not simply be molded into OPM. Because the nature of the Court's "new" test remains malleable in its nascent stage, we can still investigate its many possibilities. Scholars have plumbed THT's relation to originalism[11] and are sure to continue to do so. But the philosophical possibilities of THT remain underdeveloped. Perhaps this is because many originalist scholars maintain that judges engaging in philosophical inquiries is inimical to the originalist enterprise.[12] Originalists may provide philosophical justifications for OPM and its use to resolve constitutional disputes,[13] but they hesitate to mix philosophical inquiries *into* the constitutional interpretive framework. After all, judges philosophizing from the bench is the great bogeyman that OPM sought to banish into the depths of legal obscurity. Judges could not be trusted to adhere to philosophical truths in decision-making either because none existed [14] or the nature of the inquiry was simply too

10. Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023).

11. Barnett & Solum, *supra* note 10; Girgis, *supra* note 8.

12. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1997).

13. *See, e.g.*, LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 1–4 (2019) (originalism satisfies the demands of the natural law); Kurt T. Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007) (popular sovereignty as the basis for adhering to originalism).

14. Justice Oliver Wendell Holmes, for one, was famous for his skepticism of natural law theory:

> The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be

subjective—there were no limiting principles available to constrain judges to their Article III roles and keep them from enacting their own policy preferences.[15] So OPM provided the solution: an objective, measurable way to resolve constitutional disputes. If we stuck to the history of the Founding and the meaning fixed at the time of ratification, then judges would be able to ascertain a range of independently verifiable, plausible meanings.[16] The public could then acknowledge that meaning and assent to the Court's decision as fair and legitimate. Judges would declare only what the law is, not what they think it should be. THT, originalists would hope, could be molded to achieve these same ends.

Those ends can be achieved with a philosophical approach to THT. It presents a unique opportunity to reconcile philosophical inquiries with the originalist project. Despite the perceived deficiencies, THT as it is currently framed has the tools to guide the Court in limited, principled philosophical inquiries for adjudicating constitutional rights. In investigating this nation's history and tradition, ascertaining rights that are "deeply rooted in the nation's tradition" or "fundamental in the concept of ordered liberty," this Court ought to consider the underpinning philosophical framework that gives life to the constitutional rights the Court seeks to protect: natural rights. The Court cannot take seriously the nation's history and traditions without consulting the natural rights tradition within which the Founding and, importantly, Reconstruction took place.[17] Natural rights philosophy is a fundamental part of our

---

> subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law.

Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

15. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws.").

16. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4 (2015); Caleb E. Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (explaining the difference in precedential weight between plausible meanings and implausible ones).

17. The scope of this essay precludes an extensive account of natural rights' role in the Founding and Reconstruction. For sources discussing those topics, see MICHAEL P.

history; it is our tradition. The Court can acknowledge this and carefully weave the natural rights tradition into its constitutional rights jurisprudence. This will at once give deeper meaning and guidance to THT, as well as bring the Court's jurisprudence in line with our nation's rich history. And it can have the residual effect of showing originalists the possibility of principled philosophical inquiry as it can avoid some of the dangers originalists identify in the history and tradition analysis. If later, post-ratification practices are to matter, reconciling them with the natural rights tradition creates a natural bridge between the past and present.

This essay argues that the Court's turn to history and tradition provides an opportunity to incorporate natural rights theory into constitutional jurisprudence. The Court should seize that opportunity. THT, at least as it is currently articulated, not only enables the Court to acknowledge and incorporate more natural rights reasoning into its decisions, but may actually *require* such readings. THT at once gives history pride of place in determining meaning and leaves open the possibility that something other than history may determine outcomes. Because of this, THT ought to be attractive to originalists, though it lacks a rule of decision for mooring its outcomes to historical meaning. Natural rights reasoning can provide that rule of decision. To that end, this essay is not a defense of THT. Nor does this essay provide a defense of OPM or originalism more broadly, though the main audience is originalists, presuming they are the most sympathetic to THT. But it will illuminate how originalists who see promise in THT should equally see promise in infusing natural rights reasoning into the Court's jurisprudence.

I. THE HISTORY AND TRADITION TEST

THT is not new, though its status as the Court's preferred interpretive method for constitutional rights is. Citing *Washington v.*

ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM (1998); THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (2017); Bradley Rebeiro, Natural Rights (Re)Construction: Frederick Douglass and Constitutional Abolitionism (Ph.D. dissertation, University of Notre Dame) (on file with author; available upon request).

Glucksberg,[18] Justice Alito stated that unenumerated rights must be "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[19] And *Bruen* made clear that the same test—whatever it might require—determines the scope of enumerated rights.[20] Because we are under the new history and tradition regime, there is still much to learn as far as its scope and operation. Nevertheless, there are some indications of its workings from *Bruen* and *Dobbs*.[21] And lower courts, at least in the context of the Second Amendment, have made several attempts at applying it to new cases and controversies.

Much of THT in action has played out in Second Amendment jurisprudence in the wake of *Heller* and *McDonald*. The individual right to keep and bear firearms for self-defense is absolute—the government may not regulate that right in any way. The Court uses a textual approach to understanding the Second Amendment's guarantees and confirms that understanding through historical evidence.[22] The Court looked to 17th and 18th century articulations of the right to bear arms and the practices surrounding it. Not stopping there, the Court continued to look into post-ratification history: from 19th century commentary and judicial opinions on the right to bear arms to post-Civil War commentary.[23] All of this, Justice Thomas argued, was "a critical tool of constitutional interpretation."[24] Having discerned the meaning of the right to bear arms as the right to hold commonly held weapons,[25] the Court moved on to determine the *scope* of the right, as the Second Amendment right was not without its limitations.[26] Yet whatever fell within the scope

18. 521 U.S. 702 (1991).

19. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 271 (1997)).

20. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17 (2022).

21. History and tradition has also upended First Amendment jurisprudence. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022). But this essay will focus on the outcomes and aftermath of *Bruen* and *Dobbs*.

22. *See Bruen*, 597 U.S. at 17–21.

23. *Id.* at 21.

24. *Id.* at 20 (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008)).

25. *Id.* at 70.

26. *Id.* at 21.

of the right necessarily fell *outside* the powers of government's ability to regulate it.

In determining the scope of the Second Amendment right to bear arms, Justice Thomas pronounced that, when regulations affect the right to bear arms, "the government may not simply posit that the regulation promotes an important interest."[27] Instead, the government must provide evidence that the regulation in question "is consistent with this Nation's historical tradition of firearm regulation."[28] Put simply, the Court relies on historical analogues to determine the scope of the right. Thomas warned that this does not present either a "regulatory straightjacket" where governments must carbon copy past legislation nor a "regulatory blank check" where governments may find any historical practice as sufficient for justifying modern laws.[29] To do this, the government must "identify a well-established and representative historical *analogue*," which, Thomas stated, is not necessarily a "historical *twin*."[30]

Justice Thomas provides a useful example of how a historical "analogue" might work. He referred to the "sensitive places" doctrine: the idea that governments may regulate firearms in special areas, such as schools and government buildings.[31] Based on the evidence in the record, Justice Thomas concluded that such regulations were permissible, possibly to the point of a complete ban.[32] However, New York's attempt to treat those laws as a sufficient historical analogue to its own law, which had a "proper-cause" requirement for obtaining firearms, failed because New York's interpretation of "sensitive places" broadened the doctrine well beyond its original understanding.[33] As it turns out, "sensitive places" loses its meaning if it is applied to every place law enforcement is available.[34]

---

27. *Id.* at 17.
28. *Id.*
29. *Id.* at 30.
30. *Id.*
31. *Id.*
32. *Id.*
33. *See id.* at 30–31.
34. *Id.*

Though Justice Thomas's "historical analogue" approach is intelligible in theory, it has proven mischievous in practice. In its short life, *Bruen* has confused jurists in its application[35] or otherwise led to widely criticized results.[36] The confusion largely stems not from the interpretation of the right and its scope, but rather the application of that scope to modern contexts. Take, for instance, the principle that the Second Amendment protects the right to own weapons in "common use."[37] It is no easy task to determine, for instance, whether early firearm ammunition capacities are similar to modern-day large-capacity magazines or whether, alternatively, it is simply a matter of what was in "common use" then and now.[38] Originalists might say this, in some ways, highlights a problem of construction, not necessarily constitutional interpretation.[39] Nevertheless, it highlights the latent ambiguity inherent in deriving constitutional principles from historical practices and traditions and then applying them to modern contexts. At times it might cause a judge to rely on her own scruples in determining how she will approach the question, leading to disparate results across courts. Other times judges might in good faith adhere to the test but reach rather surprising results.

Rahimi was such a case, where the Fifth Circuit reviewed a federal law banning individuals subject to a domestic violence restraining order from possessing firearms.[40] Under the new *Bruen* test, the

35. *See* Jacob Charles, *Time and Tradition in Second Amendment Law*, 51 FORDHAM URB. L.J. 259, 276 (2023).

36. *See, e.g.*, United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023); Rahimi*: The Case That Might Turn the Court Even More Extreme on Guns*, THE NEW REPUBLIC (Oct. 4, 2023), https://newrepublic.com/article/175788/rahimi-supreme-court-extreme-guns [https://perma.cc/TH97-SBZN]; Will Baude, *It's Not So Hard to Write an Opinion Following* Bruen *and Reversing in* Rahimi, VOLOKH CONSPIRACY (Nov. 22, 2023, 4:17 PM), https://reason.com/volokh/2023/11/22/its-not-so-hard-to-write-an-opinion-following-bruen-and-reversing-in-rahimi/ [https://perma.cc/DL6D-3BER]

37. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

38. *See* Or. Firearms Fed'n v. Kotek Or. All. for Gun Safety, No. 2:22-cv-01815-IM, 2023 WL 4541027, at *26–27 (D. Or. July 14, 2023).

39. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010); Solum, *supra* note 6, at 468; Barnett & Solum, *supra* note 10.

40. *Rahimi*, 61 F.4th at 448.

Fifth Circuit reasoned the government could not prohibit Rahimi from possessing a firearm inasmuch as he "was not a convicted felon or otherwise subject to another 'longstanding prohibition[] on the possession of firearms' that would have excluded him."[41] As noted, this decision has not been received warmly—mostly in progressive legal circles, but among some legal conservatives as well.[42]

Indeed, at the time of finalizing this essay, the Supreme Court reversed the Fifth Circuit, holding that a court may—consistent with the Second Amendment—issue a restraining order banning an individual from possessing a firearm where the individual poses "a credible threat to the physical safety of an intimate partner."[43] Such measures fit "comfortably" within the tradition of preventing individuals who pose threats from misusing firearms.[44] But the Court's decision raises as many questions as it answers. Critics of the Fifth Circuit's decision fairly sparked some concerns about how lower courts would handle *Bruen*'s methodology, but the Court's opinion raises some eyebrows as well. Justice Roberts, writing for the majority, noted that the Fifth Circuit erred in searching for a "historical twin" as opposed to a "historical analogue."[45] Roberts pointed to the tradition of surety laws and affray laws to defend the statute at issue in *Rahimi*.[46]

Even though Roberts stated that it was a faithful execution of the *Bruen* test, the opinion alone did not cure *Bruen*'s potential opacity. Kavanaugh, for instance, dedicated an entire concurrence to the question of constitutional interpretation, particularly how text, history, and precedent should be implemented.[47] Notably, Kavanaugh did not clarify one of the more troubling aspects of *Bruen*'s test: Exactly how much weight should a judge give to post-ratification

41. *Id.* at 452.
42. *See supra* note 36.
43. *United States v. Rahimi*, No. 22-915, slip op. (U.S. June 21, 2024).
44. *Id.*
45. *Id.* at 16.
46. *Id.* at 10–16.
47. *See id.* at 1 (Kavanaugh, J., concurring).

interpretations and applications of constitutional text?[48] Finally, perhaps most confounding of all, the very author of *Bruen*—Justice Thomas—*dissented* from the Court's opinion.[49] Thomas argued that, though surety laws addressed the problem of potential violence, they were significantly less burdensome to the point where they were not a proper historical analogue.[50] That alone does not suggest that *Bruen* is unworkably inconsistent or opaque, but it does suggest that discovering the exact workings of *Bruen* will (if anything) take more time.

As for unenumerated rights, the test likely functions identically, though we do not have as much percolation in the courts to know. In *Dobbs*, Justice Alito confirmed Justice Thomas's THT approach to constitutional interpretation, but now in the context of unenumerated rights.[51] Under the substantive due process canon, petitioners wishing to assert a fundamental, unenumerated right must demonstrate that the right is deeply rooted in the nation's history and tradition, and show that the right is essential to the nation's "scheme of ordered liberty."[52] And, not unlike in *Bruen*, evidence of not only the Magna Carta, common law tradition, and other pre-ratification sources, but also evidence of post-ratification sources is relevant.[53] It remains unclear to what extent post-ratification traditions or practices matter but, in *Dobbs*, evidence of practices until 1973—when *Roe v. Wade*[54] was decided—was relevant.[55] Also similar to *Bruen* is Justice Alito's extensive citation to practices—mostly in the form of statutes and regulations—as indicative of meaning.[56] That said, a potential difference with *Bruen* and *Dobbs* is that in *Bruen*,

48. *See id.* at 11, n.4 (Kavanaugh, J., concurring). Indeed, Justice Barrett picked up on this conundrum in her own concurrence, as well as the concern of what level of generality judges use in assessing historical evidence. *See id.* at 3 (Barrett, J., concurring).

49. *See id.* at 1 (Thomas, J., dissenting).

50. *Id.* at 18–21 (Thomas, J., dissenting).

51. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022).

52. *Id.* at 237.

53. *See id.* at 238–50.

54. 410 U.S. 113 (1973).

55. *Dobbs*, 597 U.S. at 238–50, 261.

56. *See id.* at 238–50.

the lack of historical analogues suggested that the scope of the constitutional right included the conduct in dispute while in *Dobbs*, the lack of legislation protecting abortion was indicative that the Constitution did not protect the conduct in question.[57]

What we are left with, then, is a test that ascertains constitutional meaning through historical evidence of mostly pre-ratification practices—legislation that pertains to the right in question—and, to some extent, post-ratification practices. Though the exact balance between the two remains unclear, as will be discussed, what seems clear is a reliance on originalist evidence compatible with OPM and other evidence potentially outside the scope of OPM. Originalists may balk at the use of later, post-ratification evidence as arbitrary in nature. But the Court's decisions may be more internally coherent and defensible if, in focusing on this nation's history and tradition, it gives heed to our deepest tradition—the natural rights tradition—in consideration of both pre- and post-ratification evidence.

II. THE OSTENSIBLE GORDIAN KNOT—HISTORY AND TRADITION AS A POTENTIAL BRIDGE BETWEEN NATURAL RIGHTS THEORY AND ORIGINALISM

So what, then, is the relationship between THT and OPM? And where do natural rights fit in? The scholarly response to THT and its relation to OPM is somewhat mixed. Some explain that THT has several originalist elements; others say there is little or no originalist justification for THT.[58] As for OPM and natural rights alone, few originalists would find the two reconcilable.[59] As seen in *Heller*, mention of natural rights in an originalist context generally equates to little more than an acknowledgement that the Founders used

57. *Id.* at 257.

58. Barnett & Solum, *supra* note 10; Girgis, *supra* note 8.

59. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1998) (discussing the old common-law methods of "discovering" the law and its potential incompatibility with the role of a federal judge). *Cf.* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2013); VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022).

natural rights rhetoric when discussing a right.[60] Originalists would warn justices not to engage in natural rights reasoning.[61] Yet, where some originalists perceive dangers of THT might in fact present a place for natural rights philosophy to have a more prominent role that originalists may find compelling. Inasmuch as the Court has opened the door to traditionalism[62] as a mode of interpretation, it should consider the oldest and deepest tradition that informed the American project: the natural rights tradition.

Using the natural rights tradition as a guide, the Court can rein in an otherwise unmoored reach into past and present for traditions that inform rights and their scope. Originalists worry most about the possibility of post-ratification practices changing the meaning of the Constitution and separating it from its fixed meaning.[63] With natural rights reasoning, judges can assess the past and the present not merely for change but for continuity. As will be explained, as traditions change through time in ways that conform *more closely* to the original understanding of the natural right being protected, such evidence may have greater weight and inform that right's meaning and scope. If, inversely, traditions yield meanings that do not conform to the natural right, then such evidence should have less weight. In this way, the natural rights tradition may provide a rule of decision for the Court when faced with traditions that evolve over time and yield irreconcilable meanings or scopes of rights.

What follows is not a full-throated defense of the fusion of originalism and natural rights theory.[64] Rather, this section's purpose is to briefly outline the current overlap between originalism and THT and how natural rights can fit in. This section explores the deficiencies that exist within THT and how consulting the natural rights tradition can help address those deficiencies. In doing so, this section will illuminate how infusing natural rights tradition into

60. District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

61. SCALIA, *supra* note 59, at 10.

62. Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023).

63. *Id.*

64. For the beginnings of such a defense, see Bradley Rebeiro, *Frederick Douglass and the Original Originalists*, 48 BYU L. REV. 909 (2023).

THT, at the very least, ought not cause originalists any more dismay than they currently have over THT. In fact, natural rights might mitigate some of the history-and-tradition "dangers" that originalists fear. Perhaps for some this will only serve to highlight those parts of THT that represent the "Rubicon" that cannot be crossed. For others, however, it will demonstrate how natural rights reasoning can be engaged in a principled way, and how the nation's THT can provide a helpful guide in doing so.

A. Originalism and History and Tradition

OPM locates the meaning of the Constitution's provisions in the meaning that the public held at the time of ratification—there is little room, if any, for evidence of post-ratification evidence of meaning. With limited exceptions,[65] the interpreter focuses on evidence stemming from ratification debates, public commentary, and (to a lesser extent) legislative history.[66] The Court is particularly well-equipped to engage in OPM today because originalist scholars have done much of the legwork for them—producing vast volumes of scholarship that attempt to elucidate the original meaning of constitutional provisions hotly contested today.[67] That does not mean, however, that locating the original meaning is always easy or straightforward. Often scholars disagree significantly over what the historical evidence demonstrates, what evidence is relevant, and how the evidence ought to be used as a means of producing applicable constitutional rules and principles. Perhaps no area is more contested than the Fourteenth Amendment, which also provided the context for the Court's history and tradition test.[68] Nevertheless,

65. *See, e.g.*, Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457 (1995).

66. *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2018).

67. *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490 (2021). *But see* Julian Davis Mortensen & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

68. *See generally* KURT LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES CLAUSE OF AMERICAN CITIZENSHIP (2015); RANDY BARNETT & EVAN

the Court now has before it ample evidence—some contradictory, some corroborative—which it might wade through to ascertain plausible original meanings.

Adherents of OPM pride themselves on objectivity, relying on nothing outside of evidence of how the public understood the operative meaning of words; for these originalists, there is no space for philosophical inquiry.[69] Some have attempted to justify originalism on philosophical grounds, but philosophical inquiries purportedly do not affect or inform the actual interpretive project.[70] The most discretion for originalists exists in the construction zone—where the interpreter engages in gap-filling that best fits the original meaning of the constitutional provision—and even here there is little engagement with philosophical principles.[71] Indeed, in determining the legal content of a provision's original public meaning, originalists will resort to practices—both pre- and post-ratification—to reduce a principle or standard to a measurable legal test or rule for application.[72] We find something similar in THT, except it perhaps elevates practices vertically in the hierarchy of relevant

---

BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND ITS SPIRIT (2021); CHRISTOPHER GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES AND IMMUNITIES CLAUSE (2015); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020). *See also* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022); McDonald v. City of Chicago, 561 U.S. 742 (2010). All these disputes concern essentially Section One of the Fourteenth Amendment. Other sections of the Amendment, however, also generate disagreements. There are already no less than three interpretations of the original public meaning of Section Three that originalist scholars have proffered. *See* William Baude, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024); Josh Blackman & Seth B. Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (forthcoming 2024); Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J. L. & PUB. POL'Y 309 (2024).

69. Solum, *supra* note 66, at 1631. *But see* Barnett, *supra* note 59.

70. *See* Strang, *supra* note 13.

71. John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919 (2021).

72. *See* Strang, *supra* note 13, at 215–17; Barnett & Solum, *supra* note 10, at 435; Rebeiro, *supra* note 64, at 933–36 (discussing the construction zone and the inherent discretionary nature of deriving rules, standards, or principles from constitutional test).

historical evidence and broadens horizontally the relevant evidence to more contemporary practices.

For this reason, some find THT as redeemable on originalist grounds[73] while others find its deepest nature to be incompatible with originalism.[74] Solum and Barnett find that its reliance on historical practices is wholly compatible with originalism. They refer to Professor DeGirolami's definition of traditionalism:

> Traditionalism is . . . defined by two key elements: (1) concrete practices, rather than principles, ideas, judicial precedents, and so on, as the determinants of constitutional meaning and law; and (2) the endurance of those practices as a composite of their age, longevity, and density, evidence for which includes the practice's use before, during, and after enactment of a constitutional provision.[75]

Tradition, then, is not an isolated, singular phenomenon. Rather, it is an amalgamation of practices across space and time.[76] So long as those traditions pre-date ratification, or historical practices and doctrines indicative of tradition are close in time to the ratification, they remain important evidence of original meaning.[77] But when traditions post-ratification are used as a "direct source" of providing meaning or constructing legal content, "something other than originalism" would be operating.[78]

Professor Girgis has a less optimistic view of THT. Girgis refers to the Court's recent methodology as "living traditionalism."[79] In

---

73. *See* Barnett & Solum, *supra* note 10.

74. *Id.* at 443; Girgis, *supra* note 8.

75. DeGirolami, *supra* note 62, at 6; Barnett & Solum, *supra* note 10, at 443.

76. *See* DeGirolami, *supra* note 62, at 25–26; Barnett & Solum, *supra* note 10, at 444–45.

77. Barnett & Solum, *supra* note 10, at 446–47. Barnett and Solum further note that, inasmuch as originalism is focused on the text, traditionalism might present another conundrum given that it is principally atextual customs and shared beliefs handed down by non-written means. *Id.* at 447. But this is not a problem when tradition is seen as providing constitutional meaning in a limited way (such as ascertaining the purpose of constitutional provisions) or providing context for constitutional meaning. *Id.* at 447–48.

78. *Id.* at 449.

79. *See generally* Girgis, *supra* note 8.

the context of individual rights, Girgis notes that the Court equates rights with practices: "the very fact that the states have long protected an activity *makes* that activity a right protected by the Due Process Clause."[80] He identifies several issues with this approach, two of which I will highlight. First, this approach to rights makes rights adjudication an accident of history.[81] Because *Roe* was decided in 1973, Justice Alito concludes (based on THT) that *Roe* was wrongly decided since our scheme of ordered liberty clearly demonstrated that abortion was not a fundamental right—neither historically nor in a contemporary sense circa 1973.[82] Girgis conjectures that if *Roe* were decided some twenty years later, the Court, under THT, would have had to determine there was a fundamental right to abortion because practices had changed sufficiently by that time.[83] This is a problem of internal incoherence.

Second, living traditionalism lacks a clear originalist rationale.[84] As discussed above, THT tends to rely on evidence of meaning that is not limited to pre-ratification or early post-ratification evidence. What is more, Girgis argues that even a theory of liquidation—that the Constitution's meaning (where ambiguous or indeterminate) would be clarified or "liquidated" over time—cannot justify cases that use this methodology.[85] Early practices liquidate meaning; it is for this reason OPM originalists might be willing to investigate early post-ratification practices.[86] Once meaning has been liquidated, similar to *stare decisis* principles,[87] judges or other political

80. *Id.* at 1483. Though the primary subject of this Essay is history and tradition as employed in *Bruen* and *Dobbs*, Girgis identifies a whole host of cases, dating back decades, of the Court's use of living traditionalism, of which *Bruen* and *Dobbs* are only the latest of a long line of cases. *Id.* at 1500–02.

81. *Id.* at 1485–86.

82. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 250, 260 (2022). Girgis, *supra* note 8, at 1486.

83. *Id.* at 1486.

84. *Id.* at 1488.

85. *Id.* at 1492. Madison is often cited as clear evidence the Founders had understood and relied on a theory of liquidation in early disputes over the Constitution's meaning. *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

86. Girgis, *supra* note 8, at 1491–92; Barnett & Solum, *supra* note 10.

87. *See* Nelson, *supra* note 16.

actors would need significant justification to depart from that meaning.[88] Notably, "sheer political will" does not justify liquidation; rather, liquidation is a matter of constitutional interpretation through early practice.[89]

And yet living traditionalism leaves no room for liquidation. First, it presupposes that rights are fully determinable through attaching the scope of rights, as well as identifying unenumerated rights, to practices over time.[90] Liquidation functions as a gap-filler for indeterminate text, but under living traditionalism the text will rarely if ever be indeterminate because there will be no shortage of practices from which to draw in determining the text's content.[91]

The two narratives share some consensus on THT's relation to originalism. First, there are certainly some aspects of THT that are commensurable with OPM. The reliance on historical evidence pre-ratification, and to the extent *early* post-ratification practices are relied on, resonates with OPM. Generally, practices are useful for determining original meaning, if only to serve as proxies for ascertaining original purpose or intent.[92] Second, when these practices (especially post-ratification ones) are relied on exclusively, traditionalism runs the risk of falling completely outside the realm of OPM. Where these scholars disagree is to what extent THT—as presented in *Bruen* and *Dobbs*—is redeemable. Solum and Barnett suggest there is significant overlap between OPM and THT and therefore much can be preserved.[93] Girgis, on the other hand, finds little originalist justification for living traditionalism, of which *Bruen* and *Dobbs* are manifestations.

88. Girgis, *supra* note 8, at 1492–93.

89. *See id.* at 1494; Baude, *supra* note 85, at 17.

90. *See* Girgis, *supra* note 8, at 1496. If *Bruen* and *Dobbs* present identical methodologies, a critique of one is in many respects a critique of the other.

91. *Id.*

92. Barnett & Solum, *supra* note 10; Girgis, *supra* note 8, at 1490.

93. Barnett & Solum, *supra* note 10.

B. Originalism and Natural Rights

OPM and other forms of modern originalism provide little or no space for natural-rights reasoning.[94] In fact, the possible fusion of the two has become more unlikely over time, as modern originalism shifted from original intent originalism to OPM.[95] This should come as little surprise, as modern originalism rose largely in response to the perceived excesses and judicial activism of the Warren and Burger courts.[96] Originalists understandably would balk at anything that resembled judges reaching decisions based on philosophical judgments—it would be judicial overreach all over again.

But hearkening back to past forms of originalism provides more possibilities for its compatibility with natural rights reasoning. Indeed, the originalism that rose to prominence in the 80s was hardly novel. As I have explained in detail, originalism (if by originalism we focus on the simple idea that the Constitution has a fixed meaning and history informs that meaning) first manifested in the 1830s when contestations over slavery's status and future in the Union became the preeminent constitutional issue of the day.[97] Antebellum originalism had a thinner conception of original meaning than present-day originalism, but they share similar tenets. Pro-slavery and anti-slavery advocates alike used historical arguments to argue that the Constitution promoted or inhibited slavery respectively.[98]

---

94. There are some exceptions. Barnett, for instance, permits inquiries into the original purpose or "spirit" of the constitutional provision in question. *See* Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

95. *See* Whittington, *supra* note 6.

96. *See, e.g.*, Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986–88 (1987) (criticizing opinions from the Warren Court for brazenly altering the law).

97. *See* Rebeiro, *supra* note 17; Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011).

98. *See* Rebeiro, *supra* note 17; Bradley Rebeiro, *Frederick Douglass and the Original Originalists*, 48 BYU L. REV. 909 (2023) [hereinafter FD Original]. This dichotomy—pro-slavery advocates promoting a pro-slavery Constitution and anti-slavery advocates promoting an anti-slavery Constitution—was not so clean. There were anti-slavery advocates who also advocated a pro-slavery Constitution, usually coupled with calls for disunion.

Pro-slavery advocates often relied on original intent arguments.[99] Interestingly, anti-slavery advocates used a method somewhat similar to OPM, relying on a textual approach and at times invoking historical *public* understandings; anti-slavery advocates seldom cited the Convention for authoritative meaning.[100]

Among anti-slavery advocates who used this method, one did so with a natural rights twist: Frederick Douglass. Douglass rose to national acclaim at the apex of the interpretive battle over the Constitution's relation to slavery. On the slave question, Douglass argued that the Constitution properly understood could lead to one answer only: it was an anti-slavery document.[101] Douglass employed what I have termed natural rights originalism to construe several provisions of the Constitution. Douglass concluded that the document not only did not support slavery as a national institution but it also, interpreted *and* executed properly, would eradicate slavery everywhere in the Union with time.

To understand Douglass's interpretive method one must first grasp a sense of natural rights.[102] Douglass, like other anti-slavery advocates, pointed to the Declaration of Independence for a basic sense of natural rights.[103] Natural rights is based on the premise "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[104] Natural rights are derived from the natural law. The natural law is discovered through reason and serves as the basis for positive law—enactments of law that

99. FD Original, *supra* note 98, at 937–40.

100. The most obvious reason for this was that James Madison's Notes on the Convention had just been published in 1840. Those notes presented a fairly strong case for the pro-slavery reading of the Constitution. JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION (1840).

101. *See* FD Original, *supra* note 98.

102. For a more comprehensive treatment of natural rights, *see generally* FD Original, *supra* note 98, at 949-76; Bradley Rebeiro, *Douglass's Constitutional Citizenship*, GEO. J.L. & PUB. POL'Y (forthcoming 2024).

103. *See* FD Original, *supra* note 98, at 949.

104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

regulate that people's actions.[105] Because the positive law is based on natural law, a concomitant principle is that the positive law ought to reflect the natural law.[106]

These natural rights precede government—government is not made to create those rights, but rather to secure them. When human beings enter political society, they adopt positive laws and forego some of their alienable rights in exchange for security and community.[107] In this sense Abraham Lincoln stated:

> The assertion of that principle . . . the word "fitly spoken" which has proved an "apple of gold" to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn and preserve it. The picture was made for the apple—not the apple for the picture.[108]

The Constitution was made to preserve those natural rights that pre-existed it. As the positive law—in this case the Constitution—was made to preserve natural rights, if the positive law abrogated those rights (particularly inalienable ones), then the members of the political community had moral grounding for exiting the political regime and adopting another more favorable to their natural rights.[109]

It is for this reason that the interpreter properly construes the Constitution when she does so in light of natural rights principles.[110] Indeed, Douglass cited these reasons (among others) for why he ultimately concluded that the Constitution was a "glorious

---

105. *See* FD Original, *supra* note 98, at 949–55; *see generally* H.L.A. HART, THE CONCEPT OF LAW 185–93 (1961) (discussing the relationship between natural law and positive law).

106. FD Original, *supra* note 98, at 949–55.

107. *See* FD Original, *supra note* 98.

108. ABRAHAM LINCOLN, *Fragment on the Constitution and the Union* (c. Jan. 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 169 (1953) (emphasis in original).

109. What measure of natural rights violations lead to the right of revolution is always a question of prudence. *See generally* FD Original, *supra* note 98, at 959–65. Nevertheless, the very ability to revolt and throw off one's government is perhaps the quintessential inalienable right: in no sense can a people consent to absolute bondage with no recourse.

110. *See* FD Original, *supra* note 98, at 949–51.

liberty document."[111] When interpreting the Constitution, Douglass started with the text.[112] According to Douglass, the plain reading of the Constitution did not concede the pro-slavery reading of the Constitution. There were several provisions which might be construed as promoting slavery, but the text alone did not answer the question. Douglass then aided his plain reading with a historical analysis of the Constitution's several provisions to arrive at his anti-slavery reading. He used history in a way similar to OPM. Douglass was not focused on what the Framers thought or said about the Constitution. Those "secret intentions" had no bearing on the Constitution's meaning. Rather, Douglass ascertained plausible readings of a constitutional provision based on how the adopting public would have understood the words at the time of ratification.[113]

Where a constitutional provision had more than one plausible reading there existed an ambiguity—it was here that Douglass then employed natural rights construction. Douglass's rules of construction were simple:

> First, "where [there are] two interpretations, an innocent and a guilty can be given, the innocent should always be taken." The second, somewhat an appendage of the first, is "[w]here it is sought to sustain anything against the rights of man we are to be confined to the strict letter of the instrument authorizing it"—in other words, the law restricting liberty must do so with "irresistible clearness."[114]

Put simply, Douglass employed a presumption favoring the plausible original meaning of a constitutional provision that best reflects natural rights principles. The interpreter is not free to construe the text however she sees fit—her interpretation must still adhere to plausible original meanings based on a historical analysis. Furthermore, the provision must indeed be ambiguous. If there is only one

---

111. *Id.* at 969–75.

112. FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467, 467–69 (Philip S. Foner ed., 1950) [hereinafter The Anti-Slavery Constitution].

113. *See* FD Original, *supra* note 98, at 940–44.

114. FD Original, *supra* note 98, at 945 (citations omitted).

plausible meaning of the text, the interpreter is not free to instill her own vision of what the text should have meant or should have said.

Despite these caveats, Douglass's approach differs in meaningful ways from OPM in practice. OPM, like natural rights originalism, starts with a plain reading of the text and resolves potential ambiguities or vagueness through historical evidence of the ratifying public's understanding. But that evidence will often yield multiple plausible meanings.[115] OPM therefore uses additional tools to resolve that ambiguity—whether it be contextual enrichment or some other method for narrowing down possible meanings.[116] Ultimately, where there are competing meanings available, the faithful OPM originalist will weigh the evidence and choose the meaning that has the most evidentiary support. Douglass, however, used natural rights construction to determine which meaning best reflected the law's purpose and intent, which was to protect natural rights. The sensible thing for the interpreter to do when confronted with more than one plausible meaning, therefore, was to choose the meaning that best reflected a natural rights reading. This sort of decision-making, for originalists, would be permissible only in the construction zone. But, given the nature of law and the role of the law giver in a natural rights-based republic, Douglass believed the interpreter should take note of the law's fundamental purpose—protecting natural rights—when deciding between plausible original meanings. Douglass believed this was the best way to ascertain the intent of the legislature, an aim which belongs to all forms of originalism.[117]

C. Natural Rights, History, and Tradition

THT has several potential deficiencies and natural rights originalism provides unique answers. THT can rely on original public

115. *See* FD Original, *supra* note 98, at 943. The problem of multiple original meanings occupied much of Douglass's thought after he encountered Lysander Spooner's work, THE UNCONSTITUTIONALITY OF SLAVERY (1845).

116. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV 479, 487–88 (2013).

117. FD Original, *supra* note 98, at 931.

meaning for authoritative meaning, but it is not clear that it does so. When THT is not relying on original public meaning, there does not appear to be a rule of decision for what traditions and what time(s) matter most. Natural rights originalism does rely on original public meaning, but it has an important rule of decision for resolving potential ambiguities in meaning. When applied to THT, natural rights originalism can aid the judge in determining which traditions matter in deciding constitutional cases. In doing so, natural rights originalism can serve to alleviate some of THT's suspected deficiencies in a way that may make THT more palatable for originalists.

1. Deficiencies of the History and Tradition Test

THT thus far have received at best two cheers from originalists; it has yet to be embraced fully. Of its many issues, some bear repeating as they are ripe for consideration within the context of natural rights originalism. First, there is the perception that THT overly emphasizes historical practices. OPM originalists have moved further and further toward deriving meaning of words in a constitutional provision through common usage at the time. The inquiry often includes analyzing statutes passed and early judicial decisions, but perhaps even more important is contemporary public discourse over the same words or involving the same legal question. Indeed, there are more tools available now to ascertain just how certain words were used in a variety of contemporary contexts.[118] With all of these sources at the disposal of the modern Court, it is odd that the Court decided to return to the *Glucksberg* approach and, in the process, emphasize historical practices above other sources. The Court did not disavow other sources of meaning—legal treatises and commentary, public discourse, etc.—that OPM originalists might prioritize, but the turn to practices of public officials can be in tension with the more rigorous OPM.[119] OPM originalists could accept traditionalism as another tool in ascertaining meaning—

118. *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275 (2021).

119. Girgis, *supra* note 8, at 1490.

especially in terms of contextual enrichment—but it would be uncharacteristic of OPM to make traditionalism synonymous with original meaning.

Even more problematic is THT's reliance on post-ratification practices. Not to belabor the point, it is simply worth noting that post-ratification practices can present additional plausible meanings of a constitutional provision. Where practices concerning a particular provision were X circa 1790-1795, they might have become Y by 1865-1868, and again Z by 1880-1884. This was part of the majority's reasoning in *Hurtado v. California* for why a state's foregoing grand jury proceedings did not violate the Due Process Clause of the Fourteenth Amendment.[120] The meaning of the Due Process Clause changes over time precisely because the practices of a people change over time. When the Fifth Amendment was drafted and ratified in the early 1790s, criminal proceedings included grand jury indictments with such frequency that it could be deemed the "law of the land," but that might not have been the case in 1868 when the Fourteenth Amendment was ratified.[121] If the Fourteenth Amendment Framers wanted to include the added language, they could have done so. Otherwise, the Court refused to be shackled to a prior time and prior conception of due process. Faced with multiple plausible meanings, the Court opted for a reading that permitted contemporary practices. The Court today runs the same risk: arbitrarily deciding cases by opting for older or newer practices to establish meaning.[122] Supreme Court precedents then become accidents of history.[123]

2. Gap-filling and Rules of Decision from the Natural Rights Tradition

Natural Rights Originalism provides an avenue to strengthen internally and to legitimize externally THT. Using Douglass's rules of construction and simultaneously consulting the natural rights

120. *See* Hurtado v. California, 110 U.S. 516, 528-31 (1884).

121. *See id.*

122. *See* Waldman, *supra* note 3.

123. Girgis, *supra* note 8, at 1485–86.

tradition more generally will increase the validity and predictability of cases under THT.

First is the concern of historical practices. More specifically, the concern is of which ones to consult. Here, Douglass provides a useful analogue. The contestation over slavery during the late antebellum period hinged in great part on the perceived practices at the time of ratification and those since. Anti-slavery advocates argued that, taking the Constitution's historical meaning into account, it was clear that the nation had long abandoned its true principles. If properly executed, for instance, the Constitution would not have permitted slavery in any of the new territories.[124] In this vein, Douglass argued that pro-slavery advocates were attempting to impose upon the Union a *new* or *evolved* meaning of the Constitution.[125] For Douglass, practices are helpful in determining meaning, but not to the detriment of the original principle of which the practice in question claims to be a manifestation.[126] They are admittedly the least helpful in determining meaning. The interpreter can reference practices, but the principle underlying them must maintain prime of place. Thus, where there are practices that are irreconcilable, or where practices change over time, Douglass would resort to elevating the principle as the lodestar and choose those practices (or traditions) that best reflect the principle.[127]

Essentially, judges would use natural rights as a rule of decision. Where there are multiple plausible meanings or multiple traditions from which to choose, the judge ought to choose the meaning that best reflects natural rights principles. The judge, again, will not

---

124. *See* S.P. Chase, An Argument for the Defendant, Submitted to the Supreme Court of the United States, at the December Term, 1846, In the Case of Wharton Jones v. Vanzandt, at 72, 89 (1847). Douglass, of course, had the decidedly abolitionist position that political actors could use the Constitution to eradicate slavery everywhere in the Union.

125. FD Original, *supra* note 98, at 942–43.

126. Frederick Douglass, *The* Dred Scott *Decision, Speech Delivered Before American Anti-Slavery Society, New York* (May 11, 1857), *in* 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 407, 423 (Philip S. Foner ed., 1950) ("The Constitution is one thing, its administration is another.").

127. *See generally* Douglass, The Anti-Slavery Constitution, *supra* note 112.

have a blank check. If the judge's desired outcome is not reflected in any meaningful tradition across time and space, then presumptively that outcome is not "plausible." Even more so if that meaning is not reflected in a plausible *original* meaning, keeping in mind that natural rights originalism still requires the interpretation to be plausible at the time of ratification. Within the context of traditionalism, this would mean focusing on the natural rights tradition as it had developed during the pre-ratification period and measuring later practices against that tradition. This does not completely remove the problem of relying heavily on practices as an indication of meaning, but adding the natural rights construction does help orient the judge's decision-making to consistently reflect the original principle and avoids the alternative—the judge simply choosing which period or epoch's traditions to use as authoritative meaning for each constitutional inquiry.

Originalists likely will balk at this process as philosophizing from the bench. But using natural rights originalism to augment some of the unique aspects of THT to ameliorate that test's deficiencies may answer that criticism: in determining whether a right is "deeply rooted" in the nation's tradition or essential to our scheme of ordered liberty, one cannot neglect natural rights tradition. At the Founding, our scheme of ordered liberty was based on natural rights.[128] One cannot have proper context, therefore, for our traditions without consulting the natural rights tradition they inherited. This would require a conscious consideration of natural rights, the law from which they derive, and how our government is uniquely established to preserve those rights. Such an endeavor would not be entirely foreign to the Court. *Heller* and *Bruen*, for example, acknowledge that part of the reason a right deserves significant protection is because it was *pre-existing*.[129] But what this proposal calls for is more than simply quoting a single Founder who happened to use the words "natural right."[130] The judge must take natural rights

128. *See supra* note 16.

129. District of Columbia v. Heller, 554 U.S. 570, 652 (2008) (Stevens, J., dissenting); N.Y. State Rife & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 72 (2022) (Alito, J., concurring).

130. *See Heller*, 554 U.S. at 585.

seriously. The judge should inquire into great works on the subject and read the evidence in light of those works. Contemporary legal and philosophical treatises would also be helpful in getting a sense for what the nature of the right is and how our nation facilitated its use. A history and tradition judge, informed of the natural rights tradition on a particular subject, would survey the plausible meanings presented by traditions and choose the meaning that best reflects natural rights. In doing so, he would be participating in the same exact tradition of the Founders. No longer would decisions be an accident of time. Rather, judges would have another cord from which to tether the Constitution's meaning to historical meanings but also eternal ones as well.[131]

III. NATURAL RIGHTS IN ACTION

Perhaps the greatest hurdle this approach—natural rights traditionalism, for ease of reference—has is the Court's (and originalist scholars') likely skepticism of its workability. Natural rights jurisprudence had a brief revival in modern jurisprudence, but it was short-lived. *Lochner* and its progeny brought natural rights front and center in Substantive Due Process jurisprudence, though its applicability was calibrated mostly to economic liberties.[132] Many consider *Lochner* not only to be wrongly decided, but among the worst decisions in the Court's history.[133] This is not exactly fecund ground upon which to build a new natural rights jurisprudence.

But that does not mean it is impossible. Indeed, if we look to originalism, it might be just as easy to foreclose its possibility based on prior poor decisions. Natural rights in the modern era might

131. Frederick Douglass, *The Meaning of July Fourth for the Negro, Speech at Rochester, New York* (July 5, 1852), *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS; Bork, *supra* note 12, at 181, 186–87.

132. *See* Lochner v. New York, 198 U.S. 45 (1905); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Other cases that followed *Lochner*'s reasoning have since been justified on other grounds. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). *But see* Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) (criticizing *Lochner* and distinguishing its progeny).

133. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

have started with one of the most questionable decisions in the Supreme Court's history, but early versions of originalism helped produce the worst decision in the Court's history: *Dred Scott v. Sandford*.[134] One could defend originalism by saying that the Court simply did originalism wrong and that it did not have the robust version of originalism today, which, if used at the time, might have demanded a different result. The same is true for natural rights traditionalism. Any one decision in the past does not foreclose its possibilities. Rather, if administered properly, and with the tools available to judges today, it might reach more reliable and just results than the *Lochner* line of cases.

* * *

If natural rights traditionalism is to work, much of the work would need to be done on the ground before cases reach the Court. Legal scholars would need to direct more time and attention to natural rights not only as a historical matter but a theoretical one. This would take time. But there are tools available to the Court to begin working through natural rights traditionalism. Not unlike OPM, there is a host of literature that the Court and its clerks can become familiar with to understand how to think through natural rights.[135] Scholars can produce more scholarship that considers the

134. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV. Indeed, scholars recently have associated originalism with slavery and racism. *See, e.g.*, SIMON J. GILHOOLEY, THE ANTEBELLUM ORIGINS OF THE MODERN CONSTITUTION: SLAVERY AND THE SPIRIT OF THE AMERICAN FOUNDING (2020); Calvin Terbeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

135. There are many works in this area, perhaps two of the most influential in the American experiment being JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Lee Ward ed., Hackett Publ'g Co. 2016) (1689), and THOMAS HOBBES, LEVIATHAN (J. C. A. Gaskin ed., Oxford Univ. Press 2008) (1651). There is a whole host of secondary sources and commentary that clerks can consult as well. Still, natural rights traditionalism would be somewhat at a disadvantage since OPM and other leading constitutional theories are taught to law students regularly. But this would likely shift over time if the Court were to take natural rights seriously. If the Court took it seriously, law schools would too. Law schools offering a course on natural rights would be welcome progress in this regard.

philosophical bases for law adopted by the people.[136] Some scholarship in this vein is already being produced.[137] Over time, much like OPM, the Court would theoretically have more and more sources to refer to when answering discrete constitutional questions. To be sure, there will be disagreements among scholars and among judges. But the mere possibility of disagreement does not foreclose the need to address these important philosophical questions of law. In a similar vein, one need look no further than Fourteenth Amendment scholarship to see just how varied originalists can approach the same time period.[138] Yet the Fourteenth Amendment harbors essential civil rights protections. The more scholars address important questions of natural rights, the more judges will have at their disposal to adjudicate cases.

As time proceeds and more sources become available to the Court, it can make decisions about what natural rights requires in each context. For instance, where the Second Amendment is concerned, there are several ostensibly conflicting standards. The *Heller* Court determined that the Second Amendment was tied to self-defense and thus prohibited the federal government from banning commonly held weapons.[139] *Bruen* expanded on this, holding that the government today must find historical analogues to justify firearm bans. But some judges expressed dismay over what time period was relevant for considering what kinds of firearms were permissible and where to look to determine what other kinds of regulations (such as ammunition, bump-stocks, etc.) were permissible. [140] Judges might reconcile these timelines and requirements by finding that the Second Amendment's purpose was to protect the natural right to self-defense. The right to self-defense was essential, but

136. *See, e.g.*, Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022).

137. *See, e.g.*, William Baude, Jud Campbell, & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024).

138. *See supra* note 66.

139. District of Columbia v. Heller, 554 U.S. 570, 613 (2008).

140. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 115 (2022).

nevertheless subject to reasonable regulation.[141] When considering later or evolving traditions that present plausible meanings, the judge can favor the meaning that best fits the natural right to self-defense.[142]

What this would mean for lower courts presents a bit more complexity. Over time the Supreme Court will make individual determinations on what natural rights requires. As that body of cases increases, lower courts should have an easier time reaching coherent and consistent decisions. Until then, they would operate much like they do today, resolving cases before them even if the right or deprivation in question is one of first impression. However, judges should remember that prudence requires courts to take special care when defining and asserting new rights.[143]

There will be times where the Court gets it wrong; again, this possibility presents no new conundrum. Principles of *stare decisis* would come into play just as in other cases.[144] If a decision is demonstrably erroneous, the Court ought to overturn it. The Court could either get the nature of the right wrong or otherwise choose a meaning that is not plausible. Should this happen, the Court should take up new cases that would help it change the course of its jurisprudence.[145] In fact, the Court's willingness to overturn its precedent may be correlated with its confidence in the possibility that there are right answers to legal questions, a notion that can be tied back to a time when judges believed that the law could be discerned through right reasoning—accessing the natural law through

141. *Heller*, 554 U.S. at 613.

142. This test would presumptively be used for all enumerated rights and, like the Court's test today, the same process would apply for unenumerated rights as well.

143. *See* FD Original, *supra* note 98, at 959–65.

144. *See* Nelson, *supra* note 16 (explaining how the Court should handle erroneous precedents).

145. We can see a similar phenomenon occurring with the Court's religious freedom jurisprudence, which now has the benefit of more scholarship on the original meaning of the Religion Clauses. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020); MUÑOZ, *supra* note 136. A similar development is possible for natural rights traditionalism.

human reason and implementing that law in keeping with the scheme of a particular legal order.[146]

CONCLUSION

Because we live in a positivist world,[147] natural rights originalism or natural rights traditionalism will be met with skepticism. Returning to an older form of jurisprudence can make the law more consistent with its underlying premise: that the law is just. Adhering to this nation's history and tradition, natural rights is the theory of justice upon which our scheme of ordered liberty was built. Practices change over time; those practices might draw closer to or pull further away from original natural rights principles. If practices are to shape the Constitution's meaning, judges would do well to scrutinize those practices against the original meaning of the Constitution, as understood in light of natural rights principles. Only then would constitutional rights not be accidents of time. Only then would we keep the nation's oldest tradition: that the silver frame was made for the golden apple, not the golden apple for the silver frame.

146. *See* Nelson, *supra* note 16, at 24–25; JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1992).

147. *See generally* HART, *supra* note 105; William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

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

HON. KEVIN C. NEWSOM*

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.

---

* Judge Kevin C. Newsom is a member of the United States Court of Appeals for the Eleventh Circuit. These remarks were delivered at a symposium on history and tradition at Harvard Law School on February 17, 2024.

* * *

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]

---

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.

---

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]

---

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,

---

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.

* * *

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.*

"NOW . . . THIS"

HON. JUSTIN R. WALKER*

Some of my favorite places to visit are Civil War battlefields. I've been to about 30 of them, and to show you how nice my wife is, we spent a day at Chickamauga on our honeymoon.

My favorite of them all is Gettysburg, where I've been more than 20 times, and where I go annually with my clerks. On the wall in my chambers is a photo of each clerk class, taken with me at the same spot, from Devil's Den, with Little Round Top behind us. Every year, in every picture, I get a little grayer, and gain a little weight.

I told my clerks this year that instead of using a licensed guide, I was going to try to give the tour myself. And their expectations were appropriately low. I assured them that I'm not an expert, and that my only goal for Gettysburg was to share with them what I think when I see it.

I'll tell you now that when I look at Little Round Top, I think about how there was a time when it seemed like the Union might be just one battle away from defeat; a time when it looked like America might not survive.[1] And I think of Chamberlain's 20th Maine, when they ran out of ammunition, and fixed bayonets.[2] And whether I'm on Little Round Top or on Cemetery Ridge or in the

---

* Judge, United States Court of Appeals for the D.C. Circuit. These remarks were delivered to the Harvard Federalist Society on October 3, 2023.

1. James R. Brann, *Defense of Little Round Top*, AM. BATTLEFIELD TRUST, https://www.battlefields.org/learn/articles/defense-little-round-top [https://perma.cc/C99H-6D4E].

2. *Joshua L. Chamberlain*, NAT'L MUSEUM OF THE U.S. ARMY, https://www.thenmusa.org/biographies/joshua-l-chamberlain/ [https://perma.cc/HS96-6VQ5].

cupola where Reynolds found Buford,[3] I think, "*Here* is where it happened. Here's where the Union was saved." You see, it's a salvation story. And salvation even came on the third day.

Proverbs says, "A good man leaves an inheritance to his children's children."[4] And you don't have to be a military historian to see that we've inherited quite a country from Chamberlain, and Reynolds, and Buford, and many, many more. That's how I come to you today—as an heir to that great inheritance, eager to talk with my fellow heirs, my co-equal heirs, about the effect on that inheritance from social media—and in particular, what social media is doing to the increasingly uncivil and unhinged discourse about our courts and our law.

First, social media is, by its nature, cynical, shallow, and combative. With every mind-numbing scroll through Twitter, our screens present us with so many things to be all for or all against—with little room for nuance—and no option for compromise in the binary world of a "like" button. True, we can learn many things reading Twitter, but sort of in the sense that we will learn many phone numbers by reading the phone book. And consider the opportunity costs: Every minute we spend on Twitter is a minute we could have spent reading Robert Caro, or Barbara Tuchman, or Jack Goldsmith.

The difference between Twitter and books is the difference between trivia and knowledge. And an attention span that can't last longer than 140 characters is a reason, to quote Bill Moyers, we live in "an anxious age of agitated amnesiacs."[5] Many "Americans seem to know everything of the last 24 hours but very little of the last sixty centuries or the last sixty years."[6]

---

3. *The Cupola*, HIST. MARKET DATABASE (July 13, 2013), https://www.hmdb.org/m.asp?m=66686 [https://perma.cc/HR3B-83TJ].

4. *Proverbs* 12:22 (New Catholic Bible).

5. Sam Ainsworth, Book Review, NEIL POSTMAN, AMUSING OURSELVES TO DEATH (1985), https://www.samainsworth.com/post/amusing-ourselves-to-death [https://perma.cc/ESY5-QFWJ].

6. *Id.*

In that sense, social media has exacerbated a phenomenon Neil Postman labeled, "Now … this." He observed that:

> "Now . . . this" is commonly used on radio and television newscasts to indicate that what one has just heard or seen has no relevance to what one is about to hear or see, or possibly to anything one is ever likely to hear or see. The phrase is a means of acknowledging the fact that the world as mapped by . . . electronic media has no order or meaning and is not to be taken seriously. There is no murder so brutal, no earthquake so devastating, no political blunder so costly—for that matter, no ball score so tantalizing or weather report so threatening—that it cannot be erased from our minds by a newscaster saying, "Now . . . this."[7]

Like Moyers, Postman offered his thoughts decades before social media, but however bad it was then, it is worse now. And it is antithetical to our professional calling. Good lawyers are careful; deliberative; thoughtful; thorough; informed.

Those are not the hallmarks of social media's "now this" presentation. And when I say social media, I'm including most blogs and substacks and similar websites, not just Twitter and Facebook and TikTok and Instagram.

To be sure, some of them are not so bad. I've even found a few that I like. I get a daily email of *Wall Street Journal* articles. I also get two or three essays a day from *Law and Liberty*. And each week, I read David Lat's Judicial Notice. I think he strikes a nice tone while flagging important judicial opinions, with good humor and good cheer. So too do Will Baude and Dan Epps on their Divided Argument podcast.

There is however—and I think Lat and Baude and Epps would agree with this—there is no substitute for actually reading the judicial opinions they discuss. That's especially true if you're getting your news from the mainstream media, which oversimplifies the cases and paints caricatures of judges and justices.[8]

---

7. NEIL POSTMAN, AMUSING OURSELVES TO DEATH 99 (20th Anniversary ed. 2005).

8. *See, e.g.*, Elizabeth Sepper, *Opinion: With its 303 Creative decision, the Supreme Court opens the door to discrimination*, L.A. TIMES (June 20, 2023), https://www.latimes.com/opinion/story/2023-06-30/supreme-court-303-creative-gay-

To be clear, the fault here is not just with journalists, and it's not confined to the left. When it comes to headlines and hot takes, there is plenty of blame to go around.

Take, for example, a conservative law professor who describes himself as "a national thought leader on constitutional law and the United States Supreme Court."[9] In 2020, he called the Amy Barrett nomination "unsettling," in part because he "didn't know who she was" when he met her at a conference.[10] Take a minute, and think about that. Amy Barrett was one of the nation's leading scholars on textualism and originalism, on one of the best faculties anywhere.[11] But this fellow didn't know anything about her scholarship,[12] and he blamed *her* for not attending enough conferences with *him*.[13]

---

rights-first-amendment-lorie-smith-neil-gorsuch-sonia-sotomayor [https://perma.cc/U7LB-EMTH]; Katie Scofield, *Amy Coney Barrett: The Cruel Irony of a Female Originalist*, THE HILL (Oct. 12, 2020), https://thehill.com/opinion/judiciary/520891-amy-coney-barrett-the-cruel-irony-of-a-female-originalist/ [https://perma.cc/K7HN-NE9V].

9. *Josh Blackman*, S. TEX. COLL. L., https://www.stcl.edu/profile/josh-blackman/ [https://perma.cc/FP7Q-3ZV4].

10. Josh Blackman, *Conservatives Should Not be Surprised by Justice Barrett's Cautious Approach*, REASON: VOLOKH CONSPIRACY (July 20, 2023), https://reason.com/volokh/2023/07/20/conservatives-should-not-be-surprised-by-justice-barretts-cautious-approach [https://perma.cc/3P96-K5WZ].

11. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

12. Blackman, *supra* note 10 ("She warmly said hello to me, but I was embarrassed that I didn't know who she was; it took me a few moments to recall that she was the professor from Notre Dame who had been nominated to the Seventh Circuit. That was *all* I knew about her.").

13. *Id.* ("Even while living in the District of Columbia, she never attended the Federalist Society's national lawyers convention—a pilgrimage for conservative lawyers. . . . The Federalist Society hosted a faculty conference at the same time as the AALS convention, usually in a hotel across the street. I do not recall ever seeing Barrett at any of those meetings. . . . I do not recall ever seeing Barrett at any Federalist Society event before 2017. And as best as I can remember, I met her for the first time in August 2017 at a law professor conference in Florida. She warmly said hello to me, but I was embarrassed that I didn't know who she was; it took me a few moments to recall that she was the professor from Notre Dame who had been nominated to the Seventh Circuit. That was *all* I knew about her. . . . I'll admit there is something unsettling about Justice Barrett's glide path to the Supreme Court. . . . To use baseball analogies, the conservative legal movement could have scored three home runs. However, we didn't even score a run. Justice Gorsuch was a standing double—a solid hit that probably could have been extended to a triple. Justice Kavanaugh was a sacrifice bunt—he advanced the

There is indeed something "unsettling" about that, and it isn't Justice Barrett's nomination.

Two years later, our same friend tried his hand at psychoanalysis—because, I guess, why not? On the internet, anyone can say anything. Referring to a Kavanaugh line in *Bruen* endorsing the validity of a mental-health records check for gun licenses, he wrote: "I have to think that Kavanaugh's dicta here was affected by the assassination attempt, in which a person with apparent mental health problems tried to kill" him.[14] Really? Is that also why Justice Scalia called mental-health requirements "presumptively lawful" in *Heller*?[15] And is it why Justice Alito did the same in *McDonald*?[16] And is it what made Kavanaugh quote Scalia and Alito with approval in a 2011 opinion—11 years before someone tried to shoot him?[17]

To give this guy his due, he stays busy: He's written more than 10,000 blog posts, often thousands of words long,[18] and over the past 10 years, he has spoken at more than 300 Federalist Society events.[19] So he is a remarkably fast writer, and he's happy to share an opinion about everything, everywhere; and that turns out to be a winning recipe for getting clicks and getting quoted. For example, the *New York Times* quoted him saying that "Gorsuch, Kavanaugh and Barrett have and will continue to disappoint conservatives"[20]—

---

movement, but still scored an out. Justice Barrett was a walk—she never swung but still made it to first.").

14. Josh Blackman, *The Kavanagh Concurrences in* Bruen *and* Dobbs, REASON: VOLOKH CONSPIRACY (June 28, 2022), https://reason.com/volokh/2022/06/28/the-kavanaugh-concurrences-in-bruen-and-dobbs [https://perma.cc/RX6A-9LNC].

15. District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008).

16. McDonald v. City of Chicago, 561 U.S. 742, 786 (2010).

17. Heller v. District of Columbia, 670 F.3d 1244, 1291 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

18. *Blog*, JOSH BLACKMAN, https://joshblackman.com/blog/ [https://perma.cc/P5CN-X5YA].

19. *Speaking Engagements*, JOSH BLACKMAN (October 1, 2013 through October 26, 2023), https://joshblackman.com/speaking/debates/ [https://perma.cc/M3LZ-LSXJ].

20. Adam Liptak & Alicia Parlapiano, *Along With Conservative Triumphs, Signs of New Caution at Supreme Court*, N.Y. TIMES (July 1, 2023), https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html [https://perma.cc/76X6-XARM].

which struck me as odd, because I know a few legal conservatives, and they're not exactly disappointed by *Dobbs*; or *West Virginia*; or *Harvard*. Or by *Roman Catholic Diocese*, *Alabama Realtors*, *Collins*, *Bruen*, *Kennedy*, *Carson*, *303 Creative*, and *Biden v. Nebraska*. From an originalist perspective, this is the best Supreme Court since John Marshall's. But our friend the "national thought leader" told the *Times*, "I don't know that future [Supreme Court] 'short lists' are worth much if they are made by the same people who generated the last batch of lists."[21]

Well, the people who made those lists include Don McGahn and Leonard Leo.[22] And calling Don McGahn and Leonard Leo insufficiently conservative is what the kids call a "hot take"—which leads me to the **second** problem with social media: You don't have to be right, or eloquent, or even coherent. **You just have to be loud.**

I'm barely old enough to remember an era when people got their news for 30 minutes a night from Tom Brokaw, Peter Jennings, or Dan Rather—the nightly news anchors at NBC, ABC, and CBS.[23] Now, there were plenty of problems with that. TV was always a "now this" medium,[24] plus there was plenty of bias in those newsrooms, especially Dan Rather's.[25] But I look back on that era with more fondness than I felt at the time—because back when I was watching a national newscast, filtered for the broadest possible audience, I didn't know that the alternative would turn out to be a never-ending circus of click-seeking clowns, hecklers, and hysterics—all shifting the Overton window away from any perspective that could have made it onto Tom Brokaw's teleprompter.

---

21. *Id*.

22. Robert O'Harrow Jr. & Shawn Boburg, *A conservative activist's behind-the-scenes campaign to remake the nation's courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/LC9N-G2W4].

23. Michael J. Socolow, The Last Time We Worshipped in the Church of the Nightly News, SLATE (Sep. 10, 2021), https://slate.com/business/2021/09/911-anchormen-nightly-news-rather-jennings-brokaw-legacy.html [https://perma.cc/RS3M-9RGB].

24. POSTMAN, *supra* note 7.

25. Charles Krauthammer, Opinion, *Rather Biased*, WASH. POST. (Jan. 13, 2005), https://www.washingtonpost.com/archive/opinions/2005/01/14/rather-biased/51d4abbb-8a06-462b-bb51-f13e2a294665/ [https://perma.cc/7F95-XDRK].

Now, by the time I was in college, cable news was prevalent, and I was a cable news junkie back then. Years later, there was even a summer when I appeared a lot on cable news, which I don't regret. And there was also a time when I read a fair amount of social media. But at a certain point, several years ago, two things occurred to me about my news consumption.

First, I thought, "All this does . . . is make me mad." I wasn't following the most outrageous voices. But I was following understandably outraged people, who were rebutting the kooks and cranks to whom social media has handed a megaphone. And I just thought to myself, "I already know there are crazy people out there. I don't need to be reminded of it all day every day."

The second thought I had was while I was scrolling on the couch next to my daughter. And I thought, "No. Just no. She's only a kid for so long. And I'm a fool if I let social media distract me from our limited time together."

And that's the **third** problem with social media: **It's isolating**. It takes your attention away from actual people. And not just your family or close friends.

Social media is a substitute—a poor substitute—for the real-life community interactions that Tocqueville found indispensable, and that we enjoyed for most of our history.[26] If you've read *Bowling Alone*, you know this story. And I liked that book so much I actually joined a bowling league. My RAs and I played 3 seasons, won just 1 match, and lost the other 23.

Bowling Alone argues that we used to join more bowling leagues, and church groups, and rotary clubs.[27] They taught us how to cooperate with people outside an immediate social circle we can closely control.[28] Republicans and Democrats alike learned that the

---

26. Matthew Wilson, *Strengthening Community Bonds Two Centuries after De Tocqueville*, THE CATALYST (2016), https://www.bushcenter.org/catalyst/leadership/strengthening-community-bonds-two-centuries-after-de-tocqueville [https://perma.cc/224Q-9HZF].

27. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (20th Anniversary ed. 2020).

28. *Id.*

other bowlers were more than Republicans and Democrats—that we are not simply "too different" to bowl together, or eat together, or perpetuate our national inheritance together.

The upside was a surplus of the social capital necessary for a republic to function at its best.[29] Our debates were humanized, because although you may not have known your opposition, you saw them. You shared a common space as companions on a common enterprise. And when there were disagreements, you needed at least a modicum of courage, respect, and restraint—because both sides were looking directly into the eyes of another person.

But what began with television accelerated with social media, and now when you hold a screen in your hand, often the only eyes you will see are those found in the reflection of that screen—your own.

When we see only ourselves, it's hard to see past ourselves. Or as George Hawley recently wrote, "Cross-party dialog is . . . effective in instances of face-to-face communication, where people are likely to practice basic norms of civility," but the "online world of anonymous or semi-anonymous social media and comment sections, where partisan hyperbole is the norm, is unlikely to foster such positive results."[30]

Among the practitioners of that partisan hyperbole are fanatics on both sides, including people who called themselves "the resistance,"[31] as if they were in occupied France, or a Star Wars movie.

---

29. *See generally* Paul Lichterman, *Social Capital or Group Style? Rescuing Tocqueville's Insights on Civic Engagement*, 35 THEORY & SOC'Y 529 (2006).

30. George Hawley, *Our Partisan Future?*, L. & LIBERTY (Aug. 28, 2023), https://lawliberty.org/book-review/our-partisan-future/ [https://perma.cc/S95P-4CWE]; *see also* Jonathan Haidt, *Why the Past 10 Years of American Life Have Been Uniquely Stupid*, ATLANTIC (May 2022).

31. *See, e.g.*, *The Resistance with Keith Olbermann*, GQ, https://www.gq.com/video/series/the-closer-with-keith-olbermann [https://perma.cc/E4WT-8NEP]; Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html [https://perma.cc/H5MW-PRPP]; Kenneth P. Vogel, *The 'Resistance,' Raising Big Money, Upends Liberal Politics*, N.Y. TIMES (Oct. 7, 2017), https://www.nytimes.com/2017/10/07/us/politics/democrats-resistance-fundraising.html [https://perma.cc/UJF9-24UR].

In a recent Pew poll, 71 percent of Democrats said they wouldn't even date a Trump voter, and 51 percent of Republicans said they wouldn't date a Clinton voter.[32]

A social media landscape that rewards the loudest voice and pits people against each other is one reason why the political is so often personalized, and the personal is so often politicized. Because it's not just dating. Take sports:[33] Are you going to stand for the national anthem?[34] And how many national anthems will there be today?[35] Or your morning coffee: Are the beans fair trade?[36] Is Starbucks anti-union?[37] Or is it only anti-Christmas?[38] I bet Howard Schultz wishes we'd just pick a lane.

Somehow it's even video games—and not just their content, like in the good old days of Mortal Combat II. No, now *Hogwarts Legacy* is being boycotted, and banned from competitions.[39] These are the

---

32. Anna Brown, *Most Democrats who are looking for a relationship would not consider dating a Trump voter*, PEW RSCH. CTR. (Apr. 24, 2020), https://www.pewresearch.org/short-reads/2020/04/24/most-democrats-who-are-looking-for-a-relationship-would-not-consider-dating-a-trump-voter/ [https://perma.cc/R5R8-XWGG].

33. Dave Zirin, *The New Era of Backlash in Sports and Politics*, The Nation (Mar. 1, 2023), https://www.thenation.com/article/politics/sports-politics/ [https://perma.cc/UP8B-LLBJ].

34. Lindsey Kagawa Colas, *Why Brittney Griner Will Stand for the National Anthem This Year*, TIME (May 19, 2023), https://time.com/6281073/brittney-griner-national-anthem-stand/ [https://perma.cc/73SE-6P58].

35. Ryan Gaydos, *Black national anthem at Super Bowl stirs debate on social media*, FOX NEWS (Feb. 12, 2023), https://www.foxnews.com/sports/black-national-anthem-super-bowl-stirs-debate-social-media [https://perma.cc/9GEF-L9NW].

36. *Coffee should be* more, https://www.boycottcoffee.com [https://perma.cc/4QWE-HRVB].

37. Megan K. Stack, *Inside Starbucks' Dirty War Against Organized Labor*, N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/opinion/starbucks-union-strikes-labor-movement.html [https://perma.cc/QL4E-FXZW].

38. Whitney Filloon & Brenna Houck, *A Brief History of Starbucks' Holiday Cup Controversies*, EATER (Nov. 5, 2018), https://www.eater.com/2015/11/10/9705570/starbucks-holiday-red-cups-controversy-history [https://perma.cc/WR47-PHDZ].

39. Jenna Benchetrit, *The new Harry Potter game is a hit. Here's why some trans gamers wish it wasn't*, CBC (Mar. 4, 2023), https://www.cbc.ca/news/entertainment/hogwarts-legacy-controversy-explained-1.6765491 [https://perma.cc/2USY-D7U9]; Hope Bellingham, *Leading speedrunning event bans Hogwarts Legacy and all other Harry Potter games from future events*, GAMESRADAR+ (Feb. 20, 2023),

kinds of tournaments where adults play video games for millions of dollars—or for charity. That hardly seems like a place for politics, but welcome to the rabbit hole.

Is all of this the fault of social media? Of course not. But the success of social media is both a cause of the disease, and a symptom. And the disease is dangerous. Everywhere you look, unifying institutions and democratic norms are dismissed and disparaged with the arrogance of a teenager who just discovered Howard Zinn. Western Civilization? Oppressive.[40] America? Racist.[41] The Senate?[42] The Electoral College?[43] The Supreme Court?[44] Illegitimate, every one of them.

The effect is, to say the least, destabilizing. It tears at the partnership that makes total strangers into a functioning society—a partnership that took generations to form—"a partnership," as Burke said, "not only between those who are living, but between those who are dead, and those who are to be born."[45]

And so I return to the place I began—our inheritance. This partnership we call America, it's a hell of an inheritance. And it depends on institutions like the family, houses of worship, and an

---

https://www.gamesradar.com/leading-speedrunning-event-bans-hogwarts-legacy-and-all-other-harry-potter-games-from-future-events/ [https://perma.cc/2TK9-PF35].

40. Simon Kennedy, *The revealed and the hidden: Reconceiving Western civilization*, AUSTL. BROAD. SERV. (Oct. 27, 2020), https://www.abc.net.au/religion/revealed-and-hidden-reconceiving-western-civilisation/12821176 [https://perma.cc/UXL7-QE46].

41. Rashawn Ray, *Is the United States a racist country?* BROOKINGS (May 4, 2021), https://www.brookings.edu/articles/is-the-united-states-a-racist-country/ [https://perma.cc/8X74-VARR].

42. Dylan Matthews, *The Senate is so crazily designed it would be literally illegal for a US state to copy it*, VOX (Dec. 13, 2015), https://www.vox.com/policy-and-politics/2015/12/13/9910796/senate-reynolds-sims [https://perma.cc/HT6F-8LGV].

43. *Outgrowing the Electoral College*, PURDUE POL'Y RSCH. INST. BLOG (Dec. 1, 2020), https://www.purdue.edu/discoverypark/ppri/blog/outgrowing-the-electoral-college/ [https://perma.cc/GM8M-YBJ9].

44. David Smith, Democrats fight to expand a 'broken and illegitimate' supreme court, GUARDIAN (May 21, 2023), https://www.theguardian.com/law/2023/may/21/supreme-court-expansion-democrats [https://perma.cc/L89B-MTDL].

45. EDMUND BURKE, OXFORD ESSENTIAL QUOTATIONS (4th ed. 2016), https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00002268 [https://perma.cc/UB6R-MUSK].

independent judiciary—to name just a few institutions for which social media influencers often have little patience and even less understanding.

There is, however, good news: Not only do I know that we can do better, but I believe most of us want to do better. Professor Dan Epps, who I mentioned earlier, and who was a year ahead of me here at HLS, recently said that he tries to be a "little bit less online" so that he can "come up with the way he thinks independently."[46] I think almost all of us, myself included, would be better off following his lead and aiming to be a "little bit less online."[47]

So if you can, get off social media. But if you can't, just try to cut back. And at the very least, approach it with caution, and reject the social media mentality that will never understand what even Mike Tyson understood when he said: "Everybody you fight is not your enemy."[48]

And if I you'll permit me one more piece of related advice: Be hopeful. It's easy to despair when you're doom scrolling—or being attacked on social media for something you said in class—or for joining the Federalist Society. But despair is an accelerant for tribalism, cynicism, and burn-it-all-down-ism—three plagues, inflamed by social media, and found at either end of the ideological spectrum.

Despair is a choice, and it's an easy choice. But hope too is a choice.

Chamberlain chose hope on Little Round Top. And so did the rest of the 20th Maine.

I suppose if you've ever seen *The Shawshank Redemption*, you know that Andy chose hope too—because he knew it was "a good thing . . . maybe the best of things."[49]

---

46. *My Despised World*, DIVIDED ARGUMENT, at 01:44 (July 21, 2023) https://www.dividedargument.com/episodes/my-despised-world [https://perma.cc/7G6M-C5R8].

47. *Id.*

48. Mike Tyson, *Everybody that you fight is not your enemy & everybody that helps you is not your friend*, YOUTUBE (Sept. 2, 2022), https://youtu.be/9Du7tkUq0yg?si=Wdyr0OjmoHQ_oS2Z.

49. Shawshank Redemption, *Hope is a good thing*, YOUTUBE, https://youtu.be/9K30e9O3Nng?si=EcXN8DwSEOc9WHT4&t=6.

Saint Peter chose hope. A future clerk recently reminded me that after Peter denied Jesus, he could have despaired, as Judas did. But Peter went on to lead the Church, because he had hope that there is no sin too great for God to forgive—that there is nothing too crooked for Him to make straight.

My childhood hero, Ronald Reagan, was one of our most hopeful presidents, and it's fitting that his last big speech was called, "America's Best Days Are Yet to Come."[50] I gave it at speech tournaments in middle school, and today it hangs in my home office. In it he said, "A fellow named James Allen once wrote in his diary, 'many thinking people believe America has seen its best days.' He wrote that July 26, 1775."[51]

I want to conclude with two more people who chose hope. One was my boss, and one was the grandmother of my wife's boss. After I started law school here, my wife went to work across the river for the Democratic Governor, Deval Patrick. When he was a kid, his grandma used to tell him: Don't say we're poor; say we're broke—because broke can be fixed.[52]

His grandma chose hope.

And so has my former boss, Justice Kavanaugh, in spite of everything. Hanging in his chambers is a replica of the painting that his old boss, George W. Bush, kept in the Oval Office. The painting is titled "Rio Grande," and it shows the east side of the Franklin Mountains, beyond the desert and past a prominent cactus.[53]

I was just out of high school in August of 2000 when I watched from the convention hall in Philadelphia as George Bush concluded his acceptance speech with an explanation of that painting. He said, "My friend, the artist Tom Lea of El Paso, Texas, captured the way

---

50. Ronald Reagan, Speech to the 1992 Republican National Convention, *America's Best Days Are Yet to Come* (Aug. 17, 1992), https://teachingamericanhistory.org/document/speech-to-the-republican-national-convention/ [https://perma.cc/AHR5-Z2MJ].

51. *Id.*

52. Editorial, *Broke, not poor*, BOSTON GLOBE (Nov. 19, 2018), https://www.bostonherald.com/2009/01/16/broke-not-poor/ [https://perma.cc/XJQ2-G4JU].

53. Tom Lea, *Rio Grande* (1954), https://www.digie.org/en/media/12376 [https://perma.cc/LZ6K-MYW8].

I feel about our great land, a land I love. He and his wife, he said, 'live on the east side of the mountain. It's the sunrise side, not the sunset side. It is the side to see the day that is coming, not to see the day that has gone.' Americans live on the sunrise side of the mountain. The night is passing, and we're ready for the day to come."[54]

Whether your politics are more like Deval Patrick's or more like George Bush's, my wish for you is that you will choose hope. I do not know when this long night of tribalism, cynicism, and burn-it-all-down-ism will begin to pass. But I know I'm ready for the day to come.

54. *El Paso artist Tom Lea dies after fall*, CHRON (Jan. 30, 2021), https://www.chron.com/news/houston-texas/article/el-paso-artist-tom-lea-dies-after-fall-2000476.php [https://perma.cc/KT87-ZDQZ].

POLITICAL RIVALRIES AMONG THE STATES, INCOMMENSURABILITY, AND THE DORMANT COMMERCE CLAUSE

R. GEORGE WRIGHT*

INTRODUCTION

Why might the Supreme Court in *National Pork Producers Council v. Ross*[1] be compared to Penelope,[2] Antigone,[3] Abraham,[4] and COVID-19 policymakers?[5] They all weighed choices in which the options could not be placed on any common scale to measure their choice-worthiness. These problems of incommensurability, sometimes likened to comparing apples and oranges, permeate the law. Sometimes, courts recognize some version of this general problem of incommensurability;[6] on other occasions, courts fail to recognize or discuss the problem.[7]

---

* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law. For Mary Theresa. Love's not Time's fool.

1. 143 S. Ct. 1142 (2023).

2. *See infra* note 95.

3. *See infra* notes 99–100 and accompanying text.

4. *See infra* note 113.

5. *See infra* notes 114–115 and accompanying text.

6. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1153 (11th Cir. 2022); United States v. Cabello, 33 F.4th 281, 293 (5th Cir. 2022); Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd., 943 F.3d 265, 270 (5th Cir. 2019).

7. *See* R. George Wright, Counterman v. Colorado: *True Threats, Speech Harms, and Missed Opportunities,* 99 IND. L.J. 27 (2023) (analyzing the recent "true threat" speech case of *Counterman v. Colorado*, 143 S. Ct. 2106, 2114–17 (2023)).

Unsurprisingly, the Court in *Ross* made little progress toward understanding the fundamental problems of incommensurability posed by weighing states' prerogatives against each other.[8] Such problems are, after all, partly philosophical. However, the Court's framing of the dormant commerce clause and (lack of) incommensurability analysis in *Ross* has swung open the door to unattractive future consequences, particularly inflammation in state-level political, moral, and cultural polarization and rivalry. Herein, I seek to explain why, following *Ross*, courts need a more robust paradigm for resolving incommensurability problems. Drawing on prominent examples of incommensurability problems—from the everyday, judicial, and literary realms—I then seek to describe what such a paradigm might look like.

I. THE DORMANT COMMERCE CLAUSE DILEMMA

A. Ross *Limited the Dormant Commerce Clause to Economic Protectionism*

Ross involved a dormant commerce clause challenge by out-of-state pork producers to a California sales rule.[9] The California law in question prohibited the in-state sale, by both out-of-state pork producers and the few in-state pork producers, "of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around."[10] Writing for the Court, Justice Gorsuch first determined that the California rule did not violate the dormant commerce clause principle that "no State may use its laws to discriminate purposefully against out-of-state economic interests."[11] Justice Gorsuch noted that states have long adopted at least some interest in state animal welfare,[12] including concerns for the mobility of pigs.[13] The evidence in *Ross* indicated

8. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023).

9. *See id.* at 1149. The rule resulted from a popular ballot initiative and thus departed from any simple model of legislated, in-state industry protectionism. *Id.* at 1150.

10. *Id.* at 1149.

11. *Id.* at 1150.

12. *Id.*

13. *Id.*

that twenty-eight percent of the industry had "converted to some form of group housing for pregnant pigs" to address some of these mobility concerns.[14] And there was at least some modest amount of California in-state pork producers who would bear compliance costs alongside their out-of-state peers.[15]

Writing for the Court, Justice Gorsuch recognized that the California rule could, at least in theory, be set aside by a legitimate act of congressional preemption under the Supremacy Clause.[16] But in the absence of any claim of congressional preemption, Justice Gorsuch framed the dormant commerce clause as concerned with questions of in-state "economic protectionism—that is, regulatory measures to benefit in-state economic interests by burdening out-of-state competitors." [17]

Thus the Court invoked the dormant commerce clause not to referee the States' conflicting cultural, moral, and political differences in general, but rather to control state-level economic rivalry and fair economic competition within a federal system.[18] The Court left open the possibility that cultural, moral, and political differences could be weighed more holistically when it suggested that the Constitution presumes that "the peoples of the several [S]tates must sink or swim together."[19] But, the Court applied this principle only

14. *See id.* at 1151.

15. *See id.* A related example is the relatively modest burden on in-state truckers to comply with the weight and size requirements at issue in *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938). *But cf.* Maine v. Taylor, 477 U.S. 131, 151–152 (1986) (upholding a prohibition on importing baitfish into Maine even in the absence of any meaningful burden on in-state baitfish transactions).

16. *Ross,* 143 S. Ct. at 1152.

17. *Id.* at 1153 (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (internal quotation marks omitted). For an interestingly distinct approach and result, see the Indiana vaping regulation case of *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 827 (7th Cir. 2017).

18. *See Ross,* 143 S. Ct. at 1152–53.

19. *Id.* at 1153 (quoting Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (alteration in original) (internal quotation marks omitted)).

in the narrow context of selfish state economic protectionism.[20] Indeed, nowhere in the opinion did the Court seem to wrestle with the broader cultural, political, or moral rivalries and conflicts among the states that have interstate commerce forms and effects.

To be fair to the *Ross* Court, the usual dormant commerce clause cases have thus far dealt with economic disputes. The typical situation giving rise to such a case occurs when out-of-state producers sell a qualitatively better (or lower-priced) version of some product offered for sale by in-state producers. One classic case arose from economic competition between North Carolina apple growers and Washington apple growers, given the latter's generally higher reputation for apple production.[21]

But our political culture has evolved since those cases were decided. Moral, cultural, or political rivalry, as distinct from economic product or service competition, do not fit the typical commerce clause paradigm. Yet, over the coming years, competition among states implicating the dormant commerce clause will likely increasingly involve opposed moral, political, and cultural ideas, as the very notion of a culture war suggests.[22] Moral, cultural, and political competition and conflict among the states reflect the corresponding moral, cultural, and political judgments held largely by official state political actors and their key constituencies. The particular ideas at stake may, of course, have been initially developed by private actors, within or outside of the state in question.

---

20. *See id.* The Court considered States' prioritizing their in-state producer interests by disadvantaging out-of-state producers. *See id.* Thus the States are to conform to the model of an "interconnected national marketplace." *Id.* at 1156.

21. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

22. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991). *See also* ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS (2d ed. 2019); STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018); JONATHAN ZIMMERMAN, WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS (2d ed. 2022). *But cf.* Andrew Anthony, *Everything you wanted to know about the culture wars—but were afraid to ask,* GUARDIAN (June 13, 2021), https://www.theguardian.com/world/2021/jun/13/everything-you-wanted-to-know-about-the-culture-wars-but-were-afraid-to-ask [perma.cc/TWU9-ZTFB] (describing a poll in which most British respondents were unclear, at best, on the meaning of the 'culture war' term).

A classic economic dormant commerce clause restriction involves economic retaliation by states to answer marketing restrictions imposed by a commerce-restricting state.[23] To illustrate, imagine that State A taxes the in-state sale of widgets made in State B, and State B then imposes a retaliatory tax on the in-state sale of widgets made in State A. In contrast, moral, political, or cultural competition affecting interstate commerce is more likely to involve state-imposed commerce requirements that are unknown in, or radically opposed by, the governments of some other states.[24] One state may thus seek to change the culture of another state, with the second state then perhaps retaliating by seeking to impose its own contrary values, in one respect or another, on the first state. While our state economic markets are indeed strongly interconnected,[25] so, in substantially different ways, are the more metaphorical state-level 'markets' in culture, morality, and public policy.[26]

In some respects, it may be quite sensible for purely economic dormant commerce clause jurisprudence to allow "'different communities' to live 'with different local standards.'"[27] But we then need some explanation why a similar logic should not, within limits, apply to interstate moral, political, and cultural rules affecting

23. *See Ross,* 143 S. Ct. at 1154–55.

24. *See infra* Parts III–IV. A state might also retaliate by seeking to impose, on an offending state, its own moral policy in a different subject area of greater interest to one or both states.

25. *See Ross,* 143 S. Ct. at 1156.

26. For discussions of the misleading metaphor of a 'marketplace' of ideas, see Morgan N. Weiland, *First Amendment Metaphors: The Death of the "Marketplace of Ideas" and the Rise of the Post-Truth "Free Flow of Information",* 33 YALE J.L. & HUMANS. 366 (2022); David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance,* 16 HARV. L. & POL'Y REV. 275 (2022); Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law,* 24 COMM. L. & POL'Y 437 (2019); Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory,* 94 NOTRE DAME L. REV. 1725 (2019); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas,* 90 N.Y.U. L. REV. 1160 (2015); Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas,* 21 S. CAL. INTERDISC. L. J. 1 (2011). Classically, *see* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing "free trade in ideas").

27. *Ross,* 143 S. Ct. at 1156 (quoting Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989)).

interstate commerce.[28] No satisfactory explanation exists. On the contrary, the logic that different communities can have different local standards should apply with equal force to a state's imposing commercial burdens largely, if not entirely, on other states on essentially moral, political, or cultural grounds, rather than for in-state producers' economic advantage.[29]

B. The Dormant Commerce Clause Should Also be Understood as Protecting Against Cultural Protectionism

Properly understood, the underlying dispute in *Ross* was about moral, rather than economic, protectionism. The cognizable economic interests that are affected within the state of California are those of the few local pig producers who are burdened along with out-of-staters.[30] Californians in general do not seek any evident economic or commercial benefit from the police power regulation in question. Instead, the California regulation focuses on the well-being of the animals, in-state or out-of-state. And in this, the regulation is not unique. Analogous concerns about horses,[31] foie gras products,[32] and sharks and shark fins[33] have also been litigated as dormant commerce clause challenges. Crucially, the perceived

---

28. The principle of valuing interstate comity, or state-level mutual respect and accommodation, is not confined to economic market transactions. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); Austin v. New Hampshire, 420 U.S. 656, 660–61 (1975).

29. *See infra* Parts III–IV.

30. *See Ross*, 143 S. Ct. at 1150–52.

31. See especially the illuminating dormant commerce clause case of *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007) (noting that, in contrast to cases such as *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1997), "[n]o local merchant or producer benefits from the ban on slaughter."). *See also* Empacadora de Carnes de Fresnillo v. Curry, 476 F.3d 326, 335 (5th Cir. 2007) ("[N]or does there appear to be any company that merely transports horsemeat through Texas.").

32. *See* Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta, 33 F.4th 1107, 1122 (9th Cir. 2022) ("Policymakers' statements about force feeding and foie gras point to the legislature's general intent to prevent complicity in animal cruelty . . . .").

33. *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1147 (9th Cir. 2015) ("The Shark Fin Law does not interfere with activity that is inherently national or that requires a uniform system of regulation. The purpose of the Shark Fin Law is to conserve state resources, prevent animal cruelty, and protect wildlife and public health.").

scope of legitimate state police power interests in health, welfare, safety, and morality, and the aggressiveness of their pursuit, have recently been expanding in many respects. Increasingly intensified political polarization promotes state-level moral, political, and cultural rivalries that have clear dormant commerce clause implications.[34]

Moral, political, and cultural polarization at the state level may at this point be self-reinforcing. That is, "[o]nce a state reaches a certain degree of political uniformity, it tends to repel those who disagree and attract fellow adherents, reinforcing its identity."[35] A state's main initial focus of policy reform may be on the low-hanging fruit within its own borders. But at some point, the costs of further moral, political, and cultural reform within the state begin to exceed the in-state costs of seeking to control the comparable behavior of private firms beyond the state's borders. There may seem to be a greater payoff, in terms of in-state moral, political, and cultural values, in incentivizing changed behavior by out-of-staters than in further pursuing merely in-state reforms.[36]

---

34. This problem is recognized by Justice Kavanaugh. *Ross,* 143 S. Ct. at 1172, 1174–76 (Kavanaugh, J., concurring in part and dissenting in part). For a sense of our exceptional political polarization at the state level, see, for example, Ronald Brownstein, *America Is Growing Apart, Possibly For Good,* ATL. (June 24, 2022), https://www.theatlantic.com/politics/archive/2022/06/red-and-blue-state-divide-is-growing-michael-podhorzer-newsletter/661377/ [https://perma.cc/ZUZ3-WCYN] (quoting Michael Podhorzer's argument that "[w]e are more like a federated republic of two nations: Blue Nation and Red Nation. This is not a metaphor; it is a geographic and political reality."). Of course, there are blue enclaves in red states, and vice versa. *See, e.g.*, Monica Potts, *Red States Are Fighting Their Blue Cities,* FIVETHIRTYEIGHT (Mar. 13, 2023, 6:00 AM), https://fivethirtyeight.com/features/how-red-states-are-fighting-their-blue-cities [https://perma.cc/5XEV-CPMX]; John Simpkins, *Blue Havens in Red States,* TEX. OBSERVER (Nov. 16, 2022, 11:34 AM), https://www.texasobserver.org/blue-havens-in-red-states/ [https://perma.cc/6AQH-T3RD].

35. Mark Pulliam, *California and Texas: The Blue and the Red?*, LAW & LIBERTY (Sept. 10, 2021), https://lawliberty.org/book-review/California-and-Texas-the-blue-and-the-red [https://perma.cc/6H9U-3RDC]. *See* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 41–47 (2009).

36. Further in-state reforms, however, may have special value as demonstrations of what is possible, above and beyond what may seem feasible elsewhere. And there may be value in being the first state to adopt any particular political or cultural reform.

As political and cultural polarization intensifies,[37] the perceived payoffs for lawmakers in seeking to export in-state values to other states, including through dormant commerce clause-type regulations, may increase. Further attempts at mere persuasive, non-coercive argumentation may seem pointless. Deference to and comity with politically antagonistic states may come to seem morally dubious. Distinctions between taking the cultural initiative and merely playing cultural self-defense may blur. Sheer hostility-based cultural antagonism between states may emerge.[38] Thus, attempts to transplant in-state values through general, non-discriminatory commerce regulations are poised to become increasingly frequent.[39] These increasingly common attempts to transplant state values will create prisoner's dilemma problems for states, which state lawmakers are likely willfully to ignore.[40]

At the moment, the states with the most power to transplant in-state values include California, Texas, and Florida, given their market size, wealth, and relative political homogeneity in our polarized political environment.[41] Florida's dominant official views on man-

37. *See generally* R. George Wright, *A Free Speech-Based Response to Media Polarization*, 18 FIU L. REV. 193, 193–95, 198–200 (2023).

38. *See id.*

39. For one general scenario, see Brynn Tannehill, *Why We're Barreling Toward a Legal War Between the States*, NEW REPUBLIC (March 15, 2023), https://newrepublic.com/article/171138/abortion-legal-war-states [https://perma.cc/DHT7-XU6M].

40. *See generally* Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYCLOPEDIA PHIL. (Apr. 2, 2019), https://plato.stanford.edu/entries/prisoner-dilemma [https://perma.cc/7RK7-W9GV].

41. *See, e.g.*, Mark Duggan & Sheila Olmstead, *A tale of two states: Contrasting economic policy in California and Texas*, STAN. INST. FOR ECON. POL'Y RSCH. (Sept. 2021), https://siepr.stanford.edu/publications/policy-brief/tale-two-states-contrasting-economic-policy-california-and-texas [https://perma.cc/224B-LC9T]; Noah Bierman, *California vs. Florida: A tale of two Americas*, L.A. TIMES (Jan. 18, 2023, 3:00 AM), https://www.latimes.com/politics/story/2023-01-18/florida-anti-california-newsom-desantis [https://perma.cc/25KF-LK3T]; Noah Bierman, *The divided states of America: Florida, California and the future of political polarization*, L.A. TIMES (Nov. 17, 2022, 7:14 AM), https://www.latimes.com/politics/story/2022-11-17/life-red-states-blue-states-different [https://perma.cc/MKG6-BT38]; Amy Walter, *DeSantis, Newsom and the Red/Blue State*

datory vaccination policies have already been subjected, unsuccessfully, to dormant commerce clause challenges.[42] But animal welfare[43] and vaccination policy[44] are hardly the only obvious subjects for state-level moral rivalries implicating the dormant commerce clause. The substantive subject-matter fields for such cases are doubtless evolving.[45] These contested policy areas have state-level strongholds and can be advanced through non-discriminatory state police power and health, welfare, and safety regulations that are intended to impact both local producers and out-of-state sellers with different priorities.

Moreover, reforms in these policy areas need not conflict with any individual or group-based fundamental constitutional right or other federal right that is currently recognized by the Supreme Court.[46] Thus state police power regulations along any of the above lines may, by intention or not, substantially but non-discriminatorily affect out-of-state enterprises and practices without substantially burdening any recognized constitutional right, or indeed any federal statute.

The hands-off approach taken in *Ross*[47] may seem unproblematic if the dormant commerce clause is thought to be aimed merely at

---

Divide, COOK POL. REP. (Jan. 11, 2023), https://www.cookpolitical.com/analysis/national/national-politics/desantis-newsom-and-redblue-state-divide [https://perma.cc/A7UJ-FKHX].

42. *See* Norwegian Cruise Line Holdings, Ltd. v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1133–35, 1141–54 (11th Cir. 2022).

43. *See supra* notes 31–33 and accompanying text.

44. *See infra* notes 114–115 and accompanying text.

45. For the moment, though, the obvious possibilities include conflicting state values and state policies over oil industry profit caps; gun control; employee health insurance coverage; abortion and abortifacient drug access; health-impairing food and drink sales; fuel efficiency standards; electric vehicle requirements; unionization; pay equity; transgender support; immigration and sanctuary policy; homelessness policy; minimum wages; corporate policy transparency; nuclear power; recycling; responsible investing; and the scope and requirements of workplace diversity, equity, and inclusion. This list will of course evolve over time.

46. This may, however, be true to a lesser degree in the area of gun control than in the area of abortion access. *Compare* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

47. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).

local economic and commercial favoritism, protectionism, or rivalries, as distinct from *interstate* moral, political, and cultural rivalries.[48] *Ross* focuses its discussion on economic and commercial interest balancing.[49]

But *Ross* would, unfortunately, allow states to attempt to coerce unreceptive out-of-state entities to adopt otherwise unattractive political and cultural policies, as long as those coercive effects also apply to in-state entities, and do not violate any currently recognized fundamental constitutional or other federal right.[50] This is likely to prove over time to be the most serious deficiency of the *Ross* hands-off approach.

Given our exceptional state-versus-state polarization, cultural rivalry, and values-based animosity, courts should not flinch from such cases, and should adjust the scope of the considerations they take into account in the relevant cases. It is uncontroversial, certainly, that a state's sheer discrimination against out-of-state firms is disruptive of the federal union and constitutionally objectionable.[51] But it is no longer the case, if, after the Civil War, it ever was, that our conjoined fates under a federal system can be confined to the purely economic and commercial interests of the individual states.[52]

---

48. *See, e.g.,* Foresight Coal Sales, LLC v. Chandler, 60 F.4th 288, 295 (6th Cir. 2023) (focusing on "economic Balkanization" and quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018). *See also* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 MICH. L. REV. 1091, 1092 (1986) (discussing the Supreme Court's focus on state economic protectionism). Of course, some out-of-state firms may actually welcome being required by a dominant state to adopt a policy they would otherwise be reluctant to embrace.

49. *See Ross,* 143 S. Ct. at 1142.

50. *See id.* Some state attempts to induce out-of-staters to adopt a particular social policy may eventually be held to violate some preemptive federal rule. These cases would involve federal preemption under the Supremacy Clause. *See* U.S. CONST. art. VI., cl. 2; Murphy v. NCAA, 128 S. Ct. 1461, 1479 (2018); Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

51. *See, e.g., Ross,* 143 S. Ct. at 1153 (discussing constitutional disvalue of sheer economic protectionism).

52. *See id.*

Instead we must, to a substantial degree, "sink or swim together"[53] in a federal system, while appreciating the obvious values of cultural and political diversity, progress, and competition. Sinking or swimming together is increasingly not simply a matter of purely commercial rivalries. We can collectively sink politically and culturally no less than commercially. The courts have, realistically, an indispensable role in avoiding undue interstate friction and the worst, most collectively self-defeating outcomes.[54]

Let us then continue to take for granted a substantial judicial role in discouraging sheer economic and commercial discrimination by particular states.[55] But let us also recognize the judicial role in regulating the increasingly important phenomenon of a state's seeking to coercively impose its own polarizing political values largely on out-of-state firms.

The crucial problem is that intense state rivalries over moral, political, and cultural issues, when aggressively pursued in the realm of interstate commerce, have just as much, if not greater, capacity for harm to the overall national interest than do purely economic and commercial rivalries among the states. The problems of state-level economic and commercial selfish rivalries and competitions were recognized early on.[56] But the judiciary has yet to appreciate the sheer gravity and growing importance of multi-directional state moral, political, and cultural imperialism, at least after the Civil War.

Understandably, there has historically been only limited interest in the problem of states' seeking, through police power regulations,

---

53. *Id.* (quoting Am. Trucking Ass'ns., Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005)).

54. *See, e.g.*, WILLIAM POUNDSTONE, PRISONER'S DILEMMA: JOHN VON NEUMANN, GAME THEORY, AND THE PUZZLE OF THE BOMB (1992) for the unfortunate but realistic logic of arriving at perverse outcomes that are less desirable for all the actors than otherwise would have been attainable.

55. *See Ross*, 143 S. Ct. at 1153.

56. *See, e.g.*, THE FEDERALIST NO. 7, at 62–63 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (1787) (cited in B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 230 (4th Cir. 2022) (Wilkinson, J., dissenting)).

to impose their own distinctive moral and political values on private entities operating primarily in other states.[57] Commonly, economic and commercial concerns, including rivalries and competitions, trumped cultural and political concerns that did not implicate constitutional rights. Thus, Alexis de Tocqueville argued as of 1835 that:

> [t]he passions that stir the Americans most deeply are commercial and not political ones, or rather they carry a trader's habits over into the business of politics. They like order, without which affairs do not prosper, and they set an especial value on regularity of mores, which are the foundation of a sound business.[58]

'Order' and 'regularity' of morals may not always correspond with whatever we take to be the best substantive moral principles. There is doubtless value in broadly and aggressively promoting, and not merely personally embodying, the highest moral and cultural values. But assuming that all states, including Texas, Florida, and California, can generally identify which substantive moral and cultural values should be aggressively promoted merely wishes away the entire problem of state-level moral and cultural conflict.

Closer to our own time, President Calvin Coolidge echoed de Tocqueville in arguing that "[a]fter all, the chief business of the American people is business. They are profoundly concerned with producing, buying, selling, investing and prospering in the world."[59] Perhaps this description was reasonably accurate a century ago. But it is plainly less than accurate—or at least incomplete—today, under the intensified political polarization on display in our various red-state-versus-blue state conflicts.[60]

---

57. Movements for the abolition of slavery and for the emancipation of women of course ran up against not merely the practices of out-of-state private businesses, but also the federal and state constitutional and state statutory requirements.

58. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (George Lawrence trans., Doubleday & Co. 1969) (1835).

59. Ellen Terrell, *When a quote is not (exactly) a quote: The Business of America is Business Edition,* LIBRARY OF CONGRESS BLOGS: INSIDE ADAMS (Jan. 17, 2019), https://blogs.loc.gov/inside_adams/2019/01/when-a-quote-is-not-exactly-a-quote [https://perma.cc/SBM3-JXFB] (quoting President Coolidge's address to the American Society of Newspaper Editors on Jan. 17, 1925).

60. *See supra* note 34.

One way of recognizing the problem is to appreciate that the underlying logic of the commerce clause extends well beyond purely commercial concerns. In a federal system, there are inevitably non-economic costs, as well as benefits, to "unceasing animosities"[61] among and between states. Actions by states that are "destructive of the general harmony"[62] impose costs whether they are motivated by selfish economic rivalries or cultural or moral disputes.

It has been said that the "dormant commerce clause prevents a state from 'project[ing] its legislation' into another state."[63] There is a broader constitutional interest in imposing "restraint on state action in the interests of interstate harmony."[64] Here again, though, this policy logic cannot be confined merely to selfish commercial and economic rivalries, in which states attempt to avoid the economic burdens they would impose on residents of other states. Trade, after all, is not all that deeply matters. Particular states—even those as morally, politically, and culturally divergent as California and Florida –- do not seek to impose requirements on out-of-state entities while themselves avoiding living by the same requirements. It is, for example, not as though California seeks humane living conditions for pigs in other states that may be sold in California, while ideally seeking to exempt the California in-state producers from the same burdens.[65]

In this crucial respect, then, *Ross* directly and inevitably facilitates harms to the most basic values underlying the dormant commerce clause cases, where the regulations do not discriminate against out-of-staters or impair currently recognized constitutional or other federal statutory rights. Such regulations are safe from judicial examination under *Ross* as long as they take the form of collectively

61. *B-21 Wines,* 36 F.4th at 230 (quoting James Madison).

62. *Id.* (quoting James Madison).

63. Online Merchs. Guild v. Cameron, 995 F.3d 540, 559 (6th Cir. 2021) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) (alteration in original)).

64. United Bldg. & Const. Trades Council v. City of Camden, 465 U.S. 208, 220 (1984) (referring in particular to the Article IV privileges and immunities clause).

65. *See Ross,* 143 S. Ct. at 1149. Consider also virtually any of the hot-button political issues of the day. Hypocrisy in state regulation is hardly the typical issue in such cases.

destructive culture wars and intense state-level polarization, as distinct from in-state commercial protectionism. The *Ross* Court thus facilitates and encourages further polarization, in numerous important policy contexts, most of which Congress will inevitably not address.[66]

II. THE SOLUTION: SOLVING INCOMMENSURABILITY PROBLEMS

A. The Court Can Still Weigh States' Incommensurable Interests Under the Dormant Commerce Clause

Justice Gorsuch's opinion in *Ross* turned from the question of pure discrimination against out-of-state products to one of interest balancing. In particular, Justice Gorsuch attempted to balance a state regulation's adverse effects on interstate markets against the value of a state's police power interests, as promoted by the regulation in question.[67] This familiar balancing test compares the constitutional weight of a regulation's burden on out-of-staters against the police power value obtained for the enacting state by the regulation of commerce in question.[68] Strikingly, Justice Gorsuch attempted to limit judicial interest balancing, as opposed to aggressive judicial responses to sheer discrimination against out-of-state interests.[69] But as noted by Justice Kavanaugh, "six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations."[70] So dormant commerce clause interest balancing, as

66. For further discussion of our exceptionally intensive, and extensive, political polarization, see, for example, PETER T. COLEMAN, THE WAY OUT: HOW TO OVERCOME TOXIC POLARIZATION (2021); DANIEL F. STONE, UNDUE HATE: A BEHAVIORAL ECONOMIC ANALYSIS OF HOSTILE POLARIZATION IN US POLITICS AND BEYOND (2023); Vyacheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, *The Political Polarization of Corporate America* (Chi. Booth Research Paper No. 22–14, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4154770 [https://perma.cc/7JGD-ZMTV].

67. *See Ross*, 143 S. Ct. at 1157 (discussing the balancing that is arguably legitimized by, for example, Pike v. Bruce Church, Inc., 397 U.S. 174 (1970)).

68. *See id.*

69. *See id.* at 1157–59.

70. *See id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

opposed to rejecting only sheer discrimination in favor of in-state producers, may be alive and well in some contexts.

As *Ross* indicates, a majority of the current Court recognizes, in one way or another, problems of incommensurability in the dormant commerce clause cases.[71] Justice Gorsuch notably invokes Justice Scalia's reference to the supposed futility of attempting to determine "'whether a particular line is longer than a particular rock is heavy.'"[72] In such a case, according to Justice Gorsuch, "the competing goods before us are insusceptible to resolution by reference to any juridical principle."[73] Justice Gorsuch then crucially cited the well-known incommensurability argument of Justice Scalia in *Bendix Autolite*.[74] In his own voice, Justice Gorsuch formulated the basic incommensurability problem in these terms:

> How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle.[75]

Justice Barrett declared that she "agree[d] with Justice G[orsuch] that the benefits and burdens of Proposition 12 are incommensurable."[76]

---

71. *See id.* at 1159–60; *id.* at 1167 (Barrett, J., concurring in part and dissenting in part); *id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part).

72. *Ross,* 143 S. Ct. at 1160 (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment)).

73. *Id.* at 1159–60

74. *See Bendix Autolite,* 486 U.S. at 897 (Scalia, J, concurring in the judgment). Lower courts have also cited Justice Scalia's language in *Bendix Autolite. See, e.g.,* Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1153 (11th Cir. 2022); United States v. Cabello, 33 F.4th 281, 293 (5th Cir. 2022); Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd., 943 F.3d 265, 270 (5th Cir. 2019).

75. *Ross,* 143 S. Ct. at 1159–60. Whether the lack of any "juridical" principle is thought to include any "reasonable" or "nonarbitrary" principle as well is here left unspecified. Not all entirely reasonable principles need also be narrowly "juridical" principles. But it may well be proper for courts to resolve cases through principles that are entirely reasonable, but not narrowly or specially "juridical" in their nature.

76. *Id.* at 1167 (Barrett, J., concurring in part).

Justice Gorsuch's concerns about judicial interest balancing and cost-benefit analysis included institutional decision-making disadvantages of a court; preservation of democratic legitimacy; and, crucially, questions of value incommensurability.[77] It is difficult to separate these concerns: questions of relative institutional competence, and of democratic legitimacy, themselves contribute to questions of incommensurability.[78]

Justice Gorsuch elaborated his theoretical, practical, and institutional competency concerns by explicitly referring to the competing goods in *Ross* as involving a problem of "incommensurability."[79] In any attempt at resolving the conflicting values, Justice Gorsuch declared that "[y]our guess is as good as ours."[80] In fact, given concerns for institutional competency and for democratic legitimacy, "your guess is *better* than ours."[81] That is, such incommensurable value choices are to be made, on whatever grounds, and however apparently arbitrarily, by "the people and their elected representatives."[82] Congress, in particular, is "better equipped than this Court to identify and access all the pertinent economic and political interests at play across the country."[83]

If legislatures are merely better than the Supreme Court in addressing these sorts of dormant commerce clause tradeoffs, being more likely to arrive at a better answer, then actually, the problem is one not of genuine incommensurability but of decision-making difficulty. Two conflicting values are not incommensurable if comparing them is merely difficult for most people. Whether Venus is bigger than Mars is difficult for most people to figure out on their own. But that does not make the planetary sizes incommensurable.

---

77. *See id.* at 1159–62.

78. *See id.*

79. *Id.* at 1160.

80. *Id.*

81. *Id.*

82. *Id.* Courts, perhaps more than legislatures, find *Pike i*nterest balancing to be "highly subjective," "very subtle," and difficult. Colon Health Ctrs. v. Hazel, 813 F.3d 145, 155–56 (4th Cir. 2016). *See also* Just Puppies, Inc. v. Frosh, 565 F. Supp. 3d 665, 716–17 (D. Md. 2021) (citing the work of Dean Erwin Chemerinsky).

83. *Ross,* 143 S. Ct. at 1161.

Not every problem that requires gathering large amounts of information is one of incommensurability.

Justice Gorsuch's reluctance to weigh competing interests under the dormant commerce clause provokes, as he recognizes, concern for power inequalities among the states.[84] Evidently, on Justice Gorsuch's view, the courts should not intervene in non-discriminatory dormant commerce cases to prevent interstate coercion. Justice Gorsuch, echoing Justice Kavanaugh, admits that "California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate."[85] But the problem of one or more states' seeking to non-discriminatorily leverage a policy change in other state remains unresolved, beyond the relatively rare instances of congressional preemption. Recognizing power inequalities among the states should put additional pressure on any desire to abstain from judicial balancing of competing interests.

Other Justices have also recognized the inevitability of confronting these problems. Chief Justice Roberts, acknowledging the view of Justice Gorsuch's three-member opinion for the Court that "balancing competing interests under *Pike* is simply an impossible judicial task," countered that he "certainly appreciate[d] the concern, . . . but sometimes there is no avoiding the need to weigh seemingly incommensurable values."[86] Justice Sotomayor reasoned that "courts generally are able to weigh disparate burdens and benefits against each other," and "that they . . . do so in other areas of the law with some frequency."[87]

---

84. *See id.* at 1163–64.

85. *Id.* at 1164 (citing *id.* at 1173–74 (Kavanaugh, J., concurring in part and dissenting in part).

86. *Id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part).

87. *Id.* at 1166 (Sotomayor, J., concurring in part). In response, Justice Barrett appears to adopt the incommensurability argument, if not fully, then at least in the weak sense that some legislative or popular moral policy judgment is required to overcome the kind of incommensurability in question. *See id.* at 1166–67 (Barrett, J., concurring in part).

At this point, one possible dividing line between cases involving incommensurable values is whether some fundamental constitutional right is involved. If no fundamental constitutional right is implicated, we might imagine that courts should generally defer to the relevant legislature. But if a fundamental constitutional right is indeed at stake, courts should, it might then seem, meaningfully review the legislative decision in question.[88]

Certainly, the initial focus of those Justices who are inclined toward judicially addressing incommensurabilities is on just such fundamental constitutional rights cases.[89] For example, Chief Justice Roberts points to the Court's willingness to somehow balance individual free speech rights against the conflicting public interest in the safety and environmental dimensions of public streets and sidewalks.[90] The point of enshrining a right as constitutionally fundamental is often to protect the underlying interests from unsympathetic legislative majorities, even if those legislative majorities weigh the incommensurable values differently than the courts.[91] Indeed, all of the tiers of scrutiny require weighing a government interest against a liberty infringement.[92]

It might seem, then, that in the absence of any fundamental constitutional rights claim, considerations of incommensurability ought to be left by the courts to the relevant state or federal legislatures. As discussed in this section, some Justices have worried that incommensurability poses substantial problems, at the very least, in the dormant commerce clause area. Such problems may seem to

---

88. For a classic exposition, see John Hart Ely, *Toward a Representation-reinforcing Mode of Judicial Review,* 37 MD. L. REV. 451, 451, 453 (1978), later developed in JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

89. *See Ross,* 143 S. Ct. at 1168 (Roberts, C.J., concurring in part and dissenting in part).

90. *See id.* (citing the classic content-neutral speech regulation case of *Schneider v. State*, 308 U.S. 147 (1939)).

91. For a classic, partly critical discussion, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986). For an inspirational judicial account, see *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that school children could not be required to salute the flag).

92. Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary,* 14 GEO. J.L. & PUB. POL'Y 475 (2016).

have no appropriate judicial resolution or may be somehow bypassed or ignored out of sheer practical necessity.

But taking this deferential course is a mistake; there exists a more structured approach to weighing incommensurable choices, which emerges from both our legal and literary canon.

B. Courts Can Draw on Everyday Experience to Inform a Framework for Solving Incommensurability Problems

1. Judges, Policymakers, and Individuals Must Solve Incommensurability Problems Everyday

Law, life, and literature are replete with incommensurable choices. The stakes in any case of incommensurable choice may range from trivial to immense or incalculable. In fact, the differences among incommensurable choice situations are as important as their commonalities. We might well say that there are, typically, incommensurable differences among incommensurable choice situations. But not all such problems defy reasonable, non-arbitrary, better-and-worse resolution.

As an initial matter, consider the incommensurabilities[93] involved in many ordinary judgments of the relative quality of alternative products, services, and performances that we make daily.[94] Or consider the trade-offs people make when making personal or familial decisions.[95] These problems can pose incommensurable tradeoffs, and yet people deal with them every day.

---

93. For possible degrees of incommensurability, see generally Alan Hájek & Wlodek Rabinowicz, *Degrees of commensurability and the repugnant conclusion,* 56 NOÛS 897, 897 (2021).

94. In the musical realm, consider attempting to measure, quantitatively, the ways in which Jascha Heifetz's violin playing exceeds that of Jack Benny.

95. A dramatic illustration of these sorts of incommensurable choices occurs in Homer's *Odyssey,* in which Penelope faces an ongoing, long-term choice between selecting, however incommensurably, from among her numerous marriage suitors, thereby preserving her dwindling estate from further depredations, or else remaining faithful to Odysseus, who has apparently perished at some point on his way home from the Trojan War. *See* HOMER, THE ODYSSEY (Emily Wilson trans., W.W. Norton & Co. 2018) (~700 B.C.).

Policymakers routinely confront, and deal with, these problems as well. For example, policymakers may need to draft optimal child support guidelines that account for special needs, ability to pay, and departures from guideline schedules.[96] Or they may need to resolve value conflicts between national security and respect for sincere or religious personal conscience, to create military draft laws like those at issue in *Gillette v. United States*.[97] There are countless additional incommensurability problems that policymakers might face.[98]

It is unsurprising, then, that fictional heads of state in our literary canon also confront these problems. Consider, by analogy, Antigone.[99] The edict of King Creon requires that Antigone not bury her deceased brother. Antigone faces immediate execution if she defies this decree. But complying with this decree would require Antigone to violate unwritten, and presumably eternal, law and to endure the painful prospect of eventual condemnation for her inaction by her predeceased family in the underworld.[100] Antigone thus faces an incommensurable choice between the death penalty in this life and eternal condemnation in the next.

Incommensurability problems are inherent in questions of legal interpretation. Consider Professor Ronald Dworkin's well-known

---

96. *See, e.g.*, E.A. Gjelten, *Calculating Child Support Under California Guidelines,* DIVORCENET, https://www.divorcenet.com/states/california/california_child_support_guidelines [https://perma.cc/BY82-CT76].

97. 401 U.S. 437 (1971).

98. Additional illustrations include: (1) cases of the scope and limits of Good Samaritan laws protecting at least non-reckless rescue attempts by innocent amateurs, blurring intuitive notions of right and wrong—for an example, see ATAC Team, *Good Samaritan Law: Can You Get In Trouble for Performing CPR?,* AM. TRAINING ASS'N FOR CPR (Mar. 14, 2024) https://www.uscpronline.com/blog/can-you-get-in-trouble-for-performing-cpr [https://perma.cc/KS5B-B99N]; and (2) the case of a conscientious abolitionist deciding whether to follow an existing fugitive slave law. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857).

99. SOPHOCLES, ANTIGONE 73 (Reginald Gibbons & Charles Segal trans., Oxford Univ. Press 2003) (~440 BCE).

100. *See id. See generally* Terrance McConnell, *Moral Dilemmas,* STAN. ENCYCLOPEDIA PHIL. (July 25, 2022), https://plato.stanford.edu/entries/moral-dilemmas [https://perma.cc/7S2X-BCJ7].

approach to legal interpretation.[101] Professor Dworkin's 'law as integrity' approach to legal interpretation involves what he thinks of as two separate considerations. On Professor Dworkin's interpretive theory, a judge must respect considerations of 'fit' as well as of 'justification.'[102]

Considerations of 'fit' require some sufficient degree of respect by the judge for how the relevant law has developed to its current state. The judge should respect that story, and not strike off in some entirely different but morally preferred legal direction.[103] On the other hand, law as integrity does not call for maximizing continuity and predictability in the law. The second consideration, that of justification, is at least equally crucial.

What Professor Dworkin calls 'justification' refers to the power of the legal interpretation in question to maintain, if not enhance, the political morality of the law and legal system.[104] The aim of the justification consideration is thus to cast the law, and the legal system, in the best moral light.[105] Professor Dworkin's approach thus requires some sufficient element of 'fit,' along with a more obviously moral element of 'justification.'

It is possible to try to avoid incommensurability problems in this context by claiming that that 'fit' is really just one aspect of 'justification,' and that political morality, as 'justification,' should incorporate the legitimacy that is provided by 'fit.' Even the most dramatic changes in constitutional rules must have some substantial, if previously underappreciated, grounding in the existing law in order to be justified overall. Judicial opinions overturning established constitutional precedents do not consist primarily of non-legal ethical arguments supported by citations to moral or legal philosophers.

---

101. See, for example, among other dedicated symposia, the contributions in Symposium, *Justice For Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book*, 90 B.U. L. REV. 465 (2010).

102. *See* RONALD DWORKIN, LAW'S EMPIRE 139, 239, 250, 255–57 (1986).

103. *See id.*

104. *See id.*

105. *See id.*

But Professor Dworkin's 'fit' versus 'justification' binary can hardly escape problems of incommensurability entirely. Suppose, for example, that a judge believes that the best political morality requires some sort of universal guaranteed minimum income.[106] Perhaps this rule might also pass some minimum required threshold degree of 'fit' with the existing law.[107] But judgments as to any threshold minimum degree of fit will be vague, largely subjective, and perhaps not far from arbitrary.

If we find that a threshold level of fit has indeed been met, we then face problems of commensurability. For example, it is hardly clear that a universally guaranteed minimum income, whatever its justification on moral or political-legal grounds, is also the best fit with existing law, including the current federal and state constitutional case law.[108] This likely conclusion opens the door to problems of incommensurability. If there is some minimum threshold degree of fit with prior law, should we then not care at all about any additional degrees of fit? What if a different judicial rule would gain us much more legitimizing fit, with only a trivial loss in moral justification?

Consider, for example, the possibility that a rule that falls just short of requiring a universal guaranteed minimum income would, according to the court in question, be a much better fit with the established law. In reality, though, no supposedly universal minimum income program is absolutely universal. Limits and exclusions are simply taken for granted, or uncontroversial at the moment. On these assumptions, a minimal loss in moral or politi-

106. *See, e.g., What Is UBI?*, STAN. BASIC INCOME LAB, https://basicincome.stanford.edu/about/what-is-ubi [https://perma.cc/WKY5-NLH5]; Philippe van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income,* 20 PHIL. & PUB AFFS. 101 (1991). *See also* ANNE ALSTOTT & BRUCE ACKERMAN, THE STAKEHOLDER SOCIETY (2000).

107. For a broader, related discussion, see David Lubin, *Incommensurable Values, Rational Choice, and Moral Absolutes,* 38 CLEV. ST. L. REV. 65, 76 (1990).

108. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (AFDC standard-of-need welfare case involving an equal protection challenge). *See also* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction,* 69 FORDHAM L. REV. 1821 (2001).

cal-legal justification would buy us a much better fit, enhancing legitimacy, authority, and rule of law values in that respect. The commensurability problems of any such tradeoffs between fit and justification thereby become apparent.[109]

2. People Can Solve Incommensurability Problems Even Without Having All the Relevant Information; Solving Dormant Commerce Clause Problems is no Different

To be sure, some incommensurability problems leave the chooser with insufficient information to decide between the competing outcomes. In such a case, the decision-maker's best course of action is to acquire additional relevant information, as suggested by Judges J. Skelly Wright and Harold Leventhal in *Ethyl Corp. v. EPA*.[110] But even if a chooser runs out of information, or a court "run[s] out" of the law,[111] we should hesitate to conclude, in even the most difficult cases, that the entire jurisdiction of ethics or law has really run out.[112] We, including judges, ought instead to strongly presume that some available choices are better than others.[113]

---

109. For a very brief exposition and critique of the underlying ideas of 'fit' and 'justification,' see Professor Lawrence Solum's entry in his very useful series of posts entitled *Legal Theory Lexicon,* in this instance *Legal Theory Lexicon 032: Fit and Justification* (September 19, 2021), https://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_1.html#:~:text=You%20can%20use%20%22fit%20and,Then%20move%20to%20justification [https://perma.cc/6QUZ-QUP9].

110. 541 F.2d 1 (D.C. Cir. 1976) (en banc). In the literary realm, consider, by analogy, Goethe's Faust, who could have benefitted from acquiring further choice-relevant information. *See* J.W. GOETHE, FAUST 183 (Walter Kaufmann trans., Anchor Books 1990) (1808).

111. Regina v. Dudley [1884] QB 273 (Eng.). *See also* Lon L. Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616 (1949) (describing hypothetical trapped cavers seeking timely rescue).

112. *See, e.g.,* Ralph McInerney, *The Teleological Suspension of the Ethical,* 20 THOMIST 295 (1957).

113. In the literary realm, Søren Kierkegaard's discussion of Abraham's response to an apparent divine command to sacrifice his son Isaac falls into this exceptional category. All other issues aside, if there are really cases in which doing the ethically justified thing is not clearly the overall right thing to do, we still need guidance as to when we are in fact facing such a rare case. *See* SØREN KIERKEGAARD, FEAR AND TREMBLING

Consider the information requirements involved in the context of COVID-19 lockdown policy decision making.[114] Based on inevitably minimal knowledge, COVID-19 lockdown policy had to somehow account for numerous, plainly relevant considerations, including: the number, age, and health conditions of those infected, with various degrees of severity; transmissibility questions; policy effects on many dimensions of basic equality and inequality; prevention of future pandemics; economic effects, both short and long term, domestically and globally; interactive effects and the tailoring of policies domestically and globally; policy effects on other forms of mortality and morbidity, including mental health; and recoverable and unrecoverable basic educational losses.[115]

No relevant choice in the COVID-19 lockdown policy context was ever binary. Rather, each choice was subject to gradation, the quick development of alternatives, and questions about reversibility or irreversibility. The various important incommensurabilities involved mutated and proliferated, in practically endless fashion. But few of us would largely give up on the idea of there being better and worse COVID-19 policies.

Incommensurability problems, whether we like to admit it or not, confront individuals, policymakers, and judges daily. Even if perfect knowledge of a solution is inaccessible, we still must resolve these problems.

(Alastair Hannay trans., Penguin Books 1986) (1843). The literature discussing the binding of Isaac is immense. For a very brief contemporary reference, see Clare Carlisle, *Kierkegaard's World, part 3: The story of Abraham and Isaac,* GUARDIAN (Mar. 29, 2010), https://www.theguardian.com/commentisfree/belief/2010/mar/29/kierkegaard-philosophy-abraham-isaac [https://perma.cc/3MLL-RFKB]. As translated above, Kierkegaard himself makes numerous references throughout his work to the idea of commensuration and incommensuration.

114. See, for example, among a massive and accruing literature, Jonas Herby, Lars Jonung & Steve H. Hanke, *A Literature Review and Meta-Analysis of the Effects of Lockdowns on COVID-19 Mortality,* JOHNS HOPKINS STUD. APPLIED ECON., No. 200 (Jan. 2022).

115. For a study of merely some of the relevant considerations, see, for example, Oliver C. Robinson, *COVID-19 Lockdown Policies: An Interdisciplinary Review,* 17 INTEGRAL REV. J. 5, 36 (2021). More abstractly, but crucially, a policy chooser would have to consider issues of immediate and long-term public trust while projecting strong, decisive leadership in a period of great public fear, anxiety, and uncertainty.

What we should sensibly expect of legal reasoning in dormant commerce clause interest balancing cases is not self-evident. The nature of appropriate judicial reasoning in such cases requires thoughtful inquiry. Courts, like the rest of us, may occasionally set their own standards of reasoning too high. As Blaise Pascal enjoined: "Do not try to demonstrate anything which is so clearly self-evident that there is no simpler way to prove it."[116]

More recently, the philosopher Anthony Kenny took up the theoretical problem of satisfactorily proving that the country of Australia really exists.[117] Kenny recognizes that it is possible to construct a cumulative case for a proposition, in which no single item of evidence is especially weighty or convincing.[118] Other persons may indeed come to a belief in Australia through a weighing of the evidence. But for himself, Kenny concludes that "[t]here are no other beliefs which I have which could be used to support the claim that Australia exists, which are better known to me, more firmly established in my noetic structure, than is that proposition itself."[119]

We do not generally regard the existence, or not, of Australia as a close or 'hard' question, as we might a particular dormant commerce clause interest balancing case. But even extreme difficulty or complexity need not imply that no judicial resolution is any more reasonable than any other. Professor Ronald Dworkin appreciates that some persons believe that "if no procedure exists, even in principle, for demonstrating what rights the parties have in hard cases, it follows that they have none."[120]

But to this, Professor Dworkin has a valuable response. Dworkin argues that such a view "presupposes . . . that no proposition can be true unless it can, at least in principle, be demonstrated to be true."[121] Dworkin then argues that "[t]here is no reason to accept

116. Blaise Pascal, *The Art of Persuasion, in* PENSÉES AND OTHER WRITINGS 193, 198 (Anthony Levi ed., Honor Levi trans., Oxford Univ. Press 2008) (1670).

117. *See* ANTHONY KENNY, WHAT IS FAITH?: ESSAYS IN THE PHILOSOPHY OF RELIGION 15–16 (1992).

118. *See id.*

119. *Id.*

120. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1978).

121. *Id.*

that thesis as part of a general theory of truth, and good reason to reject its specific application to propositions about legal rights."[122] In dormant commerce clause cases, no single answer may be demonstrably correct. But relatively detached judicial interest balancing in such cases may lead to a result that is more reasonable than other results and that better acknowledges and addresses state political, moral, and cultural conflicts.

We need not insist that Pascal, Kenny, or Dworkin are all precisely correct and that their insights entirely cover dormant commerce clause balancing. The point is instead that the availability of reasonable and non-arbitrary grounds for adjudicating non-discriminatory dormant commerce clause cases should not be ruled out merely because one or more versions of value incommensurability are involved.

At the level of the underlying theory, the idea of incommensurability comes in various versions and strengths.[123] One mainstream understanding has it that "[t]wo valuable options are incommensurable if . . . neither is better than the other"[124] and they are not equal in value. Incommensurability implies the lack of any common measuring stick for the options in question.[125]

In the absence of commensurability, it is often thought that there will be not merely persistent disagreement over which option to choose,[126] but "a significant element of *arbitrariness* in any particular choice.[127] A significant element of discretion in a choice need not mean, however, that no ultimate choice is any more reasonable than

---

122. *Id.*

123. *See, e.g.*, Hájek & Rabinowicz, *supra* note 93, at 897. For a broader overview, see generally Nien-hê Hsieh & Henrik Andersson, *Incommensurable Values,* STAN. ENCYCLOPEDIA PHIL. (July 14, 2021), https://plato.stanford.edu/entries/value-incommensurable/#:~:text=The%20possibility%20of%20incommensurable%20values,practical%20reason%20and%20rational%20choice [https://perma.cc/72LN-KFBF]; Francisco J. Urbina, *Incommensurability and Balancing*, 35 OX. J. LEGAL STUD. 575, 576 (2015).

124. JOSEPH RAZ, THE MORALITY OF FREEDOM 325 (1986).

125. *See, e.g.*, Joseph Boyle, *Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good,* 47 AM. J. JURIS. 123, 123 (2002).

126. *See* Martijn Boot, *Compromise Between Incommensurable Ethical Values*, COMPROMISES IN DEMOCRACY 121, 130 (S. Baume & S. Novak eds., 2020).

127. *Id.* (emphasis in the original).

the other alternative choices. But it has, admittedly, been prominently claimed to the contrary that "if two options are incommensurate then reason has no judgment to make concerning their relative value."[128]

If incommensurabilities are commonly encountered in the law, and if incommensurability is thought to preclude court judgments that are more reasonable than alternative judgments, we would indeed be left with a remarkably unfortunate state of affairs. Consider, for perspective, the conflict between rewarding effort, or desert, or merit, on the one hand, versus claims of basic need on the other.[129] The philosopher Alasdair MacIntyre holds that "our pluralistic culture possesses no method of weighing, no rational criterion for deciding between claims based on legitimate entitlement against claims based on need,"[130] given the incommensurability of such claims.[131]

As we have seen, though, there are importantly different ways in which one's available options may be incommensurable,[132] in lacking a common cardinal or ordinal measure.[133] Some real incommensurabilities may be benign. Incommensurability may often be compatible with a broader sort of reason-based comparability.[134] Two or more options may be incommensurable, but still meaningfully comparable in some relevant, reasonable, non-arbitrary way that can legitimately be pursued by the courts.[135] Choices by courts among incommensurable values can thus still be distinctly "supported by reason,"[136] in the sense of rational preferability.[137]

---

128. RAZ, *supra* note 124, at 324.

129. As discussed classically in JOHN RAWLS, A THEORY OF JUSTICE (1972).

130. *See* ALASDAIR MCINTYRE, AFTER VIRTUE 246 (2d ed. 1984).

131. *Id.*

132. See the familiar cases discussed *supra* Part III. The Solution: Solving Incommensurability Problems.

133. *See id.*

134. *See, e.g.,* Ruth Chang, *Incommensurability (and Incomparability), in* THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS 2591, 2591 (Hugh LaFollette ed., 2013).

135. *See, e.g.,* Virgilio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision,* 31 OX. J. LEGAL STUD. 273, 273 (2011).

136. *See id.*

137. Urbina, *supra* note 123, at 576.

Consider first a non-legal case of incommensurable but sensible, more or less reasonably eligible options.[138] Suppose, as in an example presented by Professor Michael Stocker, that one must get across town.[139] One might more or less reasonably walk, attempt to hitchhike, take an Uber or a taxi, drive oneself, take a bus or subway, or ask for a ride from a friend or family member.[140] There are time, weather, cost, and safety constraints, as impossible as it is to be precise about such matters.[141] We can, however, at least make some entirely reasonable judgments as to the tradeoffs among the dimensions we care most about.

Note in particular that when we choose, perhaps, to wait some time for a relatively cheap but crowded bus, we recognize that we may, ultimately, have made a genuinely wrong choice. Or else a good choice, all things considered. And we certainly need not feel that we have just arbitrarily spun the wheel of choice, casting distinctive reason and sensible argument to the wind. No single choice is clearly and indisputably superior to all, or perhaps even any, alternatives. We may think of our circumstances as presenting a complex 'hard' case. But some options may better reflect our basic values, logic, and underlying priorities than others.

In the legal context, courts inevitably face complex, undeniably incommensurable choices. Consider the circumstances of a court that is tasked with the proper tort law compensation of an injured plaintiff. Ideally, the plaintiff would be somehow restored to where they were before the accident, or where they would be indifferent as between being uninjured and being injured but with some financial compensation. There is no real commensuration between the lifelong use of a limb and some specific amount of compensatory

---

138. *See id. See also* FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 39 (2018) (it can be "reasonable to choose one alternative rather than another when the alternatives are incommensurable").

139. *See* MICHAEL STOCKER, PLURALITY AND CONFLICTING VALUES 178–79 (1990).

140. *See id.*

141. *See, e.g.*, Timothy Endicott, *Proportionality and Incommensurability, in* PROPORTIONALITY AND THE LAW 311, 323 (Grant Huscroft, Bradley W. Miller & Gregoire Webber, eds., 2014).

damages. But some compensatory arrangements are plainly and indisputably more reasonable than others. In a given case, a court can reasonably conclude that damages of one dollar, or a hundred dollars, or a thousand dollars, all unreasonably undercompensate the plaintiff.[142] And a court can also reasonably declare, given the facts of the case, that damages of one million dollars, or ten million dollars, would amount to unreasonable overcompensation.[143]

Judgments by courts in cases of incommensurable values will typically not take the form of a narrow or rigid cost-benefit analysis, except where that is required by a statute or the Constitution. In adjudicating among alternatives, costs and benefits should presumably be accounted for in a responsible, creative, thoughtful way in which even symbolism and expressivism may play a role. Cultural myopia, faddism, and the cognitive and emotional biases and fallacies,[144] should of course be avoided. Multiple perspectives, on multiple dimensions, may be considered. The interests of third parties and of future generations may be relevant as well. Sheer inconsistency, obvious or subtle, should plainly be avoided. The epistemic virtues,[145] including that of epistemic humility,[146] should be

142. *See id.* at 323–25.

143. *See id.* There is also no specific dollar amount such that below that threshold dollar amount, the compensation is unreasonably low. Nor is there any specific dollar amount such that above that dollar amount would be unreasonably high compensation. For background on vagueness, see Dominic Hyde & Diana Raffman, *Sorites Paradox,* STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/sorites-paradox (rev. ed. March 26, 2018) (visited June 14 2023). More broadly, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2001). Nor do courts necessarily abandon themselves to irrationality or lawlessness in criminally sentencing someone who had betrayed a customer, their employer, or their country. Even here, judicial judgments can be more, and less, reasonable.

144. For background, *see, e.g.,* Ben Yagoda, *The Cognitive Biases Tricking Your Brain,* ATL. (September 2018) www.theatlantic.com/magazine/archive/2018/09/cognitive-bias [https://perma.cc/3VGW-XTR6]. For a handy chart, *see* Marcus Lu, *50 Cognitive Biases in the Modern World,* www.visual/capitalist/com/50-cognitive-biases [https://perma.cc/92RM-P3KV] (February 1, 2020) (visited June 14, 2023).

145. *See* ROBERT C. ROBERTS & W. JAY WOOD, INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY 7(2007); LINDA TRINKAUS ZAGZEBSKI, VIRTUES OF THE MIND (1996).

146. *See, e.g.,* Nancy Nyquist Potter, *The Virtue of Epistemic Humility,* 29 PHIL. PSYCHIATRY & PSYCH. 121 (2022); Erik Angner, Epistemic Humility: Knowing Your Limits in a

borne in mind. The various rule of law values[147] may also be relevant, as will the claims to attention of other cases on the judge's docket.[148]

Given these considerations, we should not be surprised by different outcomes from different courts on apparently similar issues.[149] But conscientiously working through some of the above considerations, in light of incommensurable values, may well contribute more toward the ultimate reasonableness, rather than to the arbitrariness, of a given judicial outcome.

Classically, the Supreme Court has undertaken interest balancing in non-discriminatory dormant commerce clause cases when the logic of that clause so suggests. Thus the Court has recognized that

> [w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . ..[150]

Pandemic, www.behavioralscientist.org/epistemic-humility-coronavirus [https://perma.cc/US3Z-22HA](April 13, 2020) (visited June 14, 2023).

147. *See, e.g.*, Jeremy Waldron, The Rule of Law, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/rule-of-law [https://perma.cc/HMT9-QEVC](June 22, 2016) (visited June 14, 2023). More elaborately, *see* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

148. Rationality also places limits on the resources a court should devote to even the most apparently important single case. Consider, e.g., the classic and intensely elaborated, highly technical air pollution case of *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc).

149. Consider whether, in the case of entrenched circuit splits, at least one set of appellate federal courts must necessarily have engaged in ultimately arbitrary or unreasonable decision making. This hardly seems a necessary conclusion. Different judges may sensibly have different criteria for reducing biases, epistemic vices, and rule of law impairments. For one set of very general background commitments, *see* JOHN FINNIS, FUNDAMENTALS OF ETHICS 90–92 (1983). *See also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 115 (2d ed. 2011) (even with incommensurable value choices, we can make reasonable, non-cost-benefit analyses that are reasonable, rather than "blind, arbitrary, directionless or indiscriminate").

150. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation to Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960) omitted).

This process is occasionally, if not often, recognized as involving judicial balancing of interests.[151] On the Court's logic, "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[152] Effects on out-of-staters may be entirely non-discriminatory, but also far from unintended or incidental.

A more specific problem is that there is really never a distinct judicial inquiry into whether there are lesser-impact, less burdensome, or more narrowly tailored regulatory alternatives on the one hand followed by a separate and distinct process in which the relevant interests are weighed and balanced against one another. There is nothing sacred and unalterable about any specific formulation or description of any particular state police power, health, welfare, or safety interest.

Inevitably, courts will instead wonder whether, for example, the cited police power interest could be advanced nearly as well by some alternative regulation that promises to be substantially less burdensome on out-of-state interests. Perhaps the state police power interest could be fulfilled eighty percent or ninety percent as well by a restriction that is only twenty percent as burdensome on out-of-staters.[153] In general, any narrow tailoring inquiry swings open the door to an implicit, or even explicit, weighing and balancing and mutual adjustment of the conflicting interests.[154]

---

151. *See id.*

152. *Id.* This language is adopted in, for example, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also* Hunt v. Washington State Apple Advert. Com'n, 432 U.S. 333, 353–54 (1977).

153. As suggested by a variant of the classic Pareto 80-20 rule. *See, e.g.*, Carla Tardi, *The 80-20 Rule (aka Pareto Principle): What It Is, How It Works,* www.investopedia.com/terms/1/80-20-rule.asp [https://perma.cc/Y2C5-ZABX] (March 7, 2023) (visited June 14, 2023).

154. As illustrated, even in incommensurable constitutional and statutory right contexts, in R. George Wright, *The Scope of Compelling Government Interests,* 98 NOTRE DAME L. REV. REFLECTION 146 (2023). Courts often choose to characterize government regulatory interests in unduly narrow terms. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1866, 1881 (2021) ("The question . . . is not whether the City has a compelling interest in

3. A Suggestion for How Courts Might Approach Incommensurability Problems Under the Dormant Commerce Clause

Given the realistic need for courts to address some such cases under the dormant commerce clause, with all the incommensurable value conflicts that inescapably entails, what should the courts take into account in seeking a constitutionally sensible, rights-sensitive, broadly progressive, non-arbitrary, reasonable accommodation of the relevant interests?

First, and uncontroversially, the courts in such cases should determine whether any regulated entities must now comply with mutually incompatible legal requirements if they wish to market nationally. Concretely, for example, does Texas or Florida require something of the regulated entity that California forbids, or vice versa? The inability to comply with mutually inconsistent regulations is already an important consideration in some preemption contexts.[155]

In our cases, some regulated parties would face a choice between selling in one set of states at the cost of being unable to sell in some other set of politically antagonistic states. The realistic inability to comply with conflicting state regulations is, again, a consideration in the dormant commerce clause cases.[156]

---

enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."); Mast v. Fillmore Cty, Minn., 141 S. Ct. 2430, 2432 (2021) (mem.) (Alito, J., concurring in the decision to grant, vacate, and remand). Adverse effects on government interests generally come in degrees of severity. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988) (on the government interest in avoiding 'insult' or 'affront' to foreign diplomats). Some courts recognize the inevitability of judicial choice and interest balancing in such cases. *See, e.g.*, Firewalker-Fields v. Lee, 58 F.4th 104, 115 (4th Cir. 2023) (prisoner free exercise of religion claim). But in any event, judicial choice, whether explicit or implicit, is broadly inevitable, and the options will typically be incommensurable in some meaningful way.

155. *See, e.g.*, Gade v. Nat'l Solid Waste Management Ass'n, 505 U.S. 88, 98 (1992) (discussing 'conflict' preemption where "compliance with both federal and state regulations is a physical impossibility").

156. *See, e.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88 (1987); Kassell v. Consolidated Freightways Corp., 450 U.S. 662, 671 (1981) (Powell, J., for the plurality); Southern Pac. Co. v. Arizona, 325 U.S. 761, 774 (1945).

In such cases, the courts should avoid both of two extremes. Courts should not strike down non-discriminatory politically motivated regulations of commerce by, say, blue states because of the mere abstract possibility that red states, in retaliation or otherwise, might conceivably adopt incompatible regulations, thereby putting regulated entities to a difficult choice. Such a judicial policy would suppress the value of important experimentation in health, welfare, and safety regulation with both in and out of state effects.

Equally, though, courts should avoid a policy that artificially advantages 'first movers,' whether they are red or blue states, by striking down any later regulation that creates an actual conflict for the regulated parties in question. Any such first-in-time rule would worsen current hyperpolarization by rewarding the first state to impose any politically controversial and perhaps hastily adopted rule in any respect, on commercial enterprises.[157] We might call this a perverse 'race to the legislature' phenomenon.[158]

Courts have recognized that in purely economic cases, the logic of the dormant commerce clause must discourage so-called 'tit for tat' retaliation by one state against the economic selfishness of another state.[159] More narrowly, one state's economic discrimination does not legitimize counter-discrimination by a targeted state.[160] More broadly, tit for tat retaliation is thought to fall afoul of the notion that two wrongs don't make a right.[161] The idea is again, traditionally, to avoid purely economic or commercial balkanization and mutual isolation.[162]

On our approach, courts should not invariably advantage or disadvantage non-discriminatory state police power regulations that

---

157. It is reasonable, though, for courts to point out that the supposed police power value of a new conflict-creating regulation is doubtful, given the experience that has already developed under pre-existing rules with which the new rule would conflict. *See, e.g., Arizona*, 325 U.S. at 771–72. For discussion, see *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127, 1135–36 (9th Cir. 2021).

158. If not even faster by executive or administrative mandate.

159. *See, e.g.,* Foresight Coal Sales, LLC v. Chandler, 60 F.4th 288, 301 (6th Cir. 2023).

160. *See id.*

161. *See id.*

162. *See id.*

are essentially political or cultural, as opposed to economic, in their motivation. We can agree that in our cases, two wrongs do not generally make a right. But courts should first determine on the merits whether the first alleged wrong, as in *Ross* itself, was indeed a dormant commerce clause wrong. And courts should recognize that in some cases, the best way to discourage a first wrong is for another state to credibly threaten some form of retaliation if the first wrong is indeed undertaken.[163] In other cases, judicial intervention against an aggressive first-mover state is clearly appropriate.

All else equal, courts should thus seriously scrutinize a state's attempts to non-discriminatorily coerce firms operating primarily in other states into embracing values they do not share. Such attempts by a first-moving state may well be viewed by their supporters as promoting human rights and fundamental cultural and moral values. But given a hyperpolarized, mutually distrustful, increasingly hostile and antagonistic society,[164] the best judicial response will often require looking at the bigger picture. Courts should not ignore or deny the overall, national-level, mutually destructive costs of our increasing polarization.[165]

The best judicial approach to the escalating moral, political, and cultural conflicts among states under the dormant commerce clause must thus have several dimensions. Recognized constitutional rights will be given effect. Some judicial adjustments of the various

---

163. Consider, for example, under the laws of war, an aggressor nation that opts for a policy of false flags of truce, fake surrenders, avoidance of military uniform use, storing munitions at protected cultural sites, holding civilian hostages on bridges, and so forth. While two or more wrongs may not make a right, there is something to be said for the view that waiting for ineffectual post-war redress is also a 'wrong,' in the sense of causing unnecessary harm. For background, see R. George Wright, *Noncombatant Immunity: A Case Study in the Relation between International Law and Morality*, 67 NOTRE DAME L. REV. 335 (1991).

164. See, for background, R. George Wright, *A Free Speech-Based Response to Media Polarization,* 18 FIU L. REV. 193 (2023).

165. *See id.* The power of unconstrained discourse to lead to progress through reasoned persuasion alone is, admittedly, not without its limits. *But cf.* JOHN MILTON, AREOPAGITICA 58 (Cambridge U.P. ed. 1914) (1644) ("Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do ingloriously . . . to misdoubt her strength. Let her and falsehood grapple, who ever knew truth put to the worse in a free and open encounter?").

conflicting interests would simply be inefficient and unnecessarily costly. The degree of tailoring of police power regulations affecting out of staters is often improvable. Interests can be reasonably reassessed, perhaps from a more detached, broader perspective, by courts. Small losses in some values may be worth incurring for the sake of large gains in other values.

Most fundamentally, though, judges who face commensurability problems should recognize the need for the virtue of practical wisdom. Judges, and their critics, can over time cultivate and reward the relevant sorts of practical wisdom. All parties, including courts, should expand the scope and depth of their relevant knowledge; cultivate the capacity for reflection; enhance their deliberative self-discipline in the relevant respects; avoid undue emotionalism and sentimentalism; avoid cognitive biases and psychological defense mechanisms; understand the emotions and experiences and perspectives of others; deepen their reason-based epistemic humility; enhance their open-mindedness; recognize genuine conflicts among worthy values; be open to creative alternative solutions; and appreciate the difficulties of adapting broad principles to specific contexts.[166] Inevitably, though, no shortcuts to the most reasonable judicial disposition of incommensurable value conflicts will be typically available.

CONCLUSION

Whether they explicitly recognize it or not, the courts are often confronted with problems of basic value incommensurability. Courts should recognize that whatever the nature of the incommensurability in any given case, some case rationales and outcomes will almost invariably be more reasonable, less arbitrary, and more jurisprudentially defensible than others. There are some cases of incommensurability in which the court should stay its hand. But

166. Many of these considerations are adapted from LINDA TRINKAUS ZAGZEBSKI, EXEMPLARIST MORAL THEORY 95 (2017). *See also* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003). Classically, see ARISTOTLE ON PRACTICAL WISDOM: NICOMACHEAN ETHICS VI (C.D.C. Reeve trans., Harv. Univ. Press 2013) (350 BCE).

there are certainly other cases in which the courts should be more assertive. Prime examples of the latter involve dormant commerce clause cases in which states adopt non-discriminatory rules intended to coerce producers in other states to adopt political, moral and cultural policies favored by the regulating state. If courts do not work their way past the incommensurabilities in such cases, there is a likelihood of, ultimately, broadly unattractive practical consequences.

RATIONAL NONDELEGATION

JOHN YOO*

Nondelegation has risen from the dead. In the United States, the doctrine stands for the proposition that the Constitution forbids Congress from transferring excessive power to the executive branch to issue rules and make decisions with the force of law. "[T]he legislature makes, the executive executes, and the judiciary construes the law," Chief Justice John Marshall observed in *Wayman v. Southard*.[1] Nevertheless, he wrote, "the maker of the law may commit something to the discretion of the other departments." In upholding a federal statute allowing the courts to set their rules of procedure, Chief Justice Marshall acknowledged that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[2]

Despite the doctrine's ancient lineage, the modern federal judiciary has found that inquiry so delicate and difficult as to have given

* Emanuel S. Heller Professor of Law, University of California at Berkeley School of Law; Senior Fellow, Civitas Institute, University of Texas at Austin; Nonresident Senior Fellow, American Enterprise Institute. The author received helpful comments from participants at a conference on the non-delegation doctrine held by the C. Boyden Gray Center at the George Mason University Law School. Special thanks to Jennifer Mascott and Adam White for organizing it. The author received outstanding research assistance from Justin Folk, Austin Katz, and Maguire Radosevic and is grateful for the support of the Thomas W. Smith Foundation.

The *Harvard Journal of Law & Public Policy* hosted a law symposium with Pacific Legal Foundation on "Doctrinal Crossroads: Major Questions, Non-delegation, and Chevron Deference." The articles were published by *JLPP: Per Curiam* here: https://journals.law.harvard.edu/jlpp/doctrinal-crossroads-major-questions-non-delegation-and-chevron-deference/ [https://perma.cc/2DRB-5Y73].

1. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

2. *Id.* at 43.

up on the task. Since the New Deal, for example, the Supreme Court has never struck down a delegation for exceeding separation of powers limits. In *Whitman v. American Trucking Association,* the Court unanimously upheld one of the broadest legislative delegations known: the Clean Air Act's authorization that the Environmental Protection Agency set air quality standards "to protect the public health" with "an adequate margin of safety."[3] Indeed, the Court last invalidated a delegation of rulemaking power in two 1935 cases.[4] *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States* even helped trigger President Franklin D. Roosevelt's court-packing plan and the Court's retreat from the close scrutiny of economic regulation.[5]

Academics have largely declared the doctrine dead. Professors Eric Posner and Adrian Vermeule provocatively argue that Congress could delegate virtually all of its legislative power to the agencies.[6] John Manning and Cass Sunstein separately observe that the values of the doctrine live on—at best—only in canons of statutory construction.[7] Peter Schuck argues that "most broad delegations satisfy the formal requirements" of the Constitution and that, therefore, the merits of nondelegation really "turn on functional considerations" rather than constitutional ones.[8]

Other scholars—primarily those who believe the Constitution's meaning is dictated by its original understanding—have defended

---

3. Whitman v. Am. Trucking Agency, 531 U.S. 464, 466 (2001) (quoting 42 U.S.C. 7409(b)(1)).

4. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

5. *See, e.g.*, WILLIAM LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 85 (1995); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105-30 (1991). For a contrary view, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 226 (1994).

6. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. CHI. L. REV. 1721, 1723 (2002).

7. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance,* 2000 S. CT. REV. 223, 227; Cass R. Sunstein, *Nondelegation Canons,* 67 U. CHI. L. REV. 315, 316 (2000).

8. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod,* 20 CARDOZO L. REV. 775, 776 (1999).

the principle that limits must exist upon Congress's ability to delegate lawmaking authority.[9] However, they, too, would concede that the federal judiciary does not currently enforce such a principle. A majority of the current Supreme Court has yet to identify a clear basis in the constitutional text for the nondelegation doctrine, to draw a neutral line between permissible and impermissible delegations, and to explain the proper balance between Congress and the courts.[10]

Nevertheless, the Roberts Court has signaled its willingness to breathe new life into the nondelegation doctrine. In *Gundy v. United States*, four different Justices questioned the narrow reach of the current nondelegation doctrine. The case itself involved whether Congress could vest the Attorney General with the power to require sex offenders who were convicted before passage of the Sex Offender Registration and Notification Act to register with the government. Only four Justices joined Justice Elena Kagan's opinion upholding Congress's delegation of authority. Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas, dissented from the broad grant of power to the administrative state.[11] Providing the fifth vote to uphold the statute, Justice Samuel Alito concurred in the judgment but declared his support for "reconsider[ing] the approach [the Court has] taken for the past 84 years" of blessing broad transfers of power from Congress to the executive branch.[12] Justice Brett Kavanaugh did not participate in *Gundy*, but, dissenting from denial of certiorari in a different case, stated that the issue warranted "further consideration in future

9. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1048–54 (2007); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1304–17 (2003); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 333–34 (2002); Michael Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto*, 76 TUL. L. REV. 265, 305–15 (2001); David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 155-64 (1993).

10. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019); Douglad H. Ginsburg, *Reviving the Nondelegation Principle in the U.S. Constitution*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT 20, 20–27 (Peter J. Wallison & John Yoo, eds., 2022).

11. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

12. *Id.* at 2131 (Alito, J., concurring in the judgment).

cases."[13] Count these votes up, and it appears that the Court has a majority to revive some version of the nondelegation doctrine.

More consequentially, the Court has revived nondelegation principles in its new major questions doctrine. In *West Virginia v. EPA,* the Court blocked the Environmental Protection Agency (EPA) from exercising wholesale control over the nation's electrical grid in the name of reducing environmental pollution.[14] It announced a new "major questions" doctrine that bars new regulations of broad "economic and political significance" unless the agency has received "clear congressional authorization" in a statute.[15]

West Virginia is one of the latest cases in the Roberts Court's reconceptualization of the relationship between constitutional law and the administrative state. The Court's primary doctrinal reform has tightened presidential control over the agencies. In cases such as *Free Enterprise Fund v. Public Company Accounting Oversight Board*[16] and *Seila Law LLC v. Consumer Financial Protection Bureau,*[17] the Court has invalidated Congressional efforts to insulate agency personnel from the President's removal power. *West Virginia*—as well as two emergency cases challenging COVID-19 regulations—points the Court in a different and potentially more radical direction than simply expanding White House control over executive branch personnel.[18] These cases limit agencies' ability to apply

13. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

14. 142 S. Ct. 2587, 2612–13 (2022).

15. *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)); *id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). While scholars have argued that the Supreme Court created the doctrine only recently, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023-49 (2023), other work maintains that its antecedents go back more than a century, see Louis J. Capozzi, *The Past and Future of the Major Questions Doctrine,* 84 OHIO ST. L.J. 191, 203 (2023).

16. 561 U.S. 477 (2010).

17. 140 S. Ct. 2183 (2020).

18. *See, e.g.,* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (invalidating CDC eviction moratorium); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.,* 142 S. Ct. 661 (2022) (per curiam) (striking down OSHA vaccine mandate).

broad statutory grants of authority only to ways that Congress—at the time it enacted the delegations—could have anticipated.

Several scholars already predict that the new major questions doctrine could have significant consequences for administrative law.[19] Professors Daniel Deacon and Leah Litman declare the major questions doctrine to be "a powerful weapon wielded against the administrative state."[20] By imposing a clear statement requirement for regulations on "major" questions that involve politically significant policies, novel rules, or significant boosts to agency powers, Deacon and Litman argue, the major questions doctrine "could exacerbate institutional and political pathologies, undermine the ostensible premises of the major question doctrine, and frustrate agency action . . . ."[21] Professor Mila Sohoni argues that the doctrine fundamentally changes the nature of judicial review of agency action, removes the *Chevron* doctrine as the initial step in that review, and reduces the deference paid to administrators by judges.[22] Cass Sunstein observes that a weak version of the major question doctrine may carve out certain questions from the benefits of *Chevron* deference, but a strong version might completely bar agencies from exercising broad powers in a manner similar to the nondelegation doctrine.[23] "For both theory and practice, the stakes are exceedingly high—whether we are speaking of the weak version, the strong version, or the choice between them."[24]

The major questions doctrine, however, is not a doctrine of constitutional dimension, but rather a canon of statutory interpretation rooted in structure. It counsels courts against, in Justice Scalia's words, finding "elephants in mouseholes."[25] It operates as a clear

19. *See, e.g.,* Mila Sohoni, *The Major Questions Quartet,* 136 HARV. L. REV. 262, 263 (2022). *See also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine,* 109 VA. L. REV. 1009, 1013–14 (2023).

20. Deacon & Litman, *supra* note 15, at 1011.

21. *Id.* at 1049.

22. Sohoni, *supra* note 19, at 263–64.

23. *See* Cass R. Sunstein, *There are Two "Major Questions" Doctrines,* 73 ADMIN. L. REV. 475, 477 (2021).

24. *Id.* at 478.

25. Whitman v. Am. Trucking Agency, 531 U.S. 464, 468 (2001).

statement rule that requires courts to find unmistakable congressional authorization for novel agency actions that involve controversial or significant policies. But the major questions doctrine does not directly attack Congress's constitutional authority to delegate lawmaking power, provided that Congress does so in plain statutory language. Congress could overrule any of the major question doctrine precedents, and, presumably, even the doctrine itself. In this respect, the doctrine acts primarily as a rule of statutory construction, but one that makes sense only if the Court believes in the substantive values that it promotes.[26] And as several academic critics observe, these values may come from the nondelegation doctrine. The "strong version [of the major questions doctrine] is rooted in the nondelegation doctrine," Sunstein asserts.[27] Or as Sohoni argues, "a sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine."[28] Rather than enforce a broad nondelegation doctrine, Sohoni observes, the Court can achieve much the same result by "an ad hoc, agency-by-agency, rule-by-rule basis through the mechanism of the . . . new clear statement rule."[29]

Debate over the major questions doctrine, therefore, can reduce into a debate over the nondelegation doctrine. To the extent that the former doctrine suffers from a lack of definition over what is "major" or even a "question," it is worth asking whether enforcing the values of the latter doctrine justify introducing such unclarity and judicial discretion into administrative law. To the extent that the former doctrine blocks agencies from promulgating regulations with significant economic or political consequences, we should ask whether the courts have achieved the goals of the latter doctrine. The major questions doctrine will suffer from a lack of direction and scope until the Court establishes its foundation—the nondelegation doctrine.

---

26. Biden v. Nebraska, 143 S. Ct. 3455, 2376–77 (2023) (Barrett, J., concurring).
27. Sunstein, *supra* note 23, at 478.
28. Sohoni, *supra* note 19, at 265–66.
29. *Id.* at 266.

This paper will address instrumental reasons for the nondelegation doctrine. Consequentialist justifications offered for nondelegation include ensuring congressional responsibility for basic policy choices, limiting the scope of federal power, protecting individual liberties, and removing decisions from unaccountable bureaucracies. Defenders of the modern administrative state, however, believe broad delegations necessary for government to adapt to new social, economic, and scientific circumstances. Congress could not spend the time and resources, or even develop the expertise, necessary to legislate on all of the matters within its jurisdiction. Others argue that broad delegation transfers technical questions from politicians to experts, which should improve the outcome of the regulatory process.

This paper takes a different approach. It will ask why the branches of government themselves would rationally want a nondelegation doctrine. It analyzes the issue using standard game theory models of the legislative process.[30] While legal scholars have used such approaches to study the administrative state for some time,[31] this is less the case in constitutional law.[32] My basic argument is that a rational member of the legislative or executive branches might favor a nondelegation doctrine due to concern over the ideological variability of agency decisions in the future. A Democratic Congress, for example, may wish to achieve broadly pro-environmental outcomes, but it cannot be confident that agencies

30. The literature using these models is vast. A leading work is DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS (1999).

31. *See, e.g.*, Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts,* 119 HARV. L. REV. 1035, 1049 (2006); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State,* 89 GEO. L.J. 97, 102 & n.26 (2000); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. ECON. & ORG. 81, 86 (1985).

32. The only law journal article that applies game theory to nondelegation appears to be Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229 (2018). That article differs from this one in that it uses game theory to attempt to define the legislative power and then to create a sliding scale for enforcement of the intelligible principle test. This article examines the broader question of the nondelegation doctrine as a part of the principal-agent problem with congressional control of agency discretion.

in the future will use their discretion as it would wish, especially under Republican presidents. Article I, Section 7's barriers to enacting legislation to override regulations, in addition to the usual transaction cost and information problems for congressional bargaining, might present a nondelegation doctrine as a second-best alternative to prevent shirking by agencies. This paper considers how the introduction of other branches and their changing policy preferences over time alter this basic principal-agent relationship.

I. THE CONTROVERSY OVER NONDELEGATION

The Constitution does not explicitly address delegation of legislative authority. Its text follows a simple three-part division of government authority into legislative, executive, and judicial powers and then allocates them to Congress, the President, and the Judiciary. Article I begins with "All legislative Powers herein granted shall be vested in a Congress of the United States."[33] While the Constitution does not forbid the executive from making law, it only grants the President "the executive power"[34] and the duty to "take Care that the Laws be faithfully executed."[35] As a result of the language of the vesting clauses and the broader principle of the separation of powers, the Supreme Court has declared that only Congress can exercise legislative power and that Congress cannot transfer it to the executive. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity."[36]

But it is obvious that the other branches of government make law today. Courts create federal common law in the silent interstices of federal statutes or by direct constitutional authorization.[37] Federal agencies within the executive branch issue broad regulations that,

33. U.S. CONST. art. I, § 1.

34. *Id.* art. II, § 1.

35. *Id.* art. II, § 3.

36. Loving v. United States, 517 U.S. 748, 758 (1996) (citation omitted).

37. *See, e.g.*, Henry J. Friendly, *In Praise of* Erie*–and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.119, 421 (1964).

under the Clean Air Act for example, set the miles-per-gallon standard for all cars and the emissions requirements for all power plants in the country,[38] or that under the Clean Water Act limit private use of property.[39] Independent agencies issue equally detailed regulations without undergoing White House control, such as the Securities and Exchange Commission's regulation of the financial markets, the Federal Reserve Bank's management of the money supply, or the Federal Communications Commission's control over the internet, cable, and communications networks. If all three branches of modern government make law, the question today may have become not whether the Constitution permits the delegation of legislative authority, but whether at some point the delegation goes too far. "The distinction between 'executive' and 'legislative' power cannot depend on anything qualitative," Cass Sunstein has written.[40] "[T]he issue is a quantitative one. The real question is: How much executive discretion is too much . . . ?"

A. History of the Nondelegation Doctrine

The dividing line between what Congress must decide for itself and what it can delegate has remained obscure to the courts. It challenged Chief Justice John Marshall in *Wayman v. Southard*.[41] In addressing a law that gave discretion to the courts to set rules of process, he started with the first principle that "the difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law."[42] This basic understanding of the separation of powers, however, did not preclude Congress from delegating some of its powers to the other branches. "But Congress may certainly delegate to others, powers

38. *See* Revised 2023 and Later Model Year Light- Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74, 434 (Dec. 20, 2021) (effective date Feb. 28, 2022) (auto emissions); West Virginia v. EPA, 597 U.S. 697, 707–15 (2022) (describing regulatory scheme for power plant emissions),

39. *See, e.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1330–36 (2023) (describing regulatory framework for approval of land use adjacent to waters of the United States).

40. Sunstein, *supra* note 7, at 326–27.

41. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

42. *Id.* at 46.

which the legislature may rightfully exercise itself."[43] Nevertheless, Congress could not delegate everything. "[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry."[44] Marshall himself drew a distinction between "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[45] Courts ever since have struggled to identify the line between "important subjects" and "those of less interest." Nevertheless, Marshall made clear that Congress could not delegate "powers which are strictly and exclusively legislative."[46]

Subsequent Supreme Court decisions have not improved upon Marshall's framing of the question and his effort to identify the line between constitutional and unconstitutional delegations. In *Field v. Clark,* the Court faced a statute that delegated to the President the authority to suspend the duty-free treatment of imports from countries that imposed "reciprocally unequal and unreasonable" tariffs on U.S. products.[47] The Court rejected the claim that the law unconstitutionally vested legislative power in the executive. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution," the Court declared, echoing Marshall in *Wayman*.[48] But the statute did not violate the separation of powers, according to the majority, because it only charged the President with finding whether a set of facts existed; if it did, the law itself went into effect without any additional discretionary action by the President. "When he ascertained the facts that duties and exactions, reciprocally unequal and

43. *Id.* at 43.

44. *Id.* at 46.

45. *Id.* at 43.

46. *Id.* at 42–43.

47. Field v. Clark, 143 U.S. 649, 680 (1892) (quoting McKinley Tariff, ch. 1244, §3, 26 Stat. 567, 612 (repealed 1894)).

48. *Id.* at 692.

unreasonable, were imposed upon the agricultural or other products of the United States," the Court observed, "it became his duty to issue a proclamation . . . which Congress had determined should occur."[49] Left unaddressed by the Court was the difference between, for example, finding that a date had passed or an event had occurred, and making the judgment that another country's tariff was "unequal and unreasonable."[50]

Foreign trade again presented the Court with the opportunity to further elaborate a delegation test. In *J.W. Hampton, Jr. & Co. v. United States,* the Court announced the "intelligible principle" test that still governs nondelegation claims.[51] Congress had authorized the President to set the amount of duties on foreign imports so as to "equalize" the "costs of production."[52] In upholding the delegation, the Court announced: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[53] That intelligible principle test continues in force today, even appearing to be the rule of decision in *Gundy*.[54]

The Supreme Court has not struck down a statute on nondelegation grounds in nine decades because of the hollowness of the test that emerged from *J.W. Hampton.* Even the cases that invalidated New Deal legislation, *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*, paid allegiance to the intelligible principle standard. *Panama* found that portions of the National Industrial Recovery Act (NIRA) failed the intelligible principle test because they provided no guidance to the executive branch for its exercise of discretion.[55] *Schechter* found that other portions of NIRA failed the intelligible principle test because they allowed the executive branch the authority to regulate the entire economy to

49. *Id.* at 693.
50. *Id.*
51. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
52. *Id.* at 399.
53. *Id.* at 409.
54. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).
55. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).

promote "fair competition."[56] But in both cases, the Court found that the statutes vested such broad power upon the executive branch to issue legislative rules that it felt little need to explain why NIRA failed the intelligible principle test but the laws in *Field* and *J.W. Hampton* did not.

Cases decided after 1935 have never found another congressional delegation to violate the intelligible principle requirement. In *Yakus v. United States,* the Court demanded only that the intelligible principle provide a standard against which a court could review the exercise of delegated authority.[57] *Yakus* itself approved the wartime authority to set prices that were "generally fair and equitable."[58] In the New Deal period, the Court upheld the Federal Communications Commission's power to regulate the airwaves[59] and the Interstate Commerce Commission's authority to approve railroad mergers,[60] so long as the regulations advanced the "public interest." Under a similar standard, the Rehnquist Court approved broad transfers of authority from Congress, such as to the U.S. Sentencing Commission to devise a system to control all judicial sentencing under federal criminal law,[61] and to the Environmental Protection Agency to set National Ambient Air Quality Standards.[62] All that the intelligible principle test seems to require is that Congress invoke the "public interest" in its delegation of authority to the agencies to survive judicial review.[63]

Striking down a federal law for delegating too much power to an agency would mark a sharp turn in the Court's approach to the administrative state. After the New Deal revolution and FDR's failed court-packing plan, the Court has never invoked the nondelegation

---

56. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553–54 (1935).

57. 321 U.S. 414, 426 (1944).

58. *Id.* at 420 (quoting Emergency Price Control Act, ch. 25, § 2(a), 56 Stat. 23, 24 (terminated 1947, repealed 1966)).

59. *See, e.g.,* Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 225–26 (1943).

60. N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

61. *See* Mistretta v. United States, 488 U.S. 361, 371 (1989).

62. *See* Whitman v. Am. Trucking Agency, 531 U.S. 464, 473–74 (2001).

63. *Mistretta,* 488 U.S. at 416 (Scalia, J., dissenting) (citing *Nat'l Broad. Co.,* 319 U.S. at 216–17 (1943)); *N.Y. Cent. Sec. Corp.,* 287 U.S. at 24–25 (1932).

doctrine to invalidate a federal law. Indeed, a unanimous Court upheld the Clean Air Act, a law that seems fairly typical of the broad delegations to the agencies, as recently as 2001 in *Whitman v. American Trucking Association*.[64] Congress had provided enough detail, the Court explained, by requiring agencies to issue air regulations that "protect the public health" with "an adequate margin of safety."[65]

The same problem that beset Chief Justice Marshall continues to trouble those who would resuscitate the nondelegation doctrine today. Even if the intelligible principle test raises no barrier to Congress to delegate almost all of its legislative power, judges have had little success devising a replacement that does not draw the courts into policymaking. As Justice Gorsuch pithily put it in his dissent in *Gundy:* "What's the test?"[66] Gorsuch identified three guiding principles to lawful delegations. First, Congress could set policy regulating private conduct, with another branch left to "fill up the details," such as in *Wayman*.[67] Second, Congress could grant the other branches the power to carry out a rule based on the finding of a specific fact, such as whether another nation had lifted an embargo on US products.[68] Third, Congress could assign non-legislative duties where its power overlaps with those of other branches, such as when Congress delegates foreign affairs powers to the executive branch.[69] Gorsuch, however, did not explain how these principles would reduce into a test that courts could apply to broad statutes such as the Clean Air Act.

Inability to identify a clear test no longer appears to stand in the way of a resuscitated nondelegation doctrine. In the wake of *Whitman*, delegation once seemed on its way toward falling under the political question doctrine, because the Court could find no "judi-

64. 531 U.S. 457, 465 (2001).
65. *Id.* at 473–74 (quoting 42 U.S.C. § 7409(b)(1)).
66. Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).
67. *Id.* at 2136.
68. *Id.* at 2136–37.
69. *Id.* at 2137.

cially discoverable and manageable standards" to identify an unconstitutional transfer of authority.[70] Judges once thought the same about the outer limits of the Commerce Clause as well, but no longer.[71] In *Gundy* itself, Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent calling for a new effort to identify a test.[72] In 2015, Justice Thomas had called for an even broader reconsideration of the Court's approach to delegation. "The core of the legislative power that the Framers sought to protect from consolidation with the executive," Thomas wrote, "is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct."[73] Rather than the intelligible principle test, Justice Thomas would require Congress to enact any regulation that affected private conduct. "Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power," Thomas wrote in concurrence. "I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."[74]

It seems that the Court is poised to resuscitate the nondelegation doctrine. A majority of the current Court has expressed a desire to explore the possibility of limiting the breadth of congressional delegation of authority to the agencies. It seems that all that is required is a test based on neutral rules with more teeth than the intelligible

---

70. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

71. *Compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556-57 (1985) (upholding application of Fair Labor Standards Act to state and local governments), *and* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 197–98 (1980) (arguing that judicial review should not extend to federalism questions), *with* Morrison v. United States, 529 U.S. 598, 619 (2000) (holding that provision of Violence Against Women Act exceeded commerce power).

72. 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

73. Dept. of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 76 (2015) (Thomas, J., concurring).

74. *Id.* at 77.

principle test. At the same time, however, significant controversy exists over whether the Constitution in fact establishes a nondelegation principle. The next part describes the scholarly debate over the nondelegation doctrine. It shows that supporters of broad delegations of rulemaking power to the administrative state rest their defense primarily on functionalist grounds, while its critics resort in the main to historical or formalist arguments. This creates the space, explored in subsequent sections of this article, for a functionalist role for a nondelegation doctrine.

B. Academic Debate over the Nondelegation Doctrine

This Part will briefly describe the academic debate over the nondelegation doctrine. Scholars have sought to make sense of the doctrine by focusing primarily on its textual, structural, and historical justifications. Perhaps the liveliest debate centers around whether the Framers would have understood the Constitution's separation of powers to establish a principle against the broad delegation of lawmaking authority.[75] Others claim that the nondelegation doctrine improves democratic accountability, while critics argue that modern government could not function effectively without broad delegation to agencies.[76] Another debate concerns whether the judiciary can truly police delegation in a principled manner, or whether judicial review would simply embroil the courts in policy disputes between the legislative and executive branches.[77] This part identifies the absence of a functionalist defense of the nondelegation doctrine, which this article seeks to provide.

Delegation is in the world all around us. It sits at the foundation of our republican Constitution, in which the American people grant limited power to the federal government to act on their behalf. It also rests at the foundation of the modern administrative state. It

---

75. *See, e.g.,* Ilan Wurman, *Nondelegation at the Founding,* 130 YALE L.J. 1490, 1525 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding,* 121 COLUM. L. REV. 277, 289 (2021).

76. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985).

77. *See generally* essays collected in Wallison & Yoo, *supra* note 10.

might not go too far to say that without delegation, the administrative state as we have known it since the New Deal could not succeed.

Supporters of broad delegation have relied primarily on functionalism. Peter Schuck, for example, declares that delegation "constitutes one of the most salutary developments in the long struggle to instantiate the often competing values of democratic participation, political accountability, legal regularity, and administrative effectiveness."[78] Schuck argues that delegation has much to do with the improvements in the U.S.'s self-government, "in the sense that its political processes and policy outcomes are now much more democratic, just, and social welfare enhancing" than in 1965.[79] Jerry Mashaw argues that delegation routes power to agencies, which can devise rules through better access to information, more expert deliberation, and even more responsiveness to the public's preferences than Congress.[80] Eric Posner and Adrian Vermeule observe that delegation is inevitable due to the need for a "division of labor in any complex institution whether public or private."[81] Adopting a transaction cost approach, political scientists David Epstein and Sharyn O'Halloran argue that delegation allows Congress to make policy in a politically efficient manner, by which they mean not overall social welfare but "in such a way as to maximize legislators' political goals."[82]

If forced to rely on a constitutional text, supporters of delegation would identify the same bases of power that justify the modern administrative state. Article I, Section 1 of the Constitution grants Congress the authority to make federal law, and the enumeration in Section 8 includes the powers to tax and spend for the general welfare, and to regulate interstate and international commerce.[83] Article I, Section 8 then allows Congress to "make all Laws which

78. Schuck, *supra* note 8, at 776.

79. *Id.* at 778.

80. *See* Mashaw, *supra* note 31, at 94–95.

81. Posner & Vermeule, *supra* note 6, at 1744.

82. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 9 (1999).

83. U.S. CONST. art. I, §§ 1, 8.

shall be necessary and proper for carrying into Execution the foregoing Powers."[84] If the Commerce Clause allows Congress to regulate telecommunications, then the Necessary and Proper Clause allows it to establish the Federal Communications Commission and to empower it to enact regulations.[85] Or, in what Posner and Vermeule consider the "naïve" view, the Constitution allows delegation under the President's power under Article II to "take care that the laws be faithfully executed."[86] In most broad administrative statutes, they argue, Congress has not even delegated legislative power; regulations instead represent the exercise of the executive power of enforcement.[87]

Initial criticism of broad delegation appealed to democratic theory. In his classic *Democracy and Distrust*, John Hart Ely criticized delegation for allowing Congress to escape its constitutional responsibilities. Delegation is "undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."[88] Political scientist Ted Lowi made a similar claim that delegation allowed Congress to abdicate its constitutional role in enacting legislation in favor of unelected bureaucrats, which he claimed amounted to a "second republic" that has replaced the original one.[89] In a refresh of this line of thought, Neomi Rao argues that delegation allows Congress as a whole to escape accountability while allowing congressional committees or even individual members of Congress to influence agencies in their exercise of discretion.[90] Chris Walker claims that this discretion may be

84. *Id.* § 8.

85. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2129–30 (2004).

86. *See* Posner & Vermeule, *supra* note 6, at 1725.

87. *Id.* at 1721.

88. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132 (1980).

89. *See* THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 274 (2d ed. 1979).

90. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1481–82, 1492 (2015).

so broad that it even allows powerful agencies to influence Congress to engage in even broader transfers of power.[91]

Additionally, legal scholars such as David Schoenbrod and Peter Wallison have attacked delegation on more formalist grounds. Under this view, the Constitution establishes a straightforward approach to policymaking. Congress makes the basic policy choices, especially the regulation of private conduct by law. The executive branch enforces the policies, but it has limited discretion to make the choices itself, while the courts should adjudicate disputes but also not intrude into policy. Schoenbrod and Wallison see delegation as an effort to undermine this clean separation of powers. They separately argue that Congress uses delegation to evade responsibility for its decisions. Individual members of Congress, who are primarily interested in re-election, want to avoid controversial policy choices and instead provide relief to constituents from government mandates.[92] These transfers of authority allegedly allow Congress and the agencies to engage in self-dealing hidden from the view of the American people, either by shirking their responsibilities or more easily sending benefits to interest groups.

A more persistent challenge to broad delegation, however, has come from constitutional law scholars. Gary Lawson, for example, argues that the original understanding of the Constitution's separation of powers might allow the executive branch to fill in the details while implementing the laws, but that it does not permit Congress to transfer its Article I, Section 8 powers to the agencies.[93] Because regulations do not undergo the Article I, Section 7 process of bicameralism and presentment, they cannot have the effect of laws. Larry Alexander and Saikrishna Prakash expanded on this theme by arguing that political thought at the time of the Framing, as found primarily in the work of John Locke, Montesquieu, and

---

91. *See* Christopher J. Walker, *Legislating in the Shadows,* 165 U. PA. L. REV. 1377, 1377–78 (2017).

92. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9–10 (1993); *See generally* PETER WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018).

93. *See* Lawson, *supra* note 9, at 339–41.

Blackstone, rejected broad delegations of legislative power.[94] In *Federalist No. 75,* for example, Hamilton explained that "the essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of society" and that this power could be exercised only by Congress.[95]

An even broader attack on delegation has arisen from legal historian Philip Hamburger. In his lengthy work of British and early American constitutional history, *Is Administrative Law Unlawful?*, Hamburger argues that the administrative state is unlawful because it exercises power akin to the royal prerogative of the British Kings of the seventeenth century.[96] While the Glorious Revolution put an end to executive lawmaking in favor of parliamentary supremacy and the common law, rule by executive fiat has risen again. But this time it has reappeared in the guise of the administrative state, made possible by unlimited delegations of power and inspired by continental theories of the state.[97] "Just as English monarchs once claimed a prerogative power to make law outside acts of Parliament, so too the American executive claims an administrative power to make law outside of acts of Congress."[98]

Response to Hamburger's work has been fierce. His critics responded that his work focused too much on British constitutional history of the seventeenth century and too little on traditional originalist sources, such as the colonial and state constitutions, the ratification debates, and early practice.[99] In a recent response, Julian Mortenson and Nicholas Bagley argue that the Founding contains no evidence of a nondelegation doctrine and that claiming otherwise amounts to projecting modern views back onto a very different history. The Framers, they argue, would have little difficulty with a delegation of legislative power to the executive branch, "so

94. *See* Alexander & Prakash, *supra* note 9, at 1310–17.

95. THE FEDERALIST NO. 75, at 503, 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

96. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

97. *Id.* at 444–50.

98. *Id.* at 31.

99. *See* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1551 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)).

long as the exercise of that power remained subject to congressional oversight and control."[100] They point to several examples of broad delegations by the early Congresses to show that none of the branches of the federal government in the early republic thought of a rule against delegation. Ilan Wurman, however, takes Mortenson and Bagley to task for misunderstanding the nature of the executive power at the time of the Framing.[101] He argues that they have also misread John Locke's discussion of the legislative power—no doubt of great importance to the political thinking of the Framing. In an important passage, Locke declared that "the legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others."[102] Any claim that this passage, which seems on its face to prohibit delegation of the legislative power to any other branch, contains a more subtle distinction between a temporary delegation and a permanent alienation of power does not appear in any of the founding sources. If anything, the Founders appear to use "delegate," "alienate," and "transfer" interchangeably.

This article contributes to this debate by addressing the case for nondelegation on the grounds favored by defenders of the administrative state. As the foregoing discussion shows, administrative law scholars have generally stood on present day functionalist considerations, such as governmental effectiveness, democratic accountability, and bureaucratic justice to defend broad delegation of authority to the agencies. Critics, on the other hand, have generally relied on formalist and originalist arguments: that the Founders would have understood the power to make laws—and by that they meant rules that regulate private conduct—to rest exclusively in the legislature.

This article provides a different, new argument in favor of nondelegation, but on functionalist grounds. Defenders of the administrative state argued that the first wave of nondelegation scholars

---

100. Julian Mortenson & Nicholas Bagley, *supra* note 75, at 280.

101. Ilan Wurman, *supra* note 75, at 1497.

102. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 79 (Prometheus Books 1986) (1690).

made claims too abstract to judge—that delegation defeats "responsibility" or "accountability." "Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls," Jerry Mashaw pointedly observed.[103] "How is it that we are not being represented?"[104] This article seeks to explain, using game theory approaches to public lawmaking, why a nondelegation doctrine would improve governmental effectiveness, the primary defense of the administrative state. I argue that a significant challenge for government effectiveness is the making and keeping of legislative bargains. Imperfect information and weak enforcement mechanisms will forestall agreements between groups in Congress, and between the branches of the federal government, that would benefit them and the nation. A nondelegation doctrine introduces the possibility for strengthened enforcement of legislative deals, which will encourage bargaining. While this article does not attempt to use game theory to identify a specific test,[105] it answers the more fundamental question: whether a nondelegation doctrine should exist in the first place.

II. GAME THEORY AND PUBLIC LAW

This section describes and applies the basic principal-agent model, generally applied to administrative law by positive political scientists, to the question of delegation.[106] In this simple model, Congress is the principal and agencies are the agent.[107] Because it does not have the time and resources to make rules on a certain

103. Mashaw, *supra* note 31, at 87.

104. *Id.*

105. For an attempt to create a two-part test for nondelegation based on game theory, see generally Sullivan, *supra* note 32.

106. *Cf.* Matthew D. McCubbins, Roger Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure, in* CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson eds., 1989).

107. *See* McCubbins, *supra* note 106, at 434.

subject, a principal will delegate that authority to an agency for several possible reasons.[108] It can save time and resources for other, more important duties.[109] It can take advantage of the agency's specialization and technical knowledge.[110] It can avoid political responsibility for unpopular decisions or over unpredictable areas with high stakes involved.[111] But even though it does not seek to make every decision, Congress still has a preference for the direction of policy, due to its electoral mandate, partisan ideology, or even its allegiance to interest groups.[112] Even if the enacting Congress has an ill-defined preference,[113] the issuance of regulations may more sharply define the preference of a contemporary Congress. Here, the underlying theory of legislative motivation is not as important as the positive description of a Congress that has a policy preference it seeks to advance through delegation to the agencies.

The central problem of the principal-agent relationship is diverging preferences.[114] A principal will delegate authority to an agent to act in its behalf, and in the course of that delegation it will grant a

---

108. ROBERT D. COOTER & MICHAEL GILBERT, PUBLIC LAW AND ECONOMICS 265 (2022).

109. *See* Sullivan, *supra* note 32, at 1258 ("The very reasons that Congress might delegate lawmaking responsibilities in the first place are to free up congressional resources and to gain the benefit of agency expertise and learning on topics beyond the ken of legislators.").

110. Julian Ku & John Yoo, *Globalization and Structure,* 53 WM. & MARY L. REV. 431, 450 (2011) (noting that Congress delegated significant power to agencies for their "expertise" in "technical and scientific areas"); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers,* 119 HARV. L. REV. 2311, 2357 (2006).

111. Ku & Yoo, *supra* note 110, at 451 (noting that Congress delegated significant power to federal agencies to avoid "taking stands on controversial issues when political opposition will result no matter which option they choose").

112. *See* Levinson & Pildes, *supra* note 110, at 2357 (noting that Congress may delegate broadly "not to abnegate policymaking responsibility, but to maximize accomplishment of its policy goals"). Indeed, some scholars have noted that Congress delegates more broadly "when government is unified than when it is divided," which supports the idea "that Congress does care about policy outcomes." *Id.*

113. *See id.*

114. *See* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem,* 106 NW. U.L. REV. 1201, 1226 (2012).

scope of discretion to the agent.[115] Without that discretion, the principal will lose the savings in time, resources, and expertise that would accrue from the delegation in the first place.[116] An agent, however, can use the discretion to engage in self-dealing conduct in a way that will be expensive for the principal to monitor.[117] Or agents can use claims of technical expertise or control over information to manipulate the context of a decision facing the principal, in order to persuade the principal to reach a conclusion that benefits the agent.[118] In the corporate law context, for example, this principal-agent problem arises when management uses its day-to-day control over a corporation to award itself excessive compensation or raises takeover defenses to outside mergers and acquisitions.[119] In the administrative law context, an agency's misuse of its discretion to pursue its own agenda, rather than that of Congress, is known as "agency slack"[120] or "bureaucratic drift."[121]

There is no perfect amount of delegation and discretion that Congress should grant an agency. Rather, there is a tradeoff. On the one side, the principal wishes to assure that the agent follows the former's preferences.[122] But on the other side, guaranteeing that the agent's actions will match the principal's wishes will require higher costs in collecting information, acquiring expertise, and overriding

---

115. *See* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 3 AM. J. POL. SCI. 697, 698, 701–02 (1994).

116. *See id.* at 701.

117. *See* Richard W. Waterman & Kenneth J. Meier, *Principal-Agent Models: An Expansion?*, 8 J. PUB. ADMIN. RSCH. & THEORY 173, 185 (1998).

118. *See id.* at 176.

119. Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSPECTIVES 71, 71, 74 (2003); Andrei Shleifer & Robert W. Vishny, *Management Entrenchment: The Case of Manager-Specific Investments*, 25 J. FIN. ECON. 123, 123, 124 (1988); Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL. REV. 265, 320–22 (1998).

120. *See, e.g.*, Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 58 (2008).

121. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9/11 World*, 94 CAL. L. REV. 1655, 1702 (2006).

122. *See* Epstein & O'Halloran, *supra* note 115, at 698.

the agent's decisions.[123] The only way to ensure that the agent's actions meet the principal's wishes every time would be for the principal simply to make the choices itself, but then the principal would lose the benefits of delegation.[124] Instead of proceeding without an agent, the principal instead can create systems to monitor the agent's performance and raise an alert should the agent deviate from the principal's wishes.[125] A principal can respond to agency slack by taking corrective measures, which can include changes to a governing statute, reductions in funding, oversight investigations, and refusal to confirm appointments.[126] Once the principal strikes the proper balance between efficient delegation on the one hand, and the costs of monitoring and correction on the other, it can cement it into laws and institutions.[127]

Applying the principal-agent model to government requires a different understanding of the agendas of public officials. In business law, a delegation problem arises because management will engage in "shirking" by receiving more pay for less work.[128] Agents seek to maximize compensation per hours worked. But increasing monetary pay does not fully capture the incentives of public officials,[129] who operate in an environment with strict pay scales usually well below those in the private sector. Agents in bureaucracies focus on advancing their preferred views on policies, rather than increase their pay and benefits (though no one would turn down a

123. *See id.* at 698, 701.

124. *See* Sullivan, *supra* note 32, at 1257.

125. Epstein & O'Halloran, *supra* note 115, at 698–99, 701.

126. *See id.*

127. *See id.* at 701–02.

128. Orts, *supra* note 119, at 276–77, 316; Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1827 (2007) ("[T]he employees of a company wish to be paid for working, but wish to work as little as possible."); *see also* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1406–07 (1985) (discussing management's temptation "to shirk in its performance or to divert corporate assets to itself").

129. Sulmasy & Yoo, *supra* note 128, at 1827 ("In the public administration context, shirking does not make as much sense.").

raise).[130] Shirking at its worst will occur when agency officials substitute their own policy views for those of the Congress that delegated the power in the first place.[131] But less egregious forms of shirking can occur when officials shape the decision-making context—by manipulating information or technical expertise—before the principal in a manner that favors the formers' preferred outcomes.[132] But shirking may not have occurred if agency officials use information and expertise to simply help the principal reach a more informed decision.[133] Like the amount of delegation and monitoring, shirking can fall along on a sliding scale where bright lines may not clearly exist on the margins between shirking and faithful implementation of a principal's wishes.

We must also apply the model over time. In the context of delegation, the principal-agent relationship occurs in three stages. First, Congress delegates authority; second, the agency promulgates a regulation; third, Congress responds.[134] Legislative disapproval can take the form of a statutory override, budget cuts, or oversight.[135] Because the relationship between the principal and agent is strategic, we would expect Congress to rarely, if ever, need to enact overriding legislation.[136] Congress and the agencies still pursue their

---

130. *Id.;* William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,* 2013 WIS. L. REV. 411, 433 (2013) (noting that agencies might shirk, among other ways, by "usurp[ing] Congress's authority" or by "fail[ing] to pursue the congressional goals effectively, perhaps because of interest group capture"); *see also* Jacob Gersen, *Designing Agencies, in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 334 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("[B]ureaucrats might maximize budgets for their agencies, the scope of their own power, leisure . . . .").

131. Sulmasy & Yoo, *supra* note 128, at 1827.

132. *Id.* (noting that public administrators may shirk by "manipulating information and events").

133. *Id.* (noting that "shirking may not have occurred" just because the agent with "specialized experience and better information[] provides advice to the principal that influences the latter's decision").

134. *See* Sullivan, *supra* note 32, at 1255.

135. *See id.;* Epstein & O'Halloran, *supra* note 115, at 699.

136. *See* Sullivan, *supra* note 32, at 1256–57 (noting that "the agency would have no reason to even try to deviate from Congress's legislative preferences, and so would legislate exactly as Congress would" if the agency knows Congress's preferences).

own agendas, but they act in a way that takes into account possible responses, which will arise from the other players' interests and the costs and benefits of their courses of action.[137] An agency will not wish to issue a regulation that would trigger a legislative override or a funding cut, a reduction in its discretion, and perhaps even a permanent narrowing of the delegation of authority.[138] Instead, agencies will promulgate regulations within the boundaries of congressional preferences.[139] The agency might have difficulty determining congressional preferences if it is acting in an area of uncertainty—such as new circumstances or information asymmetry—but it still seeks to act within a range of outcomes that will not prompt a congressional response.[140]

The relationship between Congress and the agencies also is not a one-shot game.[141] Congress creates agencies that are long-lived, if not permanent, with which it has long-term interactions.[142] This fact creates conditions that may give agencies more incentive and freedom to act outside of Congress's preferences.[143] Reversing regulations requires an overriding act. The Article I, Section 7 process is notoriously difficult due to bicameralism and presentment, especially when combined with the Senate filibuster requiring a three-fifth's vote to proceed to floor consideration.[144] The agency will adopt policies up to the preference of a filibustering Senate minority or of the President, depending on which one is further out on

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1258–59 (explaining that "the threat of congressional overrides and punishment may deter the agency from exercising its will in legislating other than as Congress would have it do").

141. *Id.* at 1261.

142. *Id.*

143. *Id.* at 1264 (explaining that "the extent of an agency's legislative power in a delegation situation" depends on "the terms and context of particular delegations of lawmaking authority").

144. *See* U.S. CONST., art. I, § 7; Senate Rule 22.

the policy spectrum.[145] Because the game is dynamic and continues into the future, the odds of a congressional overriding statute become even steeper because of Congress's limited resources to monitor and other pressing items on its agenda.[146]

Agencies have multiple means to pursue a policy at odds with that of the principal. An agency could refuse to promulgate new regulations desired by Congress. Agencies can "slow roll" congressional initiatives simply by delaying implementation.[147] Even if the regulations satisfy legislative preferences, agencies could use prosecutorial discretion to reach their own preferred outcomes.[148] Agencies can even take more systematic approaches to creating slack. Agencies might benefit from permanent information asymmetries that limit the knowledge and expertise available to Congress.[149] They might promote officials who excel at frustrating legislative oversight.[150] They can devote more resources toward pursuing their own agendas in areas that congressional committees may have difficulty in reaching with normal monitoring.[151] This amounts to a form of moral hazard in public administration, where agencies will produce excessive regulatory activity because of lax oversight and an agency's desire to achieve its own preferences.[152]

In a dynamic game, therefore, Congress will have to take up stiffer measures to guard against the wider opportunities for

145. Sullivan, *supra* note 32, at 1258 (noting that "in the extreme where Congress has no ability to monitor or respond to the agency's exercise of lawmaking discretion, the agency will simply legislate according to its own lawmaking preferences").

146. *Id.*

147. *See* Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841, 841 (2017) ("Yet delay may be a reflection of bureaucrats' strategic calculations, rather than a symptom of ineptitude, malfeasance, or circumstance").

148. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (recognizing that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

149. *See* Sulmasy & Yoo, *supra* note 128, at 1829.

150. *See id.*

151. *See id.* at 1828–29.

152. *See id.* at 1829.

agency slack. Congress will have an incentive to invest in mechanisms to monitor the agencies, not just to gain information on one policy decision, but to gain cumulative information about the agency over time.[153] The easiest tool to control slack is to enact narrower delegations of legislative authority to the agencies.[154] A broad delegation of authority with few limits on its exercise will produce the greatest opportunity for an agency to pursue its own agenda; conversely, a narrower delegation with greater procedural and substantive limits will reduce the moral hazard and the scope for slack.[155] Congress can achieve this by enacting detailed legislative rules, principles, and priorities to constrain agency discretion.[156] Congress can influence the hiring and promotion of officials by supporting those who share congressional preferences.[157] Congress might grant an agency greater autonomy in limited areas, such as enforcement, in exchange for the latter's commitment to Congress's broader policy goals.[158] But handcuffing agencies also raises the costs of delegation and can harm the agency's mission, especially if Congress keeps more of the decision-making authority for itself but lacks the expertise and information available to the agency.[159]

Congress can also monitor agencies, both to reduce information asymmetries and to identify cases for override, by involving third parties. Scholars have described some monitoring devices as "fire alarms," which rely on third parties such as the media or interest groups to watch agencies and raise the flag should they observe

153. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 46 (2d ed. 2014) (noting that "Congress [uses oversight to ensure] that agencies exercise their authority and spend their money in a manner that is consistent with evolving legislative policy goals").

154. *See* Epstein & O'Halloran, *supra* note 115, at 701 (explaining that "agencies can be controlled through limits on the range of policies they can enact").

155. *See id.* at 701–02 ("In other words, there is a fundamental trade-off in designing administrative procedures between informational gains and distributive losses").

156. *Id.* at 701.

157. *See* Sulmasy & Yoo, *supra* note 128, at 1829.

158. *See id.*

159. *See* Epstein & O'Halloran, *supra* note 115, at 701.

deviations from congressional preferences.[160] Perhaps the most well-known example of a fire alarm is the Administrative Procedure Act, which requires agencies to produce information on its rulemaking and then authorizes third party plaintiffs to seek judicial review over the result.[161] Scholars have classified others as "police patrols," that rely on investigations, oversight hearings, and the budget to engage in more intrusive monitoring of agency conduct.[162] Congress can even enlist agencies to monitor each other and report to Congress by encouraging jurisdictional rivalries.[163]

To be effective, monitoring depends on corrective options. A principal will not only need to detect deviations from their preferences, but it also will want meaningful sanctions for shirking in order to return agents to its range of preferences.[164] While monitoring and correction raise the costs of delegation to the principal, expending more resources on them will become necessary as agency slacking increases.[165] Like efforts to force disclosure of more information, congressional responses to agency action will generate their own record that will be of use to Congress in controlling a wayward agency. Congress, for example, might not detect every or even many examples of agency shirking, but when it does, it can deliver an extremely costly response to deter future drift from its preferences.[166]

III. GAME THEORY AND NONDELEGATION

This game theory perspective gives us two ways to understand the nondelegation doctrine. First, Congress may wish to create a

160. *See* Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms,* 28 AM. J. POL. SCI. 165, 166 (1984).

161. *See id.* at 173; Sullivan, *supra* note 32, at 1259.

162. *See* McCubbins & Schwartz, *supra* note 160, at 166.

163. Sullivan, *supra* note 32, at 1260–61 ("By empowering multiple agencies with parallel authority, Congress may benefit from competition between agencies, potentially giving Congress access to information it would otherwise not get.").

164. McCubbins et al., *supra* note 106, at 433–34.

165. *See* Sulmasy & Yoo, *supra* note 128, at 1826.

166. Sullivan, *supra* note 32, at 1258–59.

series of escalating sanctions in cases where it cannot devote extensive resources to monitoring. Congress should create an expected cost to impose on an agency that considers promulgating a rule that goes beyond legislative preferences. We can think of each response—congressional inquiries, oversight hearings, funding cuts, overriding statutes, and even permanent changes in an agency's fundamental governing law—as occupying a place on a spectrum of responses to agency shirking. An agency seeking to act outside of congressional preferences would take into account not just the magnitude of a response, but also the probability of detection and response. The expected cost of the response, rather than just the magnitude of the response itself, is what matters. The agency would then balance whether it made sense to shirk based on the benefit of achieving its policy preferences against the expected cost of congressional sanction.

The nondelegation doctrine would occupy a place as a severe sanction, but one so far with limited expected cost. In terms of magnitude alone, nondelegation would be more expensive for an agency than congressional action overriding a specific regulation, which would reverse only an individual exercise of delegated power, rather than multiple possible exercises of such power. But nondelegation would still be a less costly sanction than a statute that permanently eliminated agency authority or reduced its jurisdiction. Because the Supreme Court has not enforced the nondelegation doctrine since 1935, the probabilities of reversal are so small that the expected cost of the sanction may have approached zero. Congress might want the probability of the nondelegation doctrine to be greater than nothing, so that it can fill a certain place on a spectrum of responses.

A feature of this analysis is that it is agnostic as to the exact test used by courts to enforce the nondelegation doctrine. What matters is not so much the exact wording of the doctrine, but how often courts are willing to enforce it. Critics have attacked the intelligible principle test as unsupported by precedent, inadequate as doctrine,

or circular.[167] Eric Posner and Adrian Vermeule would go farther and say that there should be no test at all, because the Constitution creates no principle for courts to enforce short of a bar on the actual transfer of Congress's right to vote on legislation.[168] Even vocal supporters of a nondelegation doctrine, such as Larry Alexander and Saikrishna Prakash, shy away from providing a workable test.[169] But even if the intelligible principle test had meaningful content, it would not pose any restraint on strategic, rational agencies if the courts fail to use it. Courts could also develop a new test, but if they do not intend to apply it, agencies would continue to face little expected cost for shirking.

Note that a more vigorous nondelegation doctrine might not produce a great number of decisions. If Congress and agencies are acting strategically—and they know that courts will apply a nondelegation doctrine—they should act within the bounds of preferences set by the courts. They might also see warning signs. Courts will first begin striking down individual rulemakings as arbitrary and capricious or start rejecting agency interpretations, especially after *Loper Bright*'s reversal of the *Chevron* doctrine.[170] As John Manning and Cass Sunstein have separately observed, courts could also use the nondelegation doctrine as a norm by which to interpret statutes.[171] But if agencies continue to press beyond the preferences of the enacting Congress even after experiencing setbacks, they will approach the boundaries of the nondelegation doctrine. Agencies should pull back before they encounter a wholesale restriction on their exercise of delegated power because they wish to avoid a congressional backlash that could result in an even greater loss of power. Once the Court issues its first decisions restricting bureaucratic discretion, the agencies rationally should modify their future behavior to fall within Congress's range of preferences.

---

167. Lawson, *supra* note 9, at 355–78.

168. Eric A. Posner & Adrian Vermeule, *supra* note 6, at 1721–22 ("In our view there just is no constitutional nondelegation rule, nor has there ever been.").

169. Larry Alexander & Saikrishna Prakash, *supra* note 9, at 1298–99.

170. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

171. Manning, *supra* note 7, at 227; Sunstein, *supra* note 7, at 316.

A second way to understand nondelegation from a game theory perspective is as a means of reducing uncertainty on the part of Congress. If a majority in Congress is unsure about its future electoral support, it will seek to insulate policymaking by delegating power to an agency. This will make it more difficult for a future Congress, with a majority from the opposition party, to completely change policy direction. The agency will run on the original course set by Congress even after the original legislators have left office.[172] A congressional majority might especially favor delegation to an agency if it is electorally weak and the political process throws several veto gates in the way of any future overriding legislation. Delegation may allow that temporary majority to set the agency on policy autopilot with few opportunities by successors to alter course.

But if Congress is also unsure about agency preferences over time, it may not wish to delegate power that remains fully insulated from external control. The logic of the principal-agent game suggests that if a majority in Congress remains confident of its electoral success in the future, it would not seek extensive limits on delegation. It would have the power to sanction shirking or enact overriding legislation easily. Any restrictions on the exercise of delegated authority either in terms of rulemaking procedure or judicial review would increase the ineffectiveness of agency action without any corresponding benefit. We would expect, for example, a parliamentary system along the British model to have almost no judicial review of agencies or anything like a nondelegation doctrine. But because of the difficult process of enacting statutes set out by Article I, Section 7, and the possibility that the executive branch could fall under the control of a different political party—which has been the case for a majority of the years since President Lyndon B. Johnson left office[173]—Congress cannot override agencies so easily. It

172. *See* Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control,* 3 J.L. ECON. & ORG. 243, 244–45 (1987).

173. *Party Government Since 1857*, U.S. HOUSE OF REP.: HIST., ART. & ARCHIVES, https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/ [https://perma.cc/7WQF-754G].

may rationally look for other mechanisms to reverse agency action that do not depend on the enactment of statutes.

The nondelegation doctrine here is similar to the choices that Congress faces when it chooses to delegate a decision wholly to an agency or wholly to a court.[174] If Congress trusts an agency to honor Congress's policy choices in the future, it will delegate broadly. It might even favor deference rules that require judicial deference to agency decisions—the dynamic that prevailed until *Loper Bright.* But if Congress is uncertain about an agency's future policy preferences, it could choose to delegate a decision to the courts, as it did with the Sherman Antitrust Act. Courts will probably pay more attention to maintaining the preferences of the enacting Congress given their allegiance to interpreting statutes based on legislative intent. Precedent will also make it less likely that a court will change its interpretation over time. That is not to say that courts do not change their interpretation and enforcement policy over time, only that from the standpoint of comparative institutional politics, they are less likely to than are agencies, which might alter their agendas because of the results of a recent election.

Consideration of whether to vest greater oversight of agency policymaking in the judiciary also requires an expansion of the definition of the principal. In most models, the Congress is the sole principal, and the agency is the agent. But the Presidency also plays a rival role. Presidents are involved in the original delegation through their powers to propose legislation and to veto. The executive branch commonly uses a veto threat as leverage to negotiate changes in statutes, usually in coordination with the President's partisan supporters in Congress.[175]

---

174. *See generally* Matthew Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts,* 119 HARV. L. REV. 1035 (2006); Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation,* 96 AM. POL. SCI. REV. 321 (2002); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?,* 39 PUB. CHOICE 33 (1982).

175. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 150–60 (1999).

Once Congress passes a law, the President will compete with Congress over the agency's exercise of the delegated power. Presidents seek that power because the electorate may hold them politically responsible for agency choices, especially those that impact the economy or influence policy on highly contested issues. If a President takes office during a sharp recession, as Ronald Reagan did in 1981, he will seek greater control over regulations that affect economic growth. The Reagan administration responded to these incentives by aggressively centralizing cost-benefit review over all major regulations in the Office of Management and Budget.[176] Despite several changes in partisan control of the White House since, none of Reagan's successors relinquished that power. While the Constitution does not explicitly state that the agencies need take direction from the White House in promulgating regulations, the Court has held that the President's constitutional duty to take care that the laws are faithfully executed gives him the power to command subordinate executive officers.[177]

Presidents may even have greater ability to control agency implementation than Congress. They appoint the top leadership of the agencies, though with the advice and consent of the Senate for the highest positions.[178] They have the power to remove principal officers and perhaps all others who are not members of the civil service.[179] The power of appointment gives them the power to determine promotions for political appointees. Under the Take Care Clause, Presidents exercise prosecutorial discretion to allocate resources and personnel to pursue their enforcement priorities.[180] They can even use the Take Care Clause, combined with the threat of removal, to direct inferior officers to follow their orders. Congress may delegate to an agency, but it risks presidential influence over the regulators that causes the final rules to swing even farther

176. Christopher DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075–76 (1986).

177. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2193 (2020).

178. *See* U.S. CONST. art. II, § 2.

179. *See, e.g.*, Myers v. United States, 272 U.S. 52, 132–35 (1926); *Seila Law*, 140 S. Ct. at 2192.

180. United States v. Texas, 142 S. Ct. 1964, 1971 (2023).

beyond legislative preferences. Congress would not just have to take into account the President at the time of enactment, with whom it might agree, but future Presidents, with whom it is likely at some point to disagree.

Taking time into account also means considering future Congresses as well. Suppose Congress wants to set policy in a strongly pro-environmental direction in the Clean Air Act. It could delegate broad power to the agency, which it might predict will keep policy moving in the same direction. But also suppose a President wins election who seeks to prioritize industrial activity over the environment and his appointments to the EPA repeal previous regulations and enact less protective replacements. The enacting Congress might command enough of a majority to override the regulation, but it cannot be confident that the Congresses of the future will share the same preferences.

Within this framework, a nondelegation doctrine would appeal to a risk-averse legislator. If he delegated broadly to an agency, the legislator would take a greater chance that a future agency might shirk, that a different President might pull the agency even farther beyond the enacting Congress's wishes, or that a future Congress would have different preferences and decline to override the regulation. Such a legislator would look to a third party, such as the courts, to restrain the agency. Much of the existing scholarship looks at the choice between handing a decision over to an agency or to the courts. But they neglect the intermediate possibility of giving courts greater review over agency decisions. Congress could do this by pushing the courts to change their current approach of deference to agencies both in their rulemaking and their interpretation of ambiguous laws and regulations. Congress could also do this by encouraging courts to apply a nondelegation doctrine that prohibits excessive, standardless transfers of power to the agencies.

The enacting Congress would prefer this for two reasons. First, expanding judicial review over agencies would keep the guiding range of preferences to those of the enacting Congress. Dynamic theories of statutory interpretation expect that agencies will pay attention to the preferences of the current Congress, not the one that

enacted the law.[181] It is only the current Congress that can cut the agency's budget, delay its appointments, and override its policies. But because courts still reject dynamic theories of interpretation in favor of a formal quest for the intentions of the enacting Congress, expanding judicial review has the effect of keeping the possible range of policy outcomes in the future closer to the median legislator at the time of enactment. This should be true both for increasing judicial scrutiny of individual regulations, which falls under arbitrary and capricious review, and of a bundle of agency actions, which amounts to the nondelegation doctrine.

Second, broader judicial scrutiny would have the effect of providing stability in the exercise of delegated power over time. Agencies need not obey stare decisis. They can change their rules based on new information, theories of regulation, or even political preferences due to elections. Presidents can use their constitutional powers to effect even more dramatic change in agency rulemaking. Increasing judicial scrutiny of these decisions can force regulatory change to be more gradual, less unpredictable, and less partisan. A nondelegation doctrine will place outer limits on how far agencies can press their powers and may serve as a broader restraint on the overall exercise of delegated power across issues within an agency's jurisdiction.

This is not to say that judicial scrutiny of delegated lawmaking is certain while agency decisions are not. Just as agencies can shift their positions over time, courts can as well. Courts will apply their review over agency decisions within a range of preferences, just as the Congresses and Presidents at the time of statutory enactment and in the future try to shift the exercise of delegated power in the direction of their preferences. But unlike agencies, legislatures, and Presidents, courts decide in a comparatively slow, decentralized manner that will produce less change over time. Presidents increasingly seek to appoint judges that hew to their ideological prefer-

181. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 49 (1994).

ences in constitutional interpretation. But even as today's Presidents seek to shift the ideological makeup of the courts, such change takes time because of the gradual nature of the judicial appointments process and the creation and slow spread of new norms through a decentralized judicial system. Even after two terms in office, a President may well not appoint a majority of the Justices of the Supreme Court or of the judges on the appellate courts.

IV. NONDELEGATION AND PRESIDENTIAL INTEREST

The last section used game theory approaches to public law to understand the circumstances when Congress might want a nondelegation doctrine. This section will take up the question whether a nondelegation doctrine might support presidential interests as well. This view runs contrary to the general assumptions of the principal-agent analysis of bureaucratic politics. In the game set out in Part II, the legislature delegates to agencies but wishes to keep strings attached, while the President uses his powers over the executive branch to break those strings and pull policy toward his preferences. Under this approach, observers assume that Presidents are happy to receive ever greater grants of power. The President seeks more authority over domestic policy because the electorate commonly holds him responsible for it, even if the executive branch does not actually have control. Indeed, much political science scholarship about the presidency emphasizes the lack of actual power in the office to affect change over domestic matters.[182] Presidents will welcome grants of delegated power from Congress, which allow them to live up to their electoral promises, influence affairs in their ideologically preferred direction, and increase the power of their

182. *See generally* WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT—AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1986). This theme of a weak presidency runs back to RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS (1960) if not WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885). *But see* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 13-14 (2003).

office. Presidents therefore should oppose the nondelegation doctrine.

The maneuvering around *Gundy* presents a more complicated picture. The Trump administration's Solicitor General defended Congress's delegation of power to the Justice Department to decide whether sex offenders convicted before passage of SORNA had to comply with its terms.[183] In the case itself, the Attorney General used the delegated power to require registration for "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[184] Two Justices appointed by the Trump administration, however—Justices Neil Gorsuch and Brett Kavanaugh—have led the charge for re-examination of the nondelegation doctrine. Justice Gorsuch wrote the dissenting opinion calling for a resurrection of the doctrine[185] and Justice Kavanaugh in a separate case also appealed for the Court to take up the question.[186] If their appointments represent the Trump administration's approach to constitutional interpretation, their stance on nondelegation runs counter to the actual positions taken by the same administration in litigation.

This section will examine why a President might support a nondelegation doctrine. It shifts this Article's use of game theory to the model of bargaining failures. We can understand delegation as part of a broader relationship between the President and Congress over sharing power. As the Court observed in cases such as *Chadha*[187] and *Bowsher*,[188] the Framers designed the separation of powers to protect individual liberty by making cooperation difficult. But as James Madison observed in *The Federalist,* the Constitution also cre-

183. *See generally* Brief for the United States, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

184. *Gundy,* 139 S. Ct. at 2122 (quoting 72 Fed. Reg. 8897 (Feb. 28, 2007)).

185. *Id.* at 2131 (Gorsuch, J., dissenting).

186. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

187. INS v. Chadha, 462 U.S. 919, 950 (1983) ((quoting THE FEDERALIST No. 51, at 324 (James Madison) (Jacob E. Cooke ed. 1961)).

188. Bowsher v. Synar, 478 U.S. 714, 721 (1986).

ates political incentives for the two branches to overcome these barriers to enact laws in the public interest.[189] In a certain set of cases, both branches will be better off if they can come to an agreement on sharing power. If that legislation involves the delegation of significant authority from Congress to the President, the two branches will more easily agree if they can make credible promises on how the executive will carry out the law.[190] A nondelegation doctrine might help them in making and keeping such commitments, and hence facilitate bargaining that is in the President's interests.

The analysis here borrows from the literature on conflict, which is itself based on the same models used to examine the choice between litigation and settlement.[191] Rational actors can resolve a dispute by reaching a settlement or engaging in conflict.[192] In a criminal case, for example, prosecutors and defendants face a choice between a plea bargain or trial. In international disputes, nation-states can resolve a territorial dispute by making a deal, expressed in a treaty, or going to war.[193] If they enjoy complete information, rational actors should always seek the settlement over conflict.[194] At a minimum, for example, litigants could reach an agreement that

189. THE FEDERALIST No. 51, at 352, 353 (James Madison) (Jacob E. Cooke ed. 1961).

190. *See* Eric Posner & Adrian Vermeule, *The Credible Executive,* 74 U. CHI. L. REV. 865, 888 (2007) (indicating that when the executive and Congress are of the same political party and share ideology, the more likely Congress is to delegate its powers).

191. *See generally* James D. Fearon, *Rationalist Explanations for War,* 49 INT'L ORG. 379 (1995) [hereinafter Fearon, *Rationalist]*; Robert Powell, *Bargaining Theory and International Conflict,* 5 ANN. REV. POL. SCI. 1 (2002) [hereinafter Powell, *Bargaining]*; Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform?: Contrasting Two Institutional Perspectives on Democracy and War,* 53 INT'L ORG. 233 (1999). *See also* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery,* 23 J. LEG. STUD. 435 (1994).

192. *See, e.g.*, Fearon, *Rationalist*, *supra* note 191, at 379–81; T. David Mason & Patrick J. Fett, *How Civil Wars End: A Rational Choice Approach,* 40 J. CONFLICT RESOL. 546, 548 (1996).

193. *See, e.g.*, Shawn D. Bushway, Allison D. Redlich and Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow Of The Trial,"* 52 CRIMINOLOGY 723, 724 (2014).

194. Fearon, *Rationalist*, *supra* note 191, at 381; Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information,* 98 AM. POL. SCI. REV. 231, 231 (2004) [hereinafter Powell, *Inefficient Use]*.

mirrors the likely outcome of any trial, but which would avoid litigation costs.[195] Nations should make a treaty that divides a disputed territory, along the lines that they likely would have reached after a conflict, while avoiding the costs of war. The costs of litigation in the former example, and of war in the latter example, amount to deadweight losses that rational actors should want to escape.[196] Even a litigant that has virtually zero chance of prevailing should agree to a settlement that admits as much, because it will still save litigation and opportunity costs.[197]

In order to reach the decision on whether to settle or fight, rational actors must make calculations about the probability that they would prevail in a conflict.[198] That probability, multiplied by the value of the territory or litigation, would produce the expected benefit of a conflict.[199] To take a simple example, the expected benefit of a lottery ticket is the probability of winning the lottery, which is determined by the number of tickets, multiplied against the size of the jackpot. If the two parties are rational, they would know that their chances of prevailing would be the opposite of the other side's chances, because the sum of probabilities must add up to 1. If one team has a 70 percent chance of winning a game, for example, the other team must have a 30 percent chance of winning. To take the lottery ticket example, a rational actor should purchase the ticket when its price is less than the probability of winning times the size of the jackpot.[200]

---

195. Cooter & Gilbert, supra note 108, at 364.

196. Julian Ku & John Yoo, *Bond, the Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties*, 90 NOTRE DAME L. REV. 1607, 1619 (2015).

197. *See, e.g.*, Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1275 (2006).

198. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2527 (2006).

199. John Yoo, *Rational Treaties: Article II, Congressional Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 15 (2011) [hereinafter Yoo, *Rational Treaties*].

200. *See* John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 804 (2004) [hereinafter Yoo, *War, Responsibility]* (it is "bad policy" to act when the costs outweigh the expected benefit).

Scholars such as James Fearon and Robert Powell fruitfully applied this model to international politics.[201] Suppose a national government and a rebel group dispute territory. The rebels threaten to fight to gain control over the territory. The government must choose between conceding the territory or fighting to maintain its control. To make that decision, the government must know the value of the territory and the probability that it will prevail.[202] It will fight if the probability it will win, times the value of the territory, is greater than the rebel group's probability of winning in a conflict times the value of the territory. The government will know that the rebel group, if it acts rationally, will not fight because it will not prevail in a conflict and will also lose the costs of the fight.[203] The government and the rebels should reach an agreement that keeps the territory in the government's hands, while both avoid the deadweight loss of a conflict.[204]

But rational actors can still end up in a conflict.[205] If the government and rebel groups have access to only incomplete information, they may misjudge the variables necessary to make an accurate assessment of the expected benefits and costs of settlement versus conflict.[206] The government, for example, may not know the rebel group's ability to win, which will depend on troop and weapon levels, but also leadership, morale, and training, as well as political

---

201. *See, e.g.*, Fearon, *Rationalist*, *supra* note 191; Robert Powell, *War as a Commitment Problem,* 60 INT'L ORG. 169 (2006) [hereinafter Powell, *Commitment Problem]*.

202. James D. Fearon, *Why Do Some Civil Wars Last So Much Longer than Others?*, 41 J. PEACE 275, 275–276 (2004) [hereinafter Fearon, *Civil Wars*]; Mason & Fett, *supra* note 192, at 548.

203. Powell, *Inefficient Use*, *supra* note 219, at 233.

204. *See* Ku & Yoo, *supra* note 196, at 1621. The literature here makes several assumptions: both the government and rebels must be able to estimate the real probabilities of prevailing in a conflict; they are not risk-seeking (they do not gamble irrationally on low-probability outcomes); the territory can be divided or transferred in toto with accompanying side deals; neither side can completely eliminate the other, in that a conflict would only involve control over the disputed territory and not end the overall bargaining relationship.

205. Nzelibe & Yoo, *supra* note 198 at 2528; *see also* Branislav L. Slantchev & Ahmer Tarar, 55 AM. J. POL. SCI. 135, 136 (2011).

206. Yoo, *Rational Treaties*, *supra* note 199, at 17.

factors such as popular support and foreign allies.[207] The government may be able to gather some of this information, but some of it may also be private and harder to judge. Litigation has the same quality.[208] A plaintiff may have access to some information necessary to estimate its chances of winning, such as the legal rules, the evidence and witnesses of which it knows, and the quality of its counsel. But it will not know directly of the evidence and witnesses in the hands of the defendant, nor perhaps of the quality of the defendant's trial counsel.

If the two parties to a dispute could reveal their private information, they could reach an agreement to avoid conflict. But assuring that the information is credible is difficult. A party may be tempted to bluff—producing false information showing a higher probability of winning—to obtain a better deal than they should obtain in a bargaining environment with perfect information.[209] Bluffing means that parties will tend to discount the reliability of information that their opponents voluntarily produce. Parties can attempt to overcome this problem by engaging in costly signaling; in other words, an expensive act that shows that the information produced is credible.[210] A party could send such a credible signal, for example, by taking an act that would be politically costly to itself should it be bluffing.[211] If a nation's leader declares that it will fight, but then backs down, the leader will suffer political costs at

207. *See, e.g.*, James D. Morrow, *Capabilities, Uncertainty, and Resolve: A Limited Information Model of Crisis Bargaining*, 33 AM. J. POL. SCI. 941, 947–48 (1989) (discussing factors nation-states struggle or can't assess when determining the probability of victory).

208. *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation under Uncertainty*, 56 EMORY L.J. 619, 653 (2006) ("In any given [litigation] dispute, there is imperfect information . . . .").

209. *See* Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 AM. POL. SCI. REV. 585, 599 (2003); James D. Fearon, *Domestic Political Audiences and Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 578 (1994) [hereinafter Fearon, *Domestic Political*].

210. *See* Erik Gartzke, *War Is in the Error Term*, 12 INT'L ORG. 567, 579 (1999); Nzelibe & Yoo, *supra* note 198, at 2529.

211. *See* Schultz, *supra* note 191, at 2.

home from elites or the public.[212] A party could engage in costly spending and investments which would be wasted if it were bluffing. In the international context, a nation could build bases and infrastructure, or permanently deploy military forces and political resources, to the territory in dispute.[213]

Another important way to overcome the bluffing problem is to use an independent third party to mediate the production of credible information.[214] In the domestic litigation context, the Federal Rules of Civil Procedure allow parties to produce information on evidence and witnesses through a discovery process managed ultimately by the courts. The force of federal law makes the information produced credible.

But even if parties to a dispute can solve asymmetric information and bluffing challenges, commitment problems will pose an equal if not greater obstacle.[215] Even if the parties enjoy enough information to accurately calculate their expected values of winning a dispute, and thus they understand the bargain to be made that would avoid the deadweight losses of a conflict, they still might not choose settlement. The commitment problem is that the parties might not trust each other to keep their word in the future.[216] In environments that are less governed by binding law and institutions, such as international politics or domestic political conduct that is non-justiciable, there are few means to compel the parties to comply with agreements.[217] Parties may be tempted to renege on a settlement, especially when the resolution of the dispute itself alters

---

212. *See* Yuleng Zeng, *Bluff to peace: How economic dependence promotes peace despite increasing deception and uncertainty*, 37 CONFLICT MGMT. PEACE SCI. 633, 633 (2020) [hereinafter Fearon, *Signaling*] (citing James Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs,* 41 J. CONFLICT RESOL. 68, 78 (1997)).

213. Banislav L. Slantchev, *Military Coercion in Interstate Crises,* 99 AM. POL. SCI. REV. 533 (2005).

214. *See e.g.,* LESLEY G. TERRIS, MEDIATION OF INTERNATIONAL CONFLICTS 2, 9 (2016).

215. Gartzke, *supra* note 210, at 571.

216. Monica Duffy Toft, *Issue Indivisibility and Time Horizons as Rationalist Explanations for War,* 15 SOC'Y STUD. 34, 35 (2006).

217. *See* Andrew T. Guzman, *The Design of International Agreements,* 16 EUR. J. INT'L L. 579 (2005) (in international environments agreements are often drafted to be more easily violated and international politics lack the structure to enforce such agreements).

the status quo or triggers rapid change in the balance of power between them.[218] In the territorial dispute example, a party that emerges from a resolution better off because it has gained control over more resources and population may want to break the deal and seek even more advantage with its newfound power.[219]

If the environment where the dispute takes place is governed by weak institutions, parties will have little reason to trust each other to keep their commitments. In international relations, Fearon and Powell observe that states will have difficulty in reaching international agreements, even with perfect information, because of the lack of international institutions with enforcement power.[220] This problem will also be true, as Thomas Schelling first notably observed, in a series of domestic settings where enforcement will be weak.[221] Separation of powers disputes between the President and Congress share this feature. If the courts hold that the political question doctrine prevents judicial involvement in an area, the lack of enforcement could discourage the branches from reaching agreements to settle their political or constitutional disputes. Bargaining may also prove difficult if the courts refuse to honor mechanisms that signal credibility. In *INS v. Chadha,* for example, the Court declared that it would not enforce the outcomes of legislative vetoes, but instead would allow the underlying executive branch action—there, a decision by the Attorney General to block a removal order of an alien—to go forward.[222] But without a legislative veto, Congress will have less reason to trust the President's promises that the executive branch will respect legislative preferences, and hence delegation is less likely to occur.

---

218. Powell, *Commitment Problem, supra* note 201, at 171–72.

219. *See, e.g.*, Robert Powell, *War as a Commitment Problem,* 60 INT'L ORG. 169, 171 (2006); Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information,* 98 AM. POL. SCI. REV. 231, 231 (2004).

220. Fearon, *supra* note 191, at 384; Powell, *Commitment Problem, supra* note 201, at 181.

221. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 5 (1960) (emphasis omitted).

222. 462 U.S. 919, 928 (1983).

This model would explain why the President might favor greater judicial review over the delegation of power to the agencies. Suppose that Congress and the President both wish to expand federal regulation of a certain issue. They could choose to cooperate through enactment of legislation that delegates rulemaking power to an agency within the control of the executive branch. Congress is willing to delegate authority, but only if it knows that the executive will commit to exercising the power within a certain range of policy outcomes. The President reveals that his political preferences in using that power overlaps with Congress's preferences. If regulation within Congress's preferences leaves the President better off, the President should promise to stay within Congress's range in order to persuade the legislature to delegate the power. The President and Congress should be able to reach a deal because both branches are better off cooperating than doing nothing.

But the problem is that Congress may have few reasons to trust the President to keep his promise. Once Congress passes the law, the President could break the deal, use the delegated power outside the spectrum of policies to which he originally agreed, and suffer little chance of reversal thanks to his veto power over any reversing statute. If Congress does not have a credible commitment from the President that he will keep his word, and the President's use of delegated power would leave Congress worse off, it will not reach an agreement and pass the statute. Without any judicially enforceable agreement, Congress can retaliate by cutting funding and holding oversight of executive exercise of the delegated power, which may not much discourage the President. Congress's most meaningful sanction against presidential reneging is the same used in infinitely repeating tit-for-tat games: a loss of presidential reputation for keeping promises and, therefore, legislative refusal to cooperate in the future.

As scholars have observed, the parties have a way out. They can send costly signals that reveal their intent to keep their commitments. In the context of forming a nation, for example, groups can send a costly signal that it will keep a power-sharing deal by agreeing to a written Constitution. Parties to a Constitution might further

agree to judicial review as a commitment that they intend to live up to their promises and not seek to use the power of the new government to break the original bargain.

A more vigorous nondelegation doctrine can perform a similar function to that of a written Constitution in overcoming commitment problems in bargaining between the executive and legislative branches. Congress may distrust a President's promises on how he will wield delegated power in the future. This may especially be the case if the delegation will enhance the legal and political standing of the President compared to Congress. Congress will also have little reason to trust a President's promises about the exercise of the power by his successors, over whom he is unlikely to have much influence.

For his part, the President would benefit from the delegation, but he does not have many tools to credibly commit to exercising the power within the range of congressional preferences. The President can agree to a judicially enforced nondelegation doctrine as a costly signal that he intends to abide in the future by the promise he makes today. A nondelegation doctrine would not interfere with every exercise of a delegation, but it would allow courts to correct for any significant deviations from the agreement between the branches. A nondelegation doctrine would also place the question in the hands of an independent third party with which both branches have greater trust to detect violations of the agreement and impose remedies. The doctrine advantages the President, but it also benefits both parties because it allows them to invite external enforcement of the agreement, and thus solve the most difficult obstacles to bargaining.

A nondelegation doctrine may also provide a solution to a problem in bargaining between the executive and legislature created by the timing of execution. A common problem in bargaining arises over the order in which two parties perform their obligations. In the delegation of authority, Congress must go first in enacting the delegation, while the President moves second in exercising the grant of authority within the bounds agreed to between the

branches. Once Congress performs its part of the bargain, the President will enjoy the advantage by then applying the delegation. If the President chooses to renege and abuse the grant of power, Congress has less ability to counter the President or even terminate the deal. By committing to a nondelegation doctrine, the President can assure Congress that he will obey the original bargain even after the balance of power in the relationship has shifted in his or her direction.

Of course, the nondelegation doctrine is not a cure-all nor unique in its benefits. The Administrative Procedure Act and judicial review over agency action generally also perform the same function. Vesting review over agency action in the courts, though it reduces the efficiency of delegated power, smooths the way toward an agreement between the executive and legislative branches to share power in the first place. Rather than an obsolete mechanism, the nondelegation doctrine similarly should help the President and Congress cooperate. Of course, it would not have the same value in every area of inter-branch bargaining. In certain areas, Congress may have such great incentives to delegate power that it would do so even without the need for such commitments. These could include areas where the potential harm to the nation due to inaction is great, such as in emergencies, crises, or war, or where the political benefits of shifting policymaking is especially high, such as politically controversial questions or technically difficult problems.

But tools such as the nondelegation doctrine have become more important as others have declined. The Court has increasingly looked askance at other means of executive-legislative cooperation, such as the legislative veto, insulated decision makers, and unusual agency forms. The Rehnquist Court, for example, invalidated the widely-used legislative veto, even though—as Justice White's dissent ably explained—its presence encouraged Congress to delegate broad powers. In *INS v. Chadha,* the Court explained that the Framers intended the Constitution to defeat such governing innovations because they believed an excessively efficient government could

threaten individual liberty.[223] Similarly, the Roberts Court has struck down recent efforts to create new forms of agency independence, such as the Consumer Finance Protection Board director's for-cause removal protection. In *Seila Law v. CFPB*, the Court observed that the Constitution concentrated executive power in an elected President accountable to the people, but that it otherwise resisted the concentration of authority in other bodies, such as the CFPB, which combined the ability to regulate, prosecute, and draw its own funds without congressional approval.[224] Both the legislative veto and for cause removal encouraged congressional delegation; the former by allowing Congress to grant power but with strings attached, the latter by keeping the exercise of the delegation free from direct presidential control. With the Court finding these devices inconsistent with the separation of powers and its protection for individual liberty, nondelegation will rise to fill their place. That doctrine, however, will require judges to accept the non-intuitive result that formally policing delegations will have the result of encouraging more delegations.

CONCLUSION

This article does not undertake the difficult task of constructing a neutral doctrinal test that could enforce a nondelegation doctrine. Even if a majority on the Court wishes to dispense with the current intelligible principle test, federal judges have yet to produce a replacement that does not call on the courts to pick and choose among their favored delegations. This article has taken a different tack. It has sought to analyze the nondelegation doctrine using a public choice approach to the relationship between Congress, the President, and the agencies. On this point, this article contributes to the debate over delegation by explaining an important role for a nondelegation doctrine based on the functional considerations favored by administrative scholars, rather than originalist history or democratic theory grounds. It argues that, in certain situations, Congress

223. *Id.* at 944.

224. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

would favor a nondelegation doctrine that invites greater judicial scrutiny over agency action. It concludes that a more vigorous nondelegation doctrine might actually encourage greater cooperation between the branches by assuring them that their bargains over sharing power will be enforced. In this respect, a nondelegation doctrine might produce the unanticipated consequence of producing better legislative outcomes and increased social welfare.

STRUCTURAL IMPLEMENTATION AND THE MAJOR QUESTIONS DOCTRINE

NATE BARTHOLOMEW*

INTRODUCTION

The major questions doctrine has thoroughly captured Supreme Court watchers' attention. Supporters cheer its arrival as necessary to curb the ever-expanding administrative state. Detractors protest the legitimacy of such a sweeping doctrine and worry about its potential to derail regulatory policy in an era of congressional gridlock. Still others who may be inclined to support the doctrine question its compatibility with interpretive commitments such as textualism or originalism. No matter where one stands, the major questions doctrine will likely dominate administrative law discussions for the foreseeable future.

The doctrine's controversial nature has generated competing justifications. In his *West Virginia v. EPA* concurrence,[1] Justice Gorsuch offered one view of the major questions doctrine, rooted in a history of clear-statement rules that protect constitutional values. In her *Biden v. Nebraska* concurrence,[2] Justice Barrett presented an alternative theory. She explains the major questions doctrine as a natural element of ordinary statutory interpretation, completely in accord

* J.D. 2024, Harvard Law School; M.Acc., B.S. 2019, Brigham Young University. First and foremost, many thanks to my wife and kids for supporting me through it all. I express gratitude to Professor Cass Sunstein and Justice Stephen Breyer for leading a thought-provoking seminar that spurred on the drafting of this Note. I also give my sincere thanks to the editors of the *Harvard Journal of Law & Public Policy* for their work and dedication.

1. 142 S. Ct. 2587, 2613 (2022) (Gorsuch, J., concurring).

2. 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

with modern textualism. Chief Justice Roberts, the author of the majority opinion in both cases, has carefully avoided endorsing either view.[3]

In Part I, this Note will trace the background and history of the major questions doctrine. It will show that the doctrine is not as "new" or "unprecedented" as some objectors claim. Nonetheless, the doctrine's scope has expanded beyond its original application. Part II outlines the cases in which Justices Gorsuch and Barrett present competing defenses of the major questions doctrine. Part III examines possible critiques of these theories, which suggest that either theory threatens to undermine the stated goals of textualist statutory interpretation. In Part IV, this Note proposes a reconciliation of Justice Barrett's "plain reading" with Justice Gorsuch's "constitutional values" argument that also responds to the textualist critiques. On this reading, the major questions doctrine is the most natural way to read and implement *constitutional structure*, a key component of constitutional text. Finally, Part V will illustrate how the Supreme Court utilizes clear-statement rules in other contexts to implement constitutional structure in a similar fashion. Taken together, this approach harmonizes the competing theories of the major questions doctrine with a familiar constitutional tradition of implementing constitutional structures through clear-statement rules.

I. MAJOR QUESTIONS DOCTRINE: BACKGROUND AND HISTORY

Although some might label the major questions doctrine novel or unprecedented, the intuitions underlying the doctrine have lurked in the background since the inception of modern administrative agencies.[4] Thus, what has changed over time is not the theory, but

3. *See West Virginia*, 142 S. Ct. at 2609 (majority opinion) (resting the major questions doctrine on both "separation of powers principles" and "a practical understanding of legislative intent").

4. *See, e.g.*, Interstate Com. Comm'n v. Cincinnati, N. O. & T. P. R. Co., 167 U.S. 479, 505 (1897) ("That congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. . . . [I]f congress had intended to grant such a power to the interstate commerce commission, it

its scope and application, particularly as the theory evolved in tandem with the Court's now-defunct *Chevron* framework.[5]

The modern major questions doctrine likely originated in *Food & Drug Administration v. Brown & Williamson Tobacco Corp*.[6] The FDA sought to regulate tobacco products as "drug[s]" which are "intended to affect the structure or any function of the body."[7] Despite this plausible reading of the statute, the FDA had previously disavowed any authority to regulate tobacco.[8] Applying *Chevron* "step one," the Court asked "whether Congress has directly spoken to the precise question at issue."[9] To resolve this inquiry, the Court first reviewed the relevant statutory text "as a whole."[10] It then considered the enacting history of the FDA's organic statute along with other relevant statutory schemes.[11] Finally, the majority noted that in "extraordinary cases," there may be "reason to hesitate before concluding that Congress has intended" to delegate certain authority to an agency, even where a "statute's ambiguity" would otherwise constitute an "implicit delegation" under *Chevron*.[12]

---

cannot be doubted that it would have used language open to no misconstruction, but clear and direct."); Packard Motor Car Co. v. NLRB., 330 U.S. 485, 500 (1947) (Douglas, J., dissenting) ("[The NLRB's order] has profound implications throughout our economy. It involves a fundamental change in much of the thinking of the nation on our industrial problems. The question is so important that I cannot believe Congress legislated unwittingly on it.")

5. This Note makes frequent reference to the *Chevron* framework. While it has since been overruled in *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), understanding what was *Chevron* is essential to unraveling the history of the major questions doctrine. *Chevron* had two steps. At "step one," the Court employed traditional tools of statutory interpretation to determine "whether Congress ha[d] directly spoken to the precise question at issue." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). If statutory ambiguity remained, the Court proceeded to "step two." There, "the question for the court [was] whether the agency's answer [was] based on a permissible construction of the statute." *Id.* at 843. The Court deferred when the agency's interpretation was permissible—that is, reasonable.

6. 529 U.S. 120 (2000).

7. *Id.* at 126 (citing 21 U.S.C. § 321(g)(1)(C)).

8. *Id.* at 125.

9. *Id.* at 132 (citing *Chevron*, 467 U.S. at 842).

10. *See id.* at 133–43.

11. *See id.* at 143–59.

12. *Id.* at 159.

A quotation from Justice Breyer's academic work may be the true origin of the major-questions moniker: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, *major questions*, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[13] Ultimately, the Court concluded that this was "not an ordinary case," and that the "significant" economic impact and "unique political history" of tobacco counseled against accepting the FDA's new interpretation.[14] The Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[15]

Fourteen years later, the major questions doctrine appeared again in *Utility Air Regulatory Group v. EPA*.[16] After *Massachusetts v. EPA* held that the Clean Air Act applied to greenhouse gas emissions,[17] the EPA issued regulations that would incorporate this new understanding into existing rules regarding stationary sources.[18] The new regulations would sweep a massive and unprecedented number of existing sources into the EPA's regulatory scheme. But the Court held that the EPA was not required to apply the "greenhouse gas emissions as air pollutants" holding in the stationary sources context. At *Chevron* "step two,"[19] the Court asked whether the EPA's interpretation was a "reasonable construction of the statute."[20] The Court examined the text, structure, and overall statutory scheme to find the EPA's interpretation unreasonable.[21] Yet, that was "not the only reason" to reject the EPA's interpretation as unreasonable.[22]

---

13. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (emphasis added).
14. *Brown & Williamson*, 529 U.S. at 159–60.
15. *Id.* at 160.
16. 573 U.S. 302 (2014).
17. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).
18. *See Utility Air*, 573 U.S. at 310–14.
19. *See supra* note 5.
20. *Utility Air*, 573 U.S. at 321.
21. *See id.* at 316–24.
22. *Id.* at 324.

The regulation was also "unreasonable" because of the "enormous and transformative expansion [of] regulatory authority without clear congressional authorization."[23] In an oft-cited passage, the Court remarked:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[24]

The following year, Chief Justice Roberts applied the theory of *Brown & Williamson* and *Utility Air*, but in a novel way. *King v. Burwell*[25] asked whether the Court should defer to an Internal Revenue Service regulation implementing the Affordable Care Act. To guide the Court's decision, Chief Justice Roberts invoked the familiar *Chevron* framework.[26] Yet, rather than relying on the major questions doctrine at *Chevron*'s "step one" (as in *Brown & Williamson*) or its "step two" (as in *Utility Air*), the Court opted out of the *Chevron* framework entirely. Because this was an "extraordinary case" of "deep economic and political significance," it was "unlikely that Congress would have delegated this decision to the IRS."[27] Thus, the Court decided it was "not a case" where *Chevron* even applies.[28]

In the wake of the COVID-19 pandemic, federal agencies clambered to issue regulations to deal with that crisis. Accordingly, two major-questions cases soon arrived at the Supreme Court on the "shadow docket."[29] The first case, *Alabama Association of Realtors v. Department of Health & Human Services*,[30] challenged the

23. *Id.*

24. *Id.* (citing *Brown & Williamson*, 529 U.S. at 159).

25. 576 U.S. 473 (2015).

26. *Id.* at 485–86.

27. *Id.* at 486.

28. *Id.*

29. For a description of the Supreme Court's so-called "shadow docket," see generally William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

30. 141 S. Ct. 2485 (2021) (per curiam).

controversial eviction moratorium imposed by the Center for Disease Control. The Court first found that the CDC lacked authority to impose the moratorium under the statute.[31] It then added that "[e]ven if the text were ambiguous, the sheer scope . . . would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[32]

Similarly, in *National Federation of Independent Businesses v. Department of Labor, Occupational Safety & Health Administration*,[33] the Court struck down OSHA's vaccine mandate. It first noted that "[t]his is no everyday exercise of federal power."[34] Due to the "significant encroachment" on American life, Congress must "speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[35] Having determined this case "qualifie[d] as an exercise of [significant] authority," the Court asked "whether the Act plainly authorizes the . . . mandate."[36] The answer: "It does not."[37] The Court failed to mention or discuss the *Chevron* framework in either COVID-19 emergency case.

In summary, prior to its "formal debut" in *West Virginia v. EPA*, the Court applied the major questions doctrine in at least five distinct ways. It applied the doctrine as part of *Chevron* "step one;"[38] it applied the doctrine as part of *Chevron* "step two;"[39] it applied the doctrine to entirely preempt *Chevron*;[40] it applied the doctrine to

31. *Id.* at 2488.

32. *Id.* at 2489 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000), and Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (cleaned up).

33. 142 S. Ct. 661 (2022) (per curiam).

34. *Id.* at 665 (quoting In re MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

35. *Id.* (quoting *Alabama Ass'n*, 141 S. Ct. at 2489).

36. *Id.*

37. *Id.*

38. *See generally* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

39. *See generally* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

40. *See generally* King v. Burwell, 576 U.S. 473 (2015).

supplement its statutory analysis with no mention of *Chevron*;[41] and it applied the doctrine to precede its statutory analysis, again with no mention of *Chevron*.[42] In nearly all cases, the Court ultimately disagreed with the agency's interpretation.[43]

II. RECENT CASES

Two recent cases expressly invoked the major questions doctrine. The first was *West Virigina v. EPA*,[44] and the second was *Biden v. Nebraska*.[45]

A. West Virginia v. EPA

After more than seven years of litigation, the Court in 2022 delivered *West Virginia v. EPA*.[46] The case involved the Clean Power Plan, which would require "generation shifting" towards clean energy sources. The rule had been stayed, replaced, reinstated, and stayed once more, thus never actually taking effect.

The litigation concerned Section 111(d) of the Clean Air Act, which requires the EPA to craft regulations for certain "existing sources" of air pollution.[47] The EPA must set a limit which reflects the results achievable through the "best system of emission reduction" applicable to that source.[48] The Clean Power Plan found that the "best system" for reducing emissions was "generation shifting"—shifting production to cleaner energy sources through direct investments in new plants or, alternatively, through a cap-and-trade system.

While this reading of the term "system" is textually possible, it proved too much for the Court. Invoking the major questions doctrine—now by name—Chief Justice Roberts held that the Clean Air

41. *See generally* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

42. *See generally* NFIB v. OSHA, 142 S. Ct. 661 (2022).

43. *But see King*, 576 U.S. 473 (2015).

44. 142 S. Ct. 2587 (2022).

45. 143 S. Ct. 2355 (2023).

46. 142 S. Ct. 2587.

47. 42 U.S.C. § 7411(d).

48. 42 U.S.C. § 7411(a)(1).

Act did not authorize generation shifting. After reviewing the history and cases discussed above, Chief Justice Roberts formulated the rule as follows:

> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.[49]

He ascribes the major-questions label to the fact that an "identifiable body of law . . . has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[50]

In his concurring opinion, Justice Gorsuch provides a theory for the major questions doctrine. In his view, the major questions doctrine is simply a clear-statement rule. Clear statement rules "assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution."[51] Justice Gorsuch provides other examples, such as the presumption against retroactivity and the doctrine of sovereign immunity, which protect other constitutional values. Likewise, according to Justice Gorsuch, the major questions doctrine "protect[s] the Constitution's separation of powers."[52]

Justice Gorsuch ties this to Article I's vesting clause.[53] Hearkening back to Chief Justice Marshall, Justice Gorsuch argues that inherent in the "legislative powers" is the duty for Congress to decide on "important subjects" while leaving the executive branch to, at most,

---

49. *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

50. *Id.*

51. *Id.* at 2616 (Gorsuch, J., concurring).

52. *Id.* at 2617.

53. *Id.*; *see also* U.S. CONST. Art. I § 1.

"fill up the details."[54] Otherwise, a "ruling class of largely unaccountable 'ministers'" might subjugate the people.[55] Thus, the Constitution entrusts legislative power to "the people's elected representatives" through a process "designed . . . to capture the wisdom of the masses."[56]

Beyond the vesting clause, Justice Gorsuch finds further support for the major questions doctrine in the constitutional lawmaking process of bicameralism and presentment.[57] This "admittedly . . . difficult" procedure of lawmaking promotes important values.[58] It safeguards "individual liberty," ensures that laws "enjoy widespread acceptance," promotes "stab[ility]," "protect[s] minorities," and preserves federalism by "allowing States to serve as laboratories for novel social and economic experiments."[59] Consequently, Justice Gorsuch concludes that "[p]ermitting Congress to divest its legislative power to the Executive Branch would 'dash this whole scheme.'"[60] Liberty, accountability, stability, and federalism would be sacrificed to "the will of the current President, or, worse yet, the will of unelected officials barely responsive to him."[61]

Thus, the major questions doctrine preserves the constitutional benefits that flow from the vesting clause by "ensur[ing] that the government does 'not inadvertently cross constitutional lines.'"[62] This result is justified because "the constitutional lines at stake here are surely no less important than those this Court has long held

54. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

55. *Id.* (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

56. *Id.* (citing PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 502–03 (2014)).

57. *Id.* at 2618.

58. *Id.*

59. *Id.* (internal citations omitted).

60. *Id.* (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring)) (cleaned up).

61. *Id.*

62. *Id.* at 2620 (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 175 (2010)).

sufficient to justify parallel clear-statement rules."[63] Justice Gorsuch offers the following summary: "It is the peculiar province of the legislature to prescribe general rules for the government of society" and the major questions doctrine "helps safeguard that foundational constitutional promise."[64]

This application of the major questions doctrine in *West Virginia* represents a subtle shift from prior cases. Rather than applying the major questions doctrine in conjunction with an independent statutory analysis, the Court simply invalidated the agency's interpretation without providing any guidance on the correct reading of the statute.[65] Additionally, the Court's previous focus on the implicit *interpretive* delegation enshrined in *Chevron* seemingly transformed into skepticism of the *substantive* powers of the agency itself.

This shift animates Justice Gorsuch's theory. His separation-of-powers argument centers on Article I's legislative powers and *not* Article III's judicial power. If the major questions doctrine was merely confined to answering the interpretive *Chevron* question (that is, whether Congress "delegate[ed the] authority to the agency to elucidate a specific provision of the statute"[66]), Article I is irrelevant. The "elucidation" view of *Chevron* may evince concerns of Congress and agencies conspiring to violate Article III by usurping the power of statutory interpretation, but that problem hardly raises the concerns posed in Justice Gorsuch's concurring opinion. Instead, Justice Gorsuch's justification for the major questions doctrine only has purchase if the constitutional concern is with the agency's legislative powers, not its interpretive powers.

Thus, a second reading of the then-prevailing *Chevron* doctrine could explain both the Court's shift in *West Virginia* and Justice

63. *Id.*

64. *Id.* at 2626 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)) (cleaned up).

65. *West Virginia*, 142 S. Ct. at 2615–16 (majority opinion) ("[T]he only interpretive question before us, and the only one we answer, is . . . whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.")

66. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

Gorsuch's concurring opinion. Beyond "elucidation," *Chevron* also recognized that administration of statutory programs "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[67] Under this view, *Chevron* was not read as delegating the interpretive question to agencies, but rather as Congress granting agencies a gap-filling, legislative authority. It concerned the agency's substantive authority, as the agency both *creates* and *administers* the substantive law in question. This substantive understanding of *Chevron* more squarely justified and explained the Court's shift and Justice Gorsuch's concurrence.[68]

B. Biden v. Nebraska

The following term, the Supreme Court decided another major-questions case. As the COVID-19 pandemic waned, President Biden tried to effectuate student loan relief that had stalled in Congress. Relying on the HEROES Act, President Biden's Secretary of Education announced in August of 2022 that the administration would eliminate up to $10,000 of federal student loan debt for qualified borrowers.[69]

The HEROES Act permitted the Secretary to "waive or modify any statutory or regulatory provision" of the Higher Education Act during a nationally declared emergency.[70] While the Secretary of Education under President Trump had concluded that the HEROES Act did not authorize blanket student loan debt forgiveness, President Biden's secretary rescinded the former opinion and reached the opposite conclusion.[71] He read the words "waive or modify" as authorizing the elimination of student loan debt.

---

67. *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

68. Neither the majority nor Justice Gorsuch mentioned *Chevron*, so it is difficult to parse exactly which view of *Chevron* they espoused at the time. *Chevron* has since been overruled. *See* Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244, 2273 (2024). And Justice Thomas explicitly acknowledged the substantive reading of *Chevron* as a ground for repudiating it. *See id.* at 2275 (Thomas, J., concurring).

69. Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023).

70. *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

71. *Id.* at 143 S. Ct. at 2364.

The Court first addressed the question using traditional tools of statutory interpretation. The Court found that the word "modify" "does not authorize 'basic and fundamental changes in the scheme' designed by Congress."[72] Rather, it "must be read to mean 'to change moderately or in minor fashion.'"[73] The Court looked to prior "modifications" promulgated by the Secretary of Education to confirm that past practice supported the narrower understanding.[74] Moreover, as to "waive," the Court noted that "the Secretary does not identify any provision that he is actually waiving."[75] Because the substance of the debt forgiveness plan could not result from the elimination of any combination of concrete legal requirements, the statute's text precluded reliance on the term "waive."[76] Thus, the Secretary's proposed plan fell outside of the statutory text.

The Court turned to the major questions doctrine as an alternative "ground[] to support its conclusion."[77] Quoting *West Virginia*, the Court restated the rule: "Given the history and the breadth of the authority that the agency ha[s] asserted, and the economic and political significance of that assertion, . . . there [is] reason to hesitate before concluding that Congress meant to confer such authority."[78] The Court noted that "[u]nder the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power" and that "[t]he 'economic and political significance' of the Secretary's action is staggering by any measure."[79] Thus, "indicators from our previous major questions cases are present" in this case as well.[80] The Court dismissed the dissent's "attempt to relitigate *West Virginia*" because "the issue now is not whether [*West Virginia*] is

72. *Id.* at 2368 (quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).
73. *Id.*
74. *Id.* at 2369.
75. *Id.* at 2370.
76. *Id.*
77. *Id.* at 2375 n.9.
78. *Id.* at 2372 (cleaned up).
79. *Id.* at 2373.
80. *Id.* at 2374 (quoting *id.* at 2384 (Barrett, J., concurring)).

correct. The question is whether that case is distinguishable from this one. And it is not."[81]

The structure of the majority opinion reflects a return to the pre-*West Virginia* applications of the major questions doctrine, where the Court performed a statutory analysis independent of its major-questions analysis. Yet, the substantive non-delegation concerns that animated *West Virginia* also feature prominently here. In responding to the dissent, the majority asserts: "The question here is not whether something should be done; it is who has the authority to do it."[82] Here, "the Executive [is] seizing the power of the Legislature."[83] But with no mention of *Chevron* (by either the majority, the concurring opinion, or the dissent), the Court fully detached the major questions doctrine from the *Chevron* framework—an important step in light of *Chevron*'s eventual demise.[84]

Justice Barrett concurred. First, she set out to refute Justice Kagan's characterization of the major questions doctrine in *West Virginia* as a "get-out-of-text free card[]."[85] Second, she challenged Justice Gorsuch's theory of the major questions doctrine and provided her own. In Justice Barrett's view, Justice Gorsuch justifies the major questions doctrine as a "substantive canon," which is a "rule[] of construction that advance[s] values external to [the] statute."[86] So far, this characterization seems to fit. This worries Justice Barrett. After all, "[w]hile many [substantive] canons have a long historical pedigree, they are in significant tension with textualism insofar as they instruct a court to adopt something other than the statute's most natural meaning."[87] As a committed textualist, Justice Barrett sees the major questions doctrine as "an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to

81. *Id.* (quoting Collins v. Yellen, 141 S. Ct. 1761, 1800 (2021) (Kagan, J., concurring in part and concurring in judgment)) (alteration original).

82. *Id.* at 2373.

83. *Id.*

84. *See* Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

85. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

86. *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).

87. *Id.* at 2377 (internal citations omitted).

delegate a policy decision of such economic and political magnitude to an administrative agency.'"[88]

Her theory rests on a common textualist refrain: "In textual interpretation, context is everything."[89] After highlighting various examples where context is relevant to the statutory question, she argues that "context is also relevant to interpreting the scope of a delegation."[90] Citing agency law, she notes that "[w]hen an agent acts on behalf of a principal, she 'has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations.'"[91] She then offers the now-famous example of a general delegation to a babysitter to "make sure the kids have fun."[92] She posits that if the babysitter took the children on an extended vacation, we would be shocked because "we would expect much more clarity than a general instruction to 'make sure the kids have fun.'"[93]

Justice Barrett extends this "commonsense principle[] of communication" to Congress.[94] "Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[95] This "expectation" is "rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[96] That premise "makes eminent sense in light of our constitutional structure" because "a reasonable interpreter" of the Constitution "would expect

88. *Id.* at 2378 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

89. *Id.* (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 37 (1997)).

90. *Id.* at 2379.

91. *Id.* (quoting Restatement (Third) of Agency § 2.02(1) (2005)) (alterations original).

92. *Id.* at 2380.

93. *Id.* at 2379–80.

94. *Id.* at 2380.

95. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

96. *Id.* (internal citations omitted).

[Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[97]

Her view operates differently than a clear-statement rule because courts cannot "choose an inferior-but-tenable alternative that curbs the agency's authority," which she reads the other formulation to authorize.[98] Thus, "the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[99] At bottom, Justice Barrett believes that the major questions doctrine cannot be used to "exchange the most natural reading of a statute for a bearable one more protective of a judicially specified value."[100] Reviewing the major-questions precedents, Justice Barrett concludes that those cases pass her test.[101]

III. CRITIQUES OF THE COMPETING THEORIES

Both theories purport to explain the major questions doctrine, its congruence with precedent, and its faithfulness to important jurisprudential values. For Justice Gorsuch, the lodestar is constitutional separation of powers; for Justice Barrett, textualism. Commentators have questioned whether Justice Gorsuch's opinion is consistent with textualism. They have also questioned the accuracy of Justice Barrett's characterization. Both critiques are examined below.

A. Critique: Justice Gorsuch's Approach is Inconsistent with Textualism

One of the most salient criticisms levied against the major questions doctrine is its incompatibility with textualism. In her scathing dissent, Justice Kagan remarked:

> Some years ago, I remarked that "[w]e're all textualists now." . . . It seems I was wrong. The current Court is textualist only when

97. *Id.*

98. *Id.* at 2381.

99. *Id.*

100. *Id.* at 2383 (quoting Barrett, *supra* note 62, at 111).

101. *Id.* ("[B]y my lights, the Court arrived at the most plausible reading of the statute in these cases.").

> being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards.[102]

Justice Gorsuch barely acknowledges the attack. He simply replies: "[O]ur law is full of clear-statement rules and has been since the founding."[103] With a feeble wave towards the tradition of clear-statement rules and substantive canons, he fails to adequately grapple with the tension.

Professors Eidelson and Stephenson have recently tested the compatibility of Justice Gorsuch's theory with textualism.[104] They grapple seriously with Justice Gorsuch's "constitutionally inspired" theory, suggesting "perhaps [it] can still be reconciled with textualism because—and to the extent that—[it] derives [its] authority from the Constitution itself."[105] They focus their analysis on the following passage:

> One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution."[106]

This can be read in two ways. First, focusing on the use of "accordance," the major questions doctrine may guard against *actual* violations of the Constitution.[107] Alternatively, looking to the term "congruence," the major questions doctrine may simply promote "constitutional values" by disfavoring statutory delegations that

---

102. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (internal citations omitted).

103. *Id.* at 2625 (Gorsuch, J., concurring).

104. Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons with Textualism*, 137 HARV. L. REV. 515 (2023). Professors Eidelson and Stephenson address "substantive canons" broadly, yet the clear inspiration for the paper was the rise of the major questions doctrine.

105. *Id.* at 558.

106. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

107. Eidelson & Stephenson, *supra* note 104, at 559.

admittedly lie within Congress's constitutional powers.[108] According to Eidelson and Stephenson, neither reading squares with textualism.

On the "actual violation" reading, Eidelson and Stephenson query whether such a canon is necessary when the Court possesses the traditionally reliable tool of judicial review.[109] Still, they suggest three possible explanations. First, perhaps the Constitution itself contains a "clarity requirement."[110] This argument fails because the application of such a requirement would be merely a straightforward application of judicial review, not necessarily the application of a canon.

The second possibility is that the major questions doctrine polices constitutional "underenforcement."[111] Where the Court lacks "judicially manageable standards," it may be unable to stop Congress from transgressing *real* constitutional limitations. To Justice Gorsuch, the obvious example here is the nondelegation doctrine.[112] The major questions doctrine may police the constitutional boundaries to catch the cases that slip past the nondelegation doctrine. The major issue with this theory is that it looks and sounds a lot like the "prophylactic"[113] constitutional rules that textualists typically eschew.[114]

Eidelson and Stephenson call the third variation "concessions to precedent."[115] If Justice Gorsuch feels that the nondelegation precedents have gone astray,[116] but feels bound to some extent by *stare decisis*, the major questions doctrine may provide an alternative route. Thus, "applying a 'constitutionally inspired' substantive canon might provide the Court with [an alternative to overruling

108. *Id.* at 559–60.

109. *Id.* at 560–61.

110. *Id.* at 561–63.

111. *Id.* at 563–67.

112. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (criticizing the "intelligible principle" test and proposing a new test).

113. *See, e.g.*, Miranda v. Arizona, 384 U.S. 486 (1966).

114. Eidelson & Stephenson, *supra* note 104, at 565.

115. *Id.* at 567–61.

116. Hint: he does. *See Gundy,* 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

precedent]: Congress may still exercise the power that the Court's precedents mistakenly gave it, but Congress must at least do so clearly or explicitly." Eidelson and Stephenson admit this is the "strongest defense" of a constitutionally inspired major questions doctrine they could muster.[117] Yet, by their lights, it still falls short.

The logic unfolds as follows: "(1) determine that a statute actually would be invalid under (what they take to be) the correct understanding of constitutional law; but then (2) forbear from announcing as much; and (3) cite a hazier, 'constitutionally inspired' [major questions doctrine] as justification for reaching the same result."[118] This process "requires the Justices not to articulate the reasons that they actually endorse as legally sufficient to warrant their decisions" and leads to "constitutional law on the cheap."[119] Were this an accurate description of the major questions doctrine, such obfuscation would clearly conflict with the major aims of textualism: plain meaning and fair notice.

Finally, an alternative reading of Justice Gorsuch's concurrence is that the major questions doctrine simply promotes "congruence" by favoring certain "constitutional values."[120] Setting aside the difficult question of determining *which* constitutional values to favor, this view might be palatable to those who think that constitutional guarantees are not "dichotomous," rather they "phase in over some range," or cast "penumbras."[121] The problem here is obvious: Textualists "explicitly reject[] the premises from which it proceeds."[122] Because "the Constitution is, at its base, democratically enacted written law . . . textualists thus ought to approach the Constitution like any other legal text."[123] Thus, openly espousing a theory that rests on mere "values"—as opposed to text—threatens to undermine the entire formal textualist project.

---

117. Eidelson & Stephenson, *supra* note 104, at 568.

118. *Id.* at 569–70.

119. *Id.* at 570 (citing John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 449 (2010)).

120. *Id.* at 571–75.

121. *Id.* at 572.

122. *Id.*

123. *Id.* at 573 (cleaned up).

Eidelson and Stephenson raise serious concerns about the major questions doctrine and Justice Gorsuch's commitment to textualism. Without identifying the textual source of the constitutional requirements that Justice Gorsuch envisions, it is difficult to ascertain from where his constitutional inspiration derives.

B. Critique: Justice Barrett's Approach Rests on an Uncertain Premise

Eidelson and Stephenson address the justification for the major questions doctrine put forward by Justice Barrett as well. They probe whether the major questions doctrine is simply a "guide[] to the 'natural' meaning of legal texts."[124] Ultimately, they conclude that Justice Barrett's theory is similarly implausible.

At the onset, Justice Barrett's theory seems unproblematic. As Eidelson and Stephenson agree, "[i]n ordinary speech, the practical context in which an assertion is made often tacitly restricts its domain."[125] From this premise springs Justice Barrett's famous babysitter example. The practical context (a babysitting instruction) restricts the meaning of the assertion (make sure the kids have fun). Again, so far, most people would agree. Now, extending this example one step further, "a reasonable reader would not take Congress as making and extravagant delegation through language that it would have known could also be taken as expressing something more routine."[126]

What Justice Barrett does not explain is *why* the babysitter example works as it does. Operating silently in the background is a "putative shared understanding"[127] about what babysitters are *supposed* to do. Without saying it out loud, her example only works because her audience (ordinary Americans) shares a cultural understanding of the role of a babysitter, what actions would be considered "in bounds" for the babysitter, and what actions would be considered "extravagant." When it comes to something as universal as

124. *Id.* at 539.
125. *Id.*
126. *Id.* at 540.
127. *Id.*

babysitting, perhaps this is a safe assumption. But can the same be said of Congress?

For the babysitter example to be analogous to congressional delegations, it would require a similar shared understanding of *what* Congress does, *how* it typically delegates, and what delegations would be considered "extravagant." As Eidelson and Stephenson point out, there is "little reason to think that 'major' delegations *are* anomalous, for instance, especially in statutes specifying the authorities of a regulatory agency charged with addressing some complex and evolving problem."[128] While ordinary Americans may learn the relatively simple "School House Rock" version of lawmaking, any law student who has taken an administrative law course knows that potentially "major" and ambiguous delegations of power to agencies are a dime a dozen. Thus, it is doubtful that a consensus about how Congress "normally" delegates has emerged in any way comparable to the shared cultural understanding of babysitters.

Thus, the objection to Justice Barrett's theory is not that it is incompatible with textualism. Rather, the objection is that she is making a claim of an empirical nature. How confident is she that Americans broadly share her "common sense" as to how Congress "naturally" operates? Is such a shared understanding salient enough that, as a matter of *ordinary language*, courts can presume that Congress reserves "major questions" for itself? The premise on which she rests her conclusions is vulnerable to refutation.

Another critique of Justice Barrett's theory centers on her novel use of "context." Her opinion implicitly proceeds from the oft-quoted Scalia maxim: "[T]he good textualist is not a literalist."[129] Context is key, and context features prominently in many classic textualist opinions.[130] As typically deployed, context refers to the historical backdrop against which the statute was drafted, or the statutory scheme in which the particular provision is situated. That

128. *Id.* at 541.

129. SCALIA, *supra* note 89, at 24.

130. *See, e.g.*, Smith v. United States, 508 U.S. 223 (1993); *see also id.* (Scalia, J., dissenting).

is not how Justice Barrett uses context. Rather, she deploys what might be termed "meta-context." Rather than focusing on the context of a particular statute, she zooms out to the backdrop against which *all* statutory drafting takes place. This "meta-context" informs her "common sense" presumption against "major" delegations.

The line between "meta-context" and "purpose" is blurry.[131] While context is undoubtedly important, a core tenet of textualism is that no other consideration can override the plain meaning of a legal text—be it purpose, legislative history, or context. Despite her assurance that the major questions doctrine does not lead the Court to reject textually preferred statutory interpretations, introducing "meta-context" into the analysis might further obscure the plain meaning of the text. When "meta-context" overrides text, the tail is truly wagging the dog.

Thus, the problems with Justice Barrett's theory are twofold. First, her theory may comport with textualism, but the real-world basis on which it rests is hazy. Second, the introduction of "meta-context" may itself be unfaithful to textualism.

IV. STRUCTURAL IMPLEMENTATION AND THE MAJOR QUESTIONS DOCTRINE

Given the critiques leveled at both approaches, this Note proposes another way of understanding the major questions doctrine. The major questions doctrine is a structural implementing doctrine in the form of a clear-statement rule. It reflects how a "reasonable interpreter" would give meaning to constitutional structural choice, the same way an interpreter must give meaning to a word choice.

This theory proceeds as follows: As a baseline, textualists should agree that the text of a legal document is not limited to the words that appear on the page. Rather, the structure of a text represents

131. *See, e.g.*, Transcript of Oral Argument at 83–86, Pulsifer v. United States, 143 S. Ct. 978 (2023) (No. 22-340) (various justices comparing "context," "common sense," and "purposivi[sm]").

an additional drafting choice of which an interpreter must take note. After all, legal documents rarely (if ever) appear as a string of unbroken words. Instead, legal texts are carefully structured in a way that reflects the organization of ideas and concepts that the drafters had in mind. Structure and word choice are woven together to become "the text."[132] A faithful interpreter should strive to understand and give meaning to *all* textual choices of the drafters.

Implementing word choice is relatively straightforward. Suppose a legal text is limited in scope by the word "commerce." A legal interpreter first probes the meaning of "commerce" using a variety of tools, such as dictionaries. She then looks to the facts of the given case to determine whether they fall within the range of meaning communicated by the word "commerce." Applying the word choice faithfully means deciding which cases fall within the meaning of "commerce" and which cases fall without.

By contrast, implementing a structural choice is not as simple or straightforward. An interpreter cannot look up the meaning of a structural choice in a dictionary. That does not give the interpreter license to ignore the structural choice. Rather, she must rely on inferences drawn from the structural choice to give it meaning. Textualists generally prefer the "original public meaning" of a particular text. Thus, the interpreter might ask: what was the original implication of a particular structure? What inferences would an ordinary reader of this structure draw?

The challenge then is applying those structural inferences to a given set of facts. A word choice is usually susceptible to a small range of concrete meaning, and an interpreter can determine with some level of confidence whether the facts are within the meaning or not. By contrast, even where strong inferences can be drawn

132. The word "text" comes from the Latin "*textus*" meaning "a web" or "structure," which comes from the past participle of *texere*: "to weave, . . . to twine together, intertwine, plait," or to "construct, build." CASSELL'S LATIN DICTIONARY 602 (5th ed. 1968); *see* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1801 (5th ed. 2011).

from a structural choice, it is more difficult to say with confidence that a given set of facts falls outside of the particular structure.[133]

Consider federalism. It is often remarked that there is no "federalism clause" in the Constitution. Yet, federalism clearly informed many of the drafters' structural choices.[134] The text of the Tenth Amendment alone does not get you very far. Rather, the Court typically relies on structural inferences that *point* to federalism. Although the Constitution lacks a "federalism clause," the Court is not unfaithful to the text when it considers federalism. Structure is a part of the text as much as word choice.

Another example is the non-delegation doctrine. Searching for a textual hook, most point to the Vesting Clause. Yet squeezing such a powerful doctrine into so few words has proven difficult. Thus, commentators joke that the non-delegation doctrine had "one good year"—1935.[135] In the past 88 years, no statute has been formally struck down under the non-delegation doctrine. Rather, the Court has denied every subsequent challenge under the mostly defanged "intelligible principle" test.[136]

Justice Gorsuch has recently attempted to revive the non-delegation doctrine.[137] He explicitly ties this doctrine to the text of the vesting clauses.[138] But implicitly, Justice Gorsuch invokes the *structure* of the constitution—*i.e.*, the separation of powers—rather than relying solely on the words. He notes that the "Constitution . . . vest[s]

133. Some structural provisions appear to present binary choices, while disguising a range of outcomes. Take the removal power of the president. The Constitution is silent, but unitary executive theorists argue that structural inferences require full removal power. *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926). While this may appear to be a binary choice (the president has the removal power, or he doesn't), there are a range of possibilities. The president may have the removal power, or removal may require the advice and consent of the senate. *See* THE FEDERALIST NO. 77 (Alexander Hamilton). Alternatively, the question may simply be left open for Congress to decide. Any structural inferences may lead to a range of outcomes, rather than a binary choice.

134. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison).

135. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

136. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

137. *See* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).

138. *Id.* at 2133–35.

the authority to exercise different aspects of the people's sovereign power in distinct entities."[139] He refers to the separation of powers as the "system of government ordained by the Constitution," the "framers' . . . particular arrangement," and the "framers' design."[140] The separation of powers inheres in the structural choices of the framers, not just the word "vested."

After drawing careful inferences from the structural choice of the founders to separate powers, Justice Gorsuch asks the million-dollar question: "What's the test?"[141] He invokes the founders' sentiments on this: "Madison acknowledged that 'no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.' Chief Justice Marshall agreed that policing the separation of powers 'is a subject of delicate and difficult inquiry.'"[142] Madison and Marshall recognized the exact difficulty presented in this Note. Giving meaning to a constitutional structural choice is not as straightforward as giving meaning to a word choice.

In the 88 years since 1935, reliance on the "intelligible principle" test reflects this inherent difficulty. While the structural inferences are clear—*i.e.*, the separation of powers exists[143]—the means of implementing and enforcing these inferences are anything but. Whereas a word choice is more susceptible to binary bright-line tests—either the facts fall within the meaning of the word, or they do not—a structural choice can rarely be applied in the same way.[144]

---

139. *Id.* at 2133.

140. *Id.* at 2133–35.

141. *Id.* at 2135.

142. *Id.* at 2136 (internal citations omitted).

143. *See* INS v. Chadha, 462 U.S. 919, 946 (1983) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.").

144. In reference to nondelegation, Justice Rehnquist remarked:

> The rule against delegation of legislative power is not, however, so cardinal of principle as to allow for no exception. The Framers of the Constitution were practical statesmen, who saw that the doctrine of separation of powers was a two-sided coin. James Madison, in

Justice Gorsuch proposes such a form of binary test. He suggests there are three categories in which delegation is constitutional, and any delegation falling outside of these categories violates the non-delegation doctrine.[145]

One advantage of the "intelligible principle" test is that, although it presents itself as a binary (either Congress communicated an intelligible principle, or it didn't), the test is so forgiving that the Court will rarely—if ever—need to draw a line with any exactness. It is simple enough to say *Schechter Poultry* falls on *that* side of the line, while everything else falls on *this* side. By contrast, Justice Gorsuch's *Gundy* formulation would require *real* line drawing in the future. But when is an agency simply "filling in the details?"[146] When is it simply engaged in "fact-finding?"[147]

Though sound in theory, there are two potential wrinkles with his proposed test. The first is practical difficulty. The questions posed above are not susceptible to easy or clean answers. How are lower courts supposed to find the line? How will Congress identify the line? How will an agency know when it crosses the line? The second difficulty is the lack of a textual hook in the Constitution. If non-delegation imposes an enforceable limit which Congress may not cross, that line must be found in the text of the Constitution. It is unclear whether the word "vested" somehow encodes the three categories Justice Gorsuch proposes, and whether these categories were generally understood at the time of the founding.

> Federalist Paper No. 48, for example, recognized that while the division of authority among the various branches of government was a useful principle, "the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (The Benzene Case) (Rehnquist, J., concurring).

145. Justice Gorsuch describes the three kinds of permissible delegations as follows: 1) Congress "may authorize another branch to 'fill up the details'"; 2) Congress "may make the application of [a] rule depend on executive fact-finding"; and 3) Congress "may assign the executive and judicial branches certain non-legislative responsibilities." *Gundy*, 139 S. Ct. at 2136–41 (Gorsuch, J., dissenting).

146. *Id.* at 2136.

147. *Id.*

And yet, his theory does not proceed from a specific word in the Constitution; rather, it implicitly rests on the structural separation of powers. Despite this structural hook, it is difficult to see how these inferences can form the basis of the firm rule Justice Gorsuch imagines. Certainly, there are easy cases, such as *Schechter Poultry*, which fall far beyond the line. But the challenge is drawing lines at the margins, where the structural inferences do not provide easy answers.

Here the major questions doctrine can provide some assistance. The major questions doctrine has been described elsewhere as a "non-delegation canon."[148] Justice Gorsuch also recognizes it as such: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[149] Because the formal nondelegation doctrine is impotent in its current form and potentially unmanageable in the form Justice Gorsuch proposes, the major questions doctrine provides an alternative means of implementing the same constitutional rule. But this is not a free-floating power, unconnected to the text of the Constitution. As Justice Barrett notes, this rule "makes eminent sense in light of our constitutional structure."[150] The structure is a core component of the text, and the major questions doctrine is a faithful and judicially manageable implementation of that text.

Combining elements of both theories, the Court should embrace the major questions doctrine as a clear-statement nondelegation implementing doctrine. Far from a "second best" non-delegation doctrine, the major questions doctrine is a workable alternative for implementing the separation of powers implied by the constitutional structure. This approach builds off the important constitutional

148. *See* Cass R. Sunstein, *There Are Two "Major Question" Doctrines*, 73 ADMIN. L. REV. 475, 484 (2021).

149. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting). *See also* West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine.").

150. Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

interests identified by Justice Gorsuch. It provides a coherent response to textualist critiques raised by Justice Barrett and others. And it fits within a constitutional tradition of using clear-statement rules to implement other structural constitutional provisions.

First, this approach builds off Justice Gorsuch's theory. He identifies a host of values preserved by the Constitution: democratic accountability, individual liberty, protection of minority rights, stability of the laws, and federalism.[151] He ties these values to two constitutional structures. First, he points to the vesting of powers in three co-equal branches of government—that is, the separation of powers. Second, he looks to the structure of the lawmaking process—bicameralism and presentment. By placing the lawmaking power in a diverse representative body and making the process deliberately difficult, these constitutional structures protect the values described above. Thus "[p]ermitting Congress to divest its legislative power to the Executive Branch would 'dash this whole scheme.'"[152]

His theory is vulnerable to textualist critiques because he anchors his analysis on the values protected by the Constitution (the ends), rather than the text and structure of the Constitution itself (the means).[153] This vulnerability leads Eidelson and Stephenson to wonder whether the major questions doctrine was simply policing "constitutional underenforcement" or making "concessions to precedent," rather than squarely applying the text of the constitution.[154] By sharpening the analysis to focus on applying the structure, rather than protecting certain values, the proposed approach engages with these textualist objections.

Treating the major questions doctrine as a structural implementing doctrine responds to Eidelson and Stephenson's critiques. When styled as guarding against "constitutional

151. *See* discussion, *supra* Part I.A.

152. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

153. *See id.* at 2626 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)) (cleaned up) (The major questions doctrine "helps safeguard that foundational constitutional promise.").

154. *See* discussion, *supra* Part II.A.

underenforcement," a concerned textualist may worry about the creation of extra-textual "prophylactic" constitutional protections.[155] But a structural implementing doctrine does not look outside the text of the constitution; rather, it seeks to faithfully apply the text—including the structural components. As discussed above, structure doesn't lend itself to binary choices. While the inferences may be strong, these can't always be applied in the form of a strict rule. Applying structure through clear-statement presumptions rather than a firm rule accounts for uncertainty as to how far the inference extends.

A textualist may also worry that the major questions doctrine is simply applied as a "concession to precedent."[156] Justice Gorsuch hinted that it may have been applied this way in the past.[157] Adopting the structural implementation approach ameliorates these concerns. Although Justice Gorsuch may believe that the "intelligible principle" precedents were wrongly decided, it does not necessarily follow that the major questions doctrine is merely a workaround designed to avoid overturning these erroneous precedents. Rather, it is the independent application of a constitutional text which *includes* structure.

By focusing on structure—as opposed to abstract constitutional values or benefits—the Court can anchor the major questions doctrine in the text of the Constitution. Framing the major questions doctrine in this way also addresses concerns about a mismatch with textualism, because the doctrine focuses on giving meaning to the full text of the constitution, including structure.

The structural approach also reconciles with Justice Barrett's model. At bottom, her theory rests on "commonsense principles of

155. Eidelson & Stephenson, *supra* note 104, at 565.

156. *Id.* at 567.

157. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.").

communication."[158] "Common sense" dictates that generally worded grants of authority should not be understood to contain extraordinary grants of power. That this "commonsense principle" can be extended to understanding congressional delegations is "rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[159] However, as demonstrated above, this "basic premise" may not reflect real-world expectations of how Congress operates and is thus vulnerable to empirical refutation.[160]

Yet, adopting a structural implementation approach does not require the acceptance of this "basic premise." Rather, it simply adopts the latter half of Justice Barrett's formulation: "[I]n light of our constitutional structure," "a reasonable interpreter" of the Constitution "would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[161] Here, Justice Barrett essentially describes the approach to constitutional structure proposed by this Note. Although she raises this to supplement her "commonsense" understanding of the major questions doctrine, the two ideas are not joined at the hip. One can readily accept that a "reasonable interpreter" of the constitutional structure would draw the inferences represented by the major questions doctrine without accepting that Congress *actually* operates this way.

This approach combines elements of both theories by asking: how would a "reasonable interpreter" understand and give meaning to the constitutional structure?[162] This approach takes a milder path

158. Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

159. *Id.* (internal citations omitted).

160. *See* discussion, *supra* Part II.B.

161. *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring).

162. This approach operates independently of *Chevron*. All members of the Court have implicitly recognized that the major questions doctrine no longer fits within the *Chevron* framework. The proposed approach uses the major questions doctrine to implement the structure of Constitution, rather than answer the questions raised by the *Chevron* analysis.

than a hardline nondelegation doctrine.[163] When presented with a broadly worded statute, a reasonable interpreter applies the text of the constitution (both words and structure) and makes an informed presumption about the scope of any congressional delegations. The interpreter looks for a "clear statement" to overcome the structural inference that "Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[164]

V. OTHER CLEAR-STATEMENT RULES AS STRUCTURAL IMPLEMENTATION DOCTRINES

The Court has implemented other constitutional structures using similar clear-statement rules. Take, for example, *Gregory v. Ashcroft*.[165] This case centered on whether a federal anti-age-discrimination statute preempted a state constitutional provision. Justice O'Connor's majority opinion takes the approach proposed by this Note. First, she notes the Constitution creates a "federalist structure of joint sovereigns."[166] Then, like Justice Gorsuch, she describes the benefits achieved by the federalist system:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile

163. While Justice Gorsuch requires a clear statement under the major questions doctrine, his approach to nondelegation would not permit some delegations of law-making power even if clearly articulated. *See* Paul v. United States, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J.) (discussing *Gundy*'s nondelegation doctrine). By contrast, Justice Barrett's approach seems to accept that delegations to agencies would be permissible if sufficiently clear by text or context. This Note does not take a position on whether the nondelegation doctrine might apply as a separate limitation.

164. *Biden*, 143 S. Ct., at 2380 (Barrett, J., concurring).

165. 501 U.S. 452 (1991).

166. *Id.* at 458. *See also id.* at 457 ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle.").

> citizenry. . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power.[167]

Importantly, she does not rest her analysis on the presumed benefits alone. She ties this back to structure: "One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but *there is no doubt about the design*."[168] This cashes out as a clear-statement rule: "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[169] Like Justice Barrett, Justice O'Connor can be best understood to mean that a "reasonable interpreter" would read the "constitutional scheme" to imply that Congress doesn't unintentionally preempt state law. Thus, the Court implemented a constitutional structure through a clear-statement presumption.

In *Tafflin v. Levitt*,[170] the Court employed a similar approach when tackling the question of whether "state courts have concurrent jurisdiction over civil RICO claims."[171] The Court rooted its analysis in constitutional structure:

> We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.[172]

This presumption arises from the constitutional structure known as the "Madisonian Compromise." Article III empowers—but does not require—Congress to create lower federal courts.[173] Concurrent

---

167. *Id.* (internal citations omitted).
168. *Id.* at 459 (emphasis added).
169. *Id.* at 461.
170. 493 U.S. 455 (1990).
171. *Id.* at 458.
172. *Id.*
173. *See* U.S. CONST. art. III, § 1.

state court jurisdiction is an inference drawn from this constitutional structure, but it is not a hardline rule. "This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim."[174] To implement this, the Court looks for an "explicit statutory directive—that is, a clear statement—to determine whether Congress has overridden the most natural reading of the constitutional structure."[175]

In *Webster v. Doe*,[176] the Court took a similar approach but in fewer words. The Court held that the APA and the National Security Act did not preclude courts from determining the constitutionality of a firing based on homosexuality. It found that:

> [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.[177]

Though left unsaid, the "serious constitutional question" is not raised by the words of any specific constitutional clause. Rather, Justice Rehnquist read the constitutional structure to imply that Article III courts presumptively review constitutional questions.[178] His implemented his structural reading through a clear-statement requirement.

---

174. *Tafflin*, 493 U.S. at 459.

175. *Id.* at 460. In *Tafflin*, the Court also asked whether concurrent jurisdiction was ousted "by [an] unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* Justice Scalia would have limited the inquiry to a traditional clear-statement requirement. *Id.* at 800–03 (Scalia, J., concurring). The Court later endorsed Justice Scalia's view in *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990).

176. 486 U.S. 592 (1988).

177. *Id.* at 603.

178. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

CONCLUSION

The major questions doctrine reflects how a "reasonable interpreter" would understand and implement the constitutional separation of powers. It was not recently invented as a "get-out-of-text free card"; rather, it has long factored into the Court's opinions as a means of interpreting congressional delegations. It faithfully implements constitutional text—both word choice and structure. The structure-first approach responds to textualist critiques by anchoring the analysis to the structural components of the text. And it reflects a long tradition of giving meaning and application to constitutional structure through clear-statement rules. The Court should recognize the structural roots of the major questions doctrine as an anchor and guide in future major-questions cases.