# HISTORY, TRADITION, AND NATURAL RIGHTS

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## 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

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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

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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

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> 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.*

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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]

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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

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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

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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]

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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

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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

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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

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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.

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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).