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Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition

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ORIGINALISM AFTER *DOBBS*, *BRUEN*, AND *KENNEDY*: THE ROLE OF HISTORY AND TRADITION

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ABSTRACT—In three recent cases, the constitutional concepts of history and tradition have played important roles in the reasoning of the Supreme Court. *Dobbs v. Jackson Women's Health Organization* relied on history and tradition to overrule *Roe v. Wade*. *New York State Rifle & Pistol Ass'n v. Bruen* articulated a history and tradition test for the validity of laws regulating the right to bear arms recognized by the Second Amendment. *Kennedy v. Bremerton School District* looked to history and tradition in formulating the test for the consistency of state action with the Establishment Clause.

These cases raise important questions about the Court's approach to constitutional interpretation and construction. Do *Dobbs*, *Bruen*, and *Kennedy* represent a new theory of constitutional interpretation and construction based on history and tradition? In the alternative, should the references to history and tradition in these opinions be understood through the lens of Constitutional Pluralism as modalities of constitutional argument? Finally, can the use of history and tradition in *Dobbs*, *Bruen*, and *Kennedy* be reconciled with the Supreme Court's embrace of Public Meaning Originalism?

Part I of this Article elucidates the constitutional concepts of history and tradition. Part II lays out four distinct roles that history and tradition can play: (1) as evidence of original meaning and purpose, (2) as modalities of constitutional argument within a constitutional pluralist framework, (3) as a novel constitutional theory, which we call "Historical Traditionalism," and (4) as an implementing doctrine. Part III investigates the roles of history and tradition in *Dobbs*, *Bruen*, and *Kennedy*. Part IV articulates a comprehensive strategy for the incorporation of history and tradition in constitutional jurisprudence.

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INTRODUCTION

In three recent cases, the constitutional concepts of history and tradition have played important roles in the reasoning of the Supreme Court.[1] *Dobbs v. Jackson Women's Health Organization*[2] relied on history and tradition to overrule *Roe v. Wade*.[3] *New York State Rifle & Pistol Ass'n v. Bruen*[4] articulated a history and tradition test for the validity of laws regulating the right to bear arms recognized by the Second Amendment. *Kennedy v. Bremerton School District*[5] utilizes history and tradition, but its brief discussion of those concepts is ultimately unclear.

These cases raise important questions about the Court's approach to constitutional interpretation and construction. Do *Dobbs*, *Bruen*, and *Kennedy* represent a new theory of constitutional interpretation and construction based on history and tradition? In the alternative, should the references to history and tradition in these opinions be understood through the lens of Constitutional Pluralism as modalities of constitutional argument? Finally, can the use of history and tradition in *Dobbs*, *Bruen*, and *Kennedy* be reconciled with the Supreme Court's embrace of originalism?[6]

In this Article, we will neither support nor criticize the outcomes of *Dobbs*, *Bruen*, or *Kennedy*. Instead, our aims are to describe the role that history and tradition *did* play in the three cases and explain the role that history and tradition *should* play in originalist constitutional theory. We will argue that judges should embrace both history and tradition within an originalist framework but should reject the nonoriginalist idea that history and tradition can justify departures from the original public meaning of the constitutional text.

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[1] For commentary and discussion of this phenomenon, see generally Rachel Reed, *Should the Supreme Court Care About Tradition?*, HARVARD L. TODAY (Nov. 18, 2022), https://hls.harvard.edu/today/should-the-supreme-court-care-about-tradition [https://perma.cc/SPR7-Z2DY], which discusses the Court's reliance on history and tradition in *Dobbs* and *Bruen*; Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL'Y (2023) (forthcoming), which examines the impact of the Court's increasing reliance on history and tradition on First Amendment free-speech jurisprudence; and Chad Flanders, *Flag* Bruen*-ing:* Texas v. Johnson *in Light of The Supreme Court's 2021–22 Term*, 2022 U. ILL. L. REV. ONLINE 94, which explores how the Court might reexamine past cases like *Texas v. Johnson* using *Bruen*'s text-and-history constitutional interpretation method.

[2] 142 S. Ct. 2228, 2242 (2022).

[3] 410 U.S. 113, 154–66 (1973).

[4] 142 S. Ct. 2111, 2156 (2022).

[5] 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting).

[6] The influence of originalism on the Supreme Court in recent years has been widely discussed. *See, e.g.*, David Cole, *The Supreme Court Embraces Originalism—and All Its Flaws*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/ [https://perma.cc/G2VF-B4AY]. Whether a majority of the current Supreme Court embraces originalism is a complex question that we do not address here.

Our analysis will distinguish four concepts: (1) historical practice, (2) historical doctrines, (3) historical narratives, and (4) tradition. Each of these concepts should play a distinct role in judicial decision-making under an originalism framework. Historical practice provides important evidence of original meaning; historical doctrines can do this as well. Historical narratives provide context that both disambiguates and enriches the semantic meaning of the constitutional text. Tradition is an elusive concept that can play a variety of roles, including the important work of crafting implementing doctrines for constitutional text that underdetermines the legal content of constitutional doctrines.

When we turn to originalism, we focus on Public Meaning Originalism,[7] the most prominent member of the originalist family of constitutional theories.[8] This form of originalism includes three central ideas:

(1) The Fixation Thesis: The original meaning of the constitutional text is fixed at the time each provision is framed and ratified;[9]

(2) The Public Meaning Thesis: The best understanding of original meaning is the communicative content of the constitutional text that was accessible to the public at the time each provision was framed and ratified (its original public meaning);[10] and

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[7] There is substantial literature that articulates and defends Public Meaning Originalism. For Professor Barnett's work on the topic, see, for example, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89–117 (rev. ed. 2014), and Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29, 648–54 (1999). For Professor Solum's work on the topic, see, for example, Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1246 (2019) [hereinafter Solum, *Originalism Versus Living Constitutionalism*]; Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021) [hereinafter Solum, *Public Meaning Thesis*]; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4, 27–29 (2015) [hereinafter Solum, *Fixation Thesis*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459–60 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*]; Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/a=2940215 [https://perma.cc/5WB3-N4FP] [hereinafter Solum, *Constraint Principle*].

[8] The originalist family of constitutional theories also includes Original Intentions Originalism, Original Methods Originalism, and Original Law Originalism. For Original Intentions Originalism, see Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011). For Original Methods Originalism, see John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1400–11 (2018), and 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). On Original Law Originalism, see William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).

[9] *See* Solum, *Fixation Thesis*, *supra* note 7, at 1.

[10] *See* Solum, *Public Meaning Thesis*, *supra* note 7, at 1957.

(3) The Constraint Principle: Constitutional practice ought to be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text.[11]

Together, these three ideas express the core tenets of Public Meaning Originalism.[12]

In addition, many public meaning originalists embrace the interpretation–construction distinction,[13] which can be summarized by the following stipulated definitions:

> Constitutional Interpretation: The activity that discerns the meaning (communicative content) of the constitutional text.
>
> Constitutional Construction: The activity that determines the legal effect of the constitutional text, including the decision of constitutional cases and the crafting of constitutional doctrines.

Although some constitutional provisions are precise and provide bright-line rules (e.g., the thirty-five-year age qualification for the President),[14] others may be moderately underdeterminate (e.g., the word "unreasonable" in the Fourth Amendment).[15] When the constitutional text is underdeterminate, some method of constitutional construction is required to give the text legal effect in what can be called the "construction zone." Sometimes this activity is labeled the creation of "implementing doctrines."[16]

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[11] *See* Solum, *Constraint Principle*, *supra* note 7, at 3.

[12] A complete statement of Public Meaning Originalism would encompass several other ideas, including but not limited to the claims that (1) the communicative content is discoverable, (2) the communicative content is sufficiently rich to determine a substantial amount of constitutional doctrine, and (3) there is a feasible pathway from the status quo to a constitutional practice that is substantially ordered by originalism.

[13] Solum, *Originalism and Constitutional Construction*, *supra* note 7, at 457; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–18 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65–66 (2011).

[14] U.S. CONST. art. II, § 1 ("[N]either shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years . . . .").

[15] *Id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) ("The law is *determinate* with respect to a given case if and only if the set of results that can be squared with the legal materials contains one and only one result. The law is *indeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is identical with the set of all imaginable results. The law is *underdeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.").

[16] *See* Richard H. Fallon Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453, 462–70 (2013) (discussing the role of implementing doctrines). *See generally* RICHARD H. FALLON JR., LAW AND

While the existence of construction zones is contested by some originalist scholars,[17] the need for implementing doctrines to give effect to the meaning of the Constitution is the subject of almost universal agreement.[18]

Professors Randy Barnett and Evan Bernick have articulated an originalist framework for the development of implementing doctrines in the construction zone.[19] Their theory requires judges to both identify the original purpose(s) or function(s) of the relevant constitutional provisions and act in good faith by crafting implementing doctrines that are consistent with both the original meaning of the text and the original purpose and function of the relevant constitutional provisions.[20] To be faithful to a written constitution is to adhere to the original purposes or functions for which its provisions were adopted.[21] This is distinct from adhering to the purposes of the present-day constitutional decisionmaker and requires the same type of historical inquiry as required to identify the original meaning of the text.[22] This approach to constitutional construction provides a role for a form of "original intent"—albeit one that must be consistent with, and cannot supersede or trump, the original public meaning.

Professor Lawrence Solum has provided a framework for originalist methodology that instructs *how* to determine original public meaning.[23] The framework embraces three primary methods for discerning the original

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LEGITIMACY IN THE SUPREME COURT 68 (2001) (referring to "implementation through judicially crafted doctrines."); *id.* at 100 ("The Justices have . . . acknowledged an obligation to make reasonable efforts to achieve legal clarity by crafting and constructing a number of relatively determinate doctrines to implement vague constitutional language.").

[17] In particular, Professors McGinnis and Rappaport have argued that the Constitution is written in the language of the law. *See* McGinnis & Rappaport, *The Language of the Law*, *supra* note 8. As a consequence, their position implies that the communicative content of the constitutional text either fully determines the legal content of constitutional doctrine or almost does so.

[18] We are not aware of any originalist constitutional scholars who explicitly reject the need for implementing doctrines. Some originalists may believe that implementing doctrines can be derived by a method of deduction from the constitutional text, though we are not familiar with any scholars who say this explicitly.

[19] Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). Professor Solum has not committed to a theory of constitutional construction for the construction zone.

[20] *Id.* at 33–36.

[21] *Id.* at 36–37.

[22] *Id.* at 52. ("[T]he Constitution's letter and spirit can both be ascertained empirically by investigating similar evidence . . . .").

[23] *See, e.g.*, Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (proposing the "Method of Triangulation" approach to determining original meaning, which employs three methods—the method of corpus linguistics, the originalist method of immersion, and the method of studying the constitutional record—that work together by confirming or questioning the results reached by the other methods); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (describing originalist methodologies for constitutional interpretation and construction).

public meaning and the original functions and purposes of the constitutional text:

> The Constitutional Record: Originalist judges and scholars should consider all of the relevant evidence provided by the constitutional record. Such evidence includes, but is not limited to, the general historical background in which provisions were framed and ratified, records of the framing or drafting of the relevant provisions, public debates about the relevant provisions, ratification debates, early implementation of the relevant provisions, and early judicial decisions interpreting the provisions.[24] Importantly, jurists and scholars should consider all relevant evidence from the record and avoid cherry-picking evidence that favors a preferred outcome.[25]
>
> Historical Linguistics: Originalist judges and scholars should consider direct evidence of patterns of usage during the framing and ratification of the relevant constitutional provisions. Such evidence includes the use of corpus linguistics, which uses large databases to identify patterns of usage that constitute the semantic meaning of words and phrases contained in the text.[26]
>
> Originalist Immersion: Originalist scholars should acquire deep knowledge of the historical period in which a constitutional provision was framed and ratified, either through primary sources or through secondary sources that report the results of such immersion.[27]

Each of these three methods can be checked against the others. When all three methods agree, they provide strong support for an originalist interpretation of the constitutional text.[28] The overall aim of a rigorous originalist methodology is the reconstruction of the communicative content of the constitutional text and the reasons for its adoption that best explains all of the relevant evidence considered as a whole.[29] As our analysis will show, *Dobbs*, *Bruen*, and *Kennedy* execute originalist analysis in various ways, but none of the three opinions fully employs the originalist methods outlined here.

In Part I, we investigate "history" and "tradition" as constitutional concepts. In Part II, we lay out four distinct roles that history and tradition

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[24] Solum, *Triangulating Public Meaning*, *supra* note 23, at 1655.

[25] *See id.* at 1675 (describing the potential problem of cherry-picking).

[26] *Id.* at 1643. We have used the phrase "historical linguistics" in the text, rather than "corpus linguistics," to express the fact that historical linguistics employs several tools including but not limited to corpus linguistics.

[27] *Id.* at 1649.

[28] *Id.* at 1625.

[29] We are appealing, here, to the idea of inference to the best explanation (abduction). For an introductory account, see Igor Douven, *Abduction*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer ed. 2021), https://plato.stanford.edu/archives/sum2021/entries/abduction [https://perma.cc/NBQ6-775Q].

can play: (1) as evidence of original meaning and purpose, (2) as modalities of constitutional argument within a constitutional pluralist framework, (3) as a novel constitutional theory, which we call "Historical Traditionalism," and (4) as an implementing doctrine. In Part III, we discuss the role of history and tradition in *Dobbs*, *Bruen*, and *Kennedy*. In Part IV, we suggest an originalist approach to history and tradition.

I. HISTORY AND TRADITION AS CONSTITUTIONAL CONCEPTS

The Supreme Court frequently uses the words "history" and "tradition," but rarely defines what they mean. Our investigation begins with conceptual archaeology. What is meant by "history" and "tradition" when those terms are used by constitutional theorists and by judges in cases like *Dobbs*, *Bruen*, and *Kennedy*?

A. History

The word "history" is ambiguous when used by regular folk in ordinary conversations. And it seems to take on new and special meanings in Supreme Court opinions that rely on history to make constitutional arguments. We believe that the word "history" is used in at least three distinct ways in constitutional discourse:

> Historical Practice: We will use the phrase "historical practice" to refer to actions by executive officials and legislatures that have constitutional implications. For example, legislation enacted by the First Congress may provide evidence relevant to identifying the public meaning of "legislative Powers" in Article I.[30]
>
> Historical Doctrine: Judicial decisions are part of history and can shed light on constitutional meaning and purpose that is distinct from their precedential (stare decisis) effect. We call this "historical doctrine." Early decisions of the Supreme Court may provide evidence of the meaning and purposes of constitutional provisions. For example, early judicial decisions can be relevant to identifying the public meaning of "the judicial power" in Article III.[31]
>
> Historical Narratives: We will use the phrase "historical narratives" to refer to the construction of stories that recount the origins, purposes, development, or consequences of constitutional actions and events—and any combination of these. For example, a historical narrative might situate Section One of the Fourteenth Amendment[32] in the context of Reconstruction, identify the

[30] U.S. CONST. art. I.

[31] *Id.* art. III.

[32] *Id.* amend. XIV.

purposes for which its provisions were drafted, and discuss the development of constitutional doctrines associated with its specific provisions.[33]

All three uses of "history" are important, but the role of historical narratives requires further clarification. In the context of constitutional discourse, historical narratives can perform at least three distinct functions (causal, normative, and hermeneutic):

Causal Historical Narratives: Occasionally, a narrative is used to identify the causes of constitutionally significant actions and events. In the context of the Constitution, causal narratives frequently identify the purposes of constitutional actors as the causal explanations for constitutional actions and events. For example, a causal narrative might explain that the original purpose of those who sought textual protection of "the right of the people to keep and bear arms" in the Second Amendment was to preserve and secure from future encroachment the capacity of individuals to engage in personal and collective self-defense and to ensure the future viability of the general militia comprised of the citizenry.[34]

Normative Historical Narratives: Sometimes, the point of a historical narrative is normative. Normative historical narratives aim to elicit a moral or legal evaluation of some constitutional action or event. Such narratives can be vindicating (eliciting a positive evaluation) or debunking (eliciting a negative evaluation). For example, a narrative that tied the Electoral College to the interests of slaveowners would be a debunking narrative; whereas a narrative that explained that the Nineteenth Amendment was a response to a movement for the fundamental human rights of women would be a vindicating narrative.

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[33] *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 67–68 (1872) ("The most cursory glance at [the first twelve amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history, for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights, additional powers to the Federal government; additional restraints upon those of the States. Fortunately, that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.").

[34] *See, e.g.*, United States v. Miller, 307 U.S. 174, 178–79 (1939) ("With obvious purpose to assure the continuation and render possible the effectiveness of such [Militia] forces, the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view. The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion. The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily, when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.").

> Hermeneutic Historical Narratives: In constitutional discourse, narratives frequently have an interpretive function. That is, the point of a hermeneutic narrative would be to establish the meaning (communicative content) of a constitutional provision. For example, a narrative about the failure of state governments to protect freedmen from violence, theft, and fraud might establish that the original public meaning of the Equal Protection Clause was to provide the same legal protections against rights invasions to the former slaves and other persons as were previously provided to white citizens.[35]

When judges engage in constitutional interpretation, the third form of historical narrative is particularly important. Hermeneutic narratives bear directly on the meaning of the words and phrases in the constitutional text and provide relevant context that may disambiguate and enrich the semantic meaning of the text.

B. Tradition

Like "history," the word "tradition" appears frequently in constitutional discourse.[36] But what exactly is "tradition"? Formulating a clear and precise definition of this elusive concept is not an easy task. One way to begin is with existing definitions. For example, the Oxford English Dictionary includes the following definitions:

> A belief, statement, custom, etc., handed down by non-written means (esp. word of mouth, or practice) from generation to generation; such beliefs, etc., considered collectively.
>
> Any practice or custom which is generally accepted and has been established for some time within a society, social group, etc. (in later use not necessarily one passed down from generation to generation); such practices, etc., considered collectively.[37]

The relevant sense of "tradition" in constitutional discourse seems to be the one identified in the second definition. Constitutional traditions are practices or customs that are generally accepted in the United States, and which have been established for some time. One example of such a tradition

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[35] *See, e.g.*, Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 40 (2008) (quoting the preamble to the first Reconstruction Act which provides that "no legal State governments or adequate protection for life or property now exists in the rebel States . . . and . . . it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established").

[36] For example, the search string "adv: tradition /p constitution" produced 346 hits in the Supreme Court database on Westlaw when run on December 30, 2022. The search string "adv: history /p constitution" produced 1347 hits when run on the same day.

[37] *Tradition*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/viewdictionaryentry/Entry/204302 [https://perma.cc/GBA2-26BA].

might be the State of the Union Address, delivered orally by the President to the members of the House of Representatives and the Senate. The Constitution itself provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."[38] The text does not require an annual in-person address that is delivered orally, but there is now such a tradition of the President being invited to deliver the State of the Union Address.[39]

Inevitably, the ordinary meaning of "tradition" is imprecise and open-textured. Some traditions may involve social norms; others may involve judicial, legislative, or executive practices. Some traditions may be established by very long usages—centuries or many decades—but it also makes sense to think of a widely established, but relatively new, custom as a tradition. For example, since the end of World War II in 1945, presidents of both parties have initiated the use of military force outside the territory of the United States without first asking Congress "to declare war."[40] Over the course of just a decade or two, this now-generally-accepted practice may have come to constitute a tradition.

Professor Marc DeGirolami offers a clearer understanding of tradition through his explication of the rise of what he calls "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.[41]

Professor DeGirolami's conception of tradition emphasizes the priority of social practices over official acts:

> Traditionalism . . . rejects abstract principles or values as the primary determinants of meaning. But it also does not depend upon constitutional caselaw, judicial outputs, stare decisis, reasoned judicial elaboration, and the like, to ground its method. . . . [O]ne of its primary foci is "popular practices" (of governments or citizens) rather than "legal-professional" practices: traditionalism gives "strong weight to the concurrence of many

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[38] U.S. CONST. art. II, § III, cl. 1.

[39] For the history of the State of the Union address, see *State of the Union Address*, HISTORY, ART & ARCHIVES OF THE U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/SOTU/State-of-the-Union/ [https://perma.cc/8XL3-K34E].

[40] U.S. CONST. art. I, § VIII, cl. 11; *see* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 172 (1996).

[41] Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming) (manuscript at 6), https://papers.ssrn.com/a=4205351 [https://perma.cc/9Z7C-RBET].

> geographically and temporally disparate sources, including those that are at some distance (literal or figurative) from the conventional centers of political or cultural power."[42]

Importantly, Professor DeGirolami's understanding of traditionalism also includes a three-dimensional formulation of the factors that determine the existence and strength of a constitutionally salient tradition:

> Age: "the antiquity of a practice."[43]
>
> Longevity: "the continuity of the practice across time."[44]
>
> Density: "the extent to which the practice was used or adopted across space."[45]

In our view, a constitutional tradition is strongest or most firmly established when it has existed continuously for a very long time (more than a century) throughout the United States. And if a practice is relatively new, fluctuating, and confined to a particular locality, it would not be a tradition at all.

Professor DeGirolami's three-dimensional understanding of tradition provides criteria for the contrasting conception of a constitutional "outlier," which, by definition, cannot constitute a tradition.[46] An old practice might be an outlier if it was discontinued or geographically isolated. However, a relatively new practice which has not yet achieved the status of a tradition should not be labeled an outlier if it has been established throughout the United States for some continuous period.

According to Professor DeGirolami's "traditionalist" approach, if a practice constitutes a strong constitutional tradition, then it would have an associated constitutional status.[47] For example, a traditionally exercised power would be constitutionally valid, and a traditionally established right would be constitutionally protected. Contrawise, if an exercise of a governmental power is an outlier, it would be constitutionally suspect; similarly, if an asserted right was an outlier, it would not be a candidate for constitutional protection.

It is not clear whether Professor DeGirolami's understanding of traditionalism captures the notion of tradition that is operating in Supreme Court decisions like *Dobbs*, *Bruen*, and *Kennedy*. But it has the virtue of

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[42] *Id.* at 7 (citing Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 107–08 (2021)).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 8.

[46] Professor DeGirolami does not conceptualize the concept of an outlier, although he does use the word "outlier." *Id.* at 12, 25, 29. For scholarly discussion of the concept, see Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014).

[47] DeGirolami, *supra* note 41, at 6–7.

providing a clear articulation of the concept of tradition. This concept can then be used as a standard against which we can evaluate the use of tradition in constitutional discourse.

C. The Relationship Between History and Tradition

In clarifying the proper role of history and tradition in constitutional law, our first important claim is that *history and tradition are conceptually distinct*. Tradition is often constituted by long-established historical practice or historical doctrine; even a recently emerged tradition could be established by a historical narrative. In other words, history provides evidence of the existence of a tradition. But historical practices and doctrines are not the same as traditions.

The three types of history—practice, doctrine, and narrative—interact with tradition in different ways. By itself, the existence of a historical practice or doctrine does not establish a tradition. For example, legislation enacted by the First Congress might later be repealed and hence fail to establish a tradition with respect to the subject of the legislation. This could be true even if Congress's action provides strong evidence of original meaning. But historical narratives can identify the existence of an ongoing tradition or the rise and fall of traditions that have gone by the wayside. For example, while the First Congress established the first Bank of the United States, that Bank's charter was allowed to lapse in 1811.[48] The second Bank of the United States was established in 1816.[49] After Andrew Jackson became President in 1829, he vetoed the renewal of the second Bank's charter. As a result, the Bank closed its doors in 1836, remaining in business as strictly a private bank until 1841.[50] Thus, when the Federal Reserve System was established in 1913,[51] while there was historical practice that established a *precedent* for such an entity, there was no longstanding and continuous *tradition* supporting its establishment.

II. FOUR ROLES FOR HISTORY AND TRADITION IN CONSTITUTIONAL THEORY

We now have an account of the various distinct ideas that can be represented by the phrase "history and tradition." Our next step is to identify

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[48] William J. Kambas, *The Development of the U.S. Banking System: From Colonial Convenience to National Necessity*, 28 RUTGERS L. REC. 4 (2004).

[49] *Id.*

[50] *Id.*

[51] Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221–522). For the history of the Federal Reserve System, see Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REG. 257, 276–80 (2015).

four roles that history, tradition, or their conjunction can play in constitutional jurisprudence.

The first three roles that we identify operate at the level of constitutional theory. First, history and tradition can play an evidential role within Public Meaning Originalism. Second, history and tradition can serve as modalities of constitutional argument within the living constitutionalist approach called "Constitutional Pluralism." Third, history and tradition can form the basis of a novel constitutional theory, which we call "Historical Traditionalism."

There is a fourth role that operates at a lower level of abstraction in the realm of constitutional doctrine: History and tradition can operate as components of an implementing rule or test that operationalizes some aspect of constitutional doctrine.[52] We categorize this last role as within the activity of constitutional construction.

We will examine each role in turn, beginning with the role of history and tradition within Public Meaning Originalism.

A. History and Tradition Within Public Meaning Originalism

Recall that an originalist approach to constitutional interpretation requires us to identify the communicative content of the constitutional text. From an originalist perspective, that content ought to constrain constitutional practice, including the decision of cases and the articulation of doctrines by the Supreme Court.[53] In the construction zone, Professors Barnett and Bernick's approach requires that the identification of the original purpose or function of constitutional provisions constrain the adoption of implementing doctrines. How should history and tradition bear on originalist interpretation and construction?

1. History and Tradition as Evidence of Original Meaning and Purpose

The most obvious relationship between originalism and history is evidentiary. Evidence of the original public meaning of the constitutional text is historical evidence. The roles of historical facts as evidence of original meaning of the text are varied, but they include the following[54]:

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[52] Recall that implementing doctrines are methods of constitutional construction used to give the text legal effect and meaning when the text is underdeterminate. Implementing rules operate at the level of constitutional doctrine, not theory. As a consequence, an implementing rule that relies on history and tradition might be justified on either originalist or living constitutionalist grounds.

[53] *See supra* note 11 and accompanying text.

[54] Each of the roles for historical facts that are outlined here can be utilized in the originalist methodology discussed above. For example, historical word usage is an example of historical linguistics. The use of historical context in pragmatics will involve study of the constitutional record. A full

> Historical Word Usage and Semantics: An important component of original meaning is semantic, the meaning of the words and phrases that compose the constitutional text. Semantic meaning is determined by patterns of usage, and such patterns are historical facts.[55]
>
> Historical Context and Pragmatics: Semantics make an important contribution to original meaning, but the full communicative content of the constitutional text is also a function of context. Contextual disambiguation and pragmatic enrichment require knowledge of the historical context in which each constitutional provision was framed and ratified.[56]
>
> Historical Practice and Historical Doctrine: Historical practice and doctrine that are close in time to the framing and ratification can provide evidence of meaning. Government officials who participated in the framing and ratification of the constitutional text are very likely to grasp its original public meaning. Absent evidence to the contrary, it is reasonable to assume that their actions were consistent with the text, especially if their actions went uncontested. For this reason, historical practice and doctrine provide evidence of original public meaning.[57]

The role of history as evidence of original meaning is so clear and obvious that it hardly needs to be stated, but the role of tradition can be obscure.

Tradition is sometimes contrasted to text, and that contrast may be built into definitions of tradition, as in the Oxford English Dictionary definition above: "custom, etc., handed down by non-written means."[58] Nonetheless, tradition may shed light on the original meaning of a text in a variety of ways, including the following:

> Traditions that Provide Constitutional Meaning: 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.[59] 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."
>
> Traditions that Provide Context: Because constitutional meaning is a function of both the words and phrases and their context, tradition could play an

explanation of the connections between historical fact and originalist methodology is a very large topic and is therefore outside the scope of this Article.

[55] *See* Solum, *Originalist Methodology*, *supra* note 23, at 279.

[56] *See* Solum, *Public Meaning Thesis*, *supra* note 7, at 2039.

[57] *See* Brianne J. Gorod, *Originalism and Historical Practice in Separation-of-Powers Cases*, 66 SYRACUSE L. REV. 41, 56 (2016).

[58] OXFORD ENGLISH DICTIONARY ONLINE, *supra* note 37.

[59] U.S. CONST. amend. VII.

> important role in both the disambiguation and enrichment of the constitutional text. One example might be the Establishment Clause,[60] which was adopted against a tradition of state establishment of religions.[61] That context might suggest that one of the purposes of the clause was to deny Congress the power to disestablish religions established by the state.

The fact that tradition can play a role in the production of constitutional meaning might be misunderstood. The concept of tradition is not the same concept as meaning (communicative content). Some provisions of the constitutional text may be inconsistent with tradition; others may bring new traditions into being. For example, slavery was a traditional practice before the adoption of the Thirteenth Amendment, the purpose of which was to put an end to that tradition.[62]

2. History and Tradition in the Construction Zone

History and tradition could play various roles in the construction zone, where constitutional text that underdetermines the outcome of constitutional disputes requires implementing rules. Here are two examples of such roles:

> History or Tradition as *Evidence* of Original Purposes: Just as history or tradition can provide evidence of original meaning, they can also provide evidence of the original purpose or function of a constitutional provision. Identifying the original purpose of a constitutional provision obviously requires consideration of historical context and may include a narrative that explains the function that the provision serves in light of reasons for its adoption. For example, the Pennsylvania Constitution of 1776 stated that the purpose of the "right to bear arms" is "for the defence of themselves and the state."[63] According to Professors Barnett and Bernick, these historically-grounded original purposes should guide and constrain a faithful implementation of the original meaning of the text.[64]

> History or Tradition as a *Method* of Constitutional Construction: 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.[65]

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[60] *Id.* amend. I.

[61] Richard Albert, *The Constitutional Politics of the Establishment Clause*, 87 CHI. KENT L. REV. 867, 869 (2012).

[62] U.S. CONST. amend. XIII.

[63] PENN. CONST. art. 13 ("[T]he people have a right to bear arms for the defence of themselves and the state.").

[64] *See generally* Barnett & Bernick, *supra* note 19 (identifying and defending an originalist theory of constitutional construction).

[65] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128–29 (2022).

These two roles (evidentiary and methodological) differ from one another, but both can be consistent with an originalist approach to constitutional construction. This is true because either role would operate when the constitutional text underdetermines the legal content of constitutional doctrine and could therefore be consistent with the original communicated content of the text.

In contrast, if history or tradition are treated as the direct source of constitutional construction, something other than originalism will be operating in the construction zone. If accepted practices arising well after the adoption of the constitutional provision—in, say, 1937, 1952, or any arbitrary date—provide the basis for a judicial decision, this is a nonoriginalist approach because it is not derived from the original purpose of a provision adopted in 1789, 1791, or 1868.[66]

3. History, Tradition, and the Gravitational Force of Originalism

Professor Barnett has identified what he calls "the gravitational force of originalism."[67] According to this concept, originalism can play a role in constitutional decision-making without making an explicit appearance in the reasoning of constitutional decisions.[68] For example, many who identify as originalists, such as Justice Thomas, consider the modern doctrine of substantive due process to be inconsistent with the original meaning of the Due Process of Law Clauses in the Fifth and Fourteenth Amendments.[69] But rather than reject the doctrine of substantive due process expressly, a Justice may maintain an "off-the-books"[70] originalist assumption that leads them to adopt a highly restricted version of the doctrine that reduces, but does not eliminate, the perceived departure from the original public meaning of the clause.

In particular, conservative judges who are skeptical of the textual basis of substantive due process may have adopted the construction articulated by Chief Justice William Rehnquist in *Washington v. Glucksberg* and utilized

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[66] Even if a history-and-tradition test is consistent with the original public meaning of the constitutional text, it might not be the implementing rule that best realizes the original purpose or function of a constitutional provision. There are many possibilities and complications we cannot discuss on this occasion.

[67] Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 420 (2013).

[68] *Id.* at 421.

[69] 142 S. Ct. at 2300 (Thomas, J., concurring) ("Considerable historical evidence indicates that 'due process of law' merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property.").

[70] We elaborate on the concept of, and difficulties with, off-the-books originalism *infra* pp. 490–91.

by Justice Samuel Alito (with a modification we discuss below[71]) in *Dobbs*.[72] Starting with the belief that the protection of unenumerated substantive rights by the Due Process of Law Clauses is illegitimate on originalist grounds, an originalist judge might adopt a version of the doctrine that limits and contains a departure from original meaning. This might be called "second-best originalism."[73]

In the context of abortion, if a Justice believes that an unenumerated right to obtain an abortion is inconsistent with the original meaning of the Due Process of Law Clauses, that Justice might use a nonoriginalist doctrine—like the substantive due process doctrine[74] articulated in *Washington v. Glucksberg*—to reach what that Justice believes to be the right originalist result.[75] In this way, the gravitational force of originalism exerts its influence over nonoriginalist constitutional decisions without making an appearance in the opinions of the Court.[76]

How judges should approach nonoriginalist doctrines and precedents will be examined below in Part IV. At this stage of the analysis, our point is simply that originalism can be operating in the background even when an opinion itself is not originalist in method. And originalists should clearly distinguish between an originalist decision-making *method* and an originalism-justified *result*. The former, not the latter, is the focus of our analysis of the judicial reasoning of *Dobbs*, *Bruen*, and *Kennedy*.

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[71] *See infra* Section III.A.2.

[72] 521 U.S. 702 (1997). In *Glucksberg*, the Court established that the Due Process Clause does not specially protect a right as "fundamental" unless the narrowly and specifically defined right is deeply rooted in our nation's history and tradition. *Id.* at 720–21; *see also* Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989) (quoting Justice Potter Stewart's claim that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("[W]e must decide whether the right to keep and bear arms is . . . 'deeply rooted in this Nation's history and tradition[.]" (quoting *Glucksberg*, 521 U.S. at 721)).

[73] *See infra* text accompanying notes 204–207 (elucidating the concept of an originalist second best and explaining why the "deeply rooted in our nation's history and tradition" test is only a second-best originalist outcome).

[74] The relationship of substantive due process to originalism is complicated, but for the purposes of our analysis in this Article, we assume that the specific substantive due process analysis in *Glucksberg* cannot be justified on originalist grounds. A full discussion of this issue would be voluminous and is outside the scope of this Article. For a general critique of *Glucksberg*'s methodology, see Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

[75] The "right originalist result" would include the outcome of a particular case and a holding that would produce originalist results in future cases that are closer to the outcomes produced by a truly originalist holding. *See infra* Part IV.E.

[76] To reiterate, we take no position here on whether an unenumerated right to abortion is supported by or inconsistent with the original public meaning of some provision of the Constitution.

B. History and Tradition as Modalities Within Constitutional Pluralism

History and tradition can operate in a very different way than they do within originalism by serving as modalities of constitutional argument within what is called "Constitutional Pluralism."[77] Let us stipulate the following definition:

> Constitutional Pluralism: Constitutional doctrine and the decision of constitutional cases should be determined by a complex argument practice structured by a finite set of the modalities of constitutional justification. A constitutional doctrine or decision is reasonably justified as long as it is supported by at least one modality.

Constitutional Pluralism is usually understood as a form of living constitutionalism.[78] A representative set of modalities might include: (1) text, (2) historical practice, (3) precedent, (4) constitutional values, and (5) institutional capabilities.[79] For pluralists, no modality is privileged over the others.[80] For this reason, Constitutional Pluralism explicitly allows the constitutional text to be overridden by arguments from historical practice, precedent, constitutional values, or institutional capacities.

Constitutional Pluralism can be either "progressive" or "conservative." Progressive Constitutional Pluralism is, perhaps, the most familiar form of living constitutionalism. It includes the modalities of constitutional argument that allow judges to adopt novel constitutional constructions in response to changing values and circumstances. But we can also imagine a "conservative" form of Constitutional Pluralism that elevates the backward-looking modalities, combining history and tradition with both the original meaning of the constitutional text and precedent.

Let us stipulate the following definition:

> Conservative Constitutional Pluralism: Constitutional doctrine and the decision of constitutional cases should be determined by a complex argument practice

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[77] For particular versions of Constitutional Pluralism, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–16 (1991), which describes constitutional modalities; Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1191–93 (1987); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994), which provides that "[p]luralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution"; Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1739–41 (2013); and Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CAL. L. REV. 1755, 1795 (2018).

[78] For a discussion of the relationship of Constitutional Pluralism with originalism, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism*, *supra* note 7, at 1271–76.

[79] Different versions of Constitutional Pluralism involve varied lists of the legitimate modalities of constitutional argument. We believe that the list provided in text is representative, but nothing hangs on our specific formulation of pluralism.

[80] BOBBITT, *supra* note 77, at 12–22.

> structured by consideration of (1) text, (2) history, (3) tradition, and (4) precedent. A constitutional doctrine or decision is justified if one of the following two conditions is satisfied: (A) the doctrine or decision is required by the constitutional text, or (B) the decision is inconsistent with the text but is justified by history, tradition, or long-standing precedent.[81]

Conservative Constitutional Pluralism resembles its progressive constitutionalist cousin, but it eliminates the forward-looking modalities that enable judges to adopt constitutional constructions that respond to changing values and circumstances. Conservative Constitutional Pluralism resembles what is sometimes called "faint-hearted originalism,"[82] a view that is associated with Justice Antonin Scalia and is inconsistent with the "lion hearted originalism" that is associated with Justice Thomas.[83]

Something like conservative pluralism may capture what Justice Alito means when he calls himself a "practical originalist."[84] In short, Conservative Constitutional Pluralism is like originalism, in that it allows for constitutional decisions and doctrines that are justified by the original public meaning of the constitutional text, but it differs from originalism in that it allows departures from the text that are justified on the basis of history, tradition, or longstanding precedent.

C. Historical Traditionalism as an Independent Constitutional Theory

There is a third and more novel role that history and tradition could play in constitutional theory. History and tradition could stand alone as an independent constitutional theory—call this view "Historical Traditionalism." The leading advocate for such a view is Professor Marc

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[81] This is only one possible version of what we are calling "Conservative Constitutional Pluralism." This version emphasizes the idea that departures from the original public meaning of the constitutional text can be justified on the basis of history, tradition, *or* precedent. Other formulations are possible: for example, we can imagine a form of conservative pluralism that allows departures from original meaning *only if* it is supported by history, tradition, *and* precedent. Another variant might *require* departures from original meaning that are supported by history, tradition, *or* precedent.

[82] See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 16 (2006).

[83] *See* Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 531–33 (2022); *see also* Logan Olson, Presentation at the University of Montana Graduate Conference: Lion Hearted Originalism and the Second Amendment (Feb. 28, 2020) (comparing lion hearted originalism with Justice Scalia's originalist interpretation in the *D.C. v. Heller* case).

[84] Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man [https://perma.cc/XD92-CVGH] (quoting Justice Alito as stating, "I think I would consider myself a practical originalist.").

DeGirolami.[85] This theory, as we describe it, is inspired by Professor DeGirolami's theory, but it differs from his in several respects. Let us stipulate the following definition:

> Historical Traditionalism: Constitutional decisions and doctrines are justified only if they are deeply rooted in the history and traditions of the United States, including (1) longstanding and continuous historical practice, (2) longstanding and continuous precedent, or (3) longstanding and continuous customs and social norms.

So defined, Historical Traditionalism is not a form of originalism. Recall that originalism embraces the Constraint Principle and hence requires consistency with the original public meaning of the constitutional text.[86] Historical Traditionalism would support constitutional decisions and doctrines that are consistent with the constitutional text, but only if the original meaning is reflected in longstanding and continuous historical practice, precedent, or customs and social norms. Otherwise, Historical Traditionalism both authorizes and requires departures from the original meaning when the original meaning is not consistent with historical practice, precedent, or customs and social norms. But such departures are inconsistent with the Constraint Principle.

The contrast between Historical Traditionalism and Public Meaning Originalism can be illustrated with three hypothetical examples. The examples that follow are based on stipulated assumptions about original meaning, history, and tradition. They are offered as hypothetical illustrations and not as arguments about what the original public meaning of the constitutional text actually is.

> Federalism: Even if the original public meaning of the constitutional text requires that federal legislation be authorized by an enumerated power or the limited ancillary powers authorized by the Necessary and Proper Clause, Historical Traditionalism might sanction virtually unlimited national legislative power on the basis of a longstanding and continuous historical practice, precedent, or custom, beginning in the 1930s and persisting for decades.
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> Separation of Powers: Even if the original public meaning of the constitutional text requires a robust nondelegation doctrine, Historical Traditionalism could authorize the transfer of legislative power to administrative agencies on the basis of a historical practice, precedent, or custom of such delegations that began during the New Deal Era.

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[85] *See, e.g.*, Marc DeGirolami, *Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1128–29 (2020) (providing an overview of Professor DeGirolami's new theory of constitutional interpretation focused on traditionalism).

[86] *See supra* text accompanying note 11.

> Privileges or Immunities of Citizens: Even if the original meaning of the constitutional text bars states from abridging the fundamental substantive rights of its citizens under the Privileges or Immunities Clause, Historical Traditionalism might justify judicial nullification of the Clause on the basis of more than a century of historical practice beginning with the *Slaughter-House Cases*.[87]

These hypotheticals illustrate a core feature of Historical Traditionalism: it requires continuity with history and tradition regardless of the original public meaning of the relevant constitutional text. This requirement is inconsistent with originalism if there has been a longstanding and continuous departure from the original public meaning of the constitutional text.[88]

D. History and Tradition as Implementing Doctrines

Up to this point, our discussion of the roles of history and tradition has focused on constitutional theory. We now consider the possibility that history and tradition can be used to formulate implementing doctrines.

We can illustrate this fourth role with a hypothetical. Suppose the Supreme Court was devising an implementing doctrine for the constitutional norms governing defamation actions (libel and slander) under the Free Speech and Freedom of the Press Clauses of the Constitution,[89] as applied to the states via the Fourteenth Amendment. The Court has reached the abstract conclusion that state common law rules governing private cause of action for defamation can violate the First Amendment freedoms of speech and press. Now, it needs a less abstract implementing doctrine (a rule or test) to determine whether a particular defamation rule is unconstitutional. Imagine that the Court adopts a "history and tradition test." The test holds that state common law defamation rules are constitutional if they are supported by history and tradition, but they are unconstitutional if they are both novel and restrictive of free speech or press.[90]

The role of history and tradition as implementing doctrines is reflected in Justice Sonia Sotomayor's dissenting opinion in *Kennedy*, identifying "a

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[87] 83 U.S. 36 (1872).

[88] Still, the gravitational force of originalism could account for the following outstanding questions: why the Rehnquist Court adopted nonoriginalist limits on the nonoriginalist substantial effects doctrine; why the Roberts Court adopted the nonoriginalist "major questions doctrine" approach to statutory construction; and why conservative Justices who are sympathetic to originalism have adopted a highly restricted doctrine of substantive due process.

[89] U.S. CONST. amend. I.

[90] As formulated, the test may not be sufficiently precise; a more elaborate test might be required for a workable doctrine in the real world, but we have formulated a very simple history and tradition test to illustrate the general idea.

new 'history and tradition' *test*."[91] And Justice Brett Kavanaugh's concurring opinion in *Bruen* characterizes the majority as elaborating "on the text, history, and tradition *test*" for violations of the right to bear arms.[92]

History and tradition tests might be adopted either on the basis of originalist reasoning or by a court that employed some form of Constitutional Pluralism. For example, an originalist understanding of the Seventh Amendment might conclude the original public meaning of the Preservation Clause[93] directly requires that the right to jury trial is defined by the "history and tradition" of the jury trial right in England as of 1791 when the Seventh Amendment was adopted. Alternatively, an originalist might reach the conclusion that the phrase "right to jury trial" and the word "preserve" underdetermine the content of Seventh Amendment doctrine, but that a history and tradition test would serve the amendment's original purpose. But the same test might also be adopted by a constitutional pluralist. For example, a constitutional pluralist who was a living constitutionalist might conclude that a history and tradition test is supported by the text of the Seventh Amendment, historical practice, or constitutional values.

As we shall see, history and tradition tests may well have played an important role in *Dobbs*, *Bruen*, and *Kennedy*. We turn to those cases now.

III. HISTORY AND TRADITION IN RECENT DECISIONS OF THE SUPREME COURT

We now have a framework for evaluating the use of history and tradition in *Dobbs*, *Bruen*, and *Kennedy*. In this Part, we examine these three cases in order to reconstruct the role that history and tradition play in each case in light of the conceptual clarifications in Part I and the explication of the roles of history and tradition in Part II. Given the differing uses of history and tradition we have identified, it is not surprising that the roles to which history and tradition are put in these cases is complicated. Our aim is to clarify what, on the surface, can be very confusing.

We begin with *Dobbs*.

A. Dobbs v. Jackson Women's Health Organization

Justice Alito's opinion for the Court in *Dobbs* is a decided mix of originalist and nonoriginalist use of history and tradition.

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[91] 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (emphasis added).

[92] 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring) (emphasis added).

[93] The Preservation Clause provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

1. Nonoriginalism in Dobbs

Justice Alito explains that "the Due Process Clause of the Fourteenth Amendment . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[94]

At first blush, Justice Alito's use of history and tradition seems decidedly nonoriginalist in two distinct respects. First, notice the nature of his claim: "[T]he Due Process Clause of the Fourteenth Amendment . . . *has been held* to guarantee some rights that are not mentioned in the Constitution . . . ."[95] This is an appeal to doctrines that have developed over many decades to protect unenumerated rights: longstanding judicial precedents are the source of law. Precedent is neither being offered as evidence of the original meaning of the Due Process of Law Clause nor to provide implementing doctrines or precisifications for a meaning that is vague or open-textured. In this formulation of his position, Justice Alito is making no claim at all about the original meaning of the text of the Fourteenth Amendment.[96]

Second, Justice Alito maintains that these traditional precedents have established a method by which "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[97] Without any further qualification, this too is a nonoriginalist historical claim about a tradition of protecting a particular unenumerated right—regardless of whether that right has any basis in the original meaning of the text.

In sum, Justice Alito claims that (1) longstanding precedent requires judges to craft substantive due process doctrine based on (2) traditional recognition of those unenumerated rights that are "deeply rooted in this Nation's history and tradition" but not other rights that are not so rooted. The first proposition is established by looking to decisions of the Supreme Court. In the second proposition, what type of historical inquiry establishes "the Nation's history and tradition" is less clear. Justice Alito does not articulate

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[94] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[95] *Id.* (emphasis added).

[96] In public comments, Justice Alito has suggested that the doctrine of stare decisis is contained within the original meaning of "the judicial power." *See* The Heritage Foundation, *Live Q&A with Justice Alito*, YOUTUBE (Oct. 25, 2022), https://www.youtube.com/watch?v=WzRqIcXPmKw [https://perma.cc/6L5G-6SV6]. This claim about the original meaning of "the judicial power" is beyond the scope of this Article.

[97] *Dobbs*, 142 S. Ct. at 2242.

criteria that establish which unenumerated rights are "deeply rooted" in history and tradition and which are not.

Although the outcome could possibly have been justified on originalist grounds, to the extent that the outcome of *Dobbs* is controlled by this application of *Glucksberg*'s nonoriginalist approach to substantive due process, it is a nonoriginalist decision in its reasoning. Indeed, the nonoriginalist nature of the *Dobbs* majority is suggested by Justice Thomas's concurring opinion, which explicitly rejects the entirety of substantive due process on originalist grounds, a claim that Justice Alito does not contest.[98]

2. Originalism in Dobbs

But Justice Alito also combines his nonoriginalist analysis of the historical tradition of regulating abortion rights with some decidedly originalist moves, beginning with this one:

> Constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden*, 9 Wheat. 1, 186–189 (1824), which offers a "fixed standard" for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.[99]

The references to "the language of the instrument" and a "fixed standard" sound in originalism, but Justice Alito is also making a claim about the significance of constitutional silence. He shifts the burden to those who claim such a right to find it "implicit in the constitutional text."[100] It is here where one would expect to find an analysis of the original meaning of the Privileges or Immunities Clause, or perhaps the Ninth Amendment—both of which explicitly recognize unenumerated rights. An originalist inquiry would ask whether the unenumerated rights to which these provisions allude include a right protecting abortions. But the majority opinion eschews this analysis.[101]

Notice that Justice Alito put the burden on the party asserting the existence of such a right to establish this claim. Justice Alito then concluded

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[98] *Id.* at 2300 (Thomas, J., concurring) ("I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that 'due process of law' merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property.").

[99] *Id.* at 2244–45.

[100] *Id.* at 2245.

[101] Justice Alito's opinion addresses the Privileges or Immunities Clause in footnote 22: "But even on [the basis of the Privileges or Immunities Clause], such a right [to abortion] would need to be rooted in the Nation's history and tradition." *Id.* at 2248 n.22. The footnote does not discuss the original public meaning of the clause.

that the petitioners in *Dobbs* failed to do so. In the absence of such a claim, Justice Alito remains within the *Glucksberg* line of cases seeking to identify the right in "history and tradition."

Justice Alito's opinion contains another originalist element: it emphasizes the "history and tradition" at the founding and during the adoption of the Fourteenth Amendment. Justice Alito starts by characterizing the method he used as author of the plurality opinion in *McDonald v. City of Chicago*[102] to find that the enumerated right to keep and bear arms is "fundamental" and therefore enforceable against the states via the Fourteenth Amendment:

> The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[103]

In the quoted passages from *McDonald*, Justice Alito is using historical practice as evidence of the original meaning of the Second and Fourteenth Amendments. If all that matters for a right to be protected is that it be recognized in our Nation's tradition, as Historical Traditionalism dictates, there would be no particular reason to single out these two time periods or focus on "the Framers and ratifiers" of the Fourteenth Amendment.

Yet Justice Alito's plurality opinion in *McDonald*, which he followed in *Dobbs*, is equivocal about whether its reasoning accords with the original meaning of the text. On the one hand, when it came to whether the *Slaughter-House Cases* had accurately interpreted the original meaning of the Privileges or Immunities Clause, the *McDonald* plurality specifically declined to take any "position with respect to this academic debate,"[104] thus leaving open the question of original meaning. Instead, it analyzed "the question of the rights protected by the Fourteenth Amendment against state infringement . . . under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause," and "decline[d] to disturb the *Slaughter-House* holding."[105] Justice Alito's reference to "under the Due

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[102] 561 U.S. 742, 767 (2010).

[103] *Dobbs*, 142 S. Ct. at 2247 (citation omitted) (quoting *McDonald*, 561 U.S. at 778).

[104] 561 U.S. at 763 n.10.

[105] *Id.* at 758.

Process Clause" is clearly a reference to the Supreme Court's doctrines under this rubric, not the original meaning of the clause.

On the other hand, in a footnote in *McDonald*, Justice Alito presented selectively edited quotations that do pertain to the original meaning of the text. He took care to replace their original references to the Privileges or Immunities Clause with "the Amendment."[106] For example, he wrote, "Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that *the Amendment* protected all of 'the personal rights guarantied and secured by the first eight amendments of the Constitution.'"[107] "Representative John Bingham, the principal author of the text of § 1, said that *the Amendment* would 'arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today.'"[108] In actuality, both Howard and Bingham were specifically referencing the meaning of the "privileges or Immunities" of citizens, not the Fourteenth Amendment generally.[109] However, having eschewed taking any position on the original meaning of the text—whether the text of the Privileges or Immunities Clause or the text of the Due Process of Law Clause, exactly why the views of "the Framers and ratifiers of the Fourteenth Amendment" are privileged in the majority's analysis of "history and tradition" is unclear.

In sum, Justice Alito's reasoning in *McDonald*, is a hybrid of originalist and nonoriginalist analysis. On the one hand, he expressly avoids taking a stand on the "academic debate" about the original meaning of the Privileges or Immunities Clause—originalism "OFF." But he nevertheless proffers evidence of original meaning (albeit edited to omit the precise text that the speakers were interpreting)—originalism "ON." (Below we will suggest that this seemingly "hybrid" approach is consistent with Justice Alito's methodology being pluralist rather than originalist.)

In *Dobbs*, Justice Alito continued to employ this seemingly hybrid methodology. In this passage, Justice Alito is clearly interpreting the Due Process of Law Clause: "In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own

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[106] *See id.* at 762 n.9.

[107] *Id.* (emphasis added).

[108] *Id.* (emphasis added).

[109] *See* CONG. GLOBE, 39th Cong. 1st, Sess. 1088 (1866) (statement of Rep. Bingham); *id.* at 2765 (statement of Sen. Howard); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT 132–34 (2021) (contextualizing Bingham's statement); *id.* at 140–43 (contextualizing Howard's statement).

ardent views about the liberty that Americans should enjoy."[110] Later, he maintains that "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty," the Court "must ask what the *Fourteenth Amendment* means by the term 'liberty.'"[111]

Here Justice Alito is attempting to identify "the essential components of our Nation's concept of ordered liberty," which is what the *Glucksberg* doctrine requires. But, in the same sentence, he conjoins this with an inquiry into "what the *Fourteenth Amendment* means by the term 'liberty.'" After denying that what the Fourteenth Amendment means by the term "liberty" includes the right to an abortion, in a footnote, he asserts that this conclusion "is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause."[112]

In this footnote, Justice Alito is claiming that the same *Glucksberg*-like methodology he is employing to interpret "the due process of law" would also be the proper method of identifying a fundamental right under the original meaning of the Privileges or Immunities Clause. So even if "the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights," he contended, "such a right would need to be rooted in the Nation's history and tradition."[113]

In support of the claim that the Privileges *or* Immunities Clause of the Fourteenth Amendment requires a history and tradition test, Justice Alito cites the definition of "privileges *and* immunities" that was provided by Justice Bushrod Washington in his discussion of the Privileges and Immunities Clause of Article IV in *Corfield v. Coryell*: "fundamental" rights are those "which have, at all times, been enjoyed by the citizens of the several states."[114] In this passage, Justice Washington seems to have identified the substance of the Article IV privileges and immunities by consulting history and tradition.[115] Rights that have been enjoyed "at all times" are "fundamental."[116] Justice Alito does not explicitly make the connection between *Corfield*'s discussion of the privileges, but, as Professor Barnett has

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[110] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022).

[111] *Id.* at 2248.

[112] *Id.* n.22.

[113] *Id.*

[114] *Id.* (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823)).

[115] Barnett and Bernick adopt a slightly modified version of Justice Washington's method of locating the substantive privileges or immunities of U.S. citizens in the traditional recognition of such privileges in the positive law of the states. *See* BARNETT & BERNICK, *supra* note 109, at 243 ("[A] judicially cognizable 'privilege or immunity' must have been longstanding and widespread, enjoyed by citizens of the United States as a matter of the positive law of the states or of the nation."). Their method does indeed resemble the Court's approach in *Glucksberg*.

[116] *See id.*

observed, that link can be found in Senator Howard's speech introducing the Fourteenth Amendment in the Senate.[117]

In sum, Justice Alito is implying here that the *Glucksberg* approach to identifying the "liberty" that is protected by the Fourteenth Amendment is also supported by the original meaning of the text of the Privileges or Immunities Clause. But he neither commits himself to that conclusion, nor rests the majority's holding on this ground. Rather, we think these statements are best explained by the idea that the gravitational force of originalism is operating in the background of Justice Alito's opinion.

There is another respect in which Justice Alito's approach is a hybrid of both nonoriginalist substantive due process doctrine and original meaning. In addition to his lengthy examination of the "unbroken tradition of prohibiting abortion on pain of criminal punishment [that] persisted from the earliest days of the common law [in both England and America] until 1973," as in *McDonald*, Justice Alito also considered whether abortion was thought to be a right in 1868.[118] "By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."[119] And again, "Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy."[120]

But if Justice Alito was simply attempting to identify a longstanding tradition of criminalizing abortion as a means of demonstrating that it cannot be a fundamental right, there is no reason why the state of the law in 1868 would be particularly salient. The year 1868 is salient if the question is whether a right to abortion is a "fundamental" right protected either by the original meaning of "liberty" in the Due Process of Law Clause or as a "privilege or immunity" of citizenship, and if historical practices establish the existence of such a right. But if this is what Justice Alito is seeking, he must be clearer about which clause he is interpreting; and, if he is taking the originalist approach, there is no reason to continue to trace the protection of this right—or lack thereof—up to 1973. Doing that sends mixed signals to readers.

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[117] Randy E. Barnett, *The Continuing Relevance of the Original Meaning of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 1, 10 (2017). In this Article, we take no position on the original public meaning of the Privileges or Immunities Clause. The point of the discussion in text is that Justice Alito's opinion may be explained by the gravitational force of originalism.

[118] *Dobbs*, 142 S. Ct. at 2253–54.

[119] *Id.* at 2252–53.

[120] *Id.* at 2254.

In sum, we agree the "history and tradition" of the regulation of abortion could be relevant to the original meaning of whether a right is a "privilege or immunity" of citizens. But if that is the question the Court is answering, Justice Alito's opinion falls short, both because it fails to articulate the original public meaning of the clause and because it fails to examine most of the relevant evidence of such meaning.[121] Alternatively, the history of regulating abortion is relevant to the nonoriginalist conservative doctrine limiting the scope of substantive due process. The majority's privileging of 1868 makes *Dobbs* a hybrid opinion and, for this reason, a confusing one.

B. New York State Rifle & Pistol Ass'n v. Bruen

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court invalidated a New York statute that required a license for possession of a firearm outside the home.[122] To secure that license, the applicant had to prove that "proper cause exist[ed]" to issue it. That cause was required to be over and above any general desire to equip oneself to engage in lawful self-defense.[123] If an applicant could not make that showing, he could receive only a "restricted" license for public carry, which would allow him "to carry a firearm for a limited purpose, such as hunting, target shooting, or employment."[124]

The concepts of history and tradition played a key role in the decision. Justice Thomas's opinion for the Court states:

> [W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[125]

So, "historical tradition" plays an important role in the Court's articulation of its holding in *Bruen*. But what, precisely, is that role? What is the Court's justification for the "historical tradition" test? And how is that test related to the original meaning of the Second and Fourteenth Amendments? Answering these questions requires a close reading of Justice

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[121] Relevant sources of the public meaning, as discussed in Section II.A.1, include historical word usage and semantics, historical context and pragmatics, or historical practice and historical doctrine.

[122] 142 S. Ct. 2111 (2022).

[123] *Id.* at 2123.

[124] *Id.* at 2123 (citations omitted).

[125] *Id.* at 2126 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

Thomas's opinion together with some speculation about the assumptions upon which the opinion rests.

As articulated by Justice Thomas, analysis of a Second Amendment case requires two steps. The first step involves the question whether the regulated conduct is within the scope of the Second Amendment. That portion of the analysis is based on the originalist analysis of the Second Amendment in *District of Columbia v. Heller*.[126] Here are the two relevant paragraphs:

> Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms. As we explained in *Heller*, the "textual elements" of the Second Amendment's operative clause—"the right of the people to keep and bear Arms, shall not be infringed"—guarantee the individual right to possess and carry weapons in case of confrontation." *Heller* further confirmed that the right to "bear arms" refers to the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."
>
> This definition of "bear" naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often "keep" firearms in their home, at the ready for self-defense, most do not "bear" (i.e., carry) them in the home beyond moments of actual confrontation. To confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections.[127]

For the purposes of this Article, we will not recapitulate Justice Scalia's analysis in *Heller* or take a position on the validity of his conclusions. Our point is that *Bruen* assumes that *Heller* articulates the original public meaning of the Second Amendment and then argues that this articulation encompasses the carrying of a gun in public. Whether or not its conclusions are correct in light of all the evidence bearing on the public meaning of the Second Amendment, this portion of the opinion clearly relies on originalist methodology.

Justice Thomas then bolsters the evidence of linguistic usage with an appeal to the original function or purpose of the right to keep and bear arms:

> Moreover, confining the right to "bear" arms to the home would make little sense given that self-defense is "the *central component* of the [Second Amendment] right itself." After all, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," and confrontation can surely take place outside the home.

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[126] 554 U.S. 570, 573 (2008).

[127] *Bruen*, 142 S. Ct. at 2134–35.

> Although we remarked in *Heller* that the need for armed self-defense is perhaps "most acute" in the home, we did not suggest that the need was insignificant elsewhere. Many Americans hazard greater danger outside the home than in it . . . . The text of the Second Amendment reflects that reality.[128]

Based on this textual and contextual analysis, Justice Thomas concludes that the "Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to 'bear' arms in public for self-defense."[129]

Notice that in this very brief treatment of original meaning, history is being used to provide evidence of the communicative content of the phrase "bear arms"—an example of what we call "Historical Semantics" above.[130] Justice Thomas is also appealing to the historical context and pragmatics to inform his conclusion about original meaning with reference to the original purpose of the right: enabling the exercise of self-defense.

To be clear, the claim is not that the original meaning of the Second Amendment includes a personal right of self-defense. Justice Thomas's opinion says no such thing. The claim is that the content of the right to arms expressed in the text is influenced by its known and widely accepted purpose of facilitating a fundamental unenumerated right of self-defense.

So, Justice Thomas concludes that public carrying of firearms is within the scope of the right to bear arms. The next step of the analysis is to determine whether the permit scheme provided by New York violates that right. It is at this point that the *Bruen* court declines to use the approach that had been adopted by the lower federal courts in the wake of *Heller* and *McDonald v. City of Chicago*,[131] which had held that the Second Amendment right recognized by *Heller* applied to the states.[132] Justice Thomas's opinion characterizes the approach of the lower courts as follows: "the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means–end scrutiny . . . [which allows the state to] justify its regulation [by showing] that the regulation promotes an important interest."[133]

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[128] *Id.* at 2135 (citations omitted).

[129] *Id.*

[130] *See supra* text accompanying notes 23–29.

[131] 561 U.S. 742, 749–50 (2010).

[132] *Id.* at 750 ("[W]e hold that the Second Amendment right is fully applicable to the States.").

[133] 142 S. Ct. at 2125–26. The two-step test that *Bruen* replaced has been articulated in various ways. For example, Professors Darrell Miller and Joseph Blocher identify the two steps as follows:

> At the first step, the lower courts used an approach—strongly influenced by history and *Heller*'s categorical distinctions—to decide whether the Second Amendment covered the challenger's

The first step of the predominant framework was viewed by Justice Thomas as consistent with the originalist approach in *Heller*: "Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."[134] It is at the second step that Justice Thomas's approach differs from that of the lower courts.

In *Bruen*, Justice Thomas replaced the lower courts' "important interest" test with a test that focuses on consistency with historical tradition. Even if a state regulation of the right to bear arms serves an important interest, it is nonetheless invalid unless it can be shown to be consistent with the historical tradition of firearms regulation in the United States[135]: "[T]he government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[136]

Justice Thomas then elaborated:

> Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge.[137]

When it came to discretionary or "may issue" regulations of carrying firearms outside the home, he concluded, "[a]t the end of this long journey through the Anglo-American history of public carry, . . . respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement."[138]

So, in *Bruen*, the concept of historical tradition plays a role in the newly formulated step two as a replacement for the means–ends scrutiny approach

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activity. If it did not, then that was the end of the inquiry. Felons caught with firearms, or challenges to guns in "sensitive places" like commercial airliners, usually failed at this step.

If the history was unclear, or the category underspecified, or the judge was cautious, courts would address step two, and apply a conventional means-end analysis calibrated by how close the regulation came to the "core" of the right. In doing so, courts would evaluate the stated government interest (typically described as public safety) and examine how closely the regulation fit with this stated goal compared to the expected burden on otherwise core Second Amendment conduct. Often, but not always, this analysis took the form of intermediate scrutiny.

Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 53–54.

[134] 142 S. Ct. at 2127.

[135] *Id.* at 2126.

[136] *Id.* at 2127.

[137] *Id.* at 2132.

[138] *Id.* at 2156.

developed by the lower courts. We can now return to our questions about the use of history and tradition in *Bruen*: What is the role of the historical traditions test? How is that test justified? And what is the relationship of the test to the original meaning of the Second and Fourteenth Amendments (as that meaning was understood by the Court)?

Our answer to these questions begins with a brief recapitulation of the possibilities discussed above.[139] The reference to "historical tradition" in *Bruen* could be understood in several ways, the first three of which are consistent with originalism (at least in theory). Here are five possibilities.

> Possibility One: Originalist Evidence: Historical tradition might provide evidence of the original meaning of the Second or Fourteenth Amendments.
>
> Possibility Two: Originalist Content of the Right to Bear Arms: Historical tradition might provide the actual communicative content of the right to bear arms—a role that would be analogous to that of the historical tradition of the right to jury trial in the preservation clause of the Seventh Amendment.
>
> Possibility Three: Originalist Implementing Rule in the Construction Zone: Historical tradition might provide an implementing rule that resolves the underdeterminacy created by the imprecision of Second Amendment's operative clause, "the right of the people to keep and bear Arms, shall not be infringed."[140]

And there are at least two other possible understandings of the role of historical tradition:

> Possibility Four: Constitutional Pluralist Modality: Historical tradition might be operating as a modality of constitutional argument; regulations of the right to bear arms are justified because of historical tradition *independently of the original meaning* of the constitutional text.
>
> Possibility Five: Historical Traditionalism: Historical tradition might be operating as a new framework for constitutional interpretation and construction that *replaces* both originalism and living constitutionalism.

Possibilities One and Five are easily eliminated. It is quite clear that the historical tradition test is not being used to establish the original public meaning of the words and phrases that make up the text of the Second Amendment. Nothing in Justice Thomas's opinion suggests that "historical tradition" is being used to revisit questions about the meaning of the Second Amendment that were asked and answered in *Heller*. Similarly, there is simply nothing in Justice Thomas's opinion that suggests that the Court is creating an entirely new "historical tradition" framework for constitutional

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[139] *See supra* Part II.

[140] U.S. CONST. amend. II.

interpretation and construction; his opinion in *Bruen* does not represent a radical departure from both originalism and living constitutionalism.

That leaves Possibilities Two, Three, and Four, each of which requires further examination. We begin with Possibility Two—that historical tradition provides the content of the right to bear arms. On this account, the role of historical tradition in *Bruen* would be analogous to the role that the historical tradition of trial by jury plays in the context of the Preservation Clause of the Seventh Amendment,[141] which "preserve[s]" a preexisting "common law" right, the content of which is defined by the historical tradition of the right to jury trial as it existed in 1791.[142] The plausibility of this understanding of historical tradition in *Bruen* is grounded in the idea that the "right to bear arms" that may not be "infringed" is a preexisting legal right. As Justice Scalia put it in *Heller*: "[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right."[143]

If historical tradition provides the content of the right to bear arms, it then becomes important to identify the relevant historical period. Because *Heller* arose in the District of Columbia,[144] the Second Amendment applied directly and the content of the preexisting legal right to bear arms would be defined by the historical tradition as it existed in 1791. But *Bruen* was a challenge to a New York state statute,[145] and therefore the relevant constitutional provision is the Fourteenth Amendment,[146] which was ratified

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[141] *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 872–926 (2013) (providing a comprehensive analysis of the relationship of history and tradition in the Seventh and Second Amendments).

[142] For discussion, see Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185–92 (2000), which discusses "the historical test of the right to a jury trial, based upon whether the action could have been brought in a court of law in 1791, the time of the Seventh Amendment's ratification."

[143] *Heller*, 554 U.S. at 592 (emphasis omitted).

[144] *Id.* at 573.

[145] 142 S. Ct. at 2122–25.

[146] Justice Thomas's opinion has nothing to say about which clause in Section One of the Fourteenth Amendment is the basis for the Court's decision. In the *McDonald* case, Justice Alito's separate opinion for a total of four Justices stated,

> We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.

McDonald v. City of Chicago, 561 U.S. 742, 758 (2010). Justice Thomas's concurring opinion in *McDonald* disagreed: "[T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." *Id.* at 806. Justice Thomas's opinion in *Bruen* never mentions the Due Process of Law Clause or the Privileges or

in 1868.[147] This raises an important question, which Justice Amy Coney Barrett articulated in her concurring opinion:

> [T]he Court avoids [an] "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" or when the Bill of Rights was ratified in 1791 . . . . Here, the lack of support for New York's law in either period makes it unnecessary to choose between them. But if 1791 is the benchmark, then New York's appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little) . . . . So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving postenactment history more weight than it can rightly bear."[148]

So, as Justice Barrett observes, *Bruen* brackets questions about the possibility that the right to bear arms protected by the Fourteenth Amendment is identical to or different from the right conferred by the Second Amendment. Based on the Court's view of the facts presented by the parties, the New York statute challenged in *Bruen* infringed the right whether its content is provided by historical tradition as of 1791 or as of 1868.

The case for Possibility Two is further reinforced by Justice Thomas's discussion of two post-1868 statutes that imposed requirements analogous to the New York statute in *Bruen*—one statute was adopted by Texas in 1871, and the other by West Virginia in 1887.[149] Both statutes provide some "support [for] New York's proper-cause requirement," but Justice Thomas's opinion characterizes these statutes as "outliers."[150]

This characterization is illuminated by Professor DeGirolami's three-dimensional conceptualization of tradition in terms of age, longevity, and density.[151] Assuming that the content of the Fourteenth Amendment's right to bear arms is constituted by historical tradition as of 1868, two state statutes

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Immunities Clause—unlike his opinion in *Dobbs*, discussed *supra* note 98, which rejects the Due Process of Law Clause as the basis for fundamental rights. Justice Thomas's failure to discuss the closely related question as to which clause grounds the incorporation of the right to bear arms may be a function of his role as an originalist on a collegial court who needed to produce an opinion that would be joined by a majority of his colleagues. The issues raised by that situation are discussed below. *See infra* Section IV.D. For the record, our position is that the right to keep and bear arms was a privilege of U.S. citizens in 1868 and therefore this right was protected by the Privileges or Immunities Clause, but the reasons for our conclusion are outside the scope of this Article.

147 142 S. Ct. at 2136.

148 *Id.* at 2163 (Barrett, J., concurring).

149 *Id.* at 2152–53.

150 *Id.*

151 DeGirolami, *supra* note 41, at 7–8.

adopted three and nineteen years later do not establish that the right was limited in the way assumed by the New York statute at issue in *Bruen*.

On the dimension of age, both statutes fail because they postdate the Fourteenth Amendment—they were brand new. On the dimension of longevity, neither statute had a long and continuous existence as of the critical date, 1868. On the dimension of density, the statutes were confined to two states. So as of 1868, there was no historical tradition that established that the kind of restriction in the New York statute was consistent with the right to bear arms. Neither the New York nor the West Virginia statute satisfied the criteria of age, longevity, or density. Instead, these two statutes were new, novel, and geographically isolated. And if the relevant date were 1791, both statutes were far too late to establish the content of the preexisting legal right to bear arms as of that date.

Therefore, there is very strong evidence that *Bruen*'s historical tradition test should be understood on the model provided by Possibility Two: historical practice as of 1791 or 1868 provides the content of the preexisting legal right to bear arms. If this understanding is correct, then the historical tradition test operates at the level of constitutional interpretation—it provides the content of the preexisting legal right to bear arms that is a component of the original public meaning of the Second Amendment.

Possibility Three is that the historical tradition test in *Bruen* is best understood as an implementing doctrine at the stage of constitutional *construction*. That is, historical analogues are being used to decide whether any particular application of the right to a particular statute is permissible. Or, as Justice Kavanaugh put it in his concurring opinion: "The Court employs and elaborates on the text, history, and tradition test that *Heller* and *McDonald* require for evaluating whether a government regulation infringes on the Second Amendment right to possess and carry guns for self-defense."[152]

In *Bruen*, Justice Thomas quoted the *Heller* Court's assertion that "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[153] If one takes the view (as we do) that the exercise of *any* constitutional right may be reasonably regulated by the police power of the relevant legislature—whether the plenary power of state legislatures or the enumerated powers of Congress—this raises a question of constitutional construction. Whatever constitutes a "reasonable regulation" within a *proper* conception of the legislative power will not be included in the communicative content of the right itself, however limited the contours of

[152] 142 S. Ct. at 2161.

[153] *Id.* at 2128.

this right may be. Put another way, however specifically history and tradition shaped the original scope of the right, exercise of this specified right may then be regulated (though not infringed or abridged).

An implementing doctrine is required to determine whether a given restriction is a reasonable exercise of a proper legislative power and therefore not an infringement of "the right to bear arms."[154] Lower courts had been using the important interest test as an implementing doctrine for cases falling in the construction zone created by inclusion of a reasonable regulation element in the implicit content of the "right to bear arms." When it rejected this test, the majority in *Bruen* could be viewed as adopting a historical analogy test as a substitute implementing doctrine, which would be an exercise of constitutional construction.

But is this what is going on? Is the historical tradition test of *Bruen* premised on the need for an implementing rule that cashes out an implicit "reasonable regulation" qualification of the right to bear arms? The case that the historical tradition test is a rule of construction lacks direct support in the text of Justice Thomas's opinion in *Bruen*. There are two very similar passages that invoke the concept of "reasonable regulation." We quote the first of these in full:

> The historical evidence from antebellum America does demonstrate that the manner of public carry was subject to *reasonable regulation*. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.[155]

This passage is not consistent with the idea that the right to bear arms is subject to an open-ended "reasonable regulation" restriction in which "reasonableness" is assessed by a legislature or by a court. Instead, specific regulations are identified as consistent with the proposition that a right to open carry was part of the historical tradition that provided the content of the preexisting legal right to bear arms. On this reading, historical analogues, or the lack thereof, are being offered as evidence of the content of the preexisting right that constitutes the original meaning of the right to keep and bear arms.

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[154] It is very important to stress that the constitutional permissibility of the "reasonable" regulation of a constitutional right does not entail either an implementing rule that legislatures are the ultimate judge of the "reasonableness" of their regulations to which judges must defer, or that one delegates to judges an open-ended power to review a statute for its "reasonableness."

[155] *Id.* at 2150 (emphasis added).

There is another passage in *Bruen* that, at first blush, might be thought to support the hypothesis that the historical tradition test is best viewed as an implementing doctrine as a matter of constitutional construction. We quote the two relevant paragraphs in full:

> To be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." But reliance on history to inform the meaning of constitutional text—especially *text meant to codify a* pre-existing *right*—is, in our view, 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.
>
> If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.[156]

This passage might be read as arguing against the important interest implementing doctrine adopted by the lower federal courts in the wake of *Heller* and, therefore, as offering the historical analogues test as an alternative implementing doctrine. But Justice Thomas's emphasis on the existence of a "pre-existing right" as the basis for the legitimacy of the historical practice test strongly suggests that it is the content of the right (and not an implementing rule) that is at issue. So too is his reference to "reliance on history to inform the meaning of constitutional text."

What about Possibility Four? Is the historical tradition test actually a modality of constitutional argument that operates within a nonoriginalist framework? We believe that the answer to this question is clear. It would be quite odd indeed for Justice Thomas to view the assignment to write the majority opinion in *Bruen* as an opportunity to undermine the originalist framework of *Heller* and move the constitutional jurisprudence of the Court in the direction of Constitutional Pluralism and living constitutionalism. And Justice Barrett's question—"How long after ratification may subsequent

[156] *Id.* at 2130–31 (emphasis added) (citations omitted).

practice illuminate original public meaning?"[157]—indicates that she thinks that the majority opinion was indeed an affirmation of the originalism of *Heller*.

The case against Possibility Four is reinforced by the fact that Justice Thomas's opinion does not discuss whether the New York statute is justified by a historical tradition that emerged in the late nineteenth or early twentieth centuries. That period would be relevant if historical tradition had been operating as an independent modality of constitutional interpretation, but only the dissent by Justice Stephen Breyer makes note of the longevity of the New York statutes.[158]

We want to emphasize that our analysis of *Bruen* is based on the Court's understanding of the original meaning of the Second Amendment. We are neither affirming nor rejecting the preexisting legal rights approach to specifying that meaning; nor are we arguing that the historical tradition test does, in fact, accurately identify the content of the preexisting legal rights. Finally, we are not adopting the Court's assumption that specifying the precise content of the right renders unnecessary an implementing rule to distinguish proper from improper regulations of the right so specified.[159]

Rather, our modest claim is that the deployment of the historical tradition test in *Bruen* operates within an originalist framework and is not a rejection of originalism. If we are correct, then, in stark contrast with *Dobbs*, *Bruen* is a thoroughly originalist opinion.

One important implication of our conclusion pertains to how lower courts should be using the historical tradition test in assessing gun regulations. On our understanding of what the majority in *Bruen* was doing, the courts should be limiting themselves to historical practices that are close in time to 1791 or 1868. They should not be relying on historical analogues that have developed well after 1868.

C. Kennedy v. Bremerton School District

In *Kennedy v. Bremerton School District*, the Supreme Court addressed the First Amendment issues raised by a high school football coach who was

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[157] *Id.* at 2163.

[158] *Id.* at 2169 (Breyer, J., dissenting) (noting that "New York's licensing regime traces its origins to 1911" and that the standards established then "have remained the foundation of New York's licensing regime ever since").

[159] For a critique of the historical analogues approach to assessing the propriety of gun regulations, see Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, 23 FED. SOC. REV. 279, 292 (2022), which argues that "the majority's test is inherently manipulable . . . . Even if the Supreme Court stops issuing ipse dixits that greenlight regulations a majority of the Justices don't care to call into question, all courts are going to face serious challenges in faithfully applying the *Bruen* test."

fired for praying on the field.[160] The Supreme Court ruled for the coach on the basis of the Free Speech and Free Exercise Clauses.[161] In reaching those conclusions, the majority opinion, authored by Justice Neil Gorsuch, also found that the prayers offered by the coach did not violate the Establishment Clause. The role of history and tradition in *Kennedy* is complex and likely to be disputed, but in her dissenting opinion, Justice Sotomayor offered the following characterization: "[T]he Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new 'history and tradition' test."[162]

Our discussion will focus on the role of history and tradition in the Court's Establishment Clause analysis. As before, our aim is to clarify the role of history and tradition. We do not take a position on the correctness of the outcome in *Kennedy* from either a living constitutionalist or originalist perspective.

To understand the majority opinion in *Kennedy*, we need to take a step back and examine the convoluted history of the so-called *Lemon* test, articulated by Chief Justice Warren Burger in *Lemon v. Kurtzman* and used to assess whether a statute violates the Establishment Clause.[163] *Lemon* did not attempt to determine the original meaning of the constitutional text, insisting that "[t]he language of the Religion Clauses of the First Amendment is at best opaque."[164] Instead, Chief Justice Burger's opinion for the majority purported to find a test that had been "developed by the Court over many years."[165] The *Lemon* test had three parts: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and third], the statute must not foster 'an excessive government entanglement with religion.'"[166]

Justice Gorsuch's opinion in *Kennedy* began its analysis of the Establishment Clause issue by observing that the district court and the Ninth Circuit had relied on *Lemon* in reaching the conclusion that the school district could prohibit the coach's prayer in order to avoid an Establishment Clause violation.[167] This was, Justice Gorsuch explains, in error:

> What the District and the Ninth Circuit overlooked, however, is that the "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical

[160] 142 S. Ct. 2407, 2415 (2022).
[161] *Id.* at 2416.
[162] *Id.* at 2434 (Sotomayor, J., dissenting).
[163] 403 U.S. 602 (1971).
[164] *Id.* at 612.
[165] *Id.*
[166] *Id.* at 612–13.
[167] *Kennedy*, 142 S. Ct. at 2427.

> approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. . . . The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. . . . An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. . . . Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious."[168]

The role of history and tradition in Justice Gorsuch's opinion in *Kennedy* was to fill the gap created by the demise of the *Lemon* test:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." "[T]he line" that courts and governments "must draw between the permissible and the impermissible" has to "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers." An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "exception" within the "Court's Establishment Clause jurisprudence." The District and the Ninth Circuit erred by failing to heed this guidance.[169]

Justice Gorsuch's opinion states that "original meaning and history" are the rule and not the exception.

Although the passage quoted above does not mention "tradition," a later passage does. A rule requiring schools to "fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice" would "undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'"[170] These passages are likely the source of Justice Sotomayor's statement that the majority opinion establishes "a new 'history and tradition' test."[171]

Justice Gorsuch's opinion is not analytically precise about the roles that history and tradition play in the Court's reasoning. The opinion seems to assume that, as a matter of history, prayer like that in which the coach engaged was not considered an establishment of religion, but no historical analysis was actually presented in the opinion itself. Had there been such

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[168] *Id.* at 2427.

[169] *Id.* at 2428 (citations and internal quotation marks omitted).

[170] *Id.* at 2431 (citations omitted).

[171] *Id.* at 2434 (Sotomayor, J., dissenting).

analysis, then the Court would have been relying on historical practice as evidence of original meaning.

Similarly, the majority opinion does not expound on the idea of "a long constitutional tradition." The opinion identifies the tradition as one of toleration for "diverse expressive activity" and "learning how to live in a pluralistic society."[172] This identification suggests that the relevant tradition is constituted by social norms and practices. But Justice Gorsuch does not explain why and how the inconsistency of the district court's rule with social norms is relevant to the constitutional issue at hand. The next sentence suggests that it is originalism and not tradition that is actually doing the work: there is "no historically sound understanding of the Establishment Clause" that would support the district court's rule.[173]

There are other cases in which the Supreme Court has made the role of history and tradition in Establishment Clause jurisprudence more explicit.[174] One of these is *Town of Greece v. Galloway*, in which the Court held that a town council's opening prayer did not violate the Establishment Clause.[175] Justice Anthony Kennedy's opinion for the Court explained the role of tradition as follows:

> [T]he Establishment Clause must be interpreted "by reference to historical practices and understandings." . . . That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society . . . . [I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.[176]

It is clear that *Town of Greece* acknowledged an important role for historical practice in Establishment Clause jurisprudence, but it is less clear what the nature of that role is. On the one hand, the phrase "was accepted by

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[172] *Id.* at 2431.

[173] *Id.*

[174] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."); Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

[175] 572 U.S. 565, 569–70 (2014).

[176] *Id.* at 576–77 (citations omitted).

the Framers" suggests that some sort of originalism is involved, although the reference to Framers, rather than text, points in the direction of original intentions originalism.[177] On the other hand, *Town of Greece* references "the critical scrutiny of time and political change," which suggests that historical continuity itself provides independent support for constitutional doctrine.[178]

At the end of the day, *Kennedy v. Bremerton School District* sheds very little light on the role of history and tradition for the contemporary Supreme Court. It strongly suggests that the original meaning of the constitutional text is a crucial factor in constitutional analysis and that history is relevant to identifying original meaning. It is much less clear whether *Kennedy* can be read to endorse an independent role for historical practice and tradition in the form of Conservative Constitutional Pluralism or Historical Traditionalism.

D. Making Sense of History and Tradition in the October 2021 Term of the Supreme Court

The invocation of "history and tradition" in *Dobbs*, *Bruen*, and *Kennedy* has generated considerable buzz,[179] but a close look at the cases themselves does not reveal a dramatic shift in the roles that history and tradition play in constitutional jurisprudence. As we have demonstrated, history and tradition were used by the Court as evidence of original meaning and purpose—but this role for history and tradition is nothing new. Indeed, it has always been glaringly obvious that originalism requires consideration of history and tradition. Likewise, there is nothing new about the idea that historical practice and historical doctrines play important roles within Constitutional Pluralism.

In *Dobbs* and *Bruen*, the Supreme Court articulated tests based on history and tradition. But these tests served different functions in each case. In *Dobbs*, the history and tradition test was used to identify substantive-due-process-based unenumerated rights. This is best understood as operating outside an originalist framework but within a constitutional pluralist framework—although the gravitational force of originalism likely played a role in the background. By contrast, in *Bruen*, we concluded that the history and tradition test was used to identify the content of the preexisting legal "right to bear arms," secured by the Second and Fourteenth Amendments. (If we are wrong about this, then it is likely that the historical analogues test is

[177] Alternatively, this reference to "the Framers" could point to the original function or purpose of the text, upon which Professors Barnett and Bernick base their theory of construction. For a summary of their approach, see *supra* notes 19–22 and surrounding text.

[178] 572 U.S. at 577.

[179] *See* sources cited *supra* note 1.

being employed as an implementing doctrine, which is a constitutional construction.)

Kennedy is harder to pigeonhole because its discussion of history and tradition is brief and cryptic. But in prior cases like *Town of Greece*, the Court employed a history and tradition test as a method of identifying original public meaning. Practices that have gone unchallenged continuously since the founding constituted a continuously existing Historical Tradition that was consistent with the original meaning of the Establishment Clause.

To sum up, history and tradition tests are nothing new, and their use by the Supreme Court is best understood as "business as usual." There is, however, another important lesson to be drawn from the references to history and tradition in the Supreme Court's October 2021 term. Close examination of *Dobbs*, *Bruen*, and *Kennedy* reveals a "dog that did not bark."[180] Despite the buzz,[181] the opinions in these cases contain scant evidence of the emergence of a new approach to constitutional interpretation that would supplant either Public Meaning Originalism or Constitutional Pluralism along the lines of what we have called "Historical Traditionalism."[182] Instead, the October 2021 term of the Supreme Court provides evidence that Public Meaning Originalism and Constitutional Pluralism remain the two most important judicial approaches to constitutional interpretation and construction in the twenty-first century.

There is one final and important lesson to be learned from the October 2021 term: the dominant form of Constitutional Pluralism may have begun to shift away from the progressive version that prevailed from the New Deal Era to Justice Kennedy's departure and towards a new Conservative Constitutional Pluralism. The old version of Progressive Constitutional Pluralism operated as an engine of constitutional innovation because it emphasized modalities of constitutional argument that could be enlisted by progressives and liberals in support of new constitutional rights and expanded legislative and executive powers. We believe that *Griswold v. Connecticut*,[183] *Lawrence v. Texas*,[184] and *Obergefell v. Hodges*[185] are paradigmatic cases of the liberal and progressive version of Constitutional

[180] An inference from "a dog that did not bark" is based on the notion that the absence of one fact implies the existence of another. The aphorism is derived from *Silver Blaze*, a Sherlock Holmes story by Sir Arthur Conan Doyle. *See* A. CONAN DOYLE, *Silver Blaze*, *in* MEMOIRS OF SHERLOCK HOLMES 1, 27 (1894) (explaining that a guard dog's silence meant the dog knew the thief well).

[181] *See supra* note 1.

[182] *See supra* Section II.C.

[183] 381 U.S. 479 (1965).

[184] 539 U.S. 558 (2003).

[185] 135 S. Ct. 2584 (2015).

Pluralism. In those cases, changing understandings of constitutional values like privacy and liberty were the driving engines of constitutional change.[186]

This new approach, Conservative Constitutional Pluralism,[187] is a different animal altogether. As we understand it, this form of pluralism eschews reliance on changing societal values and relies instead on the backward-looking modalities of constitutional argument. These modalities include the original meaning of the constitutional text, historical practice, tradition, and precedent.[188] Each of these modalities looks towards the past to the exclusion of new and emerging constitutional values.

It is important to emphasize, however, that both the progressive and conservative variations on Constitutional Pluralism are nonoriginalist. Because constitutional pluralists reject the priority of the textualist modality, their approach permits them to support outcomes that are inconsistent with the constitutional text. Moreover, the pluralist commitment to the equality of the modalities means that a pluralist can support any outcome supported by one of the modalities. This means that pluralists can prioritize the text in some cases and precedent or historical practice in others. As originalists ourselves, we would urge all judges to use history and tradition within Public Meaning Originalism, not within the nonoriginalist approach of Constitutional Pluralism, whether progressive or conservative. We now turn to that topic.

IV. AN ORIGINALIST APPROACH TO HISTORY AND TRADITION

How should originalists approach history and tradition in light of *Dobbs*, *Bruen*, and *Kennedy*? We address this question from the perspective of Public Meaning Originalism.[189] That is, we are offering an approach to history and tradition for constitutional actors, including judges and justices, who believe that originalism provides the best approach to constitutional interpretation and construction.

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[186] This is our understanding of these cases, but a demonstration of our conclusion is outside the scope of this Article.

[187] *See supra* text following note 77 (defining Conservative Constitutional Pluralism).

[188] In this Article, we cannot fully explore the implications of Conservative Constitutional Pluralism. A defining characteristic of this version of pluralism is that it employs backward-looking modalities. The original meaning of the text, historical practice, tradition, and precedent all look to the past. For this reason, the conservative version of Constitutional Pluralism can result in legal change that undoes a progressive pluralist innovation and restores constitutional doctrines to a prior state. Thus, *Dobbs* moved substantive due process doctrine on abortion back to the state it was in before *Roe v. Wade*. It may well be that even Conservative Constitutional Pluralism can facilitate constitutional innovation in the form of implementing doctrines that apply fixed original meaning to changing circumstances. The exploration of these issues is beyond the scope of this Article.

[189] *See supra* text accompanying notes 8–12 (discussing Public Meaning Originalism).

A. Widely Shared Justifications for Originalism

Originalism is neither a purely descriptive nor purely normative theory; it has both a descriptive and normative component. The Fixation Thesis—the descriptive component—claims that the meaning of the Constitution is the meaning that is "fixed" at the time of its enactment, whether in 1789 or sometime later when an amendment is adopted. The Fixation Thesis is an empirical claim about meaning; it describes how language actually works.[190]

But originalism also has a normative component, the Constraint Principle.[191] The Constraint Principle maintains that constitutional actors *ought* to adhere to the fixed original meaning of the text and not change or amend it to another meaning that they prefer. There are several arguments for why constitutional actors ought to adhere to the original meaning of the text. Most of these arguments are mutually consistent and reinforcing. The greater the number of reasons there are for doing something, the stronger is the case for doing that thing. Such is the case, we contend, for originalism.

To understand how originalists should utilize history and tradition, we begin with the assumption that originalists accept one or more of the most common normative justifications for originalism. Of course, each originalist may have their own set of reasons for affirming originalism. For example, each of us has offered a distinctive account of the normative, conceptual, and empirical justifications for Public Meaning Originalism.[192] Nonetheless, we believe that most originalists share the following normative premises[193]:

> *The Rule of Law*: The normative ideal of the rule of law is an important political value. Living constitutionalism undermines the rule of law because it authorizes judges to make constitutional law on the basis of their own normative beliefs about constitutional issues. Originalism serves the rule of law by requiring judges to adhere to the original public meaning of the constitutional text.
>
> *The Separation of Powers*: The separation of powers is essential to both legitimacy and the preservation of liberty. Living constitutionalism undermines the separation of powers because it empowers judges to both make and apply constitutional law. Originalism confines judges to their legitimate role of deciding cases on the basis of preexisting legal rules.

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[190] *See generally* Solum, *Fixation Thesis*, *supra* note 7 (presenting the empirical argument for the Fixation Thesis).

[191] *See generally* Solum, *Constraint Principle*, *supra* note 7 (articulating the normative argument for the Constraint Principle).

[192] For Professor Barnett's normative case for originalism, see BARNETT, *supra* note 7, at 32–115. For Professor Solum's version of the case for originalism, see generally Solum, *Fixation Thesis*, *supra* note 7; Solum, *Public Meaning Thesis*, *supra* note 7; and Solum, *Constraint Principle*, *supra* note 7.

[193] This is our belief based on extensive participation in originalist events and discussions with many originalists, but so far as we know, there is no survey research that confirms our impressions.

> *Popular Sovereignty*: Popular sovereignty reflects the widely held political value of democratic legitimacy. Living constitutionalism undermines popular sovereignty by granting ultimate constitutional authority to unelected judges. Originalism subordinates judges to the will of the people as expressed in a constitution that has been ratified by either the people's representatives in constitutional conventions or by a supermajority of both Congress and the states.[194]

Of course, the normative debate between originalists and living constitutionalists is complex and highly contested; and living constitutionalists offer arguments for why their approach to constitutional interpretation better serves each of these normative rationales, or that originalism does not truly serve them. Our aim here, however, is simply to restate three justifications that are widely shared by originalists.

B. Three Essential Originalist Roles for History and Tradition

Given these normative premises, how should originalists regard history and tradition? We begin with the core originalist commitment: the original public meaning of the constitutional text should bind constitutional actors. This core commitment requires originalist judges to consider history and tradition as sources of relevant, and sometimes highly probative, evidence of original meaning. Thus, historical practice, historical precedent, historical word usage, historical context, and tradition frequently provide evidence favoring one interpretation of the constitutional text over another. For originalists, consideration of such evidence of history and tradition is mandatory, not optional. Originalist judges are bound by the original public meaning of the constitutional text; this entails that they are obligated to consider all the relevant evidence of original meaning in good faith.

Originalist judges can be bound by history and tradition in a second way. For some constitutional provisions, history and tradition are part and parcel of the original public meaning of the constitutional text. The clearest example of this is the Preservation Clause of the Seventh Amendment.[195] That clause preserves the history and tradition of the jury trial as of 1791.[196]

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[194] Professor Barnett has characterized the "collective" conception of popular sovereignty based on "the will of the people" as a "fiction," and has argued instead for an individualist conception of popular sovereignty based on the background rights of "We the People," each and every one. *See* BARNETT, *supra* note 7, at 11–31, 361–69; *see also* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 31–81 (2016) (describing how the Framers of the Constitution altered the existing majoritarian conception of popular sovereignty in favor of a more individualist one).

[195] U.S. CONST. amend. VII.

[196] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41–42 (1989); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 688 (1999); Dimick v. Schiedt, 293 U.S. 474, 490 (1935).

Because history and tradition provide the content of the "right to trial by jury" that is "preserved," originalist judges are bound by that history and tradition. As we demonstrate above, this second role for history and tradition explains the use of the "historical tradition" test in Justice Thomas's opinion for the Court in *Bruen* in which he is seeking the precise content of a preexisting right to keep and bear arms.[197]

Originalist judges can be bound by history and tradition in a third way. When implementing doctrines are needed to give legal effect to indeterminate constitutional text, originalist judges should consider themselves bound to examine history and tradition that clarifies the original purpose of the constitutional provision. The first two roles for history and tradition follow from widely accepted premises that almost all originalists acknowledge. This third role is supported by a theory of constitutional construction developed by Professors Barnett and Bernick.[198]

Given that Barnett and Bernick's theory of constitutional construction is relatively new, some originalists may have different views about the correct originalist response to cases in which the constitutional text cannot be given legal effect without some implementing rule.[199] Be that as it may, appealing to the original function or purpose of a constitutional provision to faithfully implement its original meaning can be characterized as an appeal to a sort of Framers' intent—though not the type of subjectively held intentions that Public Meaning Originalism rejects.[200] Rather, the original function or purpose of the constitutional provision is used in the construction zone, the boundaries of which are determined by the original public meaning of the text.[201] The appeal to the original intent, if it is understood as referring to the original function or purpose of a provision, is a kind of "moderate originalism"[202] that even Paul Brest, the highly influential first critic of originalism, conceded was a perfectly commonplace and "sensible" methodology.[203]

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[197] *See supra* Section III.B.

[198] *See generally* Barnett & Bernick, *supra* note 19, at 3 (identifying and defending an originalist theory of constitutional construction based on the original functions or purposes of a textual provision).

[199] Another approach might involve a default rule of deference to elected officials. This possibility is explored in Solum, *Originalism and Constitutional Construction*, *supra* note 7, at 511–22.

[200] *Id.* at 464.

[201] *Id.* at 475.

[202] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (defining "moderate originalism" as "more concerned with the adopters' *general purposes* than with their intentions in a very precise sense." (emphasis added)).

[203] *Id.* at 231 ("Moderate originalism is a perfectly sensible strategy of constitutional decisionmaking.").

Just as originalist judges are bound to consider history and tradition in the three ways discussed, originalist judges have obligations *not* to use history and tradition in ways that are inconsistent with the original meaning of the constitutional text. The clearest example of a forbidden use of history and tradition involves a situation in which history and tradition could be used to reach a nonoriginalist outcome for nonoriginalist reasons. For example, if the original public meaning of Article I is inconsistent with plenary and virtually unlimited national legislative power, an originalist should not defer to Congress's assertion of such power on the basis of a history and tradition of deference by the courts to Congress for several decades starting with the New Deal.

C. Originalism and Stare Decisis

Both originalists and constitutional pluralists must take a stance on the role of stare decisis in constitutional decision-making. For this reason, our discussion of the role of history and tradition in originalism would be incomplete without some discussion of the role of stare decisis. Precedents are part of history and can form a kind of tradition. And some precedents may themselves be based on reasoning that employs history and tradition in the various roles that we have identified.[204] Moreover, *Dobbs*, *Bruen*, and *Kennedy* are themselves precedents that bind the lower courts and must be considered by the Supreme Court.

Stare decisis has two dimensions: vertical and horizontal.[205] For the purposes of this Article, we assume that both constitutional pluralists and originalists would agree that vertical stare decisis is binding on lower court judges.[206] So, the constitutional decisions of the Supreme Court are binding on the lower federal courts, even if the Supreme Court decision is inconsistent with the original public meaning of the constitutional text. Vertical stare decisis is consistent, however, with criticism by originalist lower court judges of the nonoriginalist decisions they are obliged to follow.[207] We think such protests are healthy.

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[204] *See supra* Part II.

[205] Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 459 (2018); Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, *in* PRECEDENT IN LAW 81–82 (Laurence Goldstein ed., 1987).

[206] Professor Michael Paulsen may be an exception, but his written work is not clear on this point. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1538, 1573 (2000). We are not aware of any other originalist who believes that the original meaning of the constitutional text should prevail over a holding of the Supreme Court that would control an issue as a matter of vertical stare decisis.

[207] Solum, *Originalist Theory and Precedent*, *supra* note 205, at 459.

Horizontal stare decisis is different. We begin with the assumption that horizontal stare decisis is not binding on the Supreme Court; that is, the Court can overrule its own prior decisions.[208] When it comes to circuit court precedents, most of the United States Courts of Appeal follow the law of the circuit rule: a three-judge panel decision can only be overruled by an en banc decision of the circuit.[209]

For the purposes of this Article, we assume that these basic features of the law of precedent are constitutionally valid. But there remains a significant difference between originalists and constitutional pluralists in the treatment of precedent for the Supreme Court and for en banc circuit court panels, both of which are empowered to reject previous decisions of their respective courts.

Constitutional pluralism includes precedent as a modality of constitutional argument.[210] Given that there is no hierarchy of authority for pluralists, stare decisis can play a decisive role. For example, stare decisis might trump the original meaning of the constitutional text. But by the same token, there will also be cases in which one or more of the other modalities would justify overruling a constitutional precedent.

Originalists are divided on the question of the proper role of stare decisis within originalism,[211] and we cannot argue for a resolution of the division in this Article. Our own view is that originalists should have a fundamentally different attitude towards the hierarchy of authority than constitutional pluralists. For an originalist, the original public meaning of the constitutional text should be viewed as binding and hence superior in the hierarchy of authority to precedent.

In other words, we think that the commitment of originalists to the Constraint Principle implies that the doctrine of horizontal stare decisis does not justify the Supreme Court adhering to nonoriginalist precedent. When we observe a conservative Justice freely using precedent to override clear original meaning, we take this as an indication that this Justice is operating as a constitutional pluralist. This would be accurate whatever the label that Justice uses to describe him or herself.

There remains the question of the degree of certainty an originalist Justice has about whether a precedent truly conflicts with original meaning.

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[208] *Id.*

[209] Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 190 (2006) (describing the law-of-the-circuit doctrine).

[210] On Constitutional Pluralism, see *supra* note 77, which cites sources describing a pluralist approach to constitutional interpretation and construction.

[211] For a discussion of the issues, see Solum, *supra* note 193, at 457–59.

Our tentative approach to precedent is reflected in Justice Thomas's concurring opinion in *Gamble v. United States*[212]:

> I write separately to address the proper role of the doctrine of stare decisis. In my view, the Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates *demonstrably erroneous* decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. It is always "tempting for judges to confuse our own preferences with the requirements of the law," . . . and the Court's stare decisis doctrine exacerbates that temptation by giving the veneer of respectability to our continued application of demonstrably incorrect precedents. By applying demonstrably erroneous precedent instead of the relevant law's text—as the Court is particularly prone to do when expanding federal power or crafting new individual rights—the Court exercises "force" and "will," two attributes the People did not give it . . . .
>
> We should restore our stare decisis jurisprudence to ensure that we exercise "mer[e] judgment," . . . which can be achieved through adherence to the correct, original meaning of the laws we are charged with applying. In my view, anything less invites arbitrariness into judging.[213]

There is much more to be said about originalism and precedent, but for the purposes of this Article, we will simply assume that Justice Thomas's *Gamble* concurrence represents the best originalist approach to precedent. The doctrine of horizontal stare decisis does not justify adherence to a decision that is "demonstrably erroneous." Neither historical doctrine nor a tradition of judicial deference should be allowed to override the original public meaning of the constitutional text.

D. History and Tradition on a Collegial Court Without an Originalist Majority

Should an originalist judge write or join an opinion that reaches an originalist result but relies on a constitutional pluralist framework incorporating history and tradition? This question is deep and complex. Supreme Court Justices and appellate court judges sit on collegial courts. Given this fact, the role of history and tradition in judicial decisions may be a function of compromise between originalist and nonoriginalist judges. Moreover, the issues that we discuss here are not limited to cases in which an originalist judge is faced with nonoriginalist uses of history and tradition. An originalist judge may be faced with a potential majority nonoriginalist

[212] 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (emphasis added) (citations omitted).

[213] *Id.* (citations omitted).

opinion that relies on modalities of constitutional argument other than history and tradition. For example, as we have already noted, similar questions arise with respect to precedent.

For the purposes of the discussion that follows, we will assume that an originalist judge sits on a collegial court with both originalist and nonoriginalist judges or Justices.[214] If there were a clear originalist majority on the court, we assume that the opinions of the court would reach originalist outcomes, articulate originalist holdings, and provide originalist reasoning, subject to whatever theory of stare decisis is held by the originalist Justices.

Complications arise if the court lacks a clear originalist majority and therefore sometimes reaches nonoriginalist outcomes, articulates nonoriginalist holdings, and provides nonoriginalist reasoning. We make the simplifying assumption that the nonoriginalist judges are constitutional pluralists, some of whom consider modalities of constitutional argument that involve history and tradition; other nonoriginalist judges may also consider constitutional values and institutional concerns as well.

To sort out the complexities of originalist judging on a collegial court, we need to identify the situations that confront originalist judges and the options they have. The real world is messy, but Table 1 below captures the essentials by describing five scenarios. Each scenario is a function of three characteristics of an opinion:

(1) the *outcome* in the particular case, which can either be originalist or nonoriginalist;
(2) the *holding* produced by the opinion, which can do one of three things: (a) produce future outcomes that are identical to those produced by an originalist holding, (b) produce future outcomes that are closer to those that would be produced by an originalist holding, or (c) produce future outcomes that are either (i) identical to a nonoriginalist status quo or (ii) would move the content of constitutional doctrine even further away from an originalist holding; and
(3) the *reasoning* that justified the outcome and the holding, which could either be originalist or nonoriginalist.

[214] These are assumptions and not descriptions of any court, including the Supreme Court. For the purposes of this Article, we take no position on the originalist bona fides of the current Justices.

Originalist judges have four options in response to the five scenarios:

(1) join or write the majority opinion without a concurring opinion;
(2) join the majority opinion and write a concurring originalist opinion;
(3) concur in the outcome and write a separate concurring originalist opinion; or
(4) dissent.

Table 1 describes each scenario and what we believe is the proper originalist response.

TABLE 1: ORIGINALISM ON A COLLEGIAL COURT

	Case Outcome	Holding	Reasoning	Originalist Response
Scenario One: Pure Originalist Majority	Originalist	Originalist	Originalist	Write or Join Majority Opinion
Scenario Two: Nonoriginalist Reasoning for Originalist Outcome and Holding	Originalist	Originalist	Nonoriginalist	Concur in the Majority Opinion and Write Originalist Concurrence on Reasoning
Scenario Three: Nonoriginalist Holding That Moves Law Towards Originalism	Originalist	Nonoriginalist, Moves Constitutional Doctrine Closer to Originalism	Nonoriginalist	Complex Choice Given the Gravitational Force of Originalism
Scenario Four: Nonoriginalist Holding That Does Not Move the Law Towards Originalism	Originalist	Nonoriginalist, Does Not Move Constitutional Doctrine Closer to Originalism	Nonoriginalist	Do Not Join the Majority Opinion, Write Separate Originalist Concurrence
Scenario Five: Pure Nonoriginalist Majority	Nonoriginalist	Nonoriginalist	Nonoriginalist	Dissent

Two of the scenarios represent easy cases for originalists. If an originalist judge is confronted with the opportunity to write or join an opinion with an originalist case outcome, originalist holding, and originalist reasoning, the originalist response is clear: the originalist judge ought to join or write the majority originalist opinion. Use of history and tradition should

be limited to the originalist roles that we identify above.[215] This is Scenario One, which we label "Pure Originalist Majority."

The originalist response is equally clear if the majority opinion is nonoriginalist with respect to case outcome, holding, and reasoning; in Scenario Five, which we label "Pure Nonoriginalist Majority," an originalist judge should dissent. From an originalist perspective, it should not matter whether the pure nonoriginalist majority opinion is based on a conservative or progressive form of Constitutional Pluralism. And it should not matter whether the majority case outcome or holding is one that the originalist judge likes or dislikes. Originalism entails that judges have a duty to dissent from outcomes that are inconsistent with original meaning; likewise, originalism counsels judges to avoid holdings that will lead to nonoriginalist outcomes in the future.[216]

What about the situation where both the case outcome and the holding are originalist, but the reasoning is nonoriginalist (e.g., a constitutionalist pluralist opinion based on history and tradition)? This is Scenario Two in Table 1. The crucial question for an originalist judge is whether to join the majority opinion. From an originalist perspective, there is a *pro tanto* reason not to join: by joining an opinion with nonoriginalist reasoning, the originalist judge might legitimate nonoriginalism.

In some cases, however, the failure to join the nonoriginalist opinion would have the consequence that the proposed majority opinion would fall short of the necessary number of votes. The case outcome would remain originalist, but the originalist holding might be vitiated. On the Supreme Court, for example, we could imagine that the result of the originalist Justice's failure to join would be four Justices joining the nonoriginalist opinion, one separate concurrence in the outcome, and four dissenting opinions. This scenario might result in lower courts disregarding what would have been an originalist holding and hence in fewer originalist outcomes in lower court decisions.[217]

Given this uncertainty, there is a strong reason for the originalist judge to join in the majority opinion if the vote of the originalist judge is necessary

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[215] *See supra* Section II.A.

[216] *See infra* Section IV.E.

[217] This scenario presents a number of complexities that are beyond the scope of this Article. In particular, we will not discuss the application of the *Marks* Rule that originated in *United States v. Marks*. 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (citations omitted)). For a general discussion of that rule and its difficulties, see Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 44 (2019), which argues that "fragmented Supreme Court decisions have continued to bedevil both state and federal courts."

to sustain a holding that is identical or nearly identical to the constitutional doctrine required by the original meaning of the constitutional text. The originalist judge should then write a separate opinion that presents the originalist reasoning that supports the originalist outcome; in this way, the originalist judge can limit the legitimating effect of their joining the nonoriginalist majority.

If the case outcome is originalist but the holding is not, the situation is quite different. There are two different scenarios. One possibility is that the nonoriginalist holding nonetheless moves the implementing doctrines in the direction of originalism. We discuss this important possibility which implicates the gravitational force of originalism in Section IV.E, which immediately follows this section.

But there is another possibility: the opinion with an originalist case outcome might produce a holding that is identical to the status quo or that moves implementing doctrines away from originalism. This possibility is Scenario Four in Table 1. Under these circumstances, an originalist judge should concur in the result but not in the majority opinion. Given that both the holding and the reasoning are nonoriginalist, there is no reason for an originalist judge to join a majority opinion that does not move the law in an originalist direction.

Instead, an originalist judge should write a separate opinion concurring only in the judgment. This conclusion should hold whether or not the opinion produces a result that the originalist judge would favor as a matter of the judge's own preferences. And originalist judges should not join such opinions, regardless of whether the reasoning is based on nonoriginalist uses of history and tradition.

We have now considered all the scenarios except the third. Scenario Three involves a (potential) majority opinion that reaches an originalist outcome and produces a holding that is nonoriginalist but that moves constitutional doctrine closer to originalism than the status quo. This situation involves what is called "the gravitational force of originalism."[218]

E. The Gravitational Force of Originalism

Scenario Three involves a situation in which a nonoriginalist history-and-tradition majority opinion produces an originalist outcome in the case and moves constitutional doctrine closer to the correct originalist holding. On the surface, it might seem that an originalist judge should join or even write the nonoriginalist history-and-tradition opinion because of the

[218] Barnett, *supra* note 68, at 420.

gravitational force of originalism.[219] Moving the doctrine in the direction of an originalist outcome seems like what has been called an "originalist second best."[220] Here is how Professor Solum explains this idea:

> Given that a thoroughly originalist jurisprudence is infeasible (at least in the short to medium run), some originalists endorse the idea that there can be an "originalist second best": given the practical impossibility of the first-best originalist interpretation of the Commerce Clause, the originalist might argue for doctrines that limit departures from original meaning to those required by practical necessity. Such doctrines mitigate the damage done to original meaning by precedent and practice.[221]

Thus, an originalist Justice who believed that *Roe v. Wade* was inconsistent with the original public meaning of the Due Process of Law Clause of the Fourteenth Amendment might join the majority opinion in *Dobbs*—even though the *Dobbs* opinion endorsed a nonoriginalist history-and-tradition approach to substantive due process. Justice Thomas's concurring opinion might be read this way: Justice Thomas joined the majority opinion but wrote separately to disagree with its nonoriginalist implications.[222]

The notion of an originalist second best has clear attractions for originalists, but there are reasons for originalists to be cautious in adopting a living constitutionalist strategy to achieve second-best originalist results. For originalism to produce gravitational force, we must know the actual original public meaning of the constitutional text. That is, if an originalist judge is going to write or join a second-best opinion that moves constitutional doctrine in the direction of original meaning, the judge must know the actual original meaning.

Sometimes, original meaning is clear and well-established by the evidence. We can call cases of this sort "originalist easy cases." In these cases, the pull of the gravitational force of originalism is strongest. But even in originalist easy cases, an originalist judge would have the responsibility

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[219] *See supra* Section II.A.3.

[220] For the general idea of the second best in constitutional theory, see Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 311–12 (2008). On the notion of an originalist second best, see Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U.L. REV. 1, 54 (2013). The phrase "compensating adjustment" has also been used to describe a similar idea. *See* Mark Moller, *Internal Separation of Powers, Compensating Adjustments, and Court Rulemaking*, 36 REV. LITIG. 579, 591–95 (2018); Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 20 (2009).

[221] Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, *supra* note 206, at 54.

[222] *See Dobbs*, 142 S. Ct. at 2300 (Thomas, J., concurring) ("I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that 'due process of law' merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property.").

to examine the salient evidence and determine the valence of the gravitational force of originalism.

It is theoretically possible for an originalist judge to write a majority opinion that lays out the evidence, reaches a conclusion about original meaning, and then explains why the nonoriginalist outcome is justified as second-best. But it seems likely that in many or most cases, this will not occur. For one thing, such an opinion would openly embrace an override of original meaning on the basis of feasibility (or some other pragmatic concern). This embrace would undermine originalism because it implies that the original meaning of the constitutional text is not truly binding.

Explicit second-best originalism is especially unlikely to occur in a majority opinion, because the gap between the original meaning of the constitutional text and the second-best outcome suggests that the holding is wrong from a first-best perspective. Originalist judges would naturally be reluctant to write an opinion that both undermines the holding in the case and undermines originalism itself.

So, it seems likely that second-best originalism will sometimes or frequently involve "off-the-books" originalist analysis. Instead of the originalist reasoning appearing in the opinion, it would take place in chambers (perhaps with discussion of memoranda written by clerks of the original meaning) or perhaps in the private mental deliberations of an originalist judge. Off-the-books originalism is deeply problematic outside of originalist easy cases.

Let us call the cases that are not easy "originalist hard cases." Such cases can be hard for a variety of reasons. The question might be one where there is a paucity of originalist research: we might not know the original meaning. Or there might be a substantial amount of originalist research, but the evidence and arguments might conflict, creating a different kind of uncertainty about original meaning.

Resolving originalist hard cases on the basis of off-the-books originalism is problematic. As scholars who have engaged in originalist research and theorizing for decades, our sense is that off-the-books originalism creates substantial risks of error.[223] On-the-books originalism provides opportunities for vetting the evidence and arguments; off-the-books

[223] For example, while Professors Barnett and Bernick agree with Justice Thomas's limited definition of "liberty" in phrase "life, liberty, and property" in Section 1 of the Fourteenth Amendment, they nevertheless reject Justice Thomas's overly narrow interpretation of "the due process of law" in Section 1. They contend instead that the "due process *of law*" also requires that a deprivation of "life, liberty, and property" be by a properly enacted statute that is within the legislature's power to enact. *See* BARNETT & BERNICK, *supra* note 109, at 261–88. But because Justice Thomas merely alludes to the evidence of original meaning rather than presenting it, criticizing his position is difficult.

originalism lacks the safeguards provided by scrutiny from fellow judges on a collegial court. And if the originalism is off-the-books, the resulting opinion will lack transparency. Scholars and lawyers cannot scrutinize off-the-books originalist reasoning, because, by definition, it will not appear in the opinion itself.

For all of these reasons, we believe that off-the-books originalism should be avoided except in originalist easy cases. The gravitational force of originalism is important. An originalist second-best is likely to be better than a nonoriginalist worst-case scenario. In originalist easy cases, the gravitational force of originalism is steady and true, but in originalist hard cases, the risk of error is high and mistakes may be difficult to correct.[224]

Doing on-the-books originalism in cases where the majority opinion moves the law in an originalist direction on the basis of nonoriginalist reasoning requires that an originalist judge write a concurring opinion that lays out the evidence and makes the basis of the judges' vote transparent. If the originalist judge also joins the majority opinion, the originalist judge's concurrence should make it clear that, in a future case, the originalist judge would support a move from the second-best holding in the instant case to a first-best originalist holding.

By way of summary, we offer the following rules of thumb for originalist judges who have the option of joining a majority opinion that reaches an originalist case outcome on the basis of nonoriginalist reasoning and moves the law in the direction of originalism with a nonoriginalist holding. The gravitational force of originalism is strongest when the original meaning of the constitutional text is clear and well-established by scholarship or prior judicial opinions. When the original meaning is cloudy and the evidence has not been fully assessed, originalist judges should be wary of creating new doctrines or dramatic changes in the law on the basis of off-the-books originalism. Absent clear evidence of original meaning, the concern for the rule of law that motivates originalism itself counsels originalist judges to leave existing law (in the form of precedent or validly enacted statutes) in place.

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[224] Once an appellate court decides a case and articulates a holding, the holding will have binding effect on lower courts on the basis of the doctrine of vertical stare decisis. Of course, the nonoriginalist holding based on a mistaken but unarticulated assumption about original meaning would not be binding as a matter of horizontal stare decisis, but if the assumption about original meaning was off-the-books, there will be obstacles to any attempt to correct the holding. For one thing, if the court was unwilling to reach the originalist result on the basis of originalist reasoning in the first place, it seems unlikely that a majority would be willing to overrule a prior decision on the basis of an unarticulated mistake about original meaning. Moreover, advocates in future cases will be unaware of the mistaken assumption and hence would be less likely to appeal on this ground.

CONCLUSION

The relationship between originalism on the one hand and history and tradition on the other is both simple and complex. *Simple*, because history and tradition are obviously relevant from an originalist perspective. Historical evidence is the lifeblood of originalism. Historical linguistics is the key to the original meaning of the words and phrases that make up the constitutional text. Historical context disambiguates and enriches semantic meaning. Historical practice and historical doctrine frequently provide evidence of original meaning. And sometimes history and tradition are constitutive of the original meaning: the Seventh Amendment is an example.

But the relationship between originalism, history, and tradition is also *complex*, because history and tradition can also be used in nonoriginalist frameworks. For example, Constitutional Pluralism can include history and tradition as modalities of constitutional argument. The recent emergence of Historical Traditionalism points to an even more radical use of text and history as the basis of an approach to constitutional interpretation and construction that rivals both originalism and living constitutionalism.

Due to the Supreme Court's decisions in *Dobbs*, *Bruen*, and *Kennedy*, the simple and complex relationships between originalism, history, and tradition have come to the fore. On the surface, these decisions might be read as a change in direction—a move away from originalism and towards a nonoriginalist role for history and tradition. But that surface impression is misleading. History and tradition have long played a role in constitutional jurisprudence. There is, one might say, a history and tradition of "history and tradition."

Perhaps our most important conclusion is that, upon close examination, we find that none of the cases from the October 2021 Supreme Court term represent a radical departure from prior uses of history and tradition by both public meaning originalists and constitutional pluralists. The Court has not embraced a novel history-and-tradition alternative to either originalism or living constitutionalism. We established this conclusion by clarifying the nature of the reasoning in these three cases.

We conclude that, in the end, Justice Alito's majority opinion in *Dobbs*, like his opinion in *McDonald*, employs Conservative Constitutional Pluralist reasoning to reach an arguably originalist result.[225] To be sure, some of his

[225] To reiterate, we take no position in this Article on the correctness of the result on originalist grounds in either *Dobbs* or *Bruen*. But we acknowledge that many, if not most, originalists believe the outcomes in both cases are correct. *See, e.g.*, J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists [https://perma.cc/KSX5-X7U3] ("*Dobbs* is a tremendous victory for originalism, even if the *Dobbs*

evidence and analysis does pertain to the original meaning of the Fourteenth Amendment in 1868. But, in the end, he purports to be applying the precedent of *Glucksburg*, which is a doctrine for implementing a nonoriginalist reading of the Due Process of Law Clause. The best explanation of his opinion as a whole is provided by Constitutional Pluralism. We take Justice Thomas's concurrence in *Dobbs* to be supportive of our characterization of Justice Alito's opinion of the Court as nonoriginalist.

We do not mean here to be questioning the sincerity of Justice Alito's—or any other Justice's—claim to be an originalist. Justices can believe in originalism in their heart-of-hearts, while at the same time believe that their role as a judge on a collegial court requires them to elevate a precedent that relies on deeply-rooted history and tradition above the original meaning of the text. It seems likely to us that a sincerely committed "practical originalist" Justice could employ Conservative Constitutional Pluralist methodology to reach originalist results—although such a Justice might be basing that conclusion on less-than-reliable off-the-books originalism.

In contrast, Justice Thomas's majority opinion in *Bruen* employs thoroughly originalist reasoning in its effort to identify the meaning of the "right to . . . bear arms." This is obviously true with regard to its adoption of *Heller*'s identification of the original meaning of "bear arms." At first blush, the historical tradition test might appear to be a nonoriginalist implementation doctrine in the construction zone, rendering *Bruen* a hybrid opinion. We think, however, that a close reading of Justice Thomas's reasoning reveals he is appealing to the historical tradition test to identify the exact contours of the preexisting legal right to keep and bear arms in either 1791 or 1868.

If we are right, then Justice Thomas's opinion in *Bruen* is using the historical tradition test at the interpretation stage to determine the original public meaning of the constitutional text. Another implication of our reading is that lower courts must search for historical analogues that bear on this original meaning of the right, rather than some tradition that may have developed after 1868 (or perhaps 1791 if that is the relevant date).

In contrast with both *Dobbs* and *Bruen*, the Court's discussion of history and tradition in *Kennedy v. Bremerton School District* is so brief that no firm conclusions can be drawn about its general significance. And the same can be said for the similar discussion in the Court's prior decision in

opinion could be characterized as non-originalist in its methodology . . . . [O]riginalism is the theory that made obvious to lawyers, judges, and the general public that the *Roe* and *Casey* decisions were insupportable as a matter of constitutional law, and it is the theory that formed the legal views of the justices who voted to overrule those decisions.").

Town of Greece v. Galloway. Our view is that the best reading of these cases is that they employ a long and unbroken tradition as evidence of the original meaning of the Establishment Clause, although it is possible (but less likely) that they use history and tradition as a doctrine to implement the original meaning of the Clause. What this line of cases clearly does not represent is an independent role for historical practice and tradition, either in some form of Conservative Constitutional Pluralism, or as a new alternative both to originalism and living constitutionalism.

In this Article, we have argued for an originalist approach to history and tradition. History and tradition are essential elements in the originalist toolkit: no originalist should leave home without them. But originalists should be wary of the use of history and tradition by nonoriginalists, whether they be Progressive or Conservative Constitutional Pluralists. An originalist embrace of history and tradition that is inconsistent with the original public meaning of the constitutional text would undermine originalism itself and sacrifice the rule of law, the separation of powers, and popular sovereignty on the altar of pragmatism and political expediency. Our message is simple: "Originalists, don't go there!"