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## ARTICLES

### LIVING TRADITIONALISM

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*Today's Supreme Court is committed to originalism—the idea that the Constitution's meaning is fixed at ratification. But it often rests decisions on the post-ratification practices of other actors—Presidents, Congresses, or states. Call this method “living traditionalism”: “traditionalist” because it looks to political traditions, and “living” because the traditions postdate ratification. The method is ubiquitous but undertheorized, in part because its distinctness from “liquidation”—a variant of traditionalism that is indeed consistent with originalism, but that rarely drives any cases—has not been understood.*

*This Article offers the first comprehensive analysis of the Court's living traditionalism, which includes scores of cases spanning every subject and Justices of every stripe. Next, the Article identifies a fundamental but previously unrecognized tension in the method itself: If the Court gives living-traditionalist cases full weight as precedent, it defeats the reasons for using the method at all. Put another way, it is incoherent to treat political practices as a ratchet: capable of moving law in one direction (e.g., against a right in 2022) but not the other (in favor of the right later on). Yet the Court is at risk of doing that, making constitutional law turn on accidents of history: whatever practices happened to exist when the Court first addressed an issue. Finally, the Article proposes solutions to this predicament. Where the Court does not simply retreat from living traditionalism, it should write living-traditionalist rulings so that they expire when practices change, or else modify stare decisis to make these cases easier to overturn. These*

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*solutions would have to be paired with a resolve on the part of political actors to manifest any rejection of practice-based holdings in ways that courts could heed when the issue next arose in litigation. I review several "hard" and "soft" law means of doing so that the case law itself invests with constitutional significance. By these means, politics could shape sundry individual-rights and separation-of-powers doctrines. Absent such reforms, the Court's application of living traditionalism will prove increasingly at odds with the democratic and other rationales for using the method at all.*

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## INTRODUCTION

The current Supreme Court has invoked originalism—the idea that the Constitution’s meaning is fixed at ratification and binds us today<sup>1</sup>—to reshape the law.<sup>2</sup> Yet it has often based constitutional decisions on the *post*-ratification practices or traditions of other actors—political actors and state courts.<sup>3</sup> And the practices relied on are not ones that originalists have well-developed arguments for consulting. The Court isn’t simply relying on very early political practices as evidence of original meaning, or on judicial precedents (under the doctrine of *stare decisis*), or on non-judicial analogues of precedent (what the Founders called *liquidation*—political practices that, like judicial rulings, reflect the outcome of debate over a question of constitutional interpretation).<sup>4</sup> In case after case, that is, originalists have relied on post-ratification practices that *do not shed special light on original meaning* and *do not reflect prior actors’ deliberate efforts to interpret* the legal text (or answer the legal question) at issue. Call this method “living traditionalism”: “traditionalist” because it looks to political traditions, and “living” because the traditions postdate ratification. The Court’s reliance on such traditions has been described as a “momentous shift.”<sup>5</sup> It drove recent

<sup>1</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

<sup>2</sup> See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126–30, 2136–37 (2022) (appealing to originalism to displace almost every circuit court’s balancing tests for reviewing gun regulations); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2267 (2022) (appealing to the understanding of the Fourteenth Amendment in 1868 as a basis for overturning *Roe v. Wade*).

<sup>3</sup> See *infra* Section II.A.

<sup>4</sup> See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8–9, 36–37, 61 (2019) (alluding to or developing originalist grounds for considering all three of these types of post-ratification practices).

<sup>5</sup> Randy E. Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBLOG (June 27, 2022, 5:00 PM), <https://www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method> [<https://perma.cc/M6UZ-HLC8>].

cases on abortion, guns, religion, speech, and more.<sup>6</sup> It led Justice Barrett to devote a concurrence to raising “methodological” questions about just when “postratification practice may bear on” constitutional cases.<sup>7</sup> As she noted, scholarship offers “potentially conflicting frameworks for this analysis.”<sup>8</sup> This is indeed a pivotal moment to reexamine reliance on post-ratification history, for that method, under an originalist Court, could produce results that originalists and living constitutionalists alike would find hard to defend. The method has surprising logical implications that may give the originalist Court pause, and its critics fodder.

This Article extends several strands of scholarship to form a complete picture of living traditionalism and uses it to make two additional contributions. These points are crucial to using and assessing living traditionalism today, and one also has broader interest.

First, the Article offers the first panoramic and comprehensive survey of the Court’s living-traditionalist cases—and a systematic critique of the Court’s reasons for using the method. As that will reveal, the method has shaped scores of Court cases spanning all domains of constitutional law, every era of the nation’s history, and Justices of every stripe.<sup>9</sup> This includes every self-described originalist.<sup>10</sup> Yet the Court’s reasons for taking a living-traditionalist approach have been murky. And the originalist Justices, while embracing this method with gusto due to a mix of reasons,<sup>11</sup> have often given no persuasive originalist rationale. I will show that the Court’s most common defense of the method—based on what the Founders called “liquidation”—cannot support the reasoning of most living-traditionalist cases.<sup>12</sup> The merits of living traditionalism for any given area of law will vary based on several factors summarized at the end of the Article’s first half.

Second, the Article then applies this analysis to show that, whatever its merits, living traditionalism suffers from an internal tension that has gone unnoticed. When treated as ordinary precedents, living-traditionalist cases are self-defeating. In particular, refusing to update these precedents as our politics evolve would defeat the reasons for

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<sup>6</sup> See generally Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023) [hereinafter DeGirolami, *Traditionalism Rising*] (discussing the Court’s growing and increasingly explicit reliance on political traditions in constitutional interpretation).

<sup>7</sup> *Bruen*, 142 S. Ct. at 2162 (Barrett, J., concurring).

<sup>8</sup> *Id.* at 2163 (citing Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) [hereinafter Nelson, *Originalism*]; Michael W. McConnell, *Lecture, Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); and Baude, *supra* note 4).

<sup>9</sup> See *infra* Section II.A.

<sup>10</sup> See *infra* Section III.B.

<sup>11</sup> See *infra* Section III.B.

<sup>12</sup> See *infra* Section II.B.

applying the method in the first place.<sup>13</sup> This is true under any rationale for traditionalism given in scholarship or case law—positivist, Burkean, Hayekian, democratic, pragmatic, and more.<sup>14</sup> And that matters now in particular because the current Court may be especially reluctant to think it appropriate to update constitutional precedents as our politics change.<sup>15</sup> Originalists might thus try to marry the living part of living traditionalism with the commitment to fixity that makes them originalists. The fruit of that union would be a chimera—the fixation of constitutional norms not at ratification, but at some arbitrary later point: the dead hand of the middle-past.

Third, the Article offers solutions. Both the Court and other actors—the political branches and states—should treat living-traditionalist precedents differently from cases based on other methods.<sup>16</sup> They should not be as entrenched as other constitutional precedents. In particular, the Court should write living-traditionalist *rights* precedents so that they cease to govern future cases as soon as the political practices behind them have changed sufficiently.<sup>17</sup> As for *structural* cases, it should modify *stare decisis* analysis so that changes in the underlying political practices automatically justify overruling those precedents, regardless of the other *stare decisis* factors.<sup>18</sup>

These proposals might seem purely academic since, once the Court rules on an issue, its precedent freezes the practices then in place. In fact, though, there are various means of political resistance that remain available and should be deemed relevant by living traditionalism's lights. The states and political branches can avail themselves of various

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<sup>13</sup> This is not just one application of the broader idea, already baked into standard *stare decisis* analysis, *see infra* Section VI.A.3, that the erosion of a case's factual or legal foundations is one of several factors that courts should weigh (with no particular priority or weight given to any one factor) in deciding whether to overturn precedent. Rather, I will argue that when it comes to living-traditionalist precedents, certain changes in the underlying traditions should lead courts to *bypass* ordinary *stare decisis* analysis in one of two ways. In certain cases, they should hold that the precedent has been superseded so that it's unnecessary to overrule it or to apply the standard analysis for deciding whether to do so, and even lower courts can begin ignoring the precedent. In other cases, they should overrule without consulting *stare decisis* factors *besides* the one that asks if a case's foundations have been eroded (factors like reliance interests and the precedent's workability). *See infra* Sections VI.A.2–3 and especially notes 454–60 and accompanying text.

<sup>14</sup> *See infra* Part V (explaining the tensions between the possible rationales for living traditionalism and a refusal to update any resulting doctrines based on changed political practices).

<sup>15</sup> *Cf. infra* note 28.

<sup>16</sup> *See infra* Part VI (proposing ways to avoid continued reliance on living-traditionalist precedents once political traditions have changed).

<sup>17</sup> *See infra* Section VI.A.2.

<sup>18</sup> *See infra* Section VI.A.3.

“hard” and “soft” law means of resistance.<sup>19</sup> The Court has already looked to such measures in resolving major living-traditionalist cases. It could look to them again to tell when the traditions behind such cases have flipped, warranting reversal. It would thus have principled reasons, indeed a duty, to heed some forms of political opposition to its rulings. Beyond relieving the tensions in living traditionalism, this would promote democracy and popular sovereignty. Under several constitutional theories, every generation of Americans should be free to fill gaps in constitutional meaning with “constructions” they adopt through politics.<sup>20</sup> But how can Americans do so, when the Court has judicialized earlier constructions, and its word is treated as supreme? This Article spots answers in the Court’s own traditionalist case law.

Before closing, let me preview the details of living traditionalism, its motivations, and its internal problem. In cases using this method, the Court reads a constitutional text in light of the longstanding or widespread practices of other actors. The actors may be Presidents or Congresses, state lawmakers or state courts, or even ordinary citizens. This method includes and goes beyond the “historical gloss” that important recent work has traced in separation-of-powers cases.<sup>21</sup> And

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<sup>19</sup> See *infra* Section VI.B.

<sup>20</sup> See *infra* note 375 and accompanying text.

<sup>21</sup> See Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017) [hereinafter Bradley, *Doing Gloss*] (exploring the different justifications for judicial reliance on historical gloss, as well as the implications those justifications have for which practices to consult); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015) [hereinafter Bradley & Siegel, *After Recess*] (identifying a potentially broad conception of “historical gloss” endorsed by the Supreme Court majority in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), a case addressing the balance of power between Congress and the President); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412 (2012) (taking a systematic approach to analyzing the role of historical practice in the separation-of-powers context); see also E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. 1419 (2019) (arguing that liquidated meanings should be considered authoritative only if they result from “inter-branch contestation and settlement”). Other works on traditionalism specific to a particular domain include pieces on unenumerated rights. See McConnell, *supra* note 8, at 1775–76 (discussing the Court’s reliance on historical practice in substantive due process cases); see also Akhil Reed Amar, *America’s Lived Constitution*, 120 YALE L.J. 1734 (2011) (same); William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193 (2009) (examining judges’ and lawyers’ use of tradition in the context of substantive due process and gun rights cases “as evidence of original meaning, constitutional adverse possession, and precepts conformed by democratic deliberation”). On one enumerated right, see Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. L. REV. 701 (2019) (analogizing the Supreme Court’s reliance on “historical gloss” in separation-of-powers cases to its reliance on present-day official practices in the Fourth Amendment context). For a lucid exploration of the role of history (of all sorts) in three major cases from the Court’s 2021 Term, see Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118

the practices postdate ratification of the text—by long enough that they don't shed special light on original meaning. Nor do the practices seem to reflect what the Founders called "liquidation." I explore over sixty cases, and in almost all of them, the practices cited are never shown to have followed constitutional debate,<sup>22</sup> which the Founders thought crucial for giving liquidation its authority.<sup>23</sup>

On inspection, living-traditionalist cases fall into two categories, each with a different set of rationales. In individual rights cases, the Court suggests that practices are constitutive of the right at issue—e.g., that the very fact that the states have long protected an activity *makes* that activity a right protected by the Due Process Clause. The Court has also contended that this traditionalist approach to defining unenumerated rights is more democratically legitimate than one driven more by the Justices' own value judgments. In structural cases (on federalism and separation of powers), by contrast, the Court has consulted political practices to clarify vague texts or promote departmentalism—respect for the judgments of the other branches. But a closer look will reveal that both sets of rationales raise unanswered questions, and that many living-traditionalist cases do not fit easily with either set.<sup>24</sup>

Living traditionalism is nonetheless "rising"<sup>25</sup> due to a mix of conditions that may increase its appeal to originalist Justices. Where

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Nw. L. REV. 1 (2023). More generally, Marc DeGirolami has sampled traditionalist cases (which look to pre- and post-ratification traditions) from different areas of law to explore what makes for a legal tradition and gives it weight. See DeGirolami, *Traditionalism Rising*, *supra* note 6; Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020); Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020) [hereinafter DeGirolami, *First Amendment Traditionalism*]. In this Article, I pull together strands from each of these rich treatments to develop a trans-substantive account of an important subset of traditionalist cases. Building on that account, I then consider (1) what to do when the traditions underlying a precedent have changed, and (2) how to leave *room* for them to change. My analysis of (1) owes a debt to Amar's flagging of the issue, see Amar, *supra*, at 1782–83 (warning in closing against "judicial lock-in" of traditionalist rights and the corresponding invalidation of "governmental innovation and experimentation"), and Bradley and Siegel's exploration of it for structural cases, see Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 42–45 (2020) [hereinafter Bradley & Siegel, *Historical Gloss*] (addressing problems with a view of liquidation that "disallows re-liquidation of constitutional meaning once the meaning has become 'fixed' through practice"), as well as Will Baude's brief discussion of how to think about continuity and change in the distinct but related category of liquidation. See Baude, *supra* note 4, at 53–59.

<sup>22</sup> See *infra* Section II.B (emphasizing that, of the cases discussed here, only *Myers* and *McCulloch* noted significant constitutional debate of the question at issue).

<sup>23</sup> See *infra* Section I.C (showing that political actors' self-conscious debate on the legal issue at hand was essential to liquidation's authority for both James Madison and Chief Justice John Marshall).

<sup>24</sup> See *infra* Section III.A.

<sup>25</sup> See generally DeGirolami, *Traditionalism Rising*, *supra* note 6.

there is little text to go by, historical practices can justify departing from disfavored Warren and Burger Court precedents—but in the name of another legal criterion (tradition), rather than “judicial policymaking.”<sup>26</sup> Yet the Court has often failed to justify the results in originalist-friendly terms. In many cases, the Court claims the mantle of the Founding without clear support.<sup>27</sup> Living traditionalism becomes a kind of surrogate for originalism.

In the end, I suspect that whether living traditionalism is appropriate will vary from clause to clause, just as the rationales given by the Court (and the potential objections to them) tend to vary. So I will limit myself to offering a battery of general guidelines for assessing its use in different areas of law. After so surveying and theorizing the method and the justifications for it in broad strokes, I will zero in on an internal tension that I think plagues *any* reliance on post-ratification traditions. And I will draw out an important implication for how the method should be deployed, no matter the issue or the Court’s reasons for using such traditions to resolve it.

The internal tension is this: Living traditionalism bases certain doctrines on political traditions as they develop over time. But as soon as the Court has done this in any area, it threatens to freeze the very law that is supposed to keep following traditions—and at an arbitrary point. After all, a living-traditionalist case will set a precedent. And originalists do not think of constitutional norms, or therefore precedents, as “living” things that should evolve with changing practices.<sup>28</sup> So the

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<sup>26</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022) (warning against the “unprincipled approach” of “freewheeling judicial policymaking,” which the Court “fall[s] prey” to when it ignores history).

<sup>27</sup> See *infra* Section III.B.

<sup>28</sup> Of course, it is conceivable that a text’s original meaning might peg the substance of a constitutional norm to evolving traditions, so that originalism would actually require updating precedents as traditions changed. But in practice, originalists’ commitment to the idea that the text’s *meaning* is fixed at ratification, see generally Solum, *supra* note 1, has bled into a default expectation that the constitutional *norms created* by the text are also fixed at ratification. From that angle, the only reason to change a precedent would be to fix past departures from original meaning—not to reflect changing political traditions. This assumption (that if constitutional meaning is fixed at ratification, so must constitutional norms be) finds expression in Justice Scalia’s dissent from *Roper v. Simmons*, 543 U.S. 551 (2005). *Roper* overturned a fifteen-year-old Eighth Amendment precedent that had permitted the execution of juvenile offenders. *Id.* (overturning *Stanford v. Kentucky*, 492 U.S. 361 (1989)). The Court reasoned that the meaning of “cruel and unusual” makes post-ratification punishment practices relevant, and that those practices had evolved to render such executions cruel and unusual. *Id.* at 560–65. But Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, scoffed that this reasoning was tantamount to saying that “the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*.” *Id.* at 608 (Scalia, J., dissenting). Nonetheless, in other cases, Justice Scalia acknowledged that



Court will likely (and lower courts must) stick to the precedent even when the practices behind it have changed. Indeed, the precedent itself might *cut off* change. As a result, the law on high-stakes issues will be set by accidents of history. It will depend on whatever political practices happened to exist when the Court first turned to an issue. The law will not be set at ratification (as per originalism<sup>29</sup>) or in the rolling present (as per living *constitutionalism*<sup>30</sup>). It will be fixed at a random point in between.

In other words, it is incoherent to couple this living approach to *setting* precedents, with originalist (fixed) instincts about *entrenching* them. Yet that may be just what happens if the Court slides into living traditionalism as a surrogate for originalism—or mistakes it for a look-alike method (liquidation) whose outcomes *do* warrant entrenchment, as I will suggest.<sup>31</sup>

To make the issue concrete, consider *Dobbs v. Jackson Women's Health Organization*,<sup>32</sup> which overturned *Roe v. Wade*.<sup>33</sup> *Dobbs*'s core analysis could be read as originalist, treating abortion's status under state law at the time of the Fourteenth Amendment's ratification as the "most important historical fact"<sup>34</sup> in determining whether *Roe* was rightly decided.<sup>35</sup> But the majority's response to the dissent on a certain point seemed to assume the legitimacy of a more living-traditionalist method (at least for argument's sake).<sup>36</sup> That portion of *Dobbs* assumed *arguendo* that state practices long *after* ratification of the Fourteenth Amendment could give rise to constitutional rights.<sup>37</sup> Even then, the

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sometimes a text's fixed meaning might have varying impact over time. *See infra* note 437 and accompanying text.

<sup>29</sup> *See Solum, supra* note 1.

<sup>30</sup> *See generally* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (expounding the view that constitutional interpretation should keep account of contemporary values and circumstances).

<sup>31</sup> *See infra* Section I.C (distinguishing liquidation and its rationales from living traditionalism).

<sup>32</sup> 142 S. Ct. 2228 (2022).

<sup>33</sup> 410 U.S. 113 (1973).

<sup>34</sup> *Dobbs*, 142 S. Ct. at 2267.

<sup>35</sup> *See infra* notes 235–36 and accompanying text (quoting the dissent's view that an originalist reading of the Fourteenth Amendment was essential to the majority's legal reasoning); *see also* J. Joel Alicea, *An Originalist Victory*, *CITY J.* (June 24, 2022), <https://www.city-journal.org/article/an-originalist-victory> [<https://perma.cc/TY56-M37P>] (arguing that the *Dobbs* majority's historical analysis of the legal treatment of abortion through the ratification of the Fourteenth Amendment is "precisely what one would expect in an originalist opinion").

<sup>36</sup> *See infra* text accompanying note 240 (noting the majority's emphasis on its review of tradition extending well beyond the nineteenth century, in response to the dissent's claim that the majority was overturning *Roe* on the basis of nineteenth-century traditions alone).

<sup>37</sup> *See infra* notes 233–40 and accompanying text.

majority argued, *Roe* was wrongly decided, since most states in 1973 still banned all elective abortions.<sup>38</sup> But note the flipside of this point: If the abortion issue had first reached the Court twenty years later, when most states might have freely liberalized, the Court should then have *affirmed* an abortion right. And consider the result of combining these two positions with an originalist's instinct against changing precedent to keep up with political developments. The constitutional status of abortion would be fixed one way or the other by an accident of history: whether a plaintiff had first scaled the Court's steps in 1973 or 1993.

This would not make sense under any plausible rationale for living traditionalism.<sup>39</sup> It is self-defeating to keep applying a living-traditionalist holding (subject only to the usual *stare decisis* limits) when the practices behind it have flipped. Any reason to take a living-traditionalist approach to a case is equally a reason to avoid so entrenching the result. So living-traditionalist cases do not warrant the entrenchment to which rulings based on other methods are (I will assume) entitled.<sup>40</sup> For consistency, the Court should revisit them to keep up with political changes—on issues like capital punishment and assisted suicide, free speech and dignitary harm, and presidential power and the administrative state.<sup>41</sup>

Thus, if 2052 finds the American people with entrenched pro-choice traditions, a future Court would have to choose between *Dobbs's* outcome and a living-traditionalist approach to substantive due process. To keep applying *Dobbs's* result (without rejecting living traditionalism) would treat post-ratification practices *as a ratchet*. Practices would be capable of moving the case law in one direction (permitting abortion bans in 2022), but not as easily in the other (barring them, in 2052). No theory of law or judicial review can square that with our system of popular sovereignty.

While the Court may try to curb living traditionalism in some areas, that will not be feasible everywhere.<sup>42</sup> And yet, of all the proposals I will discuss for allowing continued political change under a contrary precedent, none is entirely effective.<sup>43</sup> So living traditionalism is ultimately

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<sup>38</sup> *See id.*

<sup>39</sup> *See infra* Part V (noting that the various rationales for living traditionalism provide strong reasons not to entrench the result from an earlier case once traditions change).

<sup>40</sup> By “the entrenchment to which other cases are entitled,” I mean judicial adherence to precedent unless overruling is supported by the balance of the factors considered in standard *stare decisis* analysis (including the precedent's workability, reliance interests, etc.). On what it means to give a precedent less weight, see *supra* note 13 and accompanying text and *infra* notes 454–60.

<sup>41</sup> *See infra* Section IV.C.3.

<sup>42</sup> *See infra* Section VI.A.1.

<sup>43</sup> *See infra* Section VI.B (explaining why no attempt to change or challenge political traditions in the teeth of a contrary precedent can provide as clear an indication of which

a tragic enterprise. Even its best implementations will frustrate some of its aspirations.

This Article proceeds as follows. Part I defines living traditionalism and distinguishes it from other methods. Part II details the remarkable range of cases using it and the political practices those cases cite. Part III maps and critiques the Court's rare rationales for living traditionalism. It explores why the method has proven especially appealing to originalists. It also shows how they have nonetheless failed, in many cases, to offer convincing defenses of it. And it identifies the factors that determine when this judicial method is and isn't justified. With that survey and theory in place, the Article's second half addresses the method's internal tension. Part IV clarifies the problem—the ratchet. Part V goes deeper into all of living traditionalism's possible rationales, to show that any case for living traditionalism tells equally against the ratchet. And Part VI explains what courts and other actors should do about it.

## I

### DEFINING LIVING TRADITIONALISM

There are many ways to carve up the space of possible methods of interpretation as objects of study for constitutional theory, based on what would be practically or theoretically useful. And what is useful might vary with changes in our law and legal culture. For these reasons, there is no single right way to define, in particular, *traditionalist* approaches to interpretation. What I have called living traditionalism encompasses all cases that rest at least partly on certain facts—the existence of certain practices well after ratification of the constitutional text at issue.<sup>44</sup> But this category is not entirely homogeneous. As will emerge, it contains an important cleavage between rights cases and structural cases, which give somewhat different rationales for relying on post-ratification traditions. The broad category of living traditionalism is worth carving out anyway for two reasons. First, though increasingly dominant in this originalist Court's opinions, the method has no obvious justification in originalist terms. For that reason alone, it would be a pressing and timely object

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practice is wisest, or best reflects the people's will, as practices that developed before courts intervened can provide).

<sup>44</sup> Note that under this definition, a case might be living-traditionalist even if its constitutional analysis relies also on other grounds for decision (like judicial precedents or policy considerations). But this breadth doesn't dilute the theoretical or practical importance of the category. Unless the living-traditionalist portion of a ruling's analysis is just window-dressing or an argument in the alternative, the case will partly turn on living traditions, in the sense that traditions will be one but-for cause of its legal conclusions. And whenever that is true, the case will require the sorts of justifications, and have the striking implications, that this Article explores.

of study and critique. Second, as I hope to show, all the cases based on this method share an unusual and important feature: They ought to be updated as our political traditions change.<sup>45</sup> And this will follow *whatever* one's broader theory of interpretation, originalist or not.

Why do living-traditionalist cases lack a clear originalist rationale? In short, they reflect neither an attempt to discern original meaning nor an attempt to defer to the constitutional interpretations of past actors. To begin with, these cases consult *post*-ratification practices. Hence the label "living" traditionalism—by analogy to "living constitutionalism," which consults post-ratification developments of all kinds. So living-traditionalist cases cannot rest on the originalist rationale behind some cases citing *pre*-ratification traditions: that a given text was originally understood to enshrine a pre-existing right constituted by traditions leading up to the text's adoption.<sup>46</sup> Likewise, as defined below, living traditionalism excludes cases that cite *early* post-ratification practice merely as evidence of a text's original meaning. It also excludes cases that rely on prior courts' efforts to answer the interpretive question at hand—i.e., on-point judicial precedents. Finally, it excludes cases that cite past *non*-judicial officials' attempts to debate and resolve an interpretive issue—what the Founders called "liquidation." As a result, the method cannot rest on the argument of some originalists that respect for *stare decisis* or liquidation is justified by Founding-era pedigree.<sup>47</sup>

In relying on post-ratification practices without an obvious originalist argument, living traditionalism is redolent of living constitutionalism—the view that "constitutional law can and should evolve in response to changing circumstances and values."<sup>48</sup> But it is not *identical* to the latter, and in fact differs in several ways. First, none of the Court's living-traditionalist cases (that I have found) cite practices to override

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<sup>45</sup> On why this is not just a special case of a point thought to apply to all precedents—that certain changes in fact or law may count in favor of their repudiation—see *supra* note 13 and *infra* notes 454–60.

<sup>46</sup> For example, to implement the Seventh Amendment's demand that "[i]n Suits at common law . . . the right of trial by jury shall be preserved," U.S. CONST. amend. VII, the Court has used a "historical test . . . based upon whether the action could have been brought in a court of law in 1791, the time of the Seventh Amendment's ratification," Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 183 (2000). In a similar vein, the Court has held that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," which can be fleshed out based on political traditions like "analogous . . . rights in state constitutions that preceded" the Amendment's ratification. *District of Columbia v. Heller*, 554 U.S. 570, 592, 600–01 (2008).

<sup>47</sup> See McConnell, *supra* note 8, at 1773 (noting that "[t]here is substantial evidence that the Founders expected that the Constitution would be interpreted" in line with longstanding political practices as well as judicial precedents).

<sup>48</sup> Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. REV. 1243, 1244 (2019).

the text's concededly clear original meaning (as living constitutionalists might cite other post-ratification developments to do<sup>49</sup>). On the contrary, several cases stress that "deeply embedded traditional ways of conducting government cannot supplant the Constitution" but can only "give meaning to the words of a text" that was vague or "supply" words where text directly on point is lacking.<sup>50</sup> This constraint seems to be a constant premise of all uses of living traditionalism in our system.

More broadly, living traditionalism doesn't consult just any post-ratification developments. It cites only conduct. It looks to exercises of authority or freedom by Presidents, Congresses, state officials, or ordinary people. In particular, the method focuses on these actors' *widespread* or *longstanding* actions.<sup>51</sup> One case held certain recess appointments lawful because Presidents had long made them, without much protest from Senators.<sup>52</sup> Another held that parental control over children's education is a constitutional right because it has long been protected under the law of many states.<sup>53</sup> I give scores of other examples below.

In other words, this method—unlike living constitutionalism—doesn't consider mere changes in the meaning of words.<sup>54</sup> Or in the case law that drives common-law constitutionalism.<sup>55</sup> Or in the mental states—e.g., the "evolving standards of decency" of a "maturing society"<sup>56</sup>—that shape Eighth Amendment doctrine (other aspects of which *are* living traditionalist<sup>57</sup>). Or in understandings of the moral principles that Ronald Dworkin would have judges apply.<sup>58</sup> And finally, given these limits, living traditionalism can claim certain

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<sup>49</sup> See STRAUSS, *supra* note 30, at 103 (allowing for the "disregard[ing]" of "original understandings").

<sup>50</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); see also, e.g., *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("[W]here [the Constitution's words] are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight."); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2137 (2022) ("[T]o the extent later history contradicts what the text says, the text controls.").

<sup>51</sup> See *infra* Section II.B (discussing the forms of practice cited by living-traditionalist decisions).

<sup>52</sup> See *NLRB v. Noel Canning*, 573 U.S. 513, 532–33 (2014).

<sup>53</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>54</sup> Nor, therefore, does it consider the changes in merely *linguistic* practices that *drive* changes in the meaning of words.

<sup>55</sup> See STRAUSS, *supra* note 30, at 36.

<sup>56</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>57</sup> See *infra* note 146.

<sup>58</sup> See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997) (arguing that the Constitution's abstract terms—like due process and equal protection—constitutionalize general moral principles, and that applying provisions containing those terms thus requires judges to engage in moral reasoning).

defenses—Burkean, Hayekian, departmentalist—not available to all forms of living constitutionalism.<sup>59</sup> The rest of this Part further defines living traditionalism by saying more about what it excludes.

### A. *Not Practices as Evidence of Original Meaning*

Living traditionalism does not encompass reliance on practices only as evidence of original understandings.

Originalists ascribe special authority to the original meaning of a text or the original intent behind its adoption, and for a mix of reasons.<sup>60</sup> So they naturally put stock as well in political practices that provide evidence of original understanding.<sup>61</sup> That reliance is not really about practice. It treats practice as a proxy.<sup>62</sup> As a result, it cares about only a subset of practices—early ones.<sup>63</sup> Cases relying on early practice for originalist reasons are not living traditionalist.

If entrenching originalist readings makes sense, so does entrenching those cases' readings of a text, regardless of later changes in practice. After all, early practice can reflect original meaning no matter what happens later. If the first Congress opened with prayer, suggesting that the ratifiers thought the Establishment Clause allowed this, so what if later Congresses changed course? Early practice could still reflect original meaning. Thus, I will assume that cases citing early practice warrant entrenchment under *stare decisis*, just as I'll assume of other cases based on originalism (or other methods). But the practice of later generations offers no privileged evidence of original meaning.<sup>64</sup> So reliance on it—and entrenchment of cases relying on it—would need some other justification.

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<sup>59</sup> See *infra* Part V.

<sup>60</sup> See DeGirolami, *Traditionalism Rising*, *supra* note 6, at 18 (describing varieties of originalism and prominent rationales for them).

<sup>61</sup> See Baude, *supra* note 4, at 62–63 (“To the extent that constitutional interpreters give weight to original meaning, they could be justified in giving these earliest practices special attention. But interpreters should be careful to disentangle the importance of these practices as a matter of liquidation from their indirect relevance to original meaning.”).

<sup>62</sup> See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (treating the practices of the Establishment Clause’s ratifiers as contemporaneous evidence of its meaning).

<sup>63</sup> See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1537 (2005) (“Early interpretations evidence the original meaning of the Constitution because it is thought that early interpreters were likely to understand the meaning of the constitutional language and the context in which it was enacted.”).

<sup>64</sup> Later generations are less acquainted with “the relevant context and linguistic conventions.” John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86 n.334 (2001) (citation omitted); see also Barnett & Solum, *supra* note 21, at 15 (“If accepted practices arising well after the adoption of the constitutional provision—in, say, 1937 or 1952—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.”).

### B. *Not Judicial Precedents*

Judicial precedents are post-ratification practices in a sense—past judges’ applications of constitutional texts to decide cases. But when a court today relies on that sort of “practice”—or more precisely, when it defers to a previous court’s answer to the legal question at issue—it isn’t doing living traditionalism (unless the earlier precedent was living traditionalist).<sup>65</sup>

Thus, when I argue below against entrenchment of living-traditionalist cases that rest on obsolete “practices,” I will not be opposing stare decisis more broadly. Under that doctrine, if case *A* reads a constitutional text a certain way, so should case *B*, absent a “special justification.”<sup>66</sup> I will assume that this sort of entrenchment is justified when case *A* was based on factors like text, structure, original understanding, values, consequences—or judicial precedents that themselves rested on these factors. All I will question is the entrenchment of judicial rulings that turn on the (defunct) practices of actors *besides* courts interpreting the federal-constitutional text at hand: political branches, state actors, or the people.

### C. *Not Liquidation*

There is one final set of practices that fall beyond the scope of living traditionalism, and for the same reasons that judicial precedents do. In assuming that it is right to follow previous judicial applications of a text, I am taking for granted the standard formalist or pragmatic defenses of stare decisis. In formalist terms, some originalists think respect for judicial precedents is proper based on the original meaning of “the judicial Power,”<sup>67</sup> or the original law of interpretation.<sup>68</sup> Others may think stare

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<sup>65</sup> The Supreme Court *is* engaging in what I have called living traditionalism if it bases its application of a text on a court case that was applying some *other* text. For example, if the Court protects an unenumerated right under the federal Due Process Clause, based on a raft of state court cases finding the activity at issue protected under state law sources. See *Washington v. Glucksberg*, 521 U.S. 702, 710–11, 719–21 (1997). Or if it discerns Article III’s limits on what counts as an “injury” sufficient to confer standing to sue, by looking to state court rulings that assessed the cognizability of plaintiffs’ injuries under state law. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200, 2210 n.6 (2021). Like reliance on postratification *political* traditions, this sort of reliance on judicial precedent is not justified (or required) by stare decisis. It does not involve deference to a previous court’s reading of the legal text (or answer to the legal question) at issue. So it lacks support in the typical arguments for stare decisis—for example, epistemic humility and a desire to balance the goal of having the law settled with the goal of getting it right.

<sup>66</sup> *E.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (internal citation omitted).

<sup>67</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 168 (2013).

<sup>68</sup> See, *e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1120 (2017).

decisis has authority because it's integral to our legal practices.<sup>69</sup> The more pragmatic argument is that stare decisis properly balances two values: having the law settled and getting the law right.<sup>70</sup> But—this is the key—similar formalist and pragmatic rationales have been offered for entrenching readings based on some *non-judicial* practices<sup>71</sup>—though only some.

Madison called the category “liquidation.”<sup>72</sup> As William Baude has explained, liquidation was for Madison a “specific way of looking at post-Founding practice to settle constitutional disputes.”<sup>73</sup> Madison wrote that new laws are “obscure and equivocal, until their meaning be liquidated” (clarified) by judges *or* non-judicial actors.<sup>74</sup> Their liquidation by non-judges required three things: “an indeterminacy, a course of deliberate practice, and settlement.”<sup>75</sup> First, the text had to be indeterminate. Otherwise, consulting practice to fill in blanks would be unnecessary (and any cited practices would effectively be *overriding* clear text, which is improper).<sup>76</sup> Second, there had to be a consistent course of practice—by the political branches, states, or the people—that reflected a deliberate effort to interpret the text.<sup>77</sup> And finally, there had to be settlement: the acquiescence of others in the one actor’s interpretation.<sup>78</sup> With these conditions met, the resulting interpretation was entitled to entrenchment on similar terms to judicial readings<sup>79</sup>—as a sort of “legislative precedent[],” Madison wrote.<sup>80</sup> A reading expressed in liquidation would thus “have lasting impact as a ‘permanent exposition of the constitution.’”<sup>81</sup> Departures from liquidations would

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<sup>69</sup> See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 654 (1987) (“[T]he force of precedent . . . is an aspect of our law because of acceptance.”).

<sup>70</sup> See RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 9 (2017) (calling this the enduring characterization of scholarly and judicial defenses of stare decisis) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

<sup>71</sup> See, e.g., Nelson, *Originalism*, *supra* note 8, at 525–53 (2003) (discussing Founders’ expectations that post-ratification practices would fix gaps in constitutional meaning); *id.* at 550 n.136 (observing that originalists may support reliance on liquidation also on pragmatic grounds).

<sup>72</sup> Baude, *supra* note 4, at 4.

<sup>73</sup> *Id.*

<sup>74</sup> THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>75</sup> Baude, *supra* note 4, at 13.

<sup>76</sup> *Id.* at 13–16.

<sup>77</sup> *Id.* at 16–18.

<sup>78</sup> *Id.* at 18–20.

<sup>79</sup> *Id.* at 52–54.

<sup>80</sup> See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183 (1865).

<sup>81</sup> See Nelson, *Originalism*, *supra* note 8, at 527 (citation omitted).



require “substantial justification”<sup>82</sup> (if not “extraordinary [and] peculiar circumstances”<sup>83</sup>), just as *stare decisis* requires for departures from past *judicial* readings of the Constitution.<sup>84</sup>

These conditions—especially debate on a legal question, and acceptance of one answer—gave liquidation its precedential force for Chief Justice John Marshall, too, in *McCulloch v. Maryland*—the most prominent Supreme Court precedent often cited to support reliance on post-ratification practices. In that case, Chief Justice Marshall wrote that courts’ reading of vague texts should “receive a considerable impression” from the set “practice of the government.”<sup>85</sup> But he took pains to emphasize that the practices he was crediting had all the features that defined liquidation for Madison. It was not just that Congress’s power to charter a bank had been “recognized by many successive legislatures,”<sup>86</sup> but that this assertion of power

was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. . . . [Later developments] convinced those who were most prejudiced against the measure of its necessity.<sup>87</sup>

In other words, Chief Justice Marshall stressed that the cited practices reflected other actors’ express debate and ultimate resolution of a legal question. Thus, if today’s Court gives precedential force to a reading based on practices *lacking* these features, it cannot appeal to the authority of *McCulloch* or Madison (or other Founding-era conventions supporting entrenchment<sup>88</sup>).<sup>89</sup>

<sup>82</sup> See McConnell, *supra* note 8, at 1774.

<sup>83</sup> Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2453 (2016) (quoting Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 185 (1865)).

<sup>84</sup> See *supra* note 66 and accompanying text.

<sup>85</sup> *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 402.

<sup>88</sup> Aditya Bamzai has discussed Founding-era principles of “customary” and “contemporaneous” exposition. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 930–47 (2017). The maxim about “contemporaneous” exposition dovetails with a look at early history as evidence of original understanding, which I have bracketed here. The other maxim, that “usage is the best interpreter of laws,” *id.* at 937, may or may not be distinct from liquidation, see Baude, *supra* note 4, at 34. Even if it is, nothing in the sources expounding it suggests that courts should adhere to holdings based on customs even when the customs have changed.

<sup>89</sup> I have been assuming that liquidation need not be early. Many originalists disagree and may for that reason alone reject appeals to liquidation to defend reliance

Debate and acquiescence were essential because—and this brings me to the pragmatic case—Madison thought them crucial to the practical justification for treating liquidation like judicial precedent. And rightly so. In Madison’s “extended analogy”<sup>90</sup> between precedent and liquidation, both warranted deference under the same conditions. And his case for following judicial precedent tracked the pragmatic one given above: balancing stability with soundness. But note that following precedent can honor the second value, soundness, only if the precedent reflects *someone’s* (judges’) deliberate effort to get the legal question right. Thus, Madison thought judicial precedents are binding only “when formed on due discussion and deliberation,” reflecting “an exposition of the law publicly made” and “deliberately sanctioned.”<sup>91</sup> Where a judge has *not* deliberately addressed an issue, *stare decisis* does not apply. It doesn’t entrench answers to questions not presented or argued.<sup>92</sup> There would be no reason to expect unnoticed implications of a ruling to be sound. No one had tried to *make* them sound.<sup>93</sup>

So the same conditions determined which “[l]egislative precedents” (as Madison called liquidation) deserved respect; they, too, had to have been chosen with “full examination & deliberation,” he wrote.<sup>94</sup> “[I]t was not enough for Madison that the practice be one of sheer political will; it must also be one of constitutional interpretation.”<sup>95</sup> Otherwise, why expect reliance on practice to strike the same balance—between stability *and* soundness—as reliance on judicial precedents? And indeed, the Court has at times declined to give interpretive weight

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(or entrenchment of cases relying) on long-post-ratification practices. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 786 (2010) (“Acknowledging that some constitutional provisions would require future liquidation, many prominent originalists, however, would accept only those liquidating precedents that arose close in time to the founding.”).

<sup>90</sup> Baude, *supra* note 4, at 17.

<sup>91</sup> See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183 (1865).

<sup>92</sup> *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

<sup>93</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring) (“Sound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute, and a constitutional rule announced sua sponte is entitled to less deference than one addressed on full briefing and argument.” (citation omitted)); see also E. Garrett West, *Revisiting Contempt of Congress*, 2019 WISC. L. REV. 1419, 1470 (2019) (“If we think of ‘gloss’ or ‘liquidation’ as a form of extra-judicial precedent, then the quality of the deliberation that led to the decision should matter.”).

<sup>94</sup> See *From James Madison to Spencer Roane, 6 May 1821*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-02-02-0266> [<https://perma.cc/LHN5-A8DN>].

<sup>95</sup> Baude, *supra* note 4, at 17.

to political actors' practices when those practices did not follow any discussion of the underlying legal issue.<sup>96</sup>

Nor should courts simply treat it as a benign fiction that, just because officials take oaths to uphold the Constitution, officials who didn't dispute an act must have accepted it with enough deliberation to give it precedential force as liquidation. After all, judges swear to abide by the same Constitution, which forbids them to decide cases absent Article III jurisdiction.<sup>97</sup> Yet their deciding a case does not create precedent establishing their jurisdiction to hear the case if they never adverted to the issue.<sup>98</sup> Since liquidation has precedential force only when a judicial ruling would,<sup>99</sup> we should not entrench the tacit or untested presuppositions of political actions any more than judicial ones. That is why Madison insisted that liquidation, to carry precedential weight, must reflect constitutional judgment, not "sheer political will."<sup>100</sup>

Officials' merely doing something may be *some*, highly defeasible evidence that they thought it permissible, and thus that it was permissible. But absent debate, their doing it should be regarded as persuasive evidence at best—nothing like binding precedent—"even when the practice in question 'covers our entire national existence and indeed predates it.'"<sup>101</sup> That is true not only based on the above analogies to judicial precedent, but also because legislative and other political decisions often reflect—and are often allowed to reflect—motivations other than legal beliefs. They may reflect beliefs about "the functional utility (as opposed to legal validity) of a practice."<sup>102</sup> Political actors are often "entirely ignorant of the relevant constitutional issue, apathetic to it, or aware of it, yet act based on policy, politics, or other legal authority," or under pressure.<sup>103</sup> Especially weak is the inference, common in living-traditionalist cases on separation of powers, that a branch must think it

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<sup>96</sup> See *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2155 (2022) (refusing to give weight to certain historic gun regulations "absent any evidence explaining *why* these unprecedented prohibitions on all public carry were understood to comport with the Second Amendment," and emphasizing that for the liquidation of ambiguous constitutional texts, the author of *Federalist No. 37* required "*a series of particular discussions*" (emphasis in original)).

<sup>97</sup> See U.S. CONST. art. III.

<sup>98</sup> See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (rejecting "drive-by jurisdictional rulings" as having "no precedential effect" (citation omitted)).

<sup>99</sup> See *supra* Section I.C.

<sup>100</sup> Baude, *supra* note 4, at 17.

<sup>101</sup> *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970)).

<sup>102</sup> Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 673, 677 (2016).

<sup>103</sup> *Id.* at 673–74.

lacks a power because it has not yet exercised it. As Leah Litman has emphasized, omissions may instead reflect officials' ignorance of law, scarcity of time and resources, or sense of what's politically expedient.<sup>104</sup>

Finally, there is a more basic reason that liquidation cannot support entrenchment when it comes, in particular, to living-traditionalist cases on constitutional *rights*. The reason is that liquidation is about filling in gaps in the text; it presupposes textual ambiguity. But as will emerge from the survey below, the Court's living-traditionalist *rights* cases have not rested on the idea that constitutional provisions creating rights are indeterminate. They have supposed instead that such provisions' content (their *determinate* content) pegs the scope of a right to certain practices. This rationale leaves no room for liquidation—the clarification of a vague text—to do any work.

None of this is to say that it is always wrong for judges to consult or entrench non-liquidation practices. Nor am I making a merely linguistic point about how to use the label “liquidation.” Rather, the point is that the reasons to adopt and entrench interpretations based on (what Madison called) liquidation do not extend to interpretations based on (what I am calling) living traditionalism. Whether there are *other* reasons to embrace and entrench readings based on the latter is a core question of this Article, answered in Parts III and V. This Part has merely explained that my answer will not touch decisions that rested on: (1) ratification-era practices taken only as evidence of original meaning, (2) judicial precedents on the question at hand, or (3) nonjudicial practices that (like judicial precedents) reflect deliberate debate and resolution of the interpretive question (liquidation).

One might wonder if there is anything left. In fact, practices in my sense underlie scores of Supreme Court cases across every major domain of constitutional law. This includes most of the living-traditionalist cases wrongly claiming support in Madisonian liquidation or *McCulloch*.

## II

### SURVEYING LIVING TRADITIONALISM

The Court has relied on living traditionalism in sundry cases consulting practices of all sorts. While it has sometimes justified this by appeal to the Founders' concept of liquidation, that has been unwarranted almost every time. The Court has rarely confirmed that the practices cited reflected deliberation and debate, and sometimes suggests that it doesn't matter if they did. Many of the cited practices definitely

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<sup>104</sup> Leah Litman, *Debunking Antinoveltly*, 66 DUKE L.J. 1407, 1468 (2017).

did not. And the Court's other justifications for traditionalism have been rare, inchoate, and often unavailing. Yet originalist *and* non-originalist Justices have relied on them. Indeed, originalists have led the living-traditionalist charge most recently.

### A. Subject Matters

Living-traditionalist rulings have addressed the separation of powers between Congress and the President, federal-courts issues, states' rights, and individual rights. They have construed provisions in all three Articles defining the three branches, all ten Amendments in the Bill of Rights (minus the Third), and the Fourteenth Amendment.

In the realm of presidential power, the Court has cited post-ratification practice to justify conclusions about the scope of the President's power to pardon,<sup>105</sup> pocket-veto bills,<sup>106</sup> make recess appointments,<sup>107</sup> remove executive officers,<sup>108</sup> bar the development of public lands,<sup>109</sup> and use executive agreements or presidential memoranda (or other action lacking Senate or Congressional support<sup>110</sup>) to bind states or other actors.<sup>111</sup>

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<sup>105</sup> See *Ex parte Grossman*, 267 U.S. 87, 118–19 (1925) (noting that eighty-five-year period starting well after Founding (in 1830), in which Presidents pardoned those convicted of contempt of a federal court, “strongly sustains” reading pardon power to encompass such cases).

<sup>106</sup> In *Pocket Veto Case*, 279 U.S. 655, 658 (1929), the Court read “adjournment” in the Pocket Veto Clause to include pre-final adjournments. Finding no guidance in precedents or “the proceedings and debates of the Constitutional Convention,” *id.* at 675–76, the Court focused on “long settled and established practice,” *id.* at 688, that “Congress has never enacted any statute authorizing” return of bills by the President during any adjournment, *id.* at 684, and that of 119 bills sent to the President within 10 days of any adjournment, none were “placed upon the statute books or treated as having become a law,” *id.* at 690.

<sup>107</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 526–38 (2014) (surveying most recent “three-quarters of a century” of Executive-Senate interactions).

<sup>108</sup> *Myers v. United States*, 272 U.S. 52, 145, 163 (1926) (affirming President's unilateral authority to remove executive officers partly because “Congress in a number of acts followed and enforced” this reading “for 74 years” by expressly authorizing such presidential removal, and several Presidents' attorneys general affirmed the power).

<sup>109</sup> *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915) (“We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined [in the affirmative] on other grounds and in the light of the legal consequences flowing from a long-continued practice to make orders like the one here involved.”); see also *id.* (citing “scores and hundreds” of instances).

<sup>110</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (allowing President to suspend legal claims against private corporations abroad because “the practice goes back over 200 years, and has received congressional acquiescence”).

<sup>111</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (holding that “history of [congressional] acquiescence in executive claims settlement” supported President's order settling legal claims between U.S. nationals and those of other nations); see also *id.* at 679 (emphasizing the most recent part of that history, from 1952 onward); *Medellin v. Texas*,

Moving beyond executive power, practice-based rulings have addressed Congress's power (or lack of power) to charter a national bank;<sup>112</sup> require the return of fugitive slaves;<sup>113</sup> prosecute contempt against itself;<sup>114</sup> override presidential vetoes;<sup>115</sup> grant and extend copyright protections;<sup>116</sup> give executive officials certain powers<sup>117</sup> or protections from removal;<sup>118</sup> require individuals to purchase products,<sup>119</sup> Justices to ride circuit,<sup>120</sup> and judges to take on extrajudicial tasks;<sup>121</sup> empower the President to define certain crimes<sup>122</sup> or suspend operation

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552 U.S. 491, 532 (2008) (holding that presidential memoranda cannot bind states, partly because such an assertion of power is nearly unprecedented).

<sup>112</sup> *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (affirming power based on Congress's practice).

<sup>113</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 620–21 (1842) (emphasizing that “every executive in the Union has constantly acted upon and admitted [the act’s] validity”).

<sup>114</sup> *Marshall v. Gordon*, 243 U.S. 521, 542 (1917) (citing “[n]ot only the adjudged [court] cases, but congressional action in enacting legislation as well as in exerting the implied power” to “conclusively sustain the views [about the scope of that power] just stated”).

<sup>115</sup> *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 284 (1919) (holding that for overriding presidential veto, Article I requires support of two-thirds of each House's present quorum, not two-thirds of whole House, based on Congress's “universal” practice regarding numbers required for congressional support of constitutional Amendments, right up to twentieth century).

<sup>116</sup> *See Golan v. Holder*, 565 U.S. 302, 319–24 (2012) (affirming congressional power to grant copyright protection to works previously in public domain, based on “several private bills restor[ing]” since-lapsed copyrights, and first copyright act's coverage of publications already in print, when some states had not yet offered copyright protections of their own); *see also Eldred v. Ashcroft*, 537 U.S. 186, 200–04 (2003) (relying on “Congress' insistent historical practice of applying newly enacted copyright terms to future and existing copyrights”).

<sup>117</sup> *See The Laura*, 114 U.S. 411, 416 (1885) (deeming it no infringement of President's pardon power for Congress to empower Secretary of Treasury to remit fines for certain offenses since many statutes grant that power, and “the practice [under federal legislation] and acquiescence under it, ‘commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction’” (citation omitted)).

<sup>118</sup> *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (holding that agency board's degree of insulation from removal was unlawful and that “the most telling indication of the severe constitutional problem with” it was the “lack of historical precedent” for it); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) (repeating suspicion of constitutional novelty and noting that “[a]n agency with a structure like that of the CFPB is almost wholly unprecedented”).

<sup>119</sup> In *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012), five Justices treated the fact that Congress had (allegedly) never before required people to engage in commerce as an argument against the validity of the Affordable Care Act's insurance-purchase mandate under the Commerce Clause. *See also id.* at 659 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>120</sup> *Stuart v. Laird*, 5 U.S. 299, 309 (1803) (emphasizing that the only objection to the practice was “of recent date” and stressing the “practice and acquiescence under it for a period of several years” from the start of the judicial system).

<sup>121</sup> *Mistretta v. United States*, 488 U.S. 361, 388 (1989) (approving of Congress's requirement that certain judges serve on the United States Sentencing Commission based on “established practice” in which Congress has given bodies including federal judges comparable tasks of other kinds).

<sup>122</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–28 (1936) (“A legislative practice . . . marked by the movement of a steady stream for a century and a half of time,

of certain statutory provisions;<sup>123</sup> or interfere in his recognition of foreign powers<sup>124</sup> or in states' recognition of same-sex marriages.<sup>125</sup> Practice-based rulings have touched on federal-courts law too—speaking to Congress's authority to abrogate states' immunity from suit,<sup>126</sup> set aside Article III judgments,<sup>127</sup> and authorize resolution of claims outside Article III courts.<sup>128</sup> Other federal-courts cases cite practice regarding jurisdiction over uncontested naturalization petitions<sup>129</sup> and the sort of harm needed to show injury-in-fact for standing.<sup>130</sup>

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goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice.”).

<sup>123</sup> *Field v. Clark*, 143 U.S. 649, 683 (1892) (stating that “[i]f we find that Congress has frequently, from the organization of the government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by [the act at issue], that fact is entitled to great weight in determining” whether Congress may delegate to the President the power to suspend operation of certain statutory provisions).

<sup>124</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23–24 (2015) (examining “accepted understandings and practice,” including alleged fact that the executive from the start “has claimed unilateral authority to recognize foreign sovereigns” and Congress “for the most part” has “acquiesced,” and emphasizing that “‘the most striking thing’ about the history of recognition” is the “absen[ce]” of another example “where Congress has enacted a statute contrary to the President’s formal and considered statement concerning recognition”).

<sup>125</sup> *United States v. Windsor*, 570 U.S. 744, 764–65, 768 (2013) (emphasizing the historic allocation of marriage-recognition power to states as basis for imposing special scrutiny on a federal law interfering with that power as to same-sex marriages).

<sup>126</sup> *Alden v. Maine*, 527 U.S. 706, 743–44 (1999) (holding that Congress cannot abrogate states’ immunity from suit in state courts based not only on “early congressional practice” but also on the fact that “statutes purporting to authorize such suits in any forum are all but absent from our historical experience” except for “the last generation”); *see also* *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 755–56 (2002) (“We therefore attribute great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or . . . until 1918.”).

<sup>127</sup> *Plaut v. Spenthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (noting “no [other] instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation,” a “prolonged reticence” that “would be amazing if such interference were not understood to be constitutionally proscribed”).

<sup>128</sup> *See* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion) (“In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution *or by historical consensus.*” (emphasis added)); *see also* *Stern v. Marshall*, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) (“[A]n Article III judge is required in *all* federal adjudications, *unless there is a firmly established historical practice to the contrary.*” (second emphasis added)).

<sup>129</sup> *See* *Tutun v. United States*, 270 U.S. 568, 576 (1926) (holding that an uncontested petition for naturalization satisfies the case-or-controversy requirement because “[t]he function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our government” and “[t]he constitutionality of this exercise of jurisdiction has never been questioned”).

<sup>130</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (requiring a “harm traditionally recognized as providing a basis for a lawsuit in American courts”); *id.* at 2210 n.6 (citing twentieth-century state courts’ practices).

Turning to states' rights and powers, the Court has cited post-ratification history in reviewing state laws affecting foreign affairs<sup>131</sup> or regulating redistricting<sup>132</sup> or the appointment or behavior of presidential electors,<sup>133</sup> as well as laws requiring states to enforce federal policies.<sup>134</sup>

Finally, in Bill of Rights and Fourteenth Amendment cases, the Court has considered post-ratification practice for myriad purposes. It has consulted practice to determine when speech is liable to regulation<sup>135</sup> or categorically exempt from First Amendment protection,<sup>136</sup> what values are "special concerns of" the Amendment,<sup>137</sup> what count as public forums specially protected by it,<sup>138</sup> which kinds of state action trigger

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<sup>131</sup> See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (finding such a state law preempted, based on "traditional practice").

<sup>132</sup> *Evenwel v. Abbott*, 578 U.S. 54, 73 (2016) (explaining that "settled practice" of "all 50 States and countless local jurisdictions . . . for decades, even centuries" confirms lawfulness of states' reliance on total population, not eligible voters, for districting).

<sup>133</sup> *McPherson v. Blacker*, 146 U.S. 1, 29 (1892) (noting "various modes of choosing the electors [that] were pursued" throughout our history); see also *id.* at 33 (looking to statutes passed as late as 1876); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (allowing states to bind presidential electors' votes because "[e]lectors have only rarely exercised discretion in casting their ballots for President," and reviewing practice past "early 1900s").

<sup>134</sup> *New York v. United States*, 505 U.S. 144, 177 (1992) (emphasizing that the challenged "provision appears to be unique" because "no other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress").

<sup>135</sup> *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474–75 (2022) (reasoning that the nation's "unbroken tradition of on-/off-premises distinctions" in regulation of public signage—"not . . . in the founding era" but through the nineteenth and twentieth centuries and into "the last 50-plus years"—"counsels against the adoption of" a rule treating those distinctions as unlawful); see also *id.* (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) as recognizing the relevance of a "history and tradition of regulation . . . when considering the scope of the First Amendment").

<sup>136</sup> *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (endorsing the stance that "[no] categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation" and emphasizing two centuries of regulation of some categories of speech but not the one at hand); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 797 (2011) (reviewing mostly failed attempts to restrict "minors' consumption of violent entertainment" in weighing a free speech challenge to a law attempting to do so in the context of video games); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) ("From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas.").

<sup>137</sup> *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citing the nation's "safeguarding [of] academic freedom" as showing that "that freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (holding that public university professors' lectures are not government speech regulable by the state—that such professors have "liberties in the areas of academic freedom and political expression"—in light of "[t]he essentiality of freedom in the community of American universities" as they have developed).

<sup>138</sup> In *Burson v. Freeman*, Justice Scalia's concurring opinion, necessary to the judgment, deemed restrictions on solicitation and display of campaign materials near polling places not to regulate a "traditional public forum" because the category "draws its content from



free speech scrutiny,<sup>139</sup> and which are permitted under the Establishment Clause.<sup>140</sup> Post-ratification practices have guided both major cases defining the scope of the rights to keep and bear arms under the Second Amendment.<sup>141</sup> Living traditionalism has also supported definitions of “seizure” under the Fourth Amendment<sup>142</sup> and procedural due process under the Fifth Amendment,<sup>143</sup> the right to testify in one’s own defense under the Fifth and Sixth Amendments,<sup>144</sup> and rules about fines<sup>145</sup> and

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*tradition*” and “restrictions on speech around polling places on election day” date to “the late 19th century” and have persisted through to the present. 504 U.S. 191, 214–16 (1992).

<sup>139</sup> *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022) (holding that verbal censure of a member of a public college board triggered no free speech scrutiny because “elected bodies in this country have long exercised the power to censure their members,” looking at evidence well into twentieth and twenty-first centuries).

<sup>140</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (emphasizing twentieth-century precedent for legislative prayers at issue there); *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (rejecting an Establishment Clause challenge based on the 200-year history of public Christmas displays); *Marsh v. Chambers*, 463 U.S. 783, 794 (1983) (citing “more than a century [of practice] in Nebraska and in many other states” regarding legislative prayers); *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (“[A]n unbroken practice of according [this tax] exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.”).

<sup>141</sup> *See N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (“assessing the postratification history” to determine the contours of the right to carry); *District of Columbia v. Heller*, 554 U.S. 570, 624, 627 (2008) (pegging weapons protected to “the sorts of weapons [that are] ‘in common use at the time’” of a given legal challenge, for “lawful purposes like self-defense”); *id.* at 626 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”); *see also* Michael P. O’Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 128–29 (2021) (noting that some of the “longstanding prohibitions” cited date only to the twentieth century).

<sup>142</sup> *See Atwater v. City of Lago Vista*, 532 U.S. 318, 341 (2001) (discussing rules embraced in American courts through 1890s and broader practice into the present); *United States v. Watson*, 423 U.S. 411, 417–18 (1976) (citing the present-day practice to reaffirm “the ancient common-law rule that a peace officer was permitted to arrest . . . for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest”).

<sup>143</sup> *Burnham v. Superior Ct.*, 495 U.S. 604, 609 (1990) (relying on “principles traditionally followed by American courts in marking out the territorial limits of each State’s authority”); *id.* at 612, 615 (emphasizing state court decisions “in the 19th and early 20th centuries” and those “continuing” to the present).

<sup>144</sup> *See Rock v. Arkansas*, 483 U.S. 44, 49–53 (1987) (rehearsing historical arguments for development of right to testify in one’s own defense, arising long after ratification but rooted in the Fifth, Sixth, and Fourteenth Amendments); *see also* *Ferguson v. State of Georgia*, 365 U.S. 570, 574–77 (1961) (conceding that defendants were widely disqualified from testifying “when this Nation was formed,” but arguing that testifying came to be a right, in both federal and state courts, through the enactment of state and federal statutes in the nineteenth century); *see also* Amar, *supra* note 21, at 1747.

<sup>145</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019) (observing that the practice of protection against excessive fines was not only of “venerable lineage,” but “[t]oday . . . remains widespread,” as reflected in current constitutions of “all 50 States”).

executions<sup>146</sup> under the Seventh and Eighth Amendments. And under the Fifth, Ninth, or Fourteenth Amendments, post-ratification practice has been used to define the scope of rights regarding privacy and family life: abortion,<sup>147</sup> cohabitation,<sup>148</sup> parents' rights,<sup>149</sup> assisted suicide,<sup>150</sup> and sexual relations.<sup>151</sup>

I have found one limit: In some cases, the Court has disavowed reliance on tradition under the Equal Protection Clause, reasoning that the Clause's function is to *interrogate* our traditions.<sup>152</sup> Nonetheless, other cases (and separate writings by Justices) seem to have consulted political traditions even here.<sup>153</sup>

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<sup>146</sup> *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (“A claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail” as reflected in “objective factors,” the “clearest and most reliable” being “legislation enacted by the country’s legislatures.”); *id.* at 314–15 (citing late 1990s and early 2000s developments); *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977) (citing the practice of rejecting the death penalty for rape of adult woman); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982) (for non-homicidal offenses); *Glossip v. Gross*, 135 S. Ct. 2726, 2745 (2015) (citing then-current lethal-injection practices).

<sup>147</sup> See *infra* notes 233–40 and accompanying text.

<sup>148</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (“The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”); *id.* at n.14 (citing “recent census reports” as evidence of the most recent practice).

<sup>149</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) (plurality opinion) (citing state statutes and state court cases “in modern times” to assess substantive due process claim to parental visitation rights brought by the biological father of child born to another man’s wife); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (finding a parental right to direct children’s education based partly on “compulsory laws” creating duty to do so in “nearly all the states”).

<sup>150</sup> See *infra* notes 230–32.

<sup>151</sup> *Lawrence v. Texas*, 539 U.S. 558, 568, 570 (2003) (citing a lack of “longstanding history in this country of laws directed at homosexual conduct as a distinct matter” up to the 1970s); *id.* at 597 (Scalia, J., dissenting) (discussing the paucity of “prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995”).

<sup>152</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015) (“[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”); see also CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* 62 (2009) (stating that “equal protection doctrine is sharply critical of traditions,” which it “attacks, rather than incorporates”).

<sup>153</sup> See *Vacco v. Quill*, 521 U.S. 793, 802 (1997) (upholding the rationality of laws distinguishing assisted suicide from the use of painkillers that have the effect of hastening death, partly on the ground that “[t]he law has long used actors’ intent or purpose to distinguish between two acts that may have the same result”); see also *id.* at 802–03 (citing common law and other state court cases). Justice Scalia has been the most explicit in urging reliance on tradition in equal protection cases. See, e.g., *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (arguing that judges’ “abstract tests” for equal protection violations “cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts”).

### B. *Kinds of Practices*

Living-traditionalist decisions cite many forms of practice. These include official and unofficial acts and omissions by every sort of actor (besides federal judges), if widespread or longstanding. And the practices cited have usually ranged beyond liquidation, despite the Court's insistence otherwise.

In separation-of-powers cases, the usual inference is that a branch *can* do something because it often has, or has without another branch's pushback. Both the asserting branch's conduct and another branch's cooperation or noninterference are relevant "practices." Thus, the President can make recess appointments within a session of Congress, not just between sessions, because he often has, with spotty protest from senators.<sup>154</sup> That Congress had the power to pass a certain law was supported by Presidents' repeated practice of enforcing that law.<sup>155</sup> Congress can require Justices to ride circuit,<sup>156</sup> or open its sessions with prayer,<sup>157</sup> because it has long done so.

Omissions count, too—as when the Court says that a branch lacks an asserted power because it has *not* traditionally exercised it. By this logic, for example, some 200 years into the Republic's history is just too late for Congress to start interfering in the President's recognition of foreign powers.<sup>158</sup> Of course, omissions (of protest) can reflect the other branch's acquiescence, too. In *NLRB v. Noel Canning*,<sup>159</sup> the Court found that the Senate had acquiesced in recess appointments because it did not oppose them enough in statutes, Senate committee reports, and floor speeches.<sup>160</sup> As this example also shows, the "practices" cited in living-traditionalist rulings may include informal actions or "soft law" by officials, not only formal actions (like votes on bills, treaties, nominations, and removal upon impeachment).<sup>161</sup> In a similar vein, *Dobbs* cited several states' amicus brief to confirm that 50 years after *Roe*, abortion's status as a right remained too contested to satisfy the test for unenumerated rights.<sup>162</sup>

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<sup>154</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 533 (2014) (noting that "the Senate as a body ha[d] done nothing to deny the validity of this practice for at least three-quarters of a century").

<sup>155</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 620–21 (1842) (noting that since the passage of the Act, "not a doubt has been breathed upon the constitutionality . . . and every executive in the Union has constantly acted upon and admitted its validity").

<sup>156</sup> See *supra* note 120.

<sup>157</sup> See *supra* note 140.

<sup>158</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 15 (2015) (rejecting such an attempt by Congress as unprecedented and thus unconstitutional).

<sup>159</sup> 573 U.S. 513 (2014).

<sup>160</sup> *Id.* at 532–33.

<sup>161</sup> See *infra* Section VI.B.2.

<sup>162</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2260 (2022).

In individual-rights cases, the category of relevant actors flings wide open. There the Court has looked to state statutes,<sup>163</sup> state court common-law rulings,<sup>164</sup> enforcement practices of executives,<sup>165</sup> and even juries.<sup>166</sup> The actions of local bodies, like education boards, also count.<sup>167</sup> Even the conduct of the people themselves may shape the contours of a right—as with certain gun,<sup>168</sup> family,<sup>169</sup> and free speech rights.<sup>170</sup> At times, the Court has gauged the people’s practices by citing census data, opinion polls, or briefs filed by professional and social organizations.<sup>171</sup>

One limit is that practices must be pervasive to count. Inter-branch practices must be longstanding to be presumed lawful.<sup>172</sup> Prohibitions of certain speech or gun use must also be longstanding to be allowed under the First or Second Amendment.<sup>173</sup> The abandonment of a certain punishment must be, if not widespread among states, at least *spreading* to doom the punishment under the Eighth Amendment.<sup>174</sup> And protections of private conduct must be widespread *and* longstanding to ground an unenumerated right under the Fifth, Ninth, or Fourteenth Amendments.<sup>175</sup>

Still, as noted, in each of the five dozen cases mentioned in this Section and the last, the practices cited by the Court postdated ratification, sometimes by a lot.<sup>176</sup> *Noel Canning* was emphatic that previous cases had relied on practice “even when that practice began after the founding era.”<sup>177</sup> It went on to rely on late twentieth-century practices.<sup>178</sup> And again, while the Court has often defended its reliance on

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<sup>163</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 715 (1997).

<sup>164</sup> See, e.g., *Burnham v. Superior Ct.*, 495 U.S. 604, 609 (1990).

<sup>165</sup> See *supra* note 155.

<sup>166</sup> See, e.g., *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion).

<sup>167</sup> See *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1257 (2022).

<sup>168</sup> See *supra* note 141.

<sup>169</sup> See *supra* note 148.

<sup>170</sup> See *supra* notes 135, 137.

<sup>171</sup> See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

<sup>172</sup> See *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (treating “longstanding” inter-branch practice as a touchstone); *id.* at 533 (deeming “three quarters of a century” “long enough”); see also *Pocket Veto Case*, 279 U.S. 655, 688–89 (1929).

<sup>173</sup> See *supra* notes 136, 141.

<sup>174</sup> See *Atkins*, 536 U.S. at 314–15 (citing eighteen states’ practices over the previous thirteen years); see also *id.* at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

<sup>175</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 715–16 (1997) (discounting a handful of states’ liberalization of assisted suicide laws as insufficient to show deeply rooted right).

<sup>176</sup> See, e.g., *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260 (2022) (citing 2020 censure practices by local government as relevant to the First Amendment, which was ratified in 1791 and incorporated against state and local governments in 1868).

<sup>177</sup> 573 U.S. at 525.

<sup>178</sup> *Id.* at 529–30.

post-ratification practices by appeal to the Founders' concept of liquidation,<sup>179</sup> that defense fails on inspection in almost every case.

For one thing, the liquidation argument doesn't even get off the ground in traditionalist rights cases. Those cases couldn't have relied on liquidation because, as seen below, the Court's reason for consulting practice in those has not been that the text is vague, as liquidation requires.<sup>180</sup> The premise has instead been that the text, the determinate text, incorporates post-ratification practices as determinants of the scope of the right at issue.<sup>181</sup> There liquidation is simply irrelevant.

Structural cases do tend to involve indeterminate provisions of the sort that liquidation could in principle be used to clarify. But in those cases, the Court has almost always ignored or flouted the Founding-era strictures on appeal to liquidation reviewed in Section I.C—strictures that are crucial to the formalist (and to the pragmatic) case for the Court's giving interpretive weight to political practices just as it does with judicial precedents.<sup>182</sup>

Specifically, of the sixty-some cases I have discussed here, only *Myers* and *McCulloch* itself noted there was extensive debate over the question at hand prior to resolution and acquiescence in a single answer.<sup>183</sup> Indeed, William Baude's systematic treatment of liquidation gives *McCulloch* as the main example of Supreme Court reliance on it. And Baude says of a few other candidates that they may or may not reflect liquidation since they "did not always discuss the elements of liquidation that Madison consistently stressed."<sup>184</sup> On my reading, after *Myers* and *McCulloch*, which I think did rely on liquidation, the next-most-liquidation-like case is *Noel Canning*. But it cited just one statute and one Senate committee report contesting the power at issue there—contestation that the Court said was promptly "abandoned."<sup>185</sup> Then there is a sharp drop-off before the next-most-liquidation-like cases, *the Pocket Veto Case*, *Ex parte Grossman*, and *Missouri Pacific Railway*

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<sup>179</sup> See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020); *Hous. Cmty.*, 142 S. Ct. at 1259; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022); *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014).

<sup>180</sup> See Baude, *supra* note 4, at 13–14 ("The first premise of liquidation is an indeterminacy in the meaning of the Constitution. If first-order interpretive principles make the meaning clear in a given context, there is no need to resort to liquidation."); *id.* at 15 ("The indeterminacy premise also implies that there are limits to the domain of liquidation."); *id.* at 16 ("Liquidation was permissible within the extent of indeterminacy, but not beyond.")

<sup>181</sup> See *infra* notes 230–40 and accompanying text.

<sup>182</sup> See Section I.C.

<sup>183</sup> See *supra* notes 85–87; *Myers v. United States*, 272 U.S. 52, 113 (1926).

<sup>184</sup> Baude, *supra* note 4, at 34.

<sup>185</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 547 (2014).

v. *Kansas*.<sup>186</sup> In each, the Court noted that the constitutional issue was contested, though only once: by a few senators in the first case,<sup>187</sup> one Attorney General (“merely in passing”) in the next,<sup>188</sup> and one House member in the last.<sup>189</sup> That’s hardly the “solemn discussion in Congress” that Madison thought crucial for liquidation carrying precedential force.<sup>190</sup> Not one of the dozens of other structural cases I have cited above mentions even one official lodging a single objection to the post-ratification practice under review (until the lawsuit at issue). Indeed, in several cases, the Court specifically said there had been no debate.<sup>191</sup>

The Court has tried to infer “implicit[] approv[al]” of a practice’s lawfulness from an actor’s failure to “question the fact of” the practice.<sup>192</sup> But the Court has often done so without any evidence that anyone had even *adverted* to the legal issue. In some cases, there is no reason to think anyone did, and the Court comes close to admitting this.<sup>193</sup> And as noted above,<sup>194</sup> political decisions can and regularly do reflect something other than legal beliefs—including beliefs about the political (as opposed to legal) validity of an action, or for that matter ignorance or apathy or a scarcity of resources.

The Court itself betrays awareness of these possibilities in some living-traditionalist cases. *Missouri Pacific* explored whether the acquiescence in that case was unthinking.<sup>195</sup> *Golan v. Holder* called the congressional action at issue a “political choice” it would “not second-guess.”<sup>196</sup> *Myers* noted that after a long stretch of Presidents asserting exclusive authority to remove executive officers, later Presidents signed

<sup>186</sup> See cases cited *supra* notes 105–06, 115.

<sup>187</sup> Pocket Veto Case, 279 U.S. 655, 687 n.11 (1929).

<sup>188</sup> *Ex parte Grossman*, 267 U.S. 87, 118 (1925).

<sup>189</sup> *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 283–84 (1919).

<sup>190</sup> Letter from James Madison to James Monroe (Dec. 27, 1817), in 1 *THE PAPERS OF JAMES MADISON: RETIREMENT SERIES* 190, 190–91 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds., 2009).

<sup>191</sup> See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539, 621 (1842) (observing “uniform recognition of [the challenged action’s] validity”); *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915) (“[I]n not a single instance was the act [under review] disapproved.”); *Tutun v. United States*, 270 U.S. 568, 576 (1926) (“The constitutionality of this exercise of jurisdiction has never been questioned.”); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 329 (1936) (calling the challenged practice “undisputed”); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (citing a lack of “direct guidance” in “relevant history” and “dearth of specific evidence” regarding Framers’ intent).

<sup>192</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 680–81 (1981).

<sup>193</sup> See, e.g., *Fed. Mar. Comm’n*, 535 U.S. at 754–55 (admitting that for most of the “relevant history,” the question at issue could not have been anticipated).

<sup>194</sup> See *supra* notes 102–04 and accompanying text.

<sup>195</sup> 248 U.S. 276, 284 (1919) (ultimately rejecting the idea that the acquiescence was unthinking).

<sup>196</sup> 565 U.S. 302, 324 (2012).

laws giving Congress control over the process.<sup>197</sup> But it said this switch was not “acquiescence” because those later Presidents were motivated not by legal conviction, but by the “otherwise valuable effect of the legislation approved.”<sup>198</sup> Because those signings did not reflect an “attitude” of support by the Executive, *Myers* gave little “weight” to “the mere presence of acts on the statute book” that resulted.<sup>199</sup> *Myers* focused instead on episodes where “there *ha[d]* been a real issue made” regarding the legal question.<sup>200</sup> Justice Thomas, too, has acknowledged that political practices may “have reflected changing policy judgments, not a sense” about what “violated” the Constitution.<sup>201</sup> And in *Bruen*, his opinion for the Court acknowledged that some practices do not reflect legal “discussions,”<sup>202</sup> and carry no interpretive weight for that reason. Yet in most other cases, the Court overlooks this possibility.

One might object that the key features of the sort of liquidation worth entrenching were not discussed until recent scholarship.<sup>203</sup> So the Court had no incentive to see if the practices it was citing reflected debate (as liquidation should). Maybe if the Court looked harder, it would find that they did? It surely would in some cases. But first, even before recent scholarship on liquidation, Justices were naturally motivated to report when a practice reflected the resolution of explicit legal debate.<sup>204</sup> Maybe they were so motivated out of deference to *McCulloch*’s example or Madison’s urging.<sup>205</sup> Or maybe they had the common sense intuition that practices, like judicial rulings, deserve deference only if they reflect a hashing out of the legal issues.<sup>206</sup> As seen above, Justices have also intuited that practices can reflect all sorts of motivations *besides* legal judgments.<sup>207</sup> One way or another, I doubt there are many cases where the Justices *could* have shown that a cited practice reflected explicit constitutional debate, but didn’t do so just because they felt no need to.

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<sup>197</sup> See *Myers v. United States*, 272 U.S. 52, 170 (1926).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 170–71.

<sup>200</sup> *Id.* at 172 (emphasis added).

<sup>201</sup> *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (mem.) (Thomas, J., concurring in denial of certiorari).

<sup>202</sup> See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2155 (2022).

<sup>203</sup> Caleb Nelson began writing on the topic in the early 2000s, see Nelson, *Originalism*, *supra* note 8, at 539–50, and Baude’s definitive treatment appeared in 2019, Baude, *supra* note 4 (providing a three-part framework for understanding constitutional liquidation).

<sup>204</sup> See *supra* notes 186–89 and accompanying text.

<sup>205</sup> See *supra* Section I.C.

<sup>206</sup> See *id.*

<sup>207</sup> See *supra* notes 194–202 and accompanying text.

Besides, in many living-traditionalist cases, it is clear that the practice did *not* reflect a position on the underlying constitutional issue.<sup>208</sup> A glaring recent example is *Chiafalo*, which upheld state laws forcing presidential electors to vote for the candidate chosen by state voters. The Court's historical analysis focused on a tradition of electors *freely choosing* to vote as their state's voters had.<sup>209</sup> Yet that conduct tells us nothing about what those electors would think of laws compelling them to vote that way, which they never encountered. Freely doing something doesn't mean you would think your state's forcing you to do it was lawful.

None of this shows that the scores of cases citing non-liquidation practice were wrong. It simply means the Court cannot use liquidation to justify *entrenching* the interpretations applied in almost any of those cases.

### III

#### UNDERSTANDING LIVING TRADITIONALISM

To better understand and evaluate living traditionalism, it is crucial to know why the Court cites post-ratification practice at all. The reasons vary from rights to structural cases. Whether the method is justified, all things considered, will likely vary across those settings and perhaps even from clause to clause. For that reason, I will focus on offering a battery of guidelines for judging whether living traditionalism is appropriate for each area of law. I will build up to those norms by surveying the Court's broad-strokes rationales for living traditionalism, flagging counterarguments, and exploring the method's growing appeal to originalists. On that evaluative foundation, the Article's second half will build a thorough case for one major practical point that applies across the board—whatever one's rationale for the method and regardless of the subject matter: that precedents relying on the method must be updated to keep up with changing political practices.

#### A. Rationales

The Court gives a variety of reasons for relying on post-ratification practices. Certain rationales are central in structural cases (separation-of-powers or federalism), and another predominates in rights cases. Yet both are underdeveloped. And in several cases, the Court has gone living-traditionalist without a clear rationale.

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<sup>208</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 200–04 (2003) (noting lawmakers' motivation by a sense of "justice, policy, and equity" and not interpretation of the constitutional text at issue, authorizing federal copyright laws).

<sup>209</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326–28 (2020).



To see the divide between structural and rights cases, note two ways for reliance on practice to fit with the Constitution's text: The text could *fail to rule out* a given practice-based ruling, due to silence, vagueness, or ambiguity. Or the text could *require* a practice-based ruling, by actually making certain practices a determinant of the law on some issue.

By analogy, suppose I tell my daughter to be home "by dinner-time." She might resolve the vagueness (5:30 p.m. or 6:00 p.m.?) based on family practice (that we usually eat at 6:00 p.m.). My utterance left a gap in the household law, and my daughter turned to practice in that gap—what originalists would call the "construction zone" that lies beyond interpretation (ascertainment of original meaning).<sup>210</sup> Such gaps often motivate the Court's living traditionalism in structural cases on federalism or separation of powers, where the Court has suggested that practices may provide important evidence of the law,<sup>211</sup> capture a compromise of the other branches of government worth honoring out of respect for those branches, or reflect a settlement that it would be too destabilizing to disrupt.

If I instead say, "Be home at the time that your sister always arrives," my daughter *must* consult practice. It's not that my utterance was vague, but that its determinate content made our household law *depend* on practice. Her sister's practices became, one might say, *constitutive* of the household law. This basis for living traditionalism is more common in rights cases, where the Court has suggested that the very content of this part of our positive law (rights protections) gives practices their legal relevance.

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<sup>210</sup> Barnett & Solum, *supra* note 21, at 5.

<sup>211</sup> That living traditionalism in structural cases applies only when the text has gaps might raise a puzzle. In contrasting this method with reliance on liquidation, I noted that living traditionalism cites practices that may not have followed a deliberate hashing out of the legal issue. And this, I said, heightens the risk that the resulting ruling will entrench a legal error. *Supra* Section I.C. But if living traditionalism only kicks in when the text runs out, one might wonder what "error" here could even mean. There are different possibilities. One is that originalism is correct, and there is a fact of the matter about what originalism (applied perfectly with full information) would require in a given case, but the answer is not *clear* (epistemically), which is what puts us in the construction zone. Then "error" means getting the original meaning wrong. A second possibility is that original meaning has run out, or originalism isn't the correct approach, but some other modalities (values, precedent, etc.) are the correct ones to apply, and there is a fact about what outcome they require, all things considered. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). Then to err is to misapply those modalities. A third possibility is that law (by originalist or non-originalist lights) has run out altogether, but one outcome is best as a matter of political morality, and to err is to pick a suboptimal one. Thus, it's meaningless to speak of "error" only in the perhaps rare case where there is no positive law (by any criteria) and morality doesn't privilege one outcome. But since it is hard to know if a constitutional issue falls in that category until it has been debated, reliance on practices that didn't follow any debate will always carry at least a heightened *risk* of error.

### I. *Structural Cases: Evidentiary Value, Departmentalism, Stability*

Scholarship on the use of post-ratification history in structural cases—or “historical gloss,” as Curt Bradley, Trevor Morrison, and Neil Siegel have called it<sup>212</sup>—often begins with *Youngstown*,<sup>213</sup> which considered whether a wartime President had inherent authority to seize private steel mills. Justice Frankfurter’s concurrence gave these reasons for looking to post-ratification practice:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. . . . [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” . . . .<sup>214</sup>

A few rationales are detectable.

First, *epistemic*. Practices may be evidence of something that matters to adjudication. For one thing, practices could be evidence of what courts are ultimately after—the provision’s legal import. It could reflect others’ views on that question. Hence his emphasis on whether a practice has been chosen by Presidents sworn to uphold the Constitution, known to Congress, and never questioned. If both branches tolerated the practice, they must have agreed that it is sound (by some independent metric), which is evidence that it *is* sound.<sup>215</sup> This same rationale drives cases finding that a branch lacks a power because it hasn’t exercised it. The assumption is that the branch must have been thought by many to lack the power.<sup>216</sup>

But as I’ve argued, inferences from officials’ practices to their supposed legal beliefs are weak when the practices did not follow a hashing out of the legal issue.<sup>217</sup> That people have always done something does not reflect a *tradition* worthy of the name, unless it also reflects a belief that the practice is *appropriate*.<sup>218</sup> For example, speeding when the traffic light turns yellow may be a common practice, but it is not a “custom”

<sup>212</sup> See Bradley & Morrison, *supra* note 21; Bradley & Siegel, *supra* note 21.

<sup>213</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>214</sup> *Id.* at 610–11 (Frankfurter, J., concurring).

<sup>215</sup> See *Prigg v. Pennsylvania*, 41 U.S. 539, 621–22 (1842) (“[A]cquiescence” by “the highest state functionaries, is a most decisive proof of the universality of the opinion, that the [Fugitive Slave Act] is founded in a just construction of the Constitution . . .”).

<sup>216</sup> See cases cited *supra* notes 111, 118–19.

<sup>217</sup> See *supra* Sections I.C, II.B.

<sup>218</sup> Cf. A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 77 (A.W.B. Simpson ed., 1973) (offering a related account of custom in common law).

with any positive normative force. Its sheer frequency does not make it good.

What else might practices be evidence of? Aside from people's views on the ultimate issue (a text's legal import), practices might indicate other facts that the text makes relevant to its own application. This idea may underpin Justice Frankfurter's suggestion that since the Constitution was meant to be a workable plan for governing, the workability of a practice "fairly establishes" that it's what the Constitution called for.<sup>219</sup> But this is a thin reed on which to rest *Youngstown* (there are many incompatible workable plans). And in most other living-traditionalist cases, the Court doesn't identify any such legally relevant fact as the thing that cited practices are evidence of.<sup>220</sup>

Several cases have also cited departmentalism—the value of respect for other branches of government—or pragmatic concerns, especially about the benefits of stability. In this vein, *Noel Canning*, for example, urged "hesitat[ion] to upset the compromises and working arrangements that the elected branches of Government themselves have reached."<sup>221</sup>

A third rationale, possibly reflected in Frankfurter's *Youngstown* concurrence, is not epistemic or pragmatic, but what I've called constitutive. It isn't that practice is evidence of lawfulness. Rather, the long history of a practice *makes* it lawful—it "mak[es]" the "exercise of power *part of* the structure of our government," as Frankfurter writes.<sup>222</sup> This rationale may reflect the idea that textual gaps delegate the fixing of details to future generations—that the "Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government[.]"<sup>223</sup> as the Court has said.<sup>224</sup> By this logic, if Article II is silent on executive officers' removal, and the President usually claims

<sup>219</sup> *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

<sup>220</sup> See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136–37 (2022) (discussing postenactment practices without explaining what legally relevant fact the practices are evidence of).

<sup>221</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014).

<sup>222</sup> *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (emphasis added).

<sup>223</sup> *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

<sup>224</sup> Compare this with the Court's reason for deferring to agency interpretations of enabling statutes—that gaps in the statute reflect congressional delegations of interpretive authority. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). In *Dames & Moore v. Regan*, the Court said, somewhat conflictedly, that "[p]ast practice does not, by itself, create power," but does create a presumption of consent by other branches that has some curative force. 453 U.S. 654, 686 (1981).

exclusive authority (without protest), it *becomes* true that our constitutional law gives the President alone that power.

But *how* do practices constitute law? Some have suggested that it's of the essence of law to be constituted by traditions.<sup>225</sup> But that doesn't seem true of practices in my sense.<sup>226</sup> When practices do determine the content of our law on an issue, this is a contingent fact about our system and about that issue. One needs an argument that the substance of a given constitutional norm somehow makes post-ratification practices a determinant of the norm's scope. While hints of such an argument appear in a few structural cases, as just shown, the argument is clearest in the Court's rights cases.

## 2. *Rights Cases: Positive Law and Democracy*

The Court has held that certain parts of the Bill of Rights have a fixed meaning whose application nonetheless turns on changing practices. The result is that the right secured by the fixed text changes over time as practices do. Thus, procedural due process bars assertions of personal jurisdiction that flout "traditional notions of fair play and substantial justice."<sup>227</sup> Under this test, a certain exercise of jurisdiction was permitted *because* it was common: "[I]ts validation [was] its pedigree, as the phrase '*traditional notions of fair play and substantial justice*' makes clear."<sup>228</sup> And the plurality allowed that what was traditional could change over time.<sup>229</sup>

Similarly, under substantive due process, *Washington v. Glucksberg* held, what makes an unenumerated liberty fundamental, and thus protected, is deep rootedness in our history and traditions.<sup>230</sup> Deep roots do not indicate that a right may be protected on other grounds. Instead, deep roots in state law *make* it protected under the Constitution: "[T]he Due Process Clause . . . specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."<sup>231</sup> Otherwise—if tradition were instead just evidence of the Clause's meaning in 1791 or 1868—*Glucksberg* would have had no

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<sup>225</sup> See, e.g., Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237 (1986).

<sup>226</sup> That the President must be 35 years old is a constitutional norm not grounded in post-ratification political practices (beyond the "practice" of treating the Constitution as authoritative). See U.S. CONST. art. II, § 1 cl. 5.

<sup>227</sup> *Burnham v. Superior Ct.*, 495 U.S. 604, 609 (1990) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>228</sup> *Id.* at 621 (emphasis in original).

<sup>229</sup> *Id.* at 627.

<sup>230</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 711, 719–21 (1997).

<sup>231</sup> *Id.* at 720–21 (quoting *Moore v. Cty. of East Cleveland*, 431 U.S. 494, 503 (1977)).

need to survey “700 years” of “Anglo-American common-law tradition” stretching from “the 12th century” to today.<sup>232</sup>

Part of *Dobbs* took the same approach, citing *Glucksberg* and reviewing laws from the dawn of the common law until the 1970s.<sup>233</sup> I say “part” because the apparent core of *Dobbs*’s analysis—what it called “the most important historical fact” undermining *Roe*—was the status of state abortion law “when the Fourteenth Amendment was adopted.”<sup>234</sup> That historical fact could simply be evidence of original meaning. Indeed, the notion that the Amendment should be read in originalist terms, as “its ratifiers” read it, was “[t]he majority’s core legal postulate,” in the dissent’s view.<sup>235</sup> And by that measure, *Dobbs*’s case against a constitutional abortion right was formidable—so compelling that the dissent expressly agreed with it.<sup>236</sup> But when the dissent charged that this originalist reasoning imperiled other modern rights, by making “19th century” traditions the “sole reason for overturning *Roe*,”<sup>237</sup> the majority said the dissent was “misrepresenting” the Court’s “application of *Glucksberg*.”<sup>238</sup> As the majority stressed, its “review of this Nation’s tradition extends well past that period,” indeed “for more than a century after 1868.”<sup>239</sup> I take this reply by the majority to be allowing, at least for argument’s sake,<sup>240</sup> that post-1868 practices could give rise to new rights.

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<sup>232</sup> *Id.* at 710 & n.9.

<sup>233</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249–53 (2022); *see also* Barnett & Solum, *supra* note 21, at 27 (arguing that if the majority is seeking original meaning, “there is no reason to continue to trace the protection of this right—or lack thereof—up to 1973”).

<sup>234</sup> *Dobbs*, 142 S. Ct. at 2257.

<sup>235</sup> *Id.* at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>236</sup> *Id.* at 2323 (“The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.”). Though I have elsewhere argued that *Dobbs*’s historical analysis was entirely sound, and indeed conclusive, *see* Sherif Girgis, *Dobbs’s History and the Future of Abortion and Privacy Law*, SCOTUSBLOG (June 28, 2022, 1:53 PM), <https://www.scotusblog.com/2022/06/dobbs-history-and-the-future-of-abortion-and-privacy-law> [<https://perma.cc/3ZGY-QDKT>], I have taken no position (and take none here) on whether the living-traditionalist element of that analysis, which the dissent treats as dicta, *see infra* note 240, is the right way to apply the Fourteenth Amendment as a matter of first principles.

<sup>237</sup> *Dobbs*, 142 S. Ct. at 2331 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>238</sup> *Id.* at 2260.

<sup>239</sup> *Id.*

<sup>240</sup> The dissent contended that if post-1868 practice had supported abortion rights, the majority would have said that 1868 is the only measure. *See id.* at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting). This suggests that the living-traditionalist part of *Dobbs* was offered (at best) just for argument’s sake, or as an argument in the alternative: The Court was saying only that its verdict on *Roe* wouldn’t change *even if* post-1868 practices mattered. And so, the dissent thought, the majority’s review of post-1868 practices was dicta. *See id.* (calling the post-1868 analysis “window dressing”).

Otherwise, it would be no answer to the charge that *Dobbs* necessarily confines our unenumerated rights to those that existed in 1868.

Is there a sound basis for this constitutivist reading of the Due Process Clause? Originalists say no, though several would read another clause, the Privileges or Immunities Clause, along similar constitutivist lines.<sup>241</sup>

But here is a deeper concern. For an activity to be a “deeply rooted” right, the Court has noted, it isn’t enough for that activity to be widely *permitted* by the states.<sup>242</sup> For instance, while states have never banned ice cream, that doesn’t make ice cream consumption a constitutional right. Yet the Court has never explained what further protection an activity needs. Justice Scalia said only that “[t]he protection need not take the form of an explicit constitutional provision or statutory guarantee,”<sup>243</sup> not what form it *need* take. Nor do we get much of an answer from cases affirming a right on the very general basis that “the American people have always regarded” it as “of supreme importance.”<sup>244</sup> Earlier I said that structural cases may be wrong to infer that something is permissible just because it was often done. Here the mere fact that something was not banned, does not mean that it *could not* be banned.

Aside from the idea that a provision might make a right’s substance turn on practice, a second rationale for traditionalism in rights cases has been democracy. In Justice Scalia’s telling, traditionalism respects “the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions.”<sup>245</sup> Likewise, several rights cases stress that tethering analysis to historical practice promotes judicial restraint and prevents “freewheeling judicial policymaking.”<sup>246</sup>

### 3. *Cases Lacking a Clear Rationale*

Some living-traditionalist cases hover among various rationales for the method without ever quite landing, or they land on weak grounds.

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<sup>241</sup> See, e.g., Barnett & Solum, *supra* note 21, at 23 (referring to the Privileges or Immunities Clause’s explicit recognition of unenumerated rights and arguing that the *Dobbs* majority eschewed an originalist analysis of the clause); RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 227–58 (2021) (arguing that the Privileges or Immunities Clause was originally understood as a font of unenumerated rights).

<sup>242</sup> See *Dobbs*, 142 S. Ct. at 2447, 2250 (reasoning that even if pre-quickening “abortion was permissible at common law,” it did not follow “that abortion was a legal right”).

<sup>243</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989) (plurality opinion).

<sup>244</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>245</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010) (Scalia, J., concurring).

<sup>246</sup> *Dobbs*, 142 S. Ct. at 2248; see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (declaring the need for “guideposts for responsible decisionmaking”).

Take the recent right-to-carry decision. First, *New York State Rifle Association v. Bruen*<sup>247</sup> observed that *District of Columbia v. Heller*,<sup>248</sup> which inaugurated modern Second Amendment doctrine, adopted a “methodology centered on constitutional text and history.”<sup>249</sup> From this, *Bruen* slid to the idea that *post-ratification* history matters.<sup>250</sup> But *Heller*’s reason for citing history was that the Amendment enshrined a “*pre-existing right*,”<sup>251</sup> reflected in practice leading up to ratification. This rationale doesn’t extend to long-*post-ratification* practices.<sup>252</sup> Second, *Bruen* added that liquidation can settle meaning post-ratification.<sup>253</sup> Yet as *Bruen* at one point admitted, post-ratification practice doesn’t always reflect anyone’s deliberate legal interpretation of the Amendment, as liquidation requires.<sup>254</sup> Third, *Bruen* seemed to limit reliance on liquidation to cases where it provides “insight” into the text’s “original meaning.”<sup>255</sup> But this would collapse liquidation into a search for early practice as direct evidence of original meaning (rather than allow practices to fill gaps in meaning over time). And it would not justify *Bruen*’s ultimate rule: that a law regulating the keeping and bearing of arms is unconstitutional unless the government can show that it has a “proper analogue” in some “historical regulation.”<sup>256</sup>

Likewise, Justice Gorsuch’s majority opinion in a recent case cited late and obscure practices—the 2020s practices of education boards—to define the bounds of free speech,<sup>257</sup> with no more explanation than *Bruen* gave.<sup>258</sup>

Might the resort to practices be regarded as a natural default, needing no justification? Not when there are alternatives. In federalism cases, for example, the Court has often resolved indeterminacy by relying on interpretive presumptions that make no reference to historical

<sup>247</sup> 142 S. Ct. 2111 (2022).

<sup>248</sup> 554 U.S. 570 (2008).

<sup>249</sup> 142 S. Ct. at 2128–29.

<sup>250</sup> *Id.* at 2136.

<sup>251</sup> 554 U.S. at 592.

<sup>252</sup> As *Bruen* notes, *Heller* considered post-ratification history only as confirmation of the original public understanding of the text. See *Bruen*, 142 S. Ct. at 2137. And *Heller* never suggests that the pre-existing right created by the text was thought to vary in scope based on future practices.

<sup>253</sup> 142 S. Ct. at 2136–37.

<sup>254</sup> *Id.* at 2155.

<sup>255</sup> *Id.* at 2137 (citation omitted).

<sup>256</sup> *Id.* at 2132.

<sup>257</sup> *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022).

<sup>258</sup> See *id.* (appealing to Madison’s endorsement of judicial reliance on liquidation, but not showing that the 2020s practices at issue reflected the outcome of a constitutional debate, as Madisonian liquidation presupposes).

practice.<sup>259</sup> So the slide into tradition tests is at least sometimes a choice to be justified.

### B. *Special Appeal to Originalists*

This critical survey of the Court's reasons for living traditionalism suggests that in many areas, it needs stronger defense. That is especially true from an originalist angle. Originalism insists on the special authority of ratifiers and Founders,<sup>260</sup> and this method cites *post*-ratification practice in ways that *lack* Founding-era support.<sup>261</sup> Yet originalists have not objected to the method; just the opposite.

In *Noel Canning*, while Justice Scalia disputed reliance on practices he thought contrary to text, he did not question living traditionalism more broadly, but endorsed it.<sup>262</sup> In other cases where he has excoriated the majority's methods—including reliance on some practices, like those of other nations<sup>263</sup>—he did not object to the majority's reliance on other post-ratification history.

On the contrary, Justice Scalia was himself an especially prolific author of living-traditionalist opinions.<sup>264</sup> Indeed, living-traditionalist opinions have been joined or authored by every self-identified originalist as well as most other recent Justices.<sup>265</sup> In 2022, an opinion citing

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<sup>259</sup> Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 838 (2020) (proposing that several federalism cases that lack a clear textual basis rest on a presumption that states could “only relinquish [their] sovereign rights by a clear and express surrender in a binding legal instrument (such as the Constitution)”).

<sup>260</sup> See generally Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

<sup>261</sup> See *supra* Sections I.C, II.B.

<sup>262</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 572–73 (2014) (Scalia, J., dissenting in part) (accepting reliance on practices “open, widespread, and unchallenged since the early days of the Republic,” but not “self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court” that is used to override “text, structure, and original understanding”).

<sup>263</sup> See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

<sup>264</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) (“[A]n Article III judge is required in *all* federal adjudications, *unless there is a firmly established historical practice to the contrary*.” (second emphasis added)); *McDonald v. City of Chicago*, 561 U.S. 742, 791–92 (2010) (Scalia, J., concurring) (extolling interpretive methods “that make[] the traditions of our people paramount”); *Plaut v. Spenthrift Farm, Inc.*, 514 U.S. 211 (1995); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011); *Burson v. Freeman*, 504 U.S. 191, 215 (1992) (Scalia, J., concurring in judgment).

<sup>265</sup> See, e.g., cases cited *supra* note 264 (Scalia); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (Thomas); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (Alito); *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253 (2022) (Gorsuch); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (Kavanaugh); see also *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (2011) (Kavanaugh, J., dissenting) (“It is



practices from as late as 2020 was written by Justice Gorsuch and joined by everyone.<sup>266</sup>

Why have originalists embraced living traditionalism? It may have heightened appeal for them now. Modern originalism began with several goals. It sought to roll back certain Warren and Burger Court precedents, constrain judges, and defer to elected officials' policy choices absent clear constitutional violations.<sup>267</sup> Those motivations may still drive originalists, including where original meaning is unclear. Relying on practices to fill gaps in meaning may seem to them more legitimate than appealing to their own policy goals (and substantively better than relying on Warren or Burger Court precedents).<sup>268</sup> Indeed, early in the movement's history, then-Circuit Judge Scalia argued precisely that consulting "historical tradition" may be "necessary . . . to support a holding based upon the remote implications of a constitutional text" in a way that doesn't veer from "the judicial task of constitutional interpretation" into a more "political" role.<sup>269</sup>

And there is reason to think these motivations for originalism *have* played a role in leading the Court to mandate living traditionalism. *Bruen* had a natural textual basis for its outcome<sup>270</sup> but went out of its way (without originalist support<sup>271</sup>) to mandate a new test for gun laws, after lamenting that "[i]f the last decade of Second Amendment litigation has taught this Court anything, it is that" the lower courts' interest-balancing tests have been too deferential to regulations, and consigned gun rights to "second-class" status.<sup>272</sup> Another case the same Term went out of its way to reject the Burger Court's multi-factor "*Lemon* test" for

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not uncommon for courts to look to post-ratification history and tradition to inform the interpretation of a constitutional provision." Justice Barrett joined *Bruen* in full, and her concurrence explored the use of post-ratification history. See *supra* note 7. But in a more recent case, she expressed skepticism of citing "historical evidence" that comes "from the late 19th and early 20th centuries—far too late to inform the meaning of" a provision ratified in 1791. *Samia v. United States*, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in the judgment). She pressed concerns about what I have called the ratchet, asking why practices from such a "seemingly random time period" should matter more than ones "from, say, the 1940s." *Id.*; cf. *infra* note 301 and accompanying text.

<sup>266</sup> *Hous. Cmty.*, 142 S. Ct. at 1259–60 (rejecting free speech challenge to local board's censure of a member, on the ground that "elected bodies in this country have long exercised the power to censure their members," citing "20 censures in August 2020 alone").

<sup>267</sup> See Whittington, *supra* note 260 (identifying the originalist movement's early motivations).

<sup>268</sup> See, e.g., *McDonald*, 561 U.S. at 791–92 (Scalia, J., concurring) (extolling test "that makes the traditions of our people paramount" even when there are "misgivings about" it "as an original matter").

<sup>269</sup> *In re Repts. Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985).

<sup>270</sup> See, e.g., Barnett & Solum, *supra* note 21, at 20–21.

<sup>271</sup> See *supra* notes 247–56 and accompanying text.

<sup>272</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2131, 2156 (2022).

Establishment Clause cases,<sup>273</sup> in favor of a history-and-tradition test that ended up playing no crucial role in the opinion.<sup>274</sup> And it offered no originalist argument for the traditionalist element of the new test,<sup>275</sup> which seemed motivated at least as much by the sense that the *Lemon* test had “invited chaos.”<sup>276</sup>

Finally, traditions may provide a basis for an originalist-friendly Court to chip away at non-originalist precedents, and reach more originalist outcomes, without embracing originalist reasoning that might require overruling those precedents wholesale. One could read *Dobbs* and *Glucksberg* as attempts to reach outcomes thought to be favored by originalism (rejection of constitutional claims to abortion and assisted suicide), without the originalist reasoning that might have impugned other substantive due process rights.<sup>277</sup> And just three years before *Dobbs*, the Court in *American Legion* invoked tradition to uphold a religious display on public land without entirely overruling the non-originalist *Lemon* test for establishments.<sup>278</sup>

Indeed, a question worth exploring further is how much originalism is being done in major cases today—rather than traditionalism as a surrogate to achieve originalism’s goals where text is too sparse, or disfavored precedent too entrenched.

### C. *Summing Up: Guidelines for Assessment*

Has the Court’s living traditionalism been sound? I doubt the method is either justified across the board or improper across the board. And for each area of law, whether it is justified might turn on too many factors to balance responsibly in one article. But the points above, taken together, do chart a path for assessing when the method is appropriate, all things considered.

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<sup>273</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *see also* *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>274</sup> *See* Barnett & Solum, *supra* note 21, at 23–25.

<sup>275</sup> *See id.* at 23–26. While the opinion insists in an originalist vein that Establishment Clause doctrine “faithfully reflect the understanding of the Founding Fathers,” *Kennedy*, 142 S. Ct. at 2428, it also calls for consistency with “long constitutional tradition[s],” without defending the latter test as a proxy for, or as required by, original meaning. *Kennedy*, 142 S. Ct. at 2431.

<sup>276</sup> *Kennedy*, 142 S. Ct. at 2427.

<sup>277</sup> *See, e.g.*, Kevin C. Walsh, *The Elevation of Reality over Restraint in Dobbs v. Jackson Women’s Health Organization*, 25 HARV. J.L. PUB. POL’Y PER CURIAM 1, 5 (2023) (arguing that *Dobbs* moved the law in an originalist direction, if not by originalist reasoning); Michael McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 669–72 (1997) [hereinafter McConnell, *Right to Die*] (describing *Glucksberg* in analogous terms).

<sup>278</sup> *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2089 (2019).

Start with rights cases. There the main argument for consulting post-ratification practices has been that sometimes the meaning of a provision creating a right *makes* such practices a determinant of the right's scope.<sup>279</sup> From this angle, the case for living traditionalism as to each of those rights will rise or fall with traditionalists' claims about the relevant provisions' meanings. The verdict may vary from clause to clause based on reams of linguistic, historical, and other arguments specific to each text (and, of course, based on one's broader theory of constitutional interpretation)—making any general assessment impossible here. But in many rights cases, the Court has not even gestured at such support for its living-traditionalist approach.<sup>280</sup> And even where that support may exist, it is hard to be confident in the Court's implementations of the method when it has never tackled key questions about exactly which practices should get weight, and how much.<sup>281</sup>

What one thinks about living traditionalism for structural cases will depend on one's broader commitments as follows. First, probably most judges and theorists will see some (but weak) support for the method's use in that subset of cases inferring that a practice must be lawful because it's longstanding. After all, that political actors have long done something—albeit without debating its constitutionality—is *some* evidence that they thought it lawful, which is some evidence that it is. But for several reasons, this point provides only modest support for the method.<sup>282</sup> Second, for a certain kind of positivist—one who takes judicial practices to play a large role in determining the content of our law<sup>283</sup>—the sheer fact that the Court has pervasively relied on this method might render that reliance itself part of our law of interpretation, and in bounds for that reason alone. Third, those willing to justify interpretive moves in more directly normative terms may defend this method as a way to promote social utility, departmentalism, popular sovereignty, or stability.<sup>284</sup> But they would have to contend with arguments that traditionalism does not advance those values as promised.<sup>285</sup>

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<sup>279</sup> See *supra* Section III.A.2.

<sup>280</sup> See *supra* Section III.A.3.

<sup>281</sup> See *supra* notes 242–44 and accompanying text.

<sup>282</sup> See *supra* notes 101–04 and 192–202 and accompanying text.

<sup>283</sup> For an example of this approach, see notes 355–56 and accompanying text.

<sup>284</sup> See *supra* Section III.A.1.

<sup>285</sup> For instance, scholars have questioned the Burkean notion that our political traditions reflect accumulated wisdom, see Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1489 (2007), as well as the suggestion that history-and-tradition tests promote objectivity and tie judges' hands, see David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 384 (2015). Most recently, of Bruen's test for Second Amendment rights in particular, scholars have argued that its call for analogical reasoning will give effect to judges' unstated policy views, see Joseph

Finally, while such values may incline originalists toward the method, originalist judges have yet to square the method with their bottom-line commitments about interpretation.<sup>286</sup> All of this makes it, again, hard to deliver a responsible, one-size-fits-all verdict.

But it turns out that it *is* possible—and since the method is not going away anytime soon, it’s valuable—to focus on what principled consistency might require for the method’s implementation, *whatever* the constitutional issue and the argument for using traditions to resolve it. In this vein, I will argue that in all events, living-traditionalist precedents should not be entrenched as other constitutional precedents are.

It’s always a challenge to justify entrenchment of judicial rulings against democratically accountable actors.<sup>287</sup> But it’s a *special* problem for living traditionalism. For whatever one’s reason for using living traditionalism to decide a case, I will argue, it’s also a reason *not* to entrench the resulting rule (i.e., not to adhere to it when the practices that drove it change). Or as I’ve put it, living traditionalism should not be a ratchet. So for each area of law, courts face a dilemma. They can reject living traditionalism. Or they can treat its precedents differently (and what’s even harder, make room for the political practices that drove the precedents to change in spite of the precedents). Part IV elaborates on the ratchet. Part V shows that it conflicts with any plausible case for living traditionalism. Part VI shows how to avoid it.

#### IV

##### AN INTERNAL TENSION: THE RATCHET

The Court applies the ratchet if it lets practice move the case law in one direction (for a legal conclusion) but not as easily the other way (against that conclusion).<sup>288</sup> With the last Sections as context,

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Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023), and that its legal implications are indefensible, see Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

<sup>286</sup> See *supra* Section III.B.

<sup>287</sup> See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 492 (1997) (“Since the founding of the American republic, judicial review has been beset by the ‘countermajoritarian difficulty’—that is, the question of whether the democratic principle of majority rule can be reconciled with the practice of remotely accountable judges invalidating legislation enacted by electorally accountable representatives.”).

<sup>288</sup> A literal ratchet is a tool (like a socket wrench) allowing motion in one direction only. Likewise, a court uses post-ratification traditions as a ratchet when it allows them to move the case law in one direction (essentially, toward whatever position becomes its first holding on an issue), while preventing later traditions from moving doctrine in the opposite direction (against that holding). This would happen if courts allowed practices up

I can define “as easily.” As noted, in different areas, the Court requires practices to satisfy different conditions. Inter-branch power allocations must be longstanding. State protections of rights must be widespread or spreading. More specific conditions may apply. My definition of the ratchet takes these conditions into account. If practices have to satisfy a certain condition to support a holding, that holding should cease to apply as soon as new and contrary practices have satisfied the same threshold condition. To impose *extra* conditions—like the satisfaction of (other) stare decisis criteria, or the “substantial justification” that McConnell would require to upend liquidation<sup>289</sup>—is to apply the ratchet.

Concretely, suppose Barnett and Bernick are right about the Privileges or Immunities Clause: It constitutionalizes any right that a supermajority of states have protected for thirty years.<sup>290</sup> More broadly, suppose that to change the status quo under the Clause, one needs action by a supermajority of states over thirty years. So if thirty-four states treat assisted suicide as a right for decades, the Court should hold that the Clause protects access to it. This holding will then require *all fifty* states to permit assisted suicide. It will do so for as long as a supermajority of states does not come to manifest opposition to the practice for thirty years (in ways described in Part VI). But as soon as a supermajority *had* expressed opposition, the Court would have to find assisted suicide no longer protected. If the Court required extra reasons to change course, it would be applying the ratchet. Likewise for structural cases: If the Court finds an allocation of power presumptively lawful because there has been “acquiescence under it for a period of several years,”<sup>291</sup> then resistance for several years should render it suspect.

The Court seems not to notice this possible implication of living traditionalism. *Dobbs*, after relying on a chain of contingent historical facts “extend[ing] well past” ratification, declares in the timeless present that “the Constitution unequivocally leaves [abortion law] for the people.”<sup>292</sup> This phrasing does not contemplate that changed practices could later ground an abortion right. Whether or not *Dobbs*

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to 1997 to justify rejection of a constitutional claim to assisted suicide, without allowing later practice to cut the other way, in support of such a claim. *Cf.* *Washington v. Glucksberg*, 521 U.S. 702 (1997). Or if courts allowed practices up to 2012 to support Presidents’ power to make certain recess appointments, without allowing a sustained reversal in practice to deprive Presidents of that power. *Cf.* *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

<sup>289</sup> See McConnell, *supra* note 8, at 1774. McConnell requires this on top of a “process of deliberation and widespread acceptance” that is “similar” to the initial liquidation. *Id.*

<sup>290</sup> See Barnett & Bernick, *supra* note 241, at 239.

<sup>291</sup> *Stuart v. Laird*, 5 U.S. 299, 309 (1803).

<sup>292</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022).

itself entails that possibility,<sup>293</sup> does living traditionalism's logic more generally make that possible? Does it matter?

### A. *The Problem*

According to the Court, Congress has no say in recognizing foreign governments because it had not, until the 2010s, tried hard enough to have a say.<sup>294</sup> The federal government may not enlist states in enforcing its policies because it hadn't tried until the 1990s.<sup>295</sup> And *Roe* should have said states may ban elective abortion because, as of the 1970s, most states hadn't yet allowed it. But "[t]here's a first time for everything."<sup>296</sup> What's so special about the 2010s, 1990s, and 1970s? Why tolerate the costs of freezing constitutional law (there are always costs) based on practices as they existed then? This Section refines and deepens these *prima facie* concerns about the ratchet, which Part V fully develops.

To get an initial feel for the arbitrariness, consider the alternatives. At one end, originalists think the text's ratifiers have special authority that justifies courts in overriding the political choices of today's generation.<sup>297</sup> At the other end, non-originalists think today's generation has special authority that justifies courts in updating the ratifiers' choices.<sup>298</sup> For the ratifiers' authority, originalists may cite the supermajorities required for constitutional lawmaking, or the nature or positive law of our written-constitutional order.<sup>299</sup> For the current generation's authority, non-originalists may cite democratic values or the practical or moral need to adapt old rules to new circumstances.<sup>300</sup> But why see special authority in the generation existing at whatever time the Court first got to an issue that it resolved based on then-existing practices?<sup>301</sup> Maybe 1789 matters, or 1791, or 1868, or *now*—but why the 1970s, 1990s, and 2010s?

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<sup>293</sup> See *supra* note 240.

<sup>294</sup> I say "hard enough" because *Zivotofsky* conceded that the history was somewhat equivocal. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2093 (2015).

<sup>295</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>296</sup> *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012).

<sup>297</sup> See generally *Solum*, *supra* note 1 (defending special authority of ratifying generation).

<sup>298</sup> See generally STRAUSS, *supra* note 30. Eighth Amendment jurisprudence reflects this duality exactly. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 339–40 (2002) (punishments are unlawful if "considered cruel and unusual at the time that the Bill of Rights was adopted" or if contrary to modern "standards of decency").

<sup>299</sup> See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

<sup>300</sup> See, e.g., STRAUSS, *supra* note 30.

<sup>301</sup> Cf. Bradley & Siegel, *After Recess*, *supra* note 21, at 32 ("The net effect . . . would be a regime that possesses many of the 'dead hand' disadvantages of originalism but few of the [theory's] asserted upsides.").

There are formalist and functionalist ways to spell out this concern. In formalist terms, letting one Congress's practice tie another's hands can look like political entrenchment. This is something that our system is generally thought to forbid.<sup>302</sup> Functionally, post-ratification entrenchment exacerbates the costs of living under the "dead hand of the past,"<sup>303</sup> by making it even harder to change practices to meet new demands.

One might now wonder if the same arbitrariness worry would apply to judicial precedents (or their non-judicial analogues, liquidation). What's so special about the post-ratification year in which a judicial precedent first comes down? Why should that precedent be entrenched, subject only to the limits of *stare decisis*? As noted, I am assuming the conventional answer: Stability matters, and respect for precedent achieves it at a tolerable cost to soundness (and enjoys legal pedigree).<sup>304</sup> The idea isn't that the year in which a precedent comes down has special authority. It's that respecting the views of the court that resolved the issue first is usually worth the costs (of error), given the benefits (stability and settlement). Likewise for liquidation.

Thus, there is a special problem with the *practice* ratchet—it's harder to justify than adherence to erroneous *judicial* precedents—for two reasons. First, the ratchet for traditions does worse than *stare decisis* (for judicial precedents) in balancing stability and soundness. Second, there is no other adequate reason to tolerate the arbitrariness of the ratchet. I defend both points in Part V. But first I explore why the ratchet matters.

### B. *The Stakes*

Even if the ratchet is unjustified, does that matter? How much harm is done by leaving in place a court decision based on now-obsolete practices? One might think that in a democracy like ours, this would be a serious problem only if the precedent wrongly *constrained* political actors, rather than wrongly *affirming* their authority to enact the people's will on some issue. And in any event, one might think the ratchet issue practically irrelevant on the ground that it will seldom arise.

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<sup>302</sup> See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 402 (2015) ("[I]t is said to be a fundamental principle of democracy that 'governments are not allowed to bind future governments' and that a present majority cannot 'bind the hands of future decision makers.'" (internal citations omitted)).

<sup>303</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 11–13 (1980) (identifying the difficulty of explaining why current majorities should be ruled by past generations' values).

<sup>304</sup> See *supra* Section I.C.

As to the stakes of getting it wrong in each area, start with constitutional rights cases. Scholars like Kurt Lash contend that cases wrongly *affirming* a right are worse, at least for popular sovereignty. These cases steal from the people their authority to legislate (plus any public goods that the valid laws would have served). By contrast, when courts commit the opposite error—wrongly denying a constitutional right—political majorities can do something about it: They can still freely choose not to pass laws infringing the right.<sup>305</sup> Lash may be right about that much, but popular sovereignty still suffers in both cases. After all, wrongly denying a right thwarts the will of the supermajority that chose to constitutionalize it (or that chose to constitutionalize whatever rights would come to enjoy sustained protection by a supermajority of states<sup>306</sup>). More to the point, popular sovereignty is not the only value. There are also the individual and minority interests harmed by rights violations (when ever lawmakers *don't* choose of their own accord to respect a right). Thus, erroneous decisions in *both* directions have meaningful costs.<sup>307</sup>

With separation-of-powers, similarly, Lash is more concerned about cases wrongly denying power to a political branch, and so depriving the people of the ability to act through their representatives. He is less troubled by cases that wrongly affirm a power,<sup>308</sup> or wrongly deny a power to one political branch while affirming it for another.<sup>309</sup> If the people are unhappy with a branch's action, he notes, they can use votes to stop it.<sup>310</sup> What the court has done, in such cases, the people can undo.<sup>311</sup>

But here again, I think, the separation of powers is not just about popular sovereignty, about letting the people act somehow or other. *Any* error in this field will, by definition, upset the balance set by the Constitution.<sup>312</sup> And that will undercut our system's further reasons for

<sup>305</sup> See Kurt T. Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1460–61 (2007).

<sup>306</sup> The Due Process Clause does this (it constitutionalizes whatever activities would later garner enough state protection) according to the Court, *see supra* notes 230–32; and the Privileges or Immunities Clause does so, according to some originalists, *see* BARNETT & BERNICK, *supra* note 241, at 239.

<sup>307</sup> *See id.* (conceding as much).

<sup>308</sup> Cf. Bradley & Siegel, *After Recess*, *supra* note 21, at 55 (“[S]eparation of powers custom does not yield many instances of a disallowance of congressional regulation.”).

<sup>309</sup> *See* Lash, *supra* note 305, at 1455–57.

<sup>310</sup> *See infra* Section VI.B.1.

<sup>311</sup> In a similar vein, Ernest Young argues that judicial reliance on political practice in constitutional cases is most troubling when it “entrenches that practice against alteration by ordinary legal means.” Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 602–03 (2016).

<sup>312</sup> *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 (2010) (“In a system of checks and balances, [p]ower abhors a vacuum, and one branch’s handicap is another’s strength.”) (citation omitted). Here it bears repeating that the main reasons to



divvying up federal powers: to curb corruption and promote individual liberty.<sup>313</sup> As a result, the Court has held, the Constitution forbids “one branch [to] invade[] the territory of another, whether or not the encroached-upon branch approves the encroachment.”<sup>314</sup> Likewise in federalism cases, the Court has urged, “[t]he Constitution does not protect the sovereignty of States for the benefit of the States”; it “divides authority between federal and state governments for the protection of individuals.”<sup>315</sup> If states’ rights are for the people, they are not for the states “to bargain away.”<sup>316</sup>

So in structural *and* rights cases, our system sees real costs to wrong decisions either way. It thus matters in each area whether living-traditionalist cases should govern when practices change.

Of course, the point would be moot if most living-traditionalist cases also rested on factors other than tradition (like original meaning) that would compel the same outcome regardless of how traditions changed. That is surely true of some cases—but likely not many, I’ll suggest.<sup>317</sup> For living traditionalism is most common in separation-of-powers cases where there is little else to go by (given the sparse or general text). Or it’s used in rights cases where practices are unavoidable, since they’re said to be *determinants* of the right at issue. So in most cases, a change in practice could be dispositive, rendering the precedent incorrect.

One might finally object that even if it *would* be a problem if traditionalist decisions became obsolete, they *won’t*, since longstanding practices rarely change. As I’ll show next, that response is partly untrue and partly irrelevant.

### C. Examples

To make it concrete that reversals of practice matter, consider changes that have happened, are underway now, and may well come.

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consult tradition in separation-of-powers cases, according to the Court, are epistemic—i.e., to capture what other actors, and in particular the other branches, have long *thought* the Constitution demands, which is likelier to *be* what the Constitution demands. See *supra* Section III.A.1. These rationales presuppose that there is a right answer—that it is possible to get the Constitution’s balance of powers wrong.

<sup>313</sup> See *id.* at 501 (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”).

<sup>314</sup> *New York v. United States*, 505 U.S. 144, 182 (1992).

<sup>315</sup> *Id.* at 181.

<sup>316</sup> Young, *supra* note 311, at 591.

<sup>317</sup> See *infra* Section VI.A.1.

### 1. *Past: Capital Punishment and Presidential Removal*

First, longstanding practices *have* flipped. The recess appointments at issue in *Noel Canning* were absent from all but two of our first 129 years and then pervasive for the next seventy-five.<sup>318</sup> Laws curbing Presidents' authority to remove executive officers were absent from our first seventy-four years and then present for decades.<sup>319</sup> The idea that the power to recognize foreign governments requires dispatch, and so belongs in the President's hands alone, was absent from "1793 until Woodrow Wilson's presidency"<sup>320</sup> and then somehow pervasive. In the rights setting, every case holding that stable trend lines have rendered once-lawful punishment cruel and unusual are *premised* on the idea that old practices have changed.

For all we know, moreover, the cases rejecting a late twentieth-century practice for being novel might have cut off what would have been an enduring change in tradition—a change toward creating independent agencies with a single officer,<sup>321</sup> commandeering states to enforce federal policies,<sup>322</sup> compelling commerce in the name of its regulation,<sup>323</sup> and so on.

In fact, sometimes practices change and then change back, with the Court also flip-flopping, just as my case against the ratchet would urge. In 1972, Akhil Amar argued, *Furman*<sup>324</sup> invalidated scores of death penalty statutes based partly on developments in practice—that executions in recent years had “dropped to zero in America,” suggesting a “national consensus.”<sup>325</sup> But when “Congress and some thirty-five states . . . pushed back against this ruling with a new round of death penalty statutes,”<sup>326</sup> the Court gave its blessing. Abstracting as Amar does from the details (which may offer ways to technically reconcile the cases), it seems that practice led the case law one way in 1972, and the opposite way years later: no ratchet.

Second, it may be that the political practices would change more often if political actors thought that changes would reliably lead to reversal of living-traditionalist rulings. For then they would have incentives

<sup>318</sup> See *NLRB v. Noel Canning*, 573 U.S. 513, 589–90 (2014) (Scalia, J., concurring).

<sup>319</sup> See *Myers v. United States*, 272 U.S. 52, 163–65 (1926).

<sup>320</sup> Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 124 (2015).

<sup>321</sup> See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

<sup>322</sup> See *New York v. United States* 505 U.S. 144, 167 (1992) (finding that Congress is permitted to attach conditions on the receipt of federal funds”).

<sup>323</sup> See *NFIB v. Sebelius*, 567 U.S. 519, 550 (2012) (“The Constitution grants Congress the power to ‘regulate Commerce.’”).

<sup>324</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>325</sup> Amar, *supra* note 21, at 1783 n.118.

<sup>326</sup> *Id.*

to resist or manifest opposition to those rulings. Thus, widespread rejection of the ratchet could itself heighten the stakes of the issue.

Third, the unpopularity of some recent living-traditionalist cases may itself spark changes in the practices they relied on. I turn to that next.

## 2. *Present: Abortion and Guns*

The nation witnessed strong political reactions against two arguably living-traditionalist cases from the 2021 Term: *Dobbs*, which permitted elective-abortion bans,<sup>327</sup> and *Bruen*, which invalidated laws requiring people to show a special need for self-defense before getting to carry guns.<sup>328</sup> *Roe*'s reversal sparked such a backlash that of the six ensuing state referendums on abortion, all broke in favor of abortion rights.<sup>329</sup> That was true even in red states.<sup>330</sup> If the trend continues, and the ratchet is unsound, a future Court would have to choose between living traditionalism and *Dobbs*.

When *Bruen* struck down a New York law curbing the right to carry, the state responded by asserting its power to regulate under another part of Second Amendment jurisprudence. Indeed, it was another living-traditionalist part. *Heller* blessed, as presumptively lawful, certain “longstanding” gun regulations—including bans on carrying near “sensitive places such as schools and government buildings.”<sup>331</sup> This was living traditionalism since some of the “longstanding” laws did not arise until the twentieth century.<sup>332</sup> But if such long-post-ratification laws could narrow the right to bear arms, so should twenty-first-century practices—including, in this case, New York’s response to *Bruen*, which was to declare *new* “sensitive” sites where carrying would henceforth be banned.<sup>333</sup> This latest step may well be enjoined by the Court soon.<sup>334</sup>

<sup>327</sup> See *supra* notes 233–40.

<sup>328</sup> See *supra* note 247.

<sup>329</sup> See *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA (2022), [https://ballotpedia.org/2022\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2022_abortion-related_ballot_measures) [<https://perma.cc/7RNW-Y9QC>].

<sup>330</sup> See *id.* (including Montana and Kansas).

<sup>331</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (holding that the District of Columbia must permit the respondent to register his handgun and issue him a license to carry it in his home).

<sup>332</sup> See Michael P. O’Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 128–29 (2021) (explaining the history of gun prohibitions dating back to the 1960s).

<sup>333</sup> See Order, *Hardaway v. Nigrelli*, No. 22–2933 (2d Cir. Dec. 7, 2022) (addressing New York’s Concealed Carry Improvement Act, which sought to criminalize possession of a firearm in, among other things, places of worship or religious observation).

<sup>334</sup> A federal district court enjoined enforcement of several provisions of the law, but the Second Circuit stayed that injunction, pending appeal. When the law’s challengers asked the Supreme Court to vacate the Second Circuit’s stay, the Court demurred. See

But if efforts like it take hold in many states, a future Court could erode *Bruen's* holding based on *Bruen's* own rationale.

### 3. *Potential*

Finally, other changes are easy to imagine. Support for assisted suicide may grow enough that *Glucksberg's* rejection of the right would lose force.<sup>335</sup> As new family structures gain acceptance, *Michael H.*'s limitation of parental visitation rights may give way.<sup>336</sup> As people in higher education become warier of unfettered freedom for painful speech,<sup>337</sup> changing school policies may reduce the "essentiality" of academic freedom to our practices and thus (by the Court's logic) to the First Amendment.<sup>338</sup> As society becomes less religious and more diverse,<sup>339</sup> religious displays on public property may wane, calling for changes in how such displays are scrutinized under the Establishment Clause.<sup>340</sup>

In the structural context, as presidential power continues to grow, Presidents may assert the power to fire all agency heads at will.<sup>341</sup> The Court may approve of those efforts, building on several recent living-traditionalist rulings in this area.<sup>342</sup> Or, as Congress continues to be gridlocked, Presidents may assert even more power to form, say, international agreements with binding effect on other parties, absent Senate support.<sup>343</sup> Finally, in an era of renewed interest in court reform, Congress may invoke its powers to reshape the Justices' job descriptions

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Antonyuk v. Nigrelli, 143 S. Ct. 481 (2023) (Mem.). But Justice Alito filed a statement noting that the "application presents novel and serious questions" under the Second Amendment and that "[a]pplicants should not be deterred by [the Supreme Court's] order from again seeking relief if the Second Circuit does not" defend its stay or expedite consideration of the appeal. *Id.* (statement of Alito, J.).

<sup>335</sup> See Megan Brenan, *Americans' Strong Support for Euthanasia Persists*, GALLUP (May 31, 2018), <https://news.gallup.com/poll/235145/americans-strong-support-euthanasia-persists.aspx> [<https://perma.cc/8EH7-63FR>] (finding that seventy-two percent of respondents supported assisted suicide).

<sup>336</sup> See *supra* note 149.

<sup>337</sup> See Jeffrey M. Jones, *More U.S. College Students Say Campus Climate Deters Speech*, GALLUP (Mar. 12, 2018), <https://news.gallup.com/poll/229085/college-students-say-campus-climate-deters-speech.aspx> [<https://perma.cc/8UCR-3ZN3>] (reporting that sixty-one percent of college students say campus climate prevents some from expressing their views for fear of giving offense).

<sup>338</sup> See *supra* note 137.

<sup>339</sup> See *Religion*, GALLUP, <https://news.gallup.com/poll/1690/religion.aspx> [<https://perma.cc/Z2QA-XNQ2>] (showing diminishing rates of Christianity and of religiosity more generally).

<sup>340</sup> Cf. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019) (privileging, under Establishment Clause doctrine, religious monuments "with a longstanding history" that show "tolerance for differing views" and "an honest endeavor to achieve inclusivity").

<sup>341</sup> See *supra* note 118.

<sup>342</sup> See *supra* note 118.

<sup>343</sup> See *supra* notes 110–11.

or limit their impact—powers the Court has defined by reference to historical practice.<sup>344</sup>

It matters, then, whether the living-traditionalist ratchet is justified.

## V

### WHY THE CASE FOR LIVING TRADITIONALISM TELLS AGAINST THE RATCHET

The arguments for applying living traditionalism that I reviewed above—positive-law, democratic and departmentalist, evidentiary and stability-based—double as strong reasons not to entrench the result: not to keep applying the earlier case if traditions change.

#### A. *Positive Law*

Courts would be justified in applying a ratchet if positive law directed them to do so. For example, if the Eighth Amendment read, “[N]or shall punishments *once* deemed cruel and unusual be *ever again* imposed.” Or if the case law so read the Amendment. Or, in a more trans-substantive key, if our positive law of interpretation required as much.<sup>345</sup> But a look at case law and scholarship suggests that the positive law—generally and for particular provisions—cannot justify the ratchet, and indeed tells against it.

If we have a general positive law of interpretation, it will show up in Supreme Court cases, which do not support the ratchet. No opinion self-aware about consulting post-ratification practice—not Justice Frankfurter’s *Youngstown* concurrence,<sup>346</sup> not the Court’s opinion in *Noel Canning*,<sup>347</sup> not more recent treatments—tells courts what to do if practices change. As Bradley and Siegel noted of *Noel Canning*, “[T]he majority never clearly committed to . . . the possibility that constitutional meaning might change over time,” but did not deny it either.<sup>348</sup> And this

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<sup>344</sup> See *supra* notes 120–21, 127. As noted in Section II.A, one living-traditionalist case upheld Congress’s power to require Justices to ride circuit. Akhil Amar has cited that case to suggest that Congress by mere statute could impose eighteen-year limits on Justices’ active service. See Akhil R. Amar, *Testimony Before the Presidential Commission on the Supreme Court of the United States* (July 20, 2021) (testimony of Akhil R. Amar, Sterling Professor of L. and Pol. Sci., Yale Univ.). Amar contends that this would not deprive the Justices of life tenure; Congress could simply redefine their job descriptions from year eighteen of their tenure onward, to exclude the hearing of cases en banc. See *id.* at 10.

<sup>345</sup> See Baude & Sachs, *supra* note 68.

<sup>346</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

<sup>347</sup> *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

<sup>348</sup> See Bradley & Siegel, *After Recess*, *supra* note 21, at 30–31. Bradley and Siegel themselves—and sometime coauthor Trevor Morrison—think nothing in the logic of

“silence . . . is characteristic of the Court’s other decisions that have endorsed historical gloss.”<sup>349</sup> In that silence, the *prima facie* case against the ratchet, given above, should control.

Some rights cases indulge rhetoric that might suggest a ratchet—that rights should be expanded but never shrunk. In striking down sodomy laws, *Lawrence v. Texas* opined that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,” such that “[a]s the Constitution endures,” it leads to “greater freedom.”<sup>350</sup> This hints at a sort of *moral* ratchet—the expectation that each generation will see better than the last on moral matters. But of course, this idea would only reinforce the case against the ratchet that I’m addressing—adherence to rulings based on since-abandoned practices. For on the moral-progress view, the newer practices would always be better. They would always justify a legal change. *Unless* one supposed that each new generation is morally wiser only on whether to add rights, and never on whether to subtract them. But no court has defended that view.

Case law and scholarship reading *specific* constitutional provisions also provide no support for the ratchet: just the opposite. In a case defining due process based on “traditional notions of fairness,” Justice Scalia noted that if “an overwhelming majority” of states takes a new approach, the “‘traditional notions of fairness’ that this Court applies may change” in tandem.<sup>351</sup> In an Eighth Amendment case looking to the practice of “44 States” to reject capital punishment for child rape, the Court paused to consider whether the most recent thirteen years had witnessed “a consistent direction of change in *support* of the death penalty for child rape,” which could “counterbalance” the otherwise-prevalent trend of opposition.<sup>352</sup> This reflected the Court’s openness to the idea that one post-ratification trend might give way to another and require a different legal conclusion. So did a 1926 case on the power to remove executive officers under Article II. *Myers* noted that a stretch of inter-branch practice pointing one way (toward exclusive presidential power), was followed by a period of practice seeming to point the other way (giving the Senate a role).<sup>353</sup> The Court entertained the notion that this change in practice might have warranted

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reliance on gloss (post-ratification practice in structural cases) prevents changes in gloss or the rulings based on it.

<sup>349</sup> *Id.*

<sup>350</sup> 539 U.S. 558, 578–79 (2003).

<sup>351</sup> *Burnham v. Superior Ct.*, 495 U.S. 604, 627 (1990).

<sup>352</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 422, 431 (2008).

<sup>353</sup> *See supra* notes 197–98 and accompanying text.

a change in legal doctrine, and only rejected this argument for other reasons.<sup>354</sup>

True, the ratchet could be part of our law even if support for it never appeared in a case in so many words. For positivists like H.L.A. Hart,<sup>355</sup> as Richard Fallon has noted in adapting Hart's framework to constitutional adjudication, the "rules" for judging need not be "authoritatively written down" to be valid.<sup>356</sup> "What matters is that those participating in" judging "should regard their behavior as governed by" a given norm.<sup>357</sup> That is, positivists think norms can have force even if they're implicit. But implicit does not mean *absent*. Even tacit norms would have to rest on judges' actual "understandings, behaviors, and expectations."<sup>358</sup> Yet one cannot point to behavior reflecting any judge's sense of having to apply the ratchet. So there isn't even implicit support for it.

*Scholarship* urging a traditionalist reading of specific provisions also, on inspection, undermines the ratchet. According to Stinneford, the Eighth Amendment forbids punishments that have long fallen out of use, even if long after ratification.<sup>359</sup> But his reading allows that punishments might not only "fall out of the tradition" but also "become part of it"<sup>360</sup> (though the latter may have to happen gradually to evade rejection by courts at the outset<sup>361</sup>). On this view, if "an old punishment practice that falls out of usage for multiple generations" is later "revived," it should be judged "against the tradition [leading right] up to" judicial challenge.<sup>362</sup> And it should be upheld if, by gradual steps, it has "gain[ed] universal reception within the relevant legal community" for long enough since its initial rejection.<sup>363</sup> So punishments long out of use are unlawful, but not forever. No ratchet.

Similarly, scholars like Barnett and Bernick propose that an activity is protected under the Privileges or Immunities Clause if treated as a right by a supermajority of states for at least thirty years.<sup>364</sup> But neither

<sup>354</sup> *Id.*

<sup>355</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 79–99 (Clarendon Press, 2d ed. 1994) (discussing the rule of recognition).

<sup>356</sup> Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1133 (2008).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 1112.

<sup>359</sup> See John F. Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1814 (2008).

<sup>360</sup> John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 44 (2019).

<sup>361</sup> *Id.* at 43.

<sup>362</sup> *Id.* at 43–44.

<sup>363</sup> *Id.* at 51.

<sup>364</sup> See *supra* note 290 and accompanying text.

that standard nor its rationale would imply that once something is a right, it must remain a right after practices have pervasively changed.<sup>365</sup>

Just the opposite: these positivist arguments about the substance of rights-protecting provisions tell *against* the ratchet. If practices supporting a right aren't just evidence of its existence, but cause it to exist, then when those practices change sufficiently, the right no longer exists (and *vice versa*). To stick by the old practices would be like applying outdated law.<sup>366</sup>

What about structural cases, where traditionalism is not thought *required* by the Constitution's substance, but is pursued for other reasons? Do those other rationales also disfavor ratchets?

### B. *Departmentalism and Democracy*

As seen above, departmentalism and democracy are two rationales often given for traditionalism.<sup>367</sup> The former holds that nonjudicial actors (especially the political branches) have the authority and duty to interpret the Constitution for themselves.<sup>368</sup> This favors the traditionalist approach of giving weight to the practices of other branches (at least when those reflect constitutional judgments).<sup>369</sup> And traditionalism honors democratic values by having unelected judges defer to officials accountable to the voting public.<sup>370</sup> Both rationales impugn the ratchet.

As to departmentalism, recall that no President can bind a future President and no Congress can bind a future Congress.<sup>371</sup> A natural corollary is that no President's or Congress's practices should bind a future one's. Yet that would effectively happen if courts relied on current branch practices in a decision that future branches could not undo.

Likewise for democratic arguments. Those emphasize that "in a democracy," the fact that "people [have] engage[d] in practices consistently and over many years" confers on them a "political legitimacy."<sup>372</sup> Or as Justice Scalia wrote, traditionalism allows judges to track rather than displace "the society's views."<sup>373</sup> This would cease to be true as soon as the Court's traditionalist cases forbade future societies to have

<sup>365</sup> Cf. *supra* note 350 and accompanying text.

<sup>366</sup> See *infra* Section VI.A.2.

<sup>367</sup> See *supra* Section III.A.1.

<sup>368</sup> See Baude, *supra* note 4, at 35 (discussing how to think about continuity and change in the distinct but related category of liquidation).

<sup>369</sup> See Bradley & Morrison, *supra* note 21, at 434.

<sup>370</sup> See DeGirolami, *Traditionalism Rising*, *supra* note 6 (manuscript at 5).

<sup>371</sup> See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. BAR FOUND. RSCH. J. 379, 405 (1987).

<sup>372</sup> DeGirolami, *First Amendment Traditionalism*, *supra* note 21, at 1656.

<sup>373</sup> Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (plurality opinion) (citing state statutes and state court cases "in modern times" to assess substantive due process claim to



the effect that previous ones did. “If majority rule means anything, it means rule by the current majority and not by a majority of the past.”<sup>374</sup>

This also follows from constitutional theories that foreground popular sovereignty, like Jack Balkin’s and Keith Whittington’s. Both think it morally imperative to leave room for each generation to engage in “construction”—to fill in textual gaps with new “governing practices” made through “the same institutions that participate in ordinary politics.”<sup>375</sup> By this logic, it would be illegitimate for a previous generation’s ordinary politics to override today’s, as per the ratchet.

The impropriety of the ratchet follows even more clearly from theories most gripped by the counter-majoritarian difficulty. Concerns about judges overruling majorities “are particularly strong when both political branches share a view that is different from the judiciary’s and have held that view for a long time,” as would happen if political traditions, once cited by courts, could never take the case law in a different direction.<sup>376</sup>

In a similar vein, common-law (living) constitutionalist David Strauss thinks it is “hard for anyone who believes in self-government to come up with an explanation for why long-ago generations should have such a decided effect on our law today, whether they are the generation of the Founding, or the Civil War, or any other.”<sup>377</sup> But that is *especially* true for generations that cannot even claim the *apparent* authority of having gone through the rigamarole of constitutional amendment.

Would the ratchet be justified if one went by the numbers? If “the judgments of many people, extending over long periods, deserve respect” as being, “in a sense, votes[,]”<sup>378</sup> one might suppose that old traditions should override today’s practices because they reflect more votes. Chesterton said that “tradition means giving votes to the most obscure of all classes, our ancestors.”<sup>379</sup> If they outnumber us, majority rule means that tradition trumps. It’s not that past actors count for more, but that there are more of them to count.

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parental visitation rights brought by the biological father of a child born to another man’s wife).

<sup>374</sup> David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 533 (1999).

<sup>375</sup> JACK BALKIN, *LIVING ORIGINALISM* 113, 297 (2011); *see also* KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 11–12 (1999).

<sup>376</sup> *See* Bradley & Siegel, *After Recess*, *supra* note 21, at 50.

<sup>377</sup> David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1719 (2003).

<sup>378</sup> SUNSTEIN, *supra* note 152, at 111.

<sup>379</sup> G.K. CHESTERTON, *ORTHODOXY* 85 (1908) (questioning how modern Christian traditions have come to be believed).

But this theory, too, cannot support a general privileging of the past. Even if a decision has had continual support since the Founding, a new one might have as much or more support if things change today and the Republic lasts for several more generations.<sup>380</sup> In that case, entrenching a practice-based ruling today would discount the “votes” of perhaps hundreds of years’ worth of future Americans. In other words, if tradition is “the democracy of the dead,”<sup>381</sup> and living traditionalism is the rolling democracy of the dead and living, the ratchet closes the polls at an arbitrary point.<sup>382</sup>

### C. *Evidentiary Value*

As noted above, the Supreme Court sometimes suggests that traditions are evidence of the best reading of the constitutional text, or of something else that the text may make relevant. By far the most common defenses of traditionalism in this epistemic vein are those traced to Burke or Hayek.<sup>383</sup> Burke stressed that traditions may reflect the wisdom of the ages, the accumulated judgments of many minds over time and space.<sup>384</sup> It would thus be hubris for us to override traditions too quickly, and hard to improve upon them by directly applying our limited reason. Hayek, for his part, thought traditions represent the survival of the fittest for practices: their longevity suggests social utility.<sup>385</sup> The first argument takes tradition as evidence of the answer to a question, the second as evidence of the best course of action.

On a Burkean note, the common law put special stock in precedents implementing “principles of the unwritten law” that “could be derived by reason” and were no more accessible to one generation than another.<sup>386</sup> The idea was that the more people acted on the belief that *X* is true, the likelier *X* was to *be* true. Thus, if *X* supported a legal

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<sup>380</sup> Thanks to population growth, it would take much less than another 235 years for a new practice to have more supporters than the old one had gotten from the Founding until today.

<sup>381</sup> CHESTERTON, *supra* note 379, at 53.

<sup>382</sup> At most the “count the votes” argument favors a tweak to my rejection of the ratchet. I have argued that new practices should begin to control interpretation as soon as they are as prevalent as the old ones had to be in order to control. This argument suggests the new practices must wait until they enjoy as much support as the old practice *ever* did.

<sup>383</sup> See e.g., Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1814 (2015).

<sup>384</sup> See SUNSTEIN, *supra* note 152, at 34–59.

<sup>385</sup> For a discussion of related views, see Bradley & Siegel, *Historical Gloss*, *supra* note 21, at 23. But Hayek appreciated that traditions are not always reliable indicators of what is socially valuable. See F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 88–89 (1973).

<sup>386</sup> Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 34 (2001) [hereinafter Nelson, *Stare Decisis*] (discussing the tension between stare decisis and originalism).

position, so would the widely shared practice. For instance, the Eighth Amendment makes the lawfulness of punishments hinge on relative culpability.<sup>387</sup> Suppose culpability is a matter of timeless moral truths that earlier generations had as much access to as we have. Then our forebears' judgments about culpability would be some evidence of the *truth* about who deserves what punishment. So historic punishment practices would be evidence of what the Amendment requires.

But then the ratchet would make no sense. Earlier generations are “no less self-serving and potentially short-sighted than later generations,” so there would be no reason to privilege beliefs and practices relevant to a constitutional issue that were prevalent “whenever the issue first arose.”<sup>388</sup> Indeed, the greater the number of people whose practices are taken into account, the better.<sup>389</sup>

One might object that there are diminishing epistemic returns—that at some point, we should cut off the process and entrench whatever doctrine emerges from practices then in place. But maybe not. The larger the group, the likelier it is to overcome the distorting effects of informational cascades—intellectual “fads and fashions” in which most people came to accept the dominant view by imitation, not independent judgment.<sup>390</sup>

Besides, if a question of legal relevance turns on shifting empirical facts (not timeless principles), later generations are *better* positioned to answer it. First, empirical knowledge grows. For example, the effects of solitary confinement were not as clear decades ago as they are now.<sup>391</sup> If those effects are relevant to the punishment's lawfulness, then its early use is outdated evidence. Second, with time the legally relevant empirical facts themselves change. Many argue that the Commerce Clause gives Congress whatever power it needs to regulate activities with spillover effects on other states.<sup>392</sup> If so, then the scope of that power grows as the economy becomes more interdependent. The Congress of 2012 could have the power to mandate the purchase of

<sup>387</sup> See *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

<sup>388</sup> Bradley & Siegel, *After Recess*, *supra* note 21, at 32.

<sup>389</sup> Formal support for this intuitive point can be found in Condorcet's Jury Theorem, which says that the larger the group of independently reasoning people, the better its odds of getting the right answer, so long as individuals are each more than fifty percent likely to do so. See SUNSTEIN, *supra* note 152, at 101. And if most people have less of a chance than that, the issue probably isn't apt for traditionalist resolution to begin with.

<sup>390</sup> *Id.* at 104–05.

<sup>391</sup> For a summary of recent findings, see, for example, Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 622 (2008).

<sup>392</sup> See, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1–2, 32 (2010).

health insurance even if the Congress of 1789 did not.<sup>393</sup> So the lack of a pre-2012 tradition of Congresses mandating such purchases should not, as the Supreme Court thought, undermine Congress's claim to have that power in 2012.<sup>394</sup> More generally, practice in 2012 is better evidence of the legally relevant facts than practice in 1789 because the relevant facts have changed. When old practices become obsolete in this way, the ratchet transfers power from the current generation to ones long dead—"from those who possess the best possible means of information, to those who, by their very position, are necessarily incapacitated from knowing anything at all about the matter," as Bentham put it.<sup>395</sup>

I've noted that a second epistemic rationale for traditionalism is not Burkean but Hayekian. It supposes that traditions reflect the most *socially useful* practices—that a practice would not have survived so long if it were not expedient.<sup>396</sup> This justification echoes "great common lawyer[s]" like "Sir John Davies," who wrote that custom takes hold when and because "a reasonable act once done is found to be good and beneficial [sic] to the people."<sup>397</sup> And while this rationale may urge courts to wait for a new practice to take root before making it the basis for new judgments,<sup>398</sup> it still tells against the ratchet—i.e., ruling based on the old practice even when the new one has satisfied all the same conditions as the old one did to get judicialized. After all, what is socially optimal may change over time, as Hayek acknowledged,<sup>399</sup> and traditions may catch up to reflect the new optimum. It is no different in biology: "The fittest" who survive are a moving target, indexed to each era. The creatures fittest in the Pleistocene era are not today's fittest, who are not tomorrow's. The ratchet would prevent fitter practices from spreading over time.

#### D. Stability

The foregoing arguments assume that a given tradition might have merit based on its content, which is taken to have evidentiary value. But as I have noted, *Noel Canning* and other cases also

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<sup>393</sup> See Akhil Reed Amar, *How to Defend Obamacare*, SLATE (Mar. 29, 2012 4:07 PM), <https://slate.com/news-and-politics/2012/03/supreme-court-and-obamacare-what-donald-verrilli-should-have-said-to-the-courts-conservative-justices.html> [<https://perma.cc/5E3N-J68H>].

<sup>394</sup> See *supra* note 119.

<sup>395</sup> JEREMY BENTHAM, *BENTHAM'S HANDBOOK OF POLITICAL FALLACIES* 55 (Harold A. Larrabee ed., 1952).

<sup>396</sup> See SUNSTEIN, *supra* note 152, at 107.

<sup>397</sup> McConnell, *Right to Die*, *supra* note 277, at 683 (citation omitted).

<sup>398</sup> See *id.* at 685 (explaining how traditionalism urges courts not to "leap in and attempt, prematurely, to resolve the issue or to accelerate the pace of change").

<sup>399</sup> See F. A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 88–89 (1973).

give a content-*independent* argument for deciding cases based on post-ratification traditions: The sheer fact of a tradition's existence (*whatever* its content)<sup>400</sup> may mean that a court's rejection of it would be destabilizing.<sup>401</sup> Does that rationale for deciding cases in a living-traditionalist fashion, also support *entrenching* such cases even when traditions have changed? Does it support the ratchet? I think it does not. In showing why, I will assume that stability matters because it serves reliance interests, and that the reliance values that lead courts to take their cues from political traditions are the same as those that drive courts' adherence to judicial precedents.<sup>402</sup> So I will draw on *stare decisis* doctrine's conceptions of reliance, which come in two varieties: one narrow, one broad.<sup>403</sup>

First, in the narrow sense, reliance interests arise when rulings "encourage . . . costly investments—of money, time, talent, and other resources—that we otherwise would not have made."<sup>404</sup> That is most common in connection with "property and contract rights,"<sup>405</sup> "where advance planning of great precision is most obviously a necessity"<sup>406</sup> and legal changes might reduce a past investment's value. Similarly, people and officials may order their affairs around political traditions. But even if this sort of reliance strongly favored courts' resolving new questions based on political traditions,<sup>407</sup> it would not support the ratchet, for three reasons.

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<sup>400</sup> See KOZEL, *supra* note 70, at 116 (describing reliance-based arguments as "a reason for upholding [a precedent] regardless of the precedent's rule of decision, much as a precedent's procedural unworkability is a reason for revisiting it no matter its substance").

<sup>401</sup> See Bradley, *Doing Gloss*, *supra* note 21, at 67.

<sup>402</sup> See West, *supra* note 21, at 1478 ("[I]f liquidation is a form of extra-judicial precedent, then . . . the principles that justify departing from *judicial* precedent might help us understand whether a provision's meaning should be de-liquidated.").

<sup>403</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276–77 (2022) (describing "traditional" reliance interests and "a more intangible form of reliance" discussed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). While *Dobbs* described these two senses only to repudiate the second, I will assume here that both are relevant.

<sup>404</sup> Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1054 (2013).

<sup>405</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.").

<sup>406</sup> *Dobbs*, 142 S. Ct. at 2276 (internal citation omitted).

<sup>407</sup> It is not clear that reliance *does* give judges strong reason to base their holdings on political traditions. In separation-of-powers cases, Bradley and Siegel note, branches can often adjust to new allocations of power, and the de facto officer doctrine limits harm to third parties. Bradley & Siegel, *After Recess*, *supra* note 21, at 48; see also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (declaring legislatures' reliance "not a compelling interest for *stare decisis*"); West, *supra* note 21, at 1478 ("Congress generally lacks the personal and business interests that allow private parties to stake a claim of reliance."). Even in rights cases, the reliance argument for traditionalist adjudication is

First, to apply the ratchet is not to stick to traditional practices. It's to stick to practice-based *precedents*, when the underlying practices have flipped—and flipped to become as longstanding, or widespread, as the old set had to become in order to support the earlier ruling. The ratchet means continuing to insist with *Glucksberg* that there is no right to assisted suicide when the vast majority of states, over several generations, have switched to recognizing one, making such a right well and truly “deeply rooted” in the nation’s traditions.<sup>408</sup> The ratchet means letting the President go on making the recess appointments once blessed in *Noel Canning*, after most Presidents have abandoned the practice or most Senates have resisted them over decades (e.g., by adopting resolutions or stripping appointees’ salaries).<sup>409</sup> In each case, the relevant actors have pervasively flipped (or openly tried to flip) traditions. So people will have had ample notice that the tradition-based law may change. And notice alleviates reliance concerns.

Second, the actors leading the charge in these changes will be politically accountable—Presidents, Congresses, state or local officials. And compared to federal judges, those actors are both more incentivized, and more institutionally capable and competent, to take measures to mitigate harm to anyone who had relied on the older practices.<sup>410</sup> In fact, a leading theorist of the reliance case for respecting judicial precedent has argued that *stare decisis* is a norm for judges but not for lawmakers precisely because judges are in the worse position “to mitigate the effects of any reliance interests that have accrued due to their passed [sic] decisions.”<sup>411</sup> But this is not a concern when the judges are just following the politicians’ lead. Those scenarios are much more like ones in which lawmakers have changed the rules—scenarios governed by nothing remotely like *stare decisis*.

Third, as people’s expectations are shaped by the new direction taken by political actors, reliance interests could be harmed by *failures* to update the law. In *Golan v. Holder*,<sup>412</sup> the Court held that Congress may grant copyright protection to work previously in the public domain, because it had long done so.<sup>413</sup> But suppose Congress for an equally long period now abstains from doing that, out of a sense of fairness to those who had come to use those works. Over time, people will come to

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weak because most of the cases decided based on post-ratification practices do not affect the contract or property rights that create reliance in this narrower sense.

<sup>408</sup> See *supra* notes 230–32 and accompanying text.

<sup>409</sup> See *supra* notes 159–60 and *infra* note 494 and accompanying text.

<sup>410</sup> Levin, *supra* note 404, at 1058–60.

<sup>411</sup> *Id.* at 1058.

<sup>412</sup> 565 U.S. 302 (2012).

<sup>413</sup> See *supra* note 116.

rely even more on the works' ongoing availability. If an outlier Congress later reverts to taking them out of the public domain, the Court's approval of that—its sticking to *Golan*, despite the intervening change in practice—would *harm* reliance.

These points also show that the ratchet would not serve reliance interests in the second, broader sense identified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>414</sup> *Casey* focused on interests that arise whenever “people . . . have ordered their thinking and living around” the existence of a holding and the activities that it enables.<sup>415</sup> This notion of reliance seems most relevant to individual rights (like abortion, as in *Casey* itself). But by the time the ratchet becomes a question in such cases, wide swathes of society have *reordered* their thinking and living on the issue—again, in a widespread fashion, and with their representatives (not federal judges) leading the way. So, reliance in this sense is no argument for the ratchet, for the same reasons as above.

## VI

### AVOIDING THE RATCHET

Practice-based rulings should not control future cases, under ordinary *stare decisis*, when practices have flipped. That leaves three options: (1) abandon practice-based rulings; (2) write them so that they stop controlling future cases when practices have flipped; or (3) modify *stare decisis*.

The second and third options would retain living traditionalism but avoid the ratchet. Option (2) would do so *ex ante*, by making practice-based holdings conditional (contingent on practices not changing too much). In that case, once practices have changed, the precedent would be superseded; overruling it (and applying the usual analysis to decide *whether* to overrule) would be unnecessary. At that point even lower courts would be able to ignore the precedent, without waiting for the Court's later say-so. As I will suggest, this may be the most appropriate course of action in most rights cases. Finally, the last option would avoid the ratchet *ex post*, by adopting special rules for applying *stare decisis* analysis to living-traditionalist precedents—rules that make certain changes in practice a sufficient basis for overruling, regardless of the other factors usually consulted in *stare decisis*. This approach may make the most sense for structural cases, though it could also be used in rights cases. One way or the other, courts would be rejecting continuing

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<sup>414</sup> 505 U.S. 833 (1992).

<sup>415</sup> *Id.* at 856.

reliance on living-traditionalist precedents when our political traditions have changed.

The need for this updating will not be limited to precedents that rested *entirely* on living traditions. Even if a case cited other factors, too—like judicial precedents—its analysis will have *turned* on certain traditions if bracketing or varying them would have changed the court's legal conclusion. (A ruling can have many but-for causes.) That is likely true of most of the dozens of cases I have identified.<sup>416</sup> And whenever it is—whenever living traditions have made a difference to a precedent—courts should regard the precedent as superseded, or overrule it, when new traditions take hold.

Both tacks, though implemented by courts, would have to be paired with a resolve on the part of other actors to manifest any rejection of practice-based holdings in ways that courts could take account of when the issue next arose in litigation. I will address how to do that in Section VI.B—after assessing in Section VI.A the pros and cons of the three strategies for reducing the ratchet. As the whole discussion will show, the merits of each approach are mixed. None allows living traditionalism, as implemented, to live up fully to the rationales for adopting it.

### A. Courts

Of the courts' three options—to curb living traditionalism, conditionalize precedents, or modify *stare decisis*—the first is hard to pull off in some contexts. The second is more feasible, and better aligns with the concerns that motivate living traditionalism, but just for rights cases. And it has collateral costs. The third works more widely—including in structural cases—but less effectively from the perspective of the living traditionalist.

#### 1. Curb Living Traditionalism

Avoiding living traditionalism is not always feasible. True, sometimes the appeal to practice is icing on the cake. That is likely so when the Court says only that a longstanding practice is “not . . . to be lightly cast aside”<sup>417</sup> but makes other arguments that would seem sufficient.<sup>418</sup> Or when it says that “settled practice” only “confirms” what other tools

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<sup>416</sup> See *infra* notes 421–33 and accompanying text.

<sup>417</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970).

<sup>418</sup> Relatedly, Chief Justice Marshall in *McCulloch v. Maryland* cites liquidation supporting Congress power to charter the bank but then denies that “were the question entirely new, the law would be found [unconstitutional],” and then gets down to first principles. 17 U.S. 316, 402 (1819).



“strongly suggest.”<sup>419</sup> Or when it cites a practice lasting “from 1791 to the present,” without separating the force of later practice (living traditionalism) from early practice’s echo of original meaning (originalism).<sup>420</sup>

But it will be harder to drop traditions from cases where the constitutional text is so threadbare, purpose so obscure, and ratification debates and case law so light, that there is little else to cite. Many separation-of-powers cases seem like that. In *Midwest Oil Company*,<sup>421</sup> the Court did not even try to “consider whether, as an original question,” the President could bar development of lands that Congress had put up for private sale.<sup>422</sup> And unless the Court were to make a rare, bald appeal to policy considerations unadorned by any support in legal sources or history,<sup>423</sup> it is hard to imagine what factors it could have cited *besides* the very practice whose “validity” was, as the Court sheepishly admitted, “the subject of investigation.”<sup>424</sup> In *Chiafalo v. Washington*,<sup>425</sup> the Court arguably bucked the Founders’ expectations,<sup>426</sup> and the natural meaning of “electors” (suggesting discretion), to let states bind presidential electors, based on longstanding practice.<sup>427</sup> And in *Garamendi*, the Court’s task was to search Article II for the President’s power to use executive agreements (not treaties) to settle claims against foreign corporations (not nations).<sup>428</sup> It relied on practice and precedents citing practice.<sup>429</sup> Here, too, alternatives are hard to come by.

It would be not only hard but impossible to omit practices from discussions of individual-rights claims where practice is not just evidence

<sup>419</sup> *Evenwel v. Abbott*, 578 U.S. 54, 73 (2016).

<sup>420</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>421</sup> 236 U.S. 459 (1915).

<sup>422</sup> *Id.* at 469.

<sup>423</sup> Policy arguments are of course not uncommon in judicial opinions, but it is rare to find them without any other consideration, even in some of the least originalist-seeming decisions. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2370–85 (2015).

<sup>424</sup> *Midwest Oil Co.*, 236 U.S. at 473. Another option would be to defer to the politically accountable actor every time. But that would effectively mean the upholding of any assertion of presidential or congressional power not clearly excluded by the text—i.e., the collapse of traditionalism about structure into Thayerian deference, see JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 18 (1893) (urging resolution of doubts about the constitutionality of political action in the political branches’ favor); and it would be of no use where the question is the allocation of power *between* the political branches (as in *Zivotofsky*); or between elected federal and elected state officials (as in *Printz v. United States*, 521 U.S. 898 (1997)).

<sup>425</sup> 140 S. Ct. 2316 (2020).

<sup>426</sup> The Court admitted it was flouting the expectations of Hamilton and Jay, assumed it might be flouting other Founders’, too, and said that was not what mattered. *Id.* at 2326.

<sup>427</sup> *Id.* at 2326–28.

<sup>428</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

<sup>429</sup> *Id.* at 415.

of a right, but *constitutive* of it. Thus, the Court says, there is a right to cohabitation with relatives because that cohabitation is common;<sup>430</sup> no right to abortion because states had long banned it;<sup>431</sup> a right to use handguns because that is the weapon most people use today;<sup>432</sup> no right to obscene speech because obscenity was long regulated.<sup>433</sup> For any of these decisions to avoid any mention of practices would be to change the subject.

It is no wonder that living-traditionalist decisions are themselves so pervasive in our history, common today, and authored or joined by Justices of all stripes. The prospects for eliminating them entirely are dim.

## 2. *Conditionalize Precedent (in Rights Cases)*

The ratchet is the persistence of a precedent's legal conclusion when the practices driving it have changed. So courts can avoid the ratchet by making their conclusions contingent on the practices *not* changing. That seems especially apt in rights cases, where practices are thought to constitute the law that is being interpreted by the precedent, so that a change in practice would make the precedent obsolete: superseded by political developments.

For example, on one reading, *Dobbs* says that *Roe* should have rejected constitutional claims to abortion based on the prevalence of abortion bans up to 1973.<sup>434</sup> This alternate-universe *Roe* (call it *alt-Roe*) could have preemptively avoided any ratchet effect by declaring that its holding would cease to govern once “*n* states had allowed/protected abortion thus.”<sup>435</sup> That way, if *n* states came to protect abortion, *alt-Roe* would be no obstacle to a future Court's—or, for that matter, lower courts'—*affirming* an abortion right. It's not that there would now be a good case for overturning *alt-Roe*, but that overturning would be unnecessary. *Alt-Roe*'s holding would by its own terms have ceased to apply.

The reason that this approach might make sense for living-traditionalist *rights* cases is simple. If it is true that practices aren't just evidence of the right but bring it into or out of existence, then sticking to a holding based on obsolete practices would be like applying outdated

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<sup>430</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

<sup>431</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252–53 (2022).

<sup>432</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

<sup>433</sup> *United States v. Stevens*, 559 U.S. 460, 468 (2010).

<sup>434</sup> See *supra* notes 233–40 and accompanying text.

<sup>435</sup> To say just how to fill in the details, one would need more specificity from the Court on what suffices for substantive due process protection. See *supra* notes 242–44 and accompanying text; see also *infra* note 445.

law. For in this tight dependence on other legal practices, traditionalist rights cases are like cases “divining customary international law from the established practices of many states,” or those “determining the general common law in the period before *Erie*.”<sup>436</sup> And no one doubts that federal court holdings interpreting these other bodies of law would simply lose relevance once the other bodies of law had changed. Why then should changes in underlying state practice not render a constitutional rights case obsolete? As Justice Scalia once noted in another connection, “[t]here is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change.”<sup>437</sup>

Another possible analogue is statutory cases. Suppose the Court interprets a statute today, and Congress amends the statute in material ways. The Court’s initial decision will no longer control future cases. It isn’t that the first case should be overruled, but that overruling is unnecessary. For example, *General Electric v. Gilbert* held that pregnancy discrimination in employment was permitted under the Civil Rights Act of 1964.<sup>438</sup> When Congress in 1978 amended the Act to ban such discrimination,<sup>439</sup> lower courts could immediately start imposing liability for that discrimination. They did not need to wait for the Court to overturn *Gilbert*, which applied only so long as the Act remained as it had been (in relevant part) in 1974.<sup>440</sup> Since 1978, *Gilbert* has simply not governed new discrimination claims.<sup>441</sup>

The present proposal for reducing the tensions of the ratchet is to make living-traditionalist rulings like statutory cases: Write them to cease to govern new cases when the traditions have changed.<sup>442</sup>

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<sup>436</sup> McConnell, *Right to Die*, *supra* note 277, at 696 n.141.

<sup>437</sup> *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting).

<sup>438</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976).

<sup>439</sup> See Civil Rights Act of 1964, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

<sup>440</sup> For an early case recognizing this, see *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900, 902–03 (1979).

<sup>441</sup> One might object that courts are free to ignore superseded statutory precedents only because Congress has constitutional authority to change statutory law, whereas courts have no similar basis for ignoring obsolete living-traditionalist precedents. But they arguably do. By *Glucksberg’s* logic, the Fourteenth Amendment gives states a kind of ability to change substantive due process law. So in both settings, practices that form a predicate for a judicial holding can change in ways that sap the holding of any force.

<sup>442</sup> For a detailed account of how courts might write “doctrinal sunsets” into precedents whose reasoning renders their holdings contingent on the persistence of certain “legislative facts,” see David Schraub, *Doctrinal Sunsets*, 93 S. CALIF. L. REV. 431 (2020). For a prominent case that came close to setting such a sunset, see *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (expressing the “expect[ation] that 25 years from now, the use of racial preferences” permitted in that case “will no longer be necessary to further the interest approved today”); see also *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2165–66 (2023) (emphasizing *Grutter’s* expectation about

One potential objection is that importing this conditionality into living-traditionalist cases might create too much uncertainty. After all, it's easy to tell when a statute has been amended, making a statutory case obsolete. Whether a "tradition" has changed is harder to say. That depends on fuzzy criteria—for example, whether enough states for enough time have gone far enough in protecting a right. Perhaps, then, it should fall to the Supreme Court to tell us when those rulings have changed, just as it falls to the Court to say when the foundations of any other precedent have been eroded.<sup>443</sup>

But if the uncertainty is greater here, it differs only in degree, not in kind. After all, in many statutory cases, too, it has been unclear whether the underlying statutes had changed in material ways.<sup>444</sup> A fortiori, one imagines, for cases interpreting not a single statute but a whole body of cases from another jurisdiction (state common law) or set of jurisdictions (international law). Yet the uncertainty of discerning material changes there doesn't lead us to say that cases in those areas remain good law until the Court itself overrules them. Perhaps it shouldn't here either.

And if treating obsolete rights cases as superseded would force the Court to be more specific about what it takes for a right to be deeply rooted (or uprooted), all the better.<sup>445</sup> The answers might involve some artificiality and arbitrary line-drawing, but the lines are being drawn one way or the other (especially in Eighth Amendment cases, which have involved very fine parsing of trends<sup>446</sup>). This approach would only increase transparency. And making it clear to the states what it would take for something to become a right would in turn make this body of law more efficiently serve the democratic values that motivate traditionalism in this area.<sup>447</sup>

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timing, in the course of holding a race-based affirmative action policy unlawful some "[t]wenty years" after *Grutter*).

<sup>443</sup> See *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

<sup>444</sup> See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991) (describing a complex and dynamic process of contestation over when and how congressional action has superseded the Court's statutory precedents).

<sup>445</sup> As noted, its positive criteria have been sparse. See *supra* note 242–44 and accompanying text. Most recent cases have denied, not affirmed, an unenumerated right, and on the easy-to-spot ground that the conduct at issue was massively regulated. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 711, 719–21 (1997) (denying an unenumerated right to assisted suicide, since states had long criminalized it).

<sup>446</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002).

<sup>447</sup> See *supra* Section V.B.

But there is also a second way forward: to deal with obsolete rights cases using the main approach that I think courts should take to obsolete *structural* cases. This approach would reduce the tensions between living traditionalism and the ratchet, while leaving it to the Court to say when new practices have overtaken a traditionalist precedent. And it would apply whether the living-traditionalist case had cited practice for evidentiary *or* constitutive reasons, in structural *or* rights cases.

### 3. *Modify Stare Decisis (Mainly in Structural Cases)*

A Court hoping to reduce the ratchet could adjust its stare decisis analysis in cases revisiting a living-traditionalist precedent based on new practices.<sup>448</sup> Under the standard analysis, courts revisiting a precedent count the poorness of its reasoning; its erosion by changes in law or fact; the unworkability of its doctrine or disruptiveness to other areas of law or other harms; and how much reliance it has induced.<sup>449</sup> Critically, there is no lexical priority among these factors. It is not a “purely mechanical exercise” to “weigh and balance all of those competing considerations,” so judges often “disagree” about how to do so “in a given case.”<sup>450</sup>

The proposal floated here is that the Court adopt a lexical ordering for some cases—those revisiting a living-traditionalist case whose underlying practices have changed. Perhaps that change in practice should suffice to justify (and compel) the case’s overruling, or at least presumptively do so.

To begin with, note that changes in the practices behind a living-traditionalist ruling may resemble the “changes in law” or “changes in fact” factors of ordinary stare decisis. The latter include real-world developments that negate a precedent’s “premises of fact,” making its “holding somehow irrelevant or unjustifiable in dealing with [an] issue.”<sup>451</sup>

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<sup>448</sup> There is precedent for modifying horizontal stare decisis “by the subject matter of the precedent.” Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1713 (2013). Under the Court’s current approach, “[s]tatutory precedents receive ‘super-strong’ stare decisis effect, common law” less, and “constitutional cases” the least. *Id.* (collecting cases). In a closer analogy to my proposal, some scholars have proposed demoting precedents based on features of their reasoning, like the influence of improper motives. See Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013).

<sup>449</sup> See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410–16 (2020) (Kavanaugh, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Justice Thomas takes a different approach. See *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (stating a commitment to overruling demonstrably erroneous precedents regardless of reliance or other stare decisis factors). But I will focus on the majority approach since it reflects what the Court (officially) does now, and my topic is whether the Court’s current approach to entrenching precedent should apply to living-traditionalist ones.

<sup>450</sup> *Ramos*, 140 S. Ct. at 1415–16 (Kavanaugh, J., concurring).

<sup>451</sup> *Casey*, 505 U.S. at 855.

The factual changes have not just *revealed* a decision's incorrectness but may have *rendered* it incorrect or irrelevant going forward. Randy Kozel cites *FCC v. Pacifica*, which held television broadcasters liable for broadcasting indecent speech partly because their broadcasts were uniquely pervasive<sup>452</sup>—a premise rendered false by later technology.<sup>453</sup> Well, changes in political practices, too, may render a previous holding unsound—as when states' abandonment of a once lawful punishment *makes* it cruel and unusual.

Alternatively, if changes in practice reflect political actors' new *understanding* of some legal question (e.g., about separation of powers), they can be assimilated to the "changes in law" factor of stare decisis analysis. That factor gives weight to doctrinal developments that leave a precedent exposed as out of place in the current legal landscape. The idea is that the doctrinal changes have not *made* the precedent unsound, but have shown that it was wrong all along. If doctrinal developments effected by judges can do that, so can political developments wrought by other officials. One way or the other, changed practices may matter to stare decisis analysis for a mix of the reasons that the changed facts and changed law have mattered.

But of course, typical stare decisis analysis treats these as only two factors among others, which could be outweighed in a given case.<sup>454</sup> Why, then, do I propose that such changes should *suffice* to justify reversing any precedent that happens to be living traditionalist? Why should workability, reliance, and other factors not *also* matter? In short, I think the reasons for weighing those extra factors in ordinary stare decisis analysis do not apply here.

As a preliminary matter, note that the goal of the typical analysis is to see if the benefits of overruling outweigh the costs.<sup>455</sup> There are always *some* benefits: all the reasons to get a case right. The costs are harms to consistency, predictability, and reliance.<sup>456</sup> But notice that these latter values are just the instrumental benefits of traditionalism canvassed above—which *avored* overruling cases based on since-abandoned practices.<sup>457</sup> So with living-traditionalist rulings based on obsolete practices, there will be benefits to overruling, and few costs.

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<sup>452</sup> 438 U.S. 726, 748–51 (1978).

<sup>453</sup> KOZEL, *supra* note 70, at 112.

<sup>454</sup> *See Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring).

<sup>455</sup> *See id.* (stating stare decisis demands a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other") (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944)).

<sup>456</sup> *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

<sup>457</sup> *See supra* Section V.D.

The stare decisis balance will usually tip toward overruling; going through the analysis may be unnecessary.

More to the point, even if the typical stare decisis scale in a given case *would* tip toward affirming the living-traditionalist precedent, affirming may still be unjustified. The stare decisis “scale” tells us that demanding a special justification to overrule—refusing to overrule for ordinary error—strikes the right balance between getting the law settled and getting it right.<sup>458</sup> But the scale was always calibrated on the assumption that the precedent being weighed would reflect another actor’s effort *simply* to get the law right.<sup>459</sup> And that assumption breaks down when the precedent rests on practices that are not liquidations—practices that do not reflect anyone’s effort to debate and answer the legal question.<sup>460</sup> So in this context, a judge needn’t discount her impression that the precedent is unsound, out of deference to others’ conclusions about that. And the argument for requiring a *further* justification before overturning a case weakens accordingly. Hence the appropriateness of treating one thing, the change in practice, as a sufficient basis to overrule.

### B. *Everyone Else*

Suppose the courts stand ready to revise living-traditionalist precedents, or hold them inapplicable, when the underlying practices have flipped. How, practically speaking, *could* practices flip? Wouldn’t the living-traditionalist precedents themselves stand in the way?

One thing is worth noting at the outset. If political practices matter because they reflect the will of the people or other branches, then practices should count for less to the extent that they were compelled by courts. Thus, even if living traditionalism is the right approach to determining if there is a constitutional abortion right, *Dobbs* was right not to look to the states’ practices regarding abortion immediately after *Roe*. For the states’ permission of abortion at that point had been, of course, compelled by the Court.

This raises the question how traditions could *ever* change in the teeth of a contrary precedent. There are several overlooked possibilities, though none offers courts as pure an indicator of the people’s will regarding an issue as those that are available before courts have intervened.

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<sup>458</sup> See KOZEL, *supra* note 70, at 9 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)) (identifying this balancing as the enduring characterization of scholarly and judicial defenses of stare decisis).

<sup>459</sup> See *supra* Section I.C.

<sup>460</sup> See *supra* Section I.C.

## 1. *Easy Options*

First, the Constitution generally doesn't bind private actors, so holdings based on the people's conduct won't hinder change.<sup>461</sup>

Second, there is no practical hurdle if the traditionalist holding is permissive. If a court says that an official *has* an asserted power because she has always exercised it, she remains free to "flip" and stop exercising the power. After *Noel Canning*, Presidents can experience a pang of conscience and repent of making recess appointments within a session of Congress.<sup>462</sup> If they stopped for long enough, and for the right stated reasons, a living-traditionalist Court could declare those appointments now unlawful.

Third, nor is there any obstacle to changing practice if the holding is that an individual lacks a right because states have not recognized it, as with assisted suicide.<sup>463</sup> The states remain free to begin treating it as a right, to make it "deeply rooted" and so protected by the Constitution.

Fourth, some actions are unreviewable (and so unstoppable) by courts but may shape courts' interpretations in cases that courts *can* hear. Say courts find a certain kind of law within Congress's power, based partly on presidential acquiescence. Still, future Presidents that disagreed could veto such laws on constitutional grounds. Those vetoes would be unreviewable.<sup>464</sup> And if they stacked up, they could inform future traditionalist rulings on the issue. Indeed, the Court considered whether exactly this had happened in a case about Congress's power to pass laws insulating executive officers from removal by the incumbent President.<sup>465</sup> Other actions may be unreviewable *de facto*. One example is the conduct of teachers too numerous and dispersed to be policed by courts, but fit (by the Court's lights) to shape free speech law.<sup>466</sup>

## 2. *Soft Law*

Thus, the only holdings that may hinder change in underlying practice are restrictive ones. I mean those saying that an official lacks a certain power, or that a state cannot regulate certain conduct. The Court has held that the President cannot make recess appointments when the recess is shorter than ten days, just because they never have during an

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<sup>461</sup> See *supra* notes 135, 141, 148 and accompanying text.

<sup>462</sup> 573 U.S. 513, 556–57 (2014).

<sup>463</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 711, 719–21 (1997).

<sup>464</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (declaring that the political question doctrine forbids judicial review when there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department").

<sup>465</sup> See *Myers v. United States*, 272 U.S. 52, 170 (1926).

<sup>466</sup> See *supra* note 338 and accompanying text.



intra-session recess.<sup>467</sup> So how could they start now? The effort would be cut off at the outset by courts. Likewise, since the Court has held that Congress cannot generally abrogate states' immunity from suit in state courts, because attempts to do so are "all but absent from our historical experience,"<sup>468</sup> wouldn't the first attempt now be held invalid? If states may not regulate certain aspects of parenting, because for a long time they didn't try to, how could they ever start?<sup>469</sup> Wouldn't any regulation be held invalid?

Yes, but these actors would still have options. This Section and the next two will offer a few in order of increasing aggressiveness.

First, there is "soft law," which includes:

[S]tatements by lawmaking authorities that do not have the force of law (most often because they do not comply with relevant formalities or for other reasons are not regarded as legally binding), but nonetheless affect the behavior of others either (1) because others take the statements as credible expressions of policy judgments or intentions that, at some later point, might be embodied in formally binding law and reflected in the coercive actions of executive agents, or (2) because the statements provide epistemic guidance about how the authorities see the world.<sup>470</sup>

Soft law from the President might include "veto messages, signing statements, speeches, briefs, and messages to Congress."<sup>471</sup> Many people think courts "do, or should," take signing statements into account when interpreting federal laws or passing on their constitutionality.<sup>472</sup> We know they take speeches to Congress into account in living-traditionalist cases.<sup>473</sup> Courts could also consult them in deciding when such cases have become obsolete.

As for Congress, it uses single-house or concurrent resolutions, sometimes to "criticize the President's interpretations of executive power" or "advance interpretations of constitutional provisions."<sup>474</sup> With congressional-executive agreements—approved only by a majority of both houses—the Senate has "issued accompanying declarations" denouncing this constitutionally shaky alternative to treaties approved by a Senate supermajority, per Article II. "There is evidence that such

<sup>467</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 537–38 (2014).

<sup>468</sup> *Alden v. Maine*, 527 U.S. 706, 744 (1999).

<sup>469</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (affirming right to direct the education of one's children).

<sup>470</sup> Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *STAN. L. REV.* 573, 577 (2008).

<sup>471</sup> *Id.* at 623.

<sup>472</sup> *Id.* at 575 (citing authorities).

<sup>473</sup> See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 25–26 (2015).

<sup>474</sup> Gersen & Posner, *supra* note 470, at 577–78.

statements have affected the Executive's" conduct,<sup>475</sup> and they might well affect the rulings of a living-traditionalist Court. Then there are statements in committee reports or floor speeches—less broadly representative of Congress or a house, but still occasionally noted in living-traditionalist decisions.<sup>476</sup>

State lawmakers or executives could use similar forms of soft law. Even their litigation positions could count; as noted, *Dobbs*'s "application of *Glucksberg*[’s]" traditionalist test for unenumerated rights took note of several states' expressions of opposition to *Roe* in the *Dobbs* litigation.<sup>477</sup>

How much weight should the Court give soft law in revisiting living-traditionalist rulings? It depends on the reason for taking a living-traditionalist approach in the first place. All these forms of soft law may communicate the views of each of these actors on what is constitutional, or some other proposition of relevance to applying some provision. They may also reflect the views of the branches, or of the people to whom officials are accountable, which are relevant under the departmentalist and democratic arguments for traditionalism (and against the ratchet).<sup>478</sup> But precisely because soft-law measures have no concrete effect, they communicate politicians' views "cheaply."<sup>479</sup> If a resolution doesn't affect the real world, Congress may deliberate less before passing it, and feel less accountable for it, which weakens its communicative value.

By the same token—lack of real-world impact—the passage and maintenance of resolutions would not give us the information of interest to the Hayekian traditionalist: which practices have staying power because of their utility.<sup>480</sup> So if one's reasons for being traditionalist in a given domain (and resisting the ratchet) are Hayekian, soft law is not an ideal basis for revisiting living-traditionalist rulings.

Finally, political actors may lack the *incentive* to keep up resistance through soft law, if it has no immediate real-world effect. Say the President won the power to make certain recess appointments partly through the Senate's acquiescence over a period of twenty years. So courts insist on waiting for another twenty years of soft-power protest before reversing themselves. In that case, the Senate might lose interest

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<sup>475</sup> Bradley & Morrison, *supra* note 21, at 450.

<sup>476</sup> See, e.g., Pocket Veto Case, 279 U.S. 655, 680 (1929) (noting that a certain view "appears to have been expressed in behalf of Congress, for the first and only time, in a report made by the Judiciary Committee of the House of Representatives in 1927").

<sup>477</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2260 (2022).

<sup>478</sup> See *supra* Section V.B.

<sup>479</sup> See Gersen & Posner, *supra* note 470, at 578.

<sup>480</sup> See *supra* note 385.

too soon. Each Senate might lack motivation to keep up a protest that would not deliver returns for twenty years.

So soft-law options are available, but not as informative or effective (from the living-traditionalist perspective) as one might hope.

### 3. *Hybrid Options*

Mildly more promising would be the enactment of laws that contradict an existing precedent. Though their enforcement would be immediately enjoined, these laws would still exist, representing a threat of future enforcement if the injunction is dissolved.<sup>481</sup> And even in the meantime, they would “send[] a signal to the courts that their jurisprudence conflicts with public values.”<sup>482</sup> Gersen and Posner cite the Flag Protection Act of 1989,<sup>483</sup> which followed a free-speech case protecting flag burning, and was itself promptly struck down.<sup>484</sup> The Religious Freedom Restoration Act (RFRA) played a similar role.<sup>485</sup> David Conkle said RFRA was a “powerful statement that Congress rejects the Supreme Court’s [then-recent case interpreting] the Free Exercise Clause” and that it “suggests that the Supreme Court should reconsider” and “overrule” the case at issue.<sup>486</sup>

This may be the main way for states to resist cases that they think wrongly protect conduct as a right. As many have noted, cases finding such rights have often engaged in “state counting”<sup>487</sup>: tallying how many states protect a putative right, to see if it’s “deeply rooted.”<sup>488</sup> To avoid the ratchet, courts could do the same in reverse, counting the states that had passed statutes purporting to regulate activities that the Court had deemed a right. Attempts to enforce these statutes would be enjoined at first. But the statutes would remain as “objective”<sup>489</sup> evidence of states’ positions on whether a recognized right should not be. If enough

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<sup>481</sup> See generally Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018) (arguing that judicial review can bar enforcement of a statute but cannot eliminate it).

<sup>482</sup> Gersen & Posner, *supra* note 470, at 586.

<sup>483</sup> 18 U.S.C. § 700.

<sup>484</sup> *Id.*

<sup>485</sup> 42 U.S.C. § 2000bb.

<sup>486</sup> David O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 79 (1995).

<sup>487</sup> See Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 952 (2006); see also Amar, *supra* note 21, at 1777–78.

<sup>488</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–22 (1997).

<sup>489</sup> *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (identifying laws as “objective” basis for determining rights).

statutes piled up, the Court could hold them valid, at which point they would spring to life.<sup>490</sup>

For just this reason, such statutes would be more telling than mere resolutions—less cheap, more indicative of the people’s will, eventually perhaps more indicative of which practices survive due to their social utility. Because these laws could one day take effect, lawmakers might deliberate more about their real-world and electoral impact. That is especially true of laws that *say* they will take effect upon reversal of precedent blocking them.

In short, statutes like these are amphibious, starting as soft law but potentially hardening. That makes them a better fit for the rationales for consulting tradition and resisting the ratchet. They thus provide a principled response to a perennial question, acute in the abortion context<sup>491</sup> but present elsewhere: How much should the Court consider political resistance to its cases?<sup>492</sup> Some think attention to politics laudable, others dishonorable.<sup>493</sup> It is crucial, for principled reasons, in living-traditionalist domains. For here, the case against the ratchet also requires the Court to heed certain forms of political resistance: those portending changes in the practices that underlay its earlier rulings.

#### 4. *Hard Law*

Most telling, by the logic of living traditionalism, are hard law options. First, actors could use hard power to resist unwelcome rulings *indirectly*. If Congress can’t prevent recess appointments approved by the Court, it can use its power of the purse to undermine them, by denying a salary to the appointees. *Noel Canning* considered whether Congress had done that in deciding whether the Senate had acquiesced to certain appointments.<sup>494</sup> But the Court could just as well take such tactics into account in a case revisiting that ruling. Similarly, in rejecting Congress’s attempt to interfere in the President’s recognition of foreign powers, the Court suggested Congress could disrupt policies “that precede and follow the act of recognition.”<sup>495</sup> It could stop “the dispatch of

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<sup>490</sup> See Mitchell, *supra* note 481, at 943.

<sup>491</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (urging that political opposition to *Roe* is a reason not to overrule it); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2278 (2022) (arguing that past or anticipated political reactions should play no role in the Court’s analysis).

<sup>492</sup> See generally Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685 (1990) (reviewing debate over the question).

<sup>493</sup> See *id.*

<sup>494</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 547–48 (2014).

<sup>495</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 16 (2015).

an ambassador, the easing of trade restrictions, and the conclusion of treaties.”<sup>496</sup> By the same token, the Court could note Congress’s use of such measures in living-traditionalist cases.

Second, lawmakers could engage in *direct* hard-law resistance. This would require a stout rejection of judicial supremacy—a disregard for the Court’s legal conclusions as they bear on conduct affecting people or entities that are not parties to the case.<sup>497</sup> A famous example is President Lincoln’s issuing passports to African Americans after *Dred Scott v. Sandford*<sup>498</sup> had declared them ineligible for citizenship.<sup>499</sup> Of course, some such forms of resistance would themselves be promptly enjoined in follow-on cases.

But some would be unreviewable. A recent example comes from Texas. Months before *Dobbs*, Texas imposed steep tort liabilities on anyone performing or aiding abortions.<sup>500</sup> Through various procedural tricks, the law shielded itself from pre-enforcement review.<sup>501</sup> This shield, combined with uncertainty about *Roe*’s future status, had a chilling effect on abortions that were then still covered by *Roe*.<sup>502</sup> The law was condemned for its affront not only to abortion rights but to the “role of the Supreme Court in our constitutional system.”<sup>503</sup> But precisely because it had massive real-world effects on the asserted right, and lawmakers were fully politically accountable for it, laws like it could provide the most information of interest to a Court keen to resist the ratchet. (And, indeed, California soon passed gun regulation modeled on Texas’s approach, and designed to move the needle in response to another recent living-traditionalist case, *Bruen*.<sup>504</sup>) Whether this narrow benefit justifies bucking judicial supremacy is another question.<sup>505</sup>

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<sup>496</sup> *Id.*

<sup>497</sup> See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343–45 (1994) (arguing that Presidents have co-equal authority to interpret the Constitution, unbound by the Court’s interpretations, when carrying out the tasks entrusted to them).

<sup>498</sup> 60 U.S. 393 (1857).

<sup>499</sup> See Justin Buckley Dyer, *Revisiting Dred Scott: Prudence, Providence, and the Limits of Constitutional Statesmanship*, 39 PERSPS. ON POL. SCI. 166, 173 n.18 (2010).

<sup>500</sup> See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 530 (2021).

<sup>501</sup> See *id.* at 531–39.

<sup>502</sup> See *id.* at 545 (Sotomayor, J., concurring in part and dissenting in part).

<sup>503</sup> *Id.* at 545 (Roberts, C.J., concurring in part and dissenting in part).

<sup>504</sup> See *S. Bay Rod & Gun Club, Inc. v. Bonta*, No. 22CV1461, 2022 WL 17811113, at \*1–4 (S.D. Cal. Dec. 19, 2022).

<sup>505</sup> For a defense of judicial supremacy, see Larry Alexander & Fred Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

## CONCLUSION

The foregoing account has several upshots for constitutional theory and practice.

First, if living traditionalism is pervasive, widely accepted, and bereft of originalist-friendly rationales, that raises questions about whether originalism really is “our law.”<sup>506</sup> And the answer might affect debates over the proper method of constitutional adjudication. Several scholars have argued that originalism is commanded by our positive (customary) law of interpretation because, among other things, it is the method that judges are widely thought to be bound to follow.<sup>507</sup> And some of the same scholars have argued that originalism permits reliance on post-ratification practices because that reliance has Madison’s blessing. But what Madison endorsed is reliance on liquidation, which differs crucially from living traditionalism. Liquidation is the subject of important scholarship.<sup>508</sup> It is what the Court’s practice-based cases often *claim* to rely on.<sup>509</sup> Yet, almost every such case has ignored or flouted the requirements for a practice to have liquidation’s authority. Those cases need another defense. If there is no originalist-friendly defense—or none broad enough to match the range of cases in which living traditionalism is widely accepted—then that weakens positivist arguments for originalism. It favors at least the view that constitutional pluralism is our law of interpretation<sup>510</sup>—that we are all pluralists now.<sup>511</sup>

Second, if living traditionalism is ineliminable, spreading, and increasingly deliberate—and if it logically commits courts to updating precedents as traditions change—then the method needs fleshing out. Judges need more explicit and precise guidance than the Supreme Court has seen fit to provide on exactly which political practices count and for what purposes. Consider by analogy how increased self-consciousness about originalism led scholars and judges to get clearer on that method’s details: whether to consult original meaning or expected applications,

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<sup>506</sup> See Baude, *supra* note 4, at 36 n.224.

<sup>507</sup> See Baude, *supra* note 299, at 2376–86.

<sup>508</sup> See Baude, *supra* note 4 (discussing liquidation and its implications).

<sup>509</sup> See *supra* Section II.B.

<sup>510</sup> See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1342 (2018) (concluding that “the dominant approach to constitutional interpretation” is a “pluralism” that consults “a multiplicity of considerations” including “nonjudicial historical practices”).

<sup>511</sup> Cf. Harvard L. Sch., *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/QL54-QPVT>] (“We’re all textualists now.”); *Kagan Confirmation Hearing, Day 2, Part 1*, C-SPAN (June 29, 2010), <https://www.c-span.org/video/?c2924010/clip-kagan-confirmation-hearing-day-2-part-1> [<https://perma.cc/LKL3-4W9X>] (declaring that “we are all originalists”).

how to weigh precedent, and so on.<sup>512</sup> Likewise, living traditionalists need a richer account of constitutionalism outside the courts, and of how it should affect judging. I have tried to identify broad patterns in when and how living-traditionalist cases have used practice—and to evaluate those patterns based on the democratic and other values that seem to drive the method. But I have also highlighted important lingering questions about implementation—areas where the Court has operated on fuzzy, unspoken, and untested assumptions.<sup>513</sup> These gaps also leave the Court open to charges that the method cannot be justified and rendered consistent, workable, and objective.<sup>514</sup>

A more detailed map of the method should interest not only courts and litigants, but also critics of living-traditionalist cases. The latter have tended to impugn the Court's output from an external perspective, and have called for reform by political means.<sup>515</sup> But the living-traditionalist method, I have argued, offers an internal basis for critique. It gives political resistance some legal significance. And the more transparent the method becomes, the easier it will be to identify cases that depart from it and chart a political path to making them obsolete.

Finally, if I'm right that even at their best, living-traditionalist precedents will ultimately distort the very traditions they aim to track, this might carry a broader lesson of theoretical and practical import. Perhaps precedents based on other methods, too, once on the books, take on a life of their own, and lead the law adrift from the logic that produced them. If so, that is another reason, apart from one's views on this or future Courts, to foster constitutional traditions outside them, too.

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<sup>512</sup> See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1745 (2020) (distinguishing law's meaning from lawmakers' "expectations about its operation"); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT 427, 442 (2007) (similar); *Gamble v. United States*, 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring) (discussing the role of precedent for originalists); Nelson, *Stare Decisis*, *supra* note 386 (same).

<sup>513</sup> See, e.g., *supra* notes 242–44 and accompanying text.

<sup>514</sup> See *supra* Section III.A.3.

<sup>515</sup> See, e.g., Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S. (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf> [<https://perma.cc/R9YN-GPPL>].