

ABANDONING ORIGINAL MEANING

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I. INTRODUCTION

Late June 2022 marked the end of the Supreme Court’s October 2021 term.¹ The final week of the term was a blockbuster event, as the Court had held off on issuing numerous highly publicized and far-reaching opinions until the end of its term.² Starting on June 23, the Court issued its opinion in *New York State Rifle and Pistol Ass’n v. Bruen*,³ expanding the scope of the Second Amendment right to bear arms and striking down a New York law that had been on the books for over a century.⁴ The next day, the Court decided *Dobbs v. Jackson Women’s Health Organization*,⁵ overruling *Roe v. Wade*⁶ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷ and holding that there was no constitutional right to abortion.⁸ The following Monday, the Court decided *Kennedy v. Bremerton School District*,⁹ overruling yet another longstanding precedent,¹⁰ *Lemon v. Kurtzman*,¹¹ holding that the Establishment Clause was an insufficient basis for a school district to remove a football coach from his job after he had prayed on a football field during several football games.¹²

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¹ VALERIE C. BRANNON, KATE R. BOWERS, MICHAEL A. FOSTER, DAVID GUNTER & HILLEL R. SMITH, CONG. RSCH. SERV., R47276, SUPREME COURT TERM OCTOBER 2021: A REVIEW OF SELECTED MAJOR RULINGS 1 (2022), <https://crsreports.congress.gov/product/pdf/R/R47276> [<https://perma.cc/WB9M-YDVQ>].

² See Ariane de Vogue, *Supreme Court Rushes to End a Term Like No Other*, CNN POL. (June 21, 2022, 1:14 PM), <https://www.cnn.com/2022/06/20/politics/supreme-court-june-preview/index.html> [<https://perma.cc/56JY-EEMD>].

³ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

⁴ See *id.* at 2122, 2156.

⁵ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁸ See *Dobbs*, 142 S. Ct. at 2279.

⁹ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

¹⁰ See *id.* at 2427.

¹¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹² See *Kennedy*, 142 S. Ct. at 2415, 2432–33.

Reactions to the Court's rulings were swift. Commentators noted that the Court's decisions in *Bruen* and *Kennedy* heralded major changes to the Court's jurisprudence, overruling longstanding law and precedent.¹³ But the reaction to *Dobbs* was most significant, as protests erupted at the Court and across the country in response to the Court's overruling of *Roe* and *Casey* and its determination that there was no constitutional right to abortion.¹⁴ This marked a continuation of backlash that had begun nearly two months before in response to an unprecedented leak of a draft of the Court's majority opinion in *Dobbs* to the public.¹⁵ While the Court itself did not rule that abortion was no longer legally permissible, numerous states' "trigger laws" kicked in with the overruling of *Roe*, resulting in bans on most abortions in at least thirteen states in the immediate wake of the *Dobbs* decision.¹⁶

In the years preceding these rulings, the theory of constitutional interpretation known as originalism—typically defined as the notion that the Constitution should be interpreted based on its original public meaning—rose to prominence in legal academia and political debates.¹⁷ Several Supreme Court Justices gained a reputation as

¹³ See, e.g., Jimmy Hoover, *Supreme Court Embraces Originalism in 'Momentous' Term*, LAW360 (July 1, 2022, 9:58 PM), <https://www.law360.com/insurance-authority/articles/1508127/supreme-court-embraces-originalism-in-momentous-term> [<https://perma.cc/6YXC-5A8S>].

¹⁴ See, e.g., *Demonstrators Converge Outside Supreme Court After Dobbs Decision*, SCOTUSBLOG (June 24, 2022, 6:33 PM), <https://www.scotusblog.com/2022/06/demonstrators-converge-outside-supreme-court-after-dobbs-decision/> [<https://perma.cc/6L9Q-NFSK>]; Natasha Ishak, *In 48 Hours of Protest, Thousands of Americans Cry Out for Abortion Rights*, VOX (June 26, 2022, 4:00 PM), <https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-roe-overturned-protests> [<https://perma.cc/X2CF-7E8B>]; Kana Ruhalter & Fernando Cervantes Jr., *Abortion Rights Advocates Take to Boston Streets for a Second Day to Protest Supreme Court's Dobbs Ruling*, GBH NEWS (June 25, 2022), <https://www.wgbh.org/news/local-news/2022/06/25/abortion-rights-advocates-take-to-boston-streets-for-a-second-day-to-protest-supreme-courts-dobbs-ruling> [<https://perma.cc/A7RE-H2X9>].

¹⁵ See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/6FZ8-VZ6U>]; Kate Zernike, Elizabeth Dias & Ruth Graham, *Leaked Threat to Roe v. Wade Stuns, Then Energizes Americans*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/2022/05/03/us/supreme-court-ro-abortion-reaction.html> [<https://perma.cc/HU3Z-Z5LD>].

¹⁶ Vanessa Romo, *Abortion Rights Advocates in the 13 Trigger Law States Refuse to Give Up Post-Roe*, NPR (July 1, 2022, 6:00 AM), <https://www.npr.org/2022/07/01/1107662821/abortion-rights-advocates-in-the-13-trigger-law-states-refuse-to-give-up-post-ro> [<https://perma.cc/GB5T-A6RB>]; see also Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html> [<https://perma.cc/6ZVG-2SFN>].

¹⁷ See generally *infra* Part II.

originalists, most notably Justices Antonin Scalia and Clarence Thomas.¹⁸ Originalism took center stage in the confirmation hearings of Justices Gorsuch, Kavanaugh, Barrett, and Jackson.¹⁹ The nominees faced questions regarding their approaches to constitutional interpretation, including whether they would interpret the Constitution based on its original meaning.²⁰ Legal academics joined in the discussion as well, penning a multitude of op-eds explaining originalism and frequently arguing in favor of various nominees' originalist credentials.²¹ Several originalist academics also testified during the confirmation hearings, both in support of the nominees' originalist bona fides and to explain the theory and prominence of originalism to lawmakers.²²

¹⁸ See Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 UNIV. DET. MERCY L. REV. 873, 873 (2011).

¹⁹ See *infra* notes 42–45 (footnotes to Part II paragraph on Justice/judicial nominee recognition of originalism's prominence).

²⁰ See Randy E. Barnett, Opinion, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL STREET J. (Mar. 24, 2022, 6:38 PM), <https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063> [<https://perma.cc/6ZLK-VH5K>]; Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution "Doesn't Change Over Time"*, NPR (Oct. 13, 2020, 10:08 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [<https://perma.cc/N4LN-4TTY>].

²¹ See Lawrence B. Solum, Opinion, *Judge Barrett is an Originalist. Should We Be Afraid?*, L.A. TIMES (Oct. 14, 2020), <https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative> [<https://perma.cc/7NT9-2M5B>]; Steven Calabresi, Opinion, *Neither Kavanaugh Nor Constitutional Originalism Are Scary*, THE HILL (Aug. 21, 2018, 12:45 AM), <https://thehill.com/opinion/judiciary/402851-neither-kavanaugh-nor-constitutional-originalism-are-scary/> [<https://perma.cc/4EMM-NUN9>]; Akhil Reed Amar, Opinion, *A Liberal's Case for Brett Kavanaugh*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html> [<https://perma.cc/R5FW-9863>] (“A judge who seeks merely to follow precedent can simply read previous judicial opinions. But an ‘originalist’ judge — who also cares about what the Constitution meant when its words were ratified in 1788 or when amendments were enacted — cannot do all the historical and conceptual legwork on his or her own. Judge Kavanaugh seems to appreciate this fact, whereas Justice Antonin Scalia, a fellow originalist, did not read enough history and was especially weak on the history of the Reconstruction amendments and the 20th-century amendments.”); Nelson Lund, Opinion, *Like Scalia, Amy Coney Barrett Shares an “Originalist” View on Second Amendment*, THE HILL (Oct. 14, 2020, 3:00 PM), <https://thehill.com/opinion/judiciary/521004-like-scalia-amy-coney-barrett-shares-an-originalist-view-on-second/> [<https://perma.cc/YHG4-6HKX>] (“Barrett was a law clerk for the late Justice Antonin Scalia, and she shares his ‘originalist’ approach to constitutional interpretation.”).

²² See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 115th Cong. 730–31 (2018) (statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center); 1 *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 115th Cong. 1000–01 (2020) (statement of Akhil Reed Amar, Sterling Professor of Law and Political Science, Yale University); JENNIFER L.

These discussions of originalism focused on the original public meaning of the Constitution, and the claim that this methodology had become the most prominent, mainstream approach to constitutional interpretation.²³ Volumes have been written on the original public meaning of constitutional amendments and provisions, all with the apparent goal of informing or affecting the Court's analysis of constitutional issues.²⁴

And yet despite the attention paid to original public meaning in academic and political contexts, the Court made virtually no reference to the original meaning of the Constitution in *Bruen*, *Dobbs*, and *Kennedy*. While the Court referred to history and longstanding traditions, there was no analysis of how this history and tradition had any bearing on the meaning of the Constitution. Instead, the Court effectively equated history and tradition with the Constitution's meaning.

The Court's opinions in *Bruen*, *Dobbs*, and *Kennedy* demonstrate a wide disconnect between academic discussion of originalism and the reality of judicial practice. While a sub-discipline of originalist scholars continue to churn out papers and books justifying the original public meaning approach, explaining the nuances of originalism, and claiming to determine the original public meaning of various words and phrases in the Constitution, the Court reached its decisions in *Bruen*, *Dobbs*, and *Kennedy* without any reliance on this work, direct or indirect. If the Court can issue such dramatic rulings and upend areas of constitutional law based on its history and tradition approach, with no reference to prevailing academic theories of originalism, this raises serious questions over whether these theories reflect judicial reality and whether they are worth pursuing.

This Article begins with some background on originalism, its development, and the focus on original public meaning in Part II. It then moves to a summary of the Court's opinions in *Bruen*, *Dobbs*, and *Kennedy* in Part III—with particular focus on the Court's approach to constitutional interpretation in each opinion. Part IV

MASCOTT, THE NOMINATION OF THE HONORABLE KETANJI BROWN JACKSON TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: PREPARED TESTIMONY OF JENNIFER L. MASCOTT 6–9 (2022), <https://www.judiciary.senate.gov/imo/media/doc/Mascott%20written%20statement%2003.24.2022.pdf> [<https://perma.cc/9RRG-VXG>].

²³ See sources cited *supra* note 22; see also Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999) (“Originalism is now the prevailing approach to constitutional interpretation.”).

²⁴ See *infra* notes 321–22.

argues that each of these opinions abandons the original public meaning approach, as the Court makes no effort in any of these opinions to derive the original public meaning of the constitutional provision at issue.

Part V argues that proponents of the original public meaning approach to constitutional interpretation need to rethink their approach to interpretation and walk back their assertions regarding particular Justices' and the Court's acceptance of originalism. The original public meaning approach has been around for several decades and, as originalists claim, is well enough established that it ought to guide or at least influence the Court's approach in these three most recent cases. That the Court adopted an alternate approach in such significant cases suggests that the original public meaning approach is far less influential than originalist scholars repeatedly assert. Part V addresses potential originalist objections to this point, as well as the possibility that the Court's opinions in *Bruen*, *Dobbs*, and *Kennedy* were in fact instances of original public meaning originalism.

Part VI addresses what is likely to come in the wake of these opinions. One possibility is that the term "originalism" shifts from being synonymous with the original public meaning approach to being associated with a focus on historical and traditional practices. Originalism has evolved in the past from a focus on original intent to a focus on original meaning, and these cases may foreshadow a further evolution in the near future. Indeed, the characterization of these opinions as "originalist" by numerous commentators suggests that this transition may already be underway. Part VI also briefly addresses how critics of the Court should formulate their arguments in the wake of these opinions. It urges critics to refer to the Court's inconsistent methodology to illustrate the Court's political nature and desire to reach preferred results rather than maintain fidelity to particular methods. It also warns against attempting to meet the Court on its own terms, as the history and tradition approach may be even more suited for goal-oriented manipulation than the original public meaning approach.

II. THE RISE OF ORIGINAL PUBLIC MEANING ORIGINALISM

Original public meaning originalism is the theory that the Constitution should be interpreted based on the original public

meaning of its text at the time it was ratified.²⁵ Today, this theory, or variations on it, tends to be the most common originalist approaches to constitutional interpretation.²⁶

It wasn't always this way, though. Early modern originalists argued for an *original intent* approach to originalism—that is, the intentions of the framers should govern what the Constitution means.²⁷ One of the most notable examples of such an approach was a speech by then-Attorney General Edwin Meese in 1985 before the American Bar Association, where Meese advocated “[a] jurisprudence seriously aimed at the explication of original intention” in the face of “a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court.”²⁸ Other Reagan appointees and scholars at the time labeled this approach to constitutional interpretation as *originalism*.²⁹

Criticism of the original intention approach to originalism was swift and devastating. Critics argued that it was impossible to determine a unified intention underlying the Constitution, which was the product of a group of framers and which was then ratified by even more individuals with their own opinions, ideologies, and political goals.³⁰ In the face of this criticism, originalists shifted to an alternate interpretive approach.³¹ Justice Antonin Scalia was one of the most prominent advocates of the *original public meaning* approach to interpretation—that interpreters should determine the original meaning of the text rather than the intentions of the drafters and ratifiers.³²

²⁵ Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1755 (2015); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1499 (2012).

²⁶ See Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 ConLawNOW 235, 239 (2018).

²⁷ See *id.*; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 4 (2d ed. 1997).

²⁸ Edwin Meese III, U.S. Att’y Gen., Speech Before the American Bar Association 6–7 (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [https://perma.cc/B75S-D83J].

²⁹ Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 878.

³⁰ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229 (1980).

³¹ See Solum, *supra* note 26, at 239.

³² ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”); Justice Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in OFF. OF LEGAL POL’Y, U.S. DEP’T OF JUST., ORIGINAL MEANING

Most modern originalists have adopted the original public meaning approach to originalism.³³ Lawrence Solum notes that, while there are variations on originalism within the academy, most theories of originalism tend to adopt at least two common propositions: (1) the “Fixation Thesis,” which holds that constitutional meaning is fixed at the time of its ratification; and (2) the “Constraint Principle,” the notion that “constitutional construction should be constrained by the original meaning of the constitutional text.”³⁴

The shift from the original intent approach to the original public meaning approach brought originalism back from the brink of oblivion and into the “center stage of debates about the Constitution.”³⁵ Some originalists take issue with those who characterize originalism as anything other than original public meaning originalism—contending that the intent of the framers is no longer the focal point of originalist interpretation.³⁶

Beyond the academy and judiciary, politicians invoke originalist rhetoric as well. Robert Post and Reva Siegel note that a complete conception of originalism must look beyond its jurisprudential claims and recognize that it also “serve[s] as an ideology that inspires political mobilization and engagement.”³⁷ Post and Siegel argue that “originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had ‘almost nothing to do with the Constitution’ and was merely an effort to enact ‘the political agenda of the American left.’”³⁸ Post and Siegel note that:

Conservative groups that have mobilized in the name of originalism are not inspired by professional historical research. These groups are instead stirred by those

JURISPRUDENCE: A SOURCEBOOK 101, 104–06 (1987); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 8 (2013).

³³ See MCGINNIS & RAPPAPORT, *supra* note 32, at 8.

³⁴ Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459–60 (2013).

³⁵ Solum, *supra* note 26, at 246.

³⁶ See, e.g., Christopher Scalia, *Get Ready for a Flood of Falsehoods About Originalism*, WALL STREET J. (Oct. 11, 2020, 4:06 PM), <https://www.wsj.com/articles/get-ready-for-a-flood-of-falsehoods-about-originalism-11602446778> [<https://perma.cc/W6GR-WW9U>] (criticizing characterizations of originalism as seeking the original intentions of the founders).

³⁷ See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006).

³⁸ See *id.* at 555 (quoting Lino A. Graglia, “Constitutional Theory”: *The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789, 789 (1987)).

dimensions of the past that can sustain a present political perspective that is persuasive and attractive. . . .

It is inevitable, then, that originalism's relationship to the past will change as its contemporary political agenda changes.³⁹

Today, originalists and nonoriginalists alike recognize the prominence of the original public meaning approach to originalism. Originalists assert that “We Are All Originalists Now.”⁴⁰ Supreme Court Justices—liberal and conservative alike—have followed suit.⁴¹ During her confirmation hearing, Justice Elena Kagan acknowledged “we are all originalists” to the extent that judges and justices attempt to apply what the founders tried to do.⁴² More recently, and explicitly, Justice Ketanji Brown Jackson stated at her confirmation hearing that the original public meaning of the Constitution would constrain her approach to constitutional interpretation.⁴³ Other Justices who reflect this sentiment are characterized as originalists.⁴⁴ Justices Gorsuch and Barrett have confirmed that, in interpreting the Constitution, Justices should look to its original public meaning.⁴⁵

³⁹ Post & Siegel, *supra* note, at 559.

⁴⁰ See ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE vii (2011); Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE, *supra*, at 1, 77.

⁴¹ See Barnett, *supra* note 20.

⁴² See *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (stating that, in the context of attempting to apply what the founders “meant to do” that “in that sense, we are all originalists”).

⁴³ See Barnett, *supra* note 20 (highlighting then-Supreme Court nominee Ketanji Brown Jackson's testimony that “I believe that the Constitution is fixed in its meaning’ . . . ‘I believe that it's appropriate to look at the original intent, original public meaning, of the words when one is trying to assess because, again, that's a limitation on my authority to import my own policy”).

⁴⁴ See Sol Wachtler, *Brett Kavanaugh Is an Originalist*, N.Y.L.J. (Sept. 20, 2018, 11:57 AM), <https://www.law.com/newyorklawjournal/2018/09/20/brett-kavanaugh-is-an-originalist/> [<https://perma.cc/KJJ3-Z46K>] (describing Justice Kavanaugh as an originalist); Kyle Peterson, Opinion, *The High Court's Rocky Mountain Originalist*, WALL STREET J. (Sept. 7, 2019, 1:52 PM), <https://www.wsj.com/articles/the-high-courts-rocky-mountain-originalist-11567792378> [<https://perma.cc/Q6HA-BJVC>] (describing an interview with Justice Neil Gorsuch and characterizing originalism as “the idea that the Constitution's meaning is the same in 2019 as in 1788”).

⁴⁵ See NEIL GORSUCH, JANE NITZE, & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 25 (2019); Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution ‘Doesn't Change Over Time’*, NPR (Oct. 13, 2020, 10:08 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [<https://perma.cc/N4LN-4TTY>] (characterizing now–

Politicians also vaunt the original public meaning approach to constitutional interpretation, arguing that interpreting the Constitution based on its original public meaning curtails judicial discretion and is a desirable approach for judicial nominees.⁴⁶ Senators and Representatives assert that originalism is synonymous with looking to the original meaning of the Constitution, often citing Justice Scalia.⁴⁷ Even when criticizing originalism, politicians tend to define it as referring to the original public meaning of the Constitution.⁴⁸

In academic circles, the original public meaning approach to constitutional interpretation is typically presented as the standard

Justice Amy Coney Barrett as an originalist and highlighting her statement that “I interpret [the Constitution’s] text as text, and I understand it to have the meaning that it had at the time people ratified it”); *see also* Solum, *supra* note 21.

⁴⁶ *See* 152 CONG. REC. S10,122 (daily ed. Sept. 26, 2006) (statement of Sen. Orrin Hatch) (quoting Justice Scalia’s statement that originalism requires that judges “give that text the meaning that it bore when it was adopted by the people” and arguing that this theory is preferable to the alternative of putting “judges rather than the people in charge of the law’s meaning and the nation’s values,” noting that “[o]riginalism limits a judge’s ability to make law”); 160 CONG. REC. S4867–68 (daily ed. July 24, 2014) (statement of Sen. Charles Grassley) (contrasting the prior statement of Fourth Circuit Court of Appeals judicial nominee Professor Pamela Harris—“I’m not an originalist”—with her statement to Senator Grassley on the record that “the Constitution’s provisions and principles change or evolve, other than by the amendment process in Article V” and that judges “are not free to change them” by applying their own preferences and policy views, and describing this as “a night-and-day difference with the judicial philosophy”); 163 CONG. REC. S2060 (daily ed. Mar. 29, 2017) (statement of Sen. John Cornyn) (claiming that the Founders believed that the judiciary would play the role of “an umpire who calls balls and strikes” based on the “fixed meaning” of the Constitution and that this approach, “sometimes . . . called originalism” is “not a political doctrine or an excuse to get certain outcomes.”).

⁴⁷ *See* S. DOC. NO. 114–12, at 44 (2017) (statement of Sen. David Vitter) (“Originalism, the theory that the clear meaning given to words in the Constitution by our Founding Fathers should be honored, was prevalent in Justice Scalia’s decisions.”); *id.* at 46–47 (statement of Sen. Ted Cruz) (“[Justice Scalia] was a passionate defender of the Constitution—not the Constitution as it has been contorted and revised by generations of activist Justices, but the Constitution as it was understood by the people who ratified it and made it the law of the land. Antonin Scalia understood that if the Constitution’s meaning was not grounded in its text, history, and structure, but could instead be revised by judicial fiat, then the people were no longer sovereign.”); 165 CONG. REC. H7861 (daily ed. Sept. 20, 2019) (statement of Rep. Steve King) (“And yet today, we have Justice Clarence Thomas, who is an originalist, a textualist, and he believes the Constitution has to mean what it was understood to mean at the time of ratification.”).

⁴⁸ *See* 152 CONG. REC. S339 (daily ed. Jan. 31, 2006) (statement of Sen. Joseph Biden) (stating that then-Judge Alito and Justice Thomas support “originalism,” and highlighting Alito’s statement that “we should look to the text of the Constitution and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption” and arguing that under this approach, many fundamental Supreme Court decisions are “simply wrong” and that the theory cannot account for developments in technology).

originalist approach.⁴⁹ As noted above, Lawrence Solum describes originalism as a family of theories that all agree on the “Fixation Thesis” and “Constraint Principle,” with the Fixation Thesis holding that the meaning of the Constitution is fixed at the time of its ratification or adoption.⁵⁰ Academic critics of originalism also tend to characterize originalism as focusing on the original public meaning of the Constitution.⁵¹

All of this is hardly an exhaustive discussion of originalism’s history and present state. But this sketch demonstrates the prominence of the original public meaning approach to constitutional interpretation. The notion that the Constitution ought to be interpreted based on its original public meaning is widespread and of central importance to constitutional theorists in general—particularly to originalists who often synonymize “originalism” with the present public meaning approach.⁵² All of this reveals what is at stake should the Court overlook or abandon this approach in high-stake, politically salient cases.

III. THE SUPREME COURT’S FOCUS ON HISTORY AND TRADITION IN *BRUEN, DOBBS, AND KENNEDY*

Over the course of less than one week in June 2022, the Supreme Court decided three blockbuster cases, the reverberations of which will likely be felt for many years to come. The cases were *New York State Rifle & Pistol Association, Inc. v. Bruen*, *Dobbs v. Jackson Women’s Health Organization*, and *Kennedy v. Bremerton School District*. This section briefly summarizes each of the opinions, with particular attention to each opinion’s approach to constitutional interpretation.

⁴⁹ See Barnett, *supra* note 23, at 611, 620–21; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 378 (2013) (noting originalists have shifted their focus “from talking about ‘original intent’ to talking about ‘original meaning’”).

⁵⁰ See Solum, *supra* note 34, at 459–60; see also Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 7 n.26 (April 6, 2019) (unpublished manuscript) (citing other scholars who have accepted Solum’s definition of originalism as a family of theories) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215).

⁵¹ See Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *HASTINGS L.J.* 707, 712–714 (2011) (describing the shift from “old originalism,” which focused on original intent, to “new originalism” which focuses on original meaning, and noting the wider acceptance and success of the latter theory); Frederick Mark Gedicks, *The “Fixation Thesis” and Other Falsehoods*, 72 *FLA. L. REV.* 219, 221 (2020) (noting that the approach of looking to the original public meaning of the Constitution “claims to be the most widely held theory of constitutional interpretation”).

⁵² See sources cited *supra* note 49.

*A. New York State Rifle & Pistol Association, Inc. v. Bruen*1. *Bruen's* Background: *Heller* and *McDonald*

Before getting into the Court's opinion in *Bruen*, some background on the state of Second Amendment law is warranted. *Bruen* was decided in the wake of the Court's earlier Second Amendment cases: *District of Columbia v. Heller*⁵³ and *McDonald v. City of Chicago*.⁵⁴

In *Heller*, Justice Scalia wrote the opinion of the Court, finding that the District of Columbia's restriction against keeping handguns unless they were unloaded and disassembled violated the Second Amendment right to possess handguns in the home.⁵⁵ In reaching this result, Justice Scalia examined each part of the Second Amendment and canvassed historic sources, concluding that the Second Amendment "conferred an individual right to keep and bear arms."⁵⁶ Scalia's analysis divided the Second Amendment into two parts: a "prefatory clause and [an] operative clause," and argued that the prefatory clause ("A well regulated Militia[,] being necessary to the security of a free state") expressed a purpose for, rather than a limitation on, the operative clause ("the right of the people to keep and bear Arms[,] shall not be infringed").⁵⁷ In defining the various terms of these clauses, Scalia looked to the time of the founding, asserting that "[a]t the time of the founding, as now, to 'bear' meant to 'carry,'" but that the phrase "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia" based on his "review of founding-era sources."⁵⁸

Justice Stevens dissented, arguing that the phrase "bear arms" was typically used in connection with military service, rather than civilian use.⁵⁹ This, among other things, supported his conclusion that the Second Amendment protected a collective right to keep and bear arms for service in a state militia, rather than an individual right to keep and bear arms.⁶⁰

In setting forth their respective arguments, both Justices Scalia and Stevens explicitly focused on the meaning of constitutional

⁵³ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵⁴ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

⁵⁵ *See Heller*, 554 U.S. at 574–75, 630, 635.

⁵⁶ *See id.* at 576–95.

⁵⁷ *See id.* at 577–78 (quoting U.S. CONST. amend. II).

⁵⁸ *See Heller*, 554 U.S. at 584.

⁵⁹ *Id.* at 646–49 (Stevens, J., dissenting).

⁶⁰ *See id.* at 651, 661–62 (Stevens, J., dissenting).

language, citing instances of usage of similar language in dictionaries, treatises, laws, and state constitutions.⁶¹ Scalia's opinion for the Court surveyed post-ratification interpretation of the Second Amendment as well, examining commentary and case law that Scalia characterized as recognizing an individual right to bear arms—particularly for purposes of self-defense.⁶² Scalia dismissed Stevens's claim that “for most of our history, the invalidity of Second Amendment based objections to firearms regulations has been well settled and uncontroversial,” arguing that “[f]or most of our history the question did not present itself.”⁶³

While the Court in *Heller* found that the Second Amendment protected an individual right to keep and bear arms, the Court acknowledged that the right was not unlimited.⁶⁴ Scalia stated that sources ranging from pre-enactment sources to 19th century cases “routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁶⁵ Scalia noted that “nothing in [the Court's] 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.”⁶⁶ The Court also noted that the right to keep and carry arms did not apply to “the carrying of ‘dangerous and unusual weapons.’”⁶⁷

Scalia also took issue with Breyer's dissent, accusing Breyer of proposing a “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.’”⁶⁸ Scalia

⁶¹ See *id.* at 576–95; *id.* at 640–62 (Stevens, J., dissenting).

⁶² See *id.* at 606–26 (first quoting *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 51–53 (1820) (Story, J., dissenting); then citing *Johnson v. Tompkins*, 13 F. Cas. 840, 850 (C.C. Pa. 1833); then quoting *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824); then citing *Nunn v. State*, 1 Ga. 243, 251 (1846); then quoting *id.*; then quoting *State v. Chandler*, 5 La. Ann. 489, 490 (1850); then quoting *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 360 (1833); then quoting *Andrews v. State*, 50 Tenn. (3 Helsk.) 165, 178–79 (1871); then citing *United States v. Cruikshank*, 92 U.S. 542 (1876); then quoting *id.* at 553; then quoting *id.*; then quoting *United States v. Miller*, 307 U.S. 174, 178 (1939); and then quoting *id.*).

⁶³ See *Heller*, 552 U.S. at 626 (quoting *id.* at 676 (Stevens, J., dissenting)).

⁶⁴ See *id.* at 595.

⁶⁵ See *id.* at 626.

⁶⁶ *Id.* at 626–27.

⁶⁷ See *id.* at 627 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 148–49 (1769)).

⁶⁸ *Heller*, 552 U.S. at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)).

characterized this approach as a “freestanding ‘interest-balancing’ approach” apart from “traditionally expressed levels” of scrutiny, such as strict scrutiny, intermediate scrutiny, and rational basis scrutiny that the Court had employed in examining restrictions on other constitutional rights.⁶⁹ Scalia did devote some attention to balancing government interests against restrictions on rights, asserting that “under any of the standards of scrutiny that we have applied to enumerated constitutional rights” a ban on handguns in the home “would fail constitutional muster.”⁷⁰ Scalia rejected the use of rational-basis scrutiny, arguing that this level of scrutiny is inapplicable in cases that involve specific, enumerated rights.⁷¹ Because the District of Columbia’s restriction struck at the “core protection” guaranteed by the Second Amendment, the Court held that the restriction was unconstitutional.⁷² Because *Heller* involved a restriction by the District of Columbia on firearm usage, the Court was not required to determine whether the Second Amendment was incorporated against the states. The Court reached this question in *McDonald v. City of Chicago*.⁷³ There, the Court addressed a Chicago ordinance that prohibited the possession of firearms without proper registration, but prohibited registering most handguns, “thus effectively banning handgun possession by almost all private citizens who reside in the City.”⁷⁴ The petitioners in *McDonald* sued the City of Chicago, seeking a declaration that the handgun ban and related ordinances violated the Second and Fourteenth Amendments of the Constitution.⁷⁵ The District Court rejected the petitioners’ arguments, and the Seventh Circuit affirmed.⁷⁶

⁶⁹ See *id.* at 634. This Article will not delve into levels of scrutiny and their application in various areas of constitutional law, but background on levels of scrutiny may be found elsewhere. See *Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [<https://perma.cc/34TF-ZR3B>] (noting that laws subject to intermediate scrutiny must “further an important government interest” and “must do so by means that are substantially related to that interest”); *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/8YTC-NVLC>] (noting that passing strict scrutiny requires that a law “further a ‘compelling governmental interest,’” and be “narrowly tailored . . . to achieve that interest”).

⁷⁰ See *Heller*, 552 U.S. at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

⁷¹ See *Heller*, 552 U.S. at 629 n.27 (first citing *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008); and then citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

⁷² See *Heller*, 552 U.S. at 634–35.

⁷³ See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

⁷⁴ See *id.* at 750.

⁷⁵ *Id.* at 752.

⁷⁶ *Id.*

Justice Alito authored the Supreme Court's opinion in *McDonald* as to Parts I, II-A, II-B, II-D, and III.⁷⁷ The Court first analyzed whether the Privileges or Immunities Clause of the Fourteenth Amendment required the incorporation of the Second Amendment's protections against state laws.⁷⁸ That clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁷⁹ The Court noted that in the *Slaughter-House Cases*,⁸⁰ it read the Privileges or Immunities Clause narrowly, finding that the Clause protected the right to transact business with the government, to "seek its protection, to share its offices, to engage in administering its functions" and to become a citizen of a particular state.⁸¹ While the petitioners in *McDonald* argued that the right to keep and bear arms was one of the privileges or immunities of the United States, the Court ruled that there was no need to "disturb the *Slaughter-House* holding," noting that "the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause."⁸²

The Court turned its attention to whether the Second Amendment should be incorporated under the Fourteenth Amendment's Due Process Clause.⁸³ Here, a majority of the Justices⁸⁴ stated that it "must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty" or "whether this right is 'deeply rooted in this Nation's history and tradition.'"⁸⁵ In doing so, the majority did not conduct its own analysis of the original meaning of the Due Process Clause or the text of the Fourteenth Amendment.⁸⁶ Instead, beyond its citation to *Glucksberg*, it noted that the Court had moved toward an approach initially advocated by Justice Hugo Black under which "almost all of the Bill of Rights' guarantees" are "fundamental to *our* scheme of ordered liberty and system of

⁷⁷ *Id.* at 748.

⁷⁸ *See id.* at 754–58.

⁷⁹ U.S. CONST. amend. XIV, § 1.

⁸⁰ *Slaughter-House Cases*, 83 U.S. 36 (1873).

⁸¹ *McDonald*, 561 U.S. at 755 (quoting *Slaughter-House Cases*, 83 U.S. at 79–80).

⁸² *Id.* at 758.

⁸³ *Id.* at 767.

⁸⁴ *See id.* at 805–06 (Thomas, J., concurring in part and in judgment) ("I therefore do not join in Parts II-C, IV, and V of the principal opinion.")

⁸⁵ *Id.* at 767 (emphasis in original) (first citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); then quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁸⁶ *See McDonald*, 561 U.S. at 762–64.

justice.”⁸⁷ In doing so, the Court cited several historical sources consistent with the notion that the Fourteenth Amendment incorporated the first eight amendments against the states.⁸⁸ But, in discussing these sources and Justice Black’s methodology, the Court did not take a position on what text in the Fourteenth Amendment warranted Black’s total-incorporation approach.⁸⁹ While Justice Thomas joined in this part of the opinion, he authored an opinion concurring in the judgment in which he argued for an approach to incorporation involving the Privileges or Immunities Clause of the Fourteenth Amendment.⁹⁰

The Court held that the right to keep and bear arms identified in the Second Amendment was indeed “deeply rooted in this Nation’s history and tradition” as self-defense “is a basic right, recognized by many legal systems from ancient times to the present day” and that *Heller* recognized that “individual self-defense is ‘the *central component*’ of the Second Amendment right.”⁹¹ Justice Alito surveyed commentary at and around the ratification debate and state constitutional provisions protecting the right to keep and bear arms in support of this conclusion.⁹² Alito went on to identify statements made in debates over the Fourteenth Amendment, the Civil Rights Act of 1866, post-Fourteenth Amendment speeches and commentary, and state constitutional provisions in place following the Fourteenth Amendment to further support the claim that the Fourteenth Amendment “counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”⁹³

The Court concluded that, because the Second Amendment was “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective,” its protection applied both against federal and state government action.⁹⁴ Accordingly, the Court reversed the Seventh Circuit, holding that Chicago’s firearms ban violated the Second and Fourteenth Amendments.⁹⁵

Justice Thomas penned a concurrence in part in which he agreed that the Second Amendment applied to Chicago’s restrictions, but by

⁸⁷ See *McDonald*, 561 U.S. at 762–64 (citing *Duncan*, 391 U.S. at 149, 149 n.14).

⁸⁸ *McDonald*, 561 U.S. at 762 n.9.

⁸⁹ *Id.* at 762-63, n.10.

⁹⁰ See *id.* at 806 (Thomas, J., concurring in part and in judgment).

⁹¹ See *id.* at 767 (first quoting *Glucksberg*, 521 U.S. at 721; and then quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

⁹² See *McDonald*, 561 U.S. at 768–70.

⁹³ See *id.* at 771–78.

⁹⁴ See *id.* at 791 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149, 149 n.14 (1968)).

⁹⁵ *McDonald*, 561 U.S. at 791.

way of the Privileges or Immunities Clause rather than the Due Process Clause.⁹⁶ Thomas argued that the Court's approach to the Privileges or Immunities Clause, starting with the *Slaughter-House Cases* and continuing into *United States v. Cruikshank* was improperly restrictive, causing litigants to turn to the Fourteenth Amendment's Due Process Clause instead.⁹⁷ Justice Thomas described the Court's doctrine of determining whether a right was "fundamental" or essential to the American "scheme of ordered liberty" or—notably—"deeply rooted in this Nation's history and tradition" as "a legal fiction," calling out the Court's opinion in *Glucksberg* among other cases.⁹⁸

Thomas argued that the history and tradition approach gave insufficient protection to certain rights, gave the Court too much flexibility in debating what rights were sufficiently fundamental, and that the approach abandoned the question of whether "the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification."⁹⁹ Following a prolonged discussion of the Privileges or Immunities Clause, its drafting, and its treatment in debates and commentary, Justice Thomas concluded that it protected "constitutionally enumerated rights, including the right to keep and bear arms."¹⁰⁰ Accordingly, Justice Thomas ultimately concluded that the Second Amendment was fully applicable to states by way of the Privileges or Immunities Clause rather than the Due Process Clause.¹⁰¹

2. *Bruen* Continues the Court's Focus on History and Tradition

With this background in place, we turn to the Court's 2022 opinion in *New York State Rifle & Pistol Ass'n v. Bruen*.¹⁰² Justice Thomas,

⁹⁶ See *id.* at 806 (Thomas, J., concurring in part and in judgment).

⁹⁷ See *McDonald*, 561 U.S. at 808–09 (Thomas, J., concurring in part and in judgment) (first citing *Slaughter-House Cases*, 83 U.S. 76, 78 (1873); then quoting *id.* at 79; then quoting *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); and then quoting *id.* at 553).

⁹⁸ See *id.* at 811 (Thomas, J., concurring in part and in judgment) (first quoting *id.* at 767; then citing *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); then citing *Lochner v. New York*, 198 U.S. 45 (1905); then citing *Roe v. Wade*, 410 U.S. 113 (1973); and then citing *Lawrence*, 539 U.S. at 558)).

⁹⁹ See *id.* (Thomas, J., concurring in part and in judgment).

¹⁰⁰ See *id.* at 837–38 (Thomas, J., concurring in part and in judgment).

¹⁰¹ See *id.* at 854, 858 (Thomas, J., concurring in part and in judgment).

¹⁰² *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

who many scholars and commentators describe as an originalist, wrote the opinion for the Court.¹⁰³

New York State Rifle & Pistol Ass’n v. Bruen involved a New York law that prohibited people from carrying handguns in public unless they held licenses issued under the state’s may issue regime.¹⁰⁴ The law at issue had been in place for over 100 years, and provided that state magistrates could issue a license to carry a concealed handgun only if “[the] person proved good moral character and proper cause.”¹⁰⁵ To show “proper cause” to receive a license to carry a concealed handgun outside of the home, New York courts had interpreted the statute to require that an applicant “demonstrate a special need for self-protection distinguishable from that of the general community.”¹⁰⁶ Under New York’s law, a general concern over living in an area with high crime was not sufficient; rather, an applicant would need to show “evidence ‘of particular threats, attacks or other extraordinary danger to personal safety.’”¹⁰⁷

The petitioners in *Bruen* were two individuals who had been denied an unrestricted license to carry handguns in public after they failed to prove that they were in any special danger.¹⁰⁸ Both individuals were members of petitioner New York State Rifle & Pistol Association, Inc., a “public-interest group organized to defend the Second Amendment rights of New Yorkers.”¹⁰⁹ The petitioners sued for declaratory and injunctive relief, alleging that the State’s denial of their unrestricted license applications violated their Second and

¹⁰³ On Justice Thomas’s reputation as an originalist, see John O. McGinnis & Mike Rappaport, *A Justice for All Seasons*, LAW & LIBERTY (Oct. 14, 2021), <https://lawliberty.org/a-justice-for-all-seasons/> [<https://perma.cc/LRW7-5FJV>] (“He has been a dauntless originalist on the Court and in many ways both bolder and more consistent than Antonin Scalia. Thomas has staked out originalist positions in scores of opinions of increasing sophistication and breadth.”); Stephen B. Presser, *Reading the Constitution Right*, CITY J. (Spring 2007), <https://www.city-journal.org/html/reading-constitution-right-13012.html> [<https://perma.cc/R8RV-UHLR>] (“Thomas is no Scalia clone; in fact, he’s even more committed to originalism than is the elder justice.”). But see Book Note, *Justice Thomas’s Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1434–36 (2008) (arguing that Justice Thomas tends to take an interpretive approach embracing “broad principles of the Declaration of Independence, such as the natural law ideal of equality” in cases involving “civil rights issues, particularly affirmative action,” while he takes a more conservative approach focusing on “Framers’ specific language and intent” in civil liberties cases like abortion and that this “framework appears results-driven”).

¹⁰⁴ *Bruen*, 142 S. Ct. at 2122.

¹⁰⁵ *Id.* (quotations omitted).

¹⁰⁶ *Id.* at 2123 (quoting *In re Klenosky*, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).

¹⁰⁷ *Bruen*, 142 S. Ct. at 2123 (first quoting *In re Bernstein*, 445 N.Y.S.2d 716, 717 (App. Div. 1981); and then quoting *In re Martinek*, 743 N.Y.S.2d 80, 81 (App. Div. 2002)).

¹⁰⁸ See *Bruen*, 142 S. Ct. at 2125.

¹⁰⁹ *Id.*

Fourteenth Amendment rights.¹¹⁰ The district court dismissed the petitioners' claims, and the Second Circuit affirmed, relying on prior case law that had found that New York's law was "substantially related to the achievement of an important governmental interest."¹¹¹

Justice Thomas wrote the opinion for the Court.¹¹² He began by noting that, in the wake of *Heller* and *McDonald*, the Courts of Appeals had taken a "two-step" approach to Second Amendment cases, evaluating: (1) whether a law regulates activity within the scope of the Second Amendment's protection; and, if so, (2) determining whether the government interest the law is meant to accomplish is sufficiently acute, and whether the law is sufficiently tailored to achieve that government interest.¹¹³ The Court noted that in cases where the court determined that a "core" Second Amendment right is burdened, the courts applied strict scrutiny—requiring a determination that the law is "narrowly tailored to achieve a compelling governmental interest."¹¹⁴ In cases where the burdened right was found not to be a "core" Second Amendment right, the courts would apply intermediate scrutiny, requiring a showing that the law is "substantially related to the achievement of an important governmental interest."¹¹⁵

The Court rejected this approach, arguing that it was inconsistent with the Court's prior holding in *Heller*.¹¹⁶ It noted that *Heller* began with a textual analysis of the "normal and ordinary" meaning of the Second Amendment's language.¹¹⁷ The Court stated that it had previously reached the conclusion that the Second Amendment "guarantee[s] the individual right to possess and carry weapons that does not depend on service in the militia," and that the *Heller* Court "looked to history" to confirm that this was how the right to bear arms had typically been understood—both before and after the Second

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2125 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

¹¹² *Bruen*, 142 S. Ct. at 2122.

¹¹³ See *Bruen*, 142 S. Ct. at 2126 (first quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019); then quoting *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017); then quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); then quoting *Kanter*, 919 F.3d at 441; then quoting *id.*; then quoting *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018); then quoting *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017); and then quoting *Kachalsky*, 701 F.3d at 96).

¹¹⁴ See *Bruen*, 142 S. Ct. at 2126 (quoting *Kolbe*, 849 F.3d at 133).

¹¹⁵ See *Bruen*, 142 S. Ct. at 2126–27 (quoting *Kachalsky*, 701 F.3d at 96).

¹¹⁶ See *Bruen*, 142 S. Ct. at 2127.

¹¹⁷ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008)).

Amendment's ratification.¹¹⁸ The Court further recounted that the *Heller* Court had looked to the “historical understanding of the Amendment to demark the limits on the exercise of that right,” recognizing that it did not guarantee the right to keep or carry any weapon in any manner and for any purpose.¹¹⁹ While the *Heller* Court had concluded that the District of Columbia's gun restriction would fail under any standard of constitutional scrutiny, the Court argued that this was not an instance of the Court applying means-end scrutiny—instead, the “historically unprecedented nature” of the restriction was sufficient to strike it down on Second Amendment grounds.¹²⁰

On this basis, the Court rejected any “means-end test such as strict or intermediate scrutiny” in favor of a “methodology centered on constitutional text and history.”¹²¹ It described that methodology as follows:

When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's “unqualified command.”¹²²

If basing the scope of a constitutional amendment's scope on historical tradition sounds familiar, it is because this is the approach that the Court applied in *McDonald*—an approach that Thomas then rejected as a “legal fiction.”¹²³

The Court noted that this textual-historical method would focus on compiling and analyzing relevant historical regulations and restrictions on the right to keep and carry arms.¹²⁴ As an example, it noted *Heller*'s reference to “longstanding” laws that prohibited carrying firearms “in sensitive places such as schools and

¹¹⁸ See *Bruen*, 142 S. Ct. at 2127 (first quoting *Heller*, 554 U.S. at 592; then quoting *id.* at 599; then quoting *id.* at 600–01; and then quoting *id.* at 605).

¹¹⁹ See *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 626).

¹²⁰ See *Bruen*, 142 S. Ct. at 2128 (first quoting *Heller*, 554 U.S. at 628–29; and then quoting *id.* at 629).

¹²¹ See *Bruen*, 142 S. Ct. at 2128–29.

¹²² *Id.* at 2129–30 (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 50 n.10 (1961)).

¹²³ See *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and in the judgment).

¹²⁴ See *Bruen*, 142 S. Ct. at 2132–33.

government buildings.”¹²⁵ Because the Court was not aware of any “disputes regarding the lawfulness of such prohibitions,” the Court could, therefore, “assume it settled that [those] locations were ‘sensitive places’ where arms carrying could be prohibited consistent with the Second Amendment.”¹²⁶

The Court then applied the textual-historical analysis approach to New York’s restriction on permits for concealed firearms.¹²⁷ Starting with the text, the Court cited *Heller* in support of the conclusion that the right to “bear arms” encompassed carrying guns, and went on to conclude that this “naturally encompasses public carry,” as most gun owners “do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table.”¹²⁸ Confining the right to bear arms to the home would “nullify half of the Second Amendment’s operative protections” and would further burden the right to self-defense should the need to defend oneself arise outside the home.¹²⁹

As for the history, the Court surveyed “a variety of historical sources from the late 1200s to the early 1900s,” concluding that historic, founding-era, antebellum-era, reconstruction era, and post-reconstruction era laws all failed to demonstrate any broad prohibition on the public carrying of firearms for self-defense, and that, at most, restrictions noted during these time periods restricted the “intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.”¹³⁰ While this Article will not summarize every restriction in the Court’s survey, as doing so is not necessary for the arguments I advance below, some examples help illustrate the Court’s historic approach. They include:

- Rejecting the Statute of Northampton, which prohibited coming before the King’s Justices or Ministers with force or arms, or going riding armed by night or by day, as an example of a historic, broad restriction on public carry of self-defense weapons.¹³¹ The Court rejected the Statute of Northampton as demonstrating a history of restricting the

¹²⁵ *Id.* at 2133 (quoting *Heller*, 554 U.S. at 626).

¹²⁶ *Bruen*, 142 S. Ct. at 2133.

¹²⁷ *See id.* at 2134.

¹²⁸ *See id.* at 2134 (quoting *Heller*, 554 U.S. at 584, 592).

¹²⁹ *See Bruen*, 142 S. Ct. at 2134–35 (first quoting *Heller*, 554 U.S. at 599; then quoting *id.* at 599; and then quoting *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012)).

¹³⁰ *See Bruen*, 142 S. Ct. at 2128, 2135, 2138.

¹³¹ *See id.* at 2139.

carrying of firearms, noting that it was enacted 450 years before the ratification of the Constitution and that it did not contemplate handguns and therefore was more likely to address armor and weapons that indicated an intent to breach the peace.¹³²

- Rejecting colonial-era statutes restricting the public carrying of firearms, expressing doubt that only three regulations “could suffice to show a tradition of public-carry regulation” and concluding that two of the restrictions prohibited carrying weapons for the purpose of terrorizing the people rather than prohibiting the generally carrying of arms, and that the third restriction applied to “dangerous and unusual weapons” because it specified the carrying of “pocket pistols” or other “unusual or unlawful weapons.”¹³³
- Rejecting examples of prosecutions against people for carrying guns, noting that the cases involved carrying guns for unlawful purposes.¹³⁴
- Rejecting reliance on surety statutes “that required certain individuals to post bond before carrying weapons in public” as examples of historic restrictions on the carrying of firearms because the “laws were not *bans* on public carry, and they typically targeted only those threatening to do harm.”¹³⁵

The Court addressed and rejected other examples of restrictions to the extent that New York attempted to characterize them as restrictions on the right to carry arms in public.¹³⁶ But as these examples demonstrate, none of this analysis addressed the original meaning of the Second Amendment. Indeed, despite the Court’s claim that its approach in *Bruen* consisted of a single step, the textual-historic test consists of two components, only one of which purported to be interested in the text of the Second Amendment.¹³⁷

¹³² See *id.* at 2140.

¹³³ See *id.* at 2142–43.

¹³⁴ See *id.* at 2145–46 (first quoting *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422–23 (1843) (per curiam); and then quoting *O’Neill v. State*, 16 Ala. 65, 67 (1849)).

¹³⁵ See *Bruen*, 142 S. Ct. at 2148.

¹³⁶ See *id.* at 2150–56.

¹³⁷ See *id.* at 2127–28, 2131.

The Court's analysis under that prong was relegated to only a few paragraphs and did not examine the original meaning of "bear" or "bear arms."¹³⁸

After considering and rejecting New York's examples of historic restrictions, the Court concluded that the State had not met its burden "to identify an American tradition justifying the State's proper-cause requirement."¹³⁹ The Court, therefore, concluded that New York's law violated the Fourteenth Amendment because it prevented "law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."¹⁴⁰

B. Dobbs v. Jackson Women's Health Organization

The day after deciding *Bruen*, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*.¹⁴¹ Tensions were already high, as a draft of the opinion had been leaked over a month earlier.¹⁴² When the Court issued its final opinion on June 24, 2022, the key aspects of the opinion remained unchanged from the leaked draft.¹⁴³

In *Dobbs*, the Court addressed Mississippi's Gestational Age Act, which prohibited abortions of fetuses with a gestational age greater than fifteen weeks unless there was a "medical emergency" or "severe fetal abnormality."¹⁴⁴ The respondents, Jackson's Women's Health Organization and one of its doctors, sued, alleging that the law violated the right to obtain an abortion.¹⁴⁵ The district court granted summary judgment in favor of the respondents, finding that the

¹³⁸ See *id.* at 2134–35.

¹³⁹ See *id.* at 2156.

¹⁴⁰ *Id.*

¹⁴¹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2228 (2022).

¹⁴² See Gerstein & Ward, *supra* note 15; Mark Sherman, *Poll: High Court Approval Drops After Abortion Opinion Leak*, ABC NEWS (May 25, 2022, 12:39 PM), <https://abcnews.go.com/Politics/wireStory/poll-high-court-approval-drops-abortion-opinion-leak-84961264> [<https://perma.cc/V8KP-P26X>]; Sonia Suter & Naomi Cahn, *Opinion, The Consequences of the Leaked Draft Opinion Go Far Beyond Abortion Rights*, THE HILL (May 5, 2022), <https://thehill.com/opinion/judiciary/3478262-the-consequences-of-the-leaked-draft-opinion-go-far-beyond-abortion-rights/> [<https://perma.cc/2ZE9-5ME5>].

¹⁴³ See Alanna Durkin Richer, *Supreme Court: The Leaked Abortion Draft Versus the Opinion*, SEATTLE TIMES (June 24, 2022, 12:46 PM), <https://www.seattletimes.com/nation-world/nation-politics/supreme-court-the-leaked-abortion-draft-versus-the-opinion/> [<https://perma.cc/F5Q8-57LH>] ("Key passages in Justice Samuel Alito's draft opinion and the final ruling released Friday are identical, including sharp denunciations of the Roe ruling as 'egregiously wrong,' with 'exceptionally weak' reasoning and 'damaging consequences.'").

¹⁴⁴ *Dobbs*, 142 S. Ct. at 2243.

¹⁴⁵ *Id.* at 2244.

State's interest in protecting fetal life is sufficient to ban nontherapeutic abortions and "that 15-week gestational age was 'prior to viability.'"¹⁴⁶ The Fifth Circuit affirmed.¹⁴⁷

Justice Alito authored the Court's opinion in *Dobbs*.¹⁴⁸ He set the stage by characterizing *Roe v. Wade*, in which the Court ruled that the Constitution protected the right to obtain an abortion, as imposing "the same highly restrictive regime on the entire Nation," and "spark[ing] a national controversy that has embittered our political culture for a half century."¹⁴⁹

Moving to the constitutional analysis, the Court noted that "[c]onstitutional analysis must begin with 'the language of the instrument.'"¹⁵⁰ This is because the language "offers a 'fixed standard' for ascertaining what our founding document means."¹⁵¹ The Court noted that the Constitution does not explicitly reference a right to abortion, meaning that "those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text."¹⁵² The Court argued that *Roe v. Wade* was "remarkably loose" in ascertaining the basis for the right, noting that the Court had cited the "First, Fourth, Fifth, Ninth, and Fourteenth Amendments."¹⁵³ The Court then turned its focus to the "bold assertion" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁵⁴ that affirmed *Roe* on the basis that "the abortion right is an aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."¹⁵⁵

The Court stated that, in deciding whether a right falls under the substantive rights protected by the Fourteenth Amendment's Due Process Clause, and where the right at issue is not guaranteed by the first eight amendments to the Constitution, the Court must consider whether the right is "'deeply rooted in [our] history and tradition' and

¹⁴⁶ See *id.* (quoting *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 539–40 (S.D. Miss. 2019)).

¹⁴⁷ *Dobbs*, 142 S. Ct. at 2244.

¹⁴⁸ *Id.* at 2240.

¹⁴⁹ *Dobbs*, 142 S. Ct. at 2241.

¹⁵⁰ *Id.* at 2244–45 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 186–89 (1824)).

¹⁵¹ See *Dobbs*, 142 S. Ct. at 2244–45 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, at 383 (1833)).

¹⁵² *Dobbs*, 142 S. Ct. at 2245.

¹⁵³ See *Dobbs*, 142 S. Ct. at 2245 (citing *Roe*, 410 U.S. at 152).

¹⁵⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

¹⁵⁵ See *Dobbs*, 142 S. Ct. at 2246 (quoting *Casey*, 505 U.S. at 846).

whether it is essential to our Nation's 'scheme of ordered liberty.'"¹⁵⁶ The Court concluded that "there was no support in American law for a constitutional right to obtain an abortion" until "the latter part of the 20th century," noting the lack of any such discussion or proposals in courts, treatises, or law reviews.¹⁵⁷

The Court then embarked on a survey of historic restrictions against abortion, contending that it had been a crime in every state prior to the decision in *Roe*.¹⁵⁸ The Court began with "eminent common-law authorities (Blackstone, Coke, Hale and the like)," and noted that each of them recognized that abortion of a child was a crime if it occurred "after quickening" (that is, the "first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy").¹⁵⁹ The Court acknowledged that while "pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*."¹⁶⁰ The Court cited little authority for this, mentioning only two cases where abortion was characterized in a negative light with no mention of whether the abortions were post-quickening.¹⁶¹ The Court then moved to colonial history, where again it cited examples of colonies criminalizing post-quickening abortions.¹⁶² The Court then noted that "during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy."¹⁶³ This "overwhelming consensus" remained in place until *Roe* was decided, although "about 'one-third of the States'" had decriminalized abortion in certain circumstances.¹⁶⁴ In response to arguments that the history cited by the Court suggested that abortion was permissible pre-quickening, the Court argued that "insistence on quickening was not universal" and that the failure of many states to criminalize pre-

¹⁵⁶ See *Dobbs*, 142 S. Ct. at 2246 (first quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019); then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); and then quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹⁵⁷ See *Dobbs*, 142 S. Ct. at 2248.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* at 2249 (quoting *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020)).

¹⁶⁰ *Dobbs*, 142 S. Ct. at 2250 (emphasis in original).

¹⁶¹ See *Dobbs*, 142 S. Ct. at 2249–50.

¹⁶² See *id.* at 2251.

¹⁶³ *Id.* at 2252.

¹⁶⁴ See *id.* at 2253 (quoting *Roe v. Wade*, 410 U.S. 113, 140 (1973)).

quickenings abortions “does not mean that anyone thought the States lacked the authority to do so.”¹⁶⁵

The Court recognized that “supporters of *Roe* and *Casey*” argued that the right to an abortion was part of a broader “right to privacy” or “freedom to make ‘intimate and personal choices’ that are ‘central to personal dignity and autonomy.’”¹⁶⁶ The Court rejected this framing, arguing that the “high level of generality” of a broad right to autonomy “could license fundamental rights to illicit drug use, prostitution, and the like.”¹⁶⁷ The Court argued that because abortion destroys “potential life,” it involved a “critical moral question” that rendered abortion distinguishable from the freedom to marry a person of a different race, the right to obtain contraceptives, the right not to be sterilized without consent, and the right to make decisions about the education of one’s children.¹⁶⁸ Accordingly, the various cases upholding those separate rights—cited by proponents of *Roe* and *Casey*—were inapposite under the Court’s abortion-focused framing.¹⁶⁹

This all led the Court to the “inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation’s history and traditions.”¹⁷⁰ The Court also rejected the argument that *stare decisis* warranted continued acceptance of *Roe* and *Casey*, concluding that *Roe* was “egregiously wrong and deeply damaging,” that *Roe* and *Casey* imposed an unworkable rule, that the reasoning of the decisions was poor, that they disrupted other areas of the law, and that there was an absence of concrete reliance on the opinions.¹⁷¹ Accordingly, the Court held that all that was required was a rational

¹⁶⁵ See *Dobbs*, 142 S. Ct. at 2255 (first citing *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); and then citing *State v. Slagle*, 83 N.C. 630, 632 (1880)).

¹⁶⁶ See *Dobbs*, 142 S. Ct. at 2257 (first citing *Roe*, 410 U.S. at 154; and then quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion)).

¹⁶⁷ See *Dobbs*, 142 S. Ct. at 2258 (first citing *Casey*, 505 U.S. at 851; and then citing *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir.1996) (O’Scannlain, J., dissenting from denial of rehearing en banc)).

¹⁶⁸ See *Dobbs*, 142 S. Ct. at 2257–58.

¹⁶⁹ See *id.* (first citing *Loving v. Virginia*, 388 U.S. 1 (1967); then citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); then citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); then citing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); then citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); then citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); and then citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

¹⁷⁰ See *Dobbs*, 142 S. Ct. at 2253.

¹⁷¹ See *id.* at 2261–78. I recognize that this single sentence does not do justice to the breadth of arguments addressed in this portion of the opinion, but I am excluding a more detailed summary in the interest of space and focus.

basis for the law, and, under this permissive standard, the Court concluded that Mississippi's restriction was permissible.¹⁷²

C. Kennedy v. Bremerton School District

Kennedy v. Bremerton School District involved a lawsuit filed by a former football coach who lost his job as a result of his prayers at football games.¹⁷³ The facts of the case vary depending on whether one reads the Court's characterization or that of the dissenting Justices.¹⁷⁴ The summary below is based on the characterization of the facts in Justice Gorsuch's opinion for the Court, although it includes interjections from the dissenting Justices where appropriate.

The petitioner in *Kennedy* had worked as a football coach at Bremerton High School since 2008.¹⁷⁵ At the conclusion of each game, Kennedy prayed by taking a knee at the 50-yard line and praying "quiet[ly]."¹⁷⁶ As time went on, some players asked to pray with Kennedy, and some of those players asked members of opposing teams to join.¹⁷⁷ Kennedy incorporated "short motivational speeches" with his prayer when others were present—and this practice took place for seven years.¹⁷⁸ As the dissent noted, while Kennedy initially prayed alone, over time, a majority of the team would join him, and Kennedy would give speeches with "overtly religious references" to the team.¹⁷⁹

In 2015, the School District took notice of Kennedy's prayers. On September 17, 2015, it sent Kennedy a letter telling him that he should avoid motivational talks with students that involved religious expression, including prayer, and that he should avoid suggesting or encouraging students to take part in prayers, as well as ensure that his prayers remained "nondemonstrative."¹⁸⁰ As the dissent notes, another school's coach had notified the District that Kennedy had

¹⁷² *Dobbs*, 142 S. Ct. at 2284 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955)).

¹⁷³ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415–16 (2022).

¹⁷⁴ Compare *id.* at 2415–19, with *id.* at 2435–40 (Sotomayor, J., dissenting).

¹⁷⁵ *Id.* at 2416.

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 2435–36 (Sotomayor, J., dissenting).

¹⁸⁰ *Id.* at 2416–17.

asked him and his team to join Kennedy in prayer.¹⁸¹ The District was concerned with tension with the “Establishment Clause,” which prohibits laws respecting an establishment of religion.¹⁸²

On October 14, 2015, Kennedy sent a letter to the District, saying that he felt compelled to offer a prayer of thanks at midfield, and requested that the District allow him to engage in that “private religious expression alone.”¹⁸³ As the dissent notes, Kennedy made “multiple media appearances” before the October 16, 2015 homecoming game, publicizing his plans to pray.¹⁸⁴ The District responded on October 16, 2015 and forbade Kennedy from engaging in any “overt actions that could appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach.”¹⁸⁵

Kennedy prayed at the October 16 game, and players from the other team and members of the community joined him before he finished the prayer.¹⁸⁶ The dissent notes that “coaches and players from the opposing team” “quickly . . . joined” Kennedy, that “[t]elevision news cameras surrounded the group” and that “[m]embers of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members.”¹⁸⁷ Media coverage of Kennedy’s “dilemma” resulted, and the District wrote to Kennedy on October 23, 2015, telling him that his October 16 prayer could be viewed as a government endorsement of religion, and telling Kennedy that he could only pray in a private location following the October 23 game.¹⁸⁸ Kennedy prayed at the 50-yard line after the October 23 game ended and nobody joined him.¹⁸⁹ Kennedy prayed at the 50-yard line again on October 26.¹⁹⁰ At the October 26 game, other adults gathered around him.¹⁹¹ The dissent notes that the members of the public who surrounded Kennedy at the October 26 game included state representatives who attended the game to support Kennedy and that the team players joined Kennedy

¹⁸¹ *Id.* at 2435 (Sotomayor, J., dissenting).

¹⁸² *See id.* at 2436 (Sotomayor, J., dissenting); *see also* U.S. CONST. amend. I.

¹⁸³ *Kennedy*, 142 S. Ct. at 2417.

¹⁸⁴ *See id.* at 2437 (Sotomayor, J., dissenting).

¹⁸⁵ *See id.* at 2417.

¹⁸⁶ *See id.* at 2418.

¹⁸⁷ *See id.* at 2438 (Sotomayor, J., dissenting). To ensure that all potential conflicts of interest are disclosed, I was once a member of my high school’s marching band, where I played the clarinet. As chilling as the imagery in this case is to me, it has not affected my characterization of the case or my subsequent analysis.

¹⁸⁸ *See id.* at 2418.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

at midfield after they finished singing the fight song.¹⁹² Shortly after the October 26 game, Kennedy was placed on administrative leave, and the District ultimately advised against rehiring Kennedy.¹⁹³ The dissent noted that “several parents” notified the District that their children “had participated in Kennedy’s prayers solely to avoid separating themselves from the rest of the team” and that no students appeared to pray on the field after Kennedy was suspended.¹⁹⁴

Kennedy sued the District, arguing that its actions violated the First Amendment’s Free Speech and Free Exercise Clauses.¹⁹⁵ After an initial certiorari petition was denied, “the parties engaged in discovery and eventually brought cross-motions for summary judgment.”¹⁹⁶ The district court ruled in the District’s favor, finding that Kennedy’s speech was offered in his capacity as a government employee and that even if it were private speech, it was properly restricted out of concern that the District would violate the First Amendment’s Establishment Clause.¹⁹⁷ The Ninth Circuit affirmed, agreeing that Kennedy’s expression on the field was speech by a government employee and that even if he were speaking as a private citizen, Kennedy’s activities and publicity efforts would have led an objective observer to conclude that the District endorsed Kennedy’s religious activity, which would “amount to a violation of the Establishment Clause.”¹⁹⁸

The Court analyzed several issues in its opinion: (1) Kennedy’s free exercise claim;¹⁹⁹ (2) Kennedy’s free speech claim;²⁰⁰ and (3) the District’s Establishment Clause violation concern.²⁰¹ On the free exercise claim, the Court noted that “a plaintiff may . . . prov[e] a free exercise violation . . . by showing that a government entity has burdened [their] sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’”²⁰² The Court cited its prior

¹⁹² *See id.* at 2439 (Sotomayor, J., dissenting).

¹⁹³ *See id.* at 2418–19.

¹⁹⁴ *See id.* at 2440 (Sotomayor, J., dissenting).

¹⁹⁵ *Id.* at 2419.

¹⁹⁶ *See id.* at 2419–20.

¹⁹⁷ *See id.* at 2420.

¹⁹⁸ *See id.* (quoting *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017–18 (9th Cir. 2021), *overruled by* 142 S. Ct. 2407 (2022)).

¹⁹⁹ *Kennedy*, 142 S. Ct. at 2421.

²⁰⁰ *Id.*

²⁰¹ *See id.* at 2426.

²⁰² *Id.* at 2421–22 (quoting *Emp. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 879–81 (1990)).

ruling in *Employment Division, Department of Human Resources of Oregon v. Smith* in support of this proposition.²⁰³ The Court held that Kennedy had demonstrated that his religious convictions were sincere and that the District’s conduct was directed toward him rather than pursuant to a neutral and generally applicable rule.²⁰⁴

As for Kennedy’s free speech claim, the Court noted that “the First Amendment’s protections extend to ‘teachers and students,’ neither of whom ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”²⁰⁵ The Court recognized that speech by government employees presented a complex question and turned to its prior decisions in *Pickering v. Board of Education of Township High School District 205, Will County*,²⁰⁶ and *Garcetti v. Ceballos*²⁰⁷ to determine how to proceed.²⁰⁸ From these precedents, the Court determined that a two-step inquiry was necessary: first, the Court would make a threshold inquiry to determine whether Kennedy spoke “pursuant to [his] official duties”; and second, if Kennedy spoke in his capacity as a private citizen, the Court would balance “the competing interests surrounding the speech and its consequences.”²⁰⁹

The Court concluded that Kennedy’s speech was private, not government, speech, as Kennedy “was not engaged in speech ‘ordinarily within the scope’ of his duties as a coach.”²¹⁰ Kennedy was not speaking “pursuant to government policy,” nor was he “instructing players, discussing strategy, [or] encouraging better on-field performance.”²¹¹ The Court noted that “[t]he timing and circumstances of Mr. Kennedy’s prayers”—“when students were engaged in other activities like singing the school fight song”—indicated that he was not addressing the team, but instead was praying as a private citizen.²¹² Keep in mind that this characterization of the facts is based on the majority’s summation of

²⁰³ *Kennedy*, 142 S. Ct. at 2422 (citing *Smith*, 494 U.S. at 879–81).

²⁰⁴ *See id.* at 2422–23.

²⁰⁵ *Id.* at 2423 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

²⁰⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

²⁰⁷ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

²⁰⁸ *See Kennedy*, 142 S. Ct. at 2423 (first citing *Pickering*, 391 U.S. at 563; and then citing *Garcetti*, 547 U.S. at 410).

²⁰⁹ *See Kennedy*, 142 S. Ct. at 2423 (first quoting *Garcetti*, 547 U.S. at 421; and then quoting *id.* at 423).

²¹⁰ *Kennedy*, 142 S. Ct. at 2424 (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014)).

²¹¹ *Kennedy*, 142 S. Ct. at 2424.

²¹² *Id.* at 2425.

the facts—which lacked all of the points noted by the dissent summarized above.²¹³

With this, the Court turned to balancing Kennedy’s interests as a private citizen against those of the District—which involved an evaluation of the District’s concerns that Kennedy’s activities would give rise to an Establishment Clause violation.²¹⁴ The Court noted that the District relied on *Lemon v. Kurtzman* to conclude that a reasonable observer was likely to view Kennedy’s prayer as an endorsement of religion by the District.²¹⁵ In response, the Court asserted that it had “long ago abandoned *Lemon* and its endorsement test offshoot.”²¹⁶ The Court criticized *Lemon* as creating a “minefield” for legislators and acting as a “modified heckler’s veto” that warranted prohibition of religious activity “based on ‘perceptions or discomfort.’”²¹⁷

Instead of the *Lemon* test, the Court stated that “the Establishment Clause must be interpreted by “reference to historical practices and understandings.””²¹⁸ The line between permissible and impermissible conduct “has to ““accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.””²¹⁹ The Court stated that analysis “focused on original meaning and history” has been the rule to its Establishment Clause jurisprudence.²²⁰

Throughout its statement of its historic methodology, the Court repeatedly cited its opinion in *Town of Greece v. Galloway*.²²¹ To provide additional depth and context to the reasoning in *Kennedy*, this Article briefly turns to *Town of Greece* and the reasoning employed by various Justices in that case.

²¹³ See *supra* notes 179, 181–182, 184, 187, 192, 194 and accompanying text.

²¹⁴ See *Kennedy*, 142 S. Ct. at 2426.

²¹⁵ See *Kennedy*, 142 S. Ct. at 2427.

²¹⁶ *Id.* (citing *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (plurality opinion)). The dissent noted that *Lemon* had not, in fact, been overturned by the opinions cited by the Court in support of that assertion. See *Kennedy*, 142 S. Ct. at 2449 (Sotomayor, J., dissenting) (first quoting *Am. Legion*, 139 S. Ct. at 2087; and then quoting *id.* at 2081–85).

²¹⁷ See *Kennedy*, 142 S. Ct. at 2427 (first quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768–69, 768 n.3 (1995); and then quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)).

²¹⁸ *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

²¹⁹ *Kennedy*, 142 S. Ct. at 2428 (alterations in original) (quoting *Town of Greece*, 572 U.S. at 577).

²²⁰ *Kennedy*, 142 S. Ct. at 2428 (first quoting *Town of Greece*, 572 U.S. at 575; then citing *Am. Legion*, 139 S. Ct. at 2087; then citing *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961); then citing *McGowan v. Maryland*, 366 U.S. 420, 437–40 (1961); and then citing *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970)).

²²¹ See *Kennedy*, 142 S. Ct. at 2427–28 (first quoting *Town of Greece*, 572 U.S. 565; then quoting *id.* at 576; and then quoting *id.* at 577).

In the portions of *Town of Greece* cited by the *Kennedy* Court, a majority of the Justices, in considering the constitutionality of prayers at town meetings, noted that the First Congress “appoint[ed] and pa[id] official chaplains, and [both] the House and Senate have continued the [chaplain’s] office virtually uninterrupted since that time.”²²² The *Town of Greece* majority inferred that because “the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment . . . the Framers considered legislative prayer a benign acknowledgment of religion’s role in society.”²²³ The majority in *Town of Greece* cited and discussed *Marsh v. Chambers*, which also addressed historical legislative prayers.²²⁴ In doing so, the majority stated:

Marsh stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. . . . A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.²²⁵

In *Town of Greece*, Justice Thomas wrote a concurrence in part and concurrence in the majority’s judgment, which Justice Scalia joined in part.²²⁶ In the portion of that opinion which both Justices Thomas and Scalia signed, Thomas contended that the establishments that existed at the time of the founding were “coercive” requirements in which taxes were levied for church revenue and attendance was mandated.²²⁷ Thomas argued that these forms of coercive requirements were what the founders understood to be an establishment—meaning there was no support for a test looking to whether a “reasonable observer” feels pressure or perceives

²²² *Town of Greece*, 572 U.S. at 575 (quoting *Marsh v. Chambers*, 463 U.S. 783, 787–89 (1983)).

²²³ See *Town of Greece*, 572 U.S. at 576.

²²⁴ *Id.* at 575–77 (first citing *Marsh*, 463 U.S. at 787–89; then citing *id.* at 788–90; and then citing *id.* at 792).

²²⁵ *Town of Greece*, 572 U.S. at 577 (first citing *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part); and then citing *Van Orden v. Perry*, 545 U.S. 677, 702–704 (2005) (Breyer, J., concurring)).

²²⁶ *Town of Greece*, 572 U.S. at 604 (Thomas, J., concurring in part and in judgment).

²²⁷ See *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring in part and in judgment).

governmental endorsement.²²⁸ To be clear, though, the *Kennedy* Court did not cite this concurrence when it set forth its historical test.

Back to the *Kennedy* case. In addition to *Town of Greece*, the *Kennedy* Court cited the plurality opinion in *American Legion v. American Humanist Ass'n*, where the plurality had recognized the approaches set forth in *Town of Greece* and *Marsh* and noted additional evidence that the founders considered legislative prayer to be “a benign acknowledgment of religion’s role in society.”²²⁹ This evidence included President George Washington proclaiming a national day of prayer, Congress reenacting the Northwest Treaty Ordinance which stated that “[r]eligion, morality, and knowledge [were] necessary to good government,” and President Washington’s Farewell Address which described religion and morality as “‘indispensable supports’ to ‘political prosperity.’”²³⁰

The Court also cited *Torcaso v. Watkins*, in which Justice Hugo Black reasoned that the Constitution’s prohibition on religious tests for office and the First Amendment arose from longstanding desires by early Americans to escape historic laws requiring such oaths.²³¹ The Court also cited *Walz v. Tax Commission of City of New York*, where the Court, in the second-to-last sentence of its opinion, noted the Court’s acceptance, “without discussion,” of federal and state tax exemption grants to churches for more than a century.²³² That “without discussion” qualifier meant that, unfortunately, the reason for the Court’s acceptance—whether related to original public meaning or other considerations—was left undiscussed in *Walz*.

The Court, interestingly, also cited *McGowan v. Maryland*. The *Kennedy* Court noted *McGowan*’s consideration of historic examples of laws restricting work to be performed on Sundays and their place in the First Amendment’s history.²³³ But while the *McGowan* Court found the history of Sunday closing laws to be “both enlightening and persuasive,” and while it concluded that these laws had “their genesis in religion,” they had since evolved and had a “more or less recent

²²⁸ See *id.* at 608–09 (Thomas, J., concurring in part and in judgment) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).

²²⁹ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) (first citing *Marsh v. Chambers*, 463 U.S. 783, 797–801 (1983); and then quoting *Town of Greece*, 572 U.S. at 576).

²³⁰ See *Am. Legion*, 139 S. Ct. at 2087–88.

²³¹ See *Kennedy*, 142 S. Ct. at 2428 (citing *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961)); *Torcaso*, 367 U.S. at 491–92 (1961).

²³² See *Kennedy*, 142 S. Ct. at 2428 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970)); *Walz*, 397 U.S. at 680.

²³³ See *Kennedy*, 142 S. Ct. at 2428 (citing *McGowan*, 366 U.S. at 437–40).

emphasis upon secular considerations.”²³⁴ In short, because the Sunday closure laws, while initially religious in nature and origin, had “evolved” to address secular concerns, the laws did not implicate the Establishment Clause.²³⁵ This analysis, by Chief Justice Earl Warren no less, is a far cry from an original public meaning approach to constitutional interpretation.

But we get ahead of ourselves. Back to *Kennedy*—the Court asserted that there was “a pretty obvious reason why the Ninth Circuit did not adopt [the historical practices and understandings approach] in proceedings below: The evidence cannot sustain it.”²³⁶ Unlike its approach in *Bruen* and *Dobbs*, however, the Court did not delve into a list of historic examples to support a tradition of permitting prayers by high school football coaches. Instead, the Court based its argument solely on its one-sided recitation of the facts. Characterizing Kennedy’s activities as “the prayer he gave alone,” and describing Kennedy as wanting to pray “quietly by himself,” albeit, in a location where “some people would have seen his religious exercise,” the Court held that this activity did not rise to the level of coercing students into participation and did not constitute an endorsement of religion.²³⁷ The Court also rejected the claim that Kennedy wielded authority and influence over the students, stating again that there was no record evidence of coercion.²³⁸

This, the Court stated, left the District defending the notion that “any visible religious conduct by a teacher or coach should be deemed . . . impermissibly coercive on students.”²³⁹ The Court rejected this, noting that it would prohibit a great deal of other conduct by teachers, such as “praying quietly over their lunch, . . . wearing a yarmulke to school, or . . . offering a midday prayer during a break before practice.”²⁴⁰ The Court also noted that the present case did not rise to the level of the Court’s prior public school Establishment Clause cases, noting that those involved compelled attendance by all or some of the school’s students.²⁴¹ The

²³⁴ See *McGowan*, 366 U.S. at 440, 444–45.

²³⁵ See *id.* at 435, 444.

²³⁶ *Kennedy*, 142 S. Ct. at 2429.

²³⁷ See *Kennedy*, 142 S. Ct. at 2429–30.

²³⁸ See *id.* But see *id.* at 2440 (Sotomayor, J., dissenting) (noting reports from parents of students who had participated in the prayers because they did not want to be separated from the rest of the team).

²³⁹ See *id.* at 2431 (emphasis in original).

²⁴⁰ *Id.*

²⁴¹ See *id.* at 2431 (first citing *Lee v. Weisman*, 505 U.S. 577, 580, 598 (1992); then quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000); and then quoting *id.* at 311).

Court concluded that because there was no Establishment Clause violation, there was no constitutional basis for the restriction of Kennedy's speech, and the Court, therefore, reversed the Ninth Circuit's decision below.²⁴²

Justice Thomas concurred, noting that two issues remained unresolved by the Court's opinion.²⁴³ First, Thomas noted that the Court did not address "how public employees' rights under the Free Exercise Clause may . . . be different from those of the general public."²⁴⁴ Justice Thomas flagged the Court's prior rulings that the First Amendment only protects public employee speech that "falls within the core of First Amendment protection" and involves matters of public concern.²⁴⁵ Justice Thomas stated, however, that it remained an "open question" whether this analysis applied to free exercise claims.²⁴⁶ Relatedly, Thomas noted that the Court had not addressed what government interest would be necessary to justify restrictions on religious expression by public employees.²⁴⁷ Nowhere in his brief concurrence did Thomas address whether the original public meaning of the First Amendment had any bearing on these unanswered questions or the case that the Court had just decided.

IV. THE COURT'S ABANDONMENT OF THE ORIGINAL PUBLIC MEANING APPROACH

This Part argues that the Court abandoned the original public meaning approach to constitutional interpretation in *Bruen*, *Dobbs*, and *Kennedy*. Nowhere in any of these opinions did the Court make an effort to determine the original public meaning of the constitutional provisions at issue. While the Court paid lip service to the Constitution's meaning, its opinions focused far more on historic practices and traditions without drawing an explicit link between such history and textual meaning.

²⁴² See *Kennedy*, 142 S. Ct. at 2433.

²⁴³ *Id.* (Thomas, J., concurring).

²⁴⁴ *Id.* (Thomas, J., concurring).

²⁴⁵ See *id.* (Thomas, J., concurring) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008)).

²⁴⁶ *Kennedy*, 142 S. Ct. at 2433 (Thomas, J., concurring) (citing *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 406 (2011) (Scalia, J., concurring in part and dissenting in part)).

²⁴⁷ See *Kennedy*, 142 S. Ct. at 2433 (Thomas, J., concurring).

You might be surprised to hear this, given the initial reactions to these cases by commentators.²⁴⁸ *Dobbs*, which was the highest profile of the three opinions, garnered the most commentary, much of which praised (or blamed) originalism for the result. Discussing the Court's 2021 term, Erwin Chemerinsky claims that "originalism is in its ascendancy on the Supreme Court" and contends that originalism is behind the Court's decisions in *Dobbs*, *Bruen*, and *Kennedy*.²⁴⁹ Akhil Amar characterizes Justice Alito's opinion overturning *Roe* and *Casey* as, "[i]n a word: Originalism" and claims that "originalism is now openly ascendant."²⁵⁰ In discussing the *Dobbs* draft opinion (which, in substance, was largely identical to the final opinion), Jennifer Mascott dismissed concerns about the opinion's originalist merits as "misguided," and claimed that the opinion would "stand as one of the opinions most consistent with originalism in this century and the last one."²⁵¹ Interestingly, Mascott did not make any claims about the final opinion's originalist credentials in subsequent commentary—instead focusing on how the opinion was based on *Washington v. Glucksberg*.²⁵² Laura Briggs criticizes the *Dobbs* draft, characterizing it as "high originalist dudgeon."²⁵³ Morgan Marietta described the opinion as based on originalism—which he characterized as "determin[ing] the original public meaning of the

²⁴⁸ See, e.g., Hoover, *supra* note 13; Carrie Campbell Severino, *A Supreme Court Term for the Ages*, NAT'L REV. (July 6, 2022, 3:07 PM), <https://www.nationalreview.com/bench-memos/a-supreme-court-term-for-the-ages/> [<https://perma.cc/9PYQ-ERGW>] (stating that the Supreme Court's October 2021 term "confirms beyond a doubt that we finally have an originalist Court").

²⁴⁹ Erwin Chemerinsky, Opinion, *How the Scourge of Originalism Is Taking over the Supreme Court*, L.A. TIMES (Sept. 6, 2022, 3:15 AM), <https://www.latimes.com/opinion/story/2022-09-06/originalism-supreme-court-conservatives-fallacy-robert-bork> [<https://perma.cc/DF6A-TZMH>].

²⁵⁰ Akhil Reed Amar, *Why Liberal Justices Need to Start Thinking Like Conservatives*, TIME (June 30, 2022, 8:00 AM), <https://time.com/6192277/supreme-court-originalism/> [<https://perma.cc/RZ2Z-RJ82>].

²⁵¹ See Jennifer Mascott, Opinion, *Alito's Master Stroke, Between Precedent and Original Meaning*, WALL STREET J. (May 15, 2022, 1:39 PM), <https://www.wsj.com/articles/supreme-court-alito-dobbs-roe-originalism-abortion-law-11652459216> [<https://perma.cc/RYG4-C6YR>]; John Keefe, Shania Shelton, Kaanita Iyer, JiMin Lee, Ariella Phillips, Kenneth Uzquiano & Christopher Hickey, *Track Changes Between the Abortion Decision and the Leaked Draft*, CNN (June 27, 2022), <https://www.cnn.com/interactive/2022/06/us/supreme-court-abortion-dobbs-decision-changes/> [<https://perma.cc/R92C-ZP43>].

²⁵² David B. Rivkin Jr. & Jennifer L. Mascott, *The Supreme Court Reclaims Its Legitimacy*, WALL STREET J. (June 24, 2022, 1:54 PM), <https://www.wsj.com/articles/supreme-court-reclaims-legitimacy-abortion-roe-v-wade-dobbs-v-jackson-women-health-reproductive-rights-life-originalism-justice-alito-11656084197> [<https://perma.cc/RU5R-4M6E>].

²⁵³ Laura Briggs, Opinion, *Originalists Are Misreading the Constitution's Silence on Abortion*, WASH. POST (May 3, 2022, 9:56 AM), <https://www.washingtonpost.com/outlook/2022/05/03/originalists-misreading-constitution-silence-abortion/> [<https://perma.cc/L7GX-7H9U>].

text.”²⁵⁴ Josh Blackman described *Dobbs* as “a triumph for originalism and sound constitutional law.”²⁵⁵

Dobbs wasn’t the only opinion characterized as originalist. Commentators noted that the Court’s focus on history in the *Kennedy* case reflected an originalist approach as well.²⁵⁶ Supporters and critics of *Bruen* label it an originalist opinion.²⁵⁷ John McGinnis claims that, in *Bruen*, “originalism was very much on the surface, not only governing the Second Amendment, but perhaps changing the approach to the adjudication of constitutional rights more generally.”²⁵⁸ And while prominent originalist scholar Randy Barnett was concerned about Justice Thomas’s “absolute” view of rights, he labeled *Bruen* as “a purportedly originalist opinion.”²⁵⁹ John Malcolm of the Heritage Foundation praises the Court as originalist, and gives it an “A-plus” for its interpretation and adherence to the Constitution in multiple outlets across the

²⁵⁴ Morgan Marietta, “A Revolutionary Ruling—and Not Just for Abortion”: A Supreme Court Scholar Explains the Impact of *Dobbs*, THE CONVERSATION (June 24, 2022, 2:55 PM), <https://theconversation.com/a-revolutionary-ruling-and-not-just-for-abortion-a-supreme-court-scholar-explains-the-impact-of-dobbs-185823> [<https://perma.cc/6C76-KBGM>].

²⁵⁵ Josh Blackman, Opinion, *Perspective: On Abortion, Justices Demonstrate Courage Under Fire*, DESERET NEWS (June 24, 2022, 6:14 PM), <https://www.deseret.com/2022/6/24/23182049/perspective-on-abortion-justices-demonstrate-courage-under-fire-roe-v-wade-dobbs-samuel-alito-casey> [<https://perma.cc/K994-B6EY>].

²⁵⁶ Danny Westneat, Opinion, *The Myth at the Heart of the Praying Bremerton Coach Case*, SEATTLE TIMES (June 29, 2022, 10:26 AM), <https://www.seattletimes.com/seattle-news/politics/the-myth-at-the-heart-of-the-praying-bremerton-coach-case/> [<https://perma.cc/59Q9-2KZG>].

²⁵⁷ Nicholas Tomaino, Opinion, *The Conservative Supreme Court Has Arrived*, WALL STREET J. (July 1, 2022, 4:28 PM), <https://www.wsj.com/articles/the-conservative-court-has-arrived-paul-clement-dobbs-bruen-religion-administrative-state-justice-roberts-alito-thomas-11656692402> [<https://perma.cc/2HXD-FZ49>]; Yvette Borja, *The Supreme Court’s Mask-Off Originalism Era Is Officially Underway*, BALLS AND STRIKES (June 23, 2022), <https://ballsandstrikes.org/scotus/bruen-opinion-recap-mask-off-originalism/> [<https://perma.cc/7R8X-W4PZ>]; Press Release, American Constitution Society, ACS Statement in Response to Supreme Court Decision in New York State Rifle & Pistol Association v. Bruen (June 23, 2022), https://www.acslaw.org/press_release/acs-statement-in-response-to-supreme-court-decision-in-new-york-state-rifle-pistol-association-v-bruen/ [<https://perma.cc/Z8CG-U862>].

²⁵⁸ John O. McGinnis, *Bruen’s Originalism*, LAW & LIBERTY (July 21, 2022), <https://lawliberty.org/bruens-originalism/> [<https://perma.cc/WTH4-9CLC>].

²⁵⁹ See Randy E. Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBLOG (June 27, 2022, 5:00 PM), www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method/ [<https://perma.cc/NLQ9-EEX6>].

country.²⁶⁰ Many other commentators characterized the Court's decisions in *Bruen*, *Dobbs*, and *Kennedy* as originalist.²⁶¹

These characterizations are incorrect. *Bruen*, *Dobbs*, and *Kennedy* are not consistent with mainstream, modern originalist theory, as none of them look to the original public meaning of the Constitution in reaching their decisions. The Court does not even purport to attempt any analysis of original public meaning, as it relies entirely on discussions of history and tradition to reach its results. These references to historic practices alone, without any reasoning or discussion of original public meaning, are not original public meaning analysis, and are more in line with a “traditionalism” approach to applying the Constitution.²⁶²

²⁶⁰ See, e.g., John G. Malcolm, *Originalism Rules at this Supreme Court, and That's a Good Thing*, PANTAGRAPH (July 8, 2022), https://pantagraph.com/opinion/columnists/john-g-malcolm-originalism-rules-at-this-supreme-court-and-that-s-a-good-thing/article_493bd61e-ff02-11ec-858b-87d422f18940.html [<https://perma.cc/G9CP-8KN6>].

²⁶¹ See, e.g., Timothy C. Leech, Opinion, *What Conservative Supreme Court Justices Get Wrong About the Founders*, WASH. POST (July 22, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/07/22/what-conservative-supreme-court-justices-get-wrong-about-founders/> [<https://perma.cc/FB7S-6T25>] (“Several of the Supreme Court’s blockbuster end-of-term decisions, which cheered conservatives and horrified liberals, were largely based on ‘originalist’ or ‘textualist’ readings of the U.S. Constitution. In other words, the justices based their majority opinions on what they thought the Constitution meant at the time the Founders wrote it.”); Eric Segall, *The Hypocrisy of Justice Thomas’ Color-Blind Constitution*, SLATE (July 21, 2022, 2:45 PM), <https://slate.com/news-and-politics/2022/07/affirmative-action-supreme-court-race-originalism-clarence-thomas-hypocrite.html> [<https://perma.cc/4TWG-FTJ2>] (characterizing *Bruen* and *Dobbs* as demonstrating an “extreme and overly narrow focus on originalism and textualism”); Corey Belobrow, Opinion, *The Problem with Originalism and the Ban on Abortion*, CONCORD MONITOR (July 21, 2022, 6:02 AM), <https://www.concordmonitor.com/My-Turn-Originalism-and-the-ban-on-abortion-47256803> [<https://perma.cc/WAF9-NPRT>] (claiming that the Court used originalism as “a guiding light” in overruling *Roe v. Wade*); John M. Morris, *Why Electing Conservative Judges Is Key to Restoring Our Constitutional Heritage*, THE N. ST. J. (July 21, 2022), <https://nsjonline.com/article/2022/07/morris-why-electing-conservative-judges-is-key-to-restoring-our-constitutional-heritage/> [<https://perma.cc/RT9Z-5WDV>] (describing the end of the Supreme Court’s October 2021 term as “an amazing resurgence of originalism in our judiciary”).

²⁶² See generally Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351) (arguing that the Supreme Court’s 2021 term reflects a traditionalist approach); see also Louis J. Virelli III, *Constitutional Traditionalism in the Roberts Court*, 73 U. PITT. L. REV. 1, 10–11 (2011) (“Traditionalism as an approach to constitutional interpretation has been a part of Supreme Court jurisprudence for over a century. It applies the concept of tradition to guide current application of the law, and has been described more broadly as the reliance on ‘history and tradition’ to give meaning to constitutional language.”). See generally Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008) (describing the Court’s resort to traditionalism in due process cases and exploring arguments for and against the method). I will continue to refer to the Court’s approach as “history and tradition,” as it is more in line with its language, and to avoid incorporating any loaded terminology from the literature on traditionalism.

A. *The Court's Abandonment of Original Public Meaning in Bruen*

Starting with *Bruen*, Justice Thomas's Textual-Historical method introduced in that case urges its own two-step inquiry: first, determine whether the plain text of the Second Amendment covers the conduct at issue, and if so, the government must justify its regulation by demonstrating consistency with "the Nation's historical tradition of firearm regulation."²⁶³ That first step, determining whether the plain text of the Second Amendment applies, appears to be where an original public meaning analysis would take place.

But there was no such inquiry in *Bruen*. The Court's analysis of this point is relegated to Section III.A of the opinion and consists of six paragraphs (with the last being a single sentence stating the Court's conclusion).²⁶⁴ The Court initially states that there is no distinction between in the home and out in public in the text of the Second Amendment with respect to the right to keep and bear arms.²⁶⁵ As for the all-important definition of "bear arms," the only citation the Court offers is to its own opinion in *Heller*, stating that "'bear arms' refers to the right to 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"²⁶⁶

But the language lifted from *Heller* is not the result of an originalist investigation into original public meaning—instead, it is a quote from Justice Ginsburg's dissent in *Muscarello v. United States*.²⁶⁷ There, the Court addressed the meaning of the phrase "carries a firearm" in the context of 18 U.S.C. § 924(c)(1)—not "bear arms" in the context of the Second Amendment.²⁶⁸ As for Justice Ginsburg, the citation she quotes in her dissent, which has now made its way through a string of quotations-of-quotations into *Bruen* to become the law of the land regarding the constitutional meaning of "bear arms," is from the Sixth Edition of Black's Law Dictionary, published in 1990.²⁶⁹

²⁶³ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022).

²⁶⁴ See *id.* at 2134–35.

²⁶⁵ See *id.* at 2134.

²⁶⁶ See *id.* (alterations in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008)).

²⁶⁷ *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting).

²⁶⁸ See *id.* at 139–40 (Ginsburg, J., dissenting).

²⁶⁹ See *id.* at 143 (Ginsburg, J., dissenting); *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 584); see also *Muscarello*, 524 U.S. at 130 (where the majority quotes the same definition from Black's Law Dictionary and includes the full citation).

Having accepted this 1990 definition of “bear arms,” the *Bruen* Court states:

This definition of “bear” naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often “keep” firearms in their home, at the ready for self-defense, most do not “bear” (*i.e.*, carry) them in the home beyond moments of actual confrontation. To confine the right to “bear” arms to the home would nullify half of the Second Amendment’s operative protections.²⁷⁰

A few major things happen in this short paragraph. First, the Court’s definition of “bear arms” evolves from what it was mere sentences before—from the 1990 Black’s Law Dictionary definition that involves carrying arms on one’s person “for the purpose . . . of being armed and ready for offensive or defensive action,” to simply, “carry.”²⁷¹ There’s no explanation for this. Second, while the Court had—again, *sentences before*—asserted that the Second Amendment’s text did not draw “a home/public distinction with respect to the right to keep and bear arms,” the Court now reverses course by asserting that the right to “bear” arms refers to carrying firearms outside of the home.²⁷² This is apparent from the Court describing guns in the home as “keep[ing]” firearms, and from the Court’s assertion that restricting “the right to ‘bear’ arms to the home would nullify half of the Second Amendment’s operative protections”—presumably the non-“keep” half of “keep and bear.”²⁷³ The Court explicitly reads a home/public distinction into the Second Amendment—a distinction that it denied just a few sentences earlier.

The Court ends its brief textual analysis with a note on self-defense, arguing that restricting the right to “bear” arms to the home would “make little sense” as the need for self-defense may arise outside of the home.²⁷⁴ While “the need for armed self-defense may be ‘most acute’ in the home,” the Court noted that “[m]any Americans hazard greater danger outside the home than in it,” citing *Moore v. Madigan*, and including a parenthetical quote from the opinion: “[A]

²⁷⁰ *Bruen*, 142 S. Ct. at 2134–35.

²⁷¹ *See id.* at 2134–35 (quoting *Heller*, 554 U.S. at 584).

²⁷² *See Bruen*, 142 S. Ct. at 2134–35.

²⁷³ *See id.* at 2134–35.

²⁷⁴ *See id.* at 2135 (quoting *Heller*, 554 U.S. at 608).

Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”²⁷⁵

That’s it for the textual analysis in *Bruen*. While the remainder of the opinion goes into detail regarding historic restrictions (and the purported absence of such restrictions) on the carrying of firearms, this is part of the Court’s second step in its analysis: whether the restriction at issue is consistent with the “historical tradition of firearm regulation.”²⁷⁶ The Court explicitly states that this historical analysis is an inquiry apart from determining the meaning of the right to keep and bear arms set forth in the Second Amendment.²⁷⁷ While all of these historical examples may prompt commentators to conclude that the Court is looking to original public meaning, that connection simply is not there.

Originalists may take issue with this analysis and argue that the Court in *Bruen* relied extensively on its *Heller* opinion, which involved a lengthy original public meaning analysis of the Second Amendment, and which explicitly stated that it was interpreting the Constitution with the understanding that it was meant to be understood in its normal and ordinary sense so as to be understood by voters.²⁷⁸ Scholars tend to describe *Heller* as an originalist opinion based on the Court’s analysis of the original public meaning of the Second Amendment.²⁷⁹ If *Heller* did the necessary lifting to determine the original public meaning of the Second Amendment, there is no need for *Bruen* to retread the same ground, and *Bruen*’s reliance on *Heller* incorporates the original public meaning approach of *Heller*.

There are several problems with this argument. First, the *Heller* Court’s analysis focused on the original meaning of “bear arms,” is

²⁷⁵ See *Bruen*, 142 S. Ct. at 2135 (first quoting *Heller*, 554 U.S. at 628; and then citing *Moore*, 702 F.3d at 937).

²⁷⁶ See *Bruen*, 142 S. Ct. at 2135–56.

²⁷⁷ See *id.* at 2135.

²⁷⁸ *Heller*, 554 U.S. at 576, 605–26 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

²⁷⁹ See, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 941–55, 980 (2009) (describing *Heller*’s originalist methodology, analysis of the original public meaning of the Second Amendment, and how this analysis comports with originalist methodology described in the academic literature, and concluding that *Heller* is “the clearest and most prominent example of originalism in contemporary Supreme Court jurisprudence”); Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-Heller Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413, 416–18 (2020) (describing the *Heller* Court’s “search for original public meaning”).

minimal and largely nonoriginalist.²⁸⁰ As noted above, the Court’s analysis of the meaning of “bear arms” focused heavily on the Court’s own analysis of the phrase “carries a firearm” in the 1998 opinion in *Muscarello v. United States*, where the Court and dissent relied on the 1990 edition of Black’s Law Dictionary in defining the phrase.²⁸¹ Recall, as well, that this is the primary support from the *Heller* opinion that the *Bruen* Court cited in its textual analysis.²⁸² While the *Heller* Court also cited several dictionaries in support of the “carry” definition as well, only one of these cited sources predated the ratification of the Second Amendment.²⁸³ The *Heller* Court did not engage in any of its characteristic analysis of other textual sources to determine the meaning of “bear arms” beyond that which it deemed necessary to conclude that the right to bear arms was an individual, rather than collective, right.²⁸⁴

This minimal analysis is likely related to the second problem with relying on *Heller* to do the heavy lifting regarding original public meaning: the *Heller* Court confronted a law restricting the possession of handguns in the home—not a restriction on carrying firearms in public.²⁸⁵ Because the Court’s analysis in *Heller* was focused on the scope of the right to keep and bear arms in connection with the need to engage in self-defense at one’s home,²⁸⁶ any analysis that happens to address the scope of a right to carry arms in public is dicta. While there are instances where the analysis in *Heller* mentions the scope of the right to bear arms,²⁸⁷ a focused inquiry into the meaning of that phrase is necessary in light of the different category of restriction at issue in *Bruen*.

Third, the *Bruen* Court does not claim that it is relying on *Heller*’s original public meaning analysis. Because the Court did not claim to rely on the original public meaning analysis in *Heller*, and because the Court did not actually do so, it is inaccurate to argue otherwise.

²⁸⁰ See *supra* notes 278-91 and accompanying text.

²⁸¹ See *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)); see also *supra* notes 267–269 and accompanying text.

²⁸² See *Bruen*, 142 S. Ct. at 2134 (citing *Heller*, 554 U.S. at 584).

²⁸³ See *Heller*, 554 U.S. at 584.

²⁸⁴ See *id.* at 584–85.

²⁸⁵ See *id.* at 573 (“We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”).

²⁸⁶ See *id.* at 577.

²⁸⁷ See, e.g., *id.* at 626–27.

*B. The Court's Abandonment of Original Public Meaning in
Dobbs*

While the Court's legal analysis in *Dobbs* begins with a brief reference to the text of the Constitution, the *Dobbs* Court does not take any effort to determine the original public meaning of any constitutional provisions. The Court begins its analysis by noting that "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means."²⁸⁸ The Court notes that there is "no express reference to a right to obtain an abortion" in the Constitution, meaning that there must be a showing that the right is "implicit" in the text.²⁸⁹ The Court acknowledged that *Roe* cited several sources for the right to abortion, but focused its analysis on *Casey*, noting that *Casey* was grounded "solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause."²⁹⁰

At this point, a court taking an original public meaning approach to constitutional interpretation would turn to the text of the Due Process Clause and investigate its original public meaning—likely through reference to reconstruction-era documents, debates over the drafting of the Fourteenth Amendment, and references to "due process" in American society at and around the time the Fourteenth Amendment was ratified.²⁹¹ That's not what the *Dobbs* Court did. The *Dobbs* Court instead cited to precedent setting forth requirements that the Court investigate whether a right is deeply rooted in history and tradition.²⁹² This test—based on precedents like *Washington v. Glucksberg*, which in turn are based on other prior Supreme Court opinions—is a precedent-based approach to constitutional interpretation that calls for a distinct examination of history and tradition, not an examination of the original public

²⁸⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) (first quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 186–89 (1824); and then quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, at 383 (1833)).

²⁸⁹ *Dobbs*, 142 S. Ct. at 2245.

²⁹⁰ See *id.* (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

²⁹¹ See Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1624 (describing a multi-step approach to determining the original public meaning of the Constitution).

²⁹² *Dobbs*, 142 S. Ct. at 2246 (first quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019); then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010); and then quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

meaning of the Due Process Clause.²⁹³ Accordingly, while the Court went on to engage in a detailed examination of historic restrictions on abortion,²⁹⁴ it did not do so in an effort to determine the meaning of the Due Process Clause.

Justice Thomas's concurrence further confirms that the Court is not engaging in an original public meaning approach in *Dobbs*. He recognizes that the majority, in reliance on its "substantive due process precedents," finds that the "right to abortion is not a form of 'liberty' protected by the Due Process Clause" as it is "neither 'deeply rooted in this Nation's history and tradition' nor 'implicit in the concept of ordered liberty.'"²⁹⁵ By concurring in the opinion, rather than concurring in the judgment, Justice Thomas does not take issue with this approach. He does argue, however, that "[c]onsiderable historical evidence indicates that 'due process of law' merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty or property," and cites two of his own prior concurring opinions in support of this proposition.²⁹⁶

Substantive due process, Justice Thomas argues, is "an oxymoron 'that lack[s] any basis in the Constitution.'"²⁹⁷ From here, the question becomes straightforward for Thomas: "[b]ecause the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion."²⁹⁸ Nor, Justice Thomas continues, does the Due Process Clause secure a right to contraception, the right to engage in private, consensual sexual acts, or the right to same-sex marriage, meaning that opinions recognizing these rights should be

²⁹³ See, e.g., *Glucksberg*, 521 U.S. at 720–21 (first citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (citing precedents and noting that the Court has "regularly observed" that the Due Process Clause protects rights that are deeply rooted in history and tradition); Reva B. Siegel, *Heller and Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1409–10 (2009) (noting that originalists "accommodat[e] the beliefs of the living . . . through the practice of stare decisis," and emphasizing the history and tradition approach of *Glucksberg* as an example of such an approach); Ronald Turner, *On Brown v. Board of Education and Discretionary Originalism*, 2015 UTAH L. REV. 1143, 1194–95 (characterizing *Glucksberg* as nonoriginalist and instead employing "a separate and distinct due process traditionalist methodology" and noting that Justices Scalia and Thomas had questioned this approach).

²⁹⁴ See *Dobbs*, 142 S. Ct. at 2248–54.

²⁹⁵ *Id.* at 2300 (Thomas, J., concurring) (quoting *Glucksberg*, 521 U.S. at 721).

²⁹⁶ See *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring) (first quoting *Johnson v. United States*, 576 U.S. 591, 623 (2015) (Thomas, J., concurring); and then quoting *United States v. Vaello Madero*, 142 S. Ct. 1439, 1545 (2022) (Thomas, J., concurring)).

²⁹⁷ See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2014) (Thomas, J., concurring)).

²⁹⁸ See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

reconsidered and overruled.²⁹⁹ This approach, in line with Justice Thomas's reading of the "historical evidence" regarding the meaning of the Due Process Clause,³⁰⁰ is Justice Thomas's vision of an original public meaning interpretation of the Constitution. By distinguishing it from the Court's approach, Justice Thomas acknowledges that the Court did not engage in analysis of the Due Process Clause's original public meaning.³⁰¹

*C. The Court's Abandonment of Original Public Meaning in
Kennedy*

In *Kennedy*, the Court's initial analysis regarding the free exercise and free expression protections in the First Amendment relied only on the Court's prior precedents, without any attempt to determine the original public meaning of either of those clauses.³⁰² As for the Establishment Clause, the Court asserted that it determines the scope of the Establishment Clause by referring to "historical practices and understandings."³⁰³ The *Kennedy* Court did not derive this test from an examination of the Constitution's original public meaning.

²⁹⁹ See *id.* (Thomas, J., concurring) (first citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); then citing *Lawrence v. Texas*, 539 U.S. 558 (2003); then citing *Obergefell v. Hodges*, 576 U.S. 644 (2015); then quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421 (2018) (Thomas, J., concurring); and then quoting *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring)).

³⁰⁰ See *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring).

³⁰¹ See *id.* at 2301 (Thomas, J., concurring).

³⁰² *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421–25 (2022) (first citing *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981); then citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995); then quoting *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); then citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021); then citing *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015); then citing *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); then citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); then citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); then citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); then quoting *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990); then quoting *id.* at 879–81; then quoting *Lukumi*, 508 U.S. at 546; then quoting *Smith*, 494 U.S. at 878; then quoting *Lukumi*, 508 U.S. at 533; then quoting *Fulton*, 141 S. Ct. at 1877; then citing *Lukumi*, 508 U.S. at 546; then quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); then citing *Lane v. Franks*, 573 U.S. 228, 231 (2014); then citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); then citing *Garcetti*, 547 U.S. at 421; then quoting *id.* at 423; then quoting *id.*; then quoting *id.* at 417; then quoting *id.* at 425; then quoting *id.* at 421; then quoting *id.*; then quoting *id.* at 422; then citing *Lane*, 573 U.S. at 233; then citing *id.* at 231; then citing *id.* at 239–40; then quoting *id.* at 240; then quoting *Garcetti*, 547 U.S. at 424; then quoting *id.*; then quoting *Lane*, 573 U.S. at 240; then quoting *Garcetti*, 547 U.S. at 421; then quoting *id.* at 421; then quoting *id.* at 424; then quoting *Tinker*, 393 U.S. at 506; and then citing *Lane*, 573 U.S. at 236).

³⁰³ See *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 472 U.S. 565, 576 (2014)).

Instead, as it did in *Dobbs*, the Court looked to its earlier precedents regarding the scope of the Establishment Clause.³⁰⁴ The historical practices and understandings approach involves a single step: whether the practice in question has endured for a long time (with particular attention to whether it or something like it was employed by the First Congress).³⁰⁵ Original public meaning plays no role here.

But that isn't the half of it. Despite taking efforts to reiterate its historic approach to the Establishment Clause and its assertion that the approach used in *Lemon* was previously overruled in favor of the historic approach,³⁰⁶ the Court didn't even apply the historic approach to the *Kennedy* case. In *Bruen* and *Dobbs*, where the Court had urged a similar approach based on history and tradition, the Court had engaged in a detailed examination of historic practices before reaching its conclusion.³⁰⁷ In *Kennedy*, however, there was no such examination—no discussion of historic traditions permitting public school sports coaches to pray on playing fields. Instead, the Court stuck to precedent alone, distinguishing cases that it characterized as involving coercion of students through mandatory attendance policies.³⁰⁸ The Court didn't even support its conclusion with affirmative authority, as it did not cite any precedents in which it previously upheld school prayer by teachers or other school officials.

Instead, the Court's analysis is based on its one-sided characterization of the facts and slippery slope concerns. The Court characterized the District's position as deeming "any visible religious conduct by a teacher or coach" as a violation of the establishment clause, and concluded that such an approach would result in the prohibition of numerous practices like wearing yarmulkes and praying quietly at lunch—a result that the Court characterized as "Establishment Clause jurisprudence . . . gone off the rails."³⁰⁹ These analogies came easily to the Court in light of its generous

³⁰⁴ See *Kennedy*, 142 S. Ct. at 2428 (first quoting *Galloway*, 472 U.S. at 575; then citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2020) (plurality opinion); then citing *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961); then citing *McGowan v. Maryland*, 366 U.S. 420, 437–40 (1961); and then citing *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970)). Other than *Lemon*, of course. See *Kennedy*, 142 S. Ct. at 2427.

³⁰⁵ *Town of Greece*, 472 U.S. at 575–77 (2014); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970).

³⁰⁶ See *Kennedy*, 142 S. Ct. at 2427–28 (first quoting *Am. Legion*, 139 S. Ct. at 2079–81 (plurality opinion); and then quoting *Town of Greece*, 572 U.S. at 576).

³⁰⁷ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134–55 (2022); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–62 (2022).

³⁰⁸ *Kennedy*, 142 S. Ct. at 2429 (first quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); and then quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

³⁰⁹ See *id.* at 2431.

characterization of the facts and its failure to acknowledge that (among other things) Kennedy had made multiple media appearances publicizing his plan to pray and that numerous attendees at the game stormed the field to join him after these appearances.³¹⁰ In light of these concerns, the Court held that Kennedy's prayers did not run afoul of the Establishment Clause and therefore rejected the basis of the School District's restriction of these activities.³¹¹

There isn't much more to be said about the *Kennedy* opinion because there simply isn't anything more to discuss. The Court adopted a historic approach based on precedent rather than original public meaning.³¹² While it appears from the precedent cited that this historic approach will look solely to historic practices and traditions rather than original public meaning, this remains unclear because the *Kennedy* Court did not apply the historic approach to the facts of the case before it.³¹³ Instead, the Court relied entirely on precedent and argumentative factual characterizations.³¹⁴ Throughout all of this, there was no discussion of the original public meaning of the First Amendment.

V. THE FUTILITY OF THE ORIGINAL PUBLIC MEANING APPROACH

Most academic originalists support theories of originalism that involve discerning the original public meaning of the constitution.³¹⁵ This is the approach that they justify and the approach they employ in their research into the Constitution's meaning. In academic circles, "originalism" is often synonymous with "original public meaning originalism."³¹⁶ This Section argues that in light of the

³¹⁰ See *id.* at 2437–38 (Sotomayor, J., dissenting).

³¹¹ See *id.* at 2432–33.

³¹² See *id.* at 2428.

³¹³ See *id.* (first quoting *Town of Greece v. Galloway*, 472 U.S. 565, 575 (2014); then citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2020) (plurality opinion); then citing *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961); then citing *McGowan v. Maryland*, 366 U.S. 420, 437–40 (1961); and then citing *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970).

³¹⁴ See, e.g., *Kennedy*, 142 S. Ct. at 2430–32 (first quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992); then quoting *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990); then quoting *Town of Greece v. Galloway*, 472 U.S. 565, 589 (2014); then citing *Zorach v. Clauson*, 343 U.S. 306, 308, 311–12 (1952); and then citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000)).

³¹⁵ See, e.g., Whittington, *supra* note 49, at 380.

³¹⁶ See *id.* at 380 ("Although the terminology deployed can still vary, 'originalism' or 'original meaning' has now pretty clearly taken dominance over 'original intent' as the preferred shorthand" for the collection of theories that have "coalesced around original public meaning as the proper object of interpretive inquiry.").

Court's abandonment of original public meaning in *Bruen*, *Dobbs*, and *Kennedy*, originalist academics must reckon with the Court's refusal to look to or employ any of their analysis or methodology, and acknowledge that there is a significant disconnect between academic discussions of originalism and originalism in practice.

A. *The Disconnect Between Academic Originalism and Judicial Practice*

The Court's refusal to engage in any analysis of original public meaning in *Bruen*, *Dobbs*, and *Kennedy* casts significant doubt on any claims that originalism is based on judicial practices or has a meaningful impact on key constitutional cases. The quest to determine original public meaning is the foundation of modern, mainstream academic originalism.³¹⁷ Volumes have been written in an effort to parse out the original public meaning of various constitutional provisions.³¹⁸ The assumption that the Court, or at

³¹⁷ See, e.g., Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE, *supra* note 40, at 2–3; Solum, *supra* note 34, at 459; David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 102; Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1290 (2015).

³¹⁸ For a sample of the literature, see, e.g., RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT (2021) (on the original meaning of the Fourteenth Amendment); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014) (also on the original public meaning of the Fourteenth Amendment); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020) (yet another book on the original public meaning of the Fourteenth Amendment); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441 (2017) (on the original public meaning of "cruel" as used in the Eighth Amendment); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) (on the original meaning of "unusual" as used in the Eighth Amendment); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing against the claim that the Constitution was originally understood to contain a nondelegation doctrine); *West Virginia v. EPA*, 142 S. Ct. 2587, 2625 n.6 (Gorsuch, J., concurring) (listing, without any meaningful analysis or insight, a host of articles drafted in support of the notion that there was founding-era support for a nondelegation doctrine which I do not want to give the courtesy of a citation); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (noting, on page 105 of the article, that by "original meaning" he is referring "to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time a particular provision was adopted."); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007); Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017 (2008); Eleanor Miller & Heather Obelgoner, *Effective But Limited: A*

least the originalist Justices on the Court, will engage in original public meaning analysis plays a significant role in motivating this scholarship.³¹⁹ One also hopes that those authoring originalist scholarship aim at informing those in the political and public spheres as well.³²⁰ Otherwise, academic scholarship on the Constitution's original public meaning serves little purpose other than to further an insular conversation among legal scholars.

The Court's rulings in *Bruen*, *Dobbs*, and *Kennedy* demonstrate that this scholarship has little to contribute when it comes to the Court's most publicized and politically salient cases.³²¹ In *Bruen*, the

Corpus Linguistic Analysis of the Original Public Meaning of Executive Power, 36 GA. ST. U. L. REV. 607 (2020); Tuhan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233 (2008) (examining the original public meaning of "inferior officer" in the context of evaluating a potential challenge to the appointment of bankruptcy judges); John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773 (2013); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013); Stuart McCommas, Note, *Forgotten But Not Lost: The Original Public Meaning of Section 4 of the Fourteenth Amendment*, 99 VA. L. REV. 1291 (2013); Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897 (2012).

³¹⁹ See Solum, *supra* note 291, at 1675, 1681; MCGINNIS & RAPPAPORT, *supra* note 32, at 198; ERIC J. SEGALL, ORIGINALISM AS FAITH 180 (2018) The Supreme Court's engagement with legal scholarship appears to be something that law schools are quick to recognize and publicize. See Denise Wager, *Supreme Court Cites Four Notre Dame Law Professors in One Day*, UNIV. OF NOTRE DAME: THE L. SCH. (June 18, 2021), <https://law.nd.edu/news-events/news/faculty-supreme-court-fulton-philadelphia-nestle-doe/> [<https://perma.cc/B2WZ-K7BB>]; see also Professor of Law Michael D. Ramsey's Work Cited in Recent U.S. Supreme Court Opinion, UNIV. OF SAN DIEGO SCH. OF L. (May 12, 2022), https://www.sandiego.edu/news/law/detail.php?_focus=85405 [<https://perma.cc/4KZ5-43K8>]; see also Charleston Law Professor, *Law Review Cited in Latest Supreme Court Opinions*, CHARLESTON SCH. OF L. (2022), https://www.charlestonlaw.edu/news/supreme-court-merkel-citing/?utm_source=rss&utm_medium=rss&utm_campaign=supreme-court-merkel-citing [<https://perma.cc/J25J-N8JW>]; as for the need for normative legal discussion to be enacted in the "social realm," see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 867–68 (1991).

³²⁰ But see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1254–55 (2019) (noting different "realms of . . . discourse," including scholarship, judicial practice, and political, all of which employ their own separate forms of originalism).

³²¹ See David G. Savage, *Supreme Court Decisions Due Soon on Abortion, Guns, Religion and Climate Change*, L.A. TIMES (May 31, 2022, 4:00 AM), <https://www.latimes.com/politics/story/2022-05-31/supreme-court-decisions-due-on-abortion-guns-religion-and-climate-change> [<https://perma.cc/U59E-3RHF>] (describing the likely overturning of the right to abortion as "one of the most significant reversals of a constitutional right in the court's history"); see also Dan Mangan & Kevin Breuninger, *Supreme Court Overturns Roe v. Wade, Ending 50 Years of Federal Abortion Rights*, CNBC (June 24, 2022, 3:03 PM), <https://www.cnbc.com/2022/06/24/roe-v-wade-overturned-by-supreme-court-ending-federal-abortion-rights.html> [<https://perma.cc/63FF-6RKL>] ("*Dobbs* was by far the most significant and controversial dispute of the court's term."); de Vogue, *supra* note 2 (noting the

Court overturned a New York law governing gun registration across the state that had been in place for more than 100 years.³²² In *Dobbs*, the Court ruled that there was no right to an abortion, overruling precedent that had been in place for more than fifty years, triggering state-level restrictions and outright prohibitions on abortion in nearly half the states in the country.³²³ In *Kennedy*, the Court again overruled precedent that had been in place for decades.³²⁴ In each of the Court's opinions in these cases, there was no analysis of the Constitution's original public meaning. The most widely accepted, mainstream approach to originalist competition in legal academia had nothing to contribute to these opinions.

To emphasize, this is not simply an instance where the Court neglected to cite or acknowledge legal scholarship. Instead, the Court reached its decisions in multiple, highly influential, politically explosive cases without a reference to the core idea underlying a major field of scholarship that purports to state how the Court should interpret the Constitution and decide these precise types of cases. The Court didn't just ignore legal scholarship regarding a particular issue. It ignored the issue altogether.

All of this demonstrates that academic discussions of originalism and original public meaning are severely disconnected from judicial and political realities. Originalist academics devote reams of paper to a seemingly endless progression of books and articles justifying the original public meaning approach, parsing out the nuances of the theory, and digging up information in an effort to shed light on the original meaning of various constitutional provisions.³²⁵ Their critics, including myself, sacrifice even more paper to the cause of exposing flaws in originalist reasoning, criticizing the rigor of originalist scholars and judges, and arguing that originalism serves as a cover to justify political results.³²⁶ But the Court's most recent set of decisions reveals a problem with originalist scholarship apart from

Court's "blockbuster docket" and identifying *Dobbs*, *Bruen*, and *Kennedy* as major decisions the Court has yet to decide).

³²² See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022); *id.* at 2169 (Breyer, J., dissenting) (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012)).

³²³ See *Mangan & Breuninger*, *supra* note 321.

³²⁴ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079–81 (2020) (plurality opinion)).

³²⁵ See *supra* note 318 (collecting written works on originalism).

³²⁶ See SEGALL, *supra* note 319; see also FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013); see also Michael L. Smith & Alexander S. Hiland, *Originalism's Implementation Problem*, 30 WM. & MARY BILL RTS. J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902216 [<https://perma.cc/33M6-EJPA>].

the theoretical issues and practical concerns the critics raise: the Court's abandonment of the original public meaning approach and decision to reach its most significant constitutional decisions using alternate interpretive methodology means that there is no meaningful, practical point to originalist scholarship.³²⁷ It is no longer a thing worth doing.³²⁸

B. Potential Originalist Responses: Determining Original Public Meaning is Still Worthwhile

A likely response from originalists is that there is still academic value in determining the original meaning of constitutional provisions. These exercises add to the sum of human knowledge and provide a standard by which the Court's decisions may be judged. This may be true. But from this point of view, it is strange to see originalist scholars publishing the bulk of their work in legal journals rather than history journals.³²⁹ It is even more puzzling to witness legal academics, many of whom are not trained historians, attempt the serious historical undertakings necessary to identify the original public meaning of constitutional provisions.³³⁰

This response loses all credibility when prominent originalists repeatedly present originalism to politicians and the public and create the impression that the practices of judicial originalists have some foundation in theories that have been tested and debated by

³²⁷ See Noah Feldman, *Supreme Court "Originalists" Are Flying a False Flag*, BLOOMBERG (July 17, 2022, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2022-07-17/supreme-court-s-conservative-originalists-are-flying-a-false-flag?sref=V4hDBprx> [<https://perma.cc/6H8H-8C49>] (emphasizing that the Court in *Bruen*, *Dobbs*, and *Kennedy* abandoned originalism "[a]t the moment of its greatest triumph").

³²⁸ *Contra* D.A. Jeremy Telman, *Originalism: A Thing Worth Doing*, 42 OHIO N.U. L. REV. 529, 553 (2016).

³²⁹ See *supra* note 318.

³³⁰ See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 655, 657 (2013) ("Living constitutionalists and historians both inside and outside of the legal academy have argued that law professors should be more sensitive to context and the complexities of history, and that lawyers should try to integrate intellectual history and good professional standards of historians."); see also Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 349 (2014) (criticizing originalist attempts to determine interpretive methods employed in the founding era as inconsistent with historical thinking, which "leads to complexity rather than to univocal meaning"); see also Calvin TerBeek, *Originalism's Obituary*, 2015 UTAH L. REV. ONLAW 29, 40–42 (2015) (summarizing various critiques of originalist methodology by historians, including historians' arguments that the notion of a single original public meaning is incoherent and that originalists engage in shoddy historical analysis).

numerous scholars.³³¹ Claims that originalism need not be connected with real-world legal practices are inconsistent with originalist scholars' testimony to lawmakers about the virtues of originalism and the originalist credentials of judicial nominees.³³² There may be some academic value to investigating the original public meaning (or, more likely, meanings) of constitutional provisions, but that is not what originalist scholars claim to do. With the Court's abandonment of the original public meaning approach, originalist scholars must acknowledge the gap between their theories and the Court's practices in order to prevent judicial practices from gaining any misplaced legitimacy or credibility from unrelated academic work.

Relatedly, originalists may argue that original public meaning originalism is still worth researching and advocating, because the Court may apply the approach in other cases. Just because the Court did not apply originalism in these cases does not mean that the Court won't get it right in the future. The problem with this response is that the Court is now made up of justices who originalist scholars characterize as originalists—and two of the opinions, *Bruen* and *Kennedy*, were written by Justices who scholars classify as solid originalists—Justices Thomas and Gorsuch.³³³ That these purportedly originalist Justices chose to decide these significant

³³¹ For only a few examples of originalists writing for a broader political audience on the purported relevance of their work to judicial practices, see, e.g., Solum, *supra* note 21; Amar, *supra* note 250; Calabresi, *supra* note 21; Amar, *supra* note 21 (“A judge who seeks merely to follow precedent can simply read previous judicial opinions. But an ‘originalist’ judge—who also cares about what the Constitution meant when its words were ratified in 1788 or when amendments were enacted—cannot do all the historical and conceptual legwork on his or her own. Judge Kavanaugh seems to appreciate this fact, whereas Justice Antonin Scalia, a fellow originalist, did not read enough history and was especially weak on the history of the Reconstruction amendments and the 20th-century amendments.”); Steven G. Calabresi, Opinion, *The Right Judicial Litmus Test*, WALL STREET J. (Oct. 1, 2007, 12:01 AM), <https://www.wsj.com/articles/SB119120336502444409> [<https://perma.cc/6PZF-AAQG>]; Lund, *supra* note 21 (“Barrett was a law clerk for the late Justice Antonin Scalia, and she shares his ‘originalist’ approach to constitutional interpretation.”)

³³² See *Confirmation Hearing on the Nomination of the Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 730–31, 734, 736 (2018) (statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center); *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 1001, 1008, 1010–11 (2018) (statement of Akhil Reed Amar, Sterling Professor of Law and Political Science, Yale University); MASCOTT, *supra* note 22, at 6–9.

³³³ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415 (2022); *N.Y. State Pistol & Rifle Ass’n v. Bruen*, 142 S. Ct. 2111, 2122 (2022); Ilan Wurman, What is Originalism? Debunking the Myths, THE CONVERSATION (Oct. 24, 2020, 12:03 PM), <https://theconversation.com/what-is-originalism-debunking-the-myths-148488> [<https://perma.cc/NZU6-JT37>].

cases on non-originalist grounds³³⁴ reflects a significant limitation on originalism's influence and status as a basis for constitutional interpretation in practice.

Originalists may also respond with the argument that *Bruen*, *Dobbs*, and *Kennedy* are only three cases. The Court's abandonment of original public meaning in three cases in a single term is hardly the basis for pronouncing a theory of constitutional interpretation futile. Originalists may argue that these decisions are merely outliers.

In casting *Bruen*, *Dobbs*, and *Kennedy* as recent outliers, this response presupposes that the Court, or at least its originalist Justices, have applied the original public meaning approach to constitutional interpretation in a consistent manner. But this assumption is incorrect.³³⁵ Academic originalists acknowledged the gap between judicial practice and academic discussions of originalism in the early days after the theory's rise to prominence.³³⁶ And, in more recent scholarship that accounted for the Court's activities in subsequent decades, Lawrence Solum admits that there is a gap between discussions of originalism in legal academia and the practices of the Supreme Court. He notes:

If the label "originalism" is applied to the actual decisional practice of self-identified judicial originalists, the content of the theory is likely to diverge from the versions of originalism advocated by legal scholars. An example of this divergence is seen in the context of precedent, where judicial originalists are likely to place greater emphasis on precedent, and constitutional theorists are likely to place more emphasis on the original meaning of the constitutional text.³³⁷

³³⁴ See discussion *supra* Part 0.

³³⁵ See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13 (2001) ("However great its intuitive appeal, originalism does not describe the actual practice of the Supreme Court.").

³³⁶ See, e.g., JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 205, 210–12 (2005) (addressing the Supreme Court's opinions in the 1990s and stating that "[a]lthough it is clear that originalism substantially reoriented constitutional theory, its influence on the Court was not as deep" and noting also that originalist opinions "were only a fraction of its overall output.").

³³⁷ See Solum, *supra* note 320, at 1254. Professor Solum is even more candid and direct about this fact in his social media posts. See Lawrence Solum (@lsolum), TWITTER (May 16, 2022, 1:00 PM), <https://twitter.com/lsolum/status/1526246166685523969> [<https://perma.cc/F37X-C8ZC>] ("But in the modern era, we have not seen a Supreme Court with a majority of Justices with a good faith commitment to originalism. My guess is that 4 Justices are hostile to originalism. 3 are sometime [sic] originalists. 2 are [mostly] consistent originalists. 'No true Scotsman.'"); Lawrence Solum (@lsolum), TWITTER (May 11, 2022, 2:15 PM),

All of this demonstrates that the Court's most recent decisions in *Bruen*, *Dobbs*, and *Kennedy* fit with a larger trend of the Court's failure to consistently take an original public meaning approach to decisions involving constitutional issues. Originalists themselves have recognized this trend, and therefore cannot plausibly characterize the Court's most recent decisions as outliers. And even if *Bruen*, *Dobbs*, and *Kennedy* are outliers, their political salience and impact in overturning longstanding precedent and laws make them difficult cases to simply dismiss.

C. A Shorthand Version of the Original Public Meaning Approach?

An alternate originalist response is that the Court has not abandoned original public meaning and that the Court's recent opinions are, in fact, consistent with an original public meaning approach to constitutional interpretation. For example, some originalists argue that founding-era and historic practices are relevant to original public meaning, as they may illustrate what people thought particular constitutional practices meant.³³⁸ Under the original public meaning approach, these practices should not be taken as dispositive. Early practices and applications do not dictate the meaning of constitutional provisions, they simply serve as a source of evidence for the original public meaning of those provisions.³³⁹ Justice Scalia appeared to take this approach as he appeared to assume in certain writings that remaining consistent with founding-era practices would be necessary for a true originalist approach.³⁴⁰ This approach also parallels the notion of "liquidation," a process in which the meaning of indeterminate constitutional provisions is determined through practice.³⁴¹ Similar arguments

<https://twitter.com/lsolum/status/1524453200669118465> [<https://perma.cc/V8T6-B6VV>] ("But the Court is not originalist. I'm defending originalism and not particular Justices.").

³³⁸ See, e.g., Solum, *supra* note 291, at 1658–61 (noting that if decisions by judges that are "close in time to [the] drafting of the text" are good faith efforts to determine the public meaning of the text, the judges' "understanding would be strong evidence of that meaning"); see also BARNETT & BERNICK, *supra* note 318, at 9 ("Although the criteria governing the meaning of concepts are a function of the conventional use of language in a linguistic community, those concepts are not identical to the things to which they are applied by people at a given time.").

³³⁹ See Solum, *supra* note 291, at 1658–61.

³⁴⁰ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (confessing that he may be a "faint-hearted originalist," as he would not be inclined to uphold a statute imposing a punishment of flogging).

³⁴¹ See William Baude, *Constitutional Liquidation*, 71 STANFORD L. REV. 1, 16–21 (2019); see also THE FEDERALIST No. 37, at 183 (James Madison) (George W. Carey & James McClellan

have been made before in attempts to explain away why Justices who claim to be and are thought of as originalists continue to rely on the intention of the framers when interpreting the Constitution.³⁴²

One could conceptualize the Court's focus on historic practices in *Bruen*, *Dobbs*, and *Kennedy* as a shorthand version of this original public meaning originalism: the Court looks to historic tradition and practices because these practices are evidence of the Constitution's original public meaning. Indeed, this was my initial instinct in response to the leaked draft of the *Dobbs* opinion, as I thought that the draft opinion could be conceptualized as deriving original meaning from an overt, even exclusive, focus on history and tradition.³⁴³

After further consideration and reading *Dobbs* in conjunction with *Bruen* and *Kennedy*, my opinion has changed. While it is conceivable that the Court could look to history and tradition as a means of informing a determination of original public meaning, that simply is not what the Court is doing in these three opinions. In *Bruen*, the Court specified (an effectively) two-step approach of determining: (1) whether conduct falls within the plain text of the Second Amendment; and (2) whether a restriction on that conduct is consistent with historic regulations and restrictions.³⁴⁴ To the extent that *Bruen* discussed historic regulations, it was all in the context of the second step of its approach, which had no bearing on the meaning of the Second Amendment.³⁴⁵ In *Dobbs*, the Court relied on precedent, rather than history, to define the Due Process Clause as protecting only those unenumerated rights that are deeply rooted in the Nation's history and tradition.³⁴⁶ History and tradition did not

eds., 2001) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

³⁴² See Megan Cairns, Note, *Originalism: Can Theory and Supreme Court Practice be Reconciled?*, 19 GEO. J.L. & PUB. POL'Y 263, 270–77 (2021) (arguing that references to "the views of the Framers" by "originalist Justices" can be justified to the extent that it provides "contextual enrichment" to the original public meaning of the Constitution).

³⁴³ See Michael Smith (@msmith750), TWITTER (May 5, 2022, 12:24 PM), <https://twitter.com/msmith750/status/1522250990715478016> [<https://perma.cc/VK8X-4JVZ>].

³⁴⁴ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022).

³⁴⁵ See *id.* at 2131–34.

³⁴⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (first quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019); then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 764, 767 (2010); and then quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

provide evidence of the clause's meaning—they determined the meaning.

Of the three opinions discussed in this Article, *Kennedy* is the only one with language that may conceivably support an inquiry into original meaning informed by history and tradition, as the Court states that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”³⁴⁷ But this phrasing can just as easily refer to the approach the Court applies in *Dobbs* and *Bruen* where historic practices dictate, rather than inform, the meaning of the Constitution.³⁴⁸ This issue remains unsettled, as the Court in *Kennedy* did not refer to history and tradition in reaching its decision, instead relying on selective emphasis of facts and slippery slope arguments to reach its conclusion and overturn longstanding precedent in the process.³⁴⁹

Hopeful readings and theoretical contortions aside—if one takes the Court at its word in *Bruen*, *Dobbs*, and *Kennedy*, the only reasonable conclusion is that the Court reached its decision in these cases without referring to the original public meaning of the constitutional provisions at issue. The absence of original public meaning interpretive methodology from these significant opinions demonstrates the method's disconnect from judicial reality and should raise serious concerns for mainstream originalist scholars.

VI. WHAT COMES NEXT?

The primary purpose of this Article is to demonstrate the Court's abandonment of the original public meaning approach to constitutional interpretation in its recent decisions in *Bruen*, *Dobbs*, and *Kennedy*. I have done so above. This Section considers further implications and predictions related to and informed by the Court's abandonment of original public meaning.

First, I predict how originalists may react to the Court's abandonment of the original public meaning approach by modifying the definition of originalism to fit with the tests set forth in *Bruen*, *Dobbs*, and *Kennedy*. Originalists have changed their approach in the past with the move from original intent to original public meaning.³⁵⁰ There is a possibility that at least some of them may

³⁴⁷ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (emphasis added) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

³⁴⁸ See *supra* notes 344–346 and accompanying text.

³⁴⁹ See discussion *supra* Section IV.C.

³⁵⁰ See *supra* note 31 and accompanying text.

shift to an “original practices” approach to originalism and define the meaning of constitutional provisions based on founding-era practices and traditions. Second, I provide suggestions for how critics of the Court should treat the Court’s abandonment of original public meaning. Critics of originalism should seize on this opportunity to critique originalism and emphasize its disconnect from judicial practice and political realities. The Court’s abandonment of original meaning also illustrates the political nature of the Court’s decision-making process, which may further other criticism of the Court. Finally, I warn against attempting to argue against the Court on its own terms, as the Court’s history and tradition approach gives it near unlimited discretion to shape the terms of the debate in support of the preferred outcomes of its conservative majority.

A New Mainstream “Originalism?”

In light of the Court’s abandonment of original public meaning originalism, originalists may move to embrace the Court’s history and tradition methodology. To maintain an appearance of consistency, and to capitalize on the credibility and cachet that originalism has gained (at least in certain academic and political circles), they may seek to label the history and tradition approach as “originalism” as well. “Originalism,” may therefore go from being synonymous with its present mainstream variation—original public meaning—to having a new, or multiple definitions.

1. Originalism’s Historic Evolution

As discussed in Section II, “originalism” today is not the “originalism” of a few decades ago.³⁵¹ Early originalists such as Raoul Berger, Robert Bork, and Edwin Meese tended to support an original intent approach to constitutional interpretation, where the intentions of the Constitution’s framers and ratifiers were the source of the Constitution’s meaning.³⁵² Originalists today may chide critics who accuse them of attempting to read James Madison’s mind. But,

³⁵¹ See *supra* notes 25–34 and accompanying text.

³⁵² See *supra* notes 27–28; see also Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension Between Originalism and Democracy*, 80 U. CHI. L. REV. ONLINE 243, 244 (2017) (noting that Robert Bork initially supported the original intent approach to constitutional interpretation).

in fairness to the critics, early modern originalists did indeed base their theory on the intentions of the founders.³⁵³

Academic originalists today now characterize the original intent approach in manners much like the following:

[T]he Oxford English Dictionary (OED) defines originalism as “judicial interpretation of the Constitution which aims to follow closely the original intentions of its drafters.” But the OED definition is sadly out-of-date. Original intent fell out of favor among originalists more than thirty years ago. No contemporary originalist of whom I am aware attempts to answer Delphic questions like, “What would Madison do?” Nevertheless, some sophisticated writers continue to believe that contemporary originalism has not changed since the mid-1980s and that it is essentially an inquiry into the original intent of the Framers.³⁵⁴

Not only has the meaning of the term “originalism” (at least, in academic contexts), shifted from determining the original intent of the founders to determining the original public meaning of the Constitution’s text, but modern originalists have also strongly rejected the original intent approach. This shift is also marked by a strong rejection of the original intent approach. Lawrence Solum describes characterizing originalism as asking “What would Madison do?” as a “parody of originalism.”³⁵⁵ When academic originalists mention “originalism,” they almost invariably refer to original public meaning originalism.³⁵⁶

2. “History and Tradition Originalism”

With this previous shift in originalist theory in mind, one potential implication of the Court’s recent decisions is that originalist academics will continue to write, speak, and urge the adoption and implementation of “originalism,” while defining originalism as something more in line with the Court’s recent history and tradition approach.³⁵⁷ As an example of such an approach, academic originalists may define “originalism” as “the meaning of the

³⁵³ See *supra* note 27.

³⁵⁴ See Solum, *supra* note 320, at 1250–51.

³⁵⁵ See *id.* at 1250 n.23.

³⁵⁶ See *id.* at 1250.

³⁵⁷ See *supra* notes 248–261 and accompanying text.

Constitution is to be determined based on the historic practices and traditions predating, during, and shortly after the drafting and ratification of the provision at issue.” I will refer to this approach as “History and Tradition Originalism.”

Such an approach lines up with the approach urged in *Bruen*—an approach that pays minimal attention to the text of the document and focuses far more on determining the constitutionality of present restrictions by referring to historic restrictions and regulations.³⁵⁸ This approach also fits with the approach in *Dobbs*, which originates in *Glucksberg*, which holds that a right that is not explicitly mentioned in the Constitution only falls under the protection of the Fourteenth Amendment’s Due Process Clause if the right is “deeply rooted in [this Nation’s] history and tradition” and “implicit in the concept of ordered liberty,” rather than looking into the original meaning of the Due Process Clause.³⁵⁹

While this portion of the Article is couched in the language of prediction, there already is some basis to suspect that there may be at least a partial or temporary move in this direction. As summarized above, in the wake of *Dobbs*, *Bruen*, and *Kennedy*, various commentators and originalists have classified these recent decisions as “originalist” even though they do not comport with the mainstream original public meaning approach.³⁶⁰ Whether intentionally redefining the term or writing in hasty generalizations, this commentary treats the Court’s focus on history and tradition as equivalent to originalism—in contrast with academic originalists’ tendency to synonymize “originalism” with “original public meaning originalism.”³⁶¹ Commentary and reactions to the Court’s recent decisions are still in a relatively early stage, and as originalists have more time to consider and analyze the opinions, they may shift from their initial instinct of describing *Dobbs*, *Bruen*, and *Kennedy* as originalist.

³⁵⁸ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128–55 (2022).

³⁵⁹ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022) (first quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019); then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 764, 767 (2010); and then quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

³⁶⁰ See *supra* notes 261–262 and accompanying text.

³⁶¹ See Whittington, *supra* note 49, at 380 (“Although the terminology deployed can still vary, ‘originalism’ or ‘original meaning’ has now pretty clearly taken dominance over ‘original intent’ as the preferred shorthand for the collection of theories” that have “coalesced around original public meaning as the proper object of interpretive theory”).

3. Does “Originalism” Already Include the History and Tradition Approach?

One possible objection to the possibility of originalism’s evolution is that “originalism” already includes the History and Tradition approach. Accordingly, the use of the term will not need to change in light of the Court’s recent decisions.

There are some broad formulations of originalism that may already encompass History and Tradition Originalism. Consider Lawrence Solum’s description of originalism as a “[f]amily of [c]onstitutional [t]heories” unified by the fixation thesis (“the original meaning of the constitutional text was fixed at the time each provision was framed, ratified, and made public”) and the constraint principle (“constitutional practice should be constrained by this fixed original meaning”).³⁶² This family of theories does not require *originalism* to adopt a particular type of *original meaning*, leaving room for approaches such as original intent originalism to fall under the broad umbrella of the family of theories.³⁶³ Supporters of History and Tradition Originalism, or self-proclaimed originalists who want to track, may argue that this approach to interpretation accepts the two theses Solum describes, and therefore falls under his definition of originalism.

Or, consider the “inclusive originalism” that William Baude describes in his article, “Is Originalism Our Law?”³⁶⁴ Baude describes the approach as follows:

Under inclusive originalism, the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision. This means that judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them.³⁶⁵

³⁶² Solum, *supra* note 320, at 1265–66.

³⁶³ To be clear, Solum does not endorse the original intent approach to originalism, nor does he encourage history and traditional originalism, as he favors the original public meaning approach. See generally Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021) (setting forth the theory of public meaning originalism, arguments for accepting the theory, and responses to potential objections to the theory).

³⁶⁴ See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2154–63 (2015).

³⁶⁵ *Id.* at 2355.

This formulation of originalism permits reliance on precedent, as such reliance “was a well-established common-law-doctrine at the time of the Founding.”³⁶⁶ Accordingly, even if “a valid rule of precedent” results in a party losing their originalist claim, this is consistent with inclusive originalism “because inclusive originalism permits rules of waiver and precedent.”³⁶⁷

One initial problem with this response—at least to the extent that Solum’s “family of theories” approach to originalism is concerned—is that it is not clear that the Court’s history and tradition approach is consistent with the Fixation Thesis.³⁶⁸ In *Bruen* and *Dobbs*, the Court addressed historic commentary and laws dating back well before the founding and during the colonial and founding eras.³⁶⁹ But the Court also addressed subsequent commentary and regulations as a means of further defining history and tradition.³⁷⁰ It, therefore, appears that practices that take place after the founding may have an influence on the meaning of constitutional provisions under History and Tradition Originalism, which is inconsistent with the thesis that the Constitution’s meaning is fixed at the time it is ratified and released to the public.

As for both of these theories, the variety of approaches that they permit are so broad as to render the label *originalism* nearly meaningless. Baude’s “inclusive originalism,” in particular, seems so permissive that virtually any opinion can be drawn into its scope.³⁷¹ Baude makes several of these points himself, suggesting that *Roe v. Wade* “is not obviously hostile to originalist reasoning,” noting the Court’s references to the late adoption of strict restrictions on abortion.³⁷² He argues that *Casey* is consistent with originalism as well, arguing only that *Casey* upheld *Roe* on the basis of precedent.³⁷³ *Gideon v. Wainwright*,³⁷⁴ which Baude characterizes as contradicting the original understanding of the Sixth Amendment as securing the right to hire one’s own counsel, is, under Baude’s characterization, at least “neutral” toward originalism because it “is almost entirely

³⁶⁶ See *id.* at 2360.

³⁶⁷ See *id.*

³⁶⁸ See Solum, *supra* note 320, at 1265–66.

³⁶⁹ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2138–45 (2022); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247–51 (2022).

³⁷⁰ See *Bruen*, 142 S. Ct. at 2145–56; *Dobbs*, 142 S. Ct. at 2252–53.

³⁷¹ See Baude, *supra* note 364, at 2154–63.

³⁷² See *id.* at 2383–84.

³⁷³ See *id.* at 2384.

³⁷⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

about precedent.”³⁷⁵ Given the power that precedent has in Baude’s formulation of originalism,³⁷⁶ it appears possible that cases that cite to and affirm the holding of a prior opinion that explicitly rejects the original public meaning of the Constitution could be deemed originalist simply because they are based on precedent.

If *Roe* and *Casey* are originalist opinions under “inclusive originalism,”³⁷⁷ is *Dobbs*, which overturns them, not an originalist opinion? I suspect that Baude would answer in the negative, given *Dobbs*’s reliance on history and tradition to determine the “meaning” of the Due Process Clause, and given *Dobbs*’s reliance on alternate precedent such as *Glucksberg*.³⁷⁸ If this is the case, then this is yet another example of how “inclusive originalism” all but guarantees that nearly all cases may be defined as originalist through strategic, broad definitions. Of course, if Baude’s inclusive originalism does not include *Dobbs*, then that poses even more problems with labeling *Dobbs* as an originalist opinion. The original public meaning approach already catches its fair share of flack for permitting flexible analysis and failing to constrain “the field of possible outcomes” more than alternative approaches.³⁷⁹ Baude’s approach, which uses a broad initial definition to label virtually any decision as “originalist,” significantly exacerbates this problem.

Stepping back, this discussion is ultimately beside the point of this Article’s main argument, which concerns the Court’s shift away from original public meaning originalism, rather than the families or alternate conceptions of originalism used in support of specific academic goals. My concern is with original public meaning originalism, even if some scholars, in certain contexts, use the term “originalism” to refer to a broader family of theories or, in some cases, original intent originalism.

There are certainly obstacles to the prospect that “originalism” will evolve to refer to defining the Constitution’s meaning solely by reference to historic traditions and practices. The original public meaning approach to constitutional interpretation is entrenched and highly theorized. Those who expound on and encourage the original public meaning approach in the academic literature will need to explicitly abandon their prior scholarship or—at the very least—

³⁷⁵ Baude, *supra* note 364, at 2385–86.

³⁷⁶ *See id.* at 2384, 2386.

³⁷⁷ *Id.* at 2383–84.

³⁷⁸ *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

³⁷⁹ *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 754–55 (2011).

introduce a new interpretive approach that will exist alongside their existing theories.

B. Implications for Critiques and Calls for Reform

The Court's decisions in *Bruen*, *Dobbs*, and *Kennedy* provide useful information and resources for those who seek to criticize the Court's methodology, the results of the Court's decisions, and the Court's place in government. The Court's abandonment of the original public meaning approach may lend support to those who seek to cast the Court as inconsistent and overly political.

Critics of the Supreme Court and its purported originalist methodology frequently argue that the Court reaches decisions based on the political inclinations of the Justices while using the language of originalist methodology to give their decisions the appearance of legitimacy.³⁸⁰ This is met with pushback from Republican politicians, who argue that the Court should not be inappropriately "politicized," despite their own political maneuvers to influence the makeup of the Court.³⁸¹ But these critiques are consistent with the underlying reasoning of other conservative politicians who argue that if originalist methodology does not result in sufficiently conservative outcomes, it ought to be abandoned.³⁸² Commentators who critique the Court in this manner have already seized on the decisions in *Bruen*, *Dobbs*, and *Kennedy* to further advance their arguments.³⁸³

³⁸⁰ See SEGALL, *supra* note 319, at 175, 178 ("Originalism does not take politics or ideology out of constitutional decision making but instead gives judges any number of ways to reach whatever results they choose in virtually any constitutional case.").

³⁸¹ See *Democrats are Politicizing Barrett Confirmation Hearings*, Sen. Sasse Says, NPR (Oct. 13, 2020, 7:56 AM), <https://www.npr.org/2020/10/13/923170395/democrats-are-politicizing-barrett-confirmation-hearings-sen-sasse-says> [<https://perma.cc/DR8Y-BD8F>] (claiming that the judicial branch of American government is "not political"); Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55–57 (2016); Mitch McConnell, *Mitch McConnell: Democrats, Leave the Supreme Court Alone*, Opinion, WASH. POST (Nov. 11, 2021, 1:29 PM), <https://www.washingtonpost.com/opinions/2021/11/11/mitch-mcconnell-supreme-court-packing-democrats/> [<https://perma.cc/JS5B-57Z8>].

³⁸² See, e.g., Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUBLIC DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043/> [<https://perma.cc/TQL8-SAXR>] (arguing that the Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), represents "the end of the conservative legal movement" because "if you can invoke textualism and originalism in order to reach such a decision—an outcome that fundamentally changes the scope and meaning and application of statutory law—then textualism and originalism and all of those phrases don't mean much at all").

³⁸³ See Aziz Huq, *Roe Was Overturned Because of Politics, Not the Constitution*, POLITICO (June 28, 2022, 4:30 AM) <https://www.politico.com/news/magazine/2022/06/28/politics-overturned->

They contend that such a transparent exercise of political power threatens the Court's legitimacy.³⁸⁴

Critics of the Court and its recent decisions would do well to consider emphasizing the Court's failure to consider the original public meaning of the Constitution in reaching the results in *Bruen*, *Dobbs*, and *Kennedy*. These cases are additional evidence against the notion that the Court makes its decisions based on some apolitical methodology, and that originalism is one such method for reaching results that are divorced from political goals.³⁸⁵

On a similar note, liberals and progressives who take issue with the Court's recent rulings should think hard about whether arguments calling for methodological consistency or urging the Supreme Court to preserve an appearance of "legitimacy" are worthwhile. Prior arguments in this vein appear to assume that the Court has a good faith desire to engage in consistent methodology to determine the outcome of cases.³⁸⁶ This line of criticism also tends to assume that the Court is concerned with preserving the appearance of "legitimacy" by refusing to reach dramatic outcomes that are in line with conservative political goals.³⁸⁷ The Court's willingness to take dramatic steps to overturn longstanding precedent and law without any reference to original public meaning casts doubt on whether there is any use for criticism appealing to the Court's desire

roe-00042625 [https://perma.cc/E6VT-8HM5]; Nathan J. Robinson, *The Supreme Court Has Destroyed Its Legitimacy and There Is No Reason to Respect It*, CURRENT AFFAIRS (June 24, 2022) <https://www.currentaffairs.org/2022/06/the-supreme-court-has-destroyed-its-legitimacy> [https://perma.cc/Z5Z5-VLNA].

³⁸⁴ See James F. McHugh & Lauren Stiller Rikleen, *The Politicization of SCOTUS Threatens Its Legitimacy*, BLOOMBERG L. (June 30, 2022, 4:00 AM) <https://news.bloomberglaw.com/banking-law/the-politicization-of-scotus-threatens-its-legitimacy> [https://perma.cc/9MGD-9CXL] (arguing that, before the Court's most recent turn, the Court "could generally be relied upon to ensure that . . . constitutional rights were protected against government overreach," but that the "conflation of politics and Constitutional law" threatens this trust).

³⁸⁵ See Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 30 (2011) ("[O]riginalism is a principled theory of constitutional interpretation and not merely a rationalization for conservatism.").

³⁸⁶ See Leah Litman, Joshua Matz & Steve Vladeck, Opinion, *We Ought to Be Concerned About Preserving the Political Order of the Supreme Court*, WASH. POST (June 18, 2019, 3:49 PM), https://www.washingtonpost.com/opinions/yes-the-publics-perception-of-the-supreme-court-matters/2019/06/18/5b25128c-91e6-11e9-b58a-a6a9afaa0e3e_story.html?noredirect=on [https://perma.cc/E37S-23PG]; see also Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2248 (2019) (reviewing RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (describing Richard Fallon's discussion of originalism and noting that "[h]owever much we may dislike a particular interpretive method" like originalism, "we can see it as legitimate — and respect a Justice who adopts that interpretive approach and applies it consistently, with candor, and in good faith").

³⁸⁷ Litman, Matz, & Vladeck, *supra* note 384.

for consistent methodology and legitimacy. Commentators and politicians would do well to take this into account and to adjust their strategies accordingly.³⁸⁸

The Court's abandonment of original public meaning in favor of a history and tradition approach should concern those who seek to critique the Court on its own terms. Those who advocate liberal and progressive outcomes should recognize that they face an uphill battle under the Court's history and tradition approach. Perhaps even more than the original public meaning approach, the Court's newly emphasized focus on history and tradition tends to smuggle goal-oriented, outdated, and oppressive ideology into a purportedly neutral method. As Justice Breyer notes in his dissent in *Dobbs*:

[T]he ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.³⁸⁹

³⁸⁸ See Jon D. Michaels, *Baller Judges*, 2020 WISC. L. REV. 411, 429–30 (2020) (describing an asymmetrical approach in which conservative politicians have had “brilliant success pushing the courts to the right” while Democrats tend to “nominate lawyers who have spent their entire careers playing it safe”).

³⁸⁹ *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2324–25 (2022) (Breyer, J., dissenting). Concerns over outdated provisions applying to present circumstances with discriminatory and unpredictable effects are not new. See Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 403–13 (2010) (describing unpredictable and potential detrimental consequences that may follow from an originalist approach to the Privileges or Immunities clause).

Supporters of the original public meaning approach argue that, at least in theory, the approach may be applied with some consistency and rigor.³⁹⁰ They argue that combining alternate methods of deriving original public meaning may lead to overlapping results that are most likely to be accurate statements of that meaning.³⁹¹ Others focus on empirical means of examining original public meaning through corpus linguistics methodology, which involves gathering numerous examples of how particular words and phrases were used from era-specific databases of documents and coding the results to determine common meanings and trends.³⁹² I find these approaches lacking for a host of reasons that I explain at length elsewhere.³⁹³ But these methods at least set forth an aspirational approach to interpretation that has at least some rules and standards for interpreters to follow.

The history and tradition approach lacks similar standards, and the Court's opinion in *Bruen* demonstrates this. The *Bruen* Court set forth no rules for determining how close in time rules or regulations need to be to the Constitution's ratification to warrant consideration as part of the relevant history and tradition. But the Court employed unwritten and unstated rules of remoteness, dismissing reliance on the Statute of Northampton because it was enacted 450 years before the ratification of the Constitution.³⁹⁴ Further demonstrating the vague and ambiguous nature of its historic method, the Court had nothing to say about whether the fact that the Statute of Northampton remained in place for hundreds of years affected the history and tradition analysis.³⁹⁵ As a further example, the *Bruen* Court set forth no rules for how many rules or regulations are enough to create or undo a right recognized by history and tradition. But the Court applied an unstated assumption that three regulations restricting the carrying of firearms was enough to undermine a history and tradition of regulating the carrying of firearms.³⁹⁶

³⁹⁰ See Solum, *supra* note 291, at 1624–25; Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 267–68 (2019).

³⁹¹ See Solum, *supra* note 291, at 1624–25 (describing a multi-step approach to determining the original public meaning of the Constitution).

³⁹² See generally Lee & Phillips, *supra* note 390 (describing and arguing in favor of a corpus linguistics approach to determining the Constitution's original public meaning).

³⁹³ See generally Smith & Hiland, *supra* note 326.

³⁹⁴ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2139–40, 2142 (2022).

³⁹⁵ See *id.* at 2139–42; see also *id.* at 2183 (Breyer, J., dissenting) (noting that the Statute of Northampton “remained in force for hundreds of years, well into the 18th century”).

³⁹⁶ See *id.* at 2142 (“[W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation.”); see also *id.* at 2179 (Breyer, J., dissenting) (criticizing the majority

The Court claims that through the “commonplace task” of analogical reasoning, one may determine what historic restrictions are relevant to the history and tradition inquiry.³⁹⁷ But this platitude does not explain or justify the Court’s rejection of restrictions that are too far in the past to be of relevance. It does not set forth a standard for determining when a history or tradition has been established. And it leaves it to the Court’s discretion to determine just how broadly, or narrowly, to define what makes a regulation relevant—permitting the *Bruen* Court to repeatedly dismiss or minimize examples of restrictions on the carrying of firearms on the basis that these restrictions were overly narrow.³⁹⁸

There certainly is room for criticism of inaccurate historical analysis. Because Justices and the attorneys appearing before them are generally not trained historians, errors will likely proliferate should the Court continue its history and tradition approach. But these critiques will likely make little difference to the Court, which has broad, undefined discretion to define the rules of analogizing, and has shown a willingness to adopt rules that favor preferred outcomes. In light of this, targeting the Court’s methodology itself—particularly in a manner that reveals the Court’s inconsistencies and goal-orientation to a broader audience—is likely to have more of an impact. If anything, such criticism will educate the broader public on the Court’s power and dispel illusions that the Court is confined by methodological commitments.

VII. CONCLUSION

The end of the Court’s October 2021 term has had a seismic impact on American law, the reverberations of which will likely continue for decades. This Article demonstrates that the Court’s decisions in *Bruen*, *Dobbs*, and *Kennedy* should have a similar impact on originalism as well. Many supporters of originalism may be happy with the outcome of these decisions. But originalist academics and commentators must reckon with the fact that the Court reached these decisions with barely a gesture to the original public meaning approach to constitutional interpretation—an approach to which

for failing to state “how many cases or laws would suffice ‘to show a tradition of public-carry regulation’”).

³⁹⁷ See *id.* at 2132.

³⁹⁸ See *id.* at 2143 (distinguishing historic restrictions against carrying firearms because those regulations only applied to instances where firearms were carried in a manner that would cause terror to the public).

originalists have devoted decades of research, writing, and theorizing.³⁹⁹ Instead, the Court adopted its own history and tradition approach—an approach that does not purport to concern itself with the Constitution’s original public meaning. While the Court rejected alternate approaches to constitutional interpretation, it did not even acknowledge the existence of the original public meaning approach.⁴⁰⁰

The Court had the opportunity to remake swathes of constitutional law in the image of the original public meaning of the Constitution. Multiple Justices on the Court have urged such an approach in confirmation hearings and in the odd judicial opinion.⁴⁰¹ Yet given this opportunity, these Justices chose a different approach—an approach that has replaced decades of precedent as the new law of the land. Law professors who teach constitutional law are now revising syllabi to account for the new legal landscape. As they do so, those of them who previously urged and argued for an original public meaning approach must come to terms with the reality that the Court—a Court that includes multiple Justices that originalist scholars have labeled as originalists—does not share their view.

³⁹⁹ See, e.g., *supra* note 339 and accompanying text.

⁴⁰⁰ See *supra* notes 116, 167, 216 and accompanying text.

⁴⁰¹ See *supra* notes 42–45.