

ORIGINALISM'S AGE OF IRONIES

*Sherif Girgis**

Guns, abortion, religious establishments, presidential power: While today's Supreme Court identifies as originalist, it has settled constitutional questions on these and many other issues using history and tradition, not just original meaning.¹ Scholars debate whether this trend can be squared with originalism.² Last Term, the originalist Justices themselves joined the fray. Their reflections might foreshadow the reasoning and outcomes of future cases, including on hot-button issues. So a close look should pay off for parties hunting for five votes on a methodologically self-conscious Court. It should interest citizens keen to know if the Court abides by its principles and wondering where those might lead. And a close look delivers theoretical insights. It makes vivid how easily the original meaning of the text runs out in Supreme Court cases, requiring "constitutional construction"³ to bridge the gap between vague meaning and specific outcomes. It reveals the divergent paths that originalists take when the method is pressed to its limits, casting light on originalism's deepest motivations and challenges. It turns out that in such cases, the purer one's originalism at the level of theory, the less it constrains judges in practice.

Part I of this Essay distinguishes originalism and traditionalism and describes the Court's apparent turn to the latter.

Part II addresses traditionalism in separation of powers cases. While Justices Kavanaugh and Barrett disagreed this Term about

* Associate Professor of Law, Notre Dame Law School. I thank Joel Alicea, Rishabh Bhandari, Sam Bray, Rick Garnett, Bill Kelley, Stefan McDaniel, Jeff Pojanowski, Reva Siegel, and Garrett West for helpful feedback or discussions.

¹ See, e.g., *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020). See generally Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023) (analyzing potential examples).

² See generally Barnett & Solum, *supra* note 1, at 446 (arguing that history and tradition can be used as evidence of original meaning and purpose, consistent with public meaning originalism); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023) (distinguishing traditionalism from originalism); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023) (arguing that the Court's reliance on political practices arising long after ratification is hard to square with originalism).

³ See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 10 (2018) (citing KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999)) (describing the distinction "between (a) endeavoring to ascertain the communicative content of constitutional text and (b) making constitutional judgments when that endeavor fails to yield a single determinate answer" and calling the latter task "*construction*"); see also *id.* at 35 (arguing that judges in cases requiring construction "specify . . . an implementing doctrine . . . consistent with the . . . original function" of the relevant constitutional norm (footnote omitted)).

traditionalism in rights cases, they both joined an opinion endorsing it in a separation of powers case: *CFPB v. Community Financial Services Ass'n of America*⁴ (*CFSA*). There, the Court had a cogent originalist theory for relying on *some* post-ratification practices as forms of what James Madison called “liquidation.” But the late practices actually cited in almost all its structural cases lack the essential features and authority of Madisonian liquidation.⁵ Originalism thus proves hard to apply consistently in structural cases that get to the Supreme Court; there, originalism restrains less than has been widely assumed.

Originalism faces a different and deeper challenge in rights cases, where the originalist Justices themselves are divided about traditionalism. Part III explores that divide using two cases from this Term (*Vidal v. Elster*⁶ and *United States v. Rahimi*⁷) and one from last Term (*Samia v. United States*⁸). Two approaches emerge. Justice Barrett would consult only ratification-era history and precedent.⁹ That approach is easier to square with originalism but less often capable of resolving cases, so it requires more supplementation with judicially developed tests. The second approach, embraced by the other conservatives and spelled out in Justice Thomas’s *Vidal* and *Samia* opinions and Justice Kavanaugh’s *Rahimi* concurrence, would give long-post-ratification practices, too, dispositive weight.¹⁰ So it finds useful history in more cases but is harder to square with originalism. Ultimately, I suggest Justice Barrett follows a more theoretically cogent originalism in rejecting the added restraints of post-ratification history.¹¹ But I think her view is too optimistic about finding sources of restraint elsewhere. She looks to Founding-era history and precedent for determinate principles to guide judges. Yet for systematic reasons rooted in original meaning and function, determinate principles will often be unavailable for open-ended rights like free speech, as I argue at length elsewhere¹² and will suggest here.¹³

The resulting dilemma for some structural and rights cases — that stringency about originalist theory might reduce restraint in adjudication — reflects an irony for a modern movement born to rein in

⁴ 144 S. Ct. 1474 (2024).

⁵ See *infra* section II.A, pp. 5–7.

⁶ 144 S. Ct. 1507 (2024).

⁷ 144 S. Ct. 1889 (2024).

⁸ 143 S. Ct. 2004 (2023).

⁹ See *infra* sections III.A, pp. 9–11 & III.C.1, pp. 14–15.

¹⁰ See *infra* section III.B, pp. 11–13.

¹¹ See *infra* section III.C, pp. 13–19.

¹² See Sherif Girgis, *Unfinished Liberties: The Inevitability of Interest-Balancing*, 125 COLUM. L. REV. (forthcoming 2025) (on file with the Harvard Law School Library).

¹³ See *infra* section III.C.2, pp. 15–17.

judges.¹⁴ Still, irony is not incoherence or even error. As Part IV briefly suggests, the developments discussed here are predictable results of a legal theory's transition to a "governing" philosophy on an apex court. Nor will the need for judges to supplement text and own up to the burden of decision scandalize contemporary originalist scholars. They have independently come to see originalism more as a theory of law than as a means of tying judges' hands — as an account of our original law, rooted in nontextual *and* textual sources, not a bare command to read the Constitution's words.¹⁵

I. THE ORIGINALIST COURT'S TURN TO TRADITION

The originalist-identifying Court relies not only on text and meaning but also on "history and tradition," especially political practices.¹⁶ And not just "original"-era practices but ones coming long after ratification, too.¹⁷

Originalism holds that constitutional law should comport with, and be rooted in, the constitutional text's original meaning,¹⁸ or the law that its adoption was originally understood to produce,¹⁹ except as lawfully amended.²⁰ Obviously, a text's original meaning is one thing, and officials' practice another. Yet not every invocation of practice departs from originalism. The method easily justifies four kinds of reliance on practice.²¹

First, *pre*-ratification practices matter when original meaning gives them legal relevance. If the Second Amendment "codified a pre-existing right," practices predating ratification would reveal its contours.²² Second, *early* practices, as Justice Barrett stressed in *Rahimi*, "elucidate[]

¹⁴ See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013). This is a relative claim about varieties of originalism; I do not deny that contemporary originalism provides more determinate guidance than the approaches originalism aimed to replace.

¹⁵ See *id.* at 393.

¹⁶ See *supra* notes 1–2 and accompanying text.

¹⁷ See Girgis, *supra* note 2, at 1496–1503.

¹⁸ See Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1964 (2021).

¹⁹ See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009) (supporting reliance on Founding-era methods of interpretation).

²⁰ See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) (defining originalism as holding that "[o]ur law is still the Founders' law, as it's been lawfully changed.>").

²¹ See Barnett & Solum, *supra* note 1, at 446–49 (identifying similar roles for practice in constitutional interpretation).

²² *United States v. Rahimi*, 144 S. Ct. 1889, 1924 (2024) (Barrett, J., concurring) (citing *District of Columbia v. Heller*, 554 U.S. 570, 595, 627 (2008)); see also William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1469 (2024) (defending a role for tradition in Second Amendment law). A text could peg a norm's changing scope to future practices, too. See John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1814–15 (2008) (defending such a reading of the Eighth Amendment).

how contemporaries understood the text — for example, the meaning of the phrase ‘bear [a]rms.’”²³ Third, originalist Justices give *stare decisis* a role, so the “practice” of past courts addressing a legal question counts. One originalist rationale for this, as Justice Kavanaugh noted in his *Rahimi* concurrence, is that the original meaning of “judicial [p]ower” itself “incorporates the principle of *stare decisis*.”²⁴

Finally, originalists rely on some *political* practices that *post*-date ratification — those that qualify as what James Madison called “liqui-dat[ion].”²⁵ We defer to the readings of vague texts reached by prior courts following adversarial testing. By the same token, Madison thought, we should defer to political actors’ interpretations as captured in settled practices that followed debates between *them* over the meaning of vague texts.²⁶ Chief Justice Marshall did so in *McCulloch v. Maryland*,²⁷ upholding the national bank as a lawful exercise of Congress’s powers after Presidents and Congresses had debated and resolved the constitutional question and acted accordingly.²⁸ Madison’s treatment of liquidation has been cited with approval by Justices Thomas,²⁹ Gorsuch,³⁰ Kavanaugh,³¹ and Barrett.³²

Here, then, I will reserve “traditionalism” for reliance on practice that falls into none of these four categories. Traditionalist cases cite practices that come too late to shed special light on original meaning; the practices also have not been shown to reflect political or judicial discussions and resolutions of a constitutional-interpretive question. Such “traditions” have included entrenched actions (or inaction) by Presidents, Congresses, and state courts and officials. Thus, the Court has concluded that Congress violates Article II when it insulates from presidential removal the sole director of a federal agency, partly because there is no deep tradition of such insulation.³³ The Second Amendment

²³ *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) (citing *Heller*, 554 U.S. at 582–92).

²⁴ *Id.* at 1920 (Kavanaugh, J., concurring).

²⁵ THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003). *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (originalist account of liquidation).

²⁶ *See* Baude, *supra* note 25, at 18–21.

²⁷ 17 U.S. (4 Wheat.) 316 (1819).

²⁸ *Id.* at 401–02.

²⁹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020)) (citing, *inter alia*, THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961)).

³⁰ *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1258 (2022) (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908)) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 401; THE FEDERALIST NO. 37, *supra* note 29, at 229 (James Madison)).

³¹ *United States v. Rahimi*, 144 S. Ct. 1889, 1917 (2024) (Kavanaugh, J., concurring) (quoting THE FEDERALIST NO. 37, *supra* note 29, at 228–29 (James Madison)).

³² *Vidal v. Elster*, 144 S. Ct. 1507, 1531 (2024) (Barrett, J., concurring in part) (citing THE FEDERALIST NO. 37, *supra* note 29, at 229 (James Madison)).

³³ *See Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020).

does not protect conduct if states have long regulated it.³⁴ And so on.³⁵ How to square these with originalism?

II. TRADITIONALISM ABOUT SEPARATION OF POWERS

Separation of powers cases have long invoked post-ratification practices.³⁶ And while Justices Kavanaugh and Barrett dispute the role of such practices in rights cases, as seen below,³⁷ both joined an opinion last Term whose sole grounding was reliance on late practices in a separation of powers case.³⁸ The Court has a cogent originalist defense of relying on certain structural practices, but it has departed from that theory in most cases invoking it. What this reveals, I think, is not opportunism but the difficulty of sticking closely to originalist-approved methods in the structural cases that reach the Supreme Court.

A. *The Limits of Liquidation*

In *CFSA*, the Court reviewed Congress's decision to let the CFPB draw funds from the Federal Reserve without having to ask Congress for an appropriation each year.³⁹ The Court found this compatible with the Constitution's demand that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."⁴⁰ Justice Thomas's majority opinion cited "[p]re-founding history" and "[t]he practice of the First Congress" as "contemporaneous" evidence of meaning.⁴¹ Justice Kagan wrote separately to cite further support in much later "19th-century practice, which became the 20th-century practice, which became today's."⁴² She was joined not only by Justice Kavanaugh,⁴³ who elsewhere championed reliance on such late practices,⁴⁴ but also by Justice Barrett,⁴⁵ who wrote in other cases to oppose it.⁴⁶ What originalist theory could justify their decisions to join?

³⁴ See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (implying constitutionality of "longstanding prohibitions").

³⁵ See Girgis, *supra* note 2, at 1497–502 (surveying cases).

³⁶ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424–26 (2012) (analyzing use of historical practice in separation of powers cases).

³⁷ See *infra* Part III, pp. 9–19.

³⁸ See *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 144 S. Ct. 1474, 1490 (2024) (Kagan, J., concurring).

³⁹ *Id.* at 1478–79 (majority opinion).

⁴⁰ *Id.* (quoting U.S. CONST. art. I, § 9, cl. 7).

⁴¹ *Id.* at 1482, 1484 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)).

⁴² *Id.* at 1490 (Kagan, J., concurring).

⁴³ See *id.*

⁴⁴ See *United States v. Rahimi*, 144 S. Ct. 1889, 1916 (2024) (Kavanaugh, J., concurring) ("[P]ost-ratification history . . . can also be important for interpreting vague constitutional text.").

⁴⁵ See *CFSA*, 144 S. Ct. at 1490 (Kagan, J., concurring).

⁴⁶ See, e.g., *Vidal v. Elster*, 144 S. Ct. 1507, 1531 (2024) (Barrett, J., concurring in part) (arguing against reliance on "late-19th and early-20th century . . . tradition" that provides no "evidence of the original meaning" of the constitutional text).

In *Vidal v. Elster*, Justice Barrett cited Justice Kagan's *CFSA* concurrence as illustrating that "the longstanding practice of the political branches" could "reinforce our understanding of the Constitution's original meaning."⁴⁷ But again, the only point of Justice Kagan's opinion was to cite late-19th and early 20th-century practices⁴⁸ — yet Justice Barrett's *Vidal* opinion immediately went on to *deny* that "late-19th and early-20th century" practices could be "evidence of the original meaning of the Free Speech Clause."⁴⁹ Thus, Justice Barrett must think political-branch practice different from the state actions cited in *Vidal*.

The natural explanation is that the branches' practices are liquidation, reliance on which has Founding-era pedigree and stare decisis support.⁵⁰ Indeed, Justice Kagan cited the *Federalist Paper* in which Madison explains liquidation.⁵¹ Of course, this basis for contrasting *CFSA* with *Vidal*, a rights case, assumes that liquidation could not clarify rights, too, which is disputed.⁵² But at least the originalists could cite a Founding-era rationale for relying on late practices in *CFSA*.

Yet the rationale does not fit *CFSA*. That's because Justice Kagan's concurrence did not show that the Congresses adopting the nineteenth- and twentieth-century funding mechanisms had ever considered and discussed their constitutionality. And without such discussions, political practices lack the force of Madisonian liquidation. Discussion of the underlying legal issue is crucial not just because Madison said so,⁵³ but because it is essential to the arguments for giving liquidation the force of precedent. Judicial precedent gets its force from legal deliberation. That's why we do not treat a case as authority on issues never addressed by the parties and the court — even issues the court was constitutionally duty-bound to settle in a certain direction, like whether it had jurisdiction.⁵⁴ (And with good reason: If stare decisis is meant to balance having the law settled and getting it right,⁵⁵ precedent must reflect someone's effort *to* get the law right.) Likewise, we should not treat political practices as authoritative without confirming that the officials had hashed out the constitutional question.⁵⁶ Justice Kagan's *CFSA* concurrence did not confirm that. (And if the practices were never questioned

⁴⁷ *Id.* (citing *CFSA*, 144 S. Ct. at 1490 (Kagan, J., concurring)).

⁴⁸ See *CFSA*, 144 S. Ct. at 1490 (Kagan, J., concurring).

⁴⁹ *Vidal*, 144 S. Ct. at 1531 (Barrett, J., concurring in part).

⁵⁰ See *supra* notes 25–32 and accompanying text.

⁵¹ *CFSA*, 144 S. Ct. at 1490 (Kagan, J., concurring) (citing THE FEDERALIST NO. 37, *supra* note 29, at 229 (James Madison)).

⁵² See Baude, *supra* note 25, at 49–50 (offering competing considerations).

⁵³ See *id.* at 16–18 (laying out Madison's requirements).

⁵⁴ See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (explaining that "drive-by jurisdictional rulings" have "no precedential effect" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998))).

⁵⁵ See RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 9 (2017) (calling this the enduring characterization of judicial defenses of stare decisis).

⁵⁶ For a more complete explanation, see Girgis, *supra* note 2, at 1493–96.

because their permissibility was clear, liquidation — whose point is to clarify ambiguity — would be superfluous.⁵⁷) While some might think undiscussed traditions an independent source of constitutional law, that would undercut originalist Justices' defining view that constitutional change requires amendment.⁵⁸

This point has import beyond *CFSA*.⁵⁹ As it turns out, the vast majority of structural cases citing practice never show that those engaged in it had discussed the underlying legal issue.⁶⁰ And quite often, I've argued, we have reason to expect they had not, as the Court has sometimes conceded.⁶¹ In those cases, reliance on tradition goes beyond what the liquidation theory can justify. That many cases rely on it anyway might suggest that originalism often simply runs out in the Court's structural cases.

B. *The Limits of Alternative Rationales*

Originalists might have other grounds to defer to undiscussed practices in structural cases,⁶² but not as often as the Court assumes.

First, under some conditions, late practices offer *some* evidence of others' view of original meaning, which is some evidence of what the meaning really was (albeit weaker evidence than early practice or practice reflecting debate). But practice is likely to reflect legal judgments only when the actors are likely to have (1) acted with diligence and good faith, so that their choosing a practice shows they thought it lawful, and (2) prioritized original meaning, so that their thinking a practice lawful should matter to originalists. Justice Barrett apparently doubted that these conditions were met in a recent rights case, where she refused to

⁵⁷ See Baude, *supra* note 25, at 13–16 (explaining the precondition that text be indeterminate).

⁵⁸ See, e.g., *United States v. Rahimi*, 144 S. Ct. 1889, 1924 (2024) (Barrett, J., concurring) (emphasizing that the originalists see “the meaning of constitutional text” as “fixed at the time of its ratification” until the “text [is] . . . ‘lawfully altered’” (quoting Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 782 (2022))).

⁵⁹ Ironically, it matters little for *CFSA*, where the majority thought original meaning sufficient. See *supra* notes 39–41 and accompanying text; see also Elias Neibart, *Methodological Convergence in Community Financial Services*, HARV. L. REV. BLOG (May 26, 2024), <https://harvardlawreview.org/blog/2024/05/methodological-convergence-in-community-financial-services> [<https://perma.cc/P4S4-9A4M>] (arguing that, in *CFSA*, “Justice Kagan agreed with the majority that the fixed original meaning should control” and that her opinion should be read as merely “provid[ing] a corroborative gloss on” the majority’s analysis). But Justices Kavanaugh and Barrett must have thought liquidation crucial more broadly, or they would not have laid down a methodological marker by endorsing it when it was avowedly superfluous to the outcome.

⁶⁰ See Girgis, *supra* note 2, at 1505–06.

⁶¹ See *id.* at 1506–08.

⁶² Besides the rationales discussed above, someone might cite “Thayerian” deference to political actors' conduct absent manifest unconstitutionality. See JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 18 (1893) (defending that norm). But Thayerism arguably makes reliance on practices superfluous, with textual ambiguity sufficing to save the action under review. And it is no help in cases featuring political actors on both sides (the President and Congress).

treat a practice as evidence of its compatibility with a right without signs that officials had addressed the issue.⁶³

Nor is it clear that departmentalism — respect for the coordinate branches — requires a different result when the actors are Congress and the President. Departmentalism is mainly about deference to other branches’ “interpretation,”⁶⁴ not undeliberated action (to which, again, the Court does not defer even when the action was its own⁶⁵). Certainly the conservative Justices have repeatedly denied that the Court should (in justiciable cases) “defer to the other branches[.]” on “questions involving the Constitution’s government-structuring provisions.”⁶⁶ Besides all this, a late practice may add little evidentiary value regarding original meaning. Compared to today, how much better were Anglophones in, say, the 1920s at discerning a word’s meaning to speakers in the 1790s?⁶⁷ The evidentiary rationale is weaker still when the Court cites a *lack* of a practice to show it *impermissible*.⁶⁸ There are many reasons not to take an action besides the belief that it would be unlawful.⁶⁹ The evidence-of-original-meaning rationale does not go very far.

Second, one might think that in many cases there are adequate substitutes for interpretive debate. In turf wars between the President and Congress, each branch might seem to have the incentives and means to fight perceived encroachments. For example, Congress could deny salaries to officials it thinks the President appointed unlawfully.⁷⁰ In those cases, one might argue, one branch’s silence should be construed as considered agreement with the other’s actions, endowing them with the force of liquidation after all.

But this suggestion assumes that Congress jealously guards its prerogatives and puts constitutional fidelity above all else, which is dubious empirically⁷¹ (and must seem dubious to Justices keen to stop Congress

⁶³ See *Samia v. United States*, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in the judgment) (objecting that if cited “state cases ma[de] no mention of the confrontation right,” they may have reflected no more than courts’ understandings of “an ordinary hearsay rule”).

⁶⁴ Baude, *supra* note 25, at 35.

⁶⁵ See *supra* note 54 and accompanying text.

⁶⁶ *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment).

⁶⁷ See *id.* at 589–92 (rejecting reliance on 1920s practice).

⁶⁸ See *supra* note 33 and accompanying text; see also *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (condemning the “assum[ption] that founding-era legislatures maximally exercised their power to regulate”).

⁶⁹ See Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1468 (2017) (identifying ignorance of the law, scarcity of time and resources, and political expediency as alternative reasons for Congress’s inaction).

⁷⁰ See *Noel Canning*, 573 U.S. at 549 (“By paying salaries to this kind of recess appointee, the 1940 Senate (and later Senates) in effect supported the President’s interpretation of the [Recess Appointments] Clause.”).

⁷¹ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (arguing that Madison’s expectation that each branch’s ambition would check that of the other branches was thwarted “almost from the outset”).

from unlawfully delegating power to the Executive, for example⁷²). This rationale also assumes that the main question in inter-branch disputes is “whether or not the encroached-upon branch approves [an] encroachment,” when what really matters is whether “one branch invades the territory of another.”⁷³ Perhaps that is why no Justice used this rationale in *CPSA*, even though it would have made that an open-and-shut case. After all, the Appropriations Clause grants Congress a check on the Executive,⁷⁴ and here, of course, it was Congress that *chose* to give the CFPB free rein.⁷⁵

Thus, originalists will sometimes have a basis for relying on post-ratification practices in structural cases, but not always and not with ease. Originalism’s guidance runs out in structural cases more often than the Court’s invocations of liquidation suggest.

III. TRADITIONALISM ABOUT RIGHTS

Both the pull of traditionalism and its friction with originalism are more intense in some rights cases. The divide among the Justices here is pronounced, exposing rifts in their reasons for being originalist and in the degrees to which their approaches would constrain judges.

A. *The Lack of an Originalist Defense*

The originalist Justices are split on whether traditions that came long after ratification may ever be dispositive in rights cases — whether they may be necessary or, as the case may be, sufficient, for constitutionality. Justice Barrett thought not; the other originalists disagreed. As this section shows, Justice Barrett powerfully argued that such traditionalism has no affirmative originalist support. The next two sections explore whether originalists should embrace traditionalism as the least bad option.

Justice Barrett’s distinctive view was clear in *Vidal*, which upheld a federal law barring registration of trademarks featuring others’ names without their consent.⁷⁶ Justice Thomas’s majority opinion regarded state court cases applying state trademark law as support for the federal statute’s “compatib[ility] with the First Amendment.”⁷⁷ Justice Barrett thought those practices came too late to cast light on the original

⁷² See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2134–42 (2019) (Gorsuch, J., dissenting) (calling for more stringent judicial enforcement of nondelegation principles).

⁷³ *New York v. United States*, 505 U.S. 144, 182 (1992).

⁷⁴ *CFPB v. Cmty. Fin. Servs. Ass’n of Am.*, 144 S. Ct. 1474, 1483–84 (2024) (explaining the history of appropriations limits as checks on executive power).

⁷⁵ *Id.* at 1494 (Alito, J., dissenting).

⁷⁶ See *Vidal v. Elster*, 144 S. Ct. 1507, 1512–13, 1524 (2024).

⁷⁷ See *id.* at 1519 (citing “deep roots in our legal tradition” as “sufficient to conclude” that the challenged rule “is compatible with the First Amendment,” and adding that “[w]e need look no further in this case”).

meaning of the Free Speech Clause or its incorporation against the states.⁷⁸ She inferred that Justice Thomas “present[ed] tradition itself as the constitutional argument,” making “late-19th and early-20th century” practices “dispositive of the First Amendment issue.”⁷⁹ Perhaps she meant he was treating historical practice as *constituting* (and thus possibly altering) the contours of a right over time — much as the Court treats “evolving standards of decency” as determining the scope of the bar on cruel and unusual punishments.⁸⁰ She saw no “theoretical justification for using tradition that way” here.⁸¹

Likewise in *Samia*. There, the Court held that if two defendants, call them Jones and Smith, are tried together, prosecutors may admit a confession from Jones that might have implicated Smith as long as the confession is modified to avoid reference to Smith and the jury is instructed not to treat it as evidence against him.⁸² The Court held this would not violate Smith’s constitutional right to confront the witnesses against him.⁸³ For support, Justice Thomas, joined in relevant part by all of the conservatives but Justice Barrett, cited cases admitting similar confessions, including cases arising long after ratification or incorporation of the Confrontation Clause.⁸⁴ Justice Barrett replied that cases from the 1890s shed no more light on original meaning than “cases from, say, the 1940s.”⁸⁵

Finally, *Rahimi* upheld a law disarming people subject to domestic violence restraining orders against a Second Amendment challenge.⁸⁶ The Court’s test required the government to point to a historical tradition of analogous regulations.⁸⁷ Justice Barrett wrote that in this inquiry, long-*post*-ratification regulations should have no dispositive role.⁸⁸ Early ones could shed light on original meaning.⁸⁹ And regulations from before or around ratification could illumine the borders of the “pre-existing right.”⁹⁰ But according to Justice Barrett, neither the latter, “original contours”⁹¹ rationale nor the evidence-of-original-meaning rationale would justify relying on long-*post*-ratification gun laws.⁹²

⁷⁸ See *id.* at 1531–32 (Barrett, J., concurring in part).

⁷⁹ *Id.* at 1532.

⁸⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁸¹ *Vidal*, 144 S. Ct. at 1532 (Barrett, J., concurring in part).

⁸² *Samia v. United States*, 143 S. Ct. 2004, 2009–10 (2023).

⁸³ *Id.* at 2010.

⁸⁴ See *id.* at 2012–13.

⁸⁵ *Id.* at 2019 (Barrett, J., concurring in part and concurring in the judgment).

⁸⁶ *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024).

⁸⁷ *Id.* at 1898.

⁸⁸ See *id.* at 1925 (Barrett, J., concurring).

⁸⁹ See *id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *id.* at 1924–25.

Thus, Justice Barrett sees no affirmative originalist case for the other five conservative Justices' willingness to begin and end a rights analysis with traditions. That argument is *prima facie* compelling. Against it, Justice Kavanaugh pleads a necessity defense: Traditionalism *must* be permissible because it is better than the available alternative approaches.

B. The Limits of a Popular Sovereignty-and-Restraint Defense

In *Rahimi*, Justice Kavanaugh defended reliance on traditions that long postdate ratification as good for the rule of law and popular sovereignty.⁹³ This section shows that on the latter score, traditionalism ultimately falls short; the next section asks if Justice Barrett's alternative method fares better.

When original meaning and case law run out, as they sometimes do for broad or vague provisions, Justice Kavanaugh thinks traditionalism wins by default for the following reasons:

1. Absent clear original meaning or precedent, the alternatives are history or policy — political traditions or judicial balancing.⁹⁴
2. Consulting history is more constraining of judges, leading to more predictable outcomes.⁹⁵
3. Relying on history also better serves popular sovereignty.⁹⁶

I will return to the first premise in the next sections, when discussing Justice Barrett's doubts that even history will always be available.⁹⁷

Contrary to the second premise, Justice Sotomayor argued that traditionalism is less constraining because traditions are mixed, allowing judges to cherry-pick based on unvoiced policy preferences.⁹⁸ But Justices Gorsuch and Kavanaugh think something is better than nothing: Judicial reasoning that has to cite or distinguish the history is more

⁹³ *Id.* at 1917 n.5 (Kavanaugh, J., concurring) (noting with approval cases citing history “extend[ing] ‘far beyond the time of enactment’” (quoting Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1960 (2017))).

⁹⁴ *See id.* at 1916 (“[T]here can be little else [but post-ratification history] to guide a judge . . . [besides] his or her own policy preferences.”).

⁹⁵ *See id.* at 1912 (“History is far less subjective than policy.”).

⁹⁶ *See id.* (arguing that the historical approach preserves a “neutral judicial role” and keeps judges from “impos[ing] their own policy views on the American people”); *see also id.* at 1922 (arguing that “the historical approach ‘intrudes less upon the democratic process,’” being rooted ultimately in “democratic decisions” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010) (Scalia, J., concurring))).

⁹⁷ The first premise may also overlook rules of interpretation for determining outcomes when other tools run out. *But see* McGinnis & Rappaport, *supra* note 19, at 773.

⁹⁸ *See* *Vidal v. Elster*, 144 S. Ct. 1507, 1539 (2024) (Sotomayor, J., concurring in the judgment) (“When it comes to subjectivity, [a traditionalist test] empowers judges to pick their friends in a crowded party.”).

constrained than reasoning that does not.⁹⁹ While Justice Jackson contested that view, noting that gun cases decided under balancing tests converged more than those reached under historical tests,¹⁰⁰ Justices Gorsuch and Kavanaugh would retort that they converged at the price of gutting the Second Amendment.¹⁰¹

Finally, as to whether relying on political traditions better respects popular sovereignty, Justice Barrett thought the opposite. At least when courts require a close historical analogue for new regulations to survive rights challenges, she wrote, they wrongly “assume[] that founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority” that *shrinks* the people’s power to make law over time.¹⁰² In other words, a judge does not honor the people’s will by constitutionalizing what the people did through ordinary lawmaking. Rather, a judge does so by letting them make whatever laws the people have not themselves rendered off-limits through higher lawmaking. And for Justice Barrett, higher law is made and undone by one means alone: “Ratification” of a “text.”¹⁰³ Thus, she wrote, while “[r]elying exclusively on history and tradition [might] seem like a way [to] avoid[] judge-made tests,” “a rule rendering tradition dispositive is *itself*” not binding law but just another “judge-made test.”¹⁰⁴ Tying judges’ hands will not serve popular sovereignty if the rope is not one the people have spun into higher law. (Ruling based on coin-flips would bring judicial policy reasoning to zero without honoring the people’s will at all.)

This disagreement goes to Justices Kavanaugh and Barrett’s different understandings of originalism, which *Rahimi* laid bare. Justice Kavanaugh cited work by then-Professor Bork and Justice Scalia touting originalism as a means of confining judges.¹⁰⁵ Justice Barrett cited a

⁹⁹ See *Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring); see also *id.* at 1922 (Kavanaugh, J., concurring). For a contrasting view in scholarship, see Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. & PUB. POL’Y (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4808688 [<https://perma.cc/ABB2-TN2W>] (arguing that historical reasoning only masks normative analysis).

¹⁰⁰ See *Rahimi*, 144 S. Ct. at 1927–28 (Jackson, J., concurring) (calling “discord,” *id.* at 1927, in tradition-based cases “striking when compared to the relative harmony,” *id.*, prevailing under balancing tests).

¹⁰¹ See *id.* at 1909 (Gorsuch, J., concurring) (“How did the government fare under that regime? In one circuit, it had an ‘undefeated, 50–0 record.’” (quoting *Duncan v. Bonta*, 19 F.4th 1087, 1167 n.8 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting))).

¹⁰² *Id.* at 1925 (Barrett, J., concurring).

¹⁰³ *Id.* at 1924 (citing Sachs, *supra* note 58, at 782). But see Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457 (1994).

¹⁰⁴ *Vidal v. Elster*, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

¹⁰⁵ *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring) (seeing, apart from “text and the history,” . . . ‘no principled way’ for a neutral judge” to choose among values (quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971))); see also *id.* (touting “[h]istory” as a “criterion . . . separate from the preferences of the judge” (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989))).

formalist defense of originalism as the best account of our higher law.¹⁰⁶ This tracks an old cleavage in legal conservatism between “those who saw originalism as a means to achieving some other substantive end” like “judicial restraint” and those who thought it “logically entailed by the Constitution and the principles on which it rested.”¹⁰⁷

But suppose (as I do) that some sort of formalist case is stronger,¹⁰⁸ so late practices never elevated to higher law should not be treated as dispositive simply as a means of tying judges’ hands. Still, Justice Kavanaugh might ask: Does any alternative criterion, when original meaning and precedent run out, *better* respect popular sovereignty?

Justice Barrett’s concern to respect the people’s ordinary lawmaking might suggest an answer: deference to ordinary laws that higher law does not *clearly* forbid. This “Thayerian” norm has its own Founding-era support.¹⁰⁹ And it might seem to deliver all the results Justice Kavanaugh favored in *Samia*, *Vidal*, *Rahimi*, and *CFSA*. Does it offer an out from the dilemma he sees when original meaning runs out? Could judges use original meaning to identify a right’s determinate core, and in all cases falling outside the core defer without further appeal to history *or* policy?

I think this path justified whenever available, as in Confrontation Clause cases like *Samia*, where Justice Barrett upheld state practices faced with “inconclusive” Founding-era history.¹¹⁰ But I will argue that this path was unavailable in *Vidal*¹¹¹ where, as it happens, she did not pursue it. Of course, that Thayerism was no use in *Vidal* does not prove Justice Barrett’s own approach there superior to Justice Kavanaugh’s — unless *hers* is inevitable.

C. *The Limits of Other Sources of Restraint in Liberties Cases*

If Justice Kavanaugh thinks either historical or policy reasoning may be inevitable, Justice Barrett thinks something resembling policy (judicial application of principles about what’s reasonable) inevitable for

¹⁰⁶ See *supra* notes 102–04 and accompanying text.

¹⁰⁷ J. Joel Alicea, *Dobbs and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), <https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement> [<https://perma.cc/F369-9EQZ>].

¹⁰⁸ I think the positivist case made by scholars like Professors William Baude and Stephen Sachs, *see, e.g.*, William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019), requires a normative backing that may in turn render inessential some of their fine-grained premises about our modern (customary) law of interpretation. *See generally* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016) (discussing the need for, and seeking to provide, a normative backing for the positivist case through natural law reasoning).

¹⁰⁹ See McGinnis & Rappaport, *supra* note 19, at 775 n.81 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135, 140–41 (1893)). *See generally* THAYER, *supra* note 62.

¹¹⁰ *Samia v. United States*, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in the judgment).

¹¹¹ See *infra* notes 128–45 and accompanying text.

interpreting broad rights like free speech. Yet she, too, seeks to avoid principles so general that they would leave judges very broad discretion. For restraint she would pull narrow principles, not from post-ratification history, but from the ratification era or judicial precedent. I agree with her point that clinging to historical analogues “delays the inevitable”¹¹² move toward general principles. But I have the same concern about her proposal to stick to low-level (determinate) principles culled from early history or precedent. We have good reason to think reliance on even more open-ended principles is inevitable — and more consistent with original understandings. Originalism may thus restrain less than she supposes.

I. Justice Barrett’s Proposal. — In *Vidal*, Justice Thomas reasoned that since trademark limitations akin to the one under review had a long history, the challenged rule did not violate free speech.¹¹³ In Justice Barrett’s view, Justice Thomas’s insistence on judging by historical analogues just “delays the inevitable” because the Court is sure to face laws that lack historical analogues when “applying broadly worded text like the Free Speech Clause.”¹¹⁴ She would cut to the chase and have judges develop more flexible tests requiring assessments of “reasonable[ness] in light of” certain “historical purpose[s].”¹¹⁵ Justice Kavanaugh in *Rahimi* wrote that all such tests collapse into a freeform balancing that empowers judges at the right’s expense.¹¹⁶ But Justice Barrett proved sensitive to this concern herself, warning that “a court must . . . not . . . read a principle at such a high level of generality that it waters down the right.”¹¹⁷ What then *should* guide a court’s design of implementing principles?

Her next sentence in *Rahimi* gave two answers: “case law or history.”¹¹⁸ First, by “history,” she meant practices leading up to ratification that constituted the “pre-existing right” enshrined by the text; she called that “‘original contours’ history.”¹¹⁹ In *Rahimi*, she thought the majority had drawn from early regulations a principle of “just the right level of generality,”¹²⁰ allowing laws “preventing individuals who

¹¹² *Vidal v. Elster*, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

¹¹³ See *supra* notes 76–77 and accompanying text.

¹¹⁴ *Vidal*, 144 S. Ct. at 1532 (Barrett, J., concurring in part).

¹¹⁵ *Id.* at 1528–29 (quoting *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).

¹¹⁶ See *United States v. Rahimi*, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring) (classifying as “balancing approach[es]” all tests that “require[] judges to . . . uphold the law as constitutional if, in the judge’s view, the law is sufficiently reasonable or important” (citing Mario L. Barnes & Erwin Chemerinsky, Essay, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080 (2011))).

¹¹⁷ *Id.* at 1926 (Barrett, J., concurring).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1925.

¹²⁰ *Id.* at 1926.

threaten physical harm to others from misusing firearms.”¹²¹ Second, as to drawing principles from precedent, Justice Barrett’s own *Vidal* analysis is an example. There she devised a standard (trademark restrictions should be “reasonable in light of the trademark system’s purpose of facilitating source identification”)¹²² by analogy to one found in earlier speech cases (restrictions on “limited public forums” should be “reasonable in light of the [forum’s] purpose”).¹²³

Thus, for broadly worded texts like the First or Second Amendment, Justice Barrett would have judges develop tests. But they would be pitched at a low level of generality dictated by original history or judicial-precedent analogues. A test limited to the disarmament of dangerous persons, in *Rahimi*; or to trademark rules, in *Vidal*.

2. *Delaying the Inevitable*. — Like Justice Kavanaugh’s, this proposal is an attractive effort to achieve objectivity and predictability using established tools. But much as Justice Barrett feared that a historical-analogue approach just “delays the inevitable”¹²⁴ move to principles, I think that trying to stick to low-level or determinate principles from the ratification era or precedent only delays an inevitable move to broader principles (tacit or explicit).¹²⁵ This is true not for discrete rights with fairly fixed costs (like the right to confront witnesses addressed in *Samia*), but for open-ended rights with more varying and unpredictable costs, like free speech and gun rights, as in *Vidal* and *Rahimi*.

Open-ended liberties like free speech protect against unforeseeable regulations that cannot be captured — in “original contours” history or a finite stock of precedents — with enough concreteness to obviate the need to apply highly general principles later on. Not only do the vague terms enshrining these liberties require reasoning from close analogies at the semantic margins, but the function of these liberties also requires looser balancing (stated or unstated) at their core. And the history of these rights’ doctrinal development — a saga of repeated failures to break away from balancing — confirms as much. While I lack space to defend those claims here, I do so in an article concluding that while something like balancing is not inevitable for the enforcement of all constitutional rights, it is for liberties like guns, religion, and speech.¹²⁶

For now, as a small case study close to home, take *Vidal* itself. As noted, Justice Barrett proposed a narrow test of constitutionality:

¹²¹ *Id.* (quoting *id.* at 1896 (majority opinion)).

¹²² *Vidal v. Elster*, 144 S. Ct. 1507, 1525 (2024) (Barrett, J., concurring in part).

¹²³ *Id.* at 1528 (quoting *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).

¹²⁴ *Id.* at 1532.

¹²⁵ Elsewhere I propose an alternative to giving judges the last word: having them underenforce open-ended rights as a constitutional matter while giving Congress greater leeway to protect them through statutes whose judicial applications could then be revised by Congress going forward. See Girgis, *supra* note 12.

¹²⁶ See generally *id.*

assessing trademark restrictions' reasonableness in light of the purposes of trademark law.¹²⁷ This assumed that trademark law and its purposes are constitutional.¹²⁸ Her narrow test did not deliver that conclusion but (sensibly!) took it as a premise.¹²⁹ Nor could she have treated the long history of trademark law as evidence of the original meaning of free speech,¹³⁰ or as self-justifying,¹³¹ for reasons she herself cited against Justice Thomas. She was able to cite a *precedent* clearing trademark law of any general free speech infirmity, but the Court that set that precedent itself could not rely on original meaning or close analogical reasoning.¹³² That Court relied instead on a freer balancing of trademark rules' benefits against free speech values.¹³³ Who could blame it?

In fact, reliance on broad principles has support in original meaning. According to Professor Jud Campbell, religion, gun, and speech rights were originally understood as broad natural rights that could nonetheless be regulated for weighty enough public benefits.¹³⁴ So while they grounded some determinate rules, their full scope could not be specified in advance *except* in highly general terms, leading to interest-balancing

¹²⁷ See *supra* notes 113–23 and accompanying text.

¹²⁸ See *Vidal*, 144 S. Ct. at 1532 (Barrett, J., concurring in part) (reasoning that if “[t]rademark protection cannot exist without [restrictions that involve] content discrimination,” any “restriction[] reasonably relate[d] to the purposes of the trademark system” must be constitutional).

¹²⁹ See *id.* at 1525 (aiming for a “standard, grounded in *both trademark law and First Amendment precedent*” (emphasis added)).

¹³⁰ See *id.* (“Because federal trademark law did not exist at the founding — and American trademark law did not develop in earnest until the mid-19th century — I do not take the Court to be making a claim about the original meaning of the Free Speech Clause.”); see also Elias Neibart, *Trading Jabs over Tradition*, HARV. L. REV. BLOG (June 28, 2024), <https://harvardlawreview.org/blog/2024/06/trading-jabs-over-tradition> [<https://perma.cc/8BD9-QSJ3>] (“Justice Barrett seem[ed] to be saying that, in some cases, a ‘history and tradition’ approach helps shed light on the original meaning of the Constitution. *Bruen* is a good example. There, she joined the Court’s opinion in full. But, in other cases, like *Elster*, other interpretive or adjudicative tools — like looking at purpose — are better fits.”).

¹³¹ See *supra* notes 76–81 and accompanying text. While Justice Barrett gave historical reasons to think the trademark system should not trigger strict scrutiny (namely, that it had not been used for censorship, *Vidal*, 144 S. Ct. at 1525 (Barrett, J., concurring in part)), she did not think that alone guarantees compatibility with the First Amendment, see *id.* at 1528 (speech regulations that “do not trigger strict scrutiny . . . are still subject to judicial review”).

¹³² At page 1532 of her concurrence in part, see *Vidal*, 144 S. Ct. at 1532 (Barrett, J., concurring in part), Justice Barrett cited the majority’s statement that “trademark rights and restrictions can ‘play well with the First Amendment,’” *id.* at 1518 (majority opinion), which quoted *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 143 S. Ct. 1578, 1590 (2023), which in turn defended certain trademark restrictions as “outweigh[ing]” free speech values because of the “substantial” interests they served. *Id.* (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979)).

¹³³ See *supra* note 132.

¹³⁴ See Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL’Y 569, 588–89 (2017) (free exercise); Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 31, 39 (gun rights); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 255–56 (2017) (free speech).

over time.¹³⁵ This means that these rights did not *have* determinate “original contours”¹³⁶ for us to uncover.¹³⁷ The contours were not just fuzzy because of vague terms (like “arms”) requiring judgement calls in edge cases.¹³⁸ “The contours simply [we]ren’t settled — not in terms one could read off without balancing.”¹³⁹

Justice Barrett made a related point about the Second Amendment: that it extends not only to “the catalogue of arms that existed in the eighteenth century, but rather to all weapons satisfying the ‘*general definition*’ of ‘bearable arms.’”¹⁴⁰ As she noted, that flexibility about the right’s coverage called for flexibility about its limits.¹⁴¹ Perhaps similar intuitions drove her preference in *Vidal* for using “generally applicable”¹⁴² standards rather than “hunting for historical forebears.”¹⁴³ The inevitability of applying flexible principles would also explain why the proposal floated above — achieving judicial restraint through Thayerian deference without balancing — is unavailable here.¹⁴⁴ One cannot avoid balancing by identifying a right’s core and upholding all regulations falling outside it if there is no fixed core to be identified without balancing.

If so, Justice Barrett’s position on traditionalism is right as far as it goes but does not go far enough: Yes, post-ratification history is inapt for fleshing out open-ended rights like free speech, but so are the low-level principles that Justice Barrett would draw from “original contours”¹⁴⁵ history and precedent. Broader principles may be inevitable.

3. *Popular Sovereignty Without Restraint.* — Though less restraining, Justice Barrett’s proposal arguably respects popular sovereignty enough. At first the opposite seems true. Recall that she opposed shrinking future legislatures’ authority by treating as higher law a single generation’s ordinary lawmaking.¹⁴⁶ Is she not making such a restraint

¹³⁵ See Campbell, *Natural Rights and the First Amendment*, *supra* note 134, at 273, 276. But the balancing was expected to be done by lawmakers, not judges. See *id.* at 257 (“At most, [the First Amendment] recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote the public good.”).

¹³⁶ *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring).

¹³⁷ See, e.g., Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, *supra* note 134, at 36.

¹³⁸ See *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) (citing *District of Columbia v. Heller*, 554 U.S. 570, 582–92 (2008)).

¹³⁹ Girgis, *supra* note 12, at 30; see also *supra* note 134 and accompanying text.

¹⁴⁰ *Rahimi*, 144 S. Ct. at 1925–26 (Barrett, J., concurring) (quoting *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022)).

¹⁴¹ See *id.* at 1925 (citing *id.* at 1897 (majority opinion)).

¹⁴² *Vidal v. Elster*, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

¹⁴³ See *id.* at 1525.

¹⁴⁴ See *supra* text accompanying note 111.

¹⁴⁵ *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring).

¹⁴⁶ *Id.*

out of something even less democratic — a few judges’ principle-making?¹⁴⁷

Indeed, her approach to free speech seems close to originalism’s *rivals*. Professor Ronald Dworkin argued that the Free Speech Clause embodies a general principle that judges cannot avoid political-moral reasoning in applying.¹⁴⁸ And Professor David Strauss defends common law constitutionalism, whose motive force is not original meaning but judge-made precedents shaped substantially by normative principles.¹⁴⁹ Originalist scholars like Professor Michael McConnell critique Dworkin’s “moral philosophic” approach,¹⁵⁰ and originalist jurists like Justice Scalia denounced the “common-law” model for “construing a democratically adopted text.”¹⁵¹ Yet Justice Barrett would elaborate free speech rights using value-laden principles in common law fashion.¹⁵²

I would read Justice Barrett’s inevitability claim as an answer to this objection, too. If the people enshrined rights using “broadly worded text[s],” and it is “inevitabl[e]” that judges applying those would “articulate principles to resolve individual cases,”¹⁵³ then their doing so is traceable to the people after all. The people effectively delegated this work to judges. That this reading might be less constraining of judges may not trouble Justice Barrett, whose case for originalism is formalist, not instrumental.¹⁵⁴ It is the standard the people enacted, confining or not, that she thinks authoritative.

Of course, that assumes these rights were originally understood to be enforceable mainly by judges, as Campbell thinks they were not.¹⁵⁵ The

¹⁴⁷ In this vein, the *Vidal* majority suggests that Justice Barrett’s proposed “test would boil down to what a judge believes is ‘reasonable in light of the purpose’ of trademark law.” *Vidal*, 144 S. Ct. at 1523 (quoting *id.* at 1535 (Sotomayor, J., concurring in the judgment)) (citing *id.* at 1527–29 (Barrett, J., concurring in part)).

¹⁴⁸ See generally RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997) (arguing for the necessity of moral analysis in the application of broadly worded rights provisions, like the “abstract” First Amendment, *id.* at 199).

¹⁴⁹ See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 62 (2010) (arguing that the judicial precedents that gave rise to “freedom of expression[] as we know it[] . . . relied most heavily on earlier judicial decisions”); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 900 (1996) (emphasizing the role of considerations typical of common-law opinions, including judicial assessments of “fairness, good policy, or social utility”).

¹⁵⁰ Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 668.

¹⁵¹ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 40 (Amy Gutmann ed., 1997).

¹⁵² See *Vidal*, 144 S. Ct. at 1532 (Barrett, J., concurring in part).

¹⁵³ *Id.*

¹⁵⁴ *United States v. Rahimi*, 144 U.S. 1889, 1924 (2024) (Barrett, J., concurring) (describing originalism as reflective of the fact “that the meaning of constitutional text is fixed at the time of its ratification and ‘remains law until lawfully altered’” (quoting Sachs, *supra* note 58, at 782) (citing Whittington, *supra* note 14, at 378)).

¹⁵⁵ See Campbell, *Natural Rights and the First Amendment*, *supra* note 134, at 276 (“Decisions about public good, however, were left to the people and their representatives — not to judges . . .”).

balancing needed to implement them was mainly for lawmakers.¹⁵⁶ But here Justice Barrett may plead *stare decisis*. Precedent overwhelmingly favors having judges apply these rights.¹⁵⁷ She could argue that a departure from the original law as to *who* enforces a right cannot justify a second departure regarding *what* the right protects.¹⁵⁸ So if the right's original substance required application of general principles, now judges should use principles.

To be sure, in fashioning principles, courts could look to post-ratification history as well as anything else for guidance. Justice Barrett herself would use history as a “persuasive data point.”¹⁵⁹ In *Vidal*, she cited trademark law's history — that it had not been used for censorship — to justify setting a low standard of scrutiny.¹⁶⁰ But her rights analysis would not begin and end with post-ratification history,¹⁶¹ as Justice Thomas's did in *Vidal*.¹⁶²

Thus, Justice Barrett's constraint at the level of theory — not making late history decisive absent an originalist rationale — yields less constraint in practice: quicker jumps to judicially fashioned tests.¹⁶³ The greater irony is that she may be too restrained still for certain liberties. And maybe the greatest is that modern originalism — born to constrain judges — would by its increasingly rigorous application do so less and less.

CONCLUSION: ORIGINALISM'S EVOLUTIONS

Originalist Justices are grappling with the limits of original sources and the need to supplement them by something — traditions or judicially developed principles. That need has emerged as real but moderate as to separation of powers disputes¹⁶⁴ and acute for cases dealing with open-ended liberties like free speech¹⁶⁵ or gun rights.¹⁶⁶ A final question

¹⁵⁶ See *id.* at 256.

¹⁵⁷ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, . . . and to establish them as legal principles to be applied by the courts.”).

¹⁵⁸ But see *supra* note 125.

¹⁵⁹ *Vidal v. Elster*, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

¹⁶⁰ See *supra* note 132; see also *Vidal*, 144 S. Ct. at 1525 (Barrett, J., concurring in part) (“More than a century's worth of precedent reflects that trademark law has always been content based without functioning as a ready tool of Government censorship.”).

¹⁶¹ *Vidal*, 144 S. Ct. at 1531 (“But tradition is not an end in itself . . .”).

¹⁶² See *id.* at 1519 (majority opinion) (“This history and tradition is sufficient to conclude that the names clause . . . is compatible with the First Amendment. We need look no further in this case.”).

¹⁶³ See *id.* at 1523 (quoting *id.* at 1535 (Sotomayor, J., concurring in the judgment)) (citing *id.* at 1527–29 (Barrett, J., concurring in part)).

¹⁶⁴ *Girgis, supra* note 2, at 1497–99 (citing separation of powers cases relying on traditions arising long after ratification).

¹⁶⁵ See, e.g., *Vidal*, 144 S. Ct. at 1532 (Barrett, J., concurring in part) (examining the difficulties of solely relying on history and tradition in the free speech context).

¹⁶⁶ See, e.g., *United States v. Rahimi*, 144 S. Ct. 1889, 1926 (Barrett, J., concurring) (identifying the limitations of reliance on historical analogues in the Second Amendment context).

is whether the rise of these non-textual criteria under an originalist Court should surprise or scandalize. It should not.

The trends described here are predictable developments in originalism's ongoing elaboration under pressure. Originalists first urged appeal to the Founders' intent.¹⁶⁷ As that faced theoretical challenges, they championed original public meaning as something more definite and democratically legitimate.¹⁶⁸ Now that originalism has become a governing philosophy, it is developing under the *practical* pressures of implementation on an apex court. Originalist Justices hear cases where their natural resources run out. Not only are broad rights and vague texts likelier to drive cases before a Court that resolves circuit splits;¹⁶⁹ now that the Court identifies as originalist,¹⁷⁰ it is likelier to get cases that are close according to *originalism*. If Professors George Priest and Benjamin Klein are right to predict "a 'tendency toward 50 percent plaintiff victories' among litigated cases,"¹⁷¹ an originalist Court may see more cases where originalism is not conclusive (another irony). This is not to say original meaning does no work at the Court.¹⁷² The Court may even be advancing originalism by cases that never reach it because their originalist resolution would be predictable and expected. A method's value is not exhausted by its footprint in the *U.S. Reports*. But the reach for non-textual criteria is no surprise.

Nor is it a betrayal of originalism, at least as the theory has developed under decades of *intellectual* pressure. Modern academic originalism is not just a theory of adjudication (much less Supreme Court adjudication), not just a means of tying judges' hands, but a theory of our higher law's content.¹⁷³ The law created by adoption of a text depends on interpretive conventions at the time.¹⁷⁴ So among scholars, originalism has of its own accord become attuned to non-textual criteria¹⁷⁵ — constitutional "backdrops,"¹⁷⁶ general law,¹⁷⁷ customary norms

¹⁶⁷ Whittington, *supra* note 14, at 379 (citing Bork, *supra* note 105, at 13).

¹⁶⁸ *See id.* at 380–81.

¹⁶⁹ SUP. CT. R. 10 (citing circuit splits as a factor in the Court's decision whether to hear a case).

¹⁷⁰ *See* Alicea, *supra* note 107 (referring to "five committed originalists" on the Supreme Court).

¹⁷¹ *See* Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59, 59 (2016) (quoting George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD., 1, 20 (1984)). The hypothesis may be undermined here by the Court's discretion to shape its docket.

¹⁷² Indeed, seven Justices thought it dispositive in *CFSA*. *See* *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 144 S. Ct. 1474, 1482–84 (2024); *see also* Neibart, *supra* note 59.

¹⁷³ *See* Sachs, *supra* note 103, at 828.

¹⁷⁴ McGinnis & Rappaport, *supra* note 19, at 751–52.

¹⁷⁵ *See* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1336 (2023).

¹⁷⁶ Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012).

¹⁷⁷ Baude & Leider, *supra* note 22, at 1470.

of interpretation,¹⁷⁸ “constitutional construction”¹⁷⁹ — that both traditionalism and judicially developed doctrines may reflect efforts (sometimes fumbling efforts) to capture.¹⁸⁰

Perhaps the practical pressures of governance are causing “chambers” originalism to converge on the direction taken by the academic variety. The originalism so developed may prove less simple, less peremptory, less useful in polemic against rivals than Judge Bork’s, but not for all that less principled.

¹⁷⁸ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017).

¹⁷⁹ Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013).

¹⁸⁰ See Baude & Leider, *supra* note 22, at 1486–95 (arguing that traditionalist gun cases attempt to capture a general law right to bear arms enshrined by the Second Amendment).