
History and Tradition's Equality Problem

Cary Franklin

ABSTRACT. The Court has recently adopted history-and-tradition tests in several key areas of constitutional law. To determine the constitutionality of a gun regulation, courts must now look back to the Founding Era, to determine whether the regulation is consistent with historical forms of gun regulation. The Court recently overturned *Roe v. Wade* after finding that the right to abortion is not “deeply rooted in the Nation’s history and traditions.” Proponents argue that this tradition-oriented approach helps to ensure judges enforce the Constitution as it was written and ratified rather than interpreting the document in ways that reflect their own twenty-first-century values. Critics of the history-and-tradition approach used to overturn *Roe* have argued that it is far more subjective than proponents suggest: there is considerable judgment involved in interpreting the historical record and deciding how to define the relevant historical tradition.

This Essay builds on the critical literature by identifying a key feature of the Court’s new history-and-tradition test for substantive due process cases that has not yet attracted significant attention: outcomes in these cases delivered by this test are often actually, or additionally, driven by hidden, contemporary judgments about equality. The Court portrays history-and-tradition as a “one-step” test that requires judges to determine only whether a right or regulation is deeply rooted in history. But there is always a second (often unarticulated) step in history-and-tradition cases. After courts identify the relevant tradition, they must determine whether that tradition is compatible with current understandings of equality. Courts cannot simply identify how Americans regulated in the past and use that history to determine the permissibility of regulation today: too many eighteenth- and nineteenth-century regulatory traditions would now be viewed as abhorrent to adhere to the results of the history-and-tradition test consistently, without considering the compatibility of these results with modern notions of equality.

This gives rise to a nested set of problems. To admit that highly contested, modern, value-laden conceptions of equality often drive the outcome of substantive due process cases using a history-and-tradition approach would undermine the purported neutrality of this approach. Thus, judges in these history-and-tradition cases often conduct the equality analysis *sub rosa* and use various

HISTORY AND TRADITION'S EQUALITY PROBLEM

doctrinal mechanisms—such as ratcheting up or down the level of generality at which they define the relevant historical tradition—to bring the outcomes of these cases in line with their own understandings of equality. But making equality determinations in the dark frees judges from accountability for their decisions. It enables them to defer to past practice in cases involving groups and rights they disfavor, but to break from past practice in cases involving groups and rights they favor—while insisting in both contexts that they're simply following the dictates of history. There is an even deeper problem: the Court is now making significant (generally unacknowledged) equality determinations in these history-and-tradition cases that in some instances substantially undermine contemporary equal protection doctrine. It can be hard to detect these threats to equality law because the Court often makes these determinations in cases in which the equality component is hidden. If this practice continues, it is possible the Court could dismantle a substantial amount of contemporary equality law in history-and-tradition cases without ever formally overruling a single equal protection decision.

INTRODUCTION

In the summer of 2022, the Supreme Court adopted history-and-tradition tests in three key areas of constitutional law. In *New York State Rifle & Pistol Ass'n v. Bruen*,¹ the Court held that laws regulating guns are permissible under the Second Amendment only if those laws are “consistent with the Nation’s historical tradition of firearm regulation.”² In *Dobbs v. Jackson Women’s Health Organization*,³ the Court held that substantive due process protects only rights that are “deeply rooted in the Nation’s history and tradition,”⁴ and that abortion does not satisfy this test. In *Kennedy v. Bremerton School District*,⁵ the Court held that the Establishment Clause must “be interpreted by reference to historical practices and understandings,”⁶ using an “analysis focused on original meaning and history.”⁷

These history-and-tradition decisions have sparked significant criticism. Some critics have argued that the Court got the history wrong.⁸ Others have

1. 597 U.S. 1 (2022).

2. *Id.* at 24.

3. 597 U.S. 215 (2022).

4. *Id.* at 250.

5. 597 U.S. 507 (2022).

6. *Id.* at 535 (internal quotation marks omitted).

7. *Id.* at 536.

8. On *Dobbs*, see, for example, *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, No. 26 MAP 2021, 2024 WL 318389, at *133–38 (Pa. Jan. 29, 2024) (Wecht, J., concurring), which discusses the “strong criticism engendered by the historical survey upon which the court embarked in order to justify its rejection of a historical right to abortion”);

argued that history-and-tradition tests are so malleable, it is hard to get the analysis “right” in any objective sort of way. Judges implementing these tests have observed that “there are frequently traditions that support each side of a constitutional controversy,” leaving judges “free to cherry-pick from those traditions to justify their preferred results.”⁹ Known and unknown gaps in the historical record often make it difficult to define our regulatory traditions with the degree of precision these tests demand¹⁰ — as does judges’ lack of professional expertise in navigating eighteenth- and nineteenth-century history.¹¹

Serena Mayeri, *The Critical Role of History After Dobbs*, 2 J. AM. CON. HIST. 171, 175 (2024), which observes that *Dobbs* “reject[ed] the considered opinions of nearly every professional historian who has studied and published on abortion law and practice in early America”; Carole J. Petersen, *Women’s Right to Equality and Reproductive Autonomy: The Impact of Dobbs v. Jackson Women’s Health Organization*, 45 U. HAW. L. REV. 305, 323 (2023), which collects critiques of *Dobbs*’s historical analysis; and Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091 (2023), which uncovers numerous flaws in *Dobbs*’s characterization of our regulatory traditions with respect to abortion. On the Court’s recent Second Amendment cases, see, for example, *McDonald v. City of Chicago*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting), observing: “Since *Heller*, historians, scholars, and judges have continued to express the view that the Court’s historical account was flawed.” For a small sample of scholarship expressing this view, see Patrick J. Charles, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009); Saul Cornell, *St. George Tucker’s Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. 1541 (2009); Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171 (2008). On *Bremerton*, see Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 239-41 (2022), which observes that the *Bremerton* Court did not actually engage in historical analysis and argues that Justices in the twenty-first century would not be willing to adhere to history in this context.

9. *Duncan v. Bonta*, 19 F.4th 1087, 1123 (9th Cir. 2021) (Berzon, J., concurring); see also *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 113 (Breyer, J., dissenting) (observing that “history, as much as any other interpretive method, leaves ample discretion to ‘loo[k] over the heads of the [crowd] for one’s friends’ (quoting ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 377 (2012))”); *United States v. Love*, 647 F. Supp. 3d 664, 670 (N.D. Ind. 2022) (discussing “the problems with *Bruen*’s game of historical Where’s Waldo”).
10. See, e.g., Shawn Hubler, *In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791*, N.Y. TIMES (Mar. 14, 2023), <https://www.nytimes.com/2023/03/14/us/gun-law-1791-supreme-court.html> [<https://perma.cc/8J5U-45AM>] (describing the surge in demand for historical evidence relating to early weapons’ regulations in the United States); Mark Joseph Stern, *The Volunteer Moms Poring over Archives to Prove Clarence Thomas Wrong*, SLATE (Aug. 31, 2023), <https://slate.com/news-and-politics/2023/08/moms-demand-action-gun-research-clarence-thomas.html> [<https://perma.cc/WP5V-WDH2>] (describing the recent uncovering of archival evidence inconsistent with the Court’s historical account of gun regulation in *Bruen*).
11. See, e.g., *Brown v. Davenport*, 596 U.S. 118, 118 n.2 (2022) (Kagan, J., dissenting) (suggesting that the Court fails to appreciate that “the past is a foreign country; they do things differently

Even in cases where the historical data is relatively clear, these tests remain highly malleable, because so much depends on the level of generality at which courts choose to define the relevant history and tradition.¹² A court inclined to preserve a particular gun regulation under the Second Amendment may identify a broad tradition of, say, disarming “dangerous” people; this broad definition could permit new forms of regulation that did not exist at the time of the Founding. A court more skeptical of gun regulation may define regulatory traditions governing firearms with a greater degree of specificity and use that narrower definition to invalidate modern regulation. Likewise, a court may find that substantive due process protects a right to use contraception if it defines the relevant history and tradition at a relatively high level of generality (identifying a regulatory tradition protecting bodily autonomy and decisions regarding parenthood); another court may reach a different conclusion if it defines the relevant history more narrowly (asking if the Constitution was understood in 1868 to protect a fundamental right to use contraception). There is a growing body of scholarship demonstrating that selecting the appropriate level of generality in a history-and-tradition case is not an objective or value-neutral enterprise.¹³ Ratcheting levels of generality up and down enables courts in history-and-tradition cases to achieve preferred outcomes while claiming they are simply deferring to the past.

This Essay builds on this existing literature by identifying a critical feature of history-and-tradition doctrine that has not yet attracted significant attention: outcomes in the Court’s new history-and-tradition cases are often driven by hidden, twenty-first-century judgments about equality. Such judgments may never

there” (internal quotation marks omitted)); *Bruen*, 597 U.S. at 107 (Breyer, J., dissenting) (arguing that it matters that “[c]ourts are . . . staffed by lawyers, not historians”); *United States v. Bullock*, No. 18-CR-165, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) (“This Court is not a trained historian. The Justices of the Supreme Court . . . are not trained historians. We lack both the methodological and substantive knowledge that historians possess.”); Jonathan Gienapp, *Knowing How vs. Knowing that: Navigating the Past*, PROCESS: BLOG AM. HIST. (Apr. 4, 2017), <https://www.processhistory.org/gienapp-knowing-how> [<https://perma.cc/2NBK-GJLU>].

12. See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992) (observing that “[m]ovements in the level of constitutional generality may be used to justify almost any outcome”).
13. The other pieces in this Collection are part of this growing body of literature. See Melissa Murray, *Making History*, 133 YALE L.J.F. 990 (2024); Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99 (2023); Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*, 133 YALE L.J.F. 65 (2023); Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161 (2023); see also, e.g., Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023); Tang, *supra* note 8; Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022).

rise to the surface, but they are often the moving force driving judges to select particular levels of generality or make other outcome-determinative choices (such as what time period and which geographic locales to consider when trying to define a “tradition,” what texts or databases to consult, whose history counts, whether to apply *stare decisis*, and so on). I have referred to these choices in previous work as “shadow decision points,” or “generally unacknowledged, often outcome-determinative choices about how to interpret [the law] that are framed as methodological but that are typically fueled by substantive . . . concerns.”¹⁴ This Essay shows that equality is often the hidden substantive concern fueling apparently methodological decisions in history-and-tradition cases—especially the all-important decision of how broadly or narrowly to define the relevant historical tradition. Judges in history-and-tradition cases frequently adjust the levels of generality at which they define the relevant historical tradition in order to reach outcomes that accord with their own understandings of equality.

This practice is not confined to judges of any particular political persuasion. Despite claims that the history-and-tradition approach is far “more determinate and ‘much less subjective’” than other interpretive methodologies¹⁵ because it forces judges to abide by “the teachings of history,”¹⁶ even judges who embrace this approach are not actually willing to bind themselves to the distant past in any consistent sort of way. The United States is nearly two-and-a-half centuries old and there are many eighteenth- and nineteenth-century regulatory practices we now consider abhorrent because they contradict modern conceptions of equality. Very few, if any, judges on the bench today could stomach a consistent application of the history-and-tradition test—one that tried simply to identify how Americans regulated in the past and used that history to determine the permissibility of regulation today without any consideration of contemporary equality concerns. Thus, what we get in practice in history-and-tradition cases is partial, inconsistent, and spotty adherence to the past—an adherence to the past that is tempered by twenty-first-century social and political judgments.

There is nothing wrong with courts’ refusal to consistently abide by past practice in history-and-tradition cases. In fact, courts are constitutionally

14. Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 126 (2020).

15. *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J.) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 804 (Scalia, J., concurring)); see also *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240 (2022) (internal quotation marks omitted) (arguing that history-and-tradition tests prevent judges from “fall[ing] into . . . freewheeling judicial policymaking”).

16. *Dobbs*, 597 U.S. at 240 (internal quotation marks omitted); see also *id.* at 334 (Thomas, J., concurring) (arguing that when the Court strays from “history and tradition,” it “divines new rights in line with its own, extraconstitutional value preferences” (internal quotation marks omitted)).

obligated *not* to uniformly adhere to the past. The Equal Protection Clause was ratified in 1868 to disrupt history and tradition. It was designed to be forward-looking, to put an end to the oppressive practices of the past and to effectuate a new promise of equal citizenship. The Constitution's equal protection guarantee means that courts do not view the long history of segregated schools in this country as a reason to permit school segregation today. Bars on interracial marriage may be deeply rooted in our history and tradition, but that does not mean states in the twenty-first century can bar such marriages. The meaning of equal protection is not static; it evolves over time and admits of new understandings, which means that governments today cannot simply treat eighteenth- and nineteenth-century practices as a barometer for what is permissible today. There are legal barriers to reinstating many practices that were widespread in the past. So it is good – indeed, constitutionally required – that courts in history-and-tradition cases do not abide by past practice consistently and instead implement history-and-tradition tests in ways that are inflected with modern conceptions of equality.

However, the fact that equal protection prevents courts in history-and-tradition cases from consistently following the relevant law circa 1791 or 1868, gives rise to a problem, or a nested set of problems. There is always a second (often unarticulated) step in history-and-tradition cases. After courts in history-and-tradition cases identify the relevant tradition, they must determine whether that tradition is consistent with equal protection. The first problem is that this unarticulated extra step is often a highly contested and value-laden enterprise that undermines the purported neutrality of the history-and-tradition test and the assertion that judges in these cases are bound by the past. Second, there is a deeper problem: the history-and-tradition cases in which the Court is making these equality determinations are not framed as equal protection cases. They are substantive due process cases, or First or Second Amendment cases. Thus, much of the time, courts are making equal protection determinations in these cases *sub rosa*; courts may not even acknowledge they are making these determinations. This means that significant constitutional determinations concerning equality may be made invisibly or implicitly, with little or no analysis or justification. This leads to the third and deepest problem, which is what is happening now. The Court has begun to silently gut or dismantle equal protection doctrine in history-and-tradition cases in ways that can be hard to detect because the Court is making these moves in cases in which the equality component is often hidden.

Part I of this Essay focuses primarily on the hiddenness problem – the fact that courts are making determinations about equality in history-and-tradition cases without acknowledging they are doing so. Part I uses *United States v.*

Rahimi,¹⁷ the Second Amendment case currently before the Court, as a case study. *Rahimi* concerns the constitutionality of a federal law that prohibits individuals subject to domestic-violence restraining orders from possessing firearms. To pass constitutional muster after *Bruen*, contemporary gun regulations must be “consistent with the Nation’s historical tradition of firearm regulation.”¹⁸ There were no laws stripping perpetrators of domestic violence of their guns at the time the Second Amendment was ratified. So, if the Court chooses to define tradition narrowly, the government will lose this case, as it did in the Fifth Circuit. But *Bruen*’s history-and-tradition test is highly malleable. If the Court wants to uphold the law, it can easily find a way to do so—including by raising the level of generality at which it defines our regulatory traditions so this law can be characterized as fitting within those traditions.

Part I focuses in particular on the covert role conceptions of equality play in *Rahimi*. The Fifth Circuit did not see any problem with hewing closely to the history in this case; it held that because there were no laws like today’s “domestic violence prohibitor” in 1791, this law is not permissible today. In reaching this conclusion, the Fifth Circuit implicitly determined that new ways of thinking about domestic violence and women’s status in family—and the fact that more than half of the women killed by current or former intimate partners are now killed with firearms¹⁹—should not prevent us from abiding by the regulatory practices of our forefathers in this context. But judging by the public outcry and the tenor of the oral argument at the Supreme Court in *Rahimi*, this view seems unlikely to prevail. Traditional ideas about women’s equality and men’s familial prerogatives have changed too much in the intervening centuries for most Americans to tolerate the idea that the government may not disarm people subject to domestic-violence restraining orders.

If the Court decides that adhering to history and tradition too closely in *Rahimi* would produce abhorrent results, there are a multitude of doctrinal mechanisms it can employ to avoid such results. Part I discusses these mechanisms. But whatever route the Court takes—even if it employs one of these escape valves—it will almost certainly insist that its decision is rooted in eighteenth-century history and that it is simply hewing to that history, properly understood. Pretending that history compels the outcome in this case will enable the Court to avoid accountability for its decision; the Court will not have to provide a full account of why it chose to depart from the specifics of history in this

17. 143 S. Ct. 2688 (2023).

18. 597 U.S. 1, 24 (2022).

19. See Brief of Public-Health Researchers and Lawyers as Amici Curiae Supporting Petitioner at 5, *United States v. Rahimi*, No. 22-915 (U.S. Mar. 17, 2023); *id.* (“An abused woman is five times more likely to be killed by a male partner when there is a firearm in the house.”).

case but not others; it will avoid the problems that would rise to the surface if it admitted that it was influenced by twenty-first-century understandings of equality in this case but refused to honor those understandings in other cases.

Part II shows how the hidden equality determinations the Court makes in history-and-tradition cases may cross doctrinal lines and impact equal protection law itself. Part II shifts the focus from guns to abortion, to show how the Court's implementation of the history-and-tradition test in *Dobbs* threatens equality law. The *Dobbs* Court defined the relevant tradition with a very high degree of specificity and found that our distant forefathers did not view abortion as a fundamental right.²⁰ Part II does not address the accuracy of this history (there is a growing body of literature that does²¹). It focuses instead on the way the Court in its substantive due process decisions picks and chooses when it is going to hew closely to past practice and when it is going to instead raise the level of generality at which it defines our regulatory traditions to produce outcomes more in line with contemporary understandings of equality. The history-and-tradition approach enables the Court to defer to past practice in cases involving groups and rights the Court disfavors, but to break from past practice in cases involving groups and rights the Court favors – while insisting in both contexts that it is simply following the dictates of history.

Part II shows that the hidden equality-based determinations the Court makes in history-and-tradition cases not only yield different results for different groups, these equality determinations may also have spill-over effects outside the confines of history-and-tradition cases. *Dobbs* is a case in point. When the Court decided to hew closely to (its account of) past practice in the context of abortion, it suggested that laws banning abortion raise no equality concerns. This suggestion disregards half a century of legal development in the context of equal protection and the construction of an equality-based body of law limiting how the state may regulate pregnancy. *Dobbs* did not formally overrule this body of law. But its failure to acknowledge the existence of this body of law – its suggestion that the revival of nineteenth-century abortion bans raises no equality concerns – covertly undermines decades of legal precedent. If this practice continues, it is possible the Court could dismantle a substantial amount of

20. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 242-50 (2022) (citing British sources extending back to the fourteenth century, colonial American sources from the seventeenth and eighteenth centuries, and early U.S. sources, in addition to sources from the period in which the Fourteenth Amendment was ratified).

21. See, for example, the *Dobbs*-related sources cited *supra* note 8. See also Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights in and After Dobbs*, in *ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT OF ABORTION* 22 (Geoffrey R. Stone & Lee Bollinger eds., 2024).

contemporary equality law in history-and-tradition cases without ever formally overruling a single equal protection decision.

I. INTERPRETING THE SECOND AMENDMENT IN THE SHADOW OF EQUAL PROTECTION

A few years ago, when *Bruen* was pending at the Supreme Court, Adam Winkler published an essay entitled *Racist Gun Laws and the Second Amendment*.²² At the time Winkler published his essay, the Court had not yet adopted a history-and-tradition test in the Second Amendment context, but a number of the Roberts Court's newest Justices had championed such a test when they sat on the U.S. Court of Appeals²³ and the momentum at the Court seemed to be in favor of more expansive gun rights. "History and tradition" was being pitched as a more Second Amendment-friendly approach,²⁴ one that would bar the government from regulating firearms unless it could identify an "appropriate"²⁵ eighteenth- or nineteenth-century analogue to its current regulation. Winkler noted a complication with this emergent test: "For much of American history, gun rights did not extend to Black people and gun control was often enacted to limit access to guns by people of color."²⁶ Many of the historical traditions proponents of "history and tradition" wanted to treat as the sole determinant of the Second Amendment's meaning "bore the ugly taint of racism."²⁷ Winkler observed that "the history of racist gun laws w[ould] complicate"²⁸ the application of the history-and-tradition approach in the Second Amendment context.

22. Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022).

23. *Kanter v. Barr*, 919 F.3d 437, 451-52 (7th Cir. 2019) (Barrett, J., dissenting) (advocating the adoption of a history-and-tradition-focused approach to determining the scope of the government's power to restrict gun rights); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that courts should "assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny").

24. See, e.g., *Silvester v. Becerra*, 583 U.S. 1139, 1139 (2018) (Thomas, J., dissenting from denial of certiorari); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 702-03 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment); *Houston v. New Orleans*, 675 F.3d 441, 451-52 (5th Cir. 2012) (Elrod, J., dissenting), *withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012) (per curiam); *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

25. *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

26. Winkler, *supra* note 22, at 137.

27. *Id.*

28. *Id.*

It was a prescient observation. There is already another gun case at the Court,²⁹ and this new case—*Rahimi*—presents the very kinds of interpretive challenges Winkler identified in his essay (although, in *Rahimi*, the problems have more to do with gender than with race). How deep does the taint of discrimination need to be before courts break with tradition? Which parts of our regulatory tradition look so rotten, from a twenty-first-century standpoint, that courts will or should balk at abiding by them?

Bruen did not acknowledge these challenges or provide any guidance to judges about what to do when confronted with eighteenth- and nineteenth-century regulatory traditions shaped by outmoded ideas. As post-*Bruen* gun cases have made their way through the courts, judges have adopted different approaches to the problem. One approach is simply to ignore the discriminatory taint: to identify the relevant history and tradition and use it to judge the constitutionality of current regulation, equality concerns notwithstanding. But that is not the only possible approach. This Part shows that *Bruen*'s history-and-tradition test provides the Supreme Court with considerable leeway if it wants to avoid the conclusions the Fifth Circuit reached in *Rahimi*. If the Justices are hesitant about adhering too closely to regulatory traditions based on antiquated ideas about domestic violence and guns, the history-and-tradition test incorporates a range of mechanisms capable of producing outcomes more in line with twenty-first-century understandings.

If the Court avails itself of one of these mechanisms, that would be an understandable, even laudable, choice. It would be brutally inegalitarian and exclusionary if twenty-first-century legislation and jurisprudence were actually tethered to the distant past in all instances. But it is a problem that the history-and-tradition test does not allow the Court to admit that it's engaged in such updating. If the Court is influenced by egalitarian concerns in *Rahimi*, it is going to have to effectuate those concerns *sub rosa*, under the cover of doctrinal moves that obscure the substantive, value-laden choices the Justices are making. This doctrinal framework accords the Justices a lot of power while substantially relieving them of accountability for their decisions. It enables the very kind of "free-wheeling policymaking"³⁰ that the history-and-tradition approach purports to curtail. This Part shows that the history-and-tradition approach does not curb judicial discretion, it pushes it underground, exacerbating rather than solving the problem of judges "legislating from the bench."

29. See Transcript of Oral Argument, *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (No. 22-915).

30. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022) (internal quotation marks omitted).

A. A “Straightforward” and “Focused” Approach to History and Tradition

The Court’s decision in *Bruen*—which was widely interpreted as a signal of the Court’s interest in expanding gun rights—sparked a wave of Second Amendment challenges. One of the laws that came under fire after *Bruen* was 18 U.S.C. § 922(g)(8), a federal law that prohibits individuals subject to domestic-violence restraining orders from possessing firearms.³¹ The Supreme Court recently heard oral argument³² in a case challenging the constitutionality of § 922(g)(8) brought by a man named Zackey Rahimi, who was convicted under this law after police found two guns in his possession alongside a copy of the restraining order he was under.³³

In the past, litigants have had no luck challenging § 922(g)(8)’s constitutionality under the Second Amendment. Indeed, when Rahimi originally filed his claim in a federal district court in Texas, there was recent Fifth Circuit precedent upholding § 922(g)(8) under the Second Amendment: in 2020, the Fifth Circuit rejected a claim nearly identical to Rahimi’s in a case called *United States v. McGinnis*.³⁴ The court in *McGinnis* applied the “two-step framework” courts adopted in the years after *District of Columbia v. Heller*³⁵ and upheld § 922(g)(8) after finding that “reducing domestic gun abuse is . . . a compelling [government interest]” and that the law “is reasonably adapted to that interest.”³⁶ That is typically how it went in these cases prior to *Bruen*. The federal district court and the Fifth Circuit panel that initially heard Rahimi’s claim rejected his

31. 18 U.S.C. § 922(g)(8) states:

It shall be unlawful for any person who is subject to a court order that—(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

32. See Transcript of Oral Argument, *United States v. Rahimi*, No. 22-915 (U.S. Nov. 7, 2023).

33. Brief for the United States at 3-4, *Rahimi*, No. 22-915 (U.S. Aug. 14, 2023).

34. *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020).

35. 554 U.S. 570 (2008).

36. *McGinnis*, 956 F.3d at 758.

contention that § 922(g)(8) violated the Second Amendment, approvingly citing *McGinnis*³⁷ and endorsing the idea that the government has a powerful interest in disarming individuals in the context of domestic violence.

This governmental interest analysis was explicitly influenced by contemporary understandings of domestic violence and the government's interest in preventing it. Section 922(g)(8) was enacted in 1994 after a multi-year effort in Congress to address the government's longstanding resistance to taking domestic violence seriously. "Between 1990 and 1991, Congress held four hearings that documented the crisis of violence against women in the United States" and the state's traditional failure to police this violence.³⁸ Section 922(g)(8) was designed specifically to address the historical absence of gun regulation in the context of domestic violence. The bipartisan proponents of § 922(g)(8) cited a plethora of studies documenting the harms domestic violence inflicted on women, particularly when guns were involved.³⁹ In light of this evidence, it is not surprising that courts uniformly upheld § 922(g)(8) pre-*Bruen*, when Second Amendment doctrine took governmental interest into account.

But not everybody in those years approved of courts' use of a balancing test under the Second Amendment. A growing number of conservative judges began to argue that the two-step framework "permitted judges to interest-balance away the Second Amendment guarantee."⁴⁰ These judges argued that the two-step "approach was nothing more than a judicial sleight-of-hand . . . feign[ing] respect to the right to keep and bear arms but never enforcing its protection."⁴¹ In fact, they asserted, this framework "treat[ed] the Second Amendment as a 'second-class right.'"⁴² One judge complained that the Second Amendment post-*Heller* still "looked like an abandoned cabin in the woods. A knot of vines, weeds, and roots, left unkempt for decades, crawling up the cabin's sides as if pulling it under the earth."⁴³

37. *United States v. Rahimi*, 2022 WL 2070392, at *1 & n.1 (No. 21-11001) (5th Cir. 2022), *withdrawn and superseded on reh'g* by 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

38. Brief for Senator Amy Klobuchar et al. as Amici Curiae Supporting Petitioner at 5, *Rahimi*, No. 22-915 (U.S. Mar. 17, 2023).

39. *Id.* at 5-12.

40. *Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., dissenting).

41. *Id.* (internal quotation marks omitted).

42. *Kanter v. Barr*, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting); *see also* *Silvester v. Becerra*, 583 U.S. 1139, 1139 (2018) (Thomas, J., dissenting from denial of certiorari) (lamenting "the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right").

43. *United States v. Perez-Gallan*, 640 F. Supp. 3d 697, 698 (W.D. Tex. 2022).

The Supreme Court responded to these concerns in *Bruen* by replacing the two-step framework that took government interest into account with a “one-step”⁴⁴ test that turns solely on history and tradition. This new test purports to accord no weight to twenty-first-century concerns about gun violence and women’s status in society. The constitutional analysis after *Bruen* turns solely on whether the government can “identify a well-established and representative historical analogue”⁴⁵ to its regulation. (The historical analogue need not be a “twin” or “a dead ringer,” but it does have to be “analogous enough [to the current law] to pass constitutional muster.”⁴⁶) Proponents of this test portray it as a more “straightforward”⁴⁷ and “focused”⁴⁸ approach to interpreting the Second Amendment. The prior balancing test invited judges to make present-day policy determinations about the government’s interest in gun regulation. *Bruen*’s test constrains judicial discretion by cutting out modern-day concerns and limiting judges’ ability to “stray” from the document’s “original meaning.”⁴⁹

After *Bruen* came down, the Fifth Circuit withdrew its opinion in *Rahimi* upholding § 922(g)(8).⁵⁰ A few months later, the court issued a new opinion that opened by observing: “The question presented in [*Rahimi*] is *not* whether prohibiting the possession of firearms by someone subject to a domestic-violence restraining order is a laudable policy goal. The question is whether 18 U.S.C. § 922(g)(8) . . . is constitutional under the Second Amendment”⁵¹ Post-*Bruen*, the Second Amendment analysis in *Rahimi* does not turn on statistics about gun violence by domestic abusers or the toll such violence takes on women. The analysis turns on whether the government can adduce a historical analogue sufficiently similar to § 922(g)(8) to satisfy the history-and-tradition test.

The government in *Rahimi* presented the Fifth Circuit with several historical analogues to § 922(g)(8).⁵² It argued there were numerous laws in England and the U.S. in centuries past that disarmed people considered dangerous, and that

44. N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 19 (2022).

45. *Id.* at 30.

46. *Id.* What qualifies as analogous enough? “To be clear,” the Court explained (without clarifying much), “analogical reasoning under the Second Amendment is neither a regulatory straight-jacket nor a regulatory blank check.” *Id.*

47. *Id.* at 26-27.

48. *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

49. *Duncan v. Bonta*, 83 F.4th 803, 812 (9th Cir. 2023) (Bumatay, J., dissenting).

50. Order, No. 21-11001, 2022 WL 2552046 (5th Cir. July 7, 2022) (per curiam) (withdrawing *United States v. Rahimi*, No. 21-11001, 2022 WL 2070392) (5th Cir. June 9, 2022)).

51. *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023).

52. Supplemental Brief for Appellee the United States at 21-31, *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023) (No. 21-11001).

these laws could serve as historical analogies to § 922(g)(8). The Fifth Circuit rejected this claim. It found that the English Militia Law of 1662—which the government cited as an example of a law permitting the disarmament of dangerous people—was used by English kings to disarm their political opponents, and that the Second Amendment was part of a regulatory tradition designed to protect against this kind of disarmament.⁵³ Similarly, the court found that early American laws disarming slaves, Native Americans, and disloyal people were inapt analogies for the new “domestic violence prohibitor” “because . . . *why* they disarmed people was different. The purpose of laws disarming ‘disloyal’ or ‘unacceptable’ groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of ‘domestic gun abuse’”⁵⁴ The court rejected laws that barred “going armed to terrify the King’s subjects” as apt analogies for the same reason: those “laws appear to have been aimed at curbing terroristic or riotous behavior, i.e., disarming those who had been adjudicated to be a threat to society generally, rather than to identified individuals.”⁵⁵ The court rejected other possible historical analogies proffered by the government after finding that they did not actually disarm people;⁵⁶ they were never adopted;⁵⁷ they were outliers,⁵⁸ etc.

This analysis closely resembled that of another federal court that reached the same conclusion about § 922(g)(8)’s constitutionality, post-*Bruen*, in a case called *United States v. Perez-Gallan*.⁵⁹ The court in *Perez-Gallan* emphasized that

53. *Rahimi*, 61 F.4th at 456.

54. *Id.* at 457. The court also rejected these laws because they were aimed “at groups excluded from the political community—i.e., written out of ‘the people’ altogether” *Id.*

55. *Id.* at 459.

56. *Id.* at 460.

57. *Id.* at 457.

58. *Id.* at 458.

59. 640 F. Supp. 3d 697 (W.D. Tex. 2022). Numerous commentators across the political spectrum have also argued that this outcome in *Rahimi* is correct under *Bruen*. See, e.g., Josh Blackman, *A Reversal in Rahimi Will Be Tougher to Write Than Critics Admit*, REASON (Nov. 11, 2023), <https://reason.com/volokh/2023/11/21/a-reversal-in-rahimi-will-be-tougher-to-write-than-critics-admit> [<https://perma.cc/MUS9-ZBSD>] (“Let’s start with a premise: *Rahimi* was a faithful application of *Bruen*. Efforts to ‘clarify’ *Bruen* are really an attempt to rewrite the precedent. I don’t think anyone seriously doubts this premise.”); Ian Millhiser, *It’s Now Legal for Domestic Abusers to Own a Gun in Texas, Louisiana, and Mississippi*, VOX (Feb. 2, 2023), <https://www.vox.com/policy-and-politics/2023/2/2/23583377/supreme-court-guns-domestic-abuse-fifth-circuit-second-amendment-rahimi-united-states> [<https://perma.cc/GE36-CS2T>] (“One of the most alarming things about *Rahimi* . . . is that it is far from clear that this decision is wrong—at least under a new precedent the Supreme Court handed down last year drastically expanding the Second Amendment.”).

Bruen required a “straightforward historical inquiry,”⁶⁰ and it noted that *Bruen* provided some useful and relevant guidance for conducting this inquiry. *Bruen* explained that “when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”⁶¹ “Likewise,” *Bruen* noted, “if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”⁶² The court in *Perez-Gallan* observed that Americans at the Founding were aware of domestic violence, but never addressed it by disarming perpetrators.⁶³ Moreover, the government itself adduced evidence that eighteenth-century Americans sometimes visited different, non-gun-related punishments on perpetrators of domestic abuse. The court found that, by showing that Americans traditionally addressed this age-old phenomenon “through materially different means,” the government substantially undercut its argument that § 922(g)(8) is constitutional.⁶⁴

The court in *Perez-Gallan* acknowledged that Americans today take domestic violence more seriously than our predecessors did in the Founding Era; the idea that this kind of violence is predominantly a private family matter has fallen out of favor.⁶⁵ The women’s movement of the mid-to-late twentieth century revolutionized the way we think about women’s standing in society, and men’s and women’s roles and prerogatives in the family. But the court in *Perez-Gallan* characterized these new ways of thinking as contemporary “public policy concerns”⁶⁶—precisely the sort of concerns *Bruen* meant to exclude from the analysis of a gun regulation’s constitutionality under the Second Amendment. The court repeatedly observed that § 922(g)(8) is a new law, that its “history started in 1994—less than 30 years ago,” making it younger than “the company Amazon.”⁶⁷ Americans today may approve of this law, but “*Bruen*’s mandate is that a gun

60. *Id.* at 702.

61. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26 (2022). *See also Perez-Gallan*, 640 F. Supp. 3d at 702, 710 (discussing this passage in *Bruen*).

62. *Bruen*, 597 U.S. at 26-27. *See also Perez-Gallan*, 640 F. Supp. 3d at 702, 710 (discussing this passage in *Bruen*).

63. *Perez-Gallan*, 640 F. Supp. 3d at 710.

64. *Id.*

65. *Id.* at 703-05 (discussing eighteenth- and nineteenth-century views of domestic violence); *id.* at 703 (describing those views as part of “a historical tradition likely unthinkable today”).

66. *Id.* at 716.

67. *Id.* at 703-04.

regulation's constitutionality hinge solely on the historical inquiry."⁶⁸ Thus, the court concluded, under a "straightforward history inquiry" into this nation's regulatory traditions, § 922(g)(8) is clearly unconstitutional.⁶⁹

B. Equality-Informed Mechanisms for Avoiding this Outcome in Rahimi

These decisions, finding § 922(g)(8) unconstitutional under the Second Amendment, provoked a substantial public outcry⁷⁰ – which is understandable, given how out-of-step they are with current social, political, and constitutional understandings. Commentators accused the Fifth Circuit of "gender bias" and of "put[ting] many women's lives in danger."⁷¹ They argued that the "re-vanchisis[t]"⁷² decision to strike § 922(g)(8) reflected the values of "[t]he early American republic . . . a far more sexist place than America in 2023."⁷³ They argued that the invalidation of § 922(g)(8) took us back to a time when women

68. *Id.* at 716.

69. Some commentators have also endorsed this view. See, e.g., Josh Blackman, *A Reversal in Rahimi Will Be Tougher to Write than Critics Admit*, REASON (Nov. 11, 2023), <https://reason.com/volokh/2023/11/21/a-reversal-in-rahimi-will-be-tougher-to-write-than-critics-admit> [<https://perma.cc/MUS9-ZBSD>] (arguing that a decision upholding § 922(g)(8) would be "motivated by consequentialism" and a distaste for the idea of allowing people like Rahimi to possess guns rather than an honest application of the history-and-tradition test).

70. See, e.g., Press Release, Gavin Newsom, Office of Governor, *Governor Newsom on Fifth Circuit Court Ruling Allowing Domestic Violence Abusers to Possess Guns* (Feb. 2, 2023), <https://www.gov.ca.gov/2023/02/02/governor-newsom-on-fifth-circuit-court-ruling-allowing-domestic-violence-abusers-to-possess-guns> [<https://perma.cc/7MBF-6M2T>] (declaring that the Fifth Circuit is "hellbent on a deranged vision of guns for all, leaving government powerless to protect its people" and that "this assault on our safety will only accelerate"); Erwin Chemerinsky, *Phony Constitutional "Originalism" Is Likely to Kill Women After Second Amendment Decision*, SALON (Feb. 7, 2023), <https://www.salon.com/2023/02/07/phony-constitutional-originalism-is-likely-to-women-after-second-amendment-decision> [<https://perma.cc/753C-VPBT>] (suggesting that the judges who issued this ruling "care more about ideology than protecting women's lives"); L.A. Times Editorial Board, *Court's Domestic Violence Gun Ruling Shoots First, Asks Questions . . . Never*, L.A. TIMES (Feb. 7, 2023), <https://www.latimes.com/opinion/story/2023-02-07/gun-ruling-5th-circuit> [<https://perma.cc/S78F-EGCG>] (arguing that "[t]he gun industry and conservative-dominated courts have . . . turned [the Second Amendment] into a national suicide pact"); Mark Joseph Stern, *5th Circuit Rules that People Accused of Domestic Violence Have a Right to Keep Their Guns*, SLATE (Feb. 2, 2023), <https://slate.com/news-and-politics/2023/02/5th-circuit-court-domestic-violence-second-amendment-right.html> [<https://perma.cc/7JDB-AYQZ>] (arguing the Fifth Circuit's ruling has "alarming implications for gun violence in America," and that "[i]f upheld, [the] decision will prove lethal to countless Americans who rely on the government to protect them from intimate partner violence").

71. Chemerinsky, *supra* note 70.

72. *Id.*

73. Millhisser, *supra* note 59.

were second-class citizens, disenfranchised and subject to the rules of coverture.⁷⁴ The commentators were not wrong about this; the whole point of these decisions was to root Second Amendment jurisprudence in understandings that prevailed in 1791.

But, this Section shows, the history-and-tradition test that now governs the adjudication of Second Amendment cases does not yield the kind of definitive answers the federal courts in these gun cases claimed to have reached. *Bruen*'s history-and-tradition test leaves plenty of leeway for courts to incorporate twenty-first-century concerns into their analysis – they just cannot do so openly, as they could in the prior “two-step” framework. That framework explicitly took governmental interest into account; in deciding whether a regulation was constitutional under the Second Amendment, courts explicitly considered the strength of the present-day justifications behind the government's regulation. *Bruen* purported to exclude all consideration of such present-day concerns. But it did not actually do so. History-and-tradition doctrine affords courts numerous escape valves – ways of abstracting out from the particulars of historical practice to reach outcomes that accord with contemporary ideas about equality and the state's role in safeguarding it. The Court is not bound to perpetuate inegalitarian regulatory traditions in *Rahimi* any more than it was in *Brown v. Board of Education*⁷⁵ or *Loving v. Virginia*.⁷⁶ The main difference between *Rahimi* and the earlier cases is that the Court will now have to assert that its conclusions are perfectly originalist and that they follow directly and inescapably from pre-twentieth-century understandings.

Here is one way the Court could do that. The Fifth Circuit in *Rahimi* and the district court in *Perez-Gallan* accorded enormous weight to the fact that there were no gun laws in 1791 barring domestic abusers from owning guns. But historians have observed that the absence of such laws is not surprising because guns in the eighteenth century were very different from guns today: “Founding-Era firearms were cumbersome, slow, and inaccurate – not what one could quickly and impulsively use for violence typically committed in the heat of the moment.”⁷⁷ For this reason, “[f]amily and household homicides – most of which were caused by abuse or simple assaults that got out of control – were committed almost exclusively with weapons that were close at hand, which were not loaded guns but rather ‘whips, sticks, hoes, shovels, axes, knives, feet, or

74. Chemerinsky, *supra* note 70.

75. 347 U.S. 483 (1954).

76. 388 U.S. 1 (1967).

77. Brief for Amici Curiae Professors of History and Law in Support of Petitioner at 23, *United States v. Rahimi*, No. 22-915 (U.S. Aug. 14, 2023).

fists.”⁷⁸ This evidence casts the absence of laws like § 922(g)(8) in 1791 in a new light: regulators in that era would have had no reason to ban perpetrators of domestic violence from owning guns because *domestic gun violence* was not a widespread social problem back then. The historical picture becomes even more complicated in light of the fact that there was some statutory and common law regulation of domestic violence in the late eighteenth century.⁷⁹ These regulations did not systematically disarm perpetrators of domestic violence, for the reasons just mentioned, and they co-existed with social norms that granted men considerable authority over family members. But the fact that there were regulations in this period designed to curb domestic abuse – although they did not target guns because guns were not relevant to this issue back then – makes it harder to argue that § 922(g)(8) is clearly foreign to our regulatory traditions.⁸⁰

Bruen itself provides a doctrinal pathway for this sort of argument. The Second Amendment Scholars brief in *Rahimi* notes that the Court in *Bruen* (and *Heller*) explicitly condoned raising the level of generality at which we define our regulatory traditions in certain instances to reflect current circumstances.⁸¹ For example, the Court acknowledged in *Bruen* that the Second Amendment was originally understood to protect the right to possess and use weapons that were “in common use at the time.”⁸² There is some evidence that “colonial laws prohibited the carrying of handguns because they were considered ‘dangerous and unusual weapons’”⁸³ at the time – a practice that would arguably deprive

78. *Id.* at 24 n.35 (quoting Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, in *A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 113 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019)); *see also id.* at 23-24 (“Most homicides took place during heated arguments or brawls Hence the prevalence of knives, sticks, stones, pitchforks, and axes, or simply hands and feet. The sheer inefficiency of eighteenth-century guns may have made them less appealing instruments of violent emotional gratification.” (quoting PRIYA SATIA, *EMPIRE OF GUNS: THE VIOLENT MAKING OF THE INDUSTRIAL REVOLUTION* 228-29 (2018))).

79. Brief for Amici Curiae Professors of History and Law, *supra* note 77, at 18-26; LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 179-86* (2009).

80. Historians argue additionally that gaps in the historical record ought to make us especially wary of concluding that the law did not police domestic abuse in the eighteenth century. Brief for Amici Curiae Professors of History and Law, *supra* note 77, at 20-21; *id.* at 20 (observing that “the historical record is often incomplete as to how both domestic violence and firearms were regulated in the eighteenth century”).

81. Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 9-17, *United States v. Rahimi*, No. 22-915 (U.S. Aug. 14, 2023).

82. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 47 (2022) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

83. *Id.*

handguns of Second Amendment protection today. But, the Court asserted, historical prohibitions on handguns “provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.”⁸⁴ The Court explained that, “even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.”⁸⁵ The Second Amendment Scholars argued in *Rahimi* that, under this reasoning, the Court ought to uphold the constitutionality of § 922(g)(8), because “historical analogues to modern firearms regulations [must] be evaluated at a level of generality commensurate with that used to define the scope of the Second Amendment right.”⁸⁶ If the Court is prepared to raise the level of generality at which it defines traditional Second Amendment rights to extend protection to new (or newly popular) weapons, it must also raise the level of generality to allow the government to regulate new gun-related threats.

The Solicitor General presented the Court in *Rahimi* with yet another doctrinally plausible theory of the case. In her brief and at oral argument, she surveyed gun regulations before, during, and after the ratification of the Second Amendment and argued that these regulations revealed an unbroken, widely-held understanding that the government was permitted to enact laws disarming dangerous people.⁸⁷ She argued that “the conception of what regulations that [historical principle] permits today is not controlled by Founding-era applications of the principle.”⁸⁸ Indeed, she argued that courts should not adhere to eighteenth-century conceptions of dangerousness in this context because historical reticence to apply this label to domestic abusers “reflected the now-discredited belief that public authorities should not intervene to prevent domestic violence because doing so could undermine marital harmony.”⁸⁹ She argued that the Court regularly identifies historical principles in constitutional law but raises the level of generality when applying those principles today to avoid perpetuating

84. *Id.*

85. *Id.* at 28.

86. Brief of Second Amendment Law Scholars, *supra* note 81, at 12 (emphasis added).

87. Brief for the United States, *supra* note 33, at 10-22, 27-29; Transcript of Oral Argument, *supra* note 32, at 50 (asserting that “legislatures for time immemorial throughout American history have been able to disarm those who are dangerous”).

88. Transcript of Oral Argument, *supra* note 32, at 18; *id.* at 18 (discussing “the Second Amendment’s original and enduring meaning that you can disarm dangerous people” and arguing that understandings of how, or to whom, this principle applies evolve over time).

89. Brief for the United States, *supra* note 33, at 40; *id.* at 40-41 (“As late as the 1960s, police manuals stated that officers responding to domestic-violence complaints ‘should never create a police problem when there is only a family problem’”) (quoting Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2171 (1996)).

outmoded understandings.⁹⁰ In keeping with this practice, she argued, the Court should uphold § 922(g)(8) as the kind of regulation the framers of the Second Amendment would have viewed as permissible even if Americans in the eighteenth century did not enact laws exactly like this one.

This Essay will be published before the Court issues its decision in *Rahimi*. It is not clear what the Court will hold. But it is useful to see, before the Court decides which direction to take, the various possibilities that lie before it. The Justices who have instituted the history-and-tradition test in the context of the Second Amendment have asserted that this test protects constitutional adjudication from the influence of contemporary ideologies by requiring judges to abide by historical understandings and regulatory traditions. But the historical record does not provide a definitive answer to the question of § 922(g)(8)'s constitutionality, in part because there is no single, neutral, objective standpoint from which to view the history. The federal courts that invalidated § 922(g)(8) claimed that they were interpreting the history objectively, that the absence of regulations like § 922(g)(8) in the historical record makes this a relatively easy case. But it is not true that the more closely one hews to past practice the more neutral one is: *Bruen* makes clear that the history-and-tradition test demands “historical analogues” not “historical twins.”⁹¹ It directs courts to engage in a certain amount of analogizing, and the Court in *Bruen* and *Heller* made clear that in some cases fidelity to tradition requires that we update our traditions so they make sense in the twenty-first century. Refusing to do so in the context of § 922(g)(8), which is designed to counteract the devastating modern epidemic of domestic gun violence, is not a value-neutral decision.

Most Court-watchers believe the Court will overturn the Fifth Circuit in *Rahimi*⁹²—that it will find a way to generalize out from historical tradition at

90. See, e.g., Transcript of Oral Argument, *supra* note 32, at 17–18 (Solicitor General Prelogar: “I think you have to come up a level of generality and use history and tradition to help identify and discern the enduring constitutional principles that define and delimit the . . . scope of the Second Amendment right.”); *id.* at 40 (“The way constitutional interpretation usually proceeds is to use history and regulation to identify principles, the enduring principles that define the scope of the Second Amendment right. And so, we think that you should make clear the courts should come up a level of generality and not nit-pick the—the historical analogues that we’re offering . . .”).

91. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 30 (2022).

92. See, e.g., Robert Barnes, *Court Seems Likely to Allow Gun Bans for Those Under Protective Orders*, WASH. POST (Nov. 7, 2023), <https://www.washingtonpost.com/politics/2023/11/07/supreme-court-guns-domestic-violence-rahimi> [<https://perma.cc/8Q54-S52N>]; Josh Gerstein, *Supreme Court Looks Poised to Uphold Ban on Guns for Accused Domestic Abusers*, POLITICO (Nov. 7, 2023), <https://www.politico.com/news/2023/11/07/supreme-court-guns-domestic-violence-argument-00125853> [<https://perma.cc/42KC-N47F>]; Adam Liptak, *Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/us/politics/supreme-court-gun-rights-domestic->

least enough to deny constitutional protection to the plaintiff in this case. That appears to be the only plausible outcome. To invalidate § 922(g)(8) would be egregiously out of step with current egalitarian commitments and difficult to justify given the Court's willingness to abstract out from the details of historical practice in other contexts in which the history-and-tradition test applies, even other contexts within the Second Amendment. What will be more interesting to see is how the Court accounts for the modernizing inherent in deciding that a law stripping people under domestic-violence restraining orders of their guns fits within our historical tradition. The Court could explain, as it did in cases like *Lawrence v. Texas*⁹³ and *Obergefell v. Hodges*⁹⁴ that history is the jumping-off point, that we must abide by principles deeply rooted in our history and tradition but that our understanding of how those principles apply changes over time, particularly as we come to recognize the exclusionary ways we applied those principles in the past. If the Court opts for this approach, it could lay out some much-needed guidelines for how courts should engage in the practice of generalizing out from tradition in future cases. But the Court could also use the history-and-tradition test to avoid this obligation. Whatever outcome the Court reaches, it could insist that it is simply abiding by historical tradition and that its opinion follows inexorably from eighteenth-century understandings. Framing *Rahimi* that way would camouflage the value-laden choices involved in resolving this case, and it would leave more room for the Court to raise and lower levels of generality as it sees fit in future cases.

C. *Now You See It, Now You Don't: Adjusting Levels of Generality at the Roberts Court*

It seems likely that the Court will ratchet up the level of generality at which it defines our regulatory traditions in *Rahimi* high enough to allow § 922(g)(8) to survive, at least in part. But if the Justices likely to engage in this ratcheting are hoping to accomplish this task without anyone noticing, they appear to be out of luck. Justice Jackson and Justice Kagan repeatedly called attention to this issue at oral argument in *Rahimi* with a series of questions designed to expose the fact that history-and-tradition doctrine does not actually bind courts to the past in any meaningful way.

violence.html [<https://perma.cc/B69H-3MAP>]; Nina Totenberg, *High Court Seems Likely to Uphold Law Banning Guns for Accused Domestic Abusers*, NAT'L PUB. RADIO (Nov. 7, 2023), <https://www.npr.org/2023/11/07/1211226091/supreme-court-guns-domestic-abuse> [<https://perma.cc/6Y4M-VDMU>].

93. 539 U.S. 558 (2003).

94. 576 U.S. 644 (2015).

Justice Kagan observed that, two centuries ago, “the problem of domestic violence was conceived very differently. People had a different understanding of the harm. People had a different understanding of the right of government to try to prevent the harm. People had different understandings with respect to pretty much every aspect of the problem.”⁹⁵ Justice Jackson suggested there was evidence in “the historical record that domestic violence was not considered dangerousness back in the day[.]”⁹⁶

The Fifth Circuit in *Rahimi* and the district court in *Perez-Gallan* cited this evidence regarding eighteenth-century conceptions of domestic violence as a central reason for invalidating § 922(g)(8), finding that the law was inconsistent with Founding Era beliefs about who could be rightfully disarmed. But Justices Jackson and Kagan did not cite this evidence to argue that § 922(g)(8) is unconstitutional. They cited this evidence to expose the fact that judges in history-and-tradition cases are not meaningfully constrained by history and tradition. Justice Kagan argued that the Court simply could not stomach adhering to historical understandings in this case—nobody in the courtroom “[could] stand . . . the consequences”⁹⁷ of saying the government could not strip domestic abusers of their guns. Her point, and Justice Jackson’s as well, was that the “historical framing”⁹⁸ does not do much analytical work in these cases. When history points in unappealing directions, even traditionalist judges raise levels of generality to bring constitutional outcomes in line with “modern sensibilities”⁹⁹ and to avoid results that strike them as “untenable”¹⁰⁰ today.

In light of the very obvious way in which courts generalize out from historical tradition to bring their decisions in line with modern sensibilities, Justice Jackson asked during oral argument, “what’s the point of going to the founding era?” Why frame the test as historical if history does not actually determine the outcomes in these cases?

Framing these cases in this way does serve a function, and not just an aesthetic or rhetorical function. If the Court insists that it is bound to adhere to history and tradition in every case, that means that in some cases, when it chooses, the Court really can adhere to historical practices—without offering any additional justification for its embrace of potentially outmoded ideas in these

95. Transcript of Oral Argument, *supra* note 32, at 73.

96. *Id.* at 18.

97. *Id.* at 89.

98. *Id.* at 19 (Justice Jackson speaking); *id.* at 18 (Justice Jackson again, asking, what the purpose is of looking back hundreds of years if we know that twenty-first-century understandings actually guide the analysis in history-and-tradition cases?).

99. *Id.* at 19.

100. *Id.* at 88.

contexts. You can see this dynamic if you set *Rahimi* alongside cases like *Lawrence* and *Obergefell*. The Solicitor General argued in *Rahimi* that there is a long tradition in the United States of disarming “dangerous” people. Americans in 1791 may not have understood that perpetrators of domestic violence are “dangerous.” But we now understand that they are, and we’re not breaking with traditional principles by including them in this category; we are simply updating the applications of those principles in light of new understandings of the dangerousness of domestic violence.

This is precisely the kind of reasoning that fueled the Court’s holdings in *Lawrence* and *Obergefell* that people have a right to engage in same-sex intimacy and that same-sex couples have a right to marry. In both of those cases, the Court identified longstanding constitutional principles (protecting the liberty of consenting adult sexual relationships and the right to marry) and updated the applications of those principles in light of new understandings of the humanity of LGBTQ+ people and the negative consequences of stigmatizing their relationships and families. It is very possible, perhaps even likely, that the Court in *Rahimi* will find a way to preserve § 922(g)(8) by abstracting out from the actual practices and understandings of eighteenth-century Americans and finding that their core principles regarding dangerousness are broad enough to include perpetrators of domestic violence. But many of the Justices who may follow this path in *Rahimi* dissented in *Obergefell*. In the gay rights case, they were quite insistent that the Court was constitutionally bound to adhere very closely to the practices of our distant ancestors, and they harshly condemned the Court for raising the level of generality at which it defined our historical traditions to bring LGBTQ+ people into the fold.

Thus, regardless of the outcome in *Rahimi*—even if the Court upholds the law—there is something pernicious about what is happening here. Whatever happens in *Rahimi*, the case has brought into sharp focus the inegalitarian functioning of the history-and-tradition test and the broad discretion this test gives the Justices to make covert determinations about the weight of constitutional equality concerns. The Justices currently in the majority on the Roberts Court seem very willing to raise the level of generality at which they define our historical traditions when doing so will result in the punishment of perpetrators of domestic violence or increase the number of weapons protected under the Second Amendment. But when doing so would extend constitutional protections to LGBTQ+ people, they take a very different view of ratcheting up levels of generality; in the LGBTQ+ cases, they insist we must abide very closely by the practices and understandings of our great, great, great grandfathers.

Part II continues this discussion of the Court’s uneven willingness to define historical traditions in capacious ways and to bring twenty-first-century understandings to bear on its analysis in history-and-tradition cases. LGBTQ+ rights

is not the only context in which the Court balks at abstracting out from the particulars of our historical traditions; the Court does so in the context of reproductive rights as well. Part II shows that the problem extends beyond partiality, the Court's willingness to raise levels of generality to protect some groups and rights and not others. When the Court holds in certain cases that it is constitutionally compelled to hew very closely to past practice and adopt the particular understandings of our forefathers, it may need to ignore or disregard equal protection precedents that stand in the way of implementing those old understandings today. Part II shows that this is already happening in the context of reproductive rights – and that the attacks on equality that occur *sub rosa* in the Court's history-and-tradition cases may actually cross doctrinal lines and have a tangible effect in the context of equal protection.

II. *DOBBS* AND THE DISMANTLING OF MODERN EQUAL PROTECTION LAW

The day after the Court adopted its new history-and-tradition test in the context of the Second Amendment in *Bruen*, it adopted a similar history-and-tradition test in the context of abortion in *Dobbs*. The Court held in *Dobbs* that substantive due process protects only those rights that are “deeply rooted in this Nation’s history and tradition,” and it explained that judges applying this test must hew very closely to historical traditions to avoid “confus[ing] what th[e] Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy.”¹⁰¹ The question in *Dobbs* was whether the right to abortion satisfied this test. The Court held that it did not.

There is much to say about the Court's characterization of the history of abortion regulation in *Dobbs*. For instance, there was considerable evidence before the Court in *Dobbs* that Americans in the nineteenth century did view abortion as a fundamental right prior to the quickening of the fetus, and that even states that purported to ban abortion did not do so in practice, in part because the public would not accept the abrogation of this right.¹⁰² But even if we accept

101. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 239 (2022).

102. See, e.g., Brief for American Historical Association and Organization of American Historians as Amici Curiae in Support of Respondents, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392). For additional argument on this point, see, for example, *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, No. 26 MAP 2021, 2024 WL 318389, at *136 (Pa. Jan. 29, 2024) (Wecht, J., concurring), wherein Judge Wecht observes that, traditionally, “[a]bortion was only legally proscribed if undertaken after quickening, usually around the fourth or fifth month,” and that “[t]he deeply rooted history and tradition of every state at the Founding afforded women the liberty to obtain an abortion prior to quickening”; Reva Siegel, *Reasoning from the Body: A*

the *Dobbs* Court's conclusion that abortion was not viewed as a fundamental right prior to the twentieth century—that it was not “deeply rooted in history and tradition”—we are still left with the problem this Essay addresses. The Court in *Dobbs* claimed it was bound by history to reject the right to abortion, case closed. But there are many other cases in which the Court has raised the level of generality at which it defines historical tradition in order to bring its decisions in line with modern equal protection principles.. It seems poised to do so in *Rahimi*; it has done so in the past in cases such as *Obergefell*, *Lawrence*, *Loving*, *Griswold v. Connecticut*,¹⁰³ *Brown v. Board of Education*,¹⁰⁴ and *Bolling v. Sharpe*.¹⁰⁵ This variability in the Court's approach to history means we cannot look solely to the past to explain the outcome in *Dobbs*. There are many canonical cases in which the Court does not abide by “history and tradition,” defined “carefully.” The past is not determining the different outcomes in these cases. The outcomes in these cases are being driven by contemporary judgments— not about history, but about equality, and about the compatibility of particular forms of regulation with modern understandings of equal citizenship.

Section II.A shows how the history-and-tradition frame hides the modern, value-laden judgments about equality that often drive the Court's decision-making in these cases. This Section shows that history is not driving the outcomes in these cases. In fact, the Court in history-and-tradition cases often shapes history to suit its needs. “History and tradition” is a tool for reaching preferred outcomes. It is not a constant and objective metric by which the Court gauges the constitutionality of twenty-first-century regulation.

Section II.B shows that the problem with the Court's history-and-tradition jurisprudence goes beyond a lack of candor and concerns about inconsistency and partiality. When the Court turns to equality to help it transcend constitutionally suspect historical traditions— either explicitly, by invoking equal protection law, or more covertly, by ratcheting up the level of generality at which it defines the relevant tradition—it may reinforce modern understandings of equality. But when the Court chooses *not* to invoke equality principles, in cases where they may be relevant, it can undermine equal protection, without acknowledging that it is doing so. This Section argues that that is what is

Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 280-319 (1992), which examines the permissibility of pre-quickening abortion prior to the medical profession's successful anti-abortion campaign in the mid-nineteenth century; and Tang, *supra* note 8, which examines how states actually regulated abortion prior to the twentieth century.

103. 381 U.S. 479 (1965).

104. 347 U.S. 483 (1954).

105. 347 U.S. 497 (1954).

happening in *Dobbs*. What the *Dobbs* Court frames as a straightforward reading of the historical record is actually a covert attack on sex-based equal protection law.

A. *The Malleability and Uneven Application of “History and Tradition”*

Justice Alito prefaced his discussion of the history of abortion regulation in *Dobbs* with a discussion of the importance of courts hewing very closely to history and tradition in deciding substantive due process cases. If they do not, he asserted, “the liberty protected by the Due Process Clause” could “be subtly transformed into the policy preferences of the Members of this Court.”¹⁰⁶ Alito argued that “when the Court has ignored the [a]ppropriate limits imposed by respect for the teachings of history, it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*.”¹⁰⁷ He warned that “[t]he Court must not fall prey to such an unprincipled approach”¹⁰⁸ again. He claimed that the only way to avoid the incursion of contemporary politics into substantive due process cases is to determine with a very high degree of specificity the contours of our regulatory traditions and to adhere to those specific contours.¹⁰⁹

One problem with this set of claims is that we, twenty-first-century Americans, cannot consistently bind ourselves to history and tradition, defined at the level of granularity this doctrine requires. We have repudiated too many regulatory traditions from the eighteenth and nineteenth centuries to feel comfortable hewing to those traditions now – particularly in cases involving historically subordinated racial and ethnic groups, women, immigrants, non-Protestants, people with disabilities, and various kinds of sexual and reproductive rights. Justice Ginsburg once observed that “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to

¹⁰⁶. *Dobbs*, 521 U.S. at 720 (internal quotation marks omitted).

¹⁰⁷. *Id.* (alteration in original) (internal quotation marks and citation omitted).

¹⁰⁸. *Id.*

¹⁰⁹. *Id.* at 256–62.

Because the dissent cannot argue that the abortion right is rooted in this Nation’s history and tradition, it contends that the “constitutional tradition” is “not captured whole at a single moment,” and that its “meaning gains content from the long sweep of our history and from successive judicial precedents.” This vague formulation imposes no clear restraints on what Justice White called the “exercise of raw judicial power, and while the dissent claims that its standard ‘does not mean anything goes,’ any real restraints are hard to discern.

Id. at 261 (internal citations omitted).

people once ignored or excluded.”¹¹⁰ A major part of this process has involved jettisoning regulatory traditions we now recognize as inequalitarian and exclusionary. Courts have repeatedly concluded that such jettisoning is constitutionally required.

Justice Scalia often framed judicial disagreement in culturally contested areas as a conflict between progressives, who sought to update the Constitution by interpreting it in accordance with their own enlightened political views, and conservatives, who honored the Constitution – “the old one,” written by “our ancestors.”¹¹¹ But the phenomenon described in the previous paragraph is one that cuts across political and ideological lines. The United States was founded hundreds of years ago; more than a century and a half has passed since the ratification of the Fourteenth Amendment. The country has experienced staggering cultural and political change in the intervening years. Progressives and conservatives today disagree about many things. One thing we share is an unwillingness to abide by many of the specific regulatory traditions of the eighteenth and nineteenth centuries.

Roberts Court Justices have called attention, in recent years, to numerous historical practices and traditions they now view as abhorrent. In *Ramos v. Louisiana*, Justice Gorsuch opened his majority opinion with a discussion of the racist origins of laws permitting nonunanimous juries to convict defendants of serious crimes.¹¹² This practice may be facially race-neutral, but, Gorsuch observed, it developed in the Jim Crow era and it reinforced racial inequality, in part by “ensur[ing] that African-American juror service would be meaningless.”¹¹³ In *Obergefell*, Justice Thomas made similar observations about antimiscegenation laws; he described the “sordid history”¹¹⁴ of those laws and the way they reinforced “white supremacy”¹¹⁵ in the aftermath of the Civil War. In *McDonald* and *Bruen*, Thomas wrote at some length about the racism that pervaded gun regulation in the eighteenth and nineteenth centuries.¹¹⁶ He

110. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

111. *Id.* at 567 (Scalia, J., dissenting).

112. 140 S. Ct. 1390 (2020).

113. *Id.* at 1394.

114. *Obergefell v. Hodges*, 576 U.S. 644, 730 n.5 (2015) (Thomas, J., dissenting).

115. *Id.* (quoting PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 19, 28 (2009)).

116. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 60-63 (2022); *id.* at 61 (describing “Southern abuses violating blacks’ right to keep and bear arms”); *McDonald v. City of Chicago*, 561 U.S. 742, 843-50 (2010) (Thomas, J., concurring in part and concurring in the judgment); *McDonald*, 561 U.S. at 845 (“The fear generated by [slave] rebellions led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense.”).

suggested that allowing such tainted regulation to persist into the present day would violate equal protection.

Justice Alito has expressed similar concerns about the history of gun regulation. He spent several pages in his majority opinion in *McDonald* discussing the racism that undergirded gun regulation prior to (and well into) the twentieth century.¹¹⁷ At the oral argument in *Bruen*, he suggested “that a major reason for the enactment of” New York’s law restricting concealed carry “was the belief that certain disfavored groups, members of labor unions, Blacks, and Italians, were carrying guns and they were dangerous people.”¹¹⁸

In *Espinoza v. Montana Department of Revenue*,¹¹⁹ Justice Alito engaged in a lengthy and impassioned disquisition on the bigotry that motivated the regulation of religious schools in the second half of the nineteenth century. He described the “virulent prejudice against immigrants, particularly Catholic immigrants,”¹²⁰ that pervaded American politics and lawmaking in this period. He discussed the major wave of immigration that occurred in the mid-nineteenth century and the “nativist fears” this new influx of people triggered. He noted that “[a]n entire political party, the Know Nothings, formed in the 1850s ‘to decrease the political influence of immigrants and Catholics,’ gaining hundreds of seats in Federal and State Government.” He observed that, even beyond the Know Nothings, many state and federal legislators in the second half of the nineteenth century were deeply biased against Catholics and that this bias routinely infected their lawmaking.¹²¹ Indeed, Alito argued that lawmaking in this period was so saturated with anti-Catholic bigotry its taint persists even today, and courts must be extra-vigilant to ensure current laws do not perpetuate such outmoded views.¹²²

Now, let us turn to *Dobbs*. The American Historical Association, the world’s largest professional organization devoted to the study of history, and the Organization of American Historians, the largest professional organization devoted to the study of U.S. history, submitted an amicus brief in *Dobbs* that reaffirmed Justice Alito’s description of the second half of the nineteenth century as a period awash in anti-immigrant, particularly anti-Catholic, sentiment.¹²³ The

117. *McDonald*, 561 U.S. at 777-80.

118. Transcript of Oral Argument at 103, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843).

119. 140 S. Ct. 2246 (2020).

120. *Id.* at 2268 (Alito, J., concurring).

121. *Id.* at 2269.

122. *Id.*

123. Brief for American Historical Association and Organization of American Historians, *supra* note 102, at 21-25.

historians' brief showed how "consternation over immigrant Catholics out-reproducing native white Protestants"¹²⁴ fueled anti-abortion lawmaking in this period. The brief described the success of the "physicians' campaign," started by Horatio Storer in 1857, in persuading many state legislatures to enact new bans on abortion.¹²⁵ The brief showed that this campaign was motivated not only by concerns that Catholic immigrants were producing more children than Protestants, but also by concerns that married women were "shunning their proper roles as mothers by choosing abortion."¹²⁶ This was the period in which Justice Bradley famously opined that it was constitutional to bar women from the practice of law because "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."¹²⁷ Lawmakers in these years routinely voiced this sentiment and legislated accordingly.

In *Dobbs*, however, Justice Alito rejects the idea that anti-Catholic sentiment could have influenced the regulation of abortion in this period. He responds to the historians' brief by asking, incredulously: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact [laws restricting abortion] were motivated by hostility to Catholics and women?"¹²⁸ It is hard to square Alito's incredulity in *Dobbs* at the suggestion that anti-Catholic sentiment influenced abortion-related lawmaking in the mid-nineteenth century with his lengthy account of the widespread anti-Catholicism of legislators in this same period in *Espinoza*. It is even harder to understand his incredulity at the suggestion that nineteenth-century lawmakers could have legislated in ways that reflected hostility to women. Lawmakers in this period denied women the right to vote, the right to serve on juries, the right to attend many schools, and the right to pursue many professions; they generally failed to regulate domestic violence; they routinely questioned women's physical and mental capabilities and insisted that women's primary purpose was to care for their families. Perhaps Alito is getting tripped up on the word "hostility" (his word—not one the historians used). Because it is not in the least bit difficult to believe that nineteenth-century legislators passed laws that forced women into traditional sex and family roles (which is what the historians argued about abortion laws). Nineteenth-century legislators did that all the time.

After expressing incredulity at the suggestion that the lawmakers who enacted abortion bans in the second half of the nineteenth century might have been motivated by prejudiced views of Catholics and women, Justice Alito argued that

124. *Id.* at 3.

125. *Id.* at 21-30.

126. *Id.* at 3-4, 26.

127. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

128. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 254 (2022).

these bans were “instead spurred by a sincere belief that abortion kills a human being.”¹²⁹ But believing that abortion kills a human being and worrying about the decline of the native population and women’s wavering commitment to traditional sex roles are not mutually exclusive. In fact, the historians’ brief shows that the nineteenth-century campaign against abortion was motivated by all these concerns.¹³⁰

In other cases – not involving abortion – Justice Alito and his colleagues in the *Dobbs* majority have been perfectly capable of recognizing mixed legislative motives. The existence of genuine concerns about the dangers presented by guns did not prevent the Justices from recognizing the racism underlying some forms of gun regulation. Legitimate concerns about protecting funding for public schools and avoiding excessive entanglement between church and state did not prevent Justice Alito from detecting the taint of anti-Catholicism in laws withholding state funding from religious schools. But in *Dobbs*, the Court applies a different filter. In cases like *McDonald*, *Bruen*, *Ramos*, and *Espinoza*, the Court is on high alert, keeping an eye out for discriminatory views that might have informed regulatory traditions in the past and scrutinizing current laws to ensure they do not carry with them even the smallest taint of those old views. In *Dobbs*, the Court takes the opposite approach, suggesting it is ludicrous to be suspicious of the motivations of nineteenth-century lawmakers and dismissing any concerns about the role of outmoded views in shaping regulatory traditions governing pregnancy and reproduction.

This gives the lie to the idea that the Court’s new history-and-tradition tests constrain judges, or enable them to discern what the law really is, in ways that living constitutionalist modes of interpretation do not. Judges who advocate these tests often concede that “[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.”¹³¹ But, they insist, the history-and-tradition test is much “more determinate and ‘much less subjective’

129. *Id.*

130. Brief for American Historical Association and Organization of American Historians, *supra* note 102, at 18 (arguing that “states restricted abortion more stringently [in the second half of the nineteenth century] following an elite-driven physicians’ campaign built on mixed and discriminatory motives”); *see also* Franklin & Siegel, *supra* note 21, at 36 (“In Justice Alito’s telling, advocates of banning abortion had one aim in mind: protecting fetuses. But this account of our history is simply wrong. Abortion regulation has long had a dual focus. It has never been concerned exclusively with protecting fetuses. It has always, also, been about the regulation of sexuality and motherhood.”); *id.* at 36-43 (presenting historical evidence to show the mixed motives driving the regulation of abortion from the time of the physicians’ campaign to the present day).

131. *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 803-04 (Scalia, J., concurring)).

because ‘it depends upon a body of evidence susceptible of reasoned analysis.’”¹³² As a result, they argue, “the range of potential answers will be far more focused under an approach based on text, history, and tradition.”¹³³

This is not true. It is not true because there are a thousand and one “shadow decision points”¹³⁴ involved in applying history-and-tradition tests. In some cases, courts accord deference to professional historians. In *Dobbs*, the Court dismisses the historians’ brief and draws much of its historical analysis from the work of a retired Villanova law professor who is not a professional historian.¹³⁵ There is no debate that the period in which many states adopted abortion bans was one of intense nativism and widespread concern about the growth of the Catholic population. There is no debate that women in this period were treated as second-class citizens and generally bound by law to conform to traditional sex and family roles. Yet the Court treats it not only as wrong but as laughable when the nation’s leading organizations of historians assert that anti-immigrant and gender-inegalitarian views influenced the passage of laws regulating pregnancy and reproduction in this period.¹³⁶

This is not the approach the Court takes when it looks to see if outmoded views influenced the historical regulation of guns or religious schools. In those contexts, the Court portrays late-nineteenth-century legislators as white supremacists who were fervently hostile to Catholics. When it comes to abortion,

^{132.} *Id.* at 1274 (quoting *McDonald*, 561 U.S. at 804 (Scalia, J., concurring)).

^{133.} *Id.* at 1275.

^{134.} Franklin, *supra* note 14, at 126.

^{135.} See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 243, 246, 248 nn.33-34, 249, 252 n.38 (2022) (drawing extensively on JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006)).

^{136.} *Id.* at 251-55 (describing the historians’ arguments as “very weak” and dismissing the extensive evidence of Horatio Storer’s sexism and nativism and the pervasiveness of these attitudes in the mid-nineteenth-century campaign that gave rise to the history and tradition of anti-abortion lawmaking at issue in *Dobbs*). In response to the Court’s dismissal of the historical evidence in *Dobbs*, the American Historical Association and the Organization of American Historians issued a statement, joined by thirty other major historical associations, declaring, in part: “[T]he court adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than 30 years. The opinion inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime.... The OAH and AHA consider it imperative that historical evidence and argument be presented according to high standards of historical scholarship. The court’s majority opinion in *Dobbs v. Jackson* does not meet those standards and has therefore established a flawed and troubling precedent.” History, the Supreme Court, and *Dobbs v. Jackson*: Joint Statement from the American Historical Association and the Organization of American Historians, Am. Hist. Ass’n (July 2022), [https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-\(july-2022\)](https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022)) [<https://perma.cc/WE7G-4DDJ>].

the Court insists their motivations were as pure as the driven snow. When one compares the Court's account of mid-to-late nineteenth-century lawmakers in *Dobbs* with its account of those very same lawmakers in other cases (cases in which the Justices in the *Dobbs* majority are less sympathetic to governmental regulation), there seems to be more at work than historical analysis.

This same variability in the Court's characterization of the past is evident in its determinations about which substantive due process precedents satisfy the history-and-tradition test and which do not. The Court announces in *Dobbs* that the Fourteenth Amendment protects only those rights that are deeply rooted in "history and tradition." It holds in *Dobbs* that abortion fails this test, and it acknowledges that this test raises concerns about the fate of LGBTQ+ rights and other reproductive rights, such as the right to contraception.¹³⁷ But it makes no mention of other substantive due process decisions that also appear to fail this test. *Bolling v. Sharpe*¹³⁸ – the 1954 case in which the Court interpreted the Due Process Clause of the Fifth Amendment to bar racial segregation in D.C. schools – clearly fails *Dobbs*'s test. It is hard to argue that the right of Black children to attend integrated schools was deeply rooted in this nation's historical traditions in 1791. *Loving*'s due process holding¹³⁹ fails the test as well; the right to interracial marriage was not deeply rooted in this nation's history in 1868. Justice Scalia argued that *Meyer v. Nebraska*,¹⁴⁰ a 1923 case protecting the substantive due process right of parents to have their children educated in a foreign language, also failed this test.¹⁴¹ The Court in *Meyer* certainly did not establish that this right was viewed as fundamental in 1868.¹⁴² Justice Stevens argued that

137. *Dobbs*, 597 U.S. at 295 (suggesting that *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* may meet a different fate than *Roe* under the history-and-tradition test because these cases do not involve a fetus, and may be saved by stare decisis – but conspicuously failing to assert that the rights protected in these cases are “deeply rooted in history and tradition”); see also *id.* at 332 (Thomas, J., concurring) (arguing that “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”).

138. 347 U.S. 497 (1954).

139. 388 U.S. 1, 12 (1967).

140. 262 U.S. 390 (1923).

141. *McDonald v. City of Chicago*, 561 U.S. 742, 792 (2010) (Scalia, J., concurring) (arguing that *Meyer* “could not past muster” under a test that required rights to “be rooted in the traditions and conscience of our people” to qualify as fundamental (internal quotation marks omitted)).

142. *Meyer*, 262 U.S. at 399 (observing that “this Court has not attempted to define with exactness the liberty thus guaranteed” by the Fourteenth Amendment and locating parents’ right to have their children educated in foreign languages under the broad umbrella of rights having to do with the rights to “acquire useful knowledge, to marry, establish a home and bring up children,” etc.).

the history-and-tradition test would also “vaporize”¹⁴³ *Pierce v. Society of Sisters*¹⁴⁴ — a 1925 decision protecting the fundamental right of parents to send their children to Catholic school. Yet when Justice Alito and Justice Thomas discuss cases that may fail to satisfy *Dobbs*’s history-and-tradition test, they cite only cases involving LGBTQ+ and reproductive rights.

All of which is to say, there is clearly something other than history and tradition driving the analysis here. The due process rights recognized in *Bolling* and *Loving* were no more deeply rooted in this nation’s history and traditions circa 1791 or 1868 than those recognized in *Griswold*, *Roe*, *Lawrence*, and *Obergefell*. We need to look elsewhere — at something other than history and tradition — to understand the Court’s differential treatment of these cases.

The factor that is actually driving the Court’s analysis is equality. The Justices in the majority in *Dobbs* put *Bolling*, *Loving*, *Meyer*, and *Pierce* on one side of a dividing line, and *Griswold*, *Roe*, *Lawrence*, and *Obergefell* on the other side of that line. But that line has little to do with history and tradition or the practices of Americans in the eighteenth and nineteenth centuries. If *Bolling*, *Loving*, *Meyer*, and *Pierce* survive after *Dobbs*, it will not be because the rights recognized in those cases were deeply rooted in history and tradition, defined at a high level of specificity. They will survive because the Court, motivated by contemporary understandings of equality, will override the results of the history-and-tradition test in those cases.

This overriding could take many forms: the Justices could cite *stare decisis*; they could rely explicitly on the Equal Protection Clause or the First Amendment; they could bump up the level of generality at which they define the relevant historical tradition. But one way or another, the Justices will ensure the outcomes in these cases comport with twenty-first-century notions of equality. When it comes to reproductive and LGBTQ+ rights, however, the Justices in the majority in *Dobbs* have signaled they will not deploy equality to save decisions that fail their new test. In other words, the Justices will break with history and tradition when old practices violate their (twenty-first-century) notions of equality, but will hew closely to tradition in cases where they continue to find the old-style regulation tolerable from an equality standpoint.

This means that attempting to identify which rights and regulatory traditions were “deeply rooted” in 1791 or 1868 will not generate reliable information about the likely outcome of a history-and-tradition case. The conservative Justices’ views about equality are a far more reliable predictor than our nation’s

143. *McDonald*, 561 U.S. at 906, 909 (Stevens, J., dissenting) (arguing that a history-and-tradition approach would “vaporize” numerous “canonical substantive due process decisions,” including *Meyer* and *Pierce*).

144. 268 U.S. 510 (1925).

history and traditions of which rights and regulations will survive under the Court's new history-and-tradition test. And when judges make equality determinations in history-and-tradition cases, they are not relying on the judgments of our ancestors about what equal protection entails. They are relying on their own, frequently unvoiced, judgments about what counts as inegalitarian—judgments that may or may not match the perceptions of the American public (at any point in our history). To call this fidelity to the past is a smokescreen. It obscures what is actually happening in these cases.

B. The Dark Side of Doing Equal Protection in the Dark

Thus far, this Essay has focused on the malleability and rule-of-law problems associated with making equality determinations behind the screen of “history and tradition.” It is difficult to predict the outcomes of cases using the history-focused doctrine the Court says it is employing because the real work is happening elsewhere. The fact that this often outcome-determinative equality work happens out of sight enables the unequal treatment of rights and groups. Judges can be tougher on eighteenth- and nineteenth-century lawmakers when they want to countermand what those lawmakers did (say with respect to guns or religious schools) and easier on them when they want to preserve historical forms of lawmaking (say with respect to reproductive or LGBTQ+ rights). They can override or depart from the particular regulatory practices of those lawmakers in cases like *Rahimi*, in which they can no longer abide eighteenth- and nineteenth-century views about women, and overlook those views in cases like *Dobbs*, in which they are more comfortable with the regulatory practices at issue.

This Section focuses on a related but distinct problem with the Court's history-and-tradition jurisprudence. History-and-tradition cases do not occur in a vacuum. When the Court makes major (often unstated) determinations about equality in these cases, those determinations are not hermetically sealed off from the rest of the law. The Court's (stated or, mostly, unstated) reasoning about equality in history-and-tradition cases bleeds into and affects other areas of the law. This is particularly true in the context of the Court's substantive due process cases. Constitutional scholars have long recognized that substantive due process and equal protection are tightly interconnected—like a double helix.¹⁴⁵ In some

145. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004). For more on the interrelationship between due process and equal protection, see, for example, William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*,

circumstances, this synergy has led to an expansion of rights, as when the Court's substantive due process decisions in *Lawrence* and *Obergefell* fortified equality-based LGBTQ+ rights claims. When the Court contracts substantive due process rights, however, this synergy can lead to a contraction of equal protection. This Section examines the potential implications of *Dobbs*—and all of the stated and unstated equality judgments embedded in the *Dobbs* Court's history-and-tradition analysis—for sex-based equal protection law.

As the preceding Section showed, the *Dobbs* Court rejected historical accounts of the role of gender stereotyping in the restriction of abortion in the nineteenth century. But amicus briefs in the case raised a host of other equality concerns as well. Numerous briefs focused on the deleterious consequences for women and other people capable of pregnancy when states criminalize reproductive healthcare.¹⁴⁶ These briefs argued that states have many nonpunitive, noncoercive tools for nurturing life and encouraging people to continue their pregnancies. Lack of financial resources is among the most cited reasons people give for obtaining abortions.¹⁴⁷ States could address those concerns, and promote life and health, through various noncarceral approaches that respect the agency of pregnant people, including: instituting evidence-based sex education programs that help to reduce unplanned pregnancies, which are far more likely than planned pregnancies to result in abortion; making contraception widely available and mandating its coverage in health insurance plans; expanding Medicaid to ensure people receive essential pre- and post-natal care; providing pregnant people with nutrition and housing support and access to drug and alcohol treatment programs; guaranteeing high-quality childcare and paid parental leave; and passing laws that protect pregnant workers.¹⁴⁸

55 UCLA L. REV. 99 (2007); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); and Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

146. See, e.g., Brief of Abortion Care Network et al. as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (No. 19-1392); Brief of American College of Obstetricians and Gynecologists, et al. as Amici Curiae in Support of Respondents, *Dobbs*, 597 U.S. 215 (No. 19-1392); Brief of Equal Protection Constitutional Law Scholars, *supra* note 102; Brief of the International Federation of Gynecology and Obstetrics as Amici Curiae in Support of Respondents, *Dobbs*, 597 U.S. 215 (No. 19-1392); Brief of Reproductive Justice Scholars as Amici Curiae Supporting Respondents, *Dobbs*, 597 U.S. 215 (No. 19-1392).

147. M. Antonia Biggs, Heather Gould & Diana Greene Foster, *Understanding Why Women Seek Abortions in the US*, BMC WOMEN'S HEALTH, July 2013, at 1.

148. See Brief of Equal Protection Constitutional Law Scholars, *supra* note 102, at 22 ("Mississippi had many policy alternatives for protecting the health of women and families. But in considering the many options before it, the State has consistently rejected noncoercive opportunities

When states eschew such measures and opt instead to institute criminal bans that threaten the wellbeing of pregnant women and others, and deprive them of agency and authority over their own lives, this raises concerns about whether the state is treating women and people capable of pregnancy with equal regard. Briefs in *Dobbs* argued that there is special cause for concern from an equality standpoint because punitive approaches to abortion take their harshest toll on Black women, women of color, and poor women, who have always been targeted by, and suffered disproportionately as a result of, governmental efforts aimed at controlling reproduction.¹⁴⁹ Briefs argued that overturning *Roe* would exact a particularly terrible toll on these women.¹⁵⁰ But, numerous briefs observed, no pregnant person can escape the threat posed by criminal abortion laws, because abortions are required in all sorts of circumstances in which the fetus is compromised and the pregnant person's life and health are at risk.¹⁵¹

When states enacted criminal abortion laws in the second half of the nineteenth century, women were second-class citizens under the law. They were deprived of basic rights and viewed as inferior to men. They were often denied agency and autonomy and forced to conform to traditional sex and family roles. Lawmakers in this period regularly opined that motherhood was women's highest calling, and they restricted women's rights in various ways to ensure women pursued this calling. The *Dobbs* Court concluded that laws forcing women to continue their pregnancies were an exception to this general dynamic. But the Court did not—could not—dispute that, in the period in which abortion bans were originally enacted, women were legally relegated to second-class status.

to improve the health of mothers and infants, even declining federal monies available to support these ends.”); *id.* at 22-29 (describing the many noncoercive means states could use to protect the lives and health of women and families); *see also* Franklin & Siegel, *supra* note 21, at 32, 32-34 (describing some of “the less restrictive alternatives to criminalization states that purport to prioritize unborn life could adopt” but noting that “many of the states enacting criminal abortion bans are openly hostile to offering social supports for pregnant people that other states routinely provide”).

149. Brief of Reproductive Justice Scholars, *supra* note 146, at 15-16 (observing that as a result of long-standing oppression, Black women compose a massively disproportionate share of Mississippi's abortion patients, and that stripping these women of control over their reproductive lives would perpetuate their oppression and damage their wellbeing).
150. Brief of American College of Obstetricians and Gynecologists, *supra* note 146, at 7 (reporting that “patients of color, those with limited socioeconomic means, and those in rural communities would be most severely harmed should [abortion bans] be allowed to go into effect”).
151. *See, e.g.*, Brief of Abortion Care Network, *supra* note 146, at 33-34 (explaining that “[t]he consequences of cutting off abortion access are not limited to people who wish to terminate pregnancies . . . [they] impact[] every aspect of pregnancy care,” in part because “[w]hen you restrict abortion access, you end up with providers who aren't competent to provide that care in an emergency”).

This raises the question: Is it constitutionally permissible to revive a nineteenth-century regulatory tradition—a regulatory tradition that restricted women’s rights in a period in which the state routinely denied women rights—today, in the twenty-first century, when we have a very different understanding of women’s constitutional status? Constitutional law now requires the state to respect women’s equal citizenship; it bars the state from regulating in ways that reflect and reinforce traditional understandings of women’s sex and family roles. Can governments today reinstitute (and enact even harsher) criminal abortion laws, given all the legal development that has occurred with respect to women’s equality in the century and a half since those laws were passed?

The *Dobbs* Court claimed it was bound by history: Americans in the eighteenth and nineteenth centuries did not protect the right to abortion, so courts today cannot protect that right either. But courts are not actually bound in this way; they regularly override or depart from history and tradition when they decide that old regulatory traditions are inconsistent with modern conceptions of equality. That is what the Court did in *Bolling* and *Loving*, and *Lawrence* and *Obergefell*; it may soon do the same in *Rahimi*. The Court’s insistence in *Dobbs* that its hands are tied by history is flatly contradicted by the cases in which the Court decides it is not bound by the past. The *Dobbs* Court affirmatively decided to allow traditional abortion regulation to be revived today, despite what we know about the history of laws regulating pregnant women in this country and the deleterious effects of carceral approaches to abortion on women and pregnant people.

This is how history-and-tradition decisions, even when they purport to turn solely on historical analysis, may undermine contemporary understandings of equal protection. When the Court draws on modern notions of equality to block some regulatory traditions, but not others, it makes determinations not just about the shape of substantive due process, but also about the content and scope of equal protection law. In many of the cases cited in this Essay, the Court makes these determinations in the dark. The fact that judges make these determinations in the dark means they are not particularly constrained by equal protection precedents; they can follow or ignore those precedents as they see fit because the equality work in history-and-tradition cases takes place completely out of view. It is not hard to see how equal protection law could be silently undermined in this way. If judges choose not to draw on equality principles to depart from histories and traditions that conflict with modern equal protection law, they may erode that law without ever mentioning the word equality.

Somewhat unusually—and maybe because the equality argument was so pressing in this case—the Court did not remain entirely silent on the subject of equality in *Dobbs*. It reached out, in a few lines of dicta, to address the equality

question explicitly.¹⁵² The Court asserted in *Dobbs* that concerns about equality have no place in the context of abortion regulation; equal protection simply does not extend to this form of regulation.¹⁵³

The Court supported this pronouncement on the scope of equal protection law by citing a fifty-year-old case called *Geduldig v. Aiello*.¹⁵⁴ *Geduldig* held that a pregnancy classification was not a sex classification for the purposes of equal protection. This decision has not been formally overruled. But that is the best one can say about *Geduldig*. In concluding that pregnancy discrimination is not sex discrimination, *Geduldig* relied on the same sort of formalistic contortion of logic courts used earlier in the twentieth century to hold that antimiscegenation laws did not discriminate on the basis of race because they barred everyone from marrying across racial lines.¹⁵⁵ In *Geduldig*, the Court held that pregnancy discrimination was not sex discrimination because pregnancy was an “objectively identifiable physical condition” affecting only a subset of women—so there was no sex-based line being drawn.¹⁵⁶ This is not precisely the same logical contortion courts relied on to insulate antimiscegenation laws from equal protection scrutiny. What links these analyses is that they are completely denuded of any social context. When *Geduldig* reached the Court in the early 1970s, the Court had just recognized that antimiscegenation laws perpetuated racial subordination. But it could not yet recognize how the regulation of pregnant women might reenforce sex-based hierarchies and it could not yet conceive of applying constitutional equality protections across biological difference.

It is not hard to fathom why the Justices cordoned off the regulation of pregnancy from equal protection scrutiny the way they did in *Geduldig*. Five of the

152. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236-37 (2022).

153. *Id.* The Court suggested it would be possible to challenge an abortion restriction on equal protection grounds if one could show the restriction was motivated by animus against women in general. *Id.* It is telling that the only citation the Court offers in support of its suggestion that this is the standard for proving a pregnancy-related sex-discrimination claim under the Fourteenth Amendment is a thirty-year-old statutory case. *See id.* (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-74 (1993), a case about the purposes of private actors protesting at an abortion clinic that had nothing do with what qualifies as sex-based state action under equal protection). It is also worth noting the near impossibility of satisfying this standard. Given that the Court expressed incredulity at the suggestion that *nineteenth-century* lawmakers passing abortion bans might have been motivated by hostility to women, it's difficult to conceive of the Court finding hostility toward women in any modern abortion case. *Id.* at 254.

154. 417 U.S. 484 (1974). Much of the discussion in the following paragraphs about *Geduldig*, *Virginia*, and *Hibbs* is drawn from Franklin & Siegel, *supra* note 21, at 28-29.

155. *See Loving v. Virginia*, 388 U.S. 1, 8-10 (1967) (discussing and rejecting the “equal application theory” that courts previously deployed to insulate various forms of race discrimination against equal protection claims).

156. *Geduldig*, 417 U.S. at 496 n.20.

six Justices in the majority were born before women in the U.S. obtained the right to vote (the sixth, Justice William Rehnquist, was born just after, in 1924). These men “came of age in an era in which the exclusion of pregnant women and mothers from the public sphere was viewed as entirely natural, an outgrowth of biological difference and a benign reflection of the fact that women’s primary calling is to have children and care for their families.”¹⁵⁷ *Geduldig* predated the construction of modern sex-based equal protection law. It arrived on the Justices’ desks before the Court had even adopted a framework for analyzing sex-based state action.

Few areas of law have evolved more in the past half century than sex-based equal protection law. This evolution has turned *Geduldig* into a constitutional relic. Its burial began soon after it was decided. In 1978, Congress repudiated the Court’s efforts to import *Geduldig*’s reasoning into federal employment-discrimination law by enacting the Pregnancy Discrimination Act (PDA), which defines discrimination on the basis of pregnancy as discrimination on the basis of sex for purposes of Title VII of the 1964 Civil Rights Act.¹⁵⁸ Soon after the PDA’s enactment, the Court began issuing major rulings enforcing the law’s prohibitions on pregnancy discrimination.¹⁵⁹ Once the Court began enforcing the PDA, it stopped invoking *Geduldig* in equal protection cases. The Court has not issued a single majority opinion (aside from *Dobbs*) invoking *Geduldig* to interpret the Equal Protection Clause since it began enforcing the PDA in the late 1970s.

In more recent equal protection decisions, the Court has explicitly repudiated *Geduldig*’s reasoning. In 1996, in *United States v. Virginia*,¹⁶⁰ the Court explained that it had come to understand that women are entitled to be treated as men’s equals notwithstanding “[i]nherent differences”¹⁶¹ between the sexes. The Court explained that laws that classify on the basis of sex “may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ [and] to ‘advance full development of the talent and capacities of our Nation’s people.’”¹⁶² But, the Court warned,

157. Franklin & Siegel, *supra* note 21, at 29.

158. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

159. See, e.g., *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987); *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

160. 518 U.S. 515 (1996).

161. *Id.* at 533. For more on “inherent differences” in this context, see Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169.

162. 518 U.S. at 533 (citations omitted).

“such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”¹⁶³

The Court made clear that pregnancy is the main “inherent difference” involved in this analysis by citing a state law governing pregnancy (a maternity leave benefit, upheld under the PDA in *California Federal Savings & Loan Ass'n v. Guerra*¹⁶⁴) as a paradigmatic example of a sex classification that is constitutional because it advances women's equality.¹⁶⁵ The Court explained in this passage in *Virginia* that equal protection does not require the state to ignore the physical reality of pregnancy, but that laws regulating pregnancy must be designed to promote equal opportunity and may not perpetuate women's subordination. Eschewing *Geduldig's* formalism, the Court in *Virginia* reasons about laws regulating pregnancy in a way that takes account of social context, asking whether the regulation promotes equal opportunity or perpetuates the inferiority of women.

The Court echoed and expanded on these principles in 2003, in *Nevada Department of Human Resources v. Hibbs*.¹⁶⁶ The Court held in *Hibbs* that Congress could enforce the Equal Protection Clause by enacting the family leave provisions of the Family and Medical Leave Act to redress the stereotyping and exclusion of pregnant workers. Chief Justice Rehnquist held that Congress's provision of family leave was an appropriate means of enforcing equal protection because many states' maternity leave policies were “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.”¹⁶⁷ The *Hibbs* Court echoed Congress's observation that, “[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second,” and that “[t]his prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.”¹⁶⁸ This

^{163.} *Id.* at 534.

^{164.} 479 U.S. 272 (1987).

^{165.} 518 U.S. at 533. See Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 206 (2020) (“*Virginia* treats a California law regulating pregnancy as an example of a sex classification subject to heightened scrutiny and offers a historically informed antistatutory standard to determine whether laws regulating pregnancy violate equal protection. This historically informed standard invites the decisionmaker to attend to the understanding of social roles on which the legislation is premised, and can be applied to laws regulating pregnancy like the law at issue in *Cal Fed.*”).

^{166.} 538 U.S. 721 (2003).

^{167.} *Id.* at 731.

^{168.} *Id.* at 736 (quoting the *Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Lab.-Mgmt. Rels. & the Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab.*, 99th Cong., 2d Sess. 33, 100 (1986)).

reasoning—about the central role the regulation of pregnancy has played in the deprivation of equal protection for women—rejects the logical contortions the Court engaged in half a century ago to exclude laws regulating pregnancy from constitutional review. *Hibbs* emphasized not only that laws regulating pregnant women may constitute sex discrimination, but that redress of such discrimination is a core concern of sex-based equal protection law.

How does *Dobbs* grapple with these legal developments? It doesn't. In the passage in *Dobbs* addressing the applicability of equal protection doctrine to abortion regulation, Justice Alito steadfastly avoids any mention of *Virginia* or *Hibbs*. Instead, he reaches back to *Geduldig*—a case decided fifty years ago, before the development of modern sex-based equal protection law—and insists that that old case “squarely foreclose[s]”¹⁶⁹ the application of equality doctrine to abortion. It is an aggressive move, this erasure of the two most important constitutional sex discrimination cases of the last thirty years. One of the reasons it's aggressive is that erasing *Virginia* and *Hibbs* not only undermines the right at issue in *Dobbs*, it threatens to reverse decades of development in sex-based equal protection law.

The Court's discussion of equal protection in *Dobbs* is dicta—but there are consequences to this kind of revisionism. Already the Sixth Circuit has relied on this dicta in breaking with other federal courts and upholding two state bans on gender-affirming medical treatments for transgender minors.¹⁷⁰ Chief Judge Jeffrey Sutton repeatedly cites *Dobbs* and *Geduldig* in his majority opinion for the proposition that sex-based equal protection law “does not apply in the context of medical procedures unique to one sex or the other.”¹⁷¹ He very tellingly observes that the Supreme Court has articulated this approach to “real differences” twice: “One year ago [in *Dobbs*], and nearly fifty years ago [in *Geduldig*].”¹⁷² Like the Court in *Dobbs*, he omits any mention of the legal developments that occurred in the intervening half-century—at the Supreme Court and in his own Circuit. Sutton posits that laws banning transgender girls from taking estrogen and transgender boys from taking testosterone are akin to laws regulating pregnant women: all these laws regulate medical procedures unique to one sex and thus raise no equal protection concerns. These are precisely the kind of logic games, stripped of any social context, *Dobbs* encouraged when it revived *Geduldig*

169. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022).

170. See *L.W. ex rel. Williams v. Skrmetti*, No. 23-5600, 2023 WL 6321688 (6th Cir. Sept. 28, 2023); see also Cary Franklin, *The Arc of Anti-Stereotyping Doctrine*, in *RUTH BADER GINSBURG: ON BEING AMERICAN* (Shannon Gilreath & Suzanne Reynolds eds., forthcoming 2024) (discussing the case).

171. *Id.* at 16.

172. *Id.* at 14.

and disregarded critical developments in sex-based equal protection law over the last fifty years.

The central aim of this Essay is to show that there is a considerable amount of equality-related work occurring in the Court's new history-and-tradition cases. Sometimes, as in *Rahimi*, that work is buried within the Court's historical analysis; sometimes, as in *Dobbs*, it rises to the surface. Much of this Essay is devoted to showing that reasoning about equality—whether buried or on the surface—can and often does affect the outcome of history-and-tradition cases. The Court frames its analysis in terms of history, but in many cases, conceptions of equality are what actually determine whether a right gets protected or a regulation stands.

This final Section shows that this process is a two-way street. Judicial conceptions of equality influence the outcome of history-and-tradition cases. But the equality work that occurs in history-and-tradition cases can also boomerang back and influence equal protection law itself. As *Dobbs* illustrates, the Court need not issue any formally precedential statements about equality to work a change in equal protection law. Change can also occur through a kind of erosion, a subtle undermining of the foundation. When the Court next takes up an actual equal protection case—particularly if that case involves gender or sexuality—we may find the protections in these areas are not as robust as they once seemed.

CONCLUSION

There is a substantial (and still growing) literature that criticizes originalist and traditionalist methods of interpretation for insisting that the Constitution's meaning can be determined only by consulting the dominant views of the slave-owning, patriarchal society the United States used to be.¹⁷³ Racial minorities, immigrants, women, and many other people now viewed as equal members of American society were not equally represented at the time our Constitution was written and our eighteenth- and nineteenth-century regulatory traditions were constructed. These people did not have an equal say in shaping the “original public meaning” of our laws (and our methods for determining “original public meaning” are not good at picking up their voices). To locate the Constitution's meaning solely in the distant past is to perpetuate this exclusion. It is not value-

173. See, e.g., ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2002); Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 445 (2014); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 982 (2012); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); Reva B. Siegel, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906 (2023).

neutral to turn to a white supremacist, patriarchal society to determine the rights of people of color and women today.

This Essay adds another dimension to this critique by showing that, in fact, even the most traditionalist courts do not actually adhere to history and tradition with any degree of consistency. American society has changed too much in the centuries since the Constitution was drafted for that to be possible. The Constitution's framers and ratifiers engaged in too many practices and had too many views we now consider abhorrent for history-and-tradition doctrine to function in the way the Court suggests. Justice Kagan accused Zackey Rahimi's lawyer of running away from the implications of history-and-tradition doctrine.¹⁷⁴ But we are all like that lawyer. None of us can consistently abide the implications of this doctrine.

That is generally a cause for celebration – a significant marker of social progress. But it presents a substantial problem for history-and-tradition doctrine. Courts applying this doctrine need to figure out how to move with the times without admitting that they are doing so. The result is a lot of maneuvering in the dark – adjusting levels of generality and characterizing historical traditions in ways that silently incorporate (or fail to incorporate) current understandings of equality, while pretending to defer to our ancestors. This practice transfers an enormous amount of power from the people and their elected representatives to the courts. It enables judges to shape the law to suit their own conceptions of liberty and equality without having to provide reasons for their differential handling of historical traditions or to justify their differential treatment of various rights and groups.

Justice Scalia once criticized judicial practitioners of living constitutionalism for openly departing from history and tradition and explicitly stating their reasons for doing so. He claimed that the fact that “such usurpation is effected unabashedly, with ‘the judge’s cards . . . laid on the table,’ – makes it even worse.”¹⁷⁵ He argued that, “[i]n a vibrant democracy, usurpation should have to be accomplished in the dark.”¹⁷⁶ The ascendance of history-and-tradition doctrine has enabled such usurpation to be accomplished in the dark. But it is far from clear that this is a positive indicator of the health of our democracy.

McDonald/Wright Chair of Law, UCLA School of Law. Thank you to Joey Fishkin and Reva Siegel for their extremely insightful comments on earlier drafts of this

174. Transcript of Oral Argument, *supra* note 32, at 88–89; *id.* at 89 (“I’m asking you to clarify your argument [in favor of strict adherence to history and tradition] because you seem to be running away from it because you can’t stand what the consequences of it are.”).

175. *McDonald v. City of Chicago*, 561 U.S. 742, 805 (Scalia, J., concurring).

176. *Id.*

HISTORY AND TRADITION'S EQUALITY PROBLEM

Essay. Thanks to Kalina Kasmierczak for outstanding research assistance. And a very big thank you to the editors of the Yale Law Journal, especially Alex Johnson, for their editorial assistance and for bringing this Collection into being.