THE LEVELS-OF-GENERALITY GAME: "HISTORY AND TRADITION" IN THE ROBERTS COURT

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47 HARV. J.L. & PUB. POL'Y (forthcoming 2025)

ABSTRACT

This Article argues that what explains the turn to the past in the history-and-tradition decisions of the Roberts Court is not a method of interpretation, but instead a justification for the Court's turn to the past. In Dobbs v. Jackson Women's Health Organization *and* New York State Rifle & Pistol Ass'n v. Bruen*, the conservative Justices claim that interpreting the Constitution through history and tradition—when described in granular factual detail—best constrains judicial discretion by tethering law to objective criteria separate from the interpreter's policy preferences. Justice Scalia long ago advanced this claim, and began a decades-long debate over "levels of generality" when he urged judges "to adopt the most specific tradition as the point of reference."*

The Article contrasts this belief—that tying constitutional interpretation to history can constrain the expression of judicial values—with an alternative account. An interpreter's appeal to facts about the nation's past in constitutional argument often expresses values—forms of argument I have called "constitutional memory" claims. What appear in constitutional argument as positive, descriptive claims about the past are often normative claims about the Constitution's meaning. In this Article, I show how my account of constitutional memory identifies the expressive role of conservative historicism, counters the judicial-constraint justification, and offers new perspectives on the levels-of-generality claims associated with it.

The Article opens by examining puzzles of method and justification presented by Dobbs *and* Bruen *during the 2021 Term. It concludes with a late-added section that samples the Justices debating the Article's judicial-constraint and levels-of-generality themes in cases of the 2023 Term—in particular, in the Second Amendment case of* United States v. Rahimi. *The Article's account of* Dobbs*,* Bruen*, and* Rahimi *demonstrates that we are all living constitutionalists now—but, crucially, not all living constitutionalism is the same. A conclusion identifies reasons why the Justices who present appeal to the past as claims of judicial constraint may engage in anti-democratic forms of living constitutionalism.*

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INTRODUCTION

Appeal to history and tradition has escalated in the Roberts Court. Why? And why does the Roberts Court appeal to history and tradition in exactly those cases in which it is *changing* the law?

This Article argues that what explains the turn to the past in the history-and-tradition decisions of the Roberts Court is not a *method* of interpretation, but instead a *justification* for the Court's turn to the past.[1] In *Dobbs v. Jackson Women's Health Organization*[2] and *New York State Rifle & Pistol Ass'n v. Bruen*,[3] the conservative Justices claim that interpreting the Constitution through history and tradition—when described in granular factual detail—best constrains judicial discretion by tethering law to objective criteria separate from the interpreter's policy preferences.[4] Justice Scalia long ago advanced this claim,[5] and began a decades-long debate over "levels of generality" when he urged judges "to adopt the most specific tradition as the point of reference."[6] He contended that appeals to the past separate law and politics more authoritatively than forms of doctrine that reason from principle or values, which he pejoratively dismissed as "living constitutionalism."[7]

1. *See infra* Parts II & III.

2. 142 S. Ct. 2228 (2022) (overturning the abortion right).

3. 142 S. Ct. 2111 (2022) (striking down licensing restrictions under the Second Amendment).

4. *See infra* Part III.

5. *See infra* text accompanying notes 67–68.

6. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989); *infra* Part III.

7. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 803–05 (2010) (Scalia, J., concurring) (arguing that "the historically focused method" is the "best means available" to "restrain[] aristocratic judicial Constitution-writing"); *id.* at 805 (contending that living constitutionalism "deprives the people of th[e] power [to adopt or reject rights], since whatever the Constitution

The Article contrasts this belief—that tying constitutional interpretation to facts about the past can constrain the expression of judicial values—with an alternative account. An appeal to facts about the past in constitutional argument can directly or indirectly express values—forms of argument I have called "constitutional memory" claims.[8] In this Article, I show how my account of constitutional memory undermines the judicial-constraint justification for conservative historicism, as well as the levels-of-generality claims associated with it. Once we understand the logic of constitutional memory, we can appreciate how the Court's turn to the past in cases like *Dobbs* or *Bruen* is a mode of expressing value, and not—as the Justices claim—constraining value. Whatever Justice Scalia might have thought when he initially advanced the claim that tying doctrine to "the most specific tradition" would constrain judicial discretion, after decades of debate Justice Scalia came to associate levels of generality with outcomes in culture-war conflict, as he likely did from the beginning.[9]

Drawing on the work of liberal and conservative constitutional law scholars, the Article probes judicial-constraint claims in history-and-tradition cases in several steps. First, it shows that scholars have difficulty identifying a content-independent interpretive method that explains the Court's turn to the past in *Dobbs* or *Bruen*.[10] Second, it shows that these decisions do offer a justification for turning to the past: they claim that tethering doctrine to facts about the nation's past constrains judicial discretion, a first-generation justification for originalism that prominent academic originalists question today.[11] Third, to probe the discretion the turn to the past provides judges, the Article examines the judicial-constraint claim expressed in the decades-long debate over "levels of generality."[12] Changing the level of generality at which judges characterize the past can be outcome-determinative and is one of many forms of discretion judges have in constructing the past to which they defer. These claims on the past *conceal* more than *constrain* judges' value judgments.[13]

In sum, reasoning from the past in interpreting the Constitution does not insulate judges from making value-based judgments. What appear in constitutional argument as positive, descriptive claims about the past are often

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and laws may say, the list of protected rights will be whatever courts wish it to be"); *infra* text accompanying notes 128–131 (quoting Justice Scalia).

8. *See infra* note 20 (identifying some of the author's recent scholarship on constitutional memory); *infra* Part I.

9. *See infra* text accompanying note 131 (quoting Justice Scalia on the historical method and "the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty").

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part V.

13. *See infra* Parts IV & V.

normative claims about the Constitution's meaning—that is, constitutional memory claims. The Article opens by illustrating this logic at work in *Dobbs* and *Bruen* during the 2021 Term. It concludes with a late-added section that samples the Justices debating the Article's themes in cases of the 2023 Term—in particular, in the Second Amendment case of *United States v. Rahimi*.[14]

In *Rahimi*, eight members of the Court upheld 18 U.S.C. § 922(g)(8), a federal law disarming persons subject to domestic-violence restraining orders, under the Second Amendment. The Fifth Circuit invalidated the law as inconsistent with tradition under *Bruen*; but the Supreme Court reversed, avoiding the glare of publicity attending that result ("repugnant"[15]) by moving up a level of generality and upholding the federal law as "consistent with the *principles* that underpin our regulatory tradition."[16] The majority then splintered into concurring opinions, with the conservatives resisting the turn to principle they had just sanctioned.[17] The case provides a window on the Justices discussing levels of generality and revising elements of history-and-tradition doctrine with an eye to preserving their discretion to distinguish the *Rahimi* case from future cases on their Second Amendment docket.

In concluding, I reassess the conservatives' claim of methodological superiority. This Article demonstrates that *we are all living constitutionalists now*[18]—but, crucially, not all living constitutionalism is the same. I identify several ways in which the Justices who present appeal to the past as claims of judicial constraint engage in *anti-democratic* forms of living constitutionalism. To mention only one here: History-and-tradition decisions in which judges deny they are engaged in normative reasoning and tie changes in the law to facts about the past, claiming constraint as they reason from value, lack transparency. Normative reasoning in this form can mislead the public and inhibit democratic oversight.[19] In this critically important sense and in others, the history-and-tradition decisions of the Roberts Court are *less* constrained—and pose a greater threat to democracy—than the cases the Court is attacking.

14. 144 S. Ct. 1889 (2024); *see infra* Parts I & VI.

15. Paul Waldman, Opinion, *How the Supreme Court's Next Gun Case Could Deal a Blow to Originalism*, WASH. POST (Oct. 4, 2023, 6:00 A.M. EDT), https://www.washingtonpost.com/opinions/2023/10/04/rahimi-supreme-court-guns-domestic-violence.

16. *Rahimi*, 144 S. Ct. at 1898 (emphasis added).

17. *See infra* text accompanying notes 147–148.

18. *See infra* note 169 and accompanying text.

19. *See infra* Part VII.

I. CONSTITUTIONAL MEMORY

In a series of articles that began before *Dobbs* and *Bruen*, I have been writing about claims on the past in constitutional argument as *constitutional memory* claims.[20]

"Constitutional memory" focuses attention on the special roles that claims about the past play in constitutional argument and how they may differ from claims of historical fact. Americans arguing about the Constitution—on the left and on the right, inside and outside of courts—often make claims on the past *as guides to the future*. These claims on the past in constitutional argument are value-laden: they express views about who we are or how we should live together—ultimately, about what the Constitution requires. In interpreting the Constitution, judges "tell stories about the nation's past experience to clarify the meaning of the nation's commitments, to guide practical reason, and to help express the nation's identity and values."[21] These claims both reflect and produce constitutional memory.

To consider a recent prominent example, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*),[22] the Court justified striking down race-conscious admissions policies in an opinion that focused on the Court's decision to repudiate school segregation in *Brown v. Board of Education*.[23] The majority recalled that "[f]or almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* the separate but equal regime that would come to deface much of America."[24] But in *Brown*, the Court "overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government."[25] This story about the past, the Court argued, led ineluctably to

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20. For a sampling of these works, see Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. PUB. POL'Y 19 (2022) [hereinafter Siegel, *Politics*]; Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1175 (2023) [hereinafter Siegel, *Memory Games*]; Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 920 (2023) [hereinafter, Siegel, *How "History and Tradition" Perpetuates Inequality*]; and 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, 127–46 (2023) [hereinafter Siegel, *The History of History and Tradition*]. *See also* Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2025) [hereinafter Siegel & Ziegler, *Comstockery*] (showing how popular mobilization against the Comstock Act helped forge modern understandings of free speech and sexual freedom law, and recovering from these lost constitutional memories a different understanding of the nation's history and traditions).

21. Siegel, *Politics*, *supra* note 20, at 21 (emphasis added).

22. 143 S. Ct. 2141 (2023).

23. *Id.* at 2159–63; Brown v. Bd. of Educ., 347 U.S. 487 (1954).

24. *SFFA*, 143 S. Ct. at 2159 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

25. *Id.* at 2160 (emphasis added) (citing *Brown*, 347 U.S. at 494–95).

its decision in *SFFA*. "The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education 'must be made available to all on equal terms,'"[26] and so fidelity to *Brown* required invalidating race-conscious admissions at Harvard and UNC.[27] The dissenting Justices challenged the majority's constitutional memory claim. They disagreed that *Brown* rested on the principle of colorblindness. Just as importantly, they insisted that the majority's claim about the past had *selectively* recounted—and whitewashed—American history, minimizing all the ways that race discrimination persisted after *Brown* and entrenched race inequality that, the dissenters argued, needed race-conscious redress.[28] Wherever one comes out in this argument, *SFFA* illustrates how debates over questions of constitutional law can take the form of competing narratives about the nation's past. Parties to these debates point to facts about the past to justify acting one way rather than another.

Claims on the past in constitutional argument, *whether true, false, or selective*, are often value-laden, normative claims: These appeals to the community's memory of the past help guide its path into the future and *legitimate the exercise* of government authority. The *SFFA* majority tells one story, appealing to America's decision to reject racial segregation in *Brown* to justify its decision to invalidate race-conscious admissions. The dissent counters, emphasizing different facts about the past to justify its claim that race-conscious admissions are just and constitutional.

As these brief observations suggest, and I have elsewhere demonstrated, appeals to the past are central to constitutional arguments both on the left and the right.[29] In what follows, I analyze some of the distinctive ways that appeals to the past—to constitutional memory—play a central part in originalism, and in claims about the nation's "history and tradition" in recent cases of the Roberts Court.

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26. *Id.* (quoting *Brown*, 347 U.S. at 493).

27. *Id.* at 2175.

28. *Id.* at 2225–26 (Sotomayor, J., dissenting). For an account showing how claims about *Brown*'s meaning have diverged, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

29. Just as conservatives and progressives advance competing constitutional memory claims in the clash over affirmative action, they make competing memory claims in the conflict over abortion. *See, e.g.*, Reva Siegel, Dobbs*, the Politics of Constitutional Memory, and the Future of Reproductive Justice*, BALKINIZATION (Jan. 22, 2023, 9:30 AM), https://balkin.blogspot.com/2023/01/dobbs-politics-of-constitutional-memory.html [https://perma.cc/SG9G-Y6TF] ("Constitutional memory is not only an instrument for justifying repression. It can also enable critique and resistance. And much of the history we have examined can be mobilized to anti-subordination ends."). For a wide-ranging account of the claims on the past in constitutional debates over abortion, see Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 171 (2024).

II. APPEALS TO "HISTORY AND TRADITION" IN THE ROBERTS COURT

As we have seen, claims on constitutional memory play an important role in legitimating the exercise of government power. On the Supreme Court that President Trump helped fashion, an appeal to history and tradition justifies *rupture—dramatic changes*—in doctrine. In *Dobbs*, the Court overturned a half-century of case law protecting the abortion right because the Court declared that right inconsistent with history and tradition—with laws criminalizing abortion in the century before *Roe*.[30] In *Bruen*, the Court rejected a decade of cases that used familiar doctrinal tests to protect the right to self-defense and instead directed judges to determine whether a public safety law burdening the right "is consistent with the Nation's historical tradition of firearm regulation"[31]—an inquiry requiring research into laws at the Founding and reasoning by analogy.

How is it that an appeal to history and tradition justifies radical change in the law? In the two years since the upheavals in the law produced by *Bruen* and *Dobbs*, law professors have been asking: Do the Roberts Court's appeals to history and tradition to change the law rest on any identifiable interpretive method (including, potentially, originalism)? The answer seems to be no, at least no method upon which scholars can agree.

Consider the Court's decision reversing the abortion right. Is the Court's decision to overturn *Roe* and fifty years of case law in *Dobbs* an act of fidelity to the original meaning of the Fourteenth Amendment? Does *Dobbs* ever ask how the Americans who ratified the Fourteenth Amendment in 1868 understood the meaning of "liberty" guaranteed by its Due Process Clause? No, and yet the *Dobbs* Court *does* ask how many states banned abortion in 1868, when the Fourteenth Amendment was ratified, and emphasizes that a majority of states did: 28 of 37.[32] We *might* surmise that a count of states banning abortion in 1868 indicates how Americans at the time of the Fourteenth Amendment's ratification expected the Amendment to apply, *but the Court offers*

30. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252–54 (2022) (overturning *Roe* on the grounds that the right it protected is not "deeply rooted in the Nation's history and traditions"); *id.* at 2276–77 (rejecting Americans' reliance interest in a half-century of Supreme Court cases recognizing a woman's right to decide whether to continue a pregnancy free of government coercion).

31. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022); *see also id.* at 2127 (discussing the "historical tradition that delimits the outer bounds of the right to keep and bear arms"). For discussion of the analogical method, see Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795 (2023).

32. *Dobbs*, 142 S. Ct. at 2252–53. *Dobbs*'s critics contest this state count. Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65 (2023). The majority itself acknowledges that there may be some ambiguity in the count. *See, e.g., Dobbs*, 142 S. Ct. at 2253 n.34; *id.* at 2259–60.

no evidence that nineteenth-century Americans in fact drew any connection between then-existing abortion laws and the Constitution.[33] Another point against the originalist reading: *Dobbs* justifies overturning *Roe* by emphasizing the laws banning abortion in the century *after* the Fourteenth Amendment's ratification and before the Court's 1973 decision in *Roe*—a point that Professor Sherif Girgis analyzes in an article called *Living Traditionalism*.[34] If *Dobbs* is an account of the Fourteenth Amendment's original meaning, why does the Court put great weight on lawmaking in the century *after* the Amendment's ratification? What does a century of *post*-ratification practice prove?

In fact, in *Dobbs* the Court makes no claim to follow the original meaning of the due process liberty guarantee or of the privileges or immunities clause, but instead invokes *Washington v. Glucksberg*[35] to justify overruling *Roe*.[36] Decided in 1997, *Glucksberg* held that physician-assisted suicide was not protected by the due process liberty guarantee because the practice was not "objectively, 'deeply rooted in this Nation's history and tradition.'"[37] Though the Court in *Glucksberg* invoked "history and tradition," it made no claim to express the Fourteenth Amendment's original understanding—that is, the *Glucksberg* majority did not offer state law at "the time the Fourteenth Amendment was ratified" as any indication of the Constitution's original meaning.[38] Worse yet, *Glucksberg recognized the abortion right as part of the history and*

33. Clarke Forsythe, a long-time *opponent* of *Roe*, observes that "no data—no legislative history, no committee reports, no speeches, no newspaper articles, no memoranda, no personal papers, no letters—have ever been cited to suggest that the sponsors mentioned abortion or the unborn child at any time during the discussion of the 14th Amendment." Clarke D. Forsythe, *The 14th Amendment's Personhood Mistake*, NAT'L REV. (Dec. 21, 2023, 3:43 PM), https://www.nationalreview.com/magazine/2024/02/the-14th-amendments-personhood-myth [https://perma.cc/XY3L-768X].

34. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1485–86 (2023); *id.* at 1513 (pointing out that the *Dobbs* majority rebutted the dissent's charge that it was imperiling other rights by emphasizing that "its 'review of the Nation's tradition extends . . . for more than a century after 1868'" (quoting *Dobbs*, 142 S. Ct. at 2260)).

35. 521 U.S. 702 (1997).

36. *Dobbs*, 142 S. Ct. at 2242.

37. *Glucksberg*, 521 U.S. at 720–21 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

38. *Id.* at 705–07.

traditions of the American people.[39] *Dobbs* never mentions this inconvenient fact as it claims that *Glucksberg* requires *Roe*'s overruling.[40]

The *Dobbs* Court insisted its decision did not cast doubt on other substantive due process cases, emphasizing that these cases did not concern "abortion," "fetal life," or "'potential life.'"[41] Distinguishing the other cases on these grounds suggested *Dobbs*'s fundamental concern was not historical, but instead moral.

If this sounds confusing, it is because it *is* confusing. Prominent originalists have declared that *Dobbs* is not originalist in method. Professor Lawrence Solum repeatedly called it "living constitutionalism."[42]

Scholars are somewhat more willing to call the Court's Second Amendment decision in *Bruen* originalist in method, but with critical qualifications. *Bruen* requires the government to show that a firearms restriction "is consistent with this Nation's historical tradition of firearm regulation,"[43] that is, to demonstrate by a "historical-analogical method [that]

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39. *Id.* at 720, 726–28; *see* Siegel, *History of History and Tradition*, *supra* note 20, at 133 n.157 ("Part II of the *Glucksberg* opinion, which sets forth the Court's reasoning about the liberty guarantee beyond the case of assisted suicide, begins by listing many rights the Court has recognized in substantive due process cases. The majority . . . specifically cites *Casey*'s abortion right as within America's history and traditions and thus included in 'the "liberty" specially protected' by the Due Process Clause." (quoting *Glucksberg*, 521 U.S. at 720)). Members of the *Glucksberg* majority insisted on language designed to protect prior substantive due process precedent, including *Casey*. *See* Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization: A History-and-Tradition Right to Healthcare Access After* Dobbs *and the 2023 Term*, 111 VA. L. REV. (forthcoming 2025) (manuscript at 39 & n.250), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881886 (discussing significance of *Glucksberg*'s drafting history); Marc Spindelman, Washington v. Glucksberg*'s Original Meaning*, 72 CLEVELAND ST. L. REV. 981, 1018-19 & n.191 (2024) (describing O'Connor's efforts to protect *Casey* in the drafting of *Glucksberg*). Justice O'Connor led the way in protecting *Casey* in the drafting of *Glucksberg*, as she was replaying a conflict with Chief Justice Rehnquist and Justice Scalia that began almost a decade earlier in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). *See* Joan Biskupic, *The Inside Story of How Sandra Day O'Connor Rebuffed Pressure from Scalia and Others to Overturn* Roe v. Wade, CNN POLS. (Sept. 13, 2024, 11:51 AM EDT), https://www.cnn.com/2024/09/13/politics/abortion-supreme-court-oconnor-scalia-rehnquist/index.html.

40. *Dobbs*, 142 S. Ct. at 2242.

41. *Id.* at 2280 (asserting that "we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion'") (citations omitted); *see id.* at 2261 ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. . . . The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect.").

42. Siegel, *Memory Games*, *supra* note 20, at 1141; Lawrence Solum (@lsolum), TWITTER (May 5, 2022, 5:33 AM), https://twitter.com/lsolum/status/1522162603291643904 [https://perma.cc/92YZ-CUT4] ("Alito's opinion is straight from Scalia's playbook; it is living constitutionalism in its constitutional pluralist flavor from top to bottom."). In this volume, Professor Stephen Sachs argues that *Dobbs* applies *Glucksberg* as an original-law originalist might. Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. & PUB. POL'Y (forthcoming 2024).

43. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

modern [gun] restrictions are 'relevantly similar' to historical forebears."[44] Professors Randy Barnett and Lawrence Solum initially called *Bruen*'s historical-analogue test "nonoriginalist."[45] A published version of their article is more circumspect, asserting that the original meaning of the Second Amendment is *"underdetermina[te]"* and, therefore, that historical analogues are judicial constructions—judge-made standards that give the original public meaning of the Second Amendment determinate meaning in particular cases.[46]

But other conservatives dispute the claim that *Bruen* is an example of original-public-meaning originalism.[47] Professor Nelson Lund, an originalist, scathingly points out that the Supreme Court doesn't even pretend to use *Bruen*'s just-announced historical analogue test when, after striking down discretionary "may-issue" gun licensing, *Bruen* affirms that less discretionary "shall-issue" licensing of guns—common in many states—is constitutional.[48] Professor Lund observes "the Court does not provide so much as a shred of evidence that any kind of licensing requirements had ever been imposed on the general population before the 20th century," emphasizing that "the first shall-issue statute was apparently not enacted *until 1961*, whereas discretionary may-issue statutes were enacted *decades earlier*."[49] Lund asks: "Under the Court's announced methodology, how in the world could only the later, rather than the earlier, of two very late 'traditions' reflect the original meaning of the Second Amendment? If there is any plausible answer to that question, it won't be found in the *Bruen* opinion."[50] Justice Breyer's dissent spotlights this

44. Blocher & Siegel, *supra* note 31, at 1798 (quoting *Bruen*, 142 S. Ct. at 2132).

45. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition* (unpublished manuscript at 23) (Jan. 26, 2023 version) (on file with author) ("*Bruen* involves both originalist and nonoriginalist elements. The core holding of *Bruen* rests on an originalist foundation, but the historical analogue test is an implementing rule that is not justified by originalist reasoning.").

46. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 448 (2023) ("A direct appeal to history or tradition could also provide a method for constitutional construction in cases of underdeterminacy. For example, in *Bruen*, Justice Clarence Thomas's opinion for the majority used a historical analogue test to determine the validity of contemporary gun control regulations.").

47. Professors Will Baude and Robert Leider contend that the decision is instead an expression of original-law originalism. *See* William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 2–3, 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618350 [https://perma.cc/2G75-QP4J].

48. *See* Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 290–300 (2022) (observing that "it's doubtful that the test announced in *Bruen* will prove workable," and a "straightforward approach would have been more creditable, and more workable in future cases, than *Bruen*'s effort to manufacture a historical tradition of gun-free zones out of virtually no historical precedents").

49. *Id.* (emphasis added).

50. *Id.* at 291–92 (emphases added).

discrepancy between *Bruen*'s claim to tie law to the nation's historical tradition and its holding.[51]

Critics savaged the *Bruen* Court's frank declaration in footnote 6 that by "historical tradition" the Court does not actually contemplate an inquiry into history as historians understand it. In *Bruen*, the majority brushed away the dissenting justices' objections that judges lack the skills to implement the sweeping historical survey that the majority has declared will replace means-ends scrutiny. With remarkable frankness, the majority explained *that the Court does not actually expect judges to do history as historians do history. In making claims about the past, judges will instead do law*: "[I]n our adversarial system of adjudication, we follow the principle of party presentation. Courts are thus entitled to decide a case based on the historical record compiled by the parties."[52] Differently put, the Court reasons from constitutional memory in deciding Second Amendment cases.

A panel of originalist scholars at a recent Federalist Society meeting convened to debate the question "How Originalist is the Supreme Court?"[53] There, Professor Joel Alicea invoked the explanation that Professor Randy Barnett has provided for shifts in the Court's doctrine.[54] Barnett suggests that the Justices might experience themselves as bound (either by their roles or by party presentation) to follow *stare decisis* and yet nevertheless pulled by the "gravitational force" of what they imagine the correct originalist outcome

51. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2172 (2022) (Breyer, J., dissenting).

52. *Id.* at 2131 n.6 (majority opinion) (citation and internal quotation marks omitted); *see also* Debra Cassens Weiss, *In 'Scorching' Opinion, Federal Judge Considers Appointing Historian to Help Him in Gun Case*, ABA J. (Nov. 2, 2022, 10:15 AM), https://www.abajournal.com/news/article/in-scorching-opinion-federal-judge-considers-appointing-historian-to-help-him-in-gun-case [https://perma.cc/J4Q4-23WS].

53. How Originalist is the Supreme Court?, Panel at The Federalist Society National Lawyers Convention (Nov. 11, 2023), https://www.youtube.com/watch?v=e7bw1QjWWEM&t=1580s [https://perma.cc/599D-FJK] (featuring: Prof. J. Joel Alicea, Co-Director, Project on Constitutional Originalism and the Catholic Intellectual Tradition, and Assistant Professor of Law, Columbus School of Law, The Catholic University of America; Prof. Randy E. Barnett, Patrick Hotung Professor of Constitutional Law, Georgetown University Law Center, and Founding Director, Georgetown Center for the Constitution; Prof. Richard H. Fallon, Jr., Story Professor of Law, Harvard Law School; Prof. Stephen E. Sachs, Antonin Scalia Professor of Law, Harvard Law School; and Hon. Neomi Rao, U.S. Court of Appeals, District of Columbia Circuit as moderator).

54. *Id.* at 21:01 (arguing that evaluating "how originalist is the Supreme Court" by "just tak[ing] a look at all the Constitutional cases in [a particular] term and figur[ing] out many of them use originalist methods to get to originalist outcomes" is "actually misguided" despite its "intuitive appeal" "because it overlooks the legitimate role that the party presentation principle and *stare decisis* could play for an originalist Supreme Court").

would be, and so change doctrine partly but without completely embracing original-public-meaning originalism.[55]

At this point we can ask: Without any public (much less adversarial) engagement with the historical record, how are judges to "know" what the "correct" "originalist" outcome is in a case that has been briefed under prevailing doctrine, and why might judges feel the pull of an unargued claim so powerfully that it leads them to act in tension with—if not in outright conflict with—their sworn role-obligations as federal officials?

On this account of originalism's "gravitational force," originalism is *not* a value-neutral, content-independent method. Instead, in these circumstances, originalism is a goal-oriented political practice,[56] a way of achieving movement-valued ends.[57] In fact, Professor Joel Alicea has reasoned this way about *Dobbs*: "The goal of overruling *Roe* and *Casey* bound the conservative political movement to the conservative legal movement, and originalism was their common constitutional theory."[58] Alicea is frank that those advocating originalism have goals: Before *Dobbs*, Alicea explained that many conservatives promoted originalism based on what he terms "instrumentalist view[s]," embracing the method as a means to "achieve various ends."[59] On this reading, *Dobbs* and *Bruen* are the result of the gravitational force of originalism understood as the interpretive practice of goal-oriented, role-constrained, movement-identified judges.[60] *Cases targeted for overturning emerge from movement-party coalitions that appoint judges to the bench*.[61]

In short, scholars on the left and on the right are more confident in characterizing *Dobbs* or *Bruen* as the work of Justices who identify as

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55. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013); *see also* J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/797Y-L6KU].

56. *See* Siegel, *Memory Games*, *supra* note 20, at 1138–48 (explaining originalism as a goal-oriented political practice).

57. *See id.* at 1141–44.

58. Alicea, *An Originalist Victory*, *supra* note 55.

59. J. Joel Alicea, Dobbs *and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement [https://perma.cc/LKA2-3RCM].

60. *See* Siegel, *Memory Games*, *supra* note 20, at 1138–61; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 562–68 (2006).

61. For history demonstrating the movement-party roots of *Dobbs*, see Siegel, *Memory Games*, *supra* note 20. For history detailing the movement-party roots of the Court's Second Amendment jurisprudence, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008). For a discussion of the movement roots of the statutes at issue in *Bruen*, see *NRA Achieves Historical Milestone as 25 States Recognize Constitutional Carry*, NRA-ILA INST. LEG. ACTION (Apr. 1, 2022), https://www.nraila.org/articles/20220401/nra-achieves-historical-milestone-as-25-states-recognize-constitutional-carry [https://perma.cc/DG7S-5SLF].

originalists—as a matter of creed or network—than in agreeing that there is an interpretive method that explains the decisions.

III. CONSERVATIVE HISTORICISM, JUDICIAL CONSTRAINT, AND THE LAW-POLITICS DISTINCTION

In what follows, I argue that what explains the turn to history in these cases is not as an identifiable *method* that directs interpreters how to decide contested constitutional questions but instead a mode of *justification*. Both *Dobbs* and *Bruen* claim that fidelity to the nation's history and tradition in interpreting the Constitution will constrain judicial discretion as traditional forms of doctrine or openly value-based judgment cannot.

In *Dobbs* and *Bruen* the Justices claim that a turn to history constrains judicial discretion by tethering law to "objective" and impersonal criteria that are separate from the interpreter's values and "policy preferences."[62] Quoting *Glucksberg*, *Dobbs* cautioned against judges allowing "the liberty protected by the Due Process Clause [to] be subtly transformed into the policy preferences of the Members of this Court."[63] "[W]hen 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* . . . ."[64] In *Bruen*, the Court urged that historically informed interpretation was more faithful to the Constitution: "*[R]eliance on history to inform the meaning of constitutional text . . . is . . . more legitimate, and more administrable*, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field."[65]

This claim about the turn to the past—that it is a domain of objective facts that offer impersonal constraints on judging—supported originalism's early claims that it could reign in the living constitutionalism of the Warren

62. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022).

63. *Id.* at 2247–48 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

64. *Id.* (second alteration in original) (citations omitted) (first quoting Moore v. City of East Cleveland, 431 U. S. 494, 503 (1977) (plurality opinion); and then citing Lochner v. New York, 198 U.S. 45 (1905)).

65. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (second alteration in original) (emphasis added) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010)); *id.* at 2131 (arguing that judges applying "'intermediate scrutiny' often defer to the determinations of legislatures" and "[w]hile that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here"); *see also McDonald*, 561 U.S. at 804 (2010) (Scalia, J., concurring) (arguing that judges looking to history "is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor").

Court.[66] In *Originalism: The Lesser Evil*,[67] Scalia warned that the "the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law."[68] For this reason, he observed, an interpretive approach requiring judgments about the Constitution's "fundamental values" risks "judicial personalization of the law"; by contrast, "[o]riginalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[69] This claim that originalism imposes judicial constraints was fundamental to the attack on the Warren and Burger Courts.[70]

Judicial constraint may still be the most politically popular justification for originalism—on the bench and talk radio.[71] But today academic originalists no longer describe their method as promising such determinate answers. The

66. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013) ("The first wave of the modern originalist literature came in response to the constitutional decisions of the Warren Court and early Burger Court . . . . The Supreme Court justices were seen as unduly activist—too willing to exercise the power of judicial review and nullify state and federal policies. Originalism was seen by many to be a solution to that problem.").

67. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

68. *Id.* at 863.

69. *Id.* at 863, 864.

70. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) ("The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provision and its various amendments."); Whittington, *Originalism: A Critical Introduction*, *supra* note 66, at 391 ("Advocates of originalism during the Reagan era were almost uniformly also advocates of judicial restraint, and the two commitments were often conflated in both scholarly and popular discourse." (footnote omitted)); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 608 (2004) [hereinafter Whittington, *New Originalism*] (discussing early originalists' focus on judicial constraint); *see also* Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (arguing judicial constraint was a key justification of first-generation originalism); *id.* at 717 (observing that "the Old Originalism was characterized by its own proponents as a theory that could constrain judges and preclude them from treading their own policy preferences—most importantly, their own preferred unenumerated rights—into the Constitution.").

71. In 2005 and then again in a rebroadcast in 2021, Rush Limbaugh defined "activist judges" as those "who take their personal policy preferences to the bench, and then they decide cases on the basis of those personal policy preferences and they call that 'law.'" And he contrasted the "originalist" interpreter: "You go back; you look at the original intent. You can find it. It's there. Federalist Papers, numerous discussions, the document itself. . . . So we're having to rewrite the Constitution because we've got a bunch of judges who are ignoring it, plain and simple. That's the definition of an activist judge . . ." *Arrogant Losers Act Like Winners*, RUSH LIMBAUGH SHOW (July 12, 2005), https://www.rushlimbaugh.com/daily/2005/07/12/arrogant_losers_act_like_winners [https://perma.cc/Z284-DAKC]; Premiere Networks, *Rush Tips Us Off to This Tactic: Leftists Intimidate the Supreme Court*, THE RUSH LIMBAUGH SHOW, https://knrs.iheart.com/featured/rush-limbaugh/content/2021-04-19-pn-rush-limbaugh-rush-tips-us-off-to-this-tactic-leftists-intimidate-the-supreme-court.

judicial-constraint justification for originalism is now *disowned* by many prominent originalists.

As we have seen in *Bruen*, theorists of original public meaning recognize the Constitution's text is often what they call "under determinate." The text's original meaning does not provide sufficient guidance to resolve controversies, and so requires "construction"[72] by judges and others who guide the text's meaning in practice. As Professor Keith Whittington describes the new originalism, judicial constraint matters less to originalists than other possible justifications for the method.[73] Discussing the constraint justification, Professor Stephen Sachs has observed that "[a]ny number of procedures can restrict judges' decisions: flip a coin, always rule for the defendant, always follow your party's political preferences, . . . and so on. If the only goal is to produce determinate results, there's no reason to pick originalism in particular."[74]

Professor Will Baude is among the many originalists who questions originalism's constraint justification, with abundant support, in a 2016 paper honoring Justice Scalia, *Originalism as a Constraint on Judges*.[75] In this essay, Baude emphasizes that it was first-generation originalists like Professor Raoul Berger, Judge Robert Bork, and Justice Scalia who were committed to originalism for its power to constrain judges. Today, he observes, the argument lacks "a clear champion . . . . [M]any modern originalists have tended to de-emphasize the importance of constraining judges, relying instead on other arguments—that originalism is normatively desirable for other reasons, that it is an account of the true meaning of the constitutional text, or that it is required by our law."[76] Baude shows that leading originalists today no longer make the claims of constraint that first-generation originalists did: "[T]he argument that originalism is justified because it will eliminate judicial discretion has been

72. *See supra* notes 45–46 and accompanying text. Professor Solum explains that while "interpretation . . . is the process . . . [t]hat recognizes or discovers the linguistic meaning or semantic content of [a] legal text," "construction . . . is the process that gives a text legal effect (either by translating the linguistic meaning into legal doctrine or by applying or implementing the text)." Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) (emphasis added).

73. Whittington, *New Originalism*, *supra* note 70, at 608 ("The new originalism is less likely to emphasize a primary commitment to judicial restraint."); *id.* at 608–09 ("[T]here seems to be less emphasis on the capacity of originalism to limit the discretion of the judge."); *see also* Whittington, *Originalism: A Critical Introduction*, *supra* note 66, at 391 ("There is nothing like the same level of agreement within the recent originalist literature on the desirability of judicial restraint"); *id.* at 392 ("Limiting judicial discretion has rarely been offered as a compelling justification for the adoption of originalism in the recent literature.").

74. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 886 (2015).

75. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

76. *Id.* at 10; *see also* Whittington, *New Originalism*, *supra* note 70, at 609 ("The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.").

refuted by originalism's critics and abandoned by its defenders."[77] As Professor Barnett explains: "[T]he new originalism that is widely accepted by most originalists today is not an enterprise in constraining judges but an enterprise in determining what the writing really means."[78] At this point, among academic originalists, originalism's claim that it will impose judicial constraints is simply a claim about role morality—not a necessary feature of its methodology. What remains, on Professor Baude's account, is Professor Lawrence Solum's "Constraint Principle"—the "normative argument that original meaning *ought* to constrain constitutional practice, for reasons derived from legitimacy and the rule of law."[79] This normative claim is quite different from Justice Scalia's claim that original understanding is superior to other methods because "it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[80]

This claim of constraint is all the more dilute as one appreciates that the new new-originalists—let's call the third generation of originalists Originalism 3.0—no longer understand the Constitution's text as constraining in the ways that the original originalists or even the new originalists did. Professors Baude and Alicea are among those originalists who, like Professors Jud Campbell and Stephen Sachs, interpret the Constitution's text in light of unwritten principles that give the Constitution's text meaning. Reading the Constitution's text as recognizing pre-existing unwritten, natural, or general law further destabilizes originalism's "constraint thesis," whether that claim of constraint is understood as descriptive or prescriptive. Delivering a lecture on natural law at Harvard Law School, Professor Joel Alicea declared that "We need to know whether the Constitution furthers the common good, and that requires knowing what the common good is, which requires knowing something about who the human person is, and how we flourish as the distinctive kinds of beings that we are."[81]

Here is how Josh Hammer defended the amicus brief that Professors John Finnis and Robert George submitted in *Dobbs* claiming that as a matter

77. Baude, *supra* note 75, at 2217; *see id.* at 2216–17 (discussing John McGinnis, Michael Rappaport, Gary Lawson, Chistopher Green, and Randy Barnett).

78. Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 DRAKE L. REV. 897, 909 (2008) (cited in Baude, *supra* note 75, at 2216).

79. Baude, *supra* note 75, at 2217 (citing generally Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (unpublished manuscript at 58–83) (Mar 24, 2017 draft), https://perma.cc/KN5Y-NDC8).

80. Scalia, *supra* note 67, at 863–64.

81. *'We Are Living Through a Natural Law Moment in Constitutional Theory,'* HARV. L. TODAY (Apr. 16, 2024), https://hls.harvard.edu/today/we-are-living-through-a-natural-law-moment-in-constitutional-theory-says-scholar-in-vaughan-lecture.

of original understanding the Fourteenth Amendment prohibited abortion.[82] Hammer argued: "Finnis' argument is adamantly supported if one sheds the strictures of an overly historicist and positivist jurisprudence and embraces what I call 'common good originalism,' which argues that where, as here, there are multiple plausible interpretations of a certain constitutional provision, one should err on the side of the American constitutional order's overarching substantive orientation toward natural justice, human flourishing and the common good."[83] Common good originalism is a close cousin of gravitational force originalism.

IV. THE LEVELS OF GENERALITY GAME: A PAST THAT CONCEALS, RATHER THAN CONSTRAINS, DISCRETION

As this brief review of academic originalists suggests, the Justices engaged in history-and-tradition modes of decision making have more discretion than their own self-accounting suggests. Even Justices who foreswear expressly value-based modes of interpretation may—consciously or unconsciously—move through a series of "shadow decision points"[84] in structuring the inquiry so that it implicitly aligns with their values. For example, the Justices can choose to turn to the deep past as they did in *Dobbs* and *Bruen*, or refuse to base their decision in the deep past as they did in *SFFA* and *Trump v. Anderson*.[85] In addition to deciding whether to look to the deep past, the

82. Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392). For an account locating the brief in the conservative legal movement, see Heidi Przybyla, *'Plain Historical Falsehoods': How Amicus Briefs Bolstered Supreme Court Conservatives*, POLITICO (Dec. 3, 2023, 7:00 AM EST), https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497 [https://perma.cc/VJU2-CLVU].

83. Josh Hammer, *The Case for the Unconstitutionality of Abortion*, NEWSWEEK (Aug. 12, 2021), https://www.newsweek.com/case-unconstitutionality-abortion-opinion-1614532 [https://perma.cc/VW89-F6Z8]; Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 4 HARV. J.L. & PUB. POL'Y 917 (2021); *see also* Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, AMERICAN MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism [https://perma.cc/KQB6-L6SS]. Hammer is adapting originalism in light of Professor Adrian Vermeule's natural-law critique of originalism. *See* Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/YH77-9W49]; ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022).

84. *Cf.* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 126 (drawing attention to "*shadow decision points*: generally unacknowledged, often outcome-determinative choices about how to interpret statutory text that are framed as methodological but that are typically fueled by substantive extratextual concerns").

85. Trump v. Anderson, 144 S. Ct. 662 (2024). In *Trump v. Anderson*, the Court addressed the qualifications for holding office set forth in Section 3 of the Fourteenth Amendment, without giving significant weight to the parties' arguments about the original understanding.

Justices can decide, second, whether to focus historical inquiry on evidence generations before or after the Constitution's ratification and, third, can select different kinds of evidence to represent the nation's traditions. Facts may be objective, but the Justices are continuously choosing the facts on which to concentrate, as well as the inferences to draw from them. These choices are plainly not "objective."[86] They are discretionary, value-laden interpretive judgments and show that the Justices in the majority in *Dobbs* and *Bruen* are conservative pluralists[87]—originalists who are "selective" in applying their interpretive method.[88]

Fourth, as I now discuss, the Justices can decide whether to characterize historical traditions that guide interpretation of the Constitution's liberty guarantee at higher or lower levels of generality. When the Court decided *Obergefell*,[89] the same-sex marriage case, Justice Kennedy reasoned about past practice at a high level of generality, recognizing that marriage is an enduring institution with features that evolve in history. The Court presented this interpretive approach as grounded in the language of the Constitution itself which it understood to sanction change by its very generality:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so *they entrusted*

See Lawrence Hurley, *After Trump Ballot Ruling, Critics Say Supreme Court Is Selectively Invoking Conservative Originalist Approach*, NBC News (Mar. 10, 2024, 7:00 AM) https://www.nbcnews.com/news/amp/rcna142020 [https://perma.cc/HC2R-3Y9X] (quoting Evan Bernick saying of the decision, "What struck me is how much attention was devoted to questions of original meaning in the briefing and at oral argument and how cursory and frankly unpersuasive the discussion of the history was in the published opinion," and J. Michael Luttig calling the decision "a textbook example of judicial activism"); Jill Lepore, *Will the Supreme Court Now Review More Constitutional Amendments*, NEW YORKER (Mar. 10, 2024), https://www.newyorker.com/magazine/2024/03/18/will-the-supreme-court-now-review-more-constitutional-amendments [https://perma.cc/Y62Q-PKSX] (asking "now that the originalists on the Court have recast themselves as consequentialists, will they be willing to revisit *Dobbs*, in light of its consequences . . . ? Or might the Court now reconsider its interpretation of the Second Amendment?").

86. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) (observing that a "fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition'" (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997))).

87. *See, e.g.*, Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 494, 508 (2022) (defining "Constitutional Pluralism" as signifying that "the legal content of constitutional doctrine should be determined by the employment of multiple modalities of constitutional argument").

88. Post & Siegel, *supra* note 60, at 562–68; Girgis, *supra* note 34, at 1479–80; Siegel, *Memory Games*, *supra* note 20, at 1131–34; Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223–25, 230–34.

89. Obergefell v. Hodges, 576 U.S. 644 (2015).

> *to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.*[90]

In *Obergefell*, the Court held that the Fourteenth Amendment's great guarantees authorize evolving interpretation and require Americans to keep faith with those guarantees *as we have come to understand them today*, and not—as Justices Scalia and Thomas urged in dissent—as the Constitution was understood in 1868.[91] Justice Kennedy was reaffirming an approach to interpreting the Fourteenth Amendment's liberty guarantee that the Court had employed over the decades.[92]

President Trump's appointments made *Obergefell*'s dissenters into a governing majority.[93] And with this new majority, *Dobbs* departed from *Obergefell*'s holding on levels of generality and adopted the dissenters' point of view. (*Dobbs* discussed stare decisis with respect to overturning *Roe*, but never acknowledged that it reasoned about the nation's history and tradition under the liberty guarantee differently than decades of cases before it had.[94])

Rather than reason about the meaning of the liberty guarantee in a fashion that included the perspectives of living Americans, as the *Obergefell* Court had, the *Dobbs* Court dialed down the level of generality and asked whether states banned abortion in 1868. By interpreting the Fourteenth Amendment through history and tradition understood at this low level of

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90. *Id.* at 664 (emphasis added); *see also id.* at 671 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

91. *Id.* at 715–16 (Scalia, J., dissenting) ("When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as 'due process of law' or 'equal protection of the laws'—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.").

92. For the history of the decades-long levels-of-generality debate between Justices Kennedy and Scalia culminating in *Obergefell*, see Siegel, *History of History and Tradition*, *supra* note 20, at 133–46.

93. *See* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 284–87 (illustrating how President Trump's appointments created the Court that decided *Dobbs* as Justices Gorsuch, Barrett, and Kavanaugh replaced Justices Scalia, Kennedy, and Ginsburg, respectively). In *Dobbs*, the new appointees joined with *Obergefell*'s original dissenters to shape due process law in ways that aligned with views expressed in the *Obergefell* dissent, yet never acknowledged that they were changing due process doctrine.

94. The Court did explain that it was overturning its decision in *Roe*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022). But in doing so, the Court did not acknowledge that it was changing its approach to enforcing the Fourteenth Amendment's liberty guarantee in substantive due process cases, adopting an approach that diverged from the Court's reasoning in *Obergefell* and even in *Glucksberg*. For accounts of these shifts in the law, see *infra* notes 133–134 and accompanying text. *See generally* Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 57 U.C. DAVIS L. REV. (forthcoming 2025), https://ssrn.com/abstract=4730389 [https://perma.cc/UYE8-W4JJ] (surveying the stealth reversals of the Roberts Court).

generality—through lawmaking at the time of the Fourteenth Amendment's ratification—the *Dobbs* decision threatened the authority of the Court's decision in the same-sex marriage case, and others. If the Court had counted state laws in 1868 to determine whether same-sex couples have the right to marry, they would have no such right. If the Court had counted state laws in 1868 to determine whether interracial couples have the right to marry, they would have no such right. In fact, as I show in *The History of History and Tradition*, the practice of counting state laws in 1868 to determine the reach of the Fourteenth Amendment's guarantees was originally developed by southern states seeking to *limit* the meaning of the Equal Protection Clause and to defend the racial segregation of schools in the argument leading to *Brown*.[95]

Moving from *Dobbs* to the Second Amendment cases, we can also see shifts in levels of generality—*here within individual cases*. Courts reason about the weapons of self-defense covered by the Second Amendment right "to keep and bear arms"[96] at a high level of generality—and so include AR-15s as protected by the Second Amendment even though these firearms and many others did not exist at the Founding.[97] Along similar lines, federal courts read *Heller* and *Bruen* as protecting the right of "the people to keep and bear arms" at a high level of generality, as modern Americans would define that term, without restricting "the people" who are entitled to bear arms as the Framers would have.[98] But in determining whether laws that *regulate* guns are permitted by the Second Amendment, courts reason differently. Under *Bruen*, to prove a law regulating guns is consistent with historical traditions of firearm regulation, the lower courts have required the government to identify historical precedents or analogues that have *particular features* of the challenged law.[99] "[A]rms" covered by the Second Amendment are described at a high level of

95. *See* Siegel, *History of History and Tradition*, *supra* note 20, at 112–20.

96. U.S. CONST. amend. II.

97. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022) ("[E]ven 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.").

98. *See* Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 134 (E.D. Va. 2023) (holding that a ban on 18-20 year-olds purchasing guns infringed on Second Amendment rights, even if at the Founding 21-years old was the age of majority, because "[t]he approach manifest in *Heller* and *Bruen* supports a finding that today's understanding of 'the people' is appropriate when considering the reach of the Second Amendment"); *id.* at 133 ("[T]aken to its full extent, the Government's argument [for limiting gun rights to those who were recognized as 'the people' at the founding] leads to a constitutionally untenable result. It is no secret that the American political community has not always been as inclusive as it is today. *Throughout our Nation's history, the definition of 'the people' has evolved and changed—for the better.*" (emphasis added)). *But see* Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437 (2023) (discussing interpretation of 'the people" in Second Amendment cases concerning noncitizens).

99. *See* Blocher & Siegel, *supra* note 31, at 1802–03.

generality—while government may only regulate those weapons through laws that closely resemble past practice, described at a low level of generality.[100]

In *United States v. Rahimi*, a Second Amendment case before the Supreme Court in the 2023 Term, the Fifth Circuit mixed and matched levels of generality in this way, and did so to justify striking down 18 U.S.C. § 922(g)(8), a federal law that disarms persons subject to domestic-violence restraining orders. In *Rahimi*, the Fifth Circuit assumed the Second Amendment protected the right to carry weapons of a lethality unimaginable at the Founding, yet decided that § 922(g)(8) violated the Second Amendment because it lacked precise analogues at the Founding. The Fifth Circuit recognized that at the Founding there were laws used to restrain violence between intimates—a magistrate could issue a peace warrant marking a perpetrator a threat to public order and requiring him to post a surety bond for good behavior—but, the court observed, these laws were not analogues because they did not *disarm* persons who engaged in domestic violence, that is, they did not regulate arms in the same way that § 922(g)(8) does.[101] This plunge to a lower level of generality emphasized differences in firearm regulation, while devoting no attention to critical technological differences in *firearms* over time: The Fifth Circuit never reckoned with the fact that single-shot, muzzle-loaded long guns that were in common use at the Founding were not useful in crimes of passion as handguns are today, so that *legislators at the Founding had*

100. *Bruen* does not require shifting levels of generality in this way. *See id.* at 1796 ("*Bruen* does not require the asymmetrical and selective approach to constitutional change practiced by some in its name. Just as *Bruen* extends the right of self-defense to weaponry of the twenty-first century, it also recognizes democracy's competence to protect against weapons threats of the twenty-first century."); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 167 (2023) [hereinafter Blocher & Ruben, *Originalism-by-Analogy*] ("Whatever principles a court selects, the level of generality selected for historical analogy should be applied symmetrically."); Joseph Blocher & Reva Siegel, *Gun Rights and Domestic Violence in* Rahimi*—Whose Traditions Does the Second Amendment Protect?*, BALKANIZATION (Oct. 31, 2023), https://balkin.blogspot.com/2023/10/gun-rights-and-domestic-violence-in.html [https://perma.cc/8C49-HTDQ] (analyzing rights and regulation under the Second Amendment with attention to levels of generality); Brief of Second Amendment Scholars as Amici Curiae in Support of Petitioner at 6–17, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915) [hereinafter *Brief of Second Amendment Scholars*] (same). These shifts in level of generality make little sense: Contemporary weapons of high lethality *pose different threats to public safety precisely because they have different features than single-shot, muzzle loaded long guns that were in common use at the Founding*. Darrell A.H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495, 2510–11 (2022).

101. 61 F.4th 443, 459–60 (5th Cir. 2023). For sources discussing law constraining violence between intimates at the Founding, see Blocher & Siegel, *supra* note 31, at 1827 & n.179. For discussion of peace warrants, see *id.* at 1827 ("On complaint, a magistrate could issue a peace warrant marking the actions of a perpetrator as a potential threat to public order; that individual could post bond for good behavior without incurring criminal penalty unless the individual broke the peace." (footnote omitted)).

little reason to enact a law specifically forbidding firearm possession by domestic abusers, even if they wanted to protect women from such abuse.[102]

Historians tell us that at the Founding guns were not commonly employed in domestic violence.[103] In the Founding era, "[f]amily and household homicides . . . were committed almost exclusively with weapons that were close at hand," not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists."[104] By contrast, today, "every 14 hours, a woman is shot and killed by a spouse or intimate partner in the United States,"[105] and intimate partner homicides often have multiple victims, including family, children, new dating partners of the victim, friends, and coworkers.[106] While the Fifth Circuit never reckoned with the stakes of its switching levels of generality, critics did[107]—and in oral argument in *Rahimi* before the Supreme Court, Justices began for the first time to consider Second Amendment inquiry in light of levels of generality.[108]

V. HOW SELF-CONSCIOUS ARE THE JUSTICES IN MANIPULATING LEVELS OF GENERALITY?

The shifts in levels of generality that I have been describing are not some accident. The changes in history-and-tradition case law that appeared as President Trump reshaped the Court emerged from long-running argument about the exercise of judicial discretion in vindicating rights—the so-called "levels of generality" debate. These shifts in the level of generality are quite *self-conscious*, the fruit of a dispute between constitutional liberals and conservatives that has been running since at least 1980. We can see the Justices engaging in the levels of generality debate over the decades, revived most recently in the cases handed down at the end of the 2023 Term.[109]

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102. *Id.* at 1827.

103. Brief of Second Amendment Scholars, *supra* note 100, at 21; Brief for Amici Curiae Professors of History and Law in Support of Petitioner at 23–26, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915).

104. 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, 117 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019)

105. Press Release, All. for Gun Resp., Domestic Violence and Firearms: A Deadly Combination (Oct. 4, 2022), https://gunresponsibility.org/press-releases/domestic-violence-and-firearms-a-deadly-combination.

106. Kaitlin Washburn, *Tips for Covering Guns and Domestic Violence: A Lethal Combination*, ASS'N OF HEALTH CARE JOURNALISTS BLOG (Dec. 18, 2023), https://healthjournalism.org/blog/2023/12/tips-for-covering-guns-and-domestic-violence-a-lethal-combination.

107. *See* sources cited *supra* note 100.

108. Discussion of levels of generality arose in different ways throughout oral argument. *See* Transcript of Oral Argument at 17–21, 39–42, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915). Justice Gorsuch seemed directly to confront the levels of generality question regarding rights and regulation. *Id.* at 41–42.

109. *See infra* Part VI.

As early as 1980, Professor Paul Brest spotlighted the levels of generality problem in one of the earliest articles challenging Reagan-era originalists, *The Misconceived Quest for Original Understanding*. Professor Brest observed that claims about original intent "may be conceptualized on different levels of generality."[110] If you enacted an ordinance providing "No vehicles shall be permitted in the park," your intent can be conceptualized at varying levels of generality: "Moving from the abstract to the particular, you might have hoped to protect pedestrians using the park from harm, or from injury caused by vehicles, or from being run into by cars."[111] Shifting to the Constitution, he observed, "[a] moderate intentionalist applies a provision consistent with the adopters' intent at a relatively high level of generality, consistent with what is sometimes called the 'purpose of the provision.' Where the strict intentionalist tries to determine the adopters' actual subjective purposes . . . ."[112] The following year Brest continued, comparing the discretion involved in ascertaining original understanding with the discretion involved in balancing under standard doctrinal tests: "The indeterminacy and manipulability of levels of generality is closely related, if not ultimately identical, to the arbitrariness inherent in accommodating fundamental rights with competing government interests."[113] For Brest, this was *law*, *an inherently judgment-filled practice*. "The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decision making can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be 'neutrally derived, defined and applied.'"[114]

In 1985, Judge Robert Bork challenged Brest,[115] and in 1989, Justice Scalia offered an even more ambitious counterargument. In *Michael H. v. Gerald D.*,[116] in a famous footnote joined only by Chief Justice Rehnquist, Justice Scalia claimed that *to avoid "arbitrary decisionmaking" it was necessary "to adopt the*

110. Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 205, 210 (1980).

111. *Id.* at 209–10.

112. *Id.* at 223.

113. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981).

114. *Id.* at 1091–92 (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971)).

115. Bork, *supra* note 70, at 828 (asserting that "Brest's statement is wrong and . . . an intentionalist can do what Brest says he cannot," contending that "the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support").

116. 491 U.S. 110 (1989).

most specific tradition as the point of reference."[117] (The Scalia-Rehnquist footnote in *Michael H.* attacking originalism's critics—published the same year as Scalia published *Originalism: The Lesser Evil*[118]—is a crucial moment on the path to *Bruen* and *Dobbs*.) Professors Laurence Tribe and Michael Dorf countered the counter-attack in a widely cited article the following year.[119] Justice Scalia had *not* "discovered a value-neutral method of selecting the appropriate level of generality," Tribe and Dorf argued.[120] They emphasized that "[t]he selection of a level of generality necessarily involves value choices."[121] "Far from providing judges with a value-neutral means for characterizing rights, [Justice Scalia's proposal] provides instead a method for disguising the importation of values."[122] As Judge Frank Easterbrook explained, "[m]ovements in the level of constitutional generality may be used to justify almost any outcome."[123] But for Justice Scalia there remained a point in a judge *performing* constraint: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."[124]

This debate—which has continued for decades—shows that in deciding cases, the Justices are not simply deferring to the past, but characterizing the past to which they defer, and they do so in the understanding that selecting a level of generality at which to vindicate a right can be outcome determinative. The Justices argued amongst themselves over standards and levels of generality with these concerns in view in *Michael H.* and in *Glucksberg*—where the majority was internally divided about protecting prior

117. *Id.* at 127 n.6. (emphasis added). He went on to argue that "[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate, rather than discern, the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference . . . is well enough exemplified . . . in the present case." *Id.*

118. Scalia, *supra* note 67.

119. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

120. *Id.* at 1058.

121. *Id.*

122. *Id.* at 1059.

123. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992).

124. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

case law—on the path to *Dobbs*.[125] This same conflict unfolded in *McDonald v. City of Chicago*[126] on the path to *Bruen*.

In *McDonald*, a decade before *Bruen* and *Dobbs*, the Court decided whether to incorporate the Second Amendment against the states under the Fourteenth Amendment's Due Process Clause. Because of the incorporation debate, due process standards were very much in play in *McDonald*. *McDonald* contains remarkable debate about the levels of generality problem.

In *McDonald*, Justice Scalia wrote a sole-authored concurring opinion in which he urged the Court to revise *Glucksberg*'s language calling for "'careful description' of the asserted fundamental liberty interest"[127] into a more extreme version of his *Michael H.* footnote; he claimed, in a new formulation, first, that *Glucksberg* required "a careful, *specific* description of the right at issue in order to determine *whether that right, thus narrowly defined, was fundamental*"[128] and, second, that interpreting the Fourteenth Amendment's liberty guarantee to protect only those "specific" and "narrowly defined" "rights" that had been recognized in the past was "much less subjective, and intrudes much less upon the democratic process" than a "living Constitution."[129] (Here Justice Scalia deliberately read "*Glucksberg*" as a cousin of his *Michael H.* footnote and the kind of opinion that Justices Kennedy and O'Connor had refused to sign.[130]) In his *McDonald* concurring opinion, Scalia equated the historical method with outcomes in culture-war cases: "In the most controversial matters brought

125. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 771 (1997) (Souter, J., concurring) (reasoning from levels of generality and citing Tribe & Dorf, *supra* note 119, at 1091). The *Glucksberg* majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *See id.* at 704. Justice O'Connor played a key role in exercising changes in the language of the *Glucksberg* opinion protecting *Casey* and other substantive due process decisions that allowed the authors of the *Casey* joint opinion to sing. *See supra* note 39.

In the era of *Casey* and *Glucksberg*, Justice Thomas continued the debate in other contexts. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 117–18 (1992) (Thomas, J., dissenting) ("Whatever the exact scope of the fundamental right to 'freedom from bodily restraint' recognized by our cases, it certainly cannot be defined at the exceedingly great level of generality the Court suggests today. There is simply no basis in our society's history or in the precedents of this Court to support the existence of a sweeping, general fundamental right to 'freedom from bodily restraint' applicable to all persons in all contexts." (footnote omitted)); City of Chicago v. Morales, 527 U.S. 41, 106 (1999) (Thomas, J., dissenting) (reasoning from levels of generality); *id.* at 105 n.5 ("[T]he plurality's approach distorts the principle articulated in th[e] cases [on which it relies], stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis.").

126. 561 U.S. 742 (2010).

127. *Glucksberg*, 521 U.S. at 721.

128. *McDonald*, 561 U.S. at 797 (Scalia, J., concurring) (first emphasis added; second emphasis in original); *see also id.* (referring to this new account of the standard as a "threshold step of defining the asserted right with precision"). Observe that in addition to adding requirements of specificity, narrowness, and precision, Justice Scalia changed discussion of a liberty interest into a threshold requirement of identifying a right.

129. *Id.* at 803–04.

130. *See supra* note 125.

before this Court—for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty—*any* historical methodology, under any plausible standard of proof, would lead to the same conclusion."[131] Inquiring minds might ask, were these predictable results an accident of Justice Scalia's quest for objectivity, *or its very point*? After decades of argument, positions in the levels-of-generality debate were now associated with outcomes in culture-war conflict.

In his *McDonald* dissent, Justice Stevens countered Justice Scalia's claims systematically and at length, asserting that "a rigid historical methodology is . . . unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs . . . are sufficiently rooted; [and] it countenances the most revolting injustices in the name of continuity."[132]

As I have elsewhere demonstrated in greater detail, *Dobbs* emerged from these long-running debates across cases over the level of generality appropriate for vindicating the Fourteenth Amendment's liberty guarantee.[133] *Dobbs* expressly justified its brand of historicism by reference to levels of generality. Justice Alito asserted: "Attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like."[134] This passage in *Dobbs* says the quiet part out loud: *Don't like the result? Dial down the level of generality!* Judges have already employed *Dobbs*'s reasoning about generality to uphold bans on gender-affirming care:[135] As Chief Judge Sutton remarked almost mockingly in upholding such a ban, "[l]evel of generality is everything in constitutional law."[136] In oral argument in *Rahimi*, the Justices and the Solicitor General all reasoned about *Bruen*'s requirements in terms of levels of

131. *Id.* at 804.

132. *Id.* at 876 (Stevens, J., dissenting) (footnote and internal quotation marks omitted).

133. Siegel, *History of History and Tradition*, supra note 20, at 105; *id.* at 136–46 (recounting debate across cases between Justice Kennedy and Justice Scalia).

134. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). At oral argument, Justice Thomas and now-Judge Rikelman had a lengthy exchange wherein Thomas pressed Rikelman to "lower the level of generality" at which she identified the "constitutional right [that] protects the right to abortion." *See* Transcript of Oral Argument at 71–73, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392).

135. Siegel, *History of History and Tradition*, *supra* note 20, at 145 & n. 211 (discussing L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 472-73 (6th Cir. 2023)).

136. *Skrmetti*, 83 F.4th at 475; *see also* Thomas More L. Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring in part and in the judgment) ("Level of generality is destiny in interpretive disputes . . . ."), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

generality.[137] Historical particularism does not remove judicial discretion: it hides it.

VI. THE LEVELS OF GENERALITY DEBATE IN THE 2023 TERM

The decisions of the Court's 2023 Term, handed down during the final editing of this Article, vindicate key features of its analysis. Above all, these decisions demonstrate that the Justices in the conservative majority are "conservative pluralists" who reason from history and tradition, but only selectively, on a case-by-case basis. As their changing modes of interpretation—and open debate about their choices—suggest, the conservative Justices are quite self-conscious in their design of doctrine.

During the 2023 Term, the conservative Justices' selectivity in approach was vividly illustrated in the cases involving the ex-President Donald Trump's qualifications to run for office[138] and his immunity from criminal prosecution.[139] Rather than decide the immunity case on the historical grounds that the parties detailed in the briefing,[140] the Court instead "announced broad and novel principles of presidential immunity from criminal indictment for official acts."[141] (Some compared the Court's decision on immunity—which reasoned about the Constitution's commitments at a high level of generality—to features of the *Roe v. Wade* decision that the Court had maligned in *Dobbs*.[142])

137. *See supra* note 108.

138. *See* Trump v. Anderson, 144 S. Ct. 662 (2024).

139. Trump v. United States, 144 S. Ct. 2312 (2024).

140. *See, e.g.*, Brief of Petitioner President Donald J. Trump at 22–24, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) (arguing that "a 234-year unbroken tradition of not prosecuting former Presidents for their official acts, despite ample motive and opportunity to do so," "confirm[s] the existence of criminal immunity"); Brief for the United States at 13–17, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) (asserting that "[h]istory . . . forecloses petitioner's claim that the Constitution grants a former President absolute immunity from criminal prosecution"); Reply Brief of Petitioner President Donald J. Trump at 12–17, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939) (contending that historical sources and historical tradition support presidential immunity). For criticism of the Court's failure to engage with the parties' originalist arguments in the *Anderson* case, see *supra* note 85.

141. *See* William Baude, Opinion, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html (discussing the Court's departure from historical modes of interpretation in both decisions concerning Trump); *see also* Opinion, *'The Justices Dropped this Bomb': Three Legal Experts on a Shocking Supreme Court Term*, N.Y. TIMES (July 11, 2024), https://www.nytimes.com/2024/07/11/opinion/supreme-court-term-immunity.html (quoting Professor Baude on the Court's departure from historical modes of interpretation in the two Trump decisions).

142. Upon beginning to read the syllabus of the presidential immunity decision, I was startled by the form of the Court's claims and immediately thought that the Court was employing modes of constitutional interpretation that *Dobbs* had criticized in *Roe*. Professor Mark Graber drew this comparison and soon developed it in a published account. *See* Mark Graber, Trump v. United States *as* Roe v. Wade, VERFASSUNGSBLOG (July 5, 2024), https://verfassungsblog.de/trump-v-united-states-as-roe-v-wade. Professor Akhil Amar also

The conservative Justices identified no reason for their decision to break from original understanding or tradition in deciding Trump's cases. But in other cases of the 2023 Term, the Justices openly debated interpretive approaches. They argued among themselves about whether to employ history and tradition, in the process making explicit the Justices' self-conscious decisions whether, why, and how to interpret the Constitution through tradition—as well as their choice of the level of generality at which to express fealty to past practice.

When the Court decided the constitutionality of a content-based but viewpoint-neutral trademark restriction in *Vidal v. Elster*,[143] four of the Justices challenged the majority for reasoning from history and tradition to decide First Amendment cases. Justice Barrett, writing with Justices Kagan and Sotomayor, discussed the judge's role in adopting decision rules that focus on tradition. As Justice Barrett put it bluntly: "a rule rendering a tradition dispositive is *itself* a judge-made test."[144] A judge had to weigh reasons for enunciating law as fidelity to history and tradition; she might instead adhere to the longstanding "tradition" of deciding a case by "adopting a generally applicable principle," which she and three other Justices thought disposition of the case required.[145] Justice Sotomayor, writing with Justices Kagan and Jackson, went further, explaining that judges had compelling reasons to *avoid* use of the history-and-tradition framework in First Amendment cases: the liberal Justices emphasized "the indeterminacy of the Court's history-and-tradition inquiry, which one might aptly describe as the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends."[146] In disputing use of the method, both the majority and its critics in *Vidal* invoked the Court's debate over the Second Amendment in *Rahimi*.[147]

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invoked *Roe* in a column criticizing the immunity decision on the grounds that it "turns the Constitution's text and structure inside out and upside down, saying things that are flatly contradicted by the document's unambiguous letter and obvious spirit." Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, ATLANTIC (July 2, 2024), https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877.

143. 144 S. Ct. 1507 (2024).

144. *Id.* at 1532 (Barrett, J., joined by Sotomayor, Kagan & Jackson, JJ., concurring in part) (emphasis in original).

145. *Id.* (Barrett, J., joined by Sotomayor & Kagan, JJ., concurring in part) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) and explaining the decision as "adopting [a] standard for application of the Necessary and Proper Clause"); *see also id.* ("In the course of applying broadly worded text like the Free Speech Clause, courts must inevitably articulate principles to resolve individual cases. I do not think we can or should avoid doing so here.").

146. *Id.* at 1534 (Sotomayor, J., concurring in the judgment) (citing *Conroy v. Aniskoff*, 507 U.S. 511, 519 (Scalia, J., concurring in the judgment)).

147. *Id.* (citing Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 4–6, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915), for its discussion of "confusion among lower courts applying *Bruen*).

The Court's decision in *Rahimi* expressed the Court's bitter divisions over historical method, much of it explicitly or implicitly circling around the levels of generality question. The Court divided eight to one, recognizing the government's authority to prohibit gun possession for persons subject to domestic-violence restraining orders; only Justice Thomas dissented, insisting that under *Bruen* the federal law violated the Second Amendment.[148] Chief Justice Roberts's opinion upholding the federal law was joined by seven other Justices, yet accompanied by *five* concurring opinions in which six of the Justices who joined the majority qualified the grounds on which they did so.[149]

The majority opinion squarely rejected the approach to reading Second Amendment precedent the Fifth Circuit employed in *Rahimi*: reasoning about Second Amendment rights of self-defense at a high level of generality, while allowing regulation of those rights only if a law closely resembled particular historical analogues. Chief Justice Roberts objected to this asymmetric approach to levels of generality as lacking in all justification. *Bruen*'s requirement of identifying a historical analogue was:

> not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. . . . By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.[150]

In calling for an analysis of right and regulation at commensurate levels of generality, the Court restated *Bruen*'s holding as a search for principles: *Bruen*'s historical analogue test required showing that the "challenged regulation is consistent with the *principles* that underpin our regulatory tradition."[151] Second, Chief Justice Roberts identified a principle that showed the challenged law was consistent with tradition: "From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. The act of 'go[ing] armed to terrify the King's subjects' was recognized at common law as a 'great offence.'"[152]

Chief Justice Roberts's opinion in *Rahimi* announced an important reading of the *Bruen* standard. But how the opinion will guide Second Amendment cases remains unclear. Those who joined the majority equivocated in separate concurring opinions about whether a tradition can be

148. *Rahimi*, 144 S. Ct. at 1896–97; *id.* at 1930.
149. *Id.* at 1893.
150. *Id.* at 1897–98 (majority opinion).
151. *Id.* at 1898 (emphasis added).
152. *Id.* at 1899 (citation omitted).

ascertained in terms of the principles composing it—an equivocation that may encourage judges to continue interpreting *Bruen* asymmetrically, as they were before the Fifth Circuit was reversed by the Court.[153]

Why did the Justices vote eight to one to overturn the Fifth Circuit's ruling in *Rahimi*, yet write so many concurring opinions qualifying their views? By striking down a law that disarmed persons subject to a domestic-violence restraining order as *in*consistent with the nation's traditions, the Fifth Circuit invited the charge that *Bruen*'s history-and-tradition approach was "repugnant"[154] because it entrenched inequality and exposed Americans to lethal violence—criticism that members of the Court either credited or believed the American public would. The Justices in the majority seemed eager to dissociate themselves from the Fifth Circuit opinion and to criticize the two-levels-of-generality approach the Fifth Circuit employed to achieve this method-discrediting result. Analyzing weapons regulations permitted under the Second Amendment at a higher level of generality—as consistent with the long-standing principle that people cannot use weapons to harm or menace others—resolved the case without discrediting the history-and-tradition method (and without discussing American law's traditional approach to domestic violence). Nested here was an explosive set of questions about the constitutional values that entrenching past practice promoted.

But in avoiding discussing these underlying normative considerations the conservative majority also, potentially, created a problem for itself. Was the majority prepared to adhere to *Rahimi*'s approach in the next wave of Second Amendment cases? Would it ask whether the challenged regulation is "consistent with the principles that underpin our regulatory tradition"[155] if the approach made it harder to justify striking down bans on high-powered weapons and other gun regulations? Perhaps.

In a concurring opinion focused on the levels of generality question, Justice Barrett rejected historical particularism while expressing caution that "a

153. Only weeks after *Rahimi*, the Eighth Circuit handed down a decision that quite defiantly continued applying the *Bruen* case much as the Fifth Circuit had in *Rahimi*. In *Worth v. Jacobson*, 108 F.4th 677 (8th Cir. 2024), the Eighth Circuit switched levels of generality to strike down an age-of-majority element in a permit law requiring applicants to be at least 21 years of age. *Id.* at 698. The Eighth Circuit rejected the state's historically based argument that "18 to 20-year-olds are not members of 'the people' protected by the Second Amendment because at common law, individuals did not have rights until they turned 21 years old." *Id.* at 689. Instead, the court reasoned that "[e]ven if the 18 to 20-year-olds were not members of the 'political community' at common law, they are today." *Id.* at 691. But after reasoning about "the people" who have rights protected by the Second Amendment at this high level of generality and rejecting these historical arguments, the court then reasoned at a much lower level of generality in determining what gun regulations the Second Amendment permits. *Id.* at 687, 692–98. Here, it struck down the state's licensing restriction because it lacked historical analogues at the Founding (and in the Reconstruction era). *Id.* at 698.

154. *See supra* note 15 and accompanying text.

155. *Rahimi*, 144 S. Ct. at 1898.

court must be careful not to read a principle at such a high level of generality that it waters down the right"; she was hesitant to pre-commit to an approach to the generality problem beyond the case at issue, which, she concluded, the Court had decided at "just the right level of generality" in recognizing that government may "prevent[] individuals who threaten physical harm to others from misusing firearms."[156]

Responding to the liberal Justices' complaints about the indeterminacies of *Bruen*'s analogical method,[157] Justices Gorsuch and Kavanaugh each wrote concurring opinions that specifically defended historical modes of interpretation and expressed doubt that judges would be faithful to the Constitution if they derived principled commitments from past practice. Each repeated the judicial-constraint claims of first-generation originalists—claims that originalists in the academy have widely repudiated.

Justice Gorsuch's opinion emphasized the judicial-constraint justification for originalism. He explained that originalist judges "respect[] the people's directions in the Constitution—directions that are 'trapped in amber.'"[158] Seeking original meaning "keeps judges in their proper lane . . . . *[P]ermit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule.*"[159] And taking guidance from Justice Scalia, Justice Gorsuch warned against judges who reason at higher levels of generality and try to extract "overarching 'policies,' 'purposes,' and 'values'" from past practices—even as Justice Gorsuch explained his vote upholding the federal law disarming persons subject to domestic-violence restraining orders on the ground that it served the same purposes as a surety law served in the Founding era.[160]

Justice Kavanaugh also turned to first-generation originalists to defend the Court's practice against the liberal Justices' critique. "To be an umpire," Kavanaugh reasoned, "the judge 'must stick close to the text and the history, and their fair implications,' because"—he argued, quoting Robert Bork—"there 'is no principled way' for a neutral judge 'to prefer any claimed human value to any other.'"[161] "History establishes a 'criterion that is conceptually quite separate from the preferences of the judge himself,'" he argued, quoting

156. *Rahimi*, 144 S. Ct. at 1926 & * (Barrett, J., concurring).

157. *See id.* at 1905-06 (Sotomayor, J., joined by Kagan, J., concurring); *id.* at 1928–29 (Jackson, J., concurring); *see also supra* text accompanying note 146 (quoting the liberal Justices in *Vidal v. Elster* criticizing the indeterminacy of history-and-tradition methods).

158. *Id.* at 1908 (Gorsuch, J., concurring) (quoting *Rahimi*, 144 S. Ct. at 1897–98).

159. *Id.* at 1909 (emphasis added).

160. *Id.* at 1908 (observing that the surety law "works in the same way and . . . for the same reasons" as the domestic violence prohibitor).

161. *Id.* at 1912 (Kavanaugh, J., concurring) (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971)).

Justice Scalia's foundational claim.[162] "A history-based methodology supplies direction and imposes a neutral and democratically infused constraint on judicial decision making."[163] "History is far less subjective than policy," Justice Kavanaugh emphasized, insisting that "reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people."[164]

Like Justice Gorsuch, Justice Kavanaugh wrote without irony, as if he had not heard the explosion of complaints from judges and others about the indeterminacies of *Bruen*'s historical analogue test,[165] or heard the public's response to *Dobbs*. Of course, it may be that Justice Kavanaugh was *not* in fact speaking "neutrally," but instead speaking *only* to supporters of the Court's history-and-tradition decisions. Otherwise, his remarks are puzzling.

The conservative legal movement is no longer outside the Court criticizing its work; the conservative legal movement is now inside the Court exercising public power. Claims about the objectivity and neutrality of historical interpretation on which the conservative legal movement mobilized against the Warren and Burger Courts will not persuade the Roberts Court's critics to defer to its judgment. Differently put, the Court's authority to speak for the nation—and not only for the conservative legal movement—cannot be established by calling its own work "neutral." Since the Roberts Court reshaped by President Trump began issuing history-and-tradition decisions, public confidence in the Court has significantly declined.[166]

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162. *Id.* (quoting Scalia, *Originalism: The Lesser Evil*, *supra* note 67, at 864).

163. *Id.* at 1922.

164. *Id.* at 1912.

165. *See, e.g.*, *Rahimi*, 144 S. Ct. at 1927 (Jackson, J., dissenting) (reporting objections of lower courts); *id.* at 1929 ("Consistent analyses and outcomes are likely to remain elusive because whether *Bruen*'s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified."); United States v. Daniels, 77 F.4th 337, 358–60 (5th Cir. 2023) (Higginson, J., concurring) (listing many uncertainties in the *Bruen* inquiry); Jacob Gershman, *Why America's Gun Laws Are in Chaos*, WALL ST. J. (Aug. 1, 2023, 5:30 A.M. ET), https://www.wsj.com/articles/why-the-nations-gun-laws-are-in-chaos-587ded3f ("'There's all this picking and choosing of historical evidence. "This is too early. This is too late. Too small, too big,'" Judge Gerard Lynch of the Second U.S. Circuit Court of Appeals said during a recent argument about a new law in New York that prohibits guns in sensitive places like parks, museums and bars."); *id.* ("'What I don't think I've ever seen elsewhere is a demand by the court that every single difficult case be resolved by a historical record that contains so little information,' said Nelson Lund, a George Mason University legal scholar who has written critically of the Bruen decision.").

166. According to the Pew Research Center, the Court's "favorable rating is 23 percentage points lower than it was in August 2020," when Justice Barrett was appointed in the closing weeks of President Trump's term. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low.

VII. CONCLUSION: JUDICIAL CONSTRAINT AND DEMOCRACY

I conclude these observations with a question: *Could liberal Justices who make constitutional claims about the past be subjected to many of these same critiques?* There is a simple sense in which the answer is *yes*: The decisions of liberal Justices also describe the past selectively and shift levels of generality. But there is a deep and important sense in which the answer is *no*. The conservative Justices have claimed that their method is *superior* to the available alternatives: that the turn to history constrains judges from acting on their values as other interpretive approaches—that openly reason from values and recognize that the meaning of the Constitution's guarantees evolve in history—do not. Justice Scalia makes this claim of conservative historicism's methodological superiority to the "living Constitution" at length in *McDonald*, where he claimed that "[t]he traditional, historically focused method" "is much less subjective, and intrudes much less upon the democratic process."[167] And the conservative Justices advance this claim of methodological superiority to justify radical changes in the law in *Dobbs* and in *Bruen*—a claim Justices Gorsuch and Kavanaugh reiterate in *Rahimi*.[168]

It is this claim of methodological superiority that I have challenged, showing that the shift to low levels of generality in the history-and-tradition cases of the Roberts Court is no accident but is instead the expression of a long-running project. The shift to low levels of generality to justify changes in the law *conceals rather than constrains* judicial discretion and values-based reasoning. The constitutional memory claims that naturalize the shift from high to low levels of generality and justify dramatic shifts in the law are yet another form of evolving interpretation, expressed in decisions like *Dobbs* and *Bruen* that justify momentous changes in the law on the basis of granular facts about the nation's past.

The conservative Justices are living constitutionalists, too. "We are all living constitutionalists now."[169]

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167. McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

168. *See supra* notes 62–65, 158–164 and accompanying text.

169. I refer, of course, to the Justices' continuing debate about whether they are all originalists now. This exchange began at Justice Elena Kagan's 2010 confirmation hearing, in the era of *McDonald*, and accelerated in the wake of *Dobbs*. Throughout, Justice Kagan has argued about original understanding with reference to the levels-of-generality debate. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 61, 62 (2010) (observing that the Framers understood "that the world was going to change" and provided for change in the way that they drafted the Constitution, pointing out "sometimes they laid down very specific rules. Sometimes they laid down broad principles" and concluding that "[e]ither way we apply what they say, what they meant to do. So in that sense, we are all originalists"); *see also* Elena Kagan, Address at Northwestern Law School (Sept. 14, 2022), https://www.c-span.org/video/?522765-1/justice-kagan-speaks-northwestern-law-school (observing that

If judges unavoidably exercise discretion and engage in value-based judgment, then perhaps conservative living constitutionalism is on an equal footing with the living constitutionalism of *Brown* and *Loving*, *Frontiero v. Richardson*[170] and *United States v. Virginia*,[171] *Roe* and *Obergefell*. But I have rejected the view that all living constitutionalism is equivalent, and have termed the political practice of originalism in judicial decisions of the Roberts Court "*anti-democratic* living constitutionalism."[172] In an article on *Dobbs* called *Memory Games*, I show how self-identified originalists in "the conservative legal movement have pursued constitutional change": first, "through specialized judicial appointment practices designed to achieve movement-party goals" and, second, "through constitutional memory work that can justify a new court's doctrinal innovations as restoring the Framers' Constitution."[173] I am not interested in measuring whether liberal or conservative jurists exercise more discretion, but instead focus on the kind of constitutional democracy that conservative judges create *precisely as they are claiming to foreswear discretion*.

Memory Games argues that the ways the conservative Justices perform constraint can "exacerbate[] the Constitution's democratic deficits along three axes."[174] Fidelity to the nation's history and traditions—understood in granular particularity—in a case like *Dobbs*, first, "restricts and threatens rights that enable equal participation of historically marginalized groups;"[175] second, it "locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies;"[176] and, third, it "presents . . . contested value judgments as expert claims of law and historical fact to which the public owes deference."[177]

"originalism does not work so well . . . because it is inconsistent with the way the Constitution is written . . . . They wrote in broad terms, and in what you might call vague terms . . . . They didn't list specific practices. They used . . . those sort of generalities for a reason. Because they knew the country would change."). Justice Alito, in particular, has challenged Justice Kagan. *See* Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html (quoting a speech by Justice Alito criticizing Justice Kagan for joining the majority in *Obergefell*, given that she "must regard herself as an originalist" and "*Obergefell* was the precise opposite of originalism," and lauding Justice Scalia's dissent in *Obergefell*, which attacked the majority through a claim that "[i]n 1868, when the 14th Amendment was adopted, nobody — nobody — understood it to protect a right to same-sex marriage").

170. 411 U.S. 677 (1973).

171. 518 U.S. 515 (1996).

172. *See* Siegel, *Memory Games*, *supra* note 20.

173. *Id.* at 1130.

174. *Id.* at 1194.

175. *Id.* For an in-depth account of how the *Dobbs* decision enforced inequalities of 1868 in Mississippi, see Siegel, *History of History and Tradition*, *supra* note 20, at 150–57.

176. Siegel, *Memory Games*, *supra* note 20, at 1196.

177. *Id.*

The liberal Justices well appreciate the anti-democratic tendencies of history-and-tradition arguments. Dissenting in *Dobbs*, they warned that the conservatives' turn to the past was not "'scrupulously neutral,'"[178] but "instead taking sides" and, by tying the Constitution's meaning to fixed points in the past, legitimated many forms of inequality.[179] For this very reason they called for interpreting the Constitution's great guarantees of liberty and equality at the level of generality at which its text is written[180] (as Justice Kagan has long emphasized[181]) so that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[182]

These views about levels of generality *were the Court's* until President Trump changed its composition,[183] and now primarily appear in dissents[184] and concurring opinions. As Justice Sotomayor, joined by Justice Kagan, emphasized in her *Rahimi* concurrence: "History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy."[185]

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178. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2328 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

179. *See id.* at 2325 ("When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."); *see also id.* at 2326 (suggesting *Dobbs*'s approach would also legitimate inequality along lines of race and sexual orientation).

180. *Id.* at 2326.

181. *See supra* note 169 (showing how Justice Kagan's commentary on whether she is an originalist in and after her confirmation hearing focuses almost exclusively on the levels of generality question).

182. *Dobbs*, 597 U.S. at 376.

183. *See supra* notes 89–92 and accompanying text (discussing *Obergefell*). *See generally* Siegel, *History of History and Tradition*, *supra* note 20, at 106 ("It was not until after Justice Kennedy's retirement that a Supreme Court constituted to reverse *Roe* and *Casey* attacked prior cases for reasoning about liberty "at a high level of generality" (citations omitted)); *id.* at 126–46 (recapitulating the fight between Justice Scalia and Justice Kennedy over interpretation of the liberty guarantee that reigned for decades, ending with President Donald Trump's appointments to the Supreme Court).

184. The most prominent expression of this view is their dissent in *Dobbs* discussed in text. More recently, in *Department of State v. Muñoz*, Justice Sotomayor, writing for Justices Kagan and Jackson, warned that the Court had analyzed the right to marry at a level of generality that threatened *Obergefell*, objecting that "[t]he majority, ignoring [*Obergefell*], makes the same fatal error it made in *Dobbs*: requiring too "'careful [a] description of the asserted fundamental liberty interest.'" Department of State v. Muñoz, 144 S. Ct. 1812, 1834 (2024) (Sotomayor, J., dissenting) (quoting *Muñoz*, 144 S. Ct. at 1822 (majority opinion) (quoting Washington v. Glucksberg, 521 U.S. 702, 721(1997))).

185. United States v. Rahimi, 144 S. Ct. 1889, 1905 (2024) (Sotomayor, J., concurring) (showing that guns of the Founding era were not effective as instruments of domestic violence, and that authorities were less likely to intervene, so that founding practice is not a reasonable constitutional baseline for our own); *see also id.* at 1929 n.3 (Jackson, J., concurring) (objecting

Notably, some state judges, concerned that the Supreme Court's history-and-tradition decisions conceal anti-democratic biases in the language of neutrality or fidelity to tradition, interpret their state constitutions differently.[186] These state courts emphasize that fidelity to the past in constitutional interpretation requires understanding the principles to which our forebears were committed—not committing ourselves to live in accordance with our forebears' understanding of these principles "trapped in amber."[187] As the Utah Supreme Court recently explained: "Failure to distinguish between principles and application of those principles would hold constitutional protections hostage to the prejudices of the 1890s."[188]

These state judges keep faith with the principles to which our forebears were committed—without adhering to our forebears' understanding of these principles, as Justice Scalia so often urged.[189] Fidelity to the past understood at the most specific level of generality would entrench the "democratic deficits" of constitutions drafted when women and people of color were excluded from participating. In the words of a North Dakota district court judge:

> The reality is that "individuals" did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests. It quite simply was not the "tradition" of the time, and therefore was not reflected in the laws or state constitution.[190]

This judge drew conclusions from history and tradition deeply at odds with the Supreme Court's in *Dobbs*, reasoning "that there was a time when we got it wrong and when women did not have a voice. This does not need to continue for all time, and the sentiments of the past, alone, need not rule the

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to the "mad scramble for historical records that *Bruen* requires" and observing that "[i]t stifles both helpful innovation and democratic engagement to read the Constitution to prevent advancement in this way").

186. For a powerful example, see Allegheny Reproductive Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808 (Pa. 2024).

187. *See supra* text accompanying notes 158–160 (discussing Justice Gorsuch's reasoning in *Rahimi*); Mayeri, *supra* note 29, at 238–40 (discussing opinions in *Allegheny Reproductive Health Center* that repudiate *Dobbs*'s history-and-tradition analysis and then reasoning about the state's past in terms of the principles that guide interpretation of state constitution).

188 . Planned Parenthood Ass'n of Utah v. Utah, 2024 UT 28, 45 (evaluating constitutionality of Utah abortion ban under Utah Constitution).

189. *See supra* note 91 (quoting Justice Scalia dissenting in *Obergefell v. Hodges*).

190. Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-CV-01608, ¶ 40 (N.D. Dist. Ct. Sept. 12, 2024) (C.R. Litig. Clearinghouse, Univ. Mich.), https://clearinghouse.net/doc/151271.

present for all time."[191] Given this history, strengthening the constitution's democratic legitimacy required interpretation faithful to the constitution's principles, not to its framers' understanding of them. Building on this decision, a Georgia state court struck down the state's six-week ban, refusing to reason from original public meaning:

> "Liberty" for white women in Georgia in 1861 did not encompass the right to vote (and thus to ratify the State's new constitution). And of course liberty did not exist at all for Black women in Georgia in 1861. Thus, any rooting around for original public meaning from that era would yield a myopic white male perspective on an issue of greatest salience to women, including women of color; certainly that is not what constitutional interpretation of any legitimate stripe ought to do.[192]

In differentiating their states' approach to tradition from the Supreme Court's, these state judges are saying the quiet part out loud. They understand that fidelity to tradition requires the exercise of critical judgment, and pretending otherwise—that traditions are facts to be found—will conceal the real grounds of decisions from the public.

It is on this last observation about the anti-democratic logic of the Roberts Court's new history-and-tradition decisions that I close. The "memory games" through which conservative Justices perform constraint—hiding value-based reasoning behind citations to ancient laws in decisions to which ordinary Americans are supposed to defer because they lack the relevant expertise—threatens danger *to democracy* that the open values-based reasoning of the Warren and Burger Courts did not. A court's open values-based reasoning is more transparent to the public. As Justice Stevens put it in

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191. *Id.* at ¶ 43. Women judges reasoning about abortion in several of the state cases sound quite different than nineteenth-century legislators and jurists. *See, e.g.*, *Johnson v. State*, No. 2023-CV-18853, at *34 (Wy. Dist. Ct. Nov. 18, 2024) (ruling that the state has placed "unreasonable and unnecessary restrictions on the right of pregnant women to make their own health care decisions"); *see also* Baylor Spears, *Wisconsin Supreme Court Justices Question Enforcing 1849 Law as an Abortion Ban*, WIS. EXAM'R (Nov. 11, 2024, 5:09 PM), https://wisconsinexaminer.com/2024/11/11/wisconsin-supreme-court-justices-question-enforcing-1849-law-as-an-abortion-ban (reporting a lengthy colloquy between two State Supreme Court judges and the Sheboygan District Attorney's attorney about enforcing Wisconsin's 1849 abortion ban).

192. Sistersong Women of Color Reproductive Justice Collective v. Georgia, No. 2022CV367796, *10-11 n.16 (Ga. Super. Ct. Sept. 30, 2024) (ACLU) https://assets.aclu.org/live/uploads/2022/07/Order-enjoining-GA-six-week-ban-9.30.24.pdf, *stayed by* Order Granting Georgia's Emergency Petition for Supersedeas, No. S25Mr0216 (Ga. Oct. 7, 2024) (ACLU), https://www.aclu.org/documents/stay-order-in-state-of-georgia-v-sistersong-women-of-color-reproductive-justice-collective-et-al; *see also* Ziva Branstetter, *Georgia Judge Lifts Six-Week Abortion Ban After Deaths of Two Women Who Couldn't Access Care*, PROPUBLICA (Oct. 3, 2024, 5:00 AM EDT), https://www.propublica.org/article/georgia-judge-lifts-six-week-abortion-ban-after-deaths.

McDonald: "At least with my approach, the judge's cards are laid on the table for all to see, and to critique," in contrast to the conservative Justices' historical method, where, Justice Stevens argued, the judge's "subjective judgments" are "smuggled into" and "*buried* in the analysis."[193]

The history-and-tradition decisions of the Roberts Court evade accountability by presenting normative judgments as if they were factual judgments, as if all traditions are respect-worthy and worthy of deference.[194] Of course that is not so. The Court itself does not believe that all traditions are respect-worthy and worthy of deference. Recall the memory work of *SFFA* where the Court attacked affirmative action by condemning America's traditions of racial segregation and celebrating its decision to reverse *Plessy* in *Brown*. The conservative Justices move from repudiating past wrongs in one case to reasoning as if the Constitution requires deference to past practice in another, without identifying why the Constitution requires deference in some circumstances and not others. In this way, the Court employs selective deference to the past to roll back equality rights without expressing the beliefs about equality that drive its decisions.[195] As I observed before the Term's end: Should the Court decide that striking down the domestic-violence prohibitor in *Rahimi* would give its history-and-tradition jurisprudence a "bad look," it can adjust levels of generality and impose other doctrinal limits on its decision, without ever articulating the reasons driving these tradition-legitimating adjustments.

193. McDonald v. City of Chicago, 561 U.S. 742, 908 (2010) (Stevens, J., dissenting) (emphasis in original). Remarkably, Justice Scalia replied: "In a vibrant democracy, usurpation should have to be accomplished in the dark. It is Justice Stevens' approach, not the Court's, that puts democracy in peril." *Id.* at 805 (Scalia, J., concurring in part).

194. In *Dobbs*, the Court proceeded as if judges could resolve the abortion question by deference to facts about the nation's past; the majority attacked at length a historians' brief demonstrating that the record posed an unavoidable normative question. The brief argued that abortion bans of the Civil War era rested on both constitutionally legitimate and *illegitimate* concerns—protecting unborn life, as well as enforcing women's roles as wives and mothers and preserving the religious and ethnic character of the nation. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250–55 (2022). For discussion of *Dobbs* in this light, see Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 20, at 920; and *id.* at 922–24, which shows that the *Dobbs* majority implicitly concedes that finding a tradition for constitutional purposes depends in part on the legitimacy of the practice—that is, the inquiry is normative as well as positive.

195. *See generally* Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 20 (showing how history-and-tradition cases can legitimate inequality); *id.* at 906 ("[T]he conservative Justices have repudiated past practices when those practices expressed racism or nativism to which the Justices objected. But in *Dobbs*, the conservative Justices embraced past practices as the nation's history and tradition . . . ."); Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 988 (2024) (showing that history-and-tradition cases involve "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").

There is a democracy problem here. Precisely as judges writing history-and-tradition decisions treat normative questions as questions of historical fact, they fail to explain how they have coordinated the competing values on which their decisions rest. Dispensing with reason-giving—by foreswearing value-based judgments at the very same time that the Court is burying its value-based judgments in a story about deference to the past—offends the rule of law and democracy itself.

With transparency, an aroused public can mobilize to challenge the Court, precisely as the conservative legal movement has in responding to *Brown v. Board*, *Roe v. Wade*, and *Obergefell v. Hodges*. By contrast, concealing value-based reasoning under claims of expertise can prevent the democratic dialogue that gave rise to the conservative legal movement itself. A Court that overturns rights or regulation in an opinion that conceals values-based reasoning behind citations to old laws—an opinion that presents values as facts about the past over which judges claim expertise and an inexpert public must defer—may deceive the public and *disable* democratic oversight. History-and-tradition opinions of this kind could ultimately prove more of a threat to democracy than opinions like *Brown*, *Roe*, and *Obergefell*, which hardly shut down democracy, but instead led to high and sustained forms of democratic engagement.