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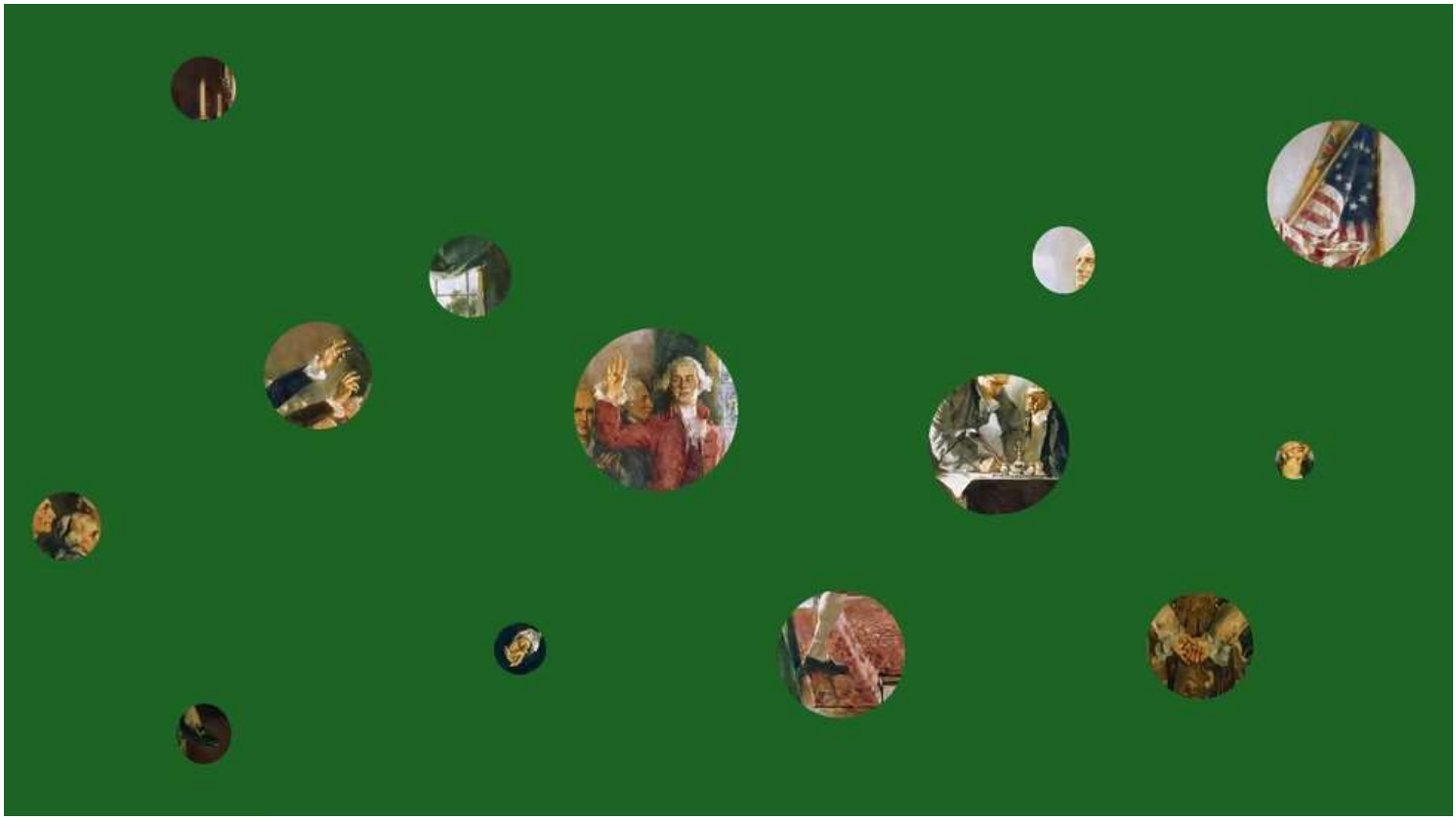
IDEAS

This Court Has Revealed Conservative Originalism to Be a Hollow Shell

The Supreme Court's right-wing justices claim to be originalists, but then they pick and choose the history that fits their ideological preferences.

By David H. Gans



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When Justice Amy Coney Barrett joined the Supreme Court in 2020, conservatives celebrated that "there are now four avowed originalists on the Court." To those on the right, the latest version of the Roberts Court had the potential to be the greatest originalist Court in history. But this term's biggest decisions show how wrong those conservatives were—even as they got all the results they wanted.

Although conservative originalists have for years been touting their method as restrained, sensible, and tightly tethered to constitutional text and history, this term blew away such pretenses. If this is the great conservative originalism, then those professing it have finally and conclusively revealed it to be what many skeptics already considered it: a hollow edifice designed to hide an ugly and aggressive ideological agenda.

This is a radical Court dominated by conservatives who treat the past practices of state legislatures as determinative of the Constitution's meaning, warping the broadly worded language that was meant to enshrine fundamental principles of liberty and equality in our national charter. This is a Court that insists it is following history and tradition where they lead, while cherry-picking the history it cares about to reach conservative results. These are damning moves for conservative justices who pride themselves on fidelity to the Constitution's first principles.

Let's start with *Dobbs v. Jackson Women's Health Organization*, where a five-justice majority overruled *Roe v. Wade* and, for the first time in history, stripped away a previously announced constitutional right essential to bodily integrity and equal citizenship. *Dobbs* offers one of the most crabbed views of liberty in Supreme Court history. Justice Samuel Alito's majority opinion presents liberty as an empty idea. According to Alito, "'liberty' is a capacious term" with hundreds of possible meanings. Because it could mean anything, Alito claimed, courts should be extremely loath "to

recognize rights that are not mentioned in the Constitution." Alito's stingy view of liberty is driven by his fear that courts will inevitably engage in "freewheeling judicial policymaking" in the guise of protecting liberty. The *Dobbs* majority turned to "history and tradition" to stop courts from safeguarding unenumerated fundamental rights, beginning with the right to abortion.

From the 1969 issue: The right of abortion

Alito's account of "history and tradition" ignores the most salient aspect of the Fourteenth Amendment's history: the horrific abuses that led the Framers of the Fourteenth Amendment to push through changes to the Constitution to broadly guarantee the protection of substantive fundamental rights. The through line from the abolitionist critiques of slavery to the debates over the Thirteenth and Fourteenth Amendments was the idea that slavery was built on the denial of bodily integrity, coerced reproduction and the rape of enslaved women, and the tearing apart of Black families. Alito's sweeping condemnation of unenumerated fundamental rights ignores the fact that the Fourteenth Amendment sought to guarantee rights to bodily integrity and to marry and raise a family, and the right to decide for oneself whether, when, and with whom to form a family.

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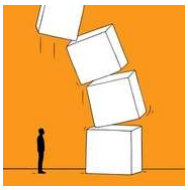

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In short, reproductive freedom is in the Constitution. Alito simply refuses to grapple with the Constitution's true history.

Instead, Alito relies heavily on state practice, insisting that because abortion was widely prohibited at the time of the Fourteenth Amendment's ratification in 1868, state bans on abortion are constitutionally permissible. Since *Brown v. Board of Education*, arguments from state practice have been the go-to argument for those seeking to gut the Fourteenth Amendment's promises of freedom and equal citizenship. Defenders of school-segregation laws, bans on interracial marriage, bans on abortion, sodomy laws, and bans on same-sex marriage argued that each of these practices was constitutional based on state legislative practice at the time of ratification. Alito draws on similar arguments to justify overruling *Roe*.

Alito's state-practice argument is wrong and deeply dangerous: The fundamental rights of Americans do not rise or fall depending on a head count of state practice in 1868. The Fourteenth Amendment changed the Constitution to correct a long history of subordination and suppression of fundamental rights, not freeze into amber state practices of the day. But Alito's majority opinion shows no interest in understanding the Fourteenth Amendment. His project, despite his denials to the contrary, was to overrule *Roe* and provide a road map to strip away bedrock rights that the Court has protected for nearly a century, including rights to use contraceptives, enjoy sexual intimacy, and marry the loved one of one's choice, regardless of sex—protections that Justice Clarence Thomas, in his *Dobbs* concurrence, indicated he would take away.

In his account of state practice, Alito presents a slanted version of history, ignoring the fact that common law made abortion accessible early in pregnancy and whitewashing the illicit racist and sexist judgments baked into the campaign to prohibit abortion.

When states moved to criminalize abortion beginning in the mid-19th century, it was based on the view, shared by the Supreme Court of that era, that a woman's proper role was to bear and raise children, as well as racist fears that white Protestant women were flouting their maternal duties at a time when immigrant populations were expanding. This is hardly history that a Court concerned with the Fourteenth Amendment's core commitments would defer to. Rather than grapple with it, Alito blithely dismisses it as irrelevant, allowing the dead hand of an unjust past to trump the majestic language inscribed in the Constitution.

Dobbs deployed selective history to take away a fundamental right; the 6–3 ruling in *New York State Rifle & Pistol Association v. Bruen* deployed selective history to create one: a radically expansive right to be armed in public. The most jaw-dropping aspect of *Bruen* is the newly minted test the conservative majority invented to adjudicate future challenges to gun-safety legislation. Instead of using the weighted interest-balancing approach that is the norm in constitutional law, the six conservatives insisted that "the government must affirmatively prove that its firearm regulation is part of a historical tradition that delimits the outer bounds of the right to keep and bear arms." As guns have proliferated, weapons have become more dangerous, and mass shootings have become an all-too-common occurrence, the 6–3 conservative majority insisted that new approaches to gun safety are constitutionally illegitimate. Going forward, only gun-safety laws that are backed by strong historical precedents are constitutionally permissible.

John A. Eterno: I was a police officer for 20 years. I know what it means to put guns on the street.

Bruen never explained why a past tradition of gun-safety regulation—written at a time when firearms were less powerful than modern ones—is hardwired into the Constitution. The Second Amendment may protect an individual right to bear arms, but nothing in its history freezes in place gun-safety regulations of the founding era. The 6–3 Court has invented a harsh test completely out of whack with the rest of constitutional law, which takes into account both rights and government interests.

Nowhere else in constitutional law does the Supreme Court employ a test that is so shackled to historical practice.

Justice Thomas's majority opinion in *Bruen* devoted virtually no space to canvassing the text and history of the Second Amendment. That is because nothing in history supports the idea that the government cannot enact reasonable gun regulations that respect the right to own a gun, while also protecting public safety. The problem is not the Constitution; it is the fact that the 6–3 conservative Court invented the idea that only gun-safety legislation with a strong historical backing is constitutionally permissible.

The *Bruen* majority promised that the government need only "identify a well-established and representative historical analogue, not a historical twin," then spent the bulk of the opinion dismissing every single example of what Justice Stephen Breyer's dissent called "a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular." The takeaway is that the conservative-majority Court will relentlessly manipulate history to find a way to strike down gun-safety legislation that it dislikes. *Bruen* is just the beginning.

In this term's religion cases, *Carson v. Makin* and *Kennedy v. Bremerton School District*, the 6–3 conservative majority dramatically expanded the protections of the free-exercise clause, without a whiff of attention to history and tradition, while whittling down the establishment clause in light of historical practice. As Justice Sonia Sotomayor trenchantly put it, "The Court leads us to a place where separation of church and state becomes a constitutional violation." This emerges most starkly in *Kennedy*, where the conservative majority played fast and loose with both the factual record and the law to overturn the dismissal of a public-school football coach who was fired for leading students in prayers on the 50-yard line following his team's games. Dismissing huge swaths of prior establishment-clause doctrine as long "abandoned," Justice Neil Gorsuch's majority opinion insisted that "historical practices and understandings" sharply limit separation of church and state principles. On Gorsuch's

account, it was the school district who overstepped its authority, and the idea that Kennedy's prayers might have coerced nonbelievers can be dismissed.

Adam Laats: The Supreme Court has ushered in a new era of religion at school

It is no coincidence that, in the same term that the 6–3 Court dismantled the right to abortion, it also rejected the notion that the government must act with a secular purpose and may not endorse religion. Where will the Court's disdain for the establishment clause go next? *Kennedy* raises the possibility that the conservative majority might allow official teacher-led prayers on the basis of historical practice of state-sanctioned prayers in public schools. Those who care about the religion clauses —both of them—should be gravely worried that the Court might enable state efforts that degrade "from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority"—precisely what James Madison's famous writings on freedom of conscience and religious equality warned against.

As these examples illustrate, "history and tradition" is the new calling card of a Supreme Court that is willing to upend our constitutional order in the name of traditionalism. Do not label the Roberts Court "originalist," if that term is to have the methodological meaning its supporters have been advertising for years. It is not. It is a deeply unprincipled conservative Court majority that manipulates both the Constitution and history to reach conservative results, reversing rights it despises and supercharging those it reveres.