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How ‘History and Tradition’ Rulings Are Changing American Law

A new legal standard is gaining traction among conservative judges — one that might turn back the clock on drag shows, gun restrictions and more.

By Emily Bazelon
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In November 2022, a group of L.G.B.T.Q. students at West Texas A&M University started planning a drag show for the following spring. They wanted to raise money for suicide prevention and stand up for queer self-expression at a time when conservatives in Texas, in the name of protecting children, were mobilizing to shut drag shows down.

The student group, Spectrum WT, set a few guidelines. The show would be “PG-13,” the students told the university. Kids under the age of 18 — the students had in mind the siblings of a performer — could come only if they were accompanied by a parent or guardian.

Despite this plan, the president of West Texas A&M, Walter Wendler, announced in March 2023 that he was barring the event from campus. In a statement on his personal website, Wendler called drag shows “derisive, divisive and demoralizing misogyny.” Spectrum WT sued, arguing that Wendler’s decision to cancel the show was a “textbook” example of discriminating against speech based on viewpoint.

Legally speaking, Spectrum WT had a strong case. Since the 1970s, the Supreme Court has ruled that the First Amendment protects speech on public university campuses, “no matter how offensive” and despite “conventions of decency,” as two

decisions put it. Wendler acknowledged that he was refusing to allow the drag show to take place "even when the law of the land appears to require it."

But the lawsuit landed on the docket of Judge Matthew J. Kacsmaryk, a Trump appointee to the federal bench in Amarillo who is the author of several sweeping arch-conservative rulings. And in the drag-show case, Judge Kacsmaryk had a new tool, supplied by the Supreme Court. Known as the "history and tradition" test, the legal standard has been recently adopted by the court's conservative majority to allow judges to set aside modern developments in the law to restore the precedents of the distant past.

The conservative justices applied the history-and-tradition test in three major rulings decided in the space of a week in June 2022. First, they struck down a New York restriction on gun ownership for being out of line with the nation's "historical tradition" around regulating guns. Next, in Dobbs v. Jackson Women's Health Organization, a conservative majority ended the constitutional right to abortion in Roe v. Wade because it was not "deeply rooted in the Nation's history and tradition." Finally, the court held that a public high school's decision to let go of a football coach for praying with a crowd he gathered at midfield was out of line with "historical practices and understandings" of religious freedom.

The flurry of history-and-tradition opinions prompted an uproar among liberal court-watchers. What counted as historical or traditional? The open-ended nature of the terms seemed to invite a freewheeling survey of the 18th and 19th centuries. It's "basically a fancy way of saying, 'if men in power didn't recognize this right as fundamental in ye olde times, we won't recognize it now,'" tweeted Joseph Fishkin, a law professor at the University of California, Los Angeles. The court was playing "memory games," in the words of a widely cited law review article about Dobbs by Reva Siegel, a Yale law professor. Why does the conservative majority "appeal to history and tradition in *exactly* those cases in which it is *changing* the law?" she asked in another, forthcoming piece.

Some judges expressed practical concerns as well. In one of many recent suits that involved challenges to state and federal gun restrictions, Judge Carlton Reeves, an Obama nominee to the federal bench in Mississippi, pointed out that judges were not trained to sort through the competing interpretations of history. “We are not experts in what white, wealthy and male property owners thought about firearms regulation in 1791,” Reeves wrote.

A protest at West Texas A&M University in March 2023 over the university’s decision to cancel a drag show on campus. Michael Cuviello/Amarillo Globe-News,via Associated Press

Conservatives, meanwhile, had their own furious debate. For them, a central question was whether the Supreme Court’s conservative majority was deviating from originalism, the method of interpreting the Constitution championed since the 1980s by heroes of the right like former Justice Antonin Scalia. Originalism resembles the history-and-tradition test in focusing on the past. But its main

selling point was to fix the meaning of the Constitution to the moment in which it was written, to prevent judges from substituting their values for the wisdom of the nation's founders.

Though originalism in practice never lived up to this promise, because judges used it inconsistently or to reach the results they preferred, "history and tradition," unlatched from any one moment, is even more pliable and indeterminate. It lets judges choose from a vast array of sources, which makes it easy to cherry-pick.

Skeptics of the history-and-tradition standard received some validation from an unlikely source. At a talk at Catholic University's law school in September 2023, Justice Amy Coney Barrett, a former Scalia clerk who joined Alito's opinion in Dobbs, used an old saying to warn that a judge's hunt for historical sources could be like "looking over a crowd and picking out your friends."

That same day, Judge Kacsmaryk issued his opinion about the student drag show. Citing the Supreme Court's approach to history in the 2022 gun case, Kacsmaryk said that the early history of the First Amendment is "drastically different" than the modern version. Kacsmaryk cited an 18th-century treatise describing the government's power to censure "licentiousness" and a 19th-century ban on mailing "lascivious" materials. Older rules like these continue to set an "outer limit" on "*sexualized* 'expressive conduct,'" Kacsmaryk wrote. He ruled that the university could bar the drag show — an extraordinary and anti-modern result.

In March, the Supreme Court rejected the student group's request to hold a second annual drag show on campus. Kacsmaryk's decision is now pending at the U.S. Court of Appeals for the Fifth Circuit. Also unresolved is a larger question: How much will the scope of American liberty change as conservative judges impose the past on the present?

Justice Samuel Alito, the author of the majority opinion in Dobbs, has called himself a "practical originalist," a phrase that fits his record of putting results above theory. In Dobbs, he used the history-and-tradition test to solve a problem that originalism posed for abortion opponents: When the Constitution was written,

and long afterward, courts in the United States followed English common law, a set of rules and precedents developed by judges that widely permitted abortion in early pregnancy.

For centuries, before pregnancy tests, many people believed that fetal life began with "quickening," when women felt the first fetal movement, usually between 15 and 18 weeks. Early American law did not even recognize an abortion as having occurred before that stage, according to a friend-of-the-court brief in Dobbs submitted by the American Historical Association and the Organization of American Historians.

In 1973, when the Supreme Court decided Roe, Justice Harry Blackmun, in his majority opinion, contrasted this early history with more recent state restrictions. "At the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor," Blackmun wrote. "A woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."

Blackmun, who was not an originalist, did not feel bound by the distant past. He treated history in Roe as "a resource, not a command," as Jack Balkin, a Yale law professor, has written in his new book, "Memory and Authority," describing how lawyers often use historical facts. This approach to the past — as relevant but not determinative — "was *the* major form of constitutional interpretation," says Robert Post, author of the recent book "The Taft Court." "History was never a simple fact to be ascertained. It was always an interpretation of the meaning of widespread practices."

The cornerstone Blackmun laid for the constitutional right to abortion came from the 14th Amendment, which Congress ratified in 1868 during Reconstruction. As one clause of the amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Interpreting those words a century later, the court said that the 14th Amendment's concept of liberty, in the due-

process clause, included a right to privacy. In Roe, Blackmun said the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Since then, majorities made up of liberals *and* conservatives have turned to the due-process clause as the basis for adapting the Constitution to modern social conditions, recognizing new rights including parental authority and sexual liberties. Anthony Kennedy, a Reagan nominee, took the lead. "The generations that wrote and ratified the Bill of Rights and the 14th Amendment did not presume to know the extent of freedom in all of its dimensions," Kennedy wrote in his landmark 2015 majority opinion providing for the right to same-sex marriage, in the case Obergefell v. Hodges, "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."

In Dobbs, however, Alito called the court's reliance on the due-process clause in abortion cases "controversial." He stopped short of declaring it invalid, which would jettison too many modern rights and freedoms, like sweeping all the pieces off a chess board. (Only Justice Clarence Thomas, in a concurrence no one else joined, called for such a reconsideration.)

Alito aimed to topple the right to abortion and only that right. Using the history-and-tradition test, he purported to show that legal abortion was not "deeply rooted" in the nation's history, claiming that "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973." But Alito didn't acknowledge that in the rare known cases in which someone was convicted of causing an abortion up to the Civil War, it was almost always *after* quickening. And "such abortion providers came to public notice not because of their practice per se but if the pregnant woman had suffered badly or died as a result," says Nancy Cott, an emerita professor of history at Harvard.

Alito also made this key claim: "By 1868, the year when the 14th Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening." But according to Aaron Tang, a law professor at the University of California, Davis, that number is

inflated. “Substantial evidence suggests that as many as 12 of the 28 states” continued to permit abortions before quickening, Tang wrote in a 2023 article in The Stanford Law Review.

Outside the Supreme Court before the oral argument in U.S. v. Rahimi in November 2023. Bill Clark/CQ Roll Call, via Associated Press

Alito then pointed out more abortion restrictions through 1910, ignoring other moments in history, including steps some states took before and after Roe, to ensure that abortion would be legal within their borders under certain circumstances. He also relied on a 1997 case, in which the court refused to extend its concept of liberty based on the due process clause to include physician-assisted suicide, because it had “no place in our Nation’s traditions.” It was hard not to think that Alito was, as Justice Barrett put it, looking out over the crowd for his friends.

The history-and-tradition test could have even more far-reaching effects on other areas of law. Last year, for example, the U.S. Court of Appeals for the Sixth Circuit considered a challenge to Tennessee's ban on gender-related medical treatments for minors, brought by parents who argued that they had a 14th Amendment right to make decisions about treatments on their children's behalf. In the majority opinion of a three-judge panel, Judge Jeffrey Sutton agreed that parents have the right to make decisions "concerning the care, custody and control of their children" — but ruled against the parents, because they hadn't shown that a right to new medical treatments was "rooted in the nation's history and tradition." A month later, another federal appeals court similarly upheld an Alabama ban on gender-related care for minors.

Applied literally, the history-and-tradition test turns on whether a new practice is like an old one. If not, courts can discount whatever modern goal it is supposed to serve. But some of the justices are already wrestling with whether they have painted themselves into a corner.

The dilemma was evident at the oral argument in November for United States v. Rahimi, a case about the intersecting dangers of guns and domestic violence. In 2021, Zackey Rahimi was arrested for having a gun, which put him in violation of a 1994 federal law that made it a crime for someone to possess a firearm if subject to a protective order for threatening a spouse or partner. The rationale for the law, which many states have versions of, is that women who live with abusers are far more likely to be murdered if their partners have access to a gun. A Texas judge granted Rahimi's ex-girlfriend a protective order in 2020 after she said Rahimi threw her to the ground, dragged her to his car and slammed her head against the dashboard. Months later, Rahimi went on a shooting spree, which included firing at another driver after a car accident, prompting police to search his home and find his guns.

But using the history-and-tradition test, the U.S. Court of Appeals for the Fifth Circuit reversed Rahimi's conviction for illegal gun possession. The conservative appeals court struck down the 1994 law for being a historical outlier "that our ancestors would never have accepted" and thus invalid under the Second

Amendment. The past governed the present, in the view of the Fifth Circuit. At the Supreme Court, the Biden administration was forced to defend the 1994 law according to the terms of the history-and-tradition test. (A decision is expected by the end of June.) The government argued that the statute fit into a general tradition, throughout American history, of disarming people who were considered dangerous.

But for much of American history, women, who could not vote, had little recourse when their family members harmed them. And the groups the government disarmed had nothing in common with domestic-violence offenders. They included enslaved people and Native Americans. The Biden administration disavowed these examples, calling them “odious” because they were based on race. That left historical examples that were also not analogous — like British loyalists and Confederate rebels.

Some conservative justices seemed to search for a way to allow the government to disarm domestic-violence offenders. “The legislature can make judgments to disarm people consistently with the Second Amendment based on dangerousness,” Justice Barrett suggested.

Now it seemed as if the history-and-tradition test were flexible — not really a command at all. Justice Ketanji Brown Jackson, a liberal, used the argument to reflect on the inconsistency. “If we’re still applying modern sensibilities, I don’t really understand the historical framing,” Jackson said. She was exposing the trap the Supreme Court has set for itself and the lower courts. Either the past, however archaic, retains real command over the present, or the history-and-tradition test is no test at all.

Read by Almarie Guerra de Wilson Narration produced by Krish Seenivasan Engineered by Lance Neal

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Source photos: Harris & Ewing/Library of Congress; Erin Schaff/The New York Times.

A correction was made on April 30, 2024*: An earlier version of a picture caption with this article misidentified the site of a March 2023 protest over the cancellation of a drag show on campus. As the article stated correctly, the protest occurred at West Texas A&M University, not Texas A&M.*

When we learn of a mistake, we acknowledge it with a correction. If you spot an error, please let us know at nytnews@nytimes.com. Learn more

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