

***US v. Rahimi*, Originalism’s Loaded Weapon, and the Lost Boys of the Supreme Court**

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“If in the first act you have hung a pistol on the wall,” wrote the Russian playwright Anton Chekhov, “then in the following one it should be fired. Otherwise, don’t put it there.”¹ According to the narrative principle of “Chekhov’s gun,” once an element is introduced in a story, it must play some later role in the plot. Justice Robert Jackson offered a juridical version of Chekhov’s gun as a warning rather than an exhortation in his famous dissent in *Korematsu v U.S.* (1944). According to Jackson, once the Court sanctions an unjust principle, such as upholding the internment of Japanese-Americans on the grounds of national defense, that principle “then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.” This aptly describes the more-than-metaphorical loaded weapon introduced by the Supreme Court’s 2008 “originalist” decision in *District of Columbia v. Heller*, which re-appeared in *NYSPPRA v. Bruen* (2022) before being featured once again in *U.S. v. Rahimi* (2024). While “Heller’s gun” may have failed to go off in *Rahimi*, its lethal promise persists.

Casting aside two hundred years of settled precedent, a conservative majority of the Supreme Court decreed in *Heller* that the Second Amendment protected an individual right to keep handguns in the home for self-defense. While the Court claimed then that the principle of individual armed self-defense was a narrow and limited one, it soon “expand[ed] it to new purposes.” In *Bruen*, an even more conservative majority announced that the Second Amendment right to bear deadly weapons extended beyond the home and could only be limited in ways that were consistent with historical regulations of the right. Given that the individual right to bear weapons did not exist until the Court willed it into existence in 2008, this “history and tradition” test seemed to call into question the constitutionality of virtually every gun regulation in the U.S. Unsurprisingly, *Bruen* unleashed a wave of constitutional challenges to longstanding firearms regulations.

One of the boldest of these challenges came from Zackey Rahimi, a domestic abuser and drug dealer who threatened two different women with a gun and had a habit of opening fire in a wide variety of places, including in a parking lot, on a highway, in a residential neighborhood, and a fast-food restaurant. One of the

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¹ Illia Gurlyand, *Reminiscences of A. P. Chekhov*, TEATR I ISKUSSTVO, July 11, 1904, at 521.

women Rahimi threatened with a gun was his ex-girlfriend and mother of their child, who obtained a restraining order against Rahimi for his abusive conduct.

Under 18 USC §922(g)(8), a federal law enacted in 1994, individuals are prohibited from possessing firearms if they are subject to restraining orders that fulfill three conditions: the defendant had notice and opportunity to be heard before the order was issued; the order prohibits the defendant from harassing, stalking, or threatening an intimate partner; and the order either includes a finding that the defendant posed a “credible threat” to the intimate partner or her child or explicitly prohibits the use, attempts to use, or threats to use physical force against the intimate partner or child. Because Rahimi’s order met all three conditions, he was subject to the firearms prohibition, which he then violated multiple times. After being convicted, Rahimi argued that §922(g)(8) was a facial violation of the Second Amendment.

The Fifth Circuit originally rejected Rahimi’s argument, but after the Supreme Court announced the “history and tradition” test in *Bruen*, it reversed course. According to the majority opinion in *Bruen*,

when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.²

Applying this reasoning to *Rahimi*, the Fifth Circuit observed that while domestic violence surely existed in the 18th century, regulations resembling §922(g)(8) did not.³ This is hardly surprising, given that domestic violence has only recently begun to be treated as a proper subject of governmental intervention in the U.S. So far from being considered a crime, wife-beating and rape were long considered to be part of husband’s marital privilege.⁴ Even as the wrongfulness of intimate partner violence began to be recognized in the twentieth century, it was treated as a domestic matter that was best resolved privately. Laws like §922(g)(8) were enacted only after decades of research and advocacy efforts that painstakingly

² *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 26–27 (2022).

³ *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), *rev’d and remanded*, 144 S. Ct. 1889 (2024) (holding that a regulation is invalid because it is inconsistent with the Nation’s historical tradition of firearm regulation).

⁴ *See* William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 432 (1765) (stating that husbands were legally entitled to give their wives “moderate correction”); Matthew Hale, HISTORY OF THE PLEAS OF THE CROWN 629 (1736) (“The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”).

documented the lethal role of firearms in domestic violence: when a domestic abuser has access to a weapon, he is five times more likely to kill his victim. Firearms are used in more than half of all intimate partner homicides. Every 14 hours, a woman in America is shot to death by an intimate partner. For the narrow category of domestic violence victims who successfully obtain protective orders that meet the requirements of §922(g)(8), the temporary disarmament of their abusers is literally the difference between life and death.

According to the Fifth Circuit, *Bruen* makes all of this irrelevant. All that matters is that no provision similar to the federal domestic violence firearms prohibition existed when the Second Amendment was ratified, and so the prohibition is unconstitutional. The Fifth Circuit expressed no particular regret for this outcome, seemingly untroubled by the reality that more women would die from domestic violence as a consequence of its ruling. The court, in particular Judge James Ho in his concurring opinion, chose instead to invoke caricatures of domestic violence victims as liars and gold-diggers and to impugn the protective order process.⁵

The unvarnished misogyny of the Fifth Circuit’s opinion, combined with the dramatic policy consequences of striking down §922(g)(8) and the fact that Rahimi was a deeply unsympathetic character, led to predictions that the Supreme Court might not rule in his favor even though a straightforward application of *Bruen* seemed to require it to do so. The *Bruen* majority had held that only firearms regulations that are “consistent with this Nation’s historical tradition of firearm regulation are constitutional,” and that “constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.” Whether this is understood to mean in 1791, when the Second Amendment was enacted, or 1868, with the adoption of the 14th Amendment, it is difficult to see how a law that went into effect in 1994 to disarm individuals subject to domestic violence restraining orders (themselves an invention of the twentieth century) could possibly qualify.

But as one legal commenter observed, “even the conservative legal movement’s most unapologetic gun rights proponents probably do not want to see ‘SUPREME COURT UPHOLDS GUN RIGHTS OF DOMESTIC ABUSERS’” proclaimed in newspaper headlines.⁶ Several of the conservative justices, all of whom had joined the *Bruen* majority, expressed skepticism about Rahimi’s claims during oral argument. Chief Justice Roberts and Justice Gorsuch repeatedly made clear they considered Rahimi to be a dangerous person. Rahimi’s own lawyer seemed so uncomfortable with the implications of a victory for his client that Justice Kagan suggested that he was “running away” from his own argument because he couldn’t

⁵ *Id.* at 465—66.

⁶ Jay Willis, *The Supreme Court’s Big Gun Case Was Humiliating for the Justices*, SLATE (Nov. 7, 2023, 5:21 PM), <https://slate.com/news-and-politics/2023/11/rahimi-supreme-court-justices-gun-case-spectacle.html> [<https://perma.cc/RN9U-JFGU>].

“stand what the consequences of it are”⁷ —a characterization that seemed equally appropriate for the conservative justices who handed down *Bruen* only to distance themselves from *Rahimi*.

U.S. v Rahimi was the third act of the Supreme Court’s extremist Second Amendment play. Unlike in *Heller*, which contemplated a gun secured within the confines of the home, or in *Bruen*, which contemplated a gun carefully transported in public by a law-abiding citizen, the gun in *Rahimi* appeared in the hands of a violent and volatile criminal, ready to go off at any second. Had the Court affirmed the Fifth Circuit, it would not only have further endangered millions of domestic violence victims facing the threat of gun violence from abusive partners but also increased the risk of firearm violence for the general public. Domestic abusers frequently also target their partners’ friends, family members, and co-workers. More than half of all mass shootings are related to intimate partner violence, and two-thirds of mass shooters have a history of domestic violence. A win for *Rahimi* would have also signaled that virtually all modern gun legislation was potentially unconstitutional, a grim prospect in a country where gun violence kills approximately 40,000 people each year⁸ and is the leading cause of death for children and teenagers.⁹

But the gun did not go off—this time. The 8-1 majority found that “[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others” and that *Rahimi* was clearly such an individual.¹⁰ The Fifth Circuit had been too crabbed in its approach to history and tradition, the Court found, demanding a historical “twin” for the federal domestic violence gun ban rather than a historical “analogue.”¹¹ The Court ruled that identifying a specific ancestor to a law was not necessary to find it constitutional; more general historical restrictions on firearm possession by dangerous individuals, in particular surety and going armed laws, were a sufficient basis for finding §922(g)(8) to be a permissible regulation under the Second Amendment.¹²

But *Rahimi* is only a pause in the hostilities unleashed by *Heller* and the selective originalism of the Roberts Court. To be sure, the majority’s adoption of a

⁷ Transcript of Oral Argument at 89:10–13, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (No. 22–915).

⁸ Kiara Alfonseca, *More Than 40,000 People Killed in Gun Violence so far in 2023*, ABC NEWS (Dec. 7, 2023, 2:30 PM), <https://abcnews.go.com/US/116-people-died-gun-violence-day-us-year/story> [<https://perma.cc/VCW8-HQNC>].

⁹ Matt McGough et al., *Child and Teen Firearm Mortality in the U.S. and Peer Countries*, KFF (July 18, 2023), <https://www.kff.org/mental-health/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries> [<https://perma.cc/6SYM-ZVHM>].

¹⁰ *United States v. Rahimi*, 144 S. Ct. 1889, 1902 (2024).

¹¹ *Id.* at 1903.

¹² *Id.* at 1899–1902.

more flexible reading of history allowed it to avoid reaching a conclusion that would have had immediate and deadly policy consequences. But while gun extremists may have lost this particular battle, the Roberts Court remains firmly on their side of the war.¹³ The firearms regulation upheld in *Rahimi* applies only to a narrow set of circumstances, and the majority's opinion confined its support to an even narrower set. More fundamentally, the majority opinion was only able to rescue the law from invalidation by distorting the holding of *Bruen* beyond recognition—a point made by no less an authority than *Bruen*'s own author, Justice Thomas, the lone dissenter in *Rahimi*.

Media headlines that characterized *Rahimi* as upholding a federal ban on domestic abusers from owning guns¹⁴ considerably overstated the case. The federal firearms dispossession law at issue in *Rahimi* applies only to individuals subject to specific kinds of domestic abuse restraining orders. Many domestic violence victims never seek restraining orders against their abusers at all, for reasons that can include fear of triggering an escalation in violence; financial or emotional dependence on the abuser; anxiety about the court process; or belief that the order will not be effective or enforced.¹⁵ And many domestic violence victims who do seek protective orders are denied, in direct contradiction to the Fifth Circuit's baseless claim that “[r]estraining orders . . . are granted to virtually all who apply.”¹⁶

Furthermore, the law only applies to protection orders sought by “intimate partners,” which are defined as a current or former spouse, current or former cohabitant, or parent of a child in common.¹⁷ That is, the law does not apply when the victim is someone the abuser has never married, lived with, or had a child with, an exception sometimes referred to as the “boyfriend loophole.”¹⁸ In addition, as noted

¹³ See Mary Anne Franks, *In U.S. v. Rahimi, Domestic Violence Victims Live to Die Another Day*, MS. MAGAZINE (June 21, 2024), <https://msmagazine.com/2024/06/21/rahimi-domestic-violence-guns-women-supreme-court-misogyny/> [<https://perma.cc/F34H-MGWM>].

¹⁴ See, e.g., Adam Liptak, *Supreme Court Upholds Law Disarming Domestic Abusers*, N.Y. TIMES (June 21, 2024) <https://www.nytimes.com/2024/06/21/us/politics/supreme-court-guns-domestic-violence.html> [<https://perma.cc/M7RE-CYNM>]; John Fritze, *Supreme Court upholds law barring domestic abusers from owning guns in major Second Amendment ruling*, CNN (June 21, 2024, 2:10 PM), <https://www.cnn.com/2024/06/21/politics/supreme-court-guns-rahimi/index.html> [<https://perma.cc/7KKF-VC62>]; Maureen Gropp and Bart Jansen, *Supreme Court upholds law banning domestic abusers from owning guns*, USA TODAY (June 21, 2024, 2:44 PM), <https://www.usatoday.com/story/news/politics/2024/06/21/supreme-court-decision-domestic-abusers-gun-ownership/72682243007/> [<https://perma.cc/H7RZ-Z37B>].

¹⁵ See *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 753 (2005).

¹⁶ *United States v. Rahimi*, 61 F.4th 466 (5th Cir. 2023).

¹⁷ 18 U.S.C. § 921(a)(32).

¹⁸ Recent federal legislation has narrowed, though not eliminated, this loophole. See Orion Rummler, *Bipartisan gun violence bill tightens the ‘boyfriend loophole’—but doesn’t close it completely*, THE 19TH (June 23, 2022, 11:02 PM), <https://19thnews.org/2022/06/gun-bill-boyfriend-loophole/> [<https://perma.cc/BKH6-NX4T>].

above, the firearms prohibition is only triggered when three conditions are met: the defendant had notice and opportunity to be heard prior to the issuance of the order; the order prohibits the defendant from harassing, stalking, or threatening an intimate partner; and the order either includes a finding that the defendant posed a “credible threat” to the physical safety of the intimate partner (or her child) or, alternatively, explicitly prohibits the use, attempts to use, or threats to use physical force against the intimate partner or child. The restraining order against Rahimi included a “credible threat” finding, and Chief Justice Roberts made clear that the majority was not offering an opinion about whether they would reach the same result with a restraining order that instead prohibited physical force against an intimate partner or their child.¹⁹ The Court also emphasized the temporary nature of the firearms prohibition in Rahimi’s case, lasting only as long as the protective order itself is in place.²⁰

In reversing the Fifth Circuit’s decision, the majority chastised the lower court for misapplying *Bruen*. But while the Fifth Circuit’s opinion was certainly troubling, it faithfully “followed *Bruen* to its lethal, logical conclusion. If the Supreme Court truly meant what it said, then Americans today have no power to disarm those men who are most likely to murder their wives, girlfriends and children.”²¹ If the conservative justices find this conclusion intolerable, they “have no one to blame but themselves”²² for establishing the precedent that led directly to it. As Justice Ketanji Brown Jackson pointed out during oral argument, if the highly selective historical tradition approach the Court adopted in *Bruen* could invalidate a 1905 state law establishing a proper cause requirement for the public carrying of firearms, the fate of a federal law enacted far later and for the protection of a class of people not even considered part of “we the people” either at the founding or when the 14th Amendment was ratified certainly seemed doomed. If “[s]ome courts have misunderstood the methodology of our recent Second Amendment cases,” as Roberts alleged, the fault is “with us, not with them.”

In her concurrence in *Rahimi*, Brown Jackson, who had not been on the Court when *Bruen* was decided and made clear she would not have joined the majority opinion, suggested that courts struggle to apply *Bruen* because “there is little method to *Bruen*’s madness.” *Rahimi* itself does very little to ameliorate this situation, as the majority opinion seemed to rely on arbitrary determinations about “the suitability of

¹⁹ “Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. We need not decide whether regulation under Section 922(g)(8)(C)(ii) is also permissible.” *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

²⁰ *Id.* at 1902.

²¹ Mark Joseph Stern, *5th Circuit Rules That People Accused of Domestic Violence Have a Right to Keep Their Guns*, *Slate* (Feb. 2, 2023, 5:29 PM), <https://slate.com/newsandpolitics/2023/02/5th-circuit-court-domestic-violence-second-amendment-right.html> [https://perma.cc/P5LS-RYCV].

²² Willis, *supra* note 5, at 6.

whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources,” leaving unanswered a host of other questions that have bedeviled lower courts since *Bruen*:

Who is protected by the Second Amendment, from a historical perspective? To what conduct does the Second Amendment’s plain text apply? To what historical era (or eras) should courts look to divine a historical tradition of gun regulation? How many analogues add up to a tradition? Must there be evidence that those analogues were enforced or subject to judicial scrutiny? How much support can nonstatutory sources lend?²³

Professor Jacob Charles concludes that the decision in *Rahimi* falls below “the bare minimum we should expect of the Supreme Court,” which is “to provide direction to the thousands of lower court judges tasked with making monumental and effectively final decisions daily. The Court in *Rahimi* seems not to have even tried.”²⁴

But of course, it would have been difficult for the Court to answer any of these fundamental questions, given that its conservative members could not agree among themselves about how to interpret its own precedent from only two years ago, a fact dramatically underscored by Justice Thomas’s dissent. “Eight justices accused the *Bruen* author of misunderstanding his own words,” writes Charles, and “the author accused the eight of acceding to the government’s attempt to ‘rewrite the Second Amendment and the Court’s precedents interpreting it.’”²⁵ Such doctrinal disarray “should give us serious pause about the soundness of an interpretive method that turns on the ability of judges to locate the fixed meanings of documents drafted a quarter millennium ago.”²⁶

But in the view of many conservative justices, the outcome in *Rahimi* was a strong demonstration of the merits of the history and tradition approach. Justice Kavanaugh, for example, spent most of his concurrence praising the role of history in constitutional interpretation. In the absence of clear judicial precedent, he wrote, there are effectively only two possible guides for constitutional interpretation: history or policy. In Kavanaugh’s account, the historical approach examines “the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text and the principles embodied in that text,” while the policy approach “rests on the philosophical or

²³ *Rahimi*, 144 S. Ct. at 1929 (Jackson, J. concurring).

²⁴ Jacob D. Charles, *On Guns, the Supreme Court Can’t Shoot Straight*, WASH. MONTHLY (June 29, 2024) <https://washingtonmonthly.com/2024/06/29/on-guns-the-supreme-court-cant-shoot-straight/> [<https://perma.cc/7Y7W-82V9>].

²⁵ *Id.* at 5.

²⁶ *Id.*

policy dispositions of the individual judge.”²⁷ History, Kavanaugh asserts, “is far less subjective than policy.”²⁸

But the *Rahimi* decision made clear that the distinction between history and policy is a false one. The originalist approach to history involves judges picking and choosing which pieces of history matter based on subjective policy preferences. Criticism of this unprincipled and arbitrary use of history came not only from the liberal members of the Court, but also from Justice Barrett. While Barrett’s concurring opinion in *Rahimi* only briefly gestured at her critique of the historical approach, it also directed the reader to her concurrences in *Vidal v. Elster* (2024) and *Samia v. United States* (2023) where it is developed at more length.

In *Vidal*, Barrett pointedly notes that “the Court never explains why hunting for historical forebears on a restriction-by-restriction basis is the right way to analyze the constitutional question.”²⁹ In *Samia*, she questions why the Court should not simply sometimes conclude, when founding-era evidence demonstrating how courts dealt with a particular interpretive question is lacking, that “the history is inconclusive?”³⁰ She criticizes the Court for looking to “seemingly random time period[s]” without explaining why they are particularly significant, “pick[ing] up the thread in 1878” and “drop[ping] it in 1896,” never answering why “cases from 1896 [are] that much more important than cases from, say, the 1940s?”³¹ Barrett’s critique brings to mind Justice Holmes’ famous declaration: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”³²

Justice Barrett’s criticism of the selective history and tradition approach is also surprisingly similar to Justice Sotomayor’s vivid description of that test as “the equivalent of entering a crowded cocktail party and looking over everyone’s heads to find your friends.”³³ The historical approach touted in *Vidal* and *Bruen*, far from being “consistent with the properly neutral judicial role,”³⁴ is, in Sotomayor’s words,

²⁷ *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J. concurring).

²⁸ *Id.*

²⁹ *Vidal v. Elster*, 602 U.S. 286, 311, 144 S. Ct. 1507, 1525 (2024) (Barrett, J. concurring).

³⁰ *Samia v. United States*, 599 U.S. 635, 655 (2023) (Barrett, J. concurring).

³¹ *Id.* at 655–56.

³² Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1899).

³³ *Vidal*, 602 U.S. at 337–38 (Sotomayor, J., concurring) (“The majority attempts to reassure litigants and the lower courts that a ‘history-focused approach’ here is sensible and workable, by citing to *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). *Ante*, at 1522, n. 4. To say that such reassurance is not comforting would be an understatement.”).

³⁴ *Rahimi*, 144 S. Ct. at 1912–13 (Kavanaugh, J. concurring).

a “‘judge-made test’ that is unmoored from constitutional text and precedent.”³⁵ As she elaborates in *Vidal*,

[T]he history-and-tradition approach is not just flawed as a matter of first principles, but also highly indeterminate and unfamiliar to judges and litigants in this area of the law. . . . How much history is enough to clear the historical analogue bar the five-Justice majority set up? What does that look like in this context? When it comes to subjectivity, their preferred approach empowers judges to pick their friends in a crowded party. . . . When faced with the two options, I choose the test that is rooted in this Court's First Amendment doctrine and precedent, is attuned to what judges and lawyers are properly trained to do, and does not limit Congress from dealing with modern-day conditions based on the foresight of yesterday's generation.³⁶

While *Vidal* was a case about trademark and the First Amendment, Sotomayor's analysis is equally applicable to firearms regulation and the Second Amendment, a conclusion echoed in Brown Jackson's assessment that *Bruen*'s “history-focused test” undermines the rule of law by failing to “foster stability, facilitate consistency, and promote predictability.”³⁷

The critique applies with equal force to the Roberts Court's reproductive rights jurisprudence. The day after it decided *Bruen*, the Supreme Court handed down its ruling in *Dobbs v. Jackson Women's Health Org.* Tossing aside a half-century of precedent, the conservative majority held that American history and tradition allows the government to force women and girls to give birth against their will. The Court's overturning of *Roe* in *Dobbs*, while expected, was particularly jarring following so quickly on the heels of the Court's expansion of *Heller* in *Bruen*. Virtually every argument the Court made to justify abolishing the constitutional right to an abortion could be equally or more aptly used to justify abolishing the individual right to wield weapons: the lack of an explicit textual or historical basis for the right; the professed concern for how the right implicates the destruction of life; and the moral and social importance of the issues the right raises that are best left in the hands of the people and their elected representatives to decide.³⁸

In a powerful and sorrowful dissent in *Dobbs*, the liberal Justices called the majority's decision “its own loaded weapon,” a direct invocation of *Korematsu* but

³⁵ *Vidal v. Elster*, 602 U.S. at 330–31 (2024) (Sotomayor, J., concurring).

³⁶ *Id.* at 336–37.

³⁷ *Rahimi*, 144 S. Ct. at 1929 (Jackson, J. concurring).

³⁸ See Brief of Professor Mary Anne Franks as Amicus Curiae in Support of Petitioner, *United States v. Rahimi*, 602 U.S., 144 S. Ct. 1889 (2024) (No. 22–915).

perhaps also a subtle reference to the wildly different, and wildly expansive, interpretive approach the conservative majority had adopted with regard to guns in *Bruen*.³⁹ The radical departure from stare decisis in the name of originalism, they wrote, “calls into question this Court’s commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today’s decision takes aim, we fear, at the rule of law.”⁴⁰

What the Court’s selective use of history means for women is plain: the privileging of founding era history will necessarily result in the privileging of men’s rights over women’s.⁴¹ As Professor Reva Siegel writes,

The tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law. The methods the Court employs are gendered in the simple sense that they tie the Constitution’s meaning to lawmaking from which women were excluded and in the deeper sense that the turn to the past provides the Court resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own.⁴²

Or, in the words of the *Dobbs* dissenters, “Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification ... it consigns women to second-class citizenship.”⁴³

This is not a bug, but a feature. It is the intended goal of what Professor Melissa Murray has aptly termed the Roberts Court’s “jurisprudence of masculinity,” which uses originalism to prioritize and expand constitutional rights that disproportionately benefit men’s interests while downgrading or removing rights that would protect women’s. “Originalism, on its face,” she writes, “knows no gender.”

As an interpretive method, it relies entirely on the recounting of historical facts. But this acknowledgment reveals the lie--and the failings--of the

³⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 413 (2022) (Breyer, Sotomayor, Kagan, J. dissenting).

⁴⁰ *Id.* at 413–14 (Breyer, Sotomayor, Kagan, J. dissenting).

⁴¹ See Mary Anne Franks, *The Supreme Court as Death Panel: The Necropolitics of Bruen and Dobbs*, 98 N.Y.U. L. REV. 1881 (2023).

⁴² Reva B. Siegel, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 HOUST. L. REV. 901 (2023).

⁴³ *Id.* at 909, 936.

Roberts Court’s originalism, which, like the jurisprudence of masculinity, is selective and outcome-driven. In the hands of the Roberts Court, “doing history” is not the careful excavation of empirical truths for the purpose of illuminating some contemporary issue. It is instead an expedition in which facts and sources will be cherry-picked and prioritized to serve a particular outcome—as it must be if it is to succeed in shrinking the constitutional landscape of women’s rights while expanding the terrain of men’s rights.⁴⁴

Murray’s article is titled the “Children of Men,” a layered reference that highlights how the jurisprudence of masculinity portrays men as the heroic and universal subjects of the law but also simultaneously as victims “uniquely endangered and deserving of judicial solicitude and protection.”⁴⁵ Even as white, Christian, heterosexual, wealthy men remain at the very top of the social, political, and economic hierarchy, the jurisprudence of masculinity insists that they are under constant threat from those objectively far more vulnerable than they are. This is a tactic that I have described elsewhere as “victim-claiming,” where powerful individuals seek to occupy the position of the subordinated in order to remain the focus of social attention and resources.⁴⁶

The complex relationship between masculinity and vulnerability is one of the themes explored by the writer Tom Nichols in a 2015 article titled “The Revenge of the Lost Boys.”⁴⁷ Nichols wrote the piece in the wake of Dylann Roof’s murder of nine Black churchgoers in Charleston, South Carolina, during a Bible study session. Nichols invoked the inhabitants of Peter Pan’s Neverland to describe the increasingly common profile of mass shooters: male, white, young, whose “[f]ear of women and hatred of minorities” manifests in ideologies such as “white supremacy, jihad, hatred of abortion, or anti-government paranoia” and who are transfixed by “symbols of sex and power” such as guns.⁴⁸ Instead of outgrowing the common anxieties and insecurities of adolescence, Lost Boys are stuck in a state of “stubborn immaturity wedded to a towering narcissism.”⁴⁹ This is a problem, Nichols says, because “narcissistic males determined to get even with a world that denies them their due—the fame, recognition, or sexual mate they think they deserve” pose real

⁴⁴ Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 *Houst. L. Rev.* 799, 857 (2023).

⁴⁵ *Id.* at 805.

⁴⁶ MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* xii–xiii (2019).

⁴⁷ Tom Nichols, *The Revenge of the Lost Boys*, *THE FEDERALIST* (July 9, 2015), <https://thefederalist.com/2015/07/09/the-revenge-of-the-lost-boys/> [<https://perma.cc/NSS4-YZ2S>].

⁴⁸ *Id.*

⁴⁹ *Id.*

dangers to society.⁵⁰ In a later essay, Nichols expressed particular alarm that “some of these young males seem to be aging into dangerous, frustrated middle-aged men, the gun-toting cosplayers who now have the time and money to pursue their angry fantasies (Think of this as the Lost Boys becoming Proud Boys.)”⁵¹

We can also think of this as the Lost Boys becoming Supreme Court Justices. The same features that characterize the Lost Boys can be observed in the practitioners of the jurisprudence of masculinity: arrogance, insecurity, resentment towards women and minorities, and above all, immaturity. What is history-and-tradition originalism but a bedtime story in which men are swashbuckling heroes, women are complacent mothers and wives, and the natives know their place? What more comforting myth could there be for men who want to be told that they are special, and brave, and that they never have to grow up?

And while the hostility of the Lost Boys of the Supreme Court is aimed most directly at women and girls, its necropolitical agenda⁵² has multiple targets. Writer Adam Serwer uses the term “undead constitutionalism” to describe how conservative judges “present contemporary right-wing positions on consequential matters as eternal and constant, and therefore the only legitimate interpretations, when they are entirely malleable and dependent on changes in conservative political identity.”⁵³ Because the Court’s historical excavations are motivated by rightwing grievances, Serwer warns that “no rights that Americans currently possess are safe from this Court. Decisions about which rights survive and which do not are highly dependent on what it means to be a conservative at that time. There will always be new right-wing grievances to ameliorate by judicial fiat, justified by new abuses of constitutional history.”⁵⁴

Even as conservative members of the Court may continue to disavow their partisan intentions, there are plenty of conservative commentators willing to openly acknowledge them. Professor Joel Alicea notes approvingly that in cases like *Dobbs* and *Bruen*,

⁵⁰ *Id.*

⁵¹ Tom Nichols, *The Narcissism of the Angry Young Men*, THE ATLANTIC (Jan 29, 2023), <https://www.theatlantic.com/ideas/archive/2023/01/lost-boys-violent-narcissism-angry-young-men/672886/> [<https://perma.cc/NSS4-YZ2S>].

⁵² See Franks, *Supreme Court as Death Panel*, *supra* note 39.

⁵³ Adam Serwer, *The Constitution Is Whatever the Right Wing Says It Is*, Atlantic (June 25, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-supreme-court-samuelalito-opinion/661386/> [<https://perma.cc/9N4K-HG3H>]. The selective appropriation of constitutional text to serve self-interests is a theme I explore at length in my book *THE CULT OF THE CONSTITUTION*, *supra* note 44.

⁵⁴ *Id.*

[T]he Court rejected methods of constitutional analysis that favored the judgments of those living today over previous generations. The Court asserted the authority of the past to bind the present, and it appealed to ‘the latent wisdom which prevails in’ custom and tradition. In short, the Court adopted constitutional theories (originalism and traditionalism) premised on anti-rationalist, anti-individualist propositions directly opposed to progressive political and constitutional theory, and it overruled precedents that helped forge the progressive faith in the long-run victory of their principles.⁵⁵

But the “latent wisdom” of the past, Professor Cass Sunstein reminds us in his 2023 book *How to Interpret the Constitution*, is what Jeremy Bentham rightly described as “the wisdom of the cradle.”⁵⁶ Sunstein turns to the French mathematician and philosopher Blaise Pascal for elaboration of this point and its significance to the project of constitutional interpretation:

Those whom we call ancient were really new in all things, and properly constituted the infancy of mankind; and as we have joined to their knowledge the experience of the centuries which have followed them, it is in ourselves that we should find this antiquity that we revere in others. They should be admired for the results which they derived from the very few principles they possessed, and they should be excused for those in which they failed rather from the lack of the advantage of experience than the strength of reasoning.⁵⁷

This observation, as Sunstein makes clear, is not a disparagement of previous generations or of the past. It is merely a recognition that knowledge accumulates with experience. Lessons from the past can of course be extremely valuable, but it is through successive experiences that their value can truly be tested. “[W]e know much more about facts. We create vaccines. We produce cell phones and electric cars. We build airplanes and laptops. Another version of this idea is that there is moral progress. We have learned a few things about liberty and equality. Consider, for example, what we have learned about democracy and who is entitled to participate in it, about freedom of speech; about equality on the basis of race; about equality on the basis of sex.”⁵⁸

⁵⁵ J. Joel Alicea, *The October 2021 Term and the Challenge to Progressive Constitutional Theory*, 2023 Wis. L. Rev. 659, 671 (2023).

⁵⁶ CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* 150 (2023).

⁵⁷ BLAISE PASCAL, *TREATISE ON VACUUM* (1647), reprinted in *BLAISE PASCAL: THOUGHTS, LETTERS AND MINOR WORKS*, 449 (O. W. Wright trans. 2007).

⁵⁸ SUNSTEIN, *supra* note 53, at 150.

Or, as eloquently summarized by the dissenting Justices in *Dobbs*:

As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.⁵⁹

Any method of constitutional interpretation that values the distant past more than the present is, quite literally, immature. That includes originalism in all of its forms, whether fixated on original intent, original public meaning, or history and tradition. Those who cling to long-lost founding fathers and sneer at progress, change, and evolution, are perpetual adolescents in a constitutional Neverland. Our society cannot mature into a true democracy until it puts away originalism, *Heller*'s gun, and other childish things.⁶⁰

⁵⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 386–87, 142 S. Ct. 2228, 2333 (2022).

⁶⁰ See e.g., 1 *Corinthians* 13:11 (King James) (“When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things”).