

ON THE LOGIC OF HISTORY AND TRADITION IN CONSTITUTIONAL RIGHTS CASES

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I. INTRODUCTION

Oliver Wendell Holmes, Jr. famously declared that “[i]t 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.”¹ Such a sentiment might be aimed at a judge who has not bothered to consider the substantive arguments for and against some particular rule.² But this sentiment could reasonably be aimed at judicial overreliance on history and tradition much more generally.³

Questions of judicial reliance on history and tradition have been prompted by several recent Supreme Court cases in which the Court has not merely emphasized, but absolutized, history and tradition.⁴ Absolutism in this sense refers to judicial language evidently requiring the relevant party to show, in every case, sufficient validation for their position in history and tradition. The requirement for such a showing of historical and traditional support is thus apparently exceptionless, and in that sense it is absolute.

This Article focuses on this absolute, or exceptionless, requirement of sufficient support for a party’s claim, specifically in history and tradition. Immediately below, this Article examines the role of history and tradition in the Court’s most recent case law, successively addressing the law of substantive due process rights;⁵ the law of gun ownership and related rights-claims under the Second Amendment;⁶ the scope, limits, and requirements of the Establishment Clause;⁷ and some important dimensions of free speech rights.⁸ The Article then addresses broader issues of the proper role and limits of attempts to absolutize requirements of history and tradition in the context

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¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

² See JOHN STUART MILL, ON LIBERTY 97 (Gertrude Himmelfarb ed., 1974) (1859) (“Whatever people believe, on subjects on which it is of the first importance to believe rightly, they ought to be able to be able to defend against at least the common objections.”).

³ Without going so far as to endorse Voltaire’s belief that “history is only a pack of tricks which we play on the dead.” See Carl Becker, *Mr. Wells and the New History*, 28 AM. HIST. REV. 641, 641 (1921).

⁴ See cases cited *infra* note 11.

⁵ See *infra* Section II.A.

⁶ See *infra* Section II.B.

⁷ See *infra* Section II.C.

⁸ See *infra* Section II.C. See generally *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022), *petition for cert. filed*, (U.S. July 12, 2022) (No. 22-42) (asking also whether any tradition of states impairing the right of qualified persons to pursue a lawful trade, for essentially protectionist reasons, really deserves a veto over such rights claim).

of rights-claims, including claims for rights that are themselves thought to be absolute and exceptionless.⁹ A brief conclusion then follows.¹⁰

II. HISTORY, TRADITION, AND ABSOLUTISM IN THE MOST RECENT SUPREME COURT CASES

A. SUBSTANTIVE DUE PROCESS CASES

The Supreme Court has recently emphasized the importance, and the indispensability, of a showing of sufficient supportive history and tradition across a range of constitutional rights contexts.¹¹ The most publicly prominent of these cases is *Dobbs v. Jackson Women's Health Organization*¹² in which the Court overruled *Roe v. Wade*¹³ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁴ *Dobbs* established an absolutism requiring validation of rights-claims by some sufficient relevant history and tradition.

In *Dobbs*, the Court majority conceded that the due process clause of the Fourteenth Amendment protects some rights that are not expressly referred to in the Constitution's text.¹⁵ But the Court then specified an absolutist, two-part conjunctive test for the legitimacy of such constitutional rights claims. Any such non-textual right claim would have to be “‘deeply rooted in this Nation's history and tradition’ and ‘implicit in the concept of ordered liberty.’”¹⁶

Otherwise put, the Court in *Dobbs* focused on “whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as ‘ordered liberty.’”¹⁷ Crucially, fundamental substantive due process rights must be “‘objectively, deeply rooted in this Nation's¹⁸ history and tradition.’”¹⁹ This “must” logically establish a form of methodological absolutism.

⁹ See *infra* Part III.

¹⁰ See *infra* Part IV.

¹¹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022).

¹² See generally *Dobbs*, 142 S. Ct. at 2242.

¹³ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁵ See *Dobbs*, 142 S. Ct. at 2242.

¹⁶ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (declining to recognize a substantive due process privacy or autonomy-based fundamental constitutional right to assisted suicide)); see also *id.* at 2260.

¹⁷ *Id.* at 2244; see also *id.* at 2246 (asking “whether the [claimed] right is ‘deeply rooted in our history and tradition’ and whether it is essential to our Nation's ‘scheme of ordered liberty’”) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

¹⁸ To introduce an ambiguity, the Court in *Glucksberg* was said to have examined not merely this Nation's history, but “more than 700 years of ‘Anglo-American common law tradition.’” *Id.* at 2247 (quoting *Glucksberg*, 521 U.S. at 711). A narrow focus on this nation's history and tradition is thus in this respect underinclusive. But the more extended in time, space, and culture the inquiry into history and tradition becomes, the greater the difficulties in characterizing the relevant tradition, and in disentangling that tradition from counter-traditions. Historical evidence then becomes increasingly murky, uncertain, and contestable.

¹⁹ *Id.* (quoting *Glucksberg*, 521 U.S. at 720–21). The requirement that the “deep[] root[ing] in . . . history and tradition” be “objective,” *id.* (quoting 521 U.S. at 720–21) (internal quotation marks omitted), only highlights the difficulties in authoritatively adopting one version of history and tradition to the exclusion of others.

In the majority's view, this focus on one or another version of history and tradition allowed the Court to bypass intensely disputed questions of ethics and metaphysics. In particular, the *Dobbs* majority declared that "[o]ur opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."²⁰ The majority concluded that access to an abortion "is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."²¹

For the moment, we can say there is indeed some case authority for the *Dobbs* majority's general position on history and tradition beyond which *Dobbs* itself cites.²² But it is equally clear that recent Court majorities, beyond the abortion context, have declined to treat substantive due process rights as limited by any version of history and tradition.²³

Thus, the majority in *Obergefell v. Hodges* declined to reduce the substantive due process fundamental right inquiry into any single formula, whether based on history and tradition or not.²⁴ The inquiry instead involves the Court's "reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."²⁵ History and tradition are typically respect-worthy and provide insights.²⁶ But crucially, evidence of historic or traditional protection of the substantive due process right in question is not essential.²⁷ In the end, according to *Obergefell*, "[h]istory and tradition guide and discipline our inquiry but do not set its outer boundaries."²⁸ For any given case, the inquiry should rightly consider the real scope and implications of why the more familiar or mainstream rights were singled out for protection.²⁹ Perhaps the purposes and reasons for historically protecting the familiar mainstream class of rights-claims fairly encompass other classes as well.³⁰

²⁰ *Id.* at 2261.

²¹ *Id.* at 2283. The majority in *Dobbs* thus inferred that as a general matter, constitutional challenges to state regulations of abortion should be governed by the minimum scrutiny requirement of merely some rational relationship to any legitimate state interest. *Id.* at 2283–84.

²² *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 122–23 (1989) (plurality opinion) (referring to rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (internal quotation marks omitted); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful respect for the teachings of history and solid recognition of the basic values that underlie our society.") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (Harlan, J., concurring)). The Court in *Moore* recognized that protection of the family living unit "is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (plurality opinion). This tradition was thought, interestingly, to extend beyond the "traditional" nuclear family to encompass uncles, aunts, cousins, and grandparents in a single housing unit. *See id.* at 504.

²³ *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 663–65 (2015) (gay marriage); *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (consensual adult criminal sodomy case). For a classic exposition, see *Michael H.*, 491 U.S. 110, at 136–41 (Brennan, J., dissenting, with Marshall & Blackmun, JJ.).

²⁴ *See Obergefell*, 576 U.S. at 663–64 (citing the influential dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

²⁵ *Id.* at 664.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *Id.* Note the observation that "[i]t was Dickens who asked why it was . . . that dead men sat on our benches." Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 263 (1996). Classically, again, "[i]t 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." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

²⁹ *See Obergefell*, 576 U.S. at 665.

³⁰ *See id.*

After the Court has made its choices, whether objectively or not, as to which practices and which time periods are to be emphasized,³¹ the Court must now, according to *Dobbs*, inquire into the limits of that specific history and tradition.³² Even if history and tradition cannot be re-characterized as supportive of a rights-claimant, the Court has, pre-*Dobbs*, sometimes looked instead to “an emerging awareness”³³—whether of a majority of the public or not—that the particular rights-claim in question now deserves constitutional protection.³⁴ More generally, the Court previously held that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”³⁵

The best judicial account of a subordinate and not necessarily required role for history and tradition, though, is found in the dissenting opinion of Justice Brennan in *Michael H. v. Gerald D.*³⁶ In that case, which involved the scope of natural parental visitation rights, Justice Brennan emphasized the sheer contestability of any concrete understanding of some relevant tradition. The idea of a tradition, in a sense relevant to constitutional rights, “can be as malleable and as elusive as ‘liberty’ itself.”³⁷ Justice Brennan then quoted Justice Byron White to the effect that “reasonable people can disagree about the content of particular traditions, and . . . they can disagree even about which traditions are relevant to the definition of ‘liberty.’”³⁸

Equally as important, Justice Brennan emphasized the indeterminacy of what we might call the relevant beginning, fading, and ending of a tradition.³⁹ Some traditions may have no reasonably ascertainable beginning date. Alternatively, their beginning might have occurred in English common law or elsewhere. The maturity of a tradition as of the time of the adoption of either the Constitution in general, the Fourteenth Amendment, or some other constitutional provision, may be similarly debatable. The vitality and status of any identified tradition, at some specified time, may be unclear as well. The weakening or obsolescence of a tradition, and the date of its obsolescence through a process of gradual erosion, may be equally murky.⁴⁰

Justice Brennan then cited a number of Supreme Court decisions protecting substantive due process privacy and autonomy claims in which the act or practice at issue, when described with specificity, might well not have been traditionally recognized and protected.⁴¹ And even where some tradition has an established scope, our cultural circumstances, including our technological abilities, may have decisively changed.⁴² Even if a tradition has been maintained, our basic reasons for valuing the tradition may have changed dramatically such as to require a reconceiving of the bounds of that

³¹ See *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

³² See *id.*

³³ *Id.* at 572.

³⁴ See *id.*

³⁵ *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy and O’Connor J.J., concurring)).

³⁶ *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989) (Brennan, J., dissenting).

³⁷ *Id.* at 137 (Brennan, J., dissenting).

³⁸ *Id.* (Brennan, J., dissenting).

³⁹ See *id.* at 138 (Brennan, J., dissenting).

⁴⁰ See *id.* (Brennan, J., dissenting).

⁴¹ See *id.* at 139–40 (Brennan, J., dissenting).

⁴² See *id.* at 140 (Brennan, J., dissenting).

tradition.⁴³ Beyond these concerns, Justice Brennan more broadly called into question the claim that no unenumerated substantive due process fundamental right should be judicially recognized in the absence of sufficient support in history and tradition.⁴⁴

B. THE SECOND AMENDMENT CASES

A number of the above concerns were then picked up in the context of the Second Amendment gun regulation cases. The role of history and tradition was central in the Court's treatment of *New York State Rifle and Pistol Association v. Bruen*.⁴⁵ *Bruen* focused on Second Amendment text, history, and tradition⁴⁶ with the emphasis on history and tradition, at least in this context, because of the Court's understanding of the specific Amendment at issue.⁴⁷ The majority in *Bruen* declared that "it has always been widely understood that the Second Amendment . . . codified a pre-existing right' . . . The Amendment 'was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors.'"⁴⁸

One could certainly argue from an originalist perspective that if an amendment has always been widely understood to merely codify an established right rather than to encompass any new principle, then recourse to history and tradition in interpreting that amendment makes sense. The other side of the coin, though, is the status of all the amendments, and the constitutional rights, that do not fall into this category. Has it always been understood that, for example, the Religion Clauses, including the Establishment Clause, merely codify late eighteenth century English law?⁴⁹ Does the Equal Protection Clause merely codify pre-existing law as of the middle of the nineteenth century?⁵⁰ Does the Free Speech Clause merely ratify English, or Colonial, speech regulation practices?⁵¹ It would be difficult to make such cases with any plausibility.

In any event, the Court in *Bruen* chose to look not only to inherited English law,⁵² but also to early American state constitutional law;⁵³ founding-era scholarship;⁵⁴ post-ratification nineteenth century case law;⁵⁵ post-Civil War congressional and public discussion;⁵⁶ and post-Civil War legal commentators.⁵⁷ This inclusiveness of legitimate sources of insight is doubtless encouraging in any case in which the overwhelming weight of each

⁴³ See *id.* (Brennan, J., dissenting).

⁴⁴ See *id.* at 141 (Brennan, J., dissenting).

⁴⁵ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

⁴⁶ See *id.* at 2127–30.

⁴⁷ See *id.* at 2127.

⁴⁸ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592, 599 (2008)) (emphasis in original).

⁴⁹ See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at public school graduation ceremony).

⁵⁰ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (gay marriage equal protection and substantive due process case).

⁵¹ See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (animal cruelty video speech case); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (violent videos without any recognizable message being sold or rented to minors without parental permission).

⁵² See *Bruen*, 142 S. Ct. at 2127.

⁵³ See *id.*

⁵⁴ See *id.* at 2128.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

legitimate source points in the same direction on the questions of history and tradition. But as a matter of inescapable logic, the greater the number of independent sources that are considered, the lower the probability that all of the sources will point, unequivocally, in the same direction. How a court is to commensurate the conflicting understandings of the histories and traditions was left, in large measure, to future case law.⁵⁸

Crucially, though, the *Bruen* majority, citing the prior gun case, *District of Columbia v. Heller*,⁵⁹ specifically declined to decide Second Amendment cases by any reference to means-ends analysis, judicial balancing of interests, or to any levels-of-judicial-scrutiny analysis.⁶⁰ Rather, the *Bruen* and *Heller* majority's interest was focused on lack of historical precedent for the regulation in question.⁶¹ In this sense, history and tradition again set absolutist boundaries.

Bruen recognized that the absolutism of permitting only those restrictions validated by history and tradition poses distinctive challenges when new types of weapons, arguably new circumstances, and arguably new forms of regulation are at issue.⁶² The Court at this point indicated the necessity for courts, in such cases, to reason by analogy.⁶³ In the Court's words, "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'"⁶⁴

The Court then declared that relevant similarity requires neither identity nor indistinguishability, but merely a somehow sufficient degree of analogy in the decisive respects.⁶⁵ A bit more specifically, the *Bruen* majority referred to two still very broad metrics of relevant similarity: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."⁶⁶ Determining "how" a regulation burdens this formulation of the Second Amendment right, as compared with historically permitted regulations, is presumably not to include any judicial interest balancing of a kind the Court has clearly ruled out.⁶⁷

Intriguingly, courts are then to consider the degree of analogy between the "why," or the historically valid reason or reasons for traditional gun

⁵⁸ *Id.* at 2162–63 (Barrett, J., concurring) (raising a number of important methodological problems, with no obvious distinctive solutions, that were left unresolved by the majority in *Bruen*). For a sense of some potential guiding principles, see Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008). For some remaining problems, see Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901 (1990); Ronald J. Krotosyzinski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006); John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172 (2009).

⁵⁹ See *Bruen*, 142 S. Ct. at 2128–29 (citing *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)).

⁶⁰ See *id.*

⁶¹ See *id.* at 2128.

⁶² See *id.* at 2132.

⁶³ See *id.*

⁶⁴ *Id.* (citing Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)); see Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 1 (1974); see also ARISTOTLE, *THE NICOMACHEAN ETHICS* 111–14 (J.O. Urmsion et al. eds., W.D. Ross trans., Oxford World's Classics 1980) (c. 350 B.C.E.). But cf. Norman C. Gillespie, *On Treating Like Cases Differently*, 25 PHIL. Q. 151 (1975) (rejecting this general principle).

⁶⁵ See *Bruen*, 142 S. Ct. at 2133.

⁶⁶ *Id.*

⁶⁷ See *id.* at 2129.

regulations, and the “why,” or the newly articulated reason or reasons, for new gun regulations. Presumably, the traditionally accepted and the newly adopted reasons for gun regulations must be sufficiently similar. If they are not, then the new, disanalogous reason for the new regulation will presumably fail the test of analogy and lead to a finding of unconstitutionality.⁶⁸

Crucially, then, this test of history and tradition declines to recognize the possibility that the main purpose for a new regulation might be insufficiently analogous to a historically recognized purpose of gun regulation, while at the same time having a reason, or purpose, of equal or greater importance, fundamentality, indispensability, or weight. The weight of a reason or purpose of a new regulation does not diminish because it is not even roughly mirrored by the reason or purpose of regulations from centuries past.⁶⁹

In any event, the scope and limits of Second Amendment rights are now thought to be fixed, in absolutist fashion, by the judicial inquiry into text, history, and tradition.⁷⁰ The pattern that obtains with regard to substantive due process rights⁷¹ is thus extended to Second Amendment cases and, as we see immediately below, to Establishment Clause cases and even to some free-speech cases as well.

C. THE ESTABLISHMENT CLAUSE AND FREE SPEECH CASES

The theme of history and tradition as necessary for falling within the scope and limits of constitutional rights and their regulation was further developed in *Kennedy v. Bremerton School District*.⁷² In *Kennedy*, the Court majority broadly addressed the Establishment Clause as a possible limitation on free exercise of religion and freedom of speech. Ultimately, the Court rejected any “ahistorical”⁷³ approach to the Establishment Clause. More precisely, the Court denied any judicial novelty in focusing on history and tradition.⁷⁴ The Court treated the familiar three-part test of *Lemon v. Kurtzman*,⁷⁵ including its variants focusing on a government’s public endorsement of religion,⁷⁶ as already rejected by prior case law.⁷⁷

Instead, the *Kennedy* majority declared that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”⁷⁸ In such cases, “the line [that courts and governments] must draw between the permissible and the impermissible [has to accord]

⁶⁸ See *id.* at 2132–33.

⁶⁹ The *Bruen* majority refers here to a regulation’s justification, which presumably points to that regulation’s reasons, purposes, or goals. If the idea of a regulation’s being “justified” is taken more comprehensively, it would begin to sound more like a final conclusion—that the regulation is ultimately either justified or not justified—than a mere step toward a judicial conclusion.

⁷⁰ See *Bruen*, 142 S. Ct. at 2127–30.

⁷¹ See *supra* Section II.A.

⁷² *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

⁷³ *Id.* at 2427.

⁷⁴ See *id.*

⁷⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

⁷⁶ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

⁷⁷ See *Kennedy*, 142 S. Ct. at 2427 (citing *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2079–81 (2019) (plurality opinion); *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

⁷⁸ See *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece*, 572 U.S. at 576).

with history and faithfully reflect the understanding of the Founding Fathers.”⁷⁹ Thus, again, we see an absolutism of perceived history and tradition.

The potential loose end left by *Kennedy* involves Establishment Clause cases in which an allegation of some form of coercion is made.⁸⁰ The *Kennedy* majority, without attempting to meaningfully clarify the murky concept of coercion, denied that anyone was coerced by *Kennedy*’s personal prayer activities⁸¹ and distinguished prior cases finding religious coercion of public schoolchildren.⁸² It is possible, perhaps, that the Court wishes to preserve the possibility of an inquiry into the presence or absence of some sufficient degree of coercion, however defined,⁸³ as a distinct approach to some Establishment Clause cases. More likely,⁸⁴ though, the Court intends to address claims of coercion within, and subject to, the broader inquiry into which government activities are required, or permitted, by an absolutist test of history and tradition.

Finally, and more equivocally, the Court again focused on history and tradition in the free speech case of *City of Austin v. Reagan National Advertising of Austin, LLC*.⁸⁵ This case addressed the regulation of advertising and other signs, whether based on the content of such signs or not, in which the regulation of speech distinguishes between on-premises signs and signs located off of the owner’s premises.⁸⁶ We herein set aside any substantive, doctrinal concern for the free speech implications of on- versus off-premises sign regulations, or for content-based and content-neutral restrictions on either commercial or non-commercial speech.⁸⁷

The *Reagan National* Court majority⁸⁸ began with the general observation that “American jurisdictions have regulated outdoor advertisements for well over a century.”⁸⁹ More specifically, “[a]s part of this regulatory tradition, federal, state, and local governments have long distinguished between signs . . . that promote ideas, products, or services located elsewhere and those that promote or identify things onsite.”⁹⁰

⁷⁹ *Id.* (quotation marks omitted) (first quoting *Town of Greece*, 572 U.S. at 576; then quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

⁸⁰ *See, e.g., Lee v. Weisman*, 505 U.S. 577, 580, 598 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000).

⁸¹ *See Kennedy*, 142 S. Ct. at 2431.

⁸² *See id.*

⁸³ For a skeptical approach, see R. George Wright, *Why A Coercion Test Is of No Use in Establishment Clause Cases*, 41 CUMB. L. REV. 193 (2011).

⁸⁴ If for no other reason than the absence of any need to multiply analytical entities. *See, e.g., E.C. Barnes, Ockham’s Razor and the Anti-Superfluity Principle*, 53 ERKENNTNIS 353, 353 (2001).

⁸⁵ *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022).

⁸⁶ *See id.* at 1469.

⁸⁷ For discussion, see R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2015); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 UNIV. MIA. L. REV. 333 (2006).

⁸⁸ The opinion of the Court, it should be noted, was written not by any of the Justices typically associated with a relatively strong normative devotion to history and tradition, but by Justice Sotomayor. *See Reagan Nat’l*, 142 S. Ct. at 1467–68.

⁸⁹ *Id.* at 1469. This claim, however, differs from any further claim that all, most, or many states have regulated such advertisements for over a century, or as of the time of the ratification of any relevant constitutional amendment, let alone any claim as to the state of English law at any point.

⁹⁰ *Id.*; *see also id.* at 1475 (referring to an unbroken tradition of on-/off-premises distinctions).

In this context, though, the Court backed away from a broader rule that would find history and tradition to be decisive across the entire range of free speech law.⁹¹ After all, a broad judicial deferral to history and tradition in regulating speech would require a revolution in the law of, for example, protection of much libelous speech;⁹² merely commercial speech;⁹³ subversive advocacy;⁹⁴ pornographic speech;⁹⁵ and public school-related speech on matters of merely personal interest.⁹⁶ Each such free speech area retains its own distinctive substantive multi-part judicial test.⁹⁷

Thus, in a sense, rigorous free speech absolutism still lies at the fringes of much current free speech law.⁹⁸ Distinctive tests and levels of scrutiny⁹⁹ still abound. But there remains the principle that history and tradition—rather than any appeal to, say, interests—set the limits on the types of communication and activity that fall outside the scope of First Amendment protection.¹⁰⁰ In this sense, at least, an absolutism of history and tradition indeed describes current free speech law.¹⁰¹

III. TRADITION, ABSOLUTISMS, AND THE NATURE OF RIGHTS

The Court's absolutist reliance on history and tradition with respect to constitutional rights provokes as many questions as it answers. One obvious question is whether the inquiry into history and tradition, and the absolutism of the result of that inquiry, can vary according to case posture and context. Most importantly, does the inquiry vary depending on whether an allegedly new right is being claimed, or if an allegedly new form of government regulation is being imposed on an established right? That is, should the inquiry be affected by the fact that an allegedly new right is being asserted, as distinct from an allegedly new restriction on an old right? If we prioritize the protection of rights, perhaps we should err on the side of rights-claimants

⁹¹ *Id.* (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (stating “history and tradition” are merely relevant factors in free speech cases)); *id.* at 1490 (Thomas, J., dissenting) (questioning the relevance of a judicial inquiry into historical practice in light of the contemporary case law on content-based regulations of speech).

⁹² *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁹³ *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁹⁴ *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

⁹⁵ *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

⁹⁶ *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

⁹⁷ Respectively, *see Sullivan*, 376 U.S. 254 (1964); *Va. State Bd. of Pharmacy*, 425 U.S. 748 (1976); *Brandenburg*, 395 U.S. 444 (1969); *Miller*, 413 U.S. 15 (1973); *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (2021).

⁹⁸ For more or less classic absolutist presentations, see Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) (“[T]here are ‘absolutes’ in our Bill of Rights, and . . . they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’”); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256 (1961). For a useful critique, see Mark D. Rosen, *When Are Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535 (2015).

⁹⁹ *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

¹⁰⁰ For overlapping lists of traditionally unprotected categories of speech, see *United States v. Alvarez*, 567 U.S. 709, 716–17 (2012) and *United States v. Stevens*, 559 U.S. 460, 468–69 (2011); *cf. id.* at 472 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”). For critique, see Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339 (2015).

¹⁰¹ See the case law categories listed in the authorities cited *supra* note 100.

when no comparable rights-claim arise on the other side of the case and history and tradition are indeterminant.

Equally as important, the Court must at some point begin to clarify and elaborate on the very idea of a “tradition.” That is, what is the nature of a tradition in the relevant constitutional sense? What does a tradition amount to? Why turn to tradition in order to constrain judicial discretion as opposed to some other technique? Do most, if not all, historical traditions carry constitutionally relevant value in themselves?

The Court’s linkage of tradition to history may indeed suggest a relatively static, as distinct from a more dynamic and evolving, sense of tradition. Tradition in this sense emphasizes handing-on, repetition, and continuity. In the words of Josef Pieper, “[T]he decisive element in the concept of tradition is that from the very first only what is received and hence what was originally received, is passed on, and that nothing new is or may be added, no improvement or revision is or may be made.”¹⁰²

Tradition in this sense may be thought of as a trial-and-error based, if not vaguely Darwinian, cultural result that deserves respect for its articulate, or inarticulate, wisdom. The sociologist Edward Shils thus refers to “the appreciation of the accomplishments and wisdom of the past . . . as well as the desirability of regarding patterns inherited from the past as valid guides”¹⁰³

A classic exposition of the basic logic of this approach is provided by Montaigne:

It is very doubtful whether there can be such evident profit in changing an accepted law, of whatever sort it be, as there is harm in disturbing it; inasmuch as a government is like a structure of different parts joined together in such a relation that it is impossible to budge one without the whole body feeling it.¹⁰⁴

But this understanding of tradition is hardly unanimous, even among those widely considered to be mainstream traditionalists. Michael Oakeshott, for one, contrasts what he calls the “preeminently fluid”¹⁰⁵ character of tradition with the “rigidity and fixity of character which . . . belongs to

¹⁰² Josef Pieper, *The Concept of Tradition*, 20 REV. POL. 465, 475 (George Wack trans., 1958); see also William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193, 194 (2009) (“Lawyers and judges tend to interpret ‘tradition’ statically . . .”).

¹⁰³ EDWARD SHILS, TRADITION 21 (1981). For a sophisticated and remarkably multi-faceted account of the possible values of adhering to a tradition in general, see Samuel Scheffler, Keynote Address at the 3rd Annual Conference of the Northwestern Society for Ethical Theory and Political Philosophy: The Normativity of Tradition (Apr. 25, 2009), http://www.law.nyu.edu/sites/default/files/ECM_PRO_065400.pdf [<https://perma.cc/F7UX-X8ZA>].

¹⁰⁴ THE COMPLETE ESSAYS OF MONTAIGNE 86 (Donald M. Frame trans., Stan. Univ. Press 1958) (1943); see also J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS’S TREATISE ON LAW 432 (2014) (“Even when the new law is really better than the old, the change brings about two results: the intended good resulting from the improvement and the unintended harm resulting from the sheer fact of change.”) (addressing THOMAS AQUINAS, SUMMA THEOLOGICA II 999 (Laurence Shapcote trans., Univ. of Chicago 2d ed. 1990) (1952)); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (discussing Burke on established traditions).

¹⁰⁵ MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 31 (photo reprint ed. 1984) (1962).

ideological politics.”¹⁰⁶ One might argue, certainly, that to the extent that traditions really are fluid, they actually lose their jurisprudential value, as contrasted with, say, following a fixed, clear, and determinate set of fundamental principles.

The idea of a fluid, or living, tradition is defended, though, by Alasdair MacIntyre. In MacIntyre’s words, “Traditions, when vital, embody continuities of conflict. Indeed when a tradition becomes Burkean, it is always dying or dead.”¹⁰⁷ In MacIntyre’s view, “A living tradition . . . is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.”¹⁰⁸

In such views, a tradition involves the idea of giving a vote to our ancestors. But a vote is not also a veto privilege. In Jaroslav Pelikan’s view, “By including the dead in the circle of discourse, we enrich the quality of the conversation.”¹⁰⁹ A voice for the past is, again, not necessarily a veto. After all, current and future generations presumably have better insight into how the policies adopted by our ancestors have worked out in practice.¹¹⁰

Thus, before we can assess the value of allowing tradition to serve, in any context, as an absolute limit on rights-claims, on the government regulation of rights, or both, we must have a better sense of what “tradition” is intended to mean. Only then can the relevance of any jurisprudential critique of reliance on tradition be assured.

Once the idea of a tradition, for constitutional law purposes, has been clarified, we then face the problem of multiple and conflicting absolutisms. We have already established the Supreme Court’s absolutist approach to history and tradition in several contexts.¹¹¹ In particular, we have seen that abortion access rights, and fundamental substantive due process rights in general, must now be validated by and limited to historical and traditional practice.¹¹² There are, according to the current Court, no such rights outside of history and tradition.

In addition, we have seen that the scope and the limits of Second Amendment rights are similarly those established by historical and traditional practice.¹¹³ There is no room under *Bruen* for either non-historic and non-traditionally-grounded gun rights or for non-historic and non-

¹⁰⁶ *Id.*; see also Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535 (2012); Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 251–52 (1986) (“It is impossible for traditions to survive unchanged.”).

¹⁰⁷ ALASDAIR MACINTYRE, *AFTER VIRTUE* 222 (2d ed. 1984).

¹⁰⁸ *Id.*; see also Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551, 551 (1985) (quoting MACINTYRE, *supra* note 107); KARL R. POPPER, *CONJECTURES AND REFUTATIONS* 161–81 (Routledge ed. 2002) (1963).

¹⁰⁹ JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 81 (1984). We might also seek to include the voices of future generations in the conversation, insofar as we can imagine their interests under our policies on education, environmental protection, and savings and investment. And our predecessors certainly need not have been traditionalists themselves, or have reasoned from tradition as we now understand it. See Jacob Neu, *The Short History and Checkered Tradition of “History and Tradition,”* (July 8, 2022), <https://iusetiustitium.com/the-short-history-and-checkered-tradition-of-history-and-tradition/> [<https://perma.cc/3379-K26U>].

¹¹⁰ See T.S. Eliot, *Tradition and the Individual Talent*, 19 PERSPECTA 36, 38 (1982) (“Someone said: ‘The dead writers are remote from us because we know so much more than they did.’ Precisely, and they are that which we know.”).

¹¹¹ See *supra* Part II.

¹¹² See *supra* Section II.A.

¹¹³ See *supra* Section II.B.

traditionally-grounded government attempts to regulate gun-related activity.¹¹⁴

Further, *Kennedy* has clearly done away with subjective and governmental purpose-oriented tests for Establishment Clause violations in favor of a dispositive appeal to the presumed verdict of history and tradition.¹¹⁵ And even in the free speech area, the current Court looks to the history and tradition of speech regulation; in particular, the Court will evidently recognize no categorical restrictions on the content of speech that are not validated by history and tradition.¹¹⁶

In all these kinds of cases, the absence of sufficient history and tradition, either in favor of a rights-claim, or in favor of a regulation of the asserted right, is thus exceptionlessly fatal. History and tradition are necessary and indispensable. In this sense, considerations of history and tradition are not to be merely heavily weighed or taken into a broad balance. They are instead required without exception and thus absolute.

A fundamental problem with any such absolutism, though, is that of apparently plural and potentially conflicting kinds of absolutes. In the most interesting cases, a claim of right may be denied by the Court on the view that the putative right in question has not been sufficiently recognized by history and tradition. The right-claimant, though, may or may not choose to concede that point while still contending for the recognition of the right-claim on other, substantive grounds of one sort or another. The right-claimant may instead assert that the right in question should not be subject to any test of history and tradition. Indeed, the right-claimant may even claim that it is the right in question, whatever its scope, that is itself absolute, exceptionless, inviolable, and infeasible.

This general problem of clashing absolutes would be reduced, if not eliminated, if there were simply no absolute, exceptionless, inviolable, or infeasible rights.¹¹⁷ Otherwise put, the absence of any absolute rights would mean there is no right such that “it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.”¹¹⁸ The sense, especially among utilitarians¹¹⁹ and other consequentialists, at the very least, is that there are indeed no such absolute rights,¹²⁰ especially where fulfilling the right, under extreme circumstances, would lead inevitably to some utterly disastrous

¹¹⁴ *See id.*

¹¹⁵ *See supra* Section II.C.

¹¹⁶ *See id.*

¹¹⁷ *See* Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 1 (1981) (“[I]t is a widely held opinion that there are no absolute rights.”).

¹¹⁸ *Id.* at 2.

¹¹⁹ A utilitarian, however, will presumably have some sort of moral and methodological rule about not discounting one person’s utility more than another’s merely because they are different people. Unless, presumably, that unequal initial discounting would itself maximize utility on some independent standard.

¹²⁰ *See, e.g.*, Germain Grisez, *Moral Absolutes: A Critique of the View of Joseph Fuchs, S.J.*, in *PROPORTIONALISM: FOR AND AGAINST* 317 (Christopher Kaczor ed., 2000) (Grisez himself, unlike Fuchs, recognizes some moral absolutes); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725 (1998) (explaining rights as a way of realizing common goods, including democratic government, education, religion, and other common goods).

outcome.¹²¹ And one need not be a utilitarian, let alone a moral skeptic, to reject the idea of broad absolute rights.¹²²

But there is also no shortage of apparent endorsements of the existence of one or more absolute rights.¹²³ We may assume absolute rights may also be fundamental, but they need not be.¹²⁴ Thus, it has been claimed that there is an absolute moral right not to be lied to, on any matter, by one's government or by anyone else, when the truth is expected.¹²⁵ There have clearly been legally recognized claims for an absolute, exceptionless moral right not to be tortured.¹²⁶ Or even if a broad absolute rule against torture is, to some persons, unpersuasive, perhaps there is at least a narrower absolute right of a mother not to be tortured to death by her son.¹²⁷ And there is also the claim of an absolute moral or human right not to be convicted of a crime based on what the court knows to be false evidence.¹²⁸

¹²¹ For the possibility of suspending otherwise overriding rights claims in order to avoid moral catastrophe, see, for example, JAMES GRIFFIN, ON HUMAN RIGHTS 75 (2008) ("We simply must not deliberately kill the innocent unless the case before us falls under an especially strongly justified exception . . ."); Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209, 209 (1995) (stating among a range of stringency of positions, some might "allow moral rights to trump competing considerations in some but not all circumstances."); N.E. Simmonds, *Rights at the Cutting Edge*, in A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 113, 206 (1998) (stating among a similar range of degrees of stringency, some may speak of rights "which can be encroached upon only in extreme and catastrophic circumstances."); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30 (1974) ("The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror . . . is one I hope largely to avoid."); JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 48 (1987) ("[M]ost human rights must be understood to contain implicit exceptions or qualifications.").

¹²² See, e.g., Roger Crisp, *Particularizing Particularism*, in MORAL PARTICULARISM 23, 25 (Brad Hooker & Margaret O. Little eds., 2003) (explaining particularism as typically claiming that "morality is essentially uncodifiable, at least in the sense that moral rules are not sufficient on their own to provide moral guidance.").

¹²³ See, e.g., JOHN FINNIS, NATURAL RIGHTS 224–26 (2d ed. 2011) (including, among other such rights, the treaty-based exceptionless right not to be tortured, or to have one's life taken for merely instrumental purposes, or to be lied to when the truth is expected, or to be knowingly falsely condemned at law); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 260 (William Rehg trans., 1996) ("[A]s soon as the deontological character of basic rights is taken seriously, they are withdrawn from . . . a cost-benefit analysis."); NICKEL, *supra* note 121; JOSEPH RAZ, THE MORALITY OF FREEDOM 186 (1986) ("It is not a part of the very notion of a right that rights have great weight or importance. Some rights may be absolute, others may have little importance."); John Finnis, *Absolute Rights: Some Problems Illustrated*, 61 AM. J. JURIS. 195, 195 (2016) (explaining absolute human or natural rights as specifiable only with reference to actor intentions, as distinct from the unintended but foreseeable side effects of actions); Gewirth, *supra* note 117, at 7, 15 (referring in particular to "a mother's right not to be tortured to death by her own son," and more broadly, "to other possible human subjects" as well); Julia Kristeva, *On the Inviolability of Human Life*, in DEATH AND OTHER PENALTIES: PHILOSOPHY IN A TIME OF MASS INCARCERATION (Geoffrey Adelsberg, Lisa Guenther & Scott Zeman eds., 2015); Mattias Kumm, *Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 51, 59, 59 n.29 (Vicki C. Jackson & Mark Tushnet eds., 2017) (identifying some but apparently not all treaty-recognized basic human rights as subject to rule-like exceptions); Jerrold Levinson, *Gewirth on Absolute Rights*, 50 PHIL. Q. 73, 73 (1982) (referring to an absolute moral right "not to be made the intended victim of a homicidal project."). Classically, if unclear as to its scope and import, see Ronald Dworkin, *Rights As Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) ("Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole."). For a concise response to Dworkin, see Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 131 (2018) ("If rights are trumps, we had better be sure we get them right. But we can't be sure, and it is costly to pretend that we are.").

¹²⁴ See RAZ, *supra* note 123, at 186.

¹²⁵ See FINNIS, *supra* note 123, at 224–26; see also R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131 (2011).

¹²⁶ See FINNIS, *supra* note 123, at 224–26.

¹²⁷ See Gewirth, *supra* note 117, at 7.

¹²⁸ See FINNIS, *supra* note 123, at 224–26.

These and other putative absolute moral rights tend to have, helpfully, a “negative” as opposed to a “positive” character. That is, the parties who are duty-bound to respect or to fulfil the right can normally do so without much direct financial cost as would be incurred in recognizing, say, an absolute right to expensive education or medical treatment. Still, any list of putative absolute rights, within some defined sphere, must face the possibility of unavoidable conflicts among those listed rights. We can at least imagine a hypothetical situation in which a trial judge must tell a lie in order to avoid having to convict a defendant the judge knows to be innocent. And we can imagine cases in which intentionally killing one innocent person will prevent the intentional killing of many other innocent persons or some other violation of a putatively absolute right.¹²⁹

Thinking about hypothetical, and often implausible or extreme, moral dilemmas, and then being guided by the results, is a controversial practice.¹³⁰ But to hold that a moral right claim is absolute or exceptionless is inescapably to logically invite testing of that claim even in unusual or extreme cases. Sometimes the all too real, as distinct from the hypothetical, is itself both extreme and morally important. The World Trade Center attacks of September 11, 2001 resulted in the deaths of 2,726 innocent persons of several nations, including first responders to the attack.¹³¹ Suppose merely that these deaths could have, with only some limited probability, have been prevented by a fleeting, minimal, compensated violation of the purportedly absolute, if less than crucial, right of a single person, whether that person is innocent or not.¹³²

Such a case, in the real world or hypothetically speaking, may well involve ignorance and uncertainty; various risks; “unknown/unknowns”; possible intervening and superseding causes; differing perspectives on agency, dignity, responsibility, and meaningful lives; the relation between one’s intentions and the foreseen but unintended side effects of one’s actions; and any moral difference between doing something and failing to prevent, or merely allowing, some outcome.¹³³

All of these matters might be contested in some given case. But it is important to bear in mind that what may be at stake is not only the would-be

¹²⁹ For a classic discussion, see Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 77, 98–99 (1973).

¹³⁰ See, e.g., Elke Brendel, *Intuition Pumps and the Proper Use of Thought Experiments*, 58 DIALECTICA 89, 106 (2004); Georg Brun, *Thought Experiments in Ethics*, in THE ROUTLEDGE COMPANION TO THOUGHT EXPERIMENTS 195 (Michael T. Stuart, Yiftach Fehige & James R. Brown eds., 2017); JONATHAN DANCY, *The Role of Imaginary Cases in Ethics*, in PRACTICAL THOUGHT: ESSAYS ON REASONS, INTUITION, AND ACTION (2021); Jakob Elster, *How Outlandish Can Imaginary Cases Be?*, 28 J. APPLIED PHIL. 241, 252 (2011); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1427 (2005) (the strong assumptions built into the torture under the circumstances of a ticking bomb and mass death hypotheticals as amounting to “intellectual fraud”); Adrian Walsh, *A Moderate Defence of the Use of Thought Experiments in Applied Ethics*, 14 ETHICAL THEORY & MORAL PRAC. 467, 480 (2011) (“When thought-experiments fail to respect the contingent nature of the problems considered in applied ethics then their use is also illicit.”).

¹³¹ *Deaths in World Trade Center Terrorist Attacks—New York City, 2001*, CDC: MORBIDITY & MORTALITY WKLY. REP. (Sept. 11, 2002), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm51spa6.htm> [<https://perma.cc/9NLN-V8AN>].

¹³² Presumably, the violation of the claimed absolute right should be no greater than reasonably appeared to be necessary, and some appropriate compensation might be provided to persons whose purportedly absolute right has been violated.

¹³³ See *supra* notes 123–30.

mass murderer as the victim of a purported absolute right violation by some government, but the many perhaps as yet undetermined or anonymous persons whose innocent lives, life plans, and fundamental dignity may also be at stake.¹³⁴ Could our analysis and disposition of rights-claims reasonably change if we could actually hear from likely eventual mass-murder victims in advance? What if they asked that their own presumed rights be taken into account? What if they made their own counterclaims of absolute right?

Now, consider again the requirement of absolute and exceptionless validation by history and tradition in cases of constitutional claims to substantive due process, regulation of weapons, Establishment Clause cases, and even some free speech cases.¹³⁵ Consider in particular that a court's reasons and justifications for imposing this historical absolutism would of course have to be secular rather than distinctly or substantially religious.¹³⁶ And consider finally the presumed moral obligation of a constitutional drafter or ratifier to account equally for the legitimate interests of all affected parties alike, including those who are fundamentally injured by judicially applying historical and traditionally-based constitutional absolutism.

On this basis, would we really want to say that there can be no exceptions to the constitutional requirement of historical and traditional backing in all substantive due process fundamental right cases?¹³⁷ Would we really want to give history and tradition a veto over the non-discriminatory government regulation of admittedly traditional firearms in our current social and cultural circumstances?¹³⁸ Would we really want to persist in historical and traditional absolutism, in either Establishment Clause or in free speech cases, if our current circumstances are crucially disanalogous, in relevant respects, to those upon which our earlier case law was based?¹³⁹

There are clearly a number of alternatives to a constitutional rights absolutism of history and tradition. The courts might opt instead for some other form of absolutism as in, perhaps, an absolutism of principles of equality or of fundamental dignity. Courts also might build in concerns for reasonably promoting basic civic virtues or for reasonably encouraging cultural progress and development. Alternatively, the courts might choose to strongly or weakly incorporate history and tradition¹⁴⁰ as elements of judicial

¹³⁴ Ultimately, the clearest defense of a refusal to, say, lie to a person in order to likely save a number of innocent lives may involve purely theological beliefs upon which governments are presumably forbidden to act. See generally JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 12 (1991) (referring to "the scheme of providence" that we do not much see); Christopher Tollefsen, *God, New Natural Law, and Human Rights*, 12 *RELIGIONS* 1, 2 (2021) ("an adequate account of human rights cannot . . . be sustained without some role for God's creative activity"); Jeremy Waldron, *What Are Moral Absolutes Like?*, N.Y.U. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 11-62 (2011). Professor Waldron asks: "Does anything like this make sense for someone who does not believe that there is a benign ruler of the universe who can be entrusted ultimately to make everything come out alright?" *Id.* at 27.

¹³⁵ See *supra* Part II.

¹³⁶ See *supra* note 134 and accompanying text.

¹³⁷ See *supra* Section II.A.

¹³⁸ See *supra* Section II.B.

¹³⁹ See *supra* Section II.C.

¹⁴⁰ For possible guiding principles and limitations, see, for example, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119 (1965); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 *MINN. L. REV.* 377 (1998); Mark V. Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 *WM. & MARY L. REV.* 93 (1987); see *supra* note 58.

tests involving multiple levels of judicial scrutiny¹⁴¹ or some form of constitutional balancing and proportionality.¹⁴² Any such alternative or combination of alternatives could give some weight to considerations of history and tradition while avoiding the costs of a constitutional rights absolutism of history and tradition.¹⁴³

IV. CONCLUSION

Recent Supreme Court opinions have embraced, in several important constitutional rights contexts, an absolutism, or an exceptionless requirement, of validation by some appropriate and sufficient history and tradition. We have traced the logic, and the moral and other costs, of such absolutism in the contexts of substantive due process, Second Amendment rights and regulations, and in Establishment Clause and some free speech contexts. As it turns out, there is, among other problems, a stark conflict

¹⁴¹ For critical background, see Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFS. (fall 2019), <https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny> [https://perma.cc/9J9R-69NW] ("The tiers of scrutiny have no basis in the text or original meaning of the Constitution," as distinct from "constitutional analysis based on the text, history, and tradition of the Constitution."); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (seeking to link strict scrutiny to a regulatory cost-benefit analysis); Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341 (2022) (noting the manipulability of tiers of scrutiny analysis without optimal balancing of interests); Tara L. Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475, 475 (2006) ("The standards of scrutiny . . . are an integral feature of constitutional law"); Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499, 510 (2016) (the free speech categories as both a binary on-off switch, and a graduated volume control knob).

¹⁴² For a sense of the range of balancing-oriented and proportionalist alternatives, see Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS. 131, 136 (2003) ("[O]ptimization relative to competing principles consists of nothing other than balancing."); Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 UNIV. TORONTO L.J. 369, 372 (2007) (on a three-stage proportionalist test); Dimitrios Kyritsis, *Whatever Works: Proportionality as a Constitutional Doctrine*, 34 OXFORD J. LEGAL STUD. 395, 415 (2014) ("Proportionality has all the justification it needs, if it is geared toward maximizing rights compliance."); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 174 (2006) ("Proportionate limitations of rights are justifiable; disproportionate [including insufficiently tailored] ones are not."); Grégoire Webber, *Proportionality and Absolute Rights* 11 (London Sch. of Econ. L., Soc'y & Econ. Working Paper, Paper No. 10, 2016) (asking whether a right to a proportionalist justification is absolute, or else is itself limited by a further proportionalist analysis). For a sense of proportionalism beyond the realm of Constitution, see GARTH L. HALLETT, *GREATER GOOD: THE CASE FOR PROPORTIONALISM* (1995); CHRISTOPHER KACZOR, *PROPORTIONALISM AND THE NATURAL LAW TRADITION* (photo reprint ed. 2012); FRANCISCO J. URBINA, *A CRITIQUE OF PROPORTIONALITY AND BALANCING* (2017).

¹⁴³ It is possible to argue that while a rule of the absolutism of history and tradition is, in the abstract, not the best we could do, in our real world of imperfect rules compliance, such absolutism should be embraced as a constitutional "precommitment" device amounting to what is technically referred to as a "second-best" option. But it hardly seems obvious that the moral costs of requiring validation by history and tradition in all cases are outweighed by the costs of using alternative, or mixed, approaches to constitutional interpretation. Think, to begin with, of the long history and tradition of de jure and de facto segregation and exclusion. For discussion of precommitment, in which we bind ourselves now, while we are supposedly calm and levelheaded, against changing a rule in the future, when we will likely be distressed and emotionally overwhelmed, see JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 89 (2000); Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751 (2003). For discussion and critique of second-best level analysis, which recognizes that if an ideal rule is unattainable, it may well not be wise to seek to approach as closely as possible to that unattainable ideal, see R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956); Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3, 3-5 (1997). At greater length, see Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1174 (2020) (stating on one approach among others, "[t]raditionalist interpretation reflects, even imperfectly or in a second-best way, the moral and political beau ideal or the truest meaning of the Constitution").

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between a constitutional absolutism of history and tradition and an absolutism of some moral and human rights claims lacking a pedigree of historical and traditional legal recognition. The Court's absolutism of history and tradition underrecognizes the strength of some absolutist rights claims that are not based on sufficient history and tradition. But in turn, absolutist rights claims, regardless of whether they are grounded in history and tradition, can themselves sometimes impose unacceptably high moral costs and must in such cases be denied. Fortunately, there is a wide range of alternative constitutional right-adjudicating templates, apart from the absolutism of history and tradition, and apart from absolutism on any other grounds.