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HOW *BRUEN* AND *DOBBS* RESOLVED OPPOSING HISTORICAL TRADITIONS THROUGH HIDDEN EQUAL PROTECTION ANALYSIS

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In New York State Rifle & Pistol Ass'n v. Bruen *and* Dobbs v. Jackson Women's Health Organization, *the Supreme Court's adoption of the history and tradition test required analysis of historical gun and abortion regulations that produced two unacknowledged problems. First, history and tradition analysis revealed opposing historical traditions but implicitly required the Court to affirm a singular tradition. Second, because these historical traditions implicated race- and sex-based equality concerns, the Court engaged in hidden equality determinations.*

Building on recent scholarship, this Comment makes the novel argument that these two problems are connected: The Court resolved the opposing traditions problem through hidden analysis resembling the equal protection standards of review. The Court implicitly struck past laws and practices out of this nation's historical tradition by applying a shadow strict scrutiny review, and it implicitly incorporated past laws and practices into the historical tradition by applying a shadow rational basis review. These quiet determinations about equality enabled the Court to create the illusion of a uniform historical tradition.

This Comment shows that Bruen *and* Dobbs *failed to articulate how history and tradition cases should evaluate competing historical traditions and those that raise equality concerns. Without adopting such a framework, the Court quietly freed its evaluation of historical laws from the constraints of its equal protection precedents. While* Bruen*'s hidden equality analysis aligned with race-based equal protection doctrine,* Dobbs*'s analysis undermined sex-based equal protection doctrine. The history and tradition test thus threatens to construct the false appearance of a singular tradition by silently eroding modern understandings of equality.*

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INTRODUCTION

The growing prominence of the history and tradition test has raised questions about how the Supreme Court evaluates historical laws and practices that would be unconstitutional today.[1] These questions encompass both long-standing and more recent concerns in constitutional interpretation. Scholars have long criticized originalist reasoning for involving a fraught exercise in evaluating competing historical evidence.[2] In the context of history and tradition analysis, this Comment labels this issue the "opposing traditions problem."[3] The history and tradition test leads the Court to identify opposing historical traditions but inherently requires it to resolve the conflict by affirming a "singular historical tradition."[4] More recently, scholars have begun to describe how history

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1. See Reva B. Siegel, Commentary, How "History and Tradition" Perpetuates Inequality: *Dobbs* on Abortion's Nineteenth-Century Criminalization, 60 Hous. L. Rev. 901, 906 (2023) [hereinafter Siegel, How History and Tradition Perpetuates Inequality] (explaining that the Court's adoption of the history and tradition test "elevate[s] 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"); Adam Winkler, Racist Gun Laws and the Second Amendment, 135 Harv. L. Rev. Forum 537, 538 (2022), https://harvardlawreview.org/forum/vol-135/racist-gun-laws-and-the-second-amendment/ [https://perma.cc/TKF6-AG56] (finding that the rising prominence of history and tradition analysis in Second Amendment jurisprudence "is significantly complicated by the fact that many gun laws adopted over the course of American history were racially motivated"). For discussion of the increasing importance of the history and tradition test, see Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 111 (2023) (acknowledging that cases adopting history and tradition in the Supreme Court's 2021 to 2022 Term may be "a harbinger of a broader change in the Supreme Court's approach to history and constitutional law").

2. See, e.g., Saul Cornell, The Right to Carry Firearms Outside of the Home: Separating Historical Myths From Historical Realities, 39 Fordham Urb. L.J. 1695, 1697 (2012) (arguing that the originalist test used in District of Columbia v. Heller, 554 U.S. 570 (2008), put judges in the "unenviable position of evaluating the complex and contradictory historical evidence paraded before them"); H. Jefferson Powell, The Political Grammar of Early Constitutional Law, 71 N.C. L. Rev. 949, 950 (1993) (noting that the "existence of 'original disagreement'"—constitutional disputes among the founders—"renders problematic the invocation of 'the founders' in constitutional debate"); Peter J. Smith, Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning, 52 UCLA L. Rev. 217, 224–25 (2004) (asserting that the "ultimate problem" of originalism, especially when judges "choose to privilege starkly different founding-era views," "lies in the difficulty of discerning objective meaning in a broadly worded document that attempted to strike compromises among competing interests").

3. This concept, explored more infra section I.A, is akin to Professors Joseph Blocher and Eric Ruben's "variations" problem—that the historical analogical method requires courts to analyze "different" and sometimes "divergent" approaches "taken in different places." See Blocher & Ruben, supra note 1, at 156, 160.

4. See Aaron Tang, Lessons From *Lawrence*: How "History" Gave Us *Dobbs*—And How History Can Help Overrule It, 133 Yale L.J. Forum 65, 92 (2023), https://www.yalelawjournal.org/pdf/TangYLJForumEssay_ys5bufi4.pdf [https://perma.cc/7ZMY-W6QB] [hereinafter Tang, Lessons From *Lawrence*] (discussing the idea that *Dobbs* required the Court to "identify[] a definitive, singular historical tradition that existed in America" in the mid-nineteenth century); see also Blocher & Ruben, supra note 1, at 160

and tradition cases also create a "hidden equality" problem.[5] Professor Reva Siegel has commented that history and tradition analysis "seem[s] to acknowledge" that legislation constituting a tradition "would have to rest on constitutional grounds."[6] Professor Cary Franklin has further argued that after courts first "identify the relevant tradition," they engage in a "second (often unarticulated) step" to "determine whether that tradition is compatible with current understandings of equality."[7]

Building on this scholarship, this Comment makes the novel argument that these two problems in history and tradition cases are connected: The Court has resolved the opposing traditions problem through hidden equal protection analysis.[8] In *New York State Rifle & Pistol Ass'n v. Bruen*[9] and *Dobbs v. Jackson Women's Health Organization*,[10] the Court evaluated which conflicting historical traditions of guns and abortion should constitute this nation's singular tradition.[11] This analysis raised equality concerns, which the Court addressed only implicitly—through "shadow" reasoning that resembled equal protection standards of review.[12] This Comment shows how *Bruen* and *Dobbs* applied this hidden equal protection analysis to create the illusion of a uniform historical tradition. Because the Court did not articulate a clear method for addressing these dual problems, the history and tradition test enabled the Court to quietly

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(suggesting that courts applying history and tradition must have some doctrinal solution to address historical variations and other issues).

5. The term "hidden equality problem" is a slight variation on the "hiddenness problem" identified by Professor Cary Franklin. See Cary Franklin, History and Tradition's Equality Problem, 133 Yale L.J. Forum 946, 951–53 (2024), https://www.yalelawjournal.org/pdf/FranklinYLJForumEssay_gkuu5yd5.pdf [https://perma.cc/HTG3-MCP3].

6. Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 932 (referencing Justice Samuel Alito's opinion in *Dobbs*).

7. See Franklin, supra note 5, at 946, 951 (explaining that history and tradition cases require courts to determine whether the "relevant tradition . . . is consistent with equal protection").

8. See id. at 949 (noting that the Court's hidden equality analysis "has not yet attracted significant attention").

9. 142 S. Ct. 2111 (2022).

10. 142 S. Ct. 2228 (2022).

11. See *Bruen*, 142 S. Ct. at 2126 (concluding that firearm regulation is only permissible when it "is consistent with this Nation's historical tradition"); see also *Dobbs*, 142 S. Ct. at 2242 (denying the existence of a substantive due process right to abortion on the basis that "any such [unenumerated] right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

12. See Franklin, supra note 5, at 950 (describing "shadow decision points" as "generally unacknowledged, often outcome-determinative choices about how to interpret [the law] that are framed as methodological but that are typically fueled by substantive . . . concerns" (alterations in original) (internal quotation marks omitted) (quoting Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 126)); see also infra Part II (discussing how the Court's reasoning resembles the application of equal protection standards of review).

depart from modern sex equality precedent and undermine constitutional protections against sex-based discrimination.[13]

Part I begins by laying out the opposing traditions and hidden equality problems. Extending the first analytical step of Professor Franklin's framework (determining "the relevant tradition"),[14] Part I argues that *Bruen* and *Dobbs* each identified *conflicting* traditions but ultimately concluded that only one constituted "this Nation's historical tradition."[15] This opposing traditions problem implicated race-based equality concerns in *Bruen* and sex-based equality concerns in *Dobbs*. Scholars have also recognized a baseline assumption in history and tradition cases that "this Nation's historical tradition" should not incorporate laws that would be deemed unconstitutional today.[16] Since historical regulations may be shaped by discriminatory ideas, the Court makes determinations about whether the traditions it identifies are consistent with equal protection.[17] These evaluations are often unacknowledged and made "implicitly, with little or no analysis or justification."[18] This creates a hidden equality problem: The Court is hiding equality determinations in the shadow of history and tradition analysis.

Part II contributes to the newly developing literature on history and tradition cases by showing how the opposing traditions and hidden equality problems intersect.[19] *Bruen* and *Dobbs* identified opposing traditions of gun and abortion regulation that implicated the Equal Protection Clause through race- and sex-based classifications.[20] But in determining which of the conflicting historical traditions would constitute this nation's singular tradition, the Court hid equality analysis behind its

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13. See Franklin, supra note 5, at 951 (arguing that the Court has begun to silently "dismantle equal protection doctrine . . . in ways that can be hard to detect"); infra section II.B.

14. See Franklin, supra note 5, at 951 .

15. *Bruen*, 142 S. Ct. at 2126.

16. See, e.g., Franklin, supra note 5, at 951 (explaining that history and tradition cases require courts to determine whether the relevant "tradition is consistent with equal protection"); Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 932 (asserting that Justice Alito's opinion in *Dobbs* "seemed to acknowledge that the legislation would have to rest on constitutional grounds if it were to constitute a tradition legitimating *Roe*'s reversal").

17. Franklin, supra note 5, at 951, 955.

18. Id. at 951.

19. For other scholars who have made similar arguments, see, e.g., id at 951 (identifying the "hiddenness problem," on which this analysis builds); Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 906–07 (explaining that the "tradition-entrenching methods" employed in *Bruen* and *Dobbs* "provide[] new justifications for enforcing old forms of status inequality").

20. See infra Part II.

Second Amendment and Due Process Clause reasoning.[21] Professor Franklin has argued that judges use "a multitude of doctrinal mechanisms" when conducting hidden equality analysis in history and tradition cases.[22] Most notably, judges will "adjust the levels of generality at which they define the relevant historical tradition."[23] This Comment offers a new framework to understand the Court's implicit equality analysis in relation to its reasoning about opposing traditions. In *Bruen*, the Court struck past gun laws and practices *out* of this nation's historical tradition by applying a hidden review of racial classifications that resembled strict scrutiny—labeled here "shadow strict scrutiny." In *Dobbs*, the Court incorporated past abortion laws and practices *into* the historical tradition by applying a hidden review of sex-based classifications that resembled rational basis—labeled here "shadow rational basis." These quiet determinations about equality enabled the Court to create the illusion of a uniform historical tradition.

This Comment reveals that *Bruen* and *Dobbs* failed to "adequately clarif[y]" how history and tradition cases should evaluate historical traditions that conflict or that raise equality concerns.[24] If history and tradition are here to stay,[25] courts need a clear framework for addressing these inevitable and intertwined problems. By not articulating guidance, the Court quietly freed its evaluation of historical laws from the constraints of its equal protection precedents.[26] As a matter of equality, *Bruen*'s shadow analysis of these laws reached the proper result.[27] Racially discriminatory

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21. See Franklin, supra note 5, at 951 (arguing that courts are making equal protection determinations in substantive due process and Second Amendment cases "*sub rosa*"—"with little or no analysis").

22. Id. at 952–53.

23. Id. at 950. The levels of generality problem in history and tradition has been widely commented on outside the hidden equality context. See, e.g., United States v. Rahimi, 144 S. Ct. 1889, 1929 (2024) (Jackson, J., concurring) (noting that the outcome of *Bruen* analysis depends in part on the level of generality applied); Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 7, 12, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 5489050 (urging the Court to clarify the level of generality at which courts should apply *Bruen*); Blocher & Ruben, supra note 1, at 121–22 (asserting that *Bruen*'s historical analogy test can lead to different outcomes based on the level of generality courts apply).

24. See *Rahimi*, 144 S. Ct. at 1926–29 (Jackson, J., concurring) (observing that *Bruen*'s history and tradition test left "many questions . . . unanswered"); Franklin, supra note 5, at 951 (finding that the equality determination in history and tradition cases is "often unarticulated"); infra Part I.

25. See Blocher & Ruben, supra note 1, at 111 (pointing to the Court's recent history and tradition cases as "a harbinger of a broader change in the Supreme Court's approach").

26. The new conservative majority's understandings of equality may (*Bruen*) or may not (*Dobbs*) align with modern equal protection doctrine. See Franklin, supra note 5, at 953 (finding that *Dobbs*'s hidden equality determinations disregarded decades of sex-based equal protection precedent); infra Part II (further discussing the relationship between the reasoning in these cases and modern equal protection doctrine).

27. If Justice Clarence Thomas made his equality analysis explicit, it would have been supported by the Court's modern precedents, which apply strict scrutiny to racial

gun laws clearly contravene modern equality doctrine and should be removed from the American constitutional tradition.[28] But in *Dobbs*, the shadow analysis reached the wrong result. The Court departed from its modern precedents in order to affirm discriminatory abortion laws that should be excluded from this nation's tradition.[29] Without a framework requiring the Court to explicitly address the opposing traditions and hidden equality problems, the history and tradition test threatens to create the false appearance of a singular historical tradition by quietly undermining modern equal protection doctrine and "entrench[ing] inequality."[30]

I. DUAL PROBLEMS WITH THE COURT'S HISTORY AND TRADITION TEST

The history and tradition test has developed gradually over several decades,[31] but today it focuses on determining which eighteenth- and nineteenth-century laws and practices comprise "this Nation's historical tradition."[32] In 2022, the Supreme Court embraced history and tradition

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classifications. See, e.g., Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 312–13 (2013); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)). A year after *Bruen*, the same majority described this strict scrutiny for racial discrimination as a "daunting" examination. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023).

28. See infra section II.A; see also Winkler, supra note 1, at 537–38 (commenting on the racist history of gun laws). While this point about racially discriminatory disarmament laws is narrow, other scholars have explored *Bruen*'s racial justice implications more thoroughly. See, e.g., Daniel S. Harawa, *NYSRPA v. Bruen*: Weaponizing Race, 20 Ohio St. J. Crim. L. 163, 163 (2022) (arguing that *Bruen* appropriated racial justice to reshape Second Amendment rights); Danny Y. Li, Note, Antisubordinating the Second Amendment, 132 Yale L.J. 1821, 1829 (2023) (explaining that *Bruen*'s "methodological reliance on history and tradition calls into question virtually everything about our current gun-regulation schemes" and "renders Black communities less safe").

29. See infra section II.B (discussing the Court's modern sex-based equal protection precedents).

30. Serena Mayeri, Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation 14 (U. of Pa. L. Sch., Pub. L. & Legal Theory Research Paper No. 25-01, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5087522 [https://perma.cc/79CK-RRTS] ("*Dobbs* exposes how a selective history and tradition methodology operates not only to entrench inequality but to make hierarchy appear legitimate . . . ."); see also Franklin, supra note 5, at 951 (explaining that hidden equality determinations in history and tradition cases have begun to "dismantle equal protection doctrine . . . in ways that can be hard to detect"); Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 907 (arguing that the Court's selective deferrals to the past in history and tradition cases enforce gendered inequality).

31. Reva B. Siegel, The History of History and Tradition: The Roots of *Dobbs*'s Method (and Originalism) in the Defense of Segregation, 133 Yale L.J. Forum 99, 133–46 (2023), https://www.yalelawjournal.org/pdf/SiegelYLJForumEssay_8o3f7k4v.pdf [https://perma.cc/9R5Y-CBDG] [hereinafter Siegel, History of History and Tradition] (describing the modern development of the history and tradition test).

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

as the key mode of constitutional interpretation in two landmark cases.[33] *Bruen* required that laws regulating the Second Amendment right to bear arms be "consistent with this Nation's historical tradition."[34] Applying this test, the Court struck down a New York concealed-carry law because the state failed to identify an American tradition justifying the law's requirements.[35] Similarly, *Dobbs* adopted a test that required unenumerated due process rights to be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[36] Finding no tradition that supported a right to abortion, the Court overturned *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[37]

The Court heralded the history and tradition test as an objective, neutral, and administrable means of interpretation.[38] While many scholars have critiqued this framing,[39] this Comment focuses narrowly on two issues raised in *Bruen* and *Dobbs*, which it labels the "opposing traditions problem" and the "hidden equality problem." Neither problem is expressly acknowledged, but their resolutions critically shaped the Court's reasoning. Sections I.A and I.B explore each problem in turn.

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33. The Court additionally adopted a history and tradition test for the First Amendment Establishment Clause in a third case, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022), which is outside the scope of this Comment.

34. 142 S. Ct. at 2126.

35. Id. at 2156.

36. 142 S. Ct. 2228, 2242 (2022) (internal quotation marks omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

37. See id.

38. See, e.g., id. (describing the purpose of the historical tradition test to seek out rights that are "objectively[] [and] deeply rooted" (quoting *Glucksberg*, 521 U.S. at 720–21)); id. at 2305, 2310 (Kavanaugh, J., concurring) (repeatedly describing history and tradition analysis as "properly return[ing] the Court to a position of judicial neutrality"); *Bruen*, 142 S. Ct. at 2129–30 (explaining that "reliance on history to inform the meaning of constitutional text . . . [is] more legitimate, and more administrable" than a "judge-empowering 'interest-balancing inquiry'" (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008))).

39. See, e.g., Franklin, supra note 5, at 947 n.8 (collecting sources about instances when the Court provided inaccurate history); Melissa Murray, Children of Men: The Roberts Court's Jurisprudence of Masculinity, 60 Hous. L. Rev. 799, 857 (2023) (describing history and tradition analysis as an "expedition" in which courts cherry-pick facts); Siegel, History of History and Tradition, supra note 31, at 107–11, 133–46 (arguing that *Dobbs*'s analysis of history "serve[d] to veil rather than to constrain the interpreter's values"); Tang, Lessons From *Lawrence*, supra note 4, at 67–68 (asserting that *Dobbs*'s count of states that historically banned all abortion "rests on a series of historical errors"); Mary Ziegler, The History of Neutrality: *Dobbs* and the Social-Movement Politics of History and Tradition, 133 Yale L.J. Forum 161, 188 (2023), https://www.yalelawjournal.org/pdf/F8.ZieglerFinalDraftforWeb_1gycmvnb.pdf [https://perma.cc/RVC9-D4H3] [hereinafter Ziegler, History of Neutrality] (criticizing history and tradition for "disregard[ing] consensus positions among historians").

A. *The Opposing Traditions Problem*

In *Bruen* and *Dobbs*, the Court's discussion of historical laws and practices revealed opposing traditions that raised equality concerns.[40] In *Bruen*, opposing traditions of gun regulation and public carry implicated racial discrimination.[41] In *Dobbs*, opposing traditions of criminalizing and permitting abortion implicated sex-based discrimination.[42] While the Court did not acknowledge these conflicts directly, the history and tradition test inherently demanded that the Court resolve them by identifying a "definitive, singular historical tradition"[43]—or, in Justice Thomas's words, "this Nation's historical tradition."[44] The Court did so by affirming one of the opposing traditions it identified and striking out the other.[45]

In *Bruen*, the Court held that New York's concealed-carry licensing regime violated the Second Amendment and adopted a new test for evaluating firearm laws.[46] Justice Clarence Thomas's majority opinion declared that the government must justify such laws by demonstrating that they are "consistent with this Nation's historical tradition of firearm regulation."[47] This requires the government to "identify a well-established

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40. Analyzing cases prior to *Bruen* and *Dobbs*, Professor Darrell A.H. Miller likewise recognized that the Court's earlier appeals to tradition led to the issue of "conflicting traditions." See Darrell A.H. Miller, Second Amendment Traditionalism and Desuetude, 14 Geo. J.L. & Pub. Pol'y 223, 225–26 (2016). Professor Miller explained that the Court has attempted to resolve these conflicts in the Seventh Amendment context through "through a combination of analogical reasoning and policy considerations." Darrell A.H. Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. 852, 884 (2013).

41. See Blocher & Ruben, supra note 1, at 160 (explaining that *Bruen*'s historical-analogical method suffers from the problem of having to account for divergent state protections for gun rights).

42. See Tang, Lessons From *Lawrence*, supra note 4, at 84–85 (highlighting an "unbroken" historical tradition of states permitting abortion that is "contradictory" to the "unbroken tradition" of punishing abortion described in *Dobbs*).

43. Id. at 92 (discussing the same history and tradition test in *Dobbs*); see also Blocher & Ruben, supra note 1, at 160 (suggesting that courts conducting *Bruen*'s history and tradition test must have some doctrinal solution to solve issues like historical variations).

44. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022). Justice Thomas similarly emphasized this idea of identifying a singular tradition—one that masks conflicting historical laws—by stating that implementing the Second Amendment demands deference to the "balance[] struck by the traditions of the American people." Id. at 2131.

45. In their discussion of *Bruen*'s historical-analogical method, Professors Blocher and Ruben address a similar, but more general, "variations" problem—that "different approaches [are] taken in different places." Blocher & Ruben, supra note 1, at 156. They suggest that the "most obvious doctrinal solution is to adjust the level of generality" of a court's inquiry. Id. at 160. This Comment focuses on a narrower problem: traditions that stand in direct conflict. It shows that when the Court has identified conflicting traditions, it has selected one to form the basis of a singular historical tradition and dismissed the other.

46. See *Bruen*, 142 S. Ct. at 2122 (declining to adopt a two-step, means–end scrutiny that had been previously applied by lower courts).

47. Id. at 2126.

and representative historical analogue" that is "relevantly similar" to a modern regulation.[48]

While it did not acknowledge the conflict outright, Justice Thomas's historical analysis identified both a tradition of regulating firearms and an opposing tradition of public carry. His "long journey through the Anglo-American history of public carry" included a discussion of historical laws implicating equality concerns related to Black Americans' right to bear arms.[49] Justice Thomas acknowledged that "free blacks were often denied [this right] in antebellum America" and that "the exercise of this fundamental right by freed slaves was systematically thwarted" after the Civil War.[50] He framed this history of disarmament both in contrast to examples of Black people publicly carrying weapons for defense and as inspiration for legislative action extending gun rights to freedmen.[51] Justice Thomas described 1866 reports that indicated Black people "indeed carried arms publicly for their self-protection" and framed Congress's 1868 extension of the Freedmen's Bureau Act as "reaffirm[ing] that freedmen were entitled to the 'full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . including the constitutional right to keep and bear arms.'"[52] He thus laid out opposing traditions of gun regulation for nineteenth-century Black Americans. However, the Court concluded that respondents had not identified a historical tradition of prohibiting public carry.[53] *Bruen* instead held that the Second Amendment "guarantee[s] to 'all Americans'" a right to carry arms for self-defense inside and outside the home.[54]

In *Dobbs*, the Court revived a narrow framing of history and tradition in order to overrule *Roe* and *Casey*.[55] In his majority opinion, Justice Samuel Alito stated that the Due Process Clause only protects unenumerated rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[56] The Court then undertook a discussion of historical abortion laws in which it found that "three-quarters of the States had made abortion a crime at any stage

48. Id. at 2132–33 (emphasis omitted).

49. Id. at 2111, 2150–52, 2156.

50. Id. at 2150–51.

51. Id. at 2151–52.

52. Id. (second and third alterations in original) (emphasis omitted) (quoting Freedmen's Bureau Act § 14, 14 Stat. 176 (1866)).

53. Id. at 2156. Against this finding, the Court's conclusion did acknowledge exceptions: "a few late-19th-century outlier jurisdictions" and "a few late-in-time outliers." Id. However, the Court did not include the history of racially discriminatory disarmament laws among these outliers. Id.

54. Id. at 2122, 2156.

55. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

56. Id. (internal quotation marks omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

of pregnancy" when the Fourteenth Amendment was adopted.[57] In contrast, the Court also acknowledged that nine out of thirty-seven states allowed abortion at that time[58] and that "many States in the late 18th and early 19th century did not criminalize pre-quickening abortions."[59] The Court thus recognized opposing traditions of criminalizing and permitting abortion. Despite this, the Court ignored the latter history and reached the "inescapable conclusion" that the right to abortion has "no basis" in the nation's history and traditions.[60] Instead, the Court found an "unbroken tradition" of criminalizing abortion "from the earliest days of the common law until 1973."[61]

B. *The Hidden Equality Problem*

The second concern with history and tradition analysis is the Court's failure to explain how it makes equality determinations about past laws. As Professors Reva Siegel and Aaron Tang have argued, the Court assumes that historical laws and practices must rest on constitutional grounds in order to constitute a tradition.[62] Analyzing this assumption, Professor Franklin has outlined three main equality concerns inherent in history and tradition cases. First, after courts identify a relevant tradition, they then engage in a second step, which is "often unarticulated" and "value-laden," in order to determine "whether that tradition is consistent with Equal Protection."[63] Second, because history and tradition are analyzed in cases about substantive due process, the First Amendment, or the Second Amendment—instead of equal protection—courts are making constitutional equality determinations "invisibly or implicitly, with little or no analysis or justification."[64] Third, by hiding these equality determinations in history and tradition analysis, the Court has begun to silently "dismantle equal protection doctrine" in "ways that can be hard to detect."[65] Building on Professor Franklin's framework, Part II highlights

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57. Id. at 2248–49. But see Aaron Tang, After *Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban, 75 Stan. L. Rev. 1091, 1128–50 (2023) (providing historical evidence that refutes *Dobbs*'s calculation that "three-quarters of the States" banned abortion at that time (internal quotation marks omitted) (quoting *Dobbs*, 142 S. Ct. at 2242–43, 2248, 2252–53, 2256)).

58. *Dobbs*, 142 S. Ct. at 2253, 2255.

59. Id. at 2252–53, 2255.

60. Id. at 2253, 2283.

61. Id. at 2253–54.

62. Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 932 (asserting that Justice Alito's opinion in *Dobbs* "seemed to acknowledge that the legislation would have to rest on constitutional grounds if it were to constitute a tradition legitimating *Roe*'s reversal"); see also Franklin, supra note 5, at 951 (explaining that history and tradition requires courts to determine whether a relevant "tradition is consistent with equal protection").

63. Franklin, supra note 5, at 951.

64. Id.

65. Id.

passages in *Bruen* and *Dobbs* that reveal how the Court employed shadow equal protection analysis to construct the illusion of a uniform historical tradition.

II. RESOLVING OPPOSING TRADITIONS THROUGH HIDDEN EQUAL PROTECTION ANALYSIS

The opposing traditions and hidden equality problems intersect in *Bruen* and *Dobbs*. This Comment uncovers how the Court quietly reasoned through equal protection considerations to determine which of the opposing traditions it identified would constitute this nation's singular historical tradition. Professor Franklin explained that the "history and tradition test incorporates a range of [doctrinal] mechanisms" to produce outcomes adhering to the Court's modern understandings of equality.[66] One such mechanism is conducting hidden equality determinations by changing the level of generality.[67] Professor Franklin found that "the Justices will break with history and tradition when old practices violate their (twenty-first-century) notions of equality, but will hew closely to tradition in cases where they continue to find the old-style regulation tolerable from an equality standpoint."[68]

This Comment offers an alternative mechanism. It argues that the unarticulated reasoning *Bruen* and *Dobbs* used to "break with" or "hew closely to" history and tradition resembled equal protection analysis.[69] The Court broke with a historical tradition by applying a hidden review resembling strict scrutiny—labeled here "shadow strict scrutiny." It hewed closely to a historical tradition by applying a hidden review resembling rational basis—"shadow rational basis." The Court made these hidden equality determinations in order to evaluate which of the conflicting traditions it would strike *out* of or incorporate *into* this nation's historical tradition. Thus, the Court resolved the opposing traditions problem through a hidden equal protection analysis.

Section II.A argues that *Bruen*'s analysis of gun traditions employed a shadow strict scrutiny review to historical regulations that discriminated on the basis of race.[70] This aligned with the evolution of race-based equality

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66. Id. at 955.

67. Id. at 946–47.

68. Id. at 978; see also Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 906 (arguing that the conservative Justices repudiated past practices that "expressed racism or nativism to which [they] objected" and did not scrutinize evidence about past practices that enforce sex-based stereotyping).

69. Franklin, supra note 5, at 950, 978.

70. While outside the scope of this Comment, the Court was again confronted with these discriminatory gun laws in United States v. Rahimi, 144 S. Ct. 1889 (2024). During oral argument, Justice Ketanji Brown Jackson suggested that there may be a "flaw" in the history and tradition framework "to the extent that when we're looking at history and tradition, we're not considering the history and tradition of all of the people but only some of the people." Transcript of Oral Argument at 54, *Rahimi*, 144 S. Ct. (No. 22-915), 2023

doctrine, which centers the original meaning of the Fourteenth Amendment as eliminating racial discrimination.[71] If Justice Thomas had made his historical equality analysis explicit, he would not have needed to depart from the Court's modern precedents.[72] This analysis ultimately reached the proper result: Racially discriminatory disarmament laws are incompatible with equal protection doctrine and should not be incorporated into America's historical tradition.[73] Nevertheless, the Court's failure to articulate a method for analyzing historical equality considerations freed other history and tradition cases to deviate from equal protection precedents.

Section II.B argues that *Dobbs*'s analysis of abortion traditions applied a shadow rational basis review to historical regulations that made sex-based classifications.[74] This analysis departed from the modern development of sex-based equality doctrine under *United States v. Virginia*[75] and *Nevada*

WL 9375567. These remarks addressed head-on that history and tradition analysis may require the Court to exclude "the tradition with respect to slaves and Native Americans," while "count[ing] underneath this historic traditions test" "only the regulation[s]" that pertain to "certain segments of society." Id. at 53 (statement of Jackson, J.). The colloquy did not go much further into this distinction, though, as then-Solicitor General Elizabeth Prelogar argued the former laws were not "a part of history that are directly relevant to the separate question at issue here." Id. at 54.

71. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the same majority that decided *Bruen* reviewed many precedents affirming the use of the demanding strict scrutiny standard in racial discrimination cases and interpreting the original meaning of the Fourteenth Amendment as aimed at eliminating race-based distinctions. See 143 S. Ct. 2141, 2161–62 (2023) (discussing, inter alia, Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); Palmore v. Sidoti, 466 U.S. 429, 432 (1984); McLaughlin v. Florida, 379 U.S. 184, 192 (1964)).

72. See *Adarand Constructors*, 515 U.S. at 206–07 (laying out the Court's precedents and standard of review for racial classifications).

73. See Winkler, supra note 1, at 539 (describing the racist history of gun laws as a "special dilemma" for history and tradition analysis given that the "Constitution's guarantee of equal protection prohibits racially discriminatory gun laws just as it bars other types of racially discriminatory laws"). This Comment's argument about *Bruen*'s proper treatment of these historical disarmament laws is fairly narrow. For a broader discussion of *Bruen*'s implications for racial justice, see Harawa, supra note 28, at 171–72 (arguing that *Bruen*'s "methodological choices allowed it to claim a racial justice mantle . . . [by] vindicating the rights of the ancestors without considering what the decision would mean for their progeny"); Li, supra note 28, at 1829 (observing that *Bruen*'s jurisprudence "deprives Black communities of the capacity to secure for themselves the conditions of equal public safety—all in the name of Founding Era history and tradition").

74. The Court suggested that these nineteenth-century laws *did not* classify on the basis of sex, but the Court ignored evidence that these laws were motivated by invidious sex-role stereotyping (in enforcing women's marital roles) that would be constitutionally suspect under modern sex-equality doctrine. Cary Franklin & Reva Siegel, Equality Emerges as a Ground for Abortion Rights in and After *Dobbs*, *in Roe* v. *Dobbs*: The Past, Present, and Future of a Constitutional Right to Abortion 22, 35–36 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

75. 518 U.S. 515 (1996).

Department of Human Resources v. Hibbs.[76] These cases repudiated the nation's "long and unfortunate history of sex discrimination,"[77] superseded the reasoning in *Geduldig v. Aiello*,[78] and established that heightened scrutiny applies to laws that regulate pregnancy.[79] However, in determining that abortion regulations do not make sex-based classifications, Justice Alito quietly swept *Virginia* and *Hibbs* under the rug.[80] Because this equality analysis was mostly implicit, he provided no explanation for this departure. Therein lies the danger of the opposing traditions and hidden equality problems. To create the illusion of a uniform historical tradition, the Court makes necessary equality determinations about historical laws without explicit reasoning. While those determinations aligned with race-based equal protection doctrine in *Bruen*, they under-mined sex-based equal protection doctrine in *Dobbs*.

A. *Shadow Strict Scrutiny Review of Racially Discriminatory Gun Laws*

In *Bruen*, Justice Thomas's account of the history of public carry in America exposed opposing traditions of a right to public carry and regulations of that right. These opposing traditions were particularly clear in Justice Thomas's discussion of race in the antebellum and Reconstruction eras.[81] Similar to his *McDonald v. City of Chicago* concurrence,[82] Justice Thomas acknowledged the substantial history of nineteenth-century disarmament laws that expressly discriminated on the basis of race.[83]

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76. 538 U.S. 721 (2003).

77. *Virginia*, 518 U.S. at 531 (internal quotation marks omitted) (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

78. 417 U.S. 484 (1974). *Geduldig* held that pregnancy was not a sex-based classification under the Equal Protection Clause. Id. at 485. Franklin and Siegel argue that the Court's experience enforcing the Pregnancy Discrimination Act—which repudiated *Geduldig*—led to holdings in *Virginia* and *Hibbs* that superseded *Geduldig*'s reasoning. See Franklin & Siegel, supra note 74, at 27–30.

79. See *Virginia*, 518 U.S. at 532–33 (establishing a "heightened review standard" for sex-based classifications); Franklin & Siegel, supra note 74, at 26–30 (arguing that *Virginia* and *Hibbs* require laws regulating pregnancy to "be closely scrutinized to ensure they do not stereotype, reinforce traditional assumptions about women's roles, or perpetuate women's second-class standing").

80. See Franklin & Siegel, supra note 74, at 30 (describing the modern equal protection standard for laws regulating pregnancy and explaining how Justice Alito ignored the "rise of sex discrimination law").

81. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2150–52 (2022).

82. See Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 915 ("[Justice Thomas's] *McDonald* concurrence chronicles the many forms of violent racial domination that American law has licensed and calls for their repudiation and repair through expansive recognition of Second Amendment rights that will secure the equal citizenship of Blacks . . . ." (citing McDonald v. City of Chicago, 561 U.S. 742, 827, 855–58 (2010) (Thomas, J., concuring in part and concurring in the judgment))).

83. See *Bruen*, 142 S. Ct. at 2150–52 (referencing the "'systematic efforts' made to disarm [Black people]" noted in *McDonald* (quoting *McDonald*, 561 U.S. at 771)). For further reference on the racist history of gun laws, see Winkler, supra note 1, at 537 ("For

However, he did not frame these laws as contributing to this nation's historical tradition. Rather, he contrasted them with an opposing tradition constructed from the practices of Black people carrying firearms in public for self-defense and laws repudiating race-based disarmament.[84] Justice Thomas concluded that respondents had failed to identify a tradition of prohibiting public carry.[85] He thus struck out the history of racially discriminatory disarmament laws without a clear explanation.[86] Implicit in his resolution of these opposing traditions was a hidden equal protection analysis. This reasoning resembled a fatal, strict scrutiny review of historical race-based classifications, mirroring that which the Court applies to equal protection cases today.[87] The following three passages from *Bruen* highlight this shadow analysis.

First, discussing the postbellum period, Justice Thomas referenced the history of "Southern abuses violating blacks' right to keep and bear arms," as described in *McDonald*.[88] For example, Justice Thomas stated that

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much of American history, gun rights did not extend to Black people and gun control was often enacted to limit access to guns by people of color.").

84. See *Bruen*, 142 S. Ct. at 2150–52 (framing racially discriminatory gun laws alongside and as the impetus for laws and statements that rebuked these racist laws).

85. See id. at 2156.

86. See id. After recounting a long history of public carry, Justice Thomas wrote a short summary paragraph reaching the conclusion that there was no tradition regulating public carry. Id. This summary referenced several previously discussed laws that regulated public carry, but he dismissed these as "outliers." Id. However, this summary and the "outliers" neither referenced the racially discriminatory gun laws nor provided a basis for excluding them. See id.

87. Franklin, supra note 5, at 972–73 (arguing that Justice Thomas suggested that allowing racially discriminatory gun regulations from the eighteenth and nineteenth centuries "to persist into the present day would violate equal protection"). A year after *Bruen*, the same majority found that the Court's precedents "repeatedly reaffirmed" that racial classifications receive a strict scrutiny review that would be fatal to the vast majority of such laws. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2168 (2023) ("As this Court has repeatedly reaffirmed, '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" (alteration in original) (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003))).

88. *Bruen*, 142 S. Ct. at 2151. It is noteworthy that Justice Thomas here repeatedly cited his concurrence and Justice Alito's majority opinion in *McDonald*, in which both discuss the history of racist efforts to disarm Black people. See *McDonald*, 561 U.S. at 771 (describing "systematic efforts . . . to disarm" Black Americans after the Civil War); id. at 845–47 (Thomas, J., concurring in part and concurring in the judgment) (demonstrating that "Southern legislatures . . . [took] particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense"). Justice Thomas's opinion in *Bruen* mirrored some of Justice Alito's opinion in *McDonald*—both frame laws that disarmed Southern Black people after the Civil War as "help[ing] to inspire the adoption of the Fourteenth Amendment." Winkler, supra note 1, at 547 (citing *McDonald*, 561 U.S. at 745). This further shows how Justice Thomas sees the Fourteenth Amendment, which secured equal citizenship for Black (male) Americans and guaranteed equal protection of the laws, U.S. Const. amend XIV, as striking out these discriminatory laws from this nation's historical tradition.

local enforcement of nineteenth-century concealed-carry laws in Florida "discriminated against blacks" and quoted an official's statement: "Why is this poor fellow fined for an offence which is committed hourly by every other white man I meet in the streets?"[89] Here, Justice Thomas explicitly acknowledged that Florida's law discriminated on the basis of race. He explained that this prohibition on concealed carry was not "applied equally, even when under federal scrutiny."[90] In doing so, Justice Thomas expressed clearly, though not explicitly, that this law would fail modern equal protection review. This provides a strong example of Justice Thomas's application of shadow strict scrutiny to historical racial classifications.

Second, Justice Thomas's discussion of South Carolina's Black Codes, which "prohibited firearm possession by blacks," also suggested a fatal-in-fact strict scrutiny.[91] Justice Thomas presented a historical law—the Black Codes—that he defined as racially discriminatory. He seemed to acknowledge the law's apparent unconstitutionality by stating it was "pre-empt[ed]" by an 1866 decree issued by General Sickles.[92] He then doubled down on the impermissibility of this classification by quoting Sickles: "The constitutional rights of *all* loyal and well-disposed inhabitants to bear arms will not be infringed . . . ."[93] Affirming the Sickles decree, Justice Thomas struck the Black Codes out of this nation's historical tradition and, instead, affirmed an opposing tradition that rejected these racist laws.

Third, Justice Thomas emphasized quotations from a Black-owned newspaper that called attention to the racially discriminatory nature of historical gun laws.[94] He quoted the paper's editors in stating that Black people had "the *same* right to own and carry fire arms that *other* citizens have."[95] This comparison highlighted racial classifications in gun laws between Black people and "other citizens."[96] He further quoted the editors, who, borrowing from the Freedmen's Bureau, stated, "'[a]ny person, *white or black*, may be disarmed if convicted of making an improper or dangerous use of weapons,' even though 'no military or civil officer has the right or authority to disarm *any class of people*.'"[97] By evoking equal

89. *Bruen*, 142 S. Ct. at 2152 n.27 (internal quotation marks omitted) (quoting H.R. Exec. Doc. No. 57, 40th Cong., 2d Sess., 83 (1867)).

90. Id.

91. See id. at 2152.

92. Id.

93. Id. at 2188 (emphasis added) (internal quotation marks omitted) (quoting Cong. Globe, 39th Cong., 1st Sess. 908 (1866)).

94. See id. at 2152.

95. Id. (internal quotation marks omitted) (quoting Editorial, Have Colored Persons a Right to Own and Carry Fire Arms?, Loyal Georgian, Feb. 3, 1866, https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82016224/1866-02-03/ed-1/seq-3/ [https://perma.cc/8YUV-RYPV]).

96. See id. (emphasis omitted) (internal quotation marks omitted).

97. Id. (first alteration in original) (emphasis added) (quoting Editorial, Have Colored Persons a Right to Own and Carry Fire Arms?, Loyal Georgian, Feb. 3, 1866,

protection treatment of racial classifications, Justice Thomas framed the expansion of gun rights to Black people as arising from the repudiation of racial discrimination. This, too, created an equal protection basis for silently striking racially discriminatory gun laws out of America's historical tradition.

Justice Thomas ultimately held that this nation has no "tradition of broadly prohibiting the public carry of commonly used firearms for self-defense."[98] He reached this conclusion by reasoning about equal protection in the shadows of history and tradition.[99] Justice Thomas excluded a tradition of racially discriminatory gun laws and affirmed an opposing tradition that rejected them.[100] This shadow strict scrutiny review of racially discriminatory gun laws is, of course, consistent with the modern evolution of the equal protection doctrine.[101] The Court's treatment of racial discrimination today is based on an originalist reading of the Equal Protection Clause that rejects race-based state action except in the most extraordinary cases.[102] The danger of *Bruen*'s hidden equal protection analysis, therefore, is not in departing from the Court's well-established jurisprudence on race.[103] Rather, by not explicitly articulating a framework to address these historical equality decisions in *Bruen*, the Court preserved for itself the ability to deviate from equal protection precedent in other history and tradition cases.[104]

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https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82016224/1866-02-03/ed-1/seq-3/ [https://perma.cc/8YUV-RYPV]).

98. Id. at 2138.

99. Franklin, supra note 5, at 972–73 (asserting that Justice Thomas suggested in his discussion of historical racist gun laws "that allowing such tainted regulation to persist into the present day would violate equal protection").

100. In several other instances, the Roberts Court has similarly repudiated historical racist practices, even facially race-neutral ones, that it now views as abhorrent. See id. at 972 (discussing how Ramos v. Louisiana, 140 S. Ct. 1390 (2020), and Justice Thomas's dissent in Obergefell v. Hodges, 576 U.S. 644 (2015), condemned past laws that reinforced racial inequality).

101. Just a year after *Bruen*, the same majority found that the Court's precedents "repeatedly reaffirmed" the application of strict scrutiny because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166, 2168 (2023) (alteration in original) (internal quotation marks omitted) (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003)).

102. See id. at 2161 (explaining that the core guarantee of equal protection derives from its original meaning, the "historical fact . . . that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination" (internal quotation marks omitted) (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964))).

103. See id. at 2149 (describing the "core purpose" of the Equal Protection Clause as eliminating "all governmentally imposed discrimination based on race" (internal quotation marks omitted) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984))).

104. See Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 906, 913–20 ("[T]hese Justices' allegiance to past practice breaks down at exactly those points where past practice is rooted in commitments that the Justices abhor.").

B. *Shadow Rational Basis Review of Discriminatory Anti-Abortion Laws*

In *Dobbs*, the Court's hidden equality analysis departed from modern equal protection doctrine in order to create the illusion of a singular historical tradition.[105] The Court's discussion of historical abortion laws revealed opposing traditions of criminalizing and permitting abortion.[106] After considering these competing traditions, the Court ultimately concluded that the right to abortion "has *no basis* . . . in our Nation's history" and instead affirmed an "unbroken tradition" of criminal abortion prohibitions.[107] The Court's reasoning suggests that it resolved the opposing traditions problem through a hidden equal protection analysis. The Court applied a shadow rational basis review to sex-based classifications in order to incorporate laws criminalizing abortion into the nation's historical tradition.[108]

In dicta, *Dobbs* tersely rejected the theory that the Equal Protection Clause protects the right to abortion—calling it "squarely foreclosed by [the Court's] precedents."[109] The Court asserted that the regulation of abortion is "not a sex-based classification" and thus does not trigger the "'heightened scrutiny' that applies to such classifications."[110] Citing *Geduldig v. Aiello*, the Court suggested that heightened scrutiny would only apply if an abortion regulation was motivated by "invidious discrimination against members of one sex."[111] But, the Court clarified, the "'goal of preventing abortion' does not constitute '[such] animus' against women."[112] The Court further stated that "laws regulating or prohibiting abortion . . . are governed by the same standard of review as other health and safety measures."[113] The Court was not direct about this standard of review. Rather, in footnote eighteen, the Court pointed to part VI of the opinion, in which it clarified that "rational-basis review is the appropriate

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105. Id.

106. See supra section I.A.

107. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253, 2283 (2022) (emphasis added).

108. Rational basis review is "most deferential to the state" and creates "a 'strong presumption of validity.'" Murray, supra note 39, at 837–38 (quoting *Dobbs*, 142 S. Ct. at 2284).

109. *Dobbs*, 142 S. Ct. at 2245–46. But see Reva B. Siegel, Serena Mayeri & Melissa Murray, Equal Protection in *Dobbs* and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 Colum. J. Gender & L. 67, 68–69 (2022) (explaining that the Court did not engage with the equal protection precedents cited by the authors in their amicus brief).

110. *Dobbs*, 142 S. Ct. at 2245.

111. Id. at 2246 (internal quotation marks omitted) (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)). In *Geduldig*, the Court held that pregnancy does not constitute a sex-based classification under the Equal Protection Clause. 417 U.S. at 494–95.

112. *Dobbs*, 142 S. Ct. at 2246 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273–74 (1993)).

113. Id.

standard for such challenges."[114] In sum, the Court declared that abortion regulations do not discriminate against women and, thus, are subject to rational basis review under the Equal Protection Clause.

While dicta, this paragraph evinced an unmistakable refusal to engage with the construction of modern sex equality law over the past half century.[115] By reviving *Geduldig*, Justice Alito ignored later cases—*United States v. Virginia*[116] and *Nevada Department of Human Resources v. Hibbs*[117]—that many scholars believed had superseded *Geduldig* and rendered it a "constitutional relic."[118] Justice Alito's invocation of the Court's 1974 opinion in *Geduldig* also suggested an intent to return equal protection doctrine to a time before the Court began formally subjecting sex-based state action to heightened scrutiny.[119] Because this equality analysis is mostly implicit, it remains to be seen whether this represented his openness to lowering the standard of review for all sex-based discrimination—a position which would be in accord with Justice Antonin Scalia's dissent in *Virginia*.[120]

While this opening salvo is not a binding holding,[121] it nonetheless established the spirit of the due process analysis to follow and implicitly freed the Court to evaluate history and tradition without regard to modern

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114. Id. at 2246 n.18, 2283.

115. See Franklin, supra note 5, at 953 (arguing that *Dobbs*'s suggestion that "laws banning abortion raise no equality concerns . . . disregards half a century of legal development in the context of equal protection and the construction of an equality-based body of law limiting how the state may regulate pregnancy").

116. 518 U.S. 515 (1996).

117. 538 U.S. 721 (2003).

118. See, e.g., Franklin, supra note 5, at 984. This argument was presented to the Court in an amicus brief. See Siegel et al., supra note 109, at 69. During oral argument in *United States v. Skrmetti*, pending at the time of publication, Justice Alito made his view that *Geduldig* was "reaffirmed in *Dobbs* in 2022" abundantly clear. Transcript of Oral Argument at 21, United States v. Skrmetti, No. 23-477 (U.S. argued Dec. 4, 2024), 2024 WL 4989203.

119. See Franklin, supra note 5, at 953–54 (arguing that *Dobbs*'s failure to acknowledge the development of sex-equality law "covertly undermines decades of legal precedent"); Siegel et al., supra note 109, at 69 (arguing that Justice Alito's failure to discuss key equal protection precedents suggested "an unwillingness to recognize the last half century of sex equality law"). The Court formally recognized that heightened scrutiny applied to sex-based discrimination in 1976. See Craig v. Boren, 429 U.S. 190, 197–99 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

120. See *Virginia*, 518 U.S. at 574–75 (Scalia, J., dissenting) (arguing that reducing the standard of review for sex-based classifications to rational basis "has a firmer foundation in our past jurisprudence" and "would be much more in accord with the genesis of heightened standards of judicial review").

121. Because no Equal Protection claim was asserted in *Dobbs*, this paragraph was purely dicta. Franklin & Siegel, supra note 74, at 23.

equality doctrine.[122] To avoid addressing the potentially discriminatory basis for historical laws criminalizing abortion, the Court silently applied a shadow rational basis review.

The Court's hidden equality analysis primarily occurred in its discussion of the amicus brief filed by the American Historical Association and Organization of American Historians ("Historians' Brief").[123] According to Justice Alito, the Historians' Brief suggested that criminal abortion statutes in effect when the Fourteenth Amendment was ratified were "enacted for illegitimate reasons."[124] Justice Alito's language here relegated a necessary equality determination about past sex-based discrimination to the shadows. His framing of "illegitimate reasons" hid what the brief, in fact, described as "[d]iscriminatory" and "[c]onstitutionally [i]mpermissible [m]otives."[125] Justice Alito further claimed that the historians made this argument to "tr[y] to dismiss the significance" of the criminal abortion laws.[126] In doing so, he subtly acknowledged the need to determine whether these laws would be constitutionally permissible and, thus, whether they could be incorporated into this nation's historical tradition.[127]

Justice Alito then called attention to two motivations for these criminal abortion laws presented in the Historians' Brief: "the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to 'shir[k their] maternal duties.'"[128] Under modern equal protection standards, this invocation of sex-role stereotyping would trigger heightened scrutiny.[129] While Justice Alito did not expressly acknowledge an equal

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122. See Siegel et al., supra note 109, at 69 (asserting that Justice Alito's "unwillingness to recognize the last half century of sex equality law" expressed "a spirit that finds many forms of expression in the opinion's due process analysis").

123. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2255–56 (2022).

124. Id. at 2255.

125. Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 18, 20, *Dobbs*, 142 S. Ct. 2242 (No. 19-1392) [hereinafter *Dobbs* Historians' Brief].

126. *Dobbs*, 142 S. Ct. at 2255.

127. See Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 932 ("Justice Alito acknowledged that historians had [shown] that nineteenth-century abortion statutes were enacted for both constitutional and unconstitutional reasons. He responded in ways that seemed to acknowledge that the legislation would have to rest on constitutional grounds . . . to constitute a tradition legitimating *Roe*'s reversal.").

128. *Dobbs*, 142 S. Ct. at 2255 (alteration in original) (quoting *Dobbs* Historians' Brief, supra note 125, at 20).

129. See Siegel et al., supra note 109, at 70, 79–81 (arguing that modern equal protection doctrine requires laws that discriminate on the basis of pregnancy be subjected to intermediate scrutiny, "just like any other sex-based state action"); see also Franklin & Siegel, supra note 74, at 26–30 (asserting that modern equal protection doctrine under *Virginia* and *Hibbs* supersedes *Geduldig* and instead requires laws regulating pregnancy to be "closely scrutinized to ensure they do not stereotype, reinforce traditional assumptions about women's roles, or perpetuate women's second-class standing").

protection problem with these laws, the motivations posed by the Historians' Brief gave him reason to further evaluate the (obvious) equality implications.[130]

Justice Alito first rejected the discriminatory motive argument and then implicitly accepted a rational basis justifying these laws. He began by attacking the discriminatory legislative motives put forward by the Historians' Brief—though he never addressed the historians' use of the word "discriminatory."[131] Expressing incredulity, he posed the question: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?"[132] With the clear implication being "no," this rhetorical question represented an unequivocal dismissal of the idea that sex-based discrimination was at play in the enactment of these laws.[133] By rejecting the notion that historical abortion bans were motivated by sexism, Justice Alito ruled out any "'invidiously discriminatory animus' against women" that he earlier suggested would be cause for heightened equal protection review.[134]

Building from the equal protection dicta, he then implied that rational basis would be the appropriate review for these historical laws and offered an ostensibly legitimate government interest: "[T]he passage of these laws was instead spurred by a sincere belief that abortion kills a human being."[135] He supported this rational basis by citing several late-nineteenth- and early-twentieth-century judicial decisions.[136] Justice Alito then concluded this section by stating, "[W]e see no reason to discount the significance of the state laws in question based on these *amici*'s suggestions about legislative motive."[137] In other words, because he found the discriminatory motive arguments insufficient to warrant heightened

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130. See Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 932 ("[Justice Alito] embraced and endorsed the nineteenth-century abortion bans, *despite* their nativism and sexism.").

131. See *Dobbs*, 142 S. Ct. at 2255–56.

132. *Dobbs*, 142 S. Ct. at 2256; see also Franklin, supra note 5, at 974 (describing Justice Alito's tone in his discussion of the Historians' Brief).

133. See Franklin & Siegel, supra note 74, at 41 (arguing that *Dobbs*'s discussion of these motives denied the "dual focus of abortion law" and insisted "that restrictions on abortion are, and always have been, exclusively about protecting fetuses").

134. *Dobbs*, 142 S. Ct. at 2245–46 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273–74 (1993)). Professors Franklin and Siegel assert that Justice Alito's reasoning was part of an effort to "shield abortion laws from the scrutiny that contemporary sex discrimination doctrine demands." Franklin & Siegel, supra note 74, at 43. Rather, this Comment suggests, Justice Alito implicitly lowered the scrutiny that sex-based discrimination demands.

135. *Dobbs*, 142 S. Ct. at 2256.

136. Id. (discussing, inter alia, Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934); State v. Moore, 25 Iowa 128, 131–32 (1868); State v. Gedicke, 43 N.J.L. 86, 90 (1881); State v. Ausplund, 167 P. 1019, 1022–23 (Or. 1917)).

137. Id.

equal protection review, he affirmed the constitutionality of these historical laws by merely applying a shadow rational basis review.

This passage suggests that *Dobbs* employed a hidden equal protection analysis to evaluate a tradition of abortion regulations that discriminated on the basis of sex. The Court implicitly determined that criminal abortion laws at the time of the Fourteenth Amendment's adoption would not be subjected to heightened scrutiny and, instead, accepted a rational basis for their passage. The Court did so in order to incorporate these laws into the nation's historical tradition of abortion regulation. By departing from the Court's modern sex-based equality precedents, *Dobbs* manifested the danger of the history and tradition test's opposing traditions and hidden equality problems.[138] The test allowed the Court to quietly undermine equal protection doctrine and revive sex-based status inequality in order to create the false appearance of a singular historical tradition.[139]

CONCLUSION

In *Bruen* and *Dobbs*, the Court's adoption of the history and tradition test required a historical analysis of gun and abortion regulations that produced two unacknowledged problems. First, history and tradition analysis revealed opposing historical traditions but required the Court to affirm a singular tradition. Second, because these traditions implicated equality concerns and because historical tradition should not rest on unconstitutional grounds, the Court engaged in hidden equality determinations. The Court's reasoning suggests that it resolved the opposing traditions problem through hidden equal protection analysis. The Court implicitly struck past laws and practices *out* of this nation's historical tradition by applying a shadow strict scrutiny review, and it implicitly incorporated past laws and practices *into* the historical tradition by applying a shadow rational basis review. In creating the illusion of a uniform historical tradition, the Court's hidden equality analysis aligned with race-based equal protection doctrine but undermined sex-based equal protection doctrine. To prevent the further erosion of modern understandings of equality, the history and tradition test needs a clear framework for evaluating the opposing traditions and hidden equality problems.

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138. See Franklin & Siegel, supra note 74, at 30 (describing the modern equal protection standard for laws regulating pregnancy and explaining how Justice Alito ignored the "rise of sex discrimination law").

139. See Franklin, supra note 5, at 951 (finding that hidden equality determinations in history and tradition cases allowed the Court to "dismantle equal protection doctrine . . . in ways that can be hard to detect"); Siegel, How History and Tradition Perpetuates Inequality, supra note 1, at 907 (asserting that the Court's selective deferrals to the past in history and tradition cases "enforc[ed] old forms of [gendered] status inequality").