

NOTE

WHOSE HISTORY, WHICH TRADITION? AN EXAMINATION OF HISTORICAL SOURCES IN THE SUPREME COURT'S HISTORY-AND-TRADITION JURISPRUDENCE

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The Supreme Court's modern reliance on history and tradition has reshaped constitutional adjudication across multiple doctrinal areas, including Substantive Due Process, the Second Amendment, and the Religion Clauses. The Court has justified this methodology as a means of constraining judicial discretion by anchoring constitutional meaning in the past. Yet persistent disagreement within the Court reveals a threshold methodological problem largely left unexplained: which historical sources are eligible to define constitutional meaning.

This Note examines numerous Supreme Court decisions and identifies three recurring categories of historical sources used by the Court in its history-and-tradition jurisprudence: American, English, and non-Anglo-American Sources. It shows that the Court alternates among these source categories without articulating consistent criteria governing their eligibility, producing doctrinal inconsistency and complicating application by lower courts. In response, this Note proposes a modest framework for historical source eligibility that emphasizes source hierarchy and temporal baselines through principled explanation. Clarifying these threshold methodological judgments would preserve history's constraining function while improving coherence and predictability in constitutional interpretation.

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INTRODUCTION

Perhaps no field is as malleable as history. Even the oft-quoted maxim that “history is written by the victors” has itself been adapted and attributed to a variety of historical figures,¹

¹ See Caroline L. Osborne, *Freedom of Expression, Collection Management, and Ethical Decision-Making: Censorship of the Good, the Bad, the Ugly, and Our Obligations to Preserve a Culture’s Story*, 117 L. LIBR. J. 191, 194 n.8 (2025) (explaining that the quote has been attributed to Sir Winston Churchill, Hermann Göring, and Maximilien Robespierre, among others). For variations on the quote, see KENNETH B. PYLE, *HIROSHIMA AND THE HISTORIANS* 64 (2024) (quoting Churchill as stating “[h]istory will treat me kindly because I propose to write it”) and GUSTAVE M. GILBERT, *THE NUREMBERG DIARY* 10 (1947) (quoting Göring as writing “[t]he victor will always be the judge, and the vanquished the accused”).

with each iteration shaped by the narrative needs of its user. Of these variations, however, George Orwell's formulation in *Nineteen Eighty-Four* best captures the phenomenon's legal implications: "[w]ho controls the past controls the future: who controls the present controls the past."² History's plasticity therefore presents both an opportunity and a danger when it enters the legal domain. For advocates, history is in the eye of the beholder; it may be reframed, emphasized, or minimized as a tool of persuasion to shape legal outcomes. But for judges, history is not invoked merely to persuade, but to justify constitutional meaning itself. The question, then, is not whether history is fluid or whether it constitutes a legitimate legal inquiry, but rather how judges should rely on history without allowing its pliability to undermine the very constraints it is invoked to impose.

Historical inquiry has been an integral part of Anglo-American judicial philosophy since its adoption by English jurists and treatise writers of the seventeenth century.³ In modern constitutional law, the practice of historical inquiry has assumed renewed prominence and has become a fundamental tool of decision-making in the Supreme Court through its history-and-tradition jurisprudence.⁴ Since its modern revival in *Washington v. Glucksberg*,⁵ various history-and-tradition tests have undergirded many of the Court's most influential decisions in interpreting the Due Process Clause,⁶ Second Amendment,⁷ First Amendment,⁸ and, recently, the equitable powers of federal district courts.⁹ The Court has defended this turn to history as a means of cabining judicial discretion and anchoring constitutional interpretation to the understandings of those who drafted and ratified the Constitution and its

² See GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 143 (1984) (citation modified).

³ See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1652–53 (1994).

⁴ See Alexandra Michalak, Note, *Historians Wear Robes Now? Applying the History and Tradition Standard: A Practical Guide for Lower Courts*, 32 WM. & MARY BILL RTS. J. 479, 480–82 (2023).

⁵ See 521 U.S. 702 (1997).

⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁷ See, e.g., *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

⁸ See, e.g., *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

⁹ See *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025).

amendments.¹⁰ Despite this justification, however, the Court frequently looks beyond the era of those constitutional architects, drawing upon much older sources such as the *Magna Carta*¹¹ or even biblical texts.¹²

The Supreme Court's use of history has drawn sustained criticism, not only from academia¹³ but from within the Court itself. In dissent from the plurality in *Michael H. v. Gerald D.*, Justice Brennan cautioned that tradition "can be as malleable and as elusive as liberty itself."¹⁴ Justice Brennan continued, explaining that:

Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant . . . the plurality has not found the objective boundary that it seeks.

Even if we could agree, moreover, on the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes firm enough to be relevant . . . and the moment at which it becomes too obsolete to be relevant any longer.¹⁵

Justice Brennan's dissent not only raises concerns with historical indeterminacy, but a larger methodological tension in the Court's reliance on history to constrain constitutional interpretation.

This Note confronts that tension by examining a threshold question the Court has largely left unexplained: which historical sources are treated as eligible to define constitutional meaning. By surveying the Court's precedent, this Note demonstrates that the Court alternates among three main types of sources—American, English, and non-Anglo-American—without articulating a consistent framework for source eligibility. This variability produces doctrinal inconsistency, facilitates

¹⁰ See Thomas C. Galligan Jr., *History and Constitutional Interpretation: What's Really "There"?*, 23 U. N.H. L. REV. 109, 110 (2025).

¹¹ See *Kerry v. Din*, 576 U.S. 86 (2015); *infra* note 33.

¹² See *Coy v. Iowa*, 487 U.S. 1012 (1988); *infra* notes 54–55.

¹³ See Michalak, *supra* note 4; Galligan, *supra* note 10. See also Michael L. Smith, *History as Precedent: Common Law Reasoning in Historical Investigation*, 27 U. PA. J. CONST. L. 587 (2025) (critiquing the use of history as precedent by judges and the lack of safeguards employed in evaluating the sufficiency of historical evidence).

¹⁴ 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (internal quotation marks omitted).

¹⁵ *Id.* at 137–38.

selective sourcing, and further obscures the principles that govern the Court's history-and-tradition jurisprudence.

This Note proceeds in four substantive parts. Part I identifies and categorizes historical sources the Court has used to inform constitutional meaning, isolating instances in which it departs from traditional Anglo-American legal sources. Part II demonstrates how these sourcing choices vary across constitutional domains. Part III articulates the costs of the Court's unstructured approach to source eligibility and explains why the absence of a principled sourcing framework undermines coherence in history-and-tradition jurisprudence. Finally, Part IV proposes modest doctrinal reforms centered on source hierarchy and temporal baselines to systematize the Court's use of history without abandoning it.

This Note does not argue that history is inherently indeterminate, that originalism is incoherent, or that courts should abandon historical reasoning. Instead, it examines how the Supreme Court determines which sources are eligible to define constitutional meaning, and how that selection process, despite its centrality to constitutional adjudication, remains largely unexplained.

I

HISTORICAL SOURCE ELIGIBILITY IN SUPREME COURT JURISPRUDENCE

A. Source Eligibility as a Threshold Question

Before the Court can interpret the meaning of a constitutional provision based on the historical record, it must first decide which portions of the record to consult. This threshold decision precedes, and often determines, the interpretive work that follows. Yet it is rarely acknowledged as a distinct methodological step. Justice Scalia, arguably the forefather of historical inquiry on the modern Court,¹⁶ recognized this issue, writing that “[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions and making nuanced judgments about which evidence to consult and how to interpret it.”¹⁷ To illustrate the difficulties of these threshold questions, consider two broad approaches to constitutional interpretation: originalism and traditionalism.

¹⁶ See Michalak, *supra* note 4 at 483.

¹⁷ McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring) (citation modified).

Originalism looks to “some set of facts that existed at a specific prior time when a law came into being.”¹⁸ Originalism comes in a variety of forms, but two are relevant here: intent-based and “original public meaning” originalism.¹⁹ Intent-based originalism focuses on the meanings that the Framers themselves gave a particular constitutional provision. “Original public meaning” originalism, by contrast, focuses on the public meaning of a constitutional provision at the time the provision was ratified.²⁰ Thus, under either originalist approach, though eligible sources are often contemporaneous to ratification, determining which sources qualify as relevant evidence presents persistent challenges. Questions as to whether a source accurately reflects the Framers’ intent surrounding a constitutional provision, which actors comprised the “public,” or whether the public actually viewed a source as authoritative complicate the Court’s task of identifying eligible sources for consideration under an originalist framework.

Traditionalism, on the other hand, “looks to the whole continuum of time leading up to the present”²¹ to determine whether history and tradition support the existence of some legal right.²² Such an approach necessarily requires the Court to decide how old a certain legal tradition is, which historical practices are sufficiently continuous to constitute a tradition, and which historical sources are too remote or attenuated to carry legal weight. These line-drawing choices are often outcome-determinative. Yet the Court rarely explains where such lines are drawn—or why.

This section isolates that threshold problem of source eligibility. Rather than assessing how the Court interprets historical evidence, it examines which sources the Court selects and treats as eligible to inform constitutional meaning.

B. Research Scope and Method of Categorization

In surveying the Supreme Court’s modern history-and-tradition jurisprudence, this Note examines numerous

¹⁸ Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL’Y 159, 173 (2009).

¹⁹ See Smith, *supra* note 13, at 594.

²⁰ See *id.* at 594–95; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92, 94 (2004) (defining original public meaning as “the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment”).

²¹ See Primus, *supra* note 18.

²² See Smith, *supra* note 13, at 596.

decisions in which the Court invokes historical analysis in a manner presented as relevant to constitutional meaning.²³ Across these cases, three recurrent categories of sources emerge: (1) American sources, beginning in the early colonial period and extending through the present; (2) English sources, spanning from the creation of the *Magna Carta* through the American founding; and (3) sources that either predate the *Magna Carta*, postdate the American founding, or fall outside the Anglo-American common-law tradition altogether. These three categories are not necessarily exhaustive but rather illustrative of the Court's patterned decisions in defining what counts as eligible historical evidence across doctrinal contexts.

C. Categories of Historical Sources

1. *American Sources*

The first category of sources can be defined along two primary dimensions: identity and time. With respect to identity, these sources are distinctly American. They consist either of materials produced by individuals who identified as Americans, including colonists in the New World who would later form the American polity,²⁴ or of sources that purport to describe general American beliefs or practices relevant to the Court's inquiry.²⁵

Temporally, this category begins in the colonial period and continues through the present. A rigid temporal baseline anchored exclusively to dates like 1776 or 1789 is neither practical nor consistent with the Court's own practice, as it would exclude nascent colonial traditions that shaped many of the Framers' beliefs and routinely inform the Court's historical analysis.²⁶

²³ This survey includes Supreme Court decisions between 1855 and 2025 in which the Court expressly relied on historical analysis as relevant to constitutional meaning.

²⁴ See *infra* note 26.

²⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015) (relying on the account of French writer Alexis de Tocqueville regarding the importance of marriage in early American life in examining the Nation's marital traditions).

²⁶ See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1905 (2021) (Alito, J., concurring) (recognizing colonial oath exemptions for certain religious groups in the 1600s in interpreting the Free Exercise Clause); *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (using colonial law to determine whether anti-sodomy laws are grounded in this Nation's history); *Smith v. Doe*, 538 U.S. 84, 97–98 (2003) (examining colonial criminal punishments to determine the scope of the Ex Post Facto Clause).

The American sources relied upon by the Court generally fall into three groups: founding-era materials, subsequent expressions of American legal beliefs and practices, and the Court's own precedent. In examining founding-era materials, the Court frequently invokes sources such as *The Federalist Papers*²⁷ and other contemporaneous writings that reflect early understandings of particular rights. As for subsequent expressions of American legal beliefs, the Court focuses on the writings of prominent statesmen that illustrate a broader spectrum of legal or ideological understandings over the course of American history.²⁸ Finally, this category encompasses the Court's own precedent,²⁹ which has itself become an influential component of this Nation's history and tradition. In short, the Court treats American sources as eligible whenever the inquiry turns on uniquely American legal understandings, whether at the founding or as reflected through subsequent practice.

2. *English Common Law Sources*

Like American sources, English common law sources can be defined along dimensions of identity and time. As for identity, these sources predominantly originate from English legal institutions and were produced by influential English legal actors whose work informed traditions inherited by the United States. The Court has expressly acknowledged the importance of such sources in constitutional interpretation, explaining that "substantial reliance on English history and custom before the founding" is appropriate where the Constitution "codified a right inherited from our English ancestors."³⁰ These authors need not have been ideological predecessors to the

²⁷ See *FCC v. Consumers' Research*, 145 S. Ct. 2482, 2519 (2025) (Gorsuch, J., dissenting) (citing *THE FEDERALIST* No. 48 (James Madison) to define the powers of Congress).

²⁸ See *Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1816 (2024) (citing multiple prominent statesmen and historical legislative documents to interpret the understandings of immigration rights and the power of the sovereign to impose conditions on immigration from the founding through the twentieth century).

²⁹ See *Vidal v. Elster*, 144 S. Ct. 1507, 1529 (2024) (examining nineteenth-century Supreme Court precedent to define the bounds of trademark law within the context of the First Amendment).

³⁰ See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127, 2138 (2022) (internal quotation marks omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

American democratic experiment so long as their work shaped areas of English common law that were adopted or adapted by the Framers.³¹

Looking to when these sources were created, this category generally spans from the creation of the *Magna Carta* to the founding of the United States. Although defining precise historical boundaries is often difficult, the *Magna Carta* is widely regarded as a foundational document in the Anglo-American tradition, frequently cited for its role in shaping constitutionalism across the Anglophone world.³² The Supreme Court has long recognized the *Magna Carta*'s importance to American law. Writing in 1884, Justice Harlan described the *Magna Carta* as securing "the rights, liberties, and immunities of our ancestors," and recognized the "signing of the [charter] as the most important event in English history" and "the keystone of English liberty."³³ As with American sources, the end-point for English common law sources is not susceptible to a precise temporal baseline. It can, however, be placed in more generalized terms. This general cutoff is best drawn at the founding of the United States, after which English legal practices ceased to develop in a continuous way that would be directly inherited by the American legal system. Because eligibility here primarily turns on whether the American practice was inherited from English common law, the category remains concrete even without a rigid endpoint.

The English sources the Court relies on generally fall into four groups: treatises, legislative enactments and charters, judicial decisions, and the documented powers of legal institutions. Among treatises, the Court frequently invokes the writings of the "eminent common law authorities,"³⁴ including

³¹ See *id.* at 2128–33 (discussing the Statute of Northampton's impact on Anglo-American common law in the context of the Second Amendment, as the Statute's restrictions on the "public carry of self-defense weapons" adversely resulted in English Acts of Parliament protecting the right to bear arms).

³² Nicholas Vincent, *Magna Carta: from King John to Western Liberty*, in *MAGNA CARTA: HISTORY, CONTEXT AND INFLUENCE* 25–38 (LAWRENCE GOLDMAN ed., 2018).

³³ See *Hurtado v. California*, 110 U.S. 516, 542 (1884) (Harlan, J., dissenting). See also *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855) (viewing the *Magna Carta* as a predecessor to the Due Process Clause); *McDonald v. City of Chicago*, 561 U.S. 742, 815–19 (2010) (Thomas, J., concurring) (describing how the *Magna Carta* formed the foundation for both the Constitution and the Privileges and Immunities Clause).

³⁴ See *Dobbs* at 2249 (citing *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020)).

Blackstone,³⁵ Coke,³⁶ Hale,³⁷ and Bracton.³⁸ The Court also relies on English legislative enactments, including Acts of Parliament³⁹ and the *Magna Carta* itself.⁴⁰ Judicially, the Court relies on English caselaw and the evolution of the common law.⁴¹ Finally, the Court examines documented powers and functions of English legal bodies, particularly those that bear a structural resemblance to American institutions, such as the American federal court system.⁴² While a source may fall into any of these categories, it is only eligible to define constitutional meaning if the practice it reflects was inherited by the American legal system.

³⁵ Blackstone and his *Commentaries on the Laws of England* are seemingly among the most popular citations on the Court. See *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (quoting 1 W. BLACKSTONE, COMMENTARIES 130 (1765) in determining that the “freedom of movement . . . ‘a is part of our heritage’”); *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting) (quoting 4 W. BLACKSTONE, COMMENTARIES 296–97 (1769) as evidence that a prisoner’s right to seek release on bail is protected by the Due Process Clause because it was protected in England); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (quoting 1 W. BLACKSTONE, COMMENTARIES 256 (1765) to illustrate the fundamentality of the presumption of the legitimacy at common law).

³⁶ See *Dobbs* at 2249 (quoting 3 COKE, INSTITUTES OF THE LAWS OF ENGLAND 50–51 (1644) to illustrate that abortion was a crime at common law after “quickening”); *Kahler v. Kansas*, 140 S. Ct. 1021, 1040 (2020) (quoting 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND to demonstrate that insanity has been recognized as a criminal defense for “hundreds of years”).

³⁷ See *Dobbs* at 2249 (quoting 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 433 (1736) to show that aborting a “quick child” was considered homicide or manslaughter at common law).

³⁸ Though much more antiquated than the three aforementioned treatise writers, Bracton’s treatises are still cited frequently. See *Dobbs* at 2249 (quoting 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 279 (T. Twiss ed. 1879) (thirteenth century-treatise) to support the argument that abortion rights are not historically grounded); *Kahler*, 140 S. Ct. at 1040 (quoting 2 BRACTON ON LAWS AND CUSTOMS OF ENGLAND 384 (S. Thorne transl. 1968) (thirteenth-century treatise) that a “madman” and a child were to be equally absolved of criminal liability); *Michael H.*, 491 U.S. at 124.

³⁹ See *Bruen* at 40–45 (referencing the Statute of Northampton).

⁴⁰ See *supra* note 33 and accompanying text.

⁴¹ See *Bruen* at 43–44 (discussing the influence of Sir John Knight’s Case, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686) on the Second Amendment and its predecessors); *Kahler*, 140 S. Ct. at 1033–35 (highlighting the importance of cognitive capacity to criminal liability in four “old common-law cases” from seventeenth and eighteenth-century England).

⁴² See *CASA* (looking to the powers of the English High Court of Chancery to define the scope of the equitable powers of federal district courts under the Judiciary Act of 1789); *Pennsylvania Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 45 n.5 (1985) (examining the powers of a sheriff at English common law to interpret the powers given to U.S. Marshals under the Judiciary Act of 1789).

3. *Non-Anglo-American Sources*

Like American and English sources, this category can also be described in terms of identity and time. Looking to identity, the category is comprised of sources that are not directly a part of the Anglo-American legal tradition. This does not necessarily mean that such sources originated outside modern-day Great Britain, nor that they bear no relation to Anglo-American law.⁴³ Rather, these sources derive from legal traditions that developed independently of the common-law reforms associated with the *Magna Carta* and the institutional development of English common law.

Drawing the boundary between sources that fall within and outside the Anglo-American tradition is often difficult, but the Supreme Court's own jurisprudence provides a guidepost. The Court has repeatedly treated the *Magna Carta* as a foundational document in the development of this Nation's history and tradition.⁴⁴ Accordingly, sources that rely upon, or predicate their existence on, legal systems or traditions not shaped by the *Magna Carta*'s reforms fall outside the Anglo-American tradition for purposes of this taxonomy. Where American sources are defined by American authorship and English sources by inherited legal authority, these sources are defined by external origin.

The temporal dimension further clarifies the category. These sources either predate the *Magna Carta*,⁴⁵ postdate the American founding,⁴⁶ or fall entirely outside the common-law timeline.⁴⁷ When combined with the identity dimension, these temporal baselines help distinguish sources that arise from external legal traditions rather than from the Anglo-American legal continuum.

The Court itself has occasionally gestured toward the limits of this category when assessing history and tradition. Writing for the majority in *New York State Rifle & Pistol Association, Inc. v. Bruen*, Justice Thomas explained that "historical evidence that long predates [the Constitution and its amendments] may not illuminate the scope of [a] right if linguistic or

⁴³ See *infra* notes 51–53 and accompanying text.

⁴⁴ See *supra* note 33 and accompanying text.

⁴⁵ See *infra* notes 51–53 and accompanying text.

⁴⁶ See *U.S. v. Wong Kim Ark*, 169 U.S. 649, 667 (1898) (covering nineteenth-century continental European and English law to define the scope of the Fourteenth Amendment with regard to birthright citizenship).

⁴⁷ See *infra* note 56 and accompanying text.

legal conventions changed in the intervening years.” He further cautioned that while courts may look to earlier English practices extending into the period surrounding the founding, it is “quite another” matter “to rely on an ancient practice that had become obsolete” by the time of the founding and was never accepted in the colonies.⁴⁸ Justice Thomas reiterated that “in interpreting [the] Constitution,” it is often “better not to go back too far into antiquity . . . unless evidence shows that [the content of the source] survived to become our Founders’ law.”⁴⁹

Non-Anglo-American sources cited by the Court typically fall into four categories: ancient legal systems, religious and theological sources, continental European or civil-law traditions, and transhistorical references. With respect to ancient legal systems, the Court has a particular affinity for Roman law, which it often utilizes to inform a broader Western legal tradition.⁵⁰ The Court has also referenced Anglo-Saxon law,⁵¹ Viking law,⁵² and Norman law,⁵³ which, while later in date than classical antiquity, nonetheless predate the *Magna Carta* by centuries. The Court occasionally references religious and theological sources, either as evidence of historical events or

⁴⁸ See *Bruen* at 34–35 (citation modified).

⁴⁹ See *id.* at 35 (citation modified) (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)).

⁵⁰ The Court has used Roman law to illustrate a longstanding tradition of allowing one to confront their accusers as a predicate to the Confrontation Clause. See *Crawford v. Washington*, 541 U.S. 36, 43 (2004); *Coy* at 1015–16. The Court has also used Roman law to support the argument that anti-sodomy laws have “ancient roots” which translate to this Nation’s tradition. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (“Homosexual sodomy was a capital crime under Roman law.”).

⁵¹ See *District of Columbia v. Heller*, 554 U.S. 570, 583 n.7 (2008) (referencing “Saxon regulations” as a precursor to regulations on the Second Amendment).

⁵² See *United States v. Rahimi*, 144 S. Ct. 1889, 1899 (2024) (citing the frankpledge system as “[r]eputedly dating to the time of Canute” in searching for historical analogues to the arms restriction before the Court). Though he reigned during the Anglo-Saxon period, Canute (or “Cnut”) the Great was a Danish King of England, Denmark, and Norway who united the kingdoms as part of his “Viking Empire.” See Dorothy Whitlock, *Canute (I)*, in ENYC. BRITANNICA, <https://www.britannica.com/biography/Canute-I> [<https://perma.cc/2APX-U2RV>] (last updated Dec. 19, 2025); John R. Hale, *The Viking Longship*, 278 SCI. AM. 56, 56 (1998). During Canute’s reign, the frankpledge system became universal upon every free-man. See A.H.F. Lefroy, *Anglo-Saxon Period of English Law*, Part II, 26 YALE L.J. 388, 391 (1917).

⁵³ See *City of Chicago v. Morales*, 527 U.S. 41, 103 (1999) (Thomas, J., dissenting) (citing laws prohibiting vagrancy and loitering at the time of the Norman conquest in defining the scope of the Due Process Clause).

practices,⁵⁴ or as reflections of “Judeo-Christian moral and ethical standards” bearing on American history and tradition.⁵⁵ Continental European legal sources likewise appear in the Court’s decisions, often in service of defining the scope or origins of Western legal authority.⁵⁶ More broadly, the Court has invoked the “history and culture of Western civilization,” or similar formulations, to emphasize rights or traditions presented as fundamental to Western society itself.⁵⁷ Although the Court invokes such sources with some frequency, their role is often less to establish a tradition dispositive of constitutional meaning than to supply background narratives about Western legal development.

II

DOCTRINAL PATTERNS IN THE COURT’S USE OF HISTORICAL SOURCES

Having identified the principal categories of historical sources the Court treats as eligible for examination, this Part examines how those sources appear across different areas of constitutional doctrine. This examination is not meant to be exhaustive, but rather illustrative of the Court’s endorsement of historical sources in three major areas of constitutional law and how the Court varies as to which categories of sources are treated as eligible depending on doctrinal context.

A. Substantive Due Process

When analyzing Substantive Due Process under the Fourteenth Amendment, the Court primarily treats Anglo-American

⁵⁴ See *Coy* at 1015–16 (citing the Roman Governor Festus’s statements about the imprisoned Apostle Paul’s right to meet his accusers in *Acts* 25:16 as evidence of the Roman predecessor to the Confrontation Clause).

⁵⁵ See *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring) (“Condemnation of [sodomy] is firmly rooted in Judeo-Christian moral and ethical standards.”).

⁵⁶ See *Wong Kim Ark* at 666–67 (discussing the scope of birthright citizenship by looking to the naturalization laws of France, Germany, Switzerland, Sweden, Norway, Portugal, the Netherlands, Denmark, Belgium, Spain, Italy, Greece, and Russia); *Holy Trinity Church v. U.S.*, 143 U.S. 457, 465–66 (1892) (relying on the inclusion of the word “God” in Christopher Columbus’s commission to the New World as evidence that the people of the United States are a “religious people.”).

⁵⁷ See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.”); *Griswold v. Connecticut*, 381 U.S. 479, 495–96 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (writing that “the traditional relation of the family” is “as old and as fundamental as our entire civilization” in defining the right to privacy under the Fourteenth Amendment).

sources as eligible, though often supplementing that examination with older and broader non-Anglo-American sources to demonstrate a preliminary foundation of longstanding moral, social, or legal practices.

Take, for example, the Court's decision in *Washington v. Glucksberg*,⁵⁸ one of the foundational cases in the Court's modern history-and-tradition jurisprudence.⁵⁹ There, in determining whether a state's prohibition against assisted suicide violated the Due Process Clause of the Fourteenth Amendment by depriving the plaintiffs of liberty, the Court looked to "700 years" of "Anglo-American common-law tradition," examining whether that tradition "has punished or . . . disapproved of both suicide and assisting suicide."⁶⁰ Before assessing historical matters, the Court made references to prohibitions against suicide in "almost every western democracy," providing a preliminary transhistorical reference to continental European legal traditions.⁶¹ The Court subsequently focused on English common-law sources disavowing suicide, including treatises by Bracton in the thirteenth century and Blackstone in the eighteenth century.⁶² In the footnotes of its analysis, however, the Court cites to much older sources to demonstrate an even more ancient tradition of opposing suicide, referencing pre-Norman ecclesiastical suicide prohibitions adopted in the seventh and tenth centuries.⁶³ The Court then shifts its analysis to a survey of American sources, beginning with suicide prohibitions during the colonial period through modern prohibitions found in the Model Penal Code.⁶⁴

This pattern is not just unique to *Glucksberg*, as many other Substantive Due Process cases rely predominantly on Anglo-American common-law sources and provide ancient or widespread legal traditions as further support for the Court's

⁵⁸ See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁹ See Thomas P. Crocker, *What is Deeply Rooted in the Constitution?*, 50 *BYU L. REV.* 265, 298 (2024) (acknowledging that the *Dobbs* majority and others believe that *Glucksberg* substantially displaced prior fundamental rights methodologies employed by the Court).

⁶⁰ See *Glucksberg*, 521 U.S. at 711.

⁶¹ See *id.* at 710, 710 n.8 (citing to assisted-suicide prohibitions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

⁶² See *id.* at 711–12.

⁶³ See *id.* at 711 n.9 (citing the Council of Hereford in 673 and King Edgar's reaffirmation of the prohibitions in 967).

⁶⁴ See *id.* at 712–16.

decision. This pattern is true of cases both succeeding⁶⁵ and preceding⁶⁶ *Glucksberg*. In the area of Substantive Due Process, broader notions of civilizational or moral history appear with greater frequency than in other doctrinal contexts.

B. The Second Amendment

When interpreting the Second Amendment, the Court heavily relies on English common-law sources and American sources that demonstrate legal inheritance of English principles to determine whether modern arms regulations have a historical analogue in the Anglo-American legal tradition.⁶⁷ The Court, however, limits its examination of American sources to the founding period, finding that Civil-War-era sources “do not provide as much insight into [the Second Amendment’s] original meaning as earlier sources.”⁶⁸ While Anglo-American history and tradition remains the core focus of the Court’s inquiry, the Court will occasionally consider older sources, where those sources provide some background for English common-law practices.

In *United States v. Rahimi*, Chief Justice Roberts, writing for the majority, interpreted the Second Amendment in reference to a variety of English common-law sources, including judicial decisions, various Acts of Parliament, the *English Bill of Rights*, and Blackstone’s *Commentaries*.⁶⁹ The Chief Justice also traced the origin of surety laws, which required likely offenders

⁶⁵ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249–54 (2022) (defining the right to abortion by analyzing Norman law before the *Magna Carta*, English law from the thirteenth to the eighteenth century, and American law from the colonial period through the Court’s decision in *Roe v. Wade*); *Obergefell v. Hodges*, 576 U.S. 644, 656–57 (2015) (rooting the history and tradition of marriage “from the[] beginning to [the most recent page of] the annals of human history”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing precedent explaining the importance of parental rights throughout the history of civilization and American history as evidence that parents have a fundamental right concerning “the care, custody, and control of their children”); *City of Chicago v. Morales*, 527 U.S. 41, 102–06 (1999) (highlighting the history of anti-loitering ordinances from the time of the Norman conquest of England to the Court’s contemporary jurisprudence).

⁶⁶ See *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (arguing that anti-sodomy laws are not only a facet of Anglo-American history and tradition, but also of Western civilization from Roman times and biblical traditions); *supra* note 57 and accompanying text.

⁶⁷ See *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132–33 (2022).

⁶⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

⁶⁹ See 144 S. Ct. 1889, 1899 (2024).

to pledge to “keep the peace” under English common law,⁷⁰ to the far-older frankpledge system, which was instituted when England was under “Viking” rule during the reign of Canute I in the eleventh century.⁷¹ Chief Justice Roberts then continued to trace the import of surety laws into late eighteenth-century and early nineteenth-century state law, but ended his analysis there.⁷² Other Second Amendment cases demonstrate heavy reliance on Anglo-American common law, with the addition of older sources where relevant.⁷³ Unlike Substantive Due Process and the Religion Clauses, the Court is less reliant on non-Anglo-American history and tradition, except where there appears to be a more concrete continuation of those practices into Anglo-American law.

C. The Religion Clauses

When the First Amendment’s Religion Clauses are at issue, the Court relies centrally on American sources displaying broader religious practices during the colonial period through the present, as well as the Founders’ beliefs on the separation of church and state. In *Town of Greece v. Galloway*, for example, the Court looked to the tradition of legislative prayer throughout the Nation’s history to determine whether the Town of Greece violated the Establishment Clause.⁷⁴ In its inquiry, the Court examined the inception of federal legislative prayer, citing the first prayer delivered to the Continental Congress in 1774, the Founders’ beliefs on prayer, and modern legislative prayers illustrating a tradition that legislative prayer need not be nonsectarian.⁷⁵

Similarly, in evaluating the Free Exercise Clause, members of the Court have examined the historical evidence surrounding the creation of the Clause to further define its

⁷⁰ See *id.* at 1900.

⁷¹ See *supra* note 52 and accompanying text.

⁷² See *United States v. Rahimi*, 144 S. Ct. 1889, 1900–01 (2024).

⁷³ See *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2138–43 (2022) (looking to medieval English law regulating arms and its evolution in interpreting the scope of the Second Amendment, but rejecting historical examples that contradict the broader trend in Anglo-American law protecting the right to bear arms); *Heller*, 554 U.S. at 582–619 (interpreting the text and scope of the Second Amendment by tracing historical definitions of the Amendment’s language and historical arms regulations at English common law to their American inheritance at the time of the founding and onwards).

⁷⁴ See 572 U.S. 565, 575–77 (2014).

⁷⁵ See *id.* at 578–79, 582–84.

meaning. For example, in his concurring opinion in *Fulton v. City of Philadelphia*, Justice Alito examined early state constitutions and colonial charters manifesting the importance and meaning of religious liberty to the Founders and their colonial predecessors, as well as broader practices that inform the scope of the Free Exercise Clause.⁷⁶ The Court's other decisions interpreting the Religion Clauses similarly focus on broader historical religious practice, including early-American understandings of the Religion Clauses.⁷⁷ In this context, historical practice, rather than the legal pedigree of particular sources—as evident in Substantive Due Process and Second Amendment jurisprudence—often supplies the measure of constitutional meaning. These patterns set the stage for Part III, which examines the doctrinal consequences of this variation in source eligibility.

III

THE CONSEQUENCES OF UNSTRUCTURED SOURCE SELECTION

The Court's use of historical sources in assessing history and tradition across constitutional doctrines reflects a set of recurring patterns rather than a unified methodology. As the preceding Part demonstrates, the Court alternates among different categories of historical sources depending on the doctrine at issue, often not fully explaining why certain types of sources are treated as eligible in one context but not another. This Part examines the consequences of that unstructured approach. Rather than challenging the legitimacy of historical reasoning itself, it identifies how the absence of principled source-selection criteria affects doctrinal stability, coherence, and the transparency of constitutional adjudication.

⁷⁶ See 141 S. Ct. 1868, 1899–1907 (2021) (Alito, J., concurring).

⁷⁷ See *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2089–90 (2019) (looking to the history of the Bladensburg Cross and how it has been broadly interpreted to determine if the imposition of the Cross on a World War I memorial violated the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 612–16 (1992) (looking to the Founders' interpretations of the Establishment Clause to define its limits); *County of Allegheny v. ACLU*, 492 U.S. 573, 670–73 (1989) (Kennedy, J., concurring in part) (examining the writings of George Washington and Franklin Delano Roosevelt, the opening session statement of the Supreme Court itself, “God save the United States and this honorable Court,” and the Pledge of Allegiance's provision describing the United States as “one Nation under God” to inform the scope of the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 787–90 (1983) (examining the historical practice of legislative prayer in interpreting the Establishment Clause).

A. Temporal Inconsistency and Shifting Historical Baselines

To be sure, the Court has emphasized the importance of continuity in its historical analysis, acknowledging that “when it comes to interpreting the Constitution, not all history is created equal.”⁷⁸ Because Anglo-American common law has developed over time, the Court has determined that a “long unbroken line of common-law precedent” is often more probative of constitutional meaning than a “short-lived . . . practice.”⁷⁹ In this sense, the Court does articulate a general principle for evaluating historical evidence: enduring traditions are treated as more probative of constitutional meaning than transient deviations.

This continuity principle, however, depends on how historical practices are evaluated over time. As discussed in Part I.A, temporal framing influences which sources are treated as probative, but the Court has not articulated how continuity itself is to be assessed in practice. Its opinions do not specify how long a practice must persist to qualify as longstanding, what degree of uniformity is required for a tradition to be considered unbroken, or how courts should evaluate periods of legal change that interrupt or qualify earlier practices.

This indeterminacy has been especially visible in the Court’s recent history-and-tradition cases, including *Bruen* and *Dobbs v. Jackson Women’s Health Organization*. In *Bruen*, the Court reconciled evidence of “public carry for self-defense in the decades leading to the founding” with the Statute of Northampton, a fourteenth-century regulation restricting the public carry of arms.⁸⁰ Although the Court acknowledged the Statute’s existence, it ultimately discounted its significance, emphasizing its temporal remoteness from the founding and characterizing its enforcement as limited.⁸¹ Specifically, the Court narrowed the Statute’s scope by relying on later interpretive characterizations rather than its original breadth.⁸²

⁷⁸ *Bruen*, 142 S. Ct. 2111 at 2136.

⁷⁹ *See id.*

⁸⁰ *See id.* at 2142.

⁸¹ *See id.* at 2139 (writing that the Statute had “little bearing on the Second Amendment” due to its relative antiquity given that it was enacted “nearly 20 years before the Black death, more than 200 years before the birth of Shakespeare, more than 350 years before the Salem Witch Trials, [and] more than 450 years before the ratification of the Constitution”). This Statute is no more antiquated than other sources the Court has relied upon to support its decisions in Second Amendment Jurisprudence in other cases. *See supra* notes 51–52 and accompanying text.

⁸² *See* New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2142 (2022) (citing HAWKINS, 1 PLEAS OF THE CROWN 167 (1716) for the proposition

In dismissing the Statute, the Court reiterated its language from *District of Columbia v. Heller* that “by the time of the founding, the right to keep and bear arms was understood to be an individual right protecting against . . . violence.”⁸³

A similar methodological move appears in *Dobbs*. There, the Court confronted the existence of quickening laws, regulations that treated abortion as criminal only after the first felt movement of the fetus, which persisted from medieval English law through the mid-nineteenth century in the United States.⁸⁴ Although the Court acknowledged the historical prevalence of these laws, it discounted their significance on the grounds that they were neither uniformly structured nor consistently enforced, and that the distinction they embodied was later abandoned in light of changing understandings of fetal development.⁸⁵ The Court thus treated this nineteenth-century criminalization as evidence of an “unbroken tradition of prohibiting abortion,”⁸⁶ rather than viewing earlier legal distinctions as a meaningful interruption or evolution of that tradition. Thus, the Court rejected the existence of quickening laws as providing a right to abortion at any stage of pregnancy under the Fourteenth Amendment’s Due Process Clause.⁸⁷

These cases illustrate that continuity is doing more work than the Court’s opinions acknowledge. Read across these cases, the Court’s continuity analysis appears to encompass at least three analytically distinct considerations: temporal relevance, geographic breadth, and doctrinal acceptance. First, a practice may be deemed temporally relevant either because it existed near the founding, because it existed over a long period, or both. Second, it may be considered geographically broad if it appeared across multiple jurisdictions within the relevant legal tradition. And third, it may be regarded as doctrinally accepted depending on the extent to which it was enforced, contested, or treated as legally consequential by contemporaneous actors.

Yet the Court does not explain how these considerations are to be weighed against one another. In *Bruen*, the Court

that the Statute of Northampton only applied to weapons that were “apt to terrify the people”).

⁸³ See *id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)) (internal quotation marks omitted).

⁸⁴ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249–52 (2022).

⁸⁵ See *id.*

⁸⁶ See *id.* at 2253.

⁸⁷ See *id.* at 2284.

emphasized temporal proximity and doctrinal acceptance while giving little independent weight to the Statute of Northampton's historical pedigree.⁸⁸ In *Dobbs*, by contrast, the Court focused on perceived weaknesses in doctrinal acceptance while largely discounting the quickening laws' extensive temporal duration and geographic reach.⁸⁹ These cases suggest that continuity is not assessed through a stable set of criteria, but rather through an implicit and context-dependent weighing of multiple historical factors.

Because the Court does not specify how continuity is identified or weighed, the concept functions less as a constraint than as a justificatory label applied *post hoc*. This lack of specification complicates efforts by litigants and lower courts to anticipate which historical practices will be deemed longstanding or unbroken as evidence of historical continuity, and it undermines the predictability that the Court has claimed for its history-and-tradition approach.⁹⁰ Temporal instability thus serves as a gateway to broader doctrinal variation in the Court's use of historical sources, a pattern explored in sections that follow.

B. Doctrinally Contingent Source Selection

As Part II demonstrates, the Court's reliance on history and tradition does not operate uniformly across constitutional doctrine. Although the Court often invokes similar methodological language when engaging in historical inquiry,⁹¹ the categories of sources it treats as eligible vary depending on the right at issue. What is missing is any explanation for why those variations occur. This is not to suggest that these sourcing choices are necessarily incorrect, but rather that the Court has not articulated why they differ.

⁸⁸ See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136, 2139–42 (2022).

⁸⁹ See *Dobbs*, 142 S. Ct. at 2249–52, 2254, 2284.

⁹⁰ See Galligan, *supra* note 10.

⁹¹ See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are . . . deeply rooted in this Nation’s history and tradition.”); *Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting) (looking for “historical analogues” in Anglo-American common law to comport with historical understandings of the Second Amendment); *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (“[I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”).

For example, the Court's opinions do not explain why Substantive Due Process analysis permits reference to moral or civilizational traditions beyond the Anglo-American common law, while Second Amendment analysis largely confines the inquiry to inherited English legal principles and early American analogues. Nor has the Court explained why historical practice itself, rather than the pedigree or legal authority of particular sources, often supplies the measure of constitutional meaning in Religion Clauses cases. Instead, these sourcing distinctions are presented as doctrinal facts rather than methodological choices requiring justification and thus have become naturalized through repetition rather than defended as interpretive judgments.

One possible explanation for this variation is that different rights present different interpretive risks or institutional concerns. The Court may view some rights as especially vulnerable to judicial discretion, prompting a narrower historical inquiry, while treating others as grounded in social practice or moral tradition, warranting a broader historical lens. Alternatively, textual differences among constitutional provisions may influence the scope of historical sources deemed eligible. But the Court rarely makes such considerations explicit, and when it gestures toward them,⁹² it does so without articulating limiting principles capable of guiding future cases.

The absence of an articulated rationale for doctrinally contingent source selection has important methodological consequences. When the choice of historical sources is doctrinally contingent without clear explanation, history risks becoming responsive to doctrinal context rather than constraining the doctrine itself. Litigants and lower courts are therefore left to infer which historical materials will be treated as eligible in a given case. As a result, the Court's use of history may appear less as the application of a stable interpretive method and more as a tool tailored to justify the doctrine at hand.

This doctrinal contingency also exacerbates the indeterminacy identified in Part III.A. Even if continuity is treated as a guiding principle across doctrines, its application depends on which traditions are permitted to establish continuity in the first place. Without principled criteria explaining why historical traditions are relevant in some contexts but not others, the Court's history-and-tradition jurisprudence lacks a coherent account of source eligibility. That absence becomes especially

⁹² See *supra* Part III.A.

salient when different justices draw on overlapping historical materials yet reach divergent conclusions, a phenomenon examined in the next section.

C. Intra-Opinion and Inter-Opinion Conflict in Historical Reasoning

Historical disagreement in constitutional interpretation is inevitable.⁹³ But what is distinctive about the Court's recent history-and-tradition cases is that disagreement often turns on source eligibility and the weight the Court places on those sources, not interpretation of a shared historical record. Without agreed-upon criteria defining source eligibility and allocating weight to those sources, history becomes contestable at every step.

In several recent cases, the majority and dissent draw from overlapping historical sources, but reach opposite conclusions on whether those sources are eligible for informing a historical pattern. Returning to *Dobbs* and the Court's treatment of quickening laws, the majority and dissent each address the existence of these laws, yet, instead of dismissing their importance to this Nation's history and tradition, the dissenting Justice Breyer argued that the existence of these laws "provides some support for abortion rights."⁹⁴ Similarly, in *Obergefell v. Hodges*, while Justice Kennedy, writing for the majority, acknowledged that much of the history supporting the importance of marriage in the United States was based on an "understanding that marriage is a union between two persons of the opposite sex," he nevertheless accounted for evolutions in the understanding of marriage in the twentieth and twenty-first centuries to determine that same-sex marriage was protected by the Fourteenth Amendment.⁹⁵ In dissent, however, Chief Justice Roberts primarily relied on historical sources that condone only opposite-sex marriage, rejecting same-sex marriage developments on the grounds that an opposite-sex "understanding of marriage has prevailed in the United States throughout our history."⁹⁶

⁹³ See Michael H. v. Gerald D., 491 U.S. 110, 137–38 (1989) (Brennan, J., dissenting) ("Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant . . . the plurality has not found the objective boundary that it seeks.")

⁹⁴ See *Dobbs*, *supra* note 6, at 2324, 2324 nn.2–3 (2022) (Breyer, J., dissenting) (citing to Blackstone, Coke, and mid-nineteenth century American state law).

⁹⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 657–76 (2015).

⁹⁶ See *id.* at 686–713 (Roberts, C.J., dissenting).

The Court has also treated the same historical source differently across cases, even where many of the same Justices join both opinions. As articulated in Part II.A, the majority in *Bruen* discounted the Statute of Northampton from a broader Anglo-American tradition protecting an individual's right to publicly carry a weapon.⁹⁷ Just less than two years later, however, in *Rahimi*, the majority focused a portion of its historical analysis on affray laws, which trace their origin to the Statute of Northampton, to uphold the constitutionality of a federal arms restriction.⁹⁸ Interestingly, the two majorities shared five common Justices, though *Bruen*'s author, Justice Thomas, did not join the majority in *Rahimi* and instead dissented.⁹⁹ Despite the differential treatment, the Court in *Rahimi* does not explain why it treated the Statute of Northampton and its progeny differently than it did in *Bruen*. Rather, the Court only noted that its analysis of surety laws in *Bruen* did not control *Rahimi*.¹⁰⁰

Taken together, these examples illustrate that historical disagreement on the Court often reflects not competing interpretations of an agreed-upon historical record, but unresolved questions about which sources are eligible to define tradition and how conflicting evidence is to be weighed. When Justices disagree about whether particular practices count as representative, probative, or dispositive of constitutional meaning—without shared criteria for driving those disagreements—history ceases to function as a constraining methodology and instead becomes a site of methodological dispute. Because the Court has not articulated principles capable of resolving such disagreements, historical reasoning does not narrow the range of plausible outcomes so much as to support them retrospectively. This fragmentation, in turn, leaves lower courts without guidance on how to reconcile conflicting historical evidence and raises broader concerns about the coherence and transparency of the Court's history-and-tradition jurisprudence: concerns that extend beyond any single doctrine or case.

⁹⁷ See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2139–42 (2022).

⁹⁸ See *United States v. Rahimi*, 144 S. Ct. 1889, 1900–03 (2024).

⁹⁹ Compare *Bruen*, 142 S. Ct. 2111 (Thomas, J., joined by Roberts, C.J., and Alito, Gorsuch, Kavanaugh, and Barrett, JJ., majority opinion) with *Rahimi*, 144 S. Ct. 1889 (Roberts, C.J., joined by Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson, JJ., majority opinion).

¹⁰⁰ See *Rahimi*, 144 S. Ct. at 1901–02.

D. Doctrinal Coherence and Institutional Legitimacy

The problems identified with the current state of the Court's history-and-tradition jurisprudence are not isolated analytical defects but are entrenched throughout historical inquiry on the Court. Nor is historical reasoning a small part of constitutional adjudication; rather, it plays a central role, featuring not only in Substantive Due Process, Second Amendment, and Religion Clauses cases, but also in Free Speech, Confrontation Clause, and Eighth Amendment jurisprudence.¹⁰¹ When methodology plays such a foundational role, its internal coherence and transparency becomes matters of institutional importance rather than mere academic concern.

First, unstructured historical source selection undermines doctrinal coherence across cases. As Parts III.A and III.B demonstrate, the Court's history-and-tradition analysis lacks stable criteria for determining temporal baselines, source eligibility, and evidentiary weight. As a result, similarly-situated claims may be resolved differently depending not on doctrinal principle, but on which historical universe the Court treats as relevant. Over time, this variability risks producing a body of constitutional law in which outcomes are difficult to reconcile across cases, even when the Court purports to apply the same interpretive framework.

These coherence problems are especially salient for lower courts and litigants. Lower courts tasked with applying the Court's history-and-tradition framework must decide, often in the first instance, which historical sources to consult, how old those sources may be, and how to evaluate competing evidence. In the absence of guidance from the Court, historical analysis becomes speculative and uneven, with courts left to infer methodology from outcomes rather than articulated standards. This issue is only exacerbated by the fact that lower courts are often overburdened with cases and undersupplied with the resources to resolve them efficiently.¹⁰² Litigants,

¹⁰¹ See *Bruen*, 142 S. Ct. at 2130 (discussing historical inquiry in Free Speech and Confrontation Clause jurisprudence); *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2215–16 (2024) (citing *Blackstone* to determine the meaning of the Cruel and Unusual Punishment Clause).

¹⁰² See ADMIN. OFF. OF THE U.S. COURTS, 2025 YEAR END REPORT ON THE FEDERAL JUDICIARY 10 (2025), <https://www.supremecourt.gov/publicinfo/year-end/2025-year-endreport.pdf> [<https://perma.cc/S74Q-TM2M>] (reporting a four percent increase of docketed civil cases to 303,563 and a thirteen percent increase in criminal defendant filings to 79,029 over the 2025 fiscal year); Michalak, *supra* note 4, at 501.

in turn, face uncertainty about how to frame constitutional claims grounded in history, unsure whether evidence will be discounted as too remote, insufficiently representative, or doctrinally irrelevant.

The lack of methodological clarity also bears implications for the Court's institutional legitimacy, understood here in a limited and jurisprudential sense. The concern here is not public approval or political backlash, but whether the court's stated methodology performs the constraining function it claims for itself. When the Court invokes history as a constraint on judicial discretion, its reasoning invites evaluation on the Court's own terms: whether history has in fact performed the constraining function the Court claims for it. Yet when the selection and weighting of historical sources remains unexplained, it becomes difficult to distinguish between historical interpretation and historical justification on the Court's own terms, leading to sustained criticism.¹⁰³ This opacity risks obscuring the grounds of decision and complicating efforts by courts, scholars, and the public to assess the coherence of the Court's reasoning.

Importantly, these concerns do not arise because history is inherently indeterminate, nor because the Court's turn to history is illegitimate. Rather, they stem from the absence of a principled account of how historical sources are selected and evaluated across doctrinal contexts. Without such an account, history's constraining potential is diminished, and its use risks appearing contingent on doctrinal or case-specific considerations rather than governed by stable methodological commitments.¹⁰⁴

These consequences suggest the need for greater methodological structure in the Court's history-and-tradition jurisprudence. Clarifying how temporal baselines are chosen, which sources are eligible to define constitutional tradition, and how conflicting historical evidence is to be evaluated would not require abandoning historical reasoning. Rather, such clarification would preserve the Court's reliance on history while promoting doctrinal coherence, predictability, and transparency. The next Part outlines modest doctrinal reforms designed to achieve these ends.

¹⁰³ See *Michael H. v. Gerald D.*, 491 U.S. 110, 137–38 (1989).

¹⁰⁴ In other words, some have accused the court of “cherry-picking” historical evidence. See Michalak, *supra* note 4, at 502.

IV

TOWARD A PRINCIPLED FRAMEWORK FOR HISTORICAL SOURCE ELIGIBILITY

The preceding parts identify a recurring problem in the Supreme Court's history-and-tradition jurisprudence: the absence of articulated principles governing which sources are eligible to define constitutional meaning and how those sources are evaluated. This Part does not argue that the Court should abandon historical reasoning, nor does it propose rigid rules that would constrain the Court's interpretive discretion. Instead, it outlines a modest framework designed to systematize the Court's use of history by emphasizing source hierarchy and temporal baselines through principled explanation. Properly understood, these reforms would preserve history's constraining potential while improving doctrinal coherence, predictability, and transparency.

A. Source Hierarchy and Justification

First, the Court should articulate a presumptive hierarchy of historical sources, accompanied by an explanation when it departs from that hierarchy. Such a hierarchy would clarify which sources are ordinarily treated as eligible to define constitutional meaning and which are offered only as contextual support. At a minimum, the Court could distinguish among the three aforementioned categories of sources.

The American source category presumptively occupies the highest tier as dispositive to constitutional meaning, reflecting the sources' direct connection to the Constitution's adoption, amendments, and early interpretation. Where there are post-ratification developments in the law, the Court could treat those developments as contextual, unless the doctrine already considers those developments under current jurisprudence.¹⁰⁵ English common-law sources that meaningfully informed the American legal tradition could occupy a secondary tier, eligible to define constitutional meaning where continuity can be plausibly demonstrated. This secondary preference comports with the Court's own recognition of the importance of English common law to the American legal tradition. At the base of this

¹⁰⁵ The Religion Clauses are an example of this. See Part II.0. Post-ratification developments might be less persuasive in Second Amendment contexts, given the Court's prior explanation that such developments are less helpful in illuminating the Amendment's scope. See *District of Columbia v. Heller*, 554 U.S. 570, at 614 (2008) (finding that Civil-War-era sources "do not provide as much insight into [the Second Amendment's] original meaning as earlier sources").

hierarchy, non-Anglo-American sources should be treated as contextual rather than dispositive. These sources should be offered to illuminate background principles rather than to define constitutional meaning on their own given their more remote relationship to American law. Under this proposed framework, non-Anglo-American sources should not define constitutional meaning absent demonstrable continuity into Anglo-American practice by the founding.

Importantly, articulating a hierarchy would not prohibit reliance on lower-tier sources, but would simply require the Court to explain why such sources are relevant in a given case, how they interact with higher-tier evidence, and why they are treated as probative despite their position in the doctrinal hierarchy. This explanatory requirement would address the doctrinal contingency identified in Part III.B and mitigate the intra-opinion and inter-opinion conflicts described in Part III.C by making explicit the criteria through which historical sources are selected, discounted, or reconciled.

B. Temporal Baselines and Historical Continuity

Second, the Court should expressly identify the temporal baseline governing its historical inquiry and explain how continuity is assessed relative to that baseline. A principled approach would require the Court to specify whether it is anchoring its inquiry to the founding era, to a longer period of Anglo-American legal development, or to some other historically relevant moment. The Court should also explain how it evaluates intervening legal change, i.e., whether such change is treated as evidence of doctrinal evolution, temporary deviation, or confirmation of an earlier tradition.

In addition, the Court should disaggregate continuity into its constituent considerations. Where continuity is invoked, the Court should clarify whether it rests on a practice's temporal relevance, its geographic breadth, its doctrinal acceptance, or some combination thereof. Making these considerations explicit would not eliminate disagreement but would channel the Court's jurisprudence toward identifiable methodological criteria rather than implicit intuition.

By requiring reasoned explanation of temporal baselines and continuity assessments, the Court would reduce the temporal instability identified in Part III.A and improve predictability for lower courts tasked with applying the history-and-tradition framework. Such explanation would also clarify why certain historical practices are treated as dispositive while others are

deemed as too attenuated or obsolete, directly addressing the legitimacy concerns identified in Part III.D.

CONCLUSION

The Supreme Court's modern reliance on history and tradition reflects a sincere effort to constrain judicial discretion and to anchor constitutional interpretation in sources external to contemporary values. Yet history can only serve that constraining function if courts are clear about which histories count and how competing historical evidence is evaluated. As this Note has shown, the Court's current history-and-tradition jurisprudence lacks a principled account of source eligibility. Across doctrinal contexts, the Court alternates among American, English, and non-Anglo-American sources without consistently explaining the methodological judgments that precede interpretation itself.

This variability has concrete consequences. Shifting temporal baselines, doctrinally contingent sourcing, and unresolved disagreements over source eligibility undermine coherence across cases and complicate the task of lower courts charged with applying the Court's framework. More fundamentally, however, the absence of articulated criteria risks blurring the line between historical constraint and historical justification, weakening the explanatory force of history at precisely the moment the Court invokes it most prominently.

The reforms proposed in this Note are intentionally modest. They do not require abandoning history, privileging any particular theory of interpretation, or imposing rigid rules on constitutional adjudication. Instead, they aim to clarify the threshold methodological judgments that already shape the Court's use of history: which sources are presumptively eligible, how temporal baselines and historical continuity are assessed, and how those sourcing choices should be explained. By making these judgments explicit, the Court could preserve history's constraining potential while improving predictability, transparency, and doctrinal coherence.

History will remain contested in constitutional adjudication. Disagreement over the past is neither avoidable nor undesirable. But disagreement is most productive when it occurs within a shared methodological framework. Clarifying which historical evidence is eligible for constitutional adjudication and why would not resolve constitutional controversy. It would, however, ensure that when the Court invokes history to justify constitutional meaning, it does so according to principles that

are intelligible, consistent, and capable of guiding future cases. Because history is inherently malleable, its constraining force in constitutional adjudication depends on principled judgments about whose history is treated as eligible and which traditions are permitted to define constitutional meaning. Without those judgments, history cannot meaningfully constrain constitutional adjudication. It can only legitimize it.