HISTORICAL FACT

*Ryan C. Williams**

The growing emphasis on history as a criterion of constitutional decision-making in Supreme Court jurisprudence has raised the importance of a distinctive type of judicial fact-finding—namely, the investigation and resolution of contested questions of historical fact. Although history has always played an important role in constitutional adjudication, its primary role has traditionally been as an input to constitutional interpretation. But in cases like New York State Rifle & Pistol Ass'n v. Bruen, *the Court has increasingly demanded that factual determinations regarding the content, meaning, purposes, and effects of decisions taken in the distant past should also guide the lower courts' application of the interpretively determined constitutional meaning to contemporary legal disputes.*

The growing importance of historical-fact determinations in constitutional litigation raises significant questions about the appropriate mechanisms for historical fact-finding and the allocation of institutional authority and responsibility among the different layers of the federal judiciary. Bruen *provides a useful case study in the complexities that are likely to attend this project. The* Bruen *Court's guidance to lower courts emphasized techniques conventionally associated with adjudicative fact-finding, such as party presentation of evidence and allocations of burdens of proof as mechanisms to resolve epistemic uncertainty about the relevant historical facts. But the Court also signaled that the historical facts thus found might carry broad precedential effects that will bind nonparties and considered extrarecord evidence, including third-party amicus briefing and the Court's own independent research, in discerning the facts it deemed relevant to the case before it.* Bruen *thus somewhat awkwardly straddles the line between assessing claims about history through conventional adjudicative fact-finding and the techniques more commonly associated with the finding of so-called "legislative" or "nonadjudicative" facts.*

This Article argues that this unresolved tension in Bruen *presents a challenge with which courts are likely to struggle in translating historical facts into legally operative facts and legal conclusions. An approach that emphasizes party control and adjudicative fact-finding is likely to produce significant redundancy, inefficiency, and inconsistency in application. But an approach that treats historical fact-finding as a pure question of nonadjudicative fact carries its own drawbacks, including enhancing the risk that binding precedential rules will be formulated on incomplete and potentially*

* Associate Professor, Boston College Law School.

inaccurate understandings of the historical record. This Article examines this tension and suggests possible ways forward for lower courts tasked with implementing doctrines that hinge on historical fact-finding.

INTRODUCTION

Few dichotomies in American law are as influential or enduring as the posited distinction between "law" and "fact." Though often "elusive"[1] and frequently criticized,[2] the law/fact distinction plays a critical role in structuring the litigation process. Among other things, categorizing an issue as one of "fact" rather than "law" (or vice versa) may affect the allocation of decision-making authority between judge and jury, the scope of appellate review, the applicability of particular evidentiary rules, and the preclusive and/or precedential effect of particular adjudicative determinations.[3]

In the constitutional realm, a further wrinkle in the law/fact distinction is provided by the widespread supposition that certain claims about the world are not properly assessed through the legal system's accepted mechanisms for determining ordinary questions of fact. There is broad agreement that, even in constitutional litigation, most factual assertions regarding the specifics of a case should be tested and determined using traditional methods of factual proof, such as adversarial evidentiary development by the parties, reliance on proof and production burdens to resolve uncertainty, and reposing ultimate decisional authority in the legally designated finder of fact (subject to very limited and highly deferential appellate review).[4]

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1 Miller v. Fenton, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."); *see also, e.g.*, Thompson v. Keohane, 516 U.S. 99, 111 (1995) (characterizing the distinction as "slippery"); Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) ("The importance of the law-fact distinction is surpassed only by its mysteriousness.").

2 *See, e.g.*, Allen & Pardo, *supra* note 1, at 1770 (contending that there is no "qualitative or ontological distinction between" law and fact and that "the quest to find 'the' essential difference between the two that can control subsequent classifications of questions as legal or factual is [thus] doomed from the start"); Neal Devins, Essay, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172–77 (2001); *cf.* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 & n.24 (1985) (observing that the attitude that "the asserted distinction [between law and fact] is fundamentally incoherent," *id.* at 233, has "always had prominent adherents," *id.* at 233 n.24).

3 *See* Allen & Pardo, *supra* note 1, at 1769 ("Significant consequences attach to whether an issue is labeled 'legal' or 'factual'—whether a judge or jury will decide the issue; if, and under what standard, there will be appellate review; whether the issue is subject to evidence and discovery rules; whether procedural devices such as burdens of proof apply; and whether the decision has precedential value."); *cf.* Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 586–93 (2017) (noting significance of the law/fact classification to issues of preclusion and precedent).

4 *See, e.g.*, Brent Ferguson, *Predictive Facts*, 95 WASH. L. REV. 1621, 1625 (2020) (observing that "[w]ell-known evidentiary rules govern how trial courts should find such [case-specific] facts and how appellate courts should review those findings").

For decades, however, courts and legal commentators have sought to distinguish such case-specific "adjudicative facts" from so-called "legislative" or "nonadjudicative" facts, which "do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion."[5] Although "no Federal Rule of Evidence directly addresses whether disputable [nonadjudicative] facts, like disputable case-specific facts, must be tested at trial,"[6] Federal Rule of Evidence 201, which governs judicial notice, obliquely recognizes a distinction between the two types of fact-finding by specifying that the rule "governs judicial notice of an adjudicative fact only, not a legislative fact."[7] The advisory committee's note accompanying that rule explains that "[t]he omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts" and opines that "any limitation in the form of indisputability . . . and any requirement of formal findings at any level" would be "inappropriate" for questions of legislative fact.[8]

Rule 201 reflects the predominant understanding among courts and commentators that adjudicative and nonadjudicative facts call for distinctive approaches to judicial fact-finding. For example, while the determination of adjudicative facts is generally held to be the unique

5 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3, at 413 (2d ed. 1979). The phrases "legislative fact" and "adjudicative fact" were originally coined by Kenneth Culp Davis in the 1940s and have proven highly influential in subsequent discussions of the topic. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942); *see also, e.g.*, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1192 (2013) (describing Davis's formulation of the distinction as "[p]erhaps the most recognized classification"). But despite its ubiquity, Davis's phrase "legislative fact" is unfortunate, both because the same term is sometimes used to refer to fact-finding by legislative bodies, *see id.* at 1193, and because it signals a controversial conception of courts as lawmaking institutions who exercise authority similar to legislatures. *See, e.g.*, Timothy B. Dyk, Essay, *The Role of Non-Adjudicative Facts in Judicial Decisionmaking*, 76 STAN. L. REV. ONLINE 10, 12 (2023) (describing the phrase "legislative facts" in the judicial context as a "misnomer" because "courts do not legislate, despite the role public policy may play in the development of legal doctrines"); *cf.* Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955, 976–79 (2024) (noting lack of consensus definition as to what constitutes a "legislative fact"). Recognizing this deficiency, some scholars have used other labels to describe the same or similar kinds of factual determinations. *See, e.g.*, Borgmann, *supra*, at 1193 (using the label "social facts"); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8 n.21 (1988) (using the label "premise facts"). At the risk of proliferating terminology unnecessarily, this Article, except where quoting other sources, will use the phrase "nonadjudicative facts," as the most accurate and neutral way to describe the types of facts Professor Davis and others have labeled "legislative facts." Dyk, *supra*, at 12 (endorsing this label).

6 Borgmann, *supra* note 5, at 1205.

7 FED. R. EVID. 201(a).

8 *Id.* advisory committee's note to 1972 proposed rules.

province of the jury (or the trial judge in nonjury cases), the general view is that appellate courts are free to reach their own independent determinations regarding nonadjudicative facts with no particular deference given to the initial finder of fact.[9] Likewise, while determinations of adjudicative fact are largely taken as limited by the evidentiary record established by the parties, courts (including appellate courts) generally view themselves as free to look beyond the trial record in establishing nonadjudicative facts, considering such matters as third-party amicus submissions, independent research by appellate judges or their clerks, and the judges' own personal intuitions and "common sense."[10] And though judicial findings of adjudicative fact are generally taken to bind only the parties to the particular case through ordinary principles of preclusion, determinations of nonadjudicative fact can have broad precedential effect that will, for all intents and purposes, bind future litigants who had no meaningful opportunity to participate in the initial proceeding.[11]

Recent trends in the Supreme Court's jurisprudence, particularly the Court's increasing emphasis on history as a guide to constitutional decision-making, have enhanced the salience of a potentially distinctive type of factual inquiry—namely, inquiries into historical fact. Though arguments about history are hardly new to constitutional law, such arguments have usually been made to support claims about the proper interpretation of particular constitutional language. In recent decisions, however, the Court has increasingly required lower courts to look to factual inquiries regarding history to guide the *application* of interpretively determined meaning as well.

As Part I of this Article will show, the Court's increasing emphasis on history as a guide for the application of constitutional rules marks a notable departure from the more conventional role of history in constitutional cases as a guide to interpretation. Part II examines the Court's recent Second Amendment decision in *New York State Rifle & Pistol Ass'n v. Bruen*,[12] as an illustration of the Court's newfound

9 *See, e.g.*, Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016) ("The consensus among appellate courts is that legislative facts are reviewed de novo.").

10 *See, e.g.*, Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1277–90 (2012) (discussing various ways in which the Supreme Court identifies and draws upon facts beyond those developed through the evidentiary record at trial).

11 *See, e.g.*, Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 73–74 (2013) (noting tendency of lower courts to "rel[y] on the Supreme Court's assertion of legislative fact . . . as authority to prove that the observation is indeed true," *id.* at 73); *cf.* Trammell, *supra* note 3, at 588–91 (observing increasing tendency of courts to accord binding precedential effect "not just to broad legal matters but also to mixed questions and intensely factual issues," *id.* at 588).

12 142 S. Ct. 2111 (2022).

emphasis on historical-fact inquiries as a guide to applying the interpretively determined meaning of constitutional language and the challenges that this new approach presents for lower courts. The *Bruen* Court sought to address concerns about the institutional capacity of lower courts to engage in the type of detailed historical inquiries its decision seemed to prescribe by emphasizing the ability of such courts to rely upon party presentation and evidentiary principles to lessen the burdens of historical inquiry. But the Justices in *Bruen* did not confine themselves to the evidentiary record developed by the parties before the trial court in that case. Instead, they engaged in a wide-ranging discussion of hundreds of years of English and American history, drawing copiously on historical sources identified through third-party amicus briefing or through the Justices' own, independent historical research.

Part III turns to a discussion of the lower courts' efforts to apply the *Bruen* Court's guidance to the problem of historical fact-finding. As Part III shows, lower courts have divided over such basic questions as the proper allocation of authority between the district courts and the courts of appeals with respect to the finding of historical facts and the nature and quantum of evidence that should be required to satisfy the applicable burdens of persuasion.

Part IV takes a closer look at the *Bruen* Court's suggestion that reliance on party presentation and well-accepted evidentiary principles can minimize the burdens of historical inquiry for lower courts. This Part takes a skeptical view of the Court's suggestion, noting that exclusive reliance on party presentation would likely lead to undesirable consequences, including massive duplication of effort, inconsistent adjudications, unpredictability, and potentially inaccurate determinations of law. The *Bruen* Court's emphasis on party presentation and adversarial evidentiary development seems centered in a paradigm of adjudicative fact-finding that seems inappropriate to the types of nonadjudicative fact inquiries at the core of the history-and-tradition test. And, contra *Bruen*, our legal system does not possess well-established and universally agreed-upon methods for establishing nonadjudicative facts.

Part V considers a possible path forward for lower courts confronting the challenges of historical fact-finding under *Bruen* and similar historically centered doctrinal frameworks.

I. HISTORICAL FACT: INTERPRETATION AND BEYOND

In order to understand the increasing importance of historical-fact inquiries in modern constitutional jurisprudence, it is important to begin by acknowledging the ways in which history has always mattered to constitutional adjudication. The use of history to inform

judicial interpretation is, of course, nothing new in our constitutional tradition. From the earliest period of the federal judiciary's existence judges have looked to preenactment history as a guide to understanding constitutional language. For example, in *Calder v. Bull*,[13] one of the Supreme Court's earliest significant constitutional decisions, the Justices looked to the English common-law treatise of Sir William Blackstone—published around two decades before the Constitution's enactment—to interpret the Ex Post Facto Clause of Article I, Section 10.[14] Various Justices also looked to other preenactment and enactment-era sources, including *The Federalist* essays prepared in connection with the New York ratification debates,[15] similarly worded provisions in state constitutions,[16] and the historical abuses of European governments, which were thought to have motivated the Framers' decision to include the provision,[17] as support for their conclusion that the clause prohibited only retrospective criminal punishments, not civil retrospectivity.

The Marshall Court likewise looked to *The Federalist* essays and other evidence of enactment-era understandings as a guide to determining the meaning of disputed constitutional provisions.[18] And though the early courts did not typically cite or discuss evidence regarding the secret deliberations of the Philadelphia Convention (for the simple reason that such materials were unavailable), the Supreme Court and other courts began routinely relying on those records soon after their publication in the mid-nineteenth century.[19] Reliance on

13 3 U.S. (3 Dall.) 386 (1798).

14 *Id.* at 391 (opinion of Chase, J.); *id.* at 396 (opinion of Paterson, J.).

15 *See id.* at 391 (opinion of Chase, J.) (noting consistency between Blackstone's understanding of "ex post facto" and the understanding endorsed by "the author of *the Federalist*, who I esteem superior to [Blackstone], for his extensive and accurate knowledge of the true principles of Government" (emphasis omitted)).

16 *See id.* at 396–97 (opinion of Paterson, J.) (citing provisions of the Massachusetts, Delaware, Maryland, and North Carolina constitutions).

17 *See id.* at 399–400 (opinion of Iredell, J.) ("The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations." *Id.* at 399 (emphasis omitted).).

18 *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821) (describing *The Federalist* as "a complete commentary on our constitution" that "is appealed to by all parties in the questions to which that instrument has given birth"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816) (referring to the "historical fact" of the common exposition of Article III "uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state [ratifying] conventions").

19 Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1728 (2012); *see also, e.g.*, Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1855) (citing the published version of Madison's notes on the Philadelphia Convention debates).

such enactment-era sources as a guide to interpretation does not seem to have diminished over time. To the contrary, available studies suggest that the Supreme Court's reliance on sources traditionally associated with "originalist" modes of interpretation increased steadily over the course of the twentieth and early twenty-first centuries.[20]

The courts have also long looked to postenactment history and practices as a guide to discerning constitutional meaning. Such evidence is sometimes looked to for the same reason as enactment-era and preenactment sources—namely, to discern the most likely meaning attributed to a disputed provision by the Framers and members of the ratifying public. For example, in *McCulloch v. Maryland*,[21] Chief Justice Marshall gave weight to the fact that the "first Congress elected under the present constitution" had enacted a bill incorporating the Bank of the United States as an influential factor supporting the Bank's constitutionality.[22] And in *Myers v. United States*,[23] the Court famously relied upon the legislative deliberations during the First Congress regarding the removability of executive branch officials as an authoritative declaration that the power resided with the President, rather than with Congress.[24]

Members of the Court have also sometimes looked to postenactment history for reasons unrelated to original understandings or meaning—for example, as a guide for discerning whether adopting a particular interpretation would disrupt reasonable reliance interests[25] or as a source of authoritative exposition of constitutional meaning emanating from the political departments.[26]

What unites these various long-accepted uses of history by the courts in constitutional cases is that they all relate, in one way or another, to the enterprise of constitutional interpretation, which, as used

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20 *See, e.g.*, Kevin Tobia, Neel U. Sukhatme & Victoria Nourse, *Originalism as the New Legal Standard? A Data-Driven Perspective* 37–45 (Geo. Univ. L. Ctr., Research Paper No. 2023/15, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4551776 [https://perma.cc/4255-CWFD]; Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 38–44 (2012).

21 17 U.S. (4 Wheat.) 316 (1819).

22 *Id.* at 401, 401–02.

23 272 U.S. 52 (1926).

24 *Id.* at 111–36.

25 *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 401 ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.").

26 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President . . . .").

in this Article, refers to the process of discerning and articulating the legally significant rules that flow from the Constitution's various textual commands.[27] The connection between interpretation and the uses to which constitutional history has most often been put by the Supreme Court and other federal courts has largely avoided the need to engage the law/fact distinction in any meaningful way. Although many interpretive questions might plausibly be viewed as calling for resolution of disputed facts—thus raising familiar evidentiary questions of relevance, weight, and admissibility[28]—our legal culture has almost uniformly assimilated questions of interpretation to the category of legal questions rather than factual questions. Outside of very limited enclaves (such as questions requiring interpretation of non-U.S. law),[29] interpretive questions are almost always regarded as purely legal questions requiring no need for special deference to the legal system's designated finder of fact or adherence to formal evidentiary procedures. And courts have largely resisted parties' efforts to "factualize" the interpretive process by framing interpretive questions as questions of fact susceptible to ordinary standards of adversarial evidentiary proof.[30]

The close connection between history and interpretation in federal judicial practice has tended to limit the burdens of historical inquiry for the federal judiciary as a whole and for lower courts in particular. Although the burdens of historical interpretive inquiry are far from insignificant,[31] confining judicial attention to the interpretively

27 *See, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997) (distinguishing "[t]heories of interpretation," which "concern the meaning of the Constitution," from "[t]heories of adjudication," which "concern the manner in which decisionmakers (paradigmatically public officials, such as judges) resolve disputes"). This sense of "interpretation" is distinct from the technical sense in which that term is used by some originalist scholars. *Cf.* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (distinguishing between "interpretation" as "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of [a] legal text" and "construction," understood as "the process that gives a text legal effect").

28 *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 874 (1992) (contending that answering a question of legal interpretation involves the same considerations of admissibility, relevance, and weight as are used to structure consideration of evidence in inquiries regarding disputed facts).

29 *See id.* at 898 ("The traditional common-law rule in this country has been to treat questions of foreign law as, for the most part, questions of fact which must be pleaded and proved in accordance with the ordinary rules of evidence.").

30 *See, e.g.*, United States v. F.E.B. Corp., 52 F.4th 916, 932 (11th Cir. 2022) (affirming the district court's refusal to admit expert linguistic testimony bearing on the meaning of disputed statutory terms "because statutory interpretation is a legal question for a judge, not a factual question for the trier of fact").

31 *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (observing that, if "done perfectly," resolving a constitutional question on originalist

determined meaning of particular constitutional words, phrases, and clauses at least limits the universe of questions for which historical meaning might potentially be relevant. The constitutional text, including all Article V amendments, comprises fewer than 8,000 words.[32] And many of its most significant provisions are sufficiently precise or uncontroversial to render them infrequent subjects of constitutional litigation.[33]

The primarily interpretive use of history in constitutional decision-making has also facilitated a somewhat informal division of responsibility between the Supreme Court and the inferior federal courts that has further limited the burdens of historical inquiry for lower-court judges. As a formal matter, lower-court judges have the same interpretive responsibilities, and are able to engage in most of the same modes of constitutional decision-making as do Supreme Court Justices.[34] But as many observers have noted, in practice, the modes of constitutional decision-making among the lower courts typically look much different than do resolutions of similar questions in the Supreme Court. Whereas the Supreme Court's Justices typically consider the full range of interpretive modalities that might possibly bear on an interpretive question (including arguments from text, history, structure, precedent, and ethical commitments),[35] lower courts tend to focus much more centrally on prior Supreme Court precedent as the ultimate touchstone of constitutional meaning.[36]

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grounds might require "thirty years" of historical investigation "and 7,000 pages" of explanation).

32 *See* Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 276 (2022) (noting that the original Constitution and amendments comprise a total of only 7,591 words).

33 *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400–02 (1985) (observing that many constitutional clauses are rarely or never litigated).

34 The principal distinction between the two being that the Supreme Court has claimed for itself exclusive authority to reconsider and overrule its own prior precedents. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

35 *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (providing a well-known typology of six recognized "modalities" of constitutional argument).

36 *See, e.g.*, Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 888 (2014) ("Lower-court decisionmaking in constitutional cases is . . . especially doctrinal in character, focusing largely on parsing the holdings (and dicta) of prior Supreme Court cases."); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849 (1993) (observing that, in the lower courts, "constitutional discourse . . . consist[s] almost entirely of the analysis of (usually recent) cases of the United States Supreme Court that ostensibly serve as dispositive 'precedents' to resolve issues under discussion.").

And, as I have argued at some length in prior work, there are practical reasons why this informal division of interpretive responsibility might make some sense.[37] The Supreme Court, which "enjoys virtually plenary control over its own docket," chooses to hear and resolve only an infinitesimal fraction of the cases considered by the lower federal courts each year and is thus able to devote substantially greater decisional resources to the consideration and resolution of each case.[38] The Supreme Court may also have certain informational advantages not available to lower courts, such as access to more extensive third-party amicus briefing and the ability to put off resolution of a question to see how arguments surrounding interpretive questions have played out in the lower courts.[39]

In view of its comparative informational advantages, it is perhaps unsurprising to see the Supreme Court take the leading role in articulating authoritative interpretations of constitutional text and elaborating constitutional doctrines and decision rules to guide lower courts' implementation of the interpretively determined constitutional meaning.[40] Lower courts, by contrast, were largely free to follow the interpretive guidance provided by the Supreme Court, specializing in the interpretation and elaboration of Supreme Court doctrine and the application of controlling caselaw to the facts of particular cases. Outside of limited contexts (such as cases of true constitutional first impression),[41] lower-court judges generally had little occasion or opportunity to engage in detailed historical inquiry as part of their official decision-making responsibilities.[42]

Recent years, however, have seen a shift by the Supreme Court away from viewing history as purely an input into the interpretive process toward viewing history as more of an all-purpose framework that should govern *both* the interpretive process as well as the *application* of the interpretively determined meaning to the facts of particular cases. For example, in *New York State Rifle & Pistol Ass'n v. Bruen*,[43] the

37 *See* Williams, *supra* note 32, at 269–74.

38 *Id.* at 272.

39 *Id.*

40 *See, e.g.*, Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475, 483–87 (2016) (discussing how changes in the Supreme Court's jurisdiction limiting the number of cases it was required to hear spurred a need "to craft doctrines that would cabin the discretion of the lower courts," including the development of tiered scrutiny analysis, *id.* at 484).

41 *See* Williams, *supra* note 32, at 275–80 (discussing role of historical inquiry by lower courts in cases of true constitutional first impression).

42 *But cf. id.* at 284–89 (noting that lower courts often have the option of looking to evidence of original meaning in cases where a particular question has not been fully answered or addressed by controlling Supreme Court precedent).

43 142 S. Ct. 2111 (2022).

Supreme Court instructed that any governmental regulation of firearms falling within the scope of the right "to keep and bear Arms"[44] protected by the Second Amendment must be supported by historical proof "that the regulation is consistent with this Nation's historical tradition of firearm regulation."[45] Similarly, in *Dobbs v. Jackson Women's Health Organization*,[46] the Court instructed that the determination of whether an asserted liberty interest falls within the scope of the Fourteenth Amendment's Due Process Clause must be determined by "ask[ing] whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[47] A similar approach has also emerged in First Amendment doctrine, in both free-speech cases and in challenges under the Religion Clauses.[48]

Such historically oriented doctrinal frameworks are not an entirely novel phenomenon. For example, the Court has long looked to the practices of English common-law courts in 1791 as a guide for determining which cases fall within the scope of the Seventh Amendment's protection of the right to a jury trial in civil cases.[49] But such explicitly historically oriented doctrinal frameworks have, until comparatively recently, been very much the exception rather than the rule.[50] And even where the Court has instructed lower courts to use history as a guide for discerning the contours of a particular constitutionally protected right, it has sometimes, as in the Seventh Amendment context, articulated the standard in a manner that is sufficiently

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44 U.S. CONST. amend. II.

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

46 142 S. Ct. 2228 (2022).

47 *Id.* at 2246 (second alteration in original) (quoting Timbs v. Indiana, 139 S. Ct. 682, 689 (2019)).

48 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (rejecting the Court's earlier "endorsement" test for identifying Establishment Clause violations and instructing "that the Establishment Clause must" instead "be interpreted by 'reference to historical practices and understandings'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))); United States v. Stevens, 559 U.S. 460, 471–72 (2010) (suggesting that all content-based regulations of speech are presumptively invalid under the First Amendment unless they fall within either a "long-established category of unprotected speech," *id.* at 471, recognized by prior Supreme Court doctrine or "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law," *id.* at 472).

49 *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) ("Since Justice Story's day, we have understood that '[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.'" (alteration in original) (citation omitted) (quoting Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935))).

50 *See* Williams, *supra* note 32, at 281 (providing additional examples).

flexible to minimize the burdens of historical research for lower courts.[51]

The Court's recent cases, however, seem to suggest a much more significant role for history as a guide to law application across a much broader swath of constitutional doctrine. The increasing emphasis on history as a criterion of constitutionality in Supreme Court jurisprudence is almost certain to enhance the significance of historical facts for lower courts, thereby bringing new focus on the methods through which such facts are ascertained.

II. WHAT THE *BRUEN* COURT SAID (AND WHAT IT DID)

The Court's recent decision in *Bruen* illustrates both the growing importance of historical-fact inquiries in constitutional adjudication as well as the complexities that are likely to attend the lower courts' efforts to resolve disputes about historical facts as a necessary input to constitutional decision-making.

In *Bruen*, the Court addressed a long-percolating question regarding the appropriate standard of review for determining whether state laws infringed upon the right of individuals to keep and bear arms. Fourteen years earlier, in *District of Columbia v. Heller*, the Court had interpreted the Second Amendment to protect a right of individuals to keep and bear arms for lawful self-defense.[52] And two years later, in *McDonald v. City of Chicago*, the Court held the right it recognized in *Heller* to be incorporated against the states by virtue of the Fourteenth Amendment.[53] But neither *Heller* nor *McDonald* spoke clearly to the methodology lower courts should use to determine whether or not a challenged restriction on firearm possession violated the constitutionally protected right.[54]

In the absence of more definitive Supreme Court guidance, most lower courts had converged on a "two-step" model for assessing the constitutionality of firearm restrictions.[55] At the first step, the lower

51 *See, e.g.*, *Markman*, 517 U.S. at 388 ("Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury . . . ."); *see also* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 859 (2013) (describing the Court's Seventh Amendment historical test as "designed to preserve the right to a trial by jury at common law in its essential features, but which remains sufficiently flexible to deal with the demands of the modern civil justice system").

52 *See* 554 U.S. 570, 628 (2008).

53 McDonald v. City of Chicago, 561 U.S. 742 (2010).

54 *See* Miller, *supra* note 51, at 866 (claiming *Heller* left lower-court judges "at sea" regarding the appropriate standard of review).

55 *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 112, 112–13 (2023) (describing the emergence of the "two-step"

courts allowed defenders of a challenged law an opportunity to "prove that the regulated conduct falls beyond the [Second] Amendment's original scope," in which case the challenge would fail and the law would be upheld.[56] But if the historical evidence was determined to be inconclusive, or if the challenged restriction was determined to fall within the "original scope" of the Second Amendment, lower courts would move on to the second step.[57] This second step required lower courts to determine "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."[58] A determination that the law fell within the "core" of the constitutionally protected Second Amendment right was deemed to call for "strict scrutiny" analysis, requiring a showing of both a compelling state interest and "narrow[] tailor[ing]" of the restriction to achieve the asserted interest.[59] But other restrictions on the constitutionally protected right merited only intermediate scrutiny, which required a showing that the challenged restriction was "substantially related to the achievement of an important governmental interest."[60]

In *Bruen*, the Supreme Court rejected this two-step approach as having "one step too many."[61] While the majority endorsed the first-step inquiry as consistent with the *Heller* decision's demand for "a test rooted in the Second Amendment's text, as informed by history," it concluded that neither *Heller* nor *McDonald* supported *any* form of means-end scrutiny in the Second Amendment context.[62] Instead, the Court held "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" from governmental infringement.[63] And rather than allowing the government and the courts to override that presumption by "simply posit[ing] that the regulation promotes an important interest," the *Bruen* Court held that a regulation of firearm ownership should only be permissible if the government could "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[64]

The historically oriented approach the *Bruen* Court endorsed has been accurately described as "a sea change" in the doctrine

model, *id.* at 112 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022)).

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

57 *Id.*

58 *Id.* (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).

59 *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (en banc)).

60 *Id.* (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

61 *Id.* at 2127.

62 *Id.*

63 *Id.* at 2126.

64 *Id.*

surrounding firearms regulation.[65] The two-step approach, which had proliferated in the lower courts during the years following *Heller* and *McDonald*,[66] was adapted, by analogy, from decades-old First Amendment jurisprudence that lower courts were well-versed in applying.[67] This approach allowed lower courts to effectively end their historical inquiry at the first-step inquiry into the historical scope of the constitutionally protected right—a question that was fundamentally interpretive in nature.[68] The step-two application stage did plausibly depend upon some degree of fact-centered inquiries, focused principally on the perceived danger of particular weapons, particular possessors, or particular practices and the strength of the government's regulatory interest in limiting weapons access. But such inquiries typically involved the type of nonadjudicative fact-finding inquiry into the state of existing facts (or predicted future facts) that is a now-familiar aspect of constitutional decision-making.[69] And in determining the legal significance of such factual findings, lower courts were free to draw upon the familiar forms of doctrinal reasoning—principally, looking to caselaw and analogy—that are the familiar stuff of lower-court constitutional adjudication.[70]

The approach prescribed by the *Bruen* Court, by contrast, emphasized the centrality of historical-fact inquiries as to *both* the initial

65 Blocher & Ruben, *supra* note 55, at 114.

66 *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017) (noting that "[a]lmost every circuit court has adopted the Two-Part Test, which was created by the Third Circuit in *Marzzarella*" (citing United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010))).

67 *See, e.g.*, *Marzzarella*, 614 F.3d at 96–97 (drawing inspiration from First Amendment standards governing "content-neutral time, place, and manner restrictions" and "[r]egulations on nonmisleading commercial speech," *id.* at 96); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (noting that "[i]n the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right").

68 Some lower courts found ways to avoid engaging the historical inquiry at this initial stage through other techniques, such as relying on Supreme Court dicta. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 135–37 (4th Cir. 2017) (en banc) (relying on a single sentence in the *Heller* majority opinion suggesting that "weapons that are most useful in military service—M-16 rifles and the like—may be banned," *id.* at 136 n.10 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)), to construct a categorical rule that any weapons that are "'like' 'M-16 rifles,'" are "outside the ambit of the Second Amendment," *id.* at 136 (quoting *Heller*, 554 U.S. at 627)); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (looking to "[d]icta in *Heller*" as foreclosing any possibility that prohibitions on weapon possession by convicted felons could violate the Second Amendment).

69 *See, e.g.*, Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 179 (2018) ("General observations about the world like these (so-called 'legislative facts') hold significant influence on the way courts construct and apply constitutional rules today.").

70 *See supra* note 36 and accompanying text.

determination regarding the proper scope of the Second Amendment right as well as the Amendment's applicability to present facts. Thus, while questions regarding the purpose, scope, and effect of contemporary restrictions on firearm ownership might still call for familiar modes of nonadjudicative fact-finding about contemporary circumstances,[71] the ultimate determination of whether such restrictions run afoul of the constitutionally protected right will depend on the judiciary's assessment of whether the restriction is consistent with the nation's "historical tradition of firearm regulation."[72]

The *Bruen* Court identified two methods through which the existence of such a historical tradition (or, as importantly, the lack thereof) might be established. The first method involves those situations in which "a challenged regulation addresses a general societal problem that has persisted since the 18th century."[73] In cases of this kind, the majority assumed that the historical inquiry would "be fairly straightforward," noting that "the lack of a distinctly similar historical regulation addressing that problem" would be "relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[74] The second method involves cases "implicating unprecedented societal concerns or dramatic technological changes," which the majority described as calling for "a more nuanced approach."[75] This "nuanced approach" requires courts to assess "whether a historical regulation is a proper analogue for a distinctly modern firearm regulation," with a particular focus on "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[76]

The *Bruen* Court's instructions place historical-fact inquiries at the center of the framework for implementing the constitutionally protected right to keep and bear arms. Even the inquiry the Court described as "fairly straightforward" requires identification of the "general societal problem" to which the challenged regulation responds, a determination of how far back that societal problem existed and whether asserted historical analogues are "distinctly similar" in relevant ways, including whether they addressed the problem through "materially different means."[77] For cases involving what a court

71 *See* Blocher & Ruben, *supra* note 55, at 170 (observing that, "[d]espite *Bruen*'s suggestion that its approach is purely historical, its test requires contemporary evidence to play a key role" because the test requires "modern empirics to demonstrate, for example, how often particular weapons are used for self-defense or in crimes, or what harms a particular law prevents").

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

73 *Id.* at 2131.

74 *Id.*

75 *Id.* at 2132.

76 *Id.* at 2132–33.

77 *Id.* at 2131.

determines to be a more distinctively modern problem, the assessment will require courts to not only delve into the historical record to identify potential regulatory analogues, but also to identify the background purposes of such laws and to assess their practical scope and effect, in order to answer the "how" and "why" questions the Court deemed central to assessing whether such laws are "relevantly similar" to the challenged regulation.[78]

In dissent, Justice Breyer (joined by Justices Sotomayor and Kagan), criticized the majority's "near-exclusive reliance on history" as "not only unnecessary" but also "deeply impractical."[79] Justice Breyer warned that the task *Bruen* imposed on the lower courts was beyond the professional training and competence of most lawyers and judges, observing that "[l]egal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems."[80] He further cautioned that lower courts were "ill equipped to conduct the type of searching historical surveys" that the majority's approach requires, observing that such courts "typically have fewer research resources, less assistance from *amici* historians, and higher caseloads" than does the Supreme Court.[81]

The majority responded to Justice Breyer's pragmatic concerns in a single footnote.[82] The majority observed that "[t]he job of judges is not to resolve historical questions in the abstract" but rather "to resolve *legal* questions presented in particular cases or controversies."[83] Drawing on a law review article authored by William Baude and Stephen Sachs, the majority observed that this legal inquiry "relies on 'various evidentiary principles and default rules' to resolve uncertainties,"[84] including, especially, "the principle of party presentation."[85] The majority concluded that "[c]ourts are thus entitled to decide a case based on the historical record compiled by the parties."[86] The Court also emphasized elsewhere in the opinion that it was "not obliged to sift the historical materials for evidence to sustain" a challenged law and that

78 *Id.* at 2133, 2132 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

79 *Id.* at 2177 (Breyer, J., dissenting).

80 *Id.*

81 *Id.* at 2179.

82 *Id.* at 2130 n.6 (majority opinion).

83 *Id.*

84 *Id.* (quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 811 (2019)).

85 *Id.* (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)).

86 *Id.*

the government proponent of the law's constitutionality bore the burdens of production and persuasion.[87]

But when the Court turned to the actual merits of the particular question presented by the case—namely, the permissibility of New York's "proper cause" standard for determining the availability of a handgun license[88]—the majority did not confine itself to the evidentiary record the parties had developed in the litigation below for guidance regarding the relevant history. The trial court in the litigation below had made no determinations regarding the relevant history, instead concluding that the plaintiff's challenge was foreclosed by an earlier Second Circuit decision applying the two-step approach, which the *Bruen* Court rejected.[89] But rather than remanding the case for further argument and fact-finding consistent with the Court's newly announced history-and-tradition standard, the *Bruen* Court proceeded to resolve the underlying factual dispute regarding the relevant history for itself. The Court devoted more than twenty pages to a discussion of more than 600 years of English and early American history, drawing on a wide variety of sources, including historians' monographs, historical work by legal academics, and numerous early and late nineteenth-century statutes, judicial decisions, and legal treatises.[90] Some of these sources were brought to the Court's attention through the parties' appellate briefing, which focused extensively on the relevant history. But many seem to have been drawn from the extensive third-party amicus briefing in the case or from the Justices' own independent historical research.

The *Bruen* decision thus somewhat awkwardly straddles the line between assessing claims about historical fact through conventional adjudicatory fact-finding premised on party presentation and adversarial proof, and the techniques more commonly associated with nonadjudicative fact-finding. This tension has not gone unnoticed in the lower courts tasked with implementing the *Bruen* Court's directives.

III. HISTORICAL FACT IN THE LOWER COURTS AFTER *BRUEN*

In the short time since *Bruen* was handed down, lower courts have issued dozens of rulings aimed at implementing the Court's new

87 *Id.* at 2150 ("[W]e are not obliged to sift the historical materials for evidence to sustain New York's statute. That is [the government's] burden.").

88 *Id.* at 2134.

89 N.Y. State Rifle & Pistol Ass'n v. Beach, 354 F. Supp. 3d 143, 148 (N.D.N.Y. 2018) (concluding that the plaintiffs' challenge was "virtually identical to" the challenge rejected by the Second Circuit in *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012)), *aff'd*, 818 F. App'x 99 (2d Cir. 2020), *rev'd sub nom. Bruen*, 142 S. Ct. 2111.

90 *Bruen*, 142 S. Ct. at 2134–56.

marching orders and have divided on a number of important issues regarding the proper application of the history-and-tradition standard.[91] Among the issues that have divided the lower courts is the proper evidentiary standard and methodology lower courts should apply in assessing claims about historical fact.

Some courts have looked to *Bruen*'s instruction regarding the centrality of party presentation as suggesting that claims regarding historical fact should be assessed in the first instance by the trial court through ordinary evidentiary processes. The decision by the United States Court of Appeals for the Seventh Circuit in *Atkinson v. Garland* illustrates this approach.[92] *Atkinson* involved a challenge to the federal "felon-in-possession" statute,[93] which criminalizes the possession of a firearm by any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."[94] Because the district court decision under review had been handed down before *Bruen* was decided and because the parties' briefing on appeal did "not grapple with *Bruen*" in any meaningful way, the panel majority concluded that the "best way forward" was "to return the case to the district court for a proper, fulsome analysis of the historical tradition supporting" the challenged law.[95] The panel majority acknowledged that both the government's brief on appeal as well as the briefing submitted on behalf of the plaintiff and his amicus had included "some historical analysis" but found that analysis to be "nothing close to what would satisfy the demanding standard set forth in *Bruen*."[96]

Instead, the majority concluded that "[b]efore we resolve the question before us, the parties should have a full and fair opportunity to develop their positions before the district court in accordance with the principles of party presentation."[97] To guide proceedings on remand, the *Atkinson* majority provided a list of five "interrelated and non-exhaustive questions" for the parties and the district court to explore, including whether or not the challenged statute "address[es] a 'general societal problem that has persisted since the 18th century,'"[98] what "history tell[s] us about disarming those convicted of crimes generally and of felonies in particular,"[99] and whether there are "broader

91 *See, e.g.*, Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 78 (2023) (describing lower-court decisions in the aftermath of *Bruen* as "scattered, unpredictable, and often internally inconsistent").

92 70 F.4th 1018 (7th Cir. 2023).

93 *Id.* at 1019.

94 18 U.S.C. § 922(g)(1) (2018).

95 *Atkinson*, 70 F.4th at 1022.

96 *Id.*

97 *Id.* at 1023.

98 *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022)).

99 *Id.*

historical analogues to" the challenged statute "during the periods that *Bruen* emphasized, including, but not limited to, laws disarming 'dangerous' groups other than felons."[100] The court insisted that "[b]oth sides should cast a wider net and provide more detail about whatever history they rely on" and advised the district court that it could "accept amicus briefs to assist with its inquiry" and also look to "recent decisions from other courts" addressing similar challenges.[101]

In dissent, Judge Wood disagreed that "further input from the district court" would be either necessary or helpful to the ultimate decision of the underlying constitutional question.[102] In Judge Wood's view, determining the proper scope of the Second Amendment and its applicability to the federal felon-in-possession statute involved "a pure question of law," which the appellate courts could resolve without any special deference to the finder of fact.[103] She further opined that any benefit that might be obtained "from further exploration of the issue" in light of *Bruen* could be gotten by "asking the parties to submit supplemental briefs."[104] Judge Wood thus saw no need to "saddl[e]" the lower court "with a Ph.D.-level historical inquiry that necessarily will be inconclusive."[105]

Judge Wood's preferred approach echoes the approach taken by other circuit courts that have rejected the need for case-specific inquiries into historical facts by the trial court. For example, the Ninth Circuit denied a government request to remand a case decided by the district court prior to the *Bruen* decision for further fact-finding regarding the relevant history and tradition, concluding that "the historical research required under *Bruen* involves issues of so-called 'legislative facts' . . . rather than adjudicative facts" and that remand was therefore unnecessary.[106]

District courts, too, have struggled to determine the nature, scope, and extent of their historical fact-finding obligations under *Bruen*'s history-and-tradition standard. Some lower courts have concluded that nothing short of a full evidentiary trial will comport with the

100 *Id.* at 1024.

101 *Id.* A similar view regarding the centrality of trial courts in the investigation into historical-fact claims was endorsed by Judge Higginson of the United States Court of Appeals for the Fifth Circuit. *See* United States v. Daniels, 77 F.4th 337, 360–61 (5th Cir. 2023) (Higginson, J., concurring) ("In my view, . . . *Bruen* requires that an evidentiary inquiry first be conducted in courts of original jurisdiction, subject to party presentation principles, aided by discovery and cross-examination and with authority to solicit expert opinion.").

102 *Atkinson*, 70 F.4th at 1025 (Wood, J., dissenting).

103 *Id.*

104 *Id.*

105 *Id.*

106 Teter v. Lopez, 76 F.4th 938, 946–47 (9th Cir. 2023) (quoting FED. R. EVID. 201 advisory committee's note to 1972 proposed rules).

obligations imposed by *Bruen*. For example, the United States District Court for the District of Oregon denied the parties' cross-motions for summary judgment in a case challenging a state law banning large-capacity firearm magazines, concluding that disputed questions of material fact existed, including "the threshold question of whether [the challenged regulations] involve conduct covered by the plain text of the Second Amendment."[107] The court thereafter conducted a week-long bench trial involving "testimony from twenty witnesses"—including expert historian witnesses called by both sides—and "more than 100 exhibits," the end result of which was a conclusion that the challenged law fell outside the scope of the Second Amendment's protections.[108]

Other district courts have regarded such evidentiary procedures as unnecessary, at least in circumstances where the parties do not disagree over the content of the relevant historical sources.[109] And some courts have sought to evade the detailed historical inquiry that *Bruen* seemingly prescribed by resorting to less-costly decision-making tactics. For example, numerous lower courts considering challenges to the federal felon-in-possession statute challenged in *Atkinson* have upheld the law without detailed consideration of the relevant history based on language in *Bruen* and earlier cases suggesting that the Second Amendment protects the rights of only "law-abiding citizens."[110] Many courts

107 Or. Firearms Fed'n v. Kotek, No. 22-cv-01815, 2023 WL 3687404, at *5 (D. Or. May 26, 2023) (denying cross-motions for summary judgment on the basis of various disputed issues of material fact, including "the threshold question of whether [the challenged regulations] involve conduct covered by the plain text of the Second Amendment").

108 Or. Firearms Fed'n v. Kotek, 682 F. Supp. 3d 874, 885, 900–01, 947 (D. Or. 2023); *see also, e.g.*, Ocean State Tactical, LLC v. Rhode Island, 646 F. Supp. 3d 368, 378–81, 387–90 (D.R.I. 2022) (assessing evidentiary record established in connection with preliminary injunction motion, including competing submissions by historical experts).

109 *See, e.g.*, United States v. Agee, No. 21-CR-00350, 2023 WL 6443924, at *7 (N.D. Ill. Oct. 3, 2023) (concluding that no evidentiary hearing was necessary where the defendant did "not quarrel with the *accuracy* of the government's proffered historical sources" but merely argued that they were not sufficiently analogous to the challenged modern restriction); United States v. Pruden, No. 23-CR-42, 2023 WL 6628606, at *6–8 (N.D. Iowa Oct. 11, 2023) (denying defendant's motion for an evidentiary hearing on his as-applied *Bruen* challenge to a federal firearms prosecution); *cf.* Cal. Rifle & Pistol Ass'n v. City of Glendale, 644 F. Supp. 3d 610, 614 n.1 (C.D. Cal. 2022) (noting parties' agreement "not to present any further evidence beyond the exhibits for which they sought judicial notice and the declarations in their written submissions").

110 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022) ("In [*Heller*] and [*McDonald*], we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense."); *see also, e.g.*, United States v. Filoial, No. 21-CR-00052, 2023 WL 5836689, at *3–4 (D. Alaska Aug. 25, 2023) (concluding that the "law-abiding citizen" language was "dicta in *Bruen*," but that "it is not without weight" and interpreting that decision to leave undisturbed binding circuit precedent authorizing restrictions on firearm ownership by

have also viewed themselves as free to rely on the dispositions of similar challenges by other lower courts as an alternative to sifting the historical record themselves.[111]

At least one lower-court judge has suggested that historical facts regarding the scope of firearms regulation should *only* be established through the aid and assistance of expert testimony by historians.[112] In a decision handed down in June 2023, Judge Reeves of the United States District Court for the Southern District of Mississippi chided the government for declining an opportunity to request the appointment of a consulting expert historian "to help [the court] sift through the historical record."[113] Judge Reeves expressed significant reservations regarding the historical demands the *Bruen* standard imposes on lower courts, observing that "[j]udges are not historians," were "not trained as historians," and "do not have historians on staff" to aid their historical investigations and thus run a substantial risk of getting the history wrong.[114] He was particularly critical of what he described as the "post-*Bruen* consensus" regarding the permissibility of felon-in-possession restrictions, noting the lack of expert historian testimony in those cases and the paucity of third-party amicus briefing to assist the courts' historical inquiry.[115]

Not all lower courts share Judge Reeves's reticence regarding the capacity of judges to "sift" the relevant history without the aid of expert

convicted felons, *id.* at *3); United States v. Tribble, No. 22-CR-085, 2023 WL 2455978, at *2 (N.D. Ind. Mar. 10, 2023) ("As tempting as it is to pore over colonial era gun laws and muse on whether they are an adequate proxy to [18 U.S.C.] § 922(g)(1), . . . the Supreme Court has stated that restrictions on felons possessing firearms are permissible. Nothing in *Bruen* indicates the Court intended to change its view on the matter."); *cf.* Vincent v. Garland, 80 F.4th 1197, 1202 (10th Cir. 2023) (concluding that language in *Bruen* suggesting the permissibility of background checks meant that the decision "did not indisputably and pellucidly abrogate" prior circuit precedent authorizing felon-possession restrictions). *But see* Range v. Att'y Gen. U.S., 69 F.4th 96, 101 (3d Cir. 2023) (en banc) (concluding that "law-abiding citizen" language in *Heller*, *McDonald*, and *Bruen* was nonbinding dicta).

111 *See, e.g.*, Duncan v. Bonta, 83 F.4th 803, 806 (9th Cir. 2023) (concluding that government was likely to prevail on merits of challenge to prohibition of large-capacity magazines based on fact that nine of ten federal courts considering similar challenges had upheld their constitutionality); United States v. Villalobos, No. 19-cr-00040, 2023 WL 3044770, at *11 n.15 (D. Idaho Apr. 21, 2023) ("[T]he Court today is not being lazy by citing other courts, nor is its analysis lacking in rigor by accepting other courts' recitation of the relevant history. . . . [That history] has been exhaustively outlined before. There is no need for the Court to recite the same things again here just for the sake of saying it did it in this case.").

112 *See* United States v. Bullock, 679 F. Supp. 3d 501, 507–08 (S.D. Miss. 2023).

113 *Id.* at 505, 507–11, 537; *see also* United States v. Bullock, No. 18-CR-165, 2022 WL 16649175, at *3 (S.D. Miss. Oct. 27, 2022) (ordering briefing by the parties as to "whether [the court] should appoint a historian to serve as a consulting expert in this matter" pursuant to Federal Rule of Evidence 706).

114 *Bullock*, 679 F. Supp. 3d at 507–09.

115 *Id.* at 529, 519–22.

assistance. In a decision handed down shortly after Judge Reeves's decision, Judge Nye of the United States District Court for the District of Idaho professed himself "not convinced that [Judge Reeves's] concerns about historians" were warranted.[116] According to Judge Nye, the principle of party presentation meant that it should be "within the [g]overnment's discretion to choose how to accomplish" its task, under *Bruen*, of convincing the court that a challenged regulation is consistent with the nation's history and tradition of firearms regulation.[117] And while the government had the option of presenting an expert historian to try to meet its burden of persuasion, Judge Nye felt it should not be *required* to do so, concluding that the court was "constitutionally and practically capable of" assessing the parties' representations regarding history "without the help of a historical expert."[118]

While Judge Reeves and Judge Nye disagreed about the *type* of evidence that should be required to establish the relevant historical facts, they agreed about the appropriate consequences of a party's failure to prove those facts to the court's satisfaction. Both judges agreed that the burden of persuasion under *Bruen* falls on the government and that a failure by the government to satisfy its burden should lead to a finding of unconstitutionality and unenforceability.[119] This common ground regarding the appropriate consequences of a failure of proof might point the way toward a means of minimizing the burdens of historical inquiry for lower-court judges. Perhaps, as the *Bruen* Court itself suggested, lower courts should rely wholly on party presentation to establish the relevant historical facts and, in the event of meaningful historical uncertainty, find against the party bearing the burden of persuasion.[120]

But though this option might seem superficially appealing, there are substantial reasons to doubt that exclusive reliance on party presentation and burdens of proof will meaningfully further the goals of either accuracy or efficiency in resolving constitutional challenges hinging on resolution of historical-fact disputes.

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116 United States v. Yates, No. 21-cr-00116, 2023 WL 5016971, at *2 (D. Idaho Aug. 7, 2023).

117 *Id.*

118 *Id.*

119 *See Bullock*, 679 F. Supp. 3d at 537 (upholding the defendant's as-applied challenge to the federal felon-in-possession statute due to the government's failure to meet its burden); *Yates*, 2023 WL 5016971, at *3 (observing that the government "bears the burden of persuasion in this case").

120 *See supra* notes 82–87 and accompanying text (discussing the *Bruen* Court's reliance on party presentation); *see also, e.g.*, United States v. Stambaugh, 641 F. Supp. 3d 1185, 1193 (W.D. Okla. 2022) ("A historical analogue to support constitutional applications of [the challenged federal statute] might well exist, but the United States hasn't pointed to it. And because it is the United States' burden . . . that failure is fatal.").

IV. THE PROMISE AND PERILS OF PARTY PRESENTATION

In support of its party-presentation solution to the epistemic and resource problems which the dissent predicted would necessarily attend implementation of its history-and-tradition standard, the *Bruen* Court cited a short scholarly essay authored by Professors William Baude and Stephen Sachs titled *Originalism and the Law of the Past*.[121] In their essay, Baude and Sachs argue that "the legal inquiry" called for by originalist theories of constitutional interpretation "is a refined subset of the historical inquiry" and thus amounts to "no more than ordinary lawyer's work."[122] Though they acknowledge the "difficulty of forming reliable views about past law" and concede that "[j]udges may lack the resources to conduct [the historical] inquiries themselves," they deny that these difficulties are insuperable.[123] They observe that judges routinely ascribe legal significance to factual determinations with which they lack any personal expertise, noting that judges "also hear antitrust cases without producing cutting-edge microeconomic research" and "decide issues of toxic-tort causation without ever donning lab coats."[124] And though they do not explicitly invoke the party-presentation principle that *Bruen* endorsed, they do observe that "our legal system contains a wealth of shortcuts, default rules, and burdens of proof to resolve disputed questions when we lack certainty about the actual answers."[125]

Professors Baude and Sachs are undoubtedly correct about the capacity of courts to incorporate outside expertise into their legal decision-making, as well as in their observation that our law sometimes "treats history in the same casually omnivorous way it treats everything else."[126] But the *Bruen* Court's reliance on these observations to support its assertion that party presentation and burdens of proof would minimize the burdens of historical research for lower courts overlooked an important distinction between the paradigm of fact-finding in the cases described in the Baude and Sachs essay and the type of fact-finding called for by the history-and-tradition test. In a typical antitrust or toxic-tort case in which expert testimony is presented by the parties, the testimony is presented for the purpose of establishing facts that are unquestionably adjudicative in nature—i.e., questions about

121 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) (citing Baude & Sachs, *supra* note 84).

122 Baude & Sachs, *supra* note 84, at 810–11.

123 *Id.* at 815–16.

124 *Id.* at 816.

125 *Id.*

126 *Id.*

the "who, when, what, and where" of a litigation.[127] For example, an economist might be called in an antitrust case to testify about the structure of a particular market or the competitive impact of a particular defendant's conduct. Likewise, scientific experts may be necessary in a toxic-tort case to establish the harmfulness of a defendant's products or to determine the likelihood that they caused a particular plaintiff's injuries. Indeed, courts may sometimes accept expert historians' testimony to establish similar case-specific facts, such as (to take another example suggested by Baude and Sachs) identifying the owner of a parcel of property where ownership depends on tracing a very old chain of title.[128]

The types of fact-finding called for by the *Bruen* history-and-tradition test—such as the purpose and effect of very old firearm regulations, the extent to which gun-related "societal problems" have persisted over time, and the degree of similarity between putative eighteenth- and nineteenth-century statutory analogues and modern restrictions—seem fundamentally different. To see why, it will be useful to imagine what litigation under *Bruen* would look like if all historical-fact questions required under that decision were treated as pure questions of adjudicative fact governed by the ordinary standards of party presentation and adversarial proof. Under such a system, each case in which a party challenged a modern firearm regulation on Second Amendment grounds would require the party bearing the burden of proof (presumably the government)[129] to bring forth evidence regarding the content, purpose, and effect of very old firearm regulations and their similarity to modern restrictions. The assessment of such evidence, including whether the government had met its burden, would be the responsibility of the designated finder of fact (either the

127 *See* Monaghan, *supra* note 2, at 235.

128 Baude & Sachs, *supra* note 84, at 809 (discussing United States v. Old Dominion Boat Club, 630 F.3d 1039, 1041 (D.C. Cir. 2011)); *see also, e.g.*, Cayuga Indian Nation v. Pataki, 165 F. Supp. 2d 266, 300 (N.D.N.Y. 2001) (discussing expert testimony by historians regarding disputed purchase of Native American land by the State of New York in the eighteenth century), *rev'd*, 413 F.3d 266 (2d Cir. 2005).

129 Although *Bruen* clearly placed the burden of identifying an analogous historical tradition of regulation for activities conceded to fall within the scope of the Second Amendment's protection on the government, *see supra* note 87 and accompanying text, some courts have concluded that parties challenging the law bear the initial burden of showing that their conduct falls within the presumptive scope of the Second Amendment's protection. *See, e.g.*, United States v. Jackson, 69 F.4th 495, 506 n.4 (8th Cir. 2023) (stating that defendant asserting an as-applied challenge "must show" that "the Second Amendment protects his particular conduct" (quoting United States v. Adams, 914 F.3d 602, 605 (8th Cir. 2019))); *cf.* Charles, *supra* note 91, at 98–99 (endorsing this approach).

trial judge or a jury), and the facts thus found would be substantially insulated against reversal on appeal.[130]

Such a system is hardly unimaginable. Indeed, some might prefer a system in which *all* issues relevant to the resolution of a dispute between adverse parties—including legal issues as well as factual issues—were governed solely by party presentation.[131] But such a system would necessarily come with certain easily appreciated costs. Most obviously, such a system would involve massive inefficiencies and duplication of effort, requiring piecemeal litigation of identical factual questions in numerous separate proceedings. Such a system would also almost certainly lead to disparate treatment of similarly situated litigants—including criminal defendants—in a wide range of cases. Such a system would also leave the state of the law in a significant state of uncertainty, leaving both those who might be interested in acquiring firearms and government officials seeking to restrict firearm possession or to enforce previously enacted restrictions without clear guidance regarding the constitutional limits of state regulatory authority. And such a system might well produce distortions that could impede the overall accuracy of the adjudicative process.[132]

With regard to "pure" issues of law, our legal system largely addresses such concerns about efficiency, consistency, and predictability through the doctrine of stare decisis.[133] With regard to "mixed" issues of law and fact, the problem is somewhat more complex. But in at least some circumstances, the consequences of a frequently recurring fact pattern may become so predictable as to ripen into an issue appropriate for judicial resolution as a matter of law. For example, in the

130 *See, e.g.*, FED. R. CIV. P. 52(a)(6).

131 *See, e.g.*, Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–23 (2011) (arguing for a strong principle of party control with respect to all issues in a case, including pure issues of law); *cf.* Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 994–1020 (2010) (suggesting that power of constitutional judicial review be limited to trial courts without possibility of appellate review).

132 For example, if governmental actors are substantially more likely to be repeat players in this type of litigation than their likely adversaries (e.g., individual criminal defendants and permit applicants), they may have greater incentives to invest in historical investigations and retention of experts; over time, these dynamics may lead to a more government-friendly assessment of the relevant history than a more evenhanded review of the evidence might suggest. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (arguing that asymmetries between repeat players and infrequent participants in litigation may, over time, lead to structural advantages that systematically favor the repeat litigants).

133 *See, e.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (observing that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles" and "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation" (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991))).

antitrust context, assessing the competitive impact of most business practices requires careful assessment of the likely effects of the challenged practices as well as the dynamics of the affected industries.[134] But some practices, such as price-fixing among direct competitors, "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."[135] Likewise, plaintiffs in federal securities litigation are allowed to establish their reliance on material misrepresentations concerning publicly traded stock through a rebuttable presumption that the market efficiently incorporated all material information available to investors, including the allegedly misleading statements, in the market prices they paid for their shares.[136]

But our legal system has yet to cohere around a fully satisfactory method for resolving pure questions of fact whose implications extend beyond the particular circumstances affecting the parties in a given case. Even in cases involving only disputed issues of adjudicative fact—for example, the harmfulness of an allegedly toxic product in a mass-tort case—courts have struggled to develop mechanisms that ensure fair, consistent, predictable, and efficient resolution of common factual issues across all similar cases within the confines of existing statutory and constitutional rules structuring the litigation process.[137]

Similar difficulties confront resolution of disputed questions of nonadjudicative fact. Despite the ubiquity of nonadjudicative facts in constitutional litigation, our legal system has yet to resolve certain very basic questions regarding the structure of nonadjudicative fact-finding. For example, the Supreme Court has never definitively spoken to the question of whether a district court's findings on matters of nonadjudicative fact are governed by the clear error standard applicable

134 *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (observing that "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect" (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 & n.13 (1982))).

135 *Id.* (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

136 Basic Inc. v. Levinson, 485 U.S. 224, 241–42, 247 (1988) (describing and endorsing this "fraud-on-the-market" theory of establishing reliance).

137 *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–28 (1997) (concluding that federal class action rule did not authorize certification of proposed nationwide class in tort action seeking recovery for injuries allegedly caused by asbestos exposure due to predominance of individualized questions, notwithstanding the existence of factual questions common to all class members, including questions regarding the "harmfulness of asbestos exposure," *id.* at 609); *cf.* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 580–89 (2008) (discussing efforts by trial courts to develop trial procedures that will fairly and accurately guide the resolution of common issues affecting numerous distinct cases).

to adjudicative fact-finding or rather subject to de novo review on appeal.[138] And though the predominant assumption among courts of appeals has long been that the de novo standard applies,[139] the Supreme Court "has not consistently adhered to th[at] view" in its own decision-making, leaving the resulting state of the law in "disarray."[140]

Thus, while the *Bruen* Court was correct to note (with Professors Baude and Sachs) the legal system's tendency to rely upon "'various evidentiary principles and default rules' to resolve uncertainties,"[141] the type of fact-finding it calls for involves an area where consensus agreement on the applicable evidentiary principles and default rules is notoriously hard to come by.

Of course, the challenges presented by the vague legal parameters governing nonadjudicative fact-finding are hardly unique to historical-fact inquiries. The same challenges confront nonadjudicative fact-finding of all kinds, including the fact-intensive inquiries into the nature and strength of asserted government interests under the interest-balancing framework that the *Bruen* Court rejected.[142] But fact-finding under that framework, though far from perfect,[143] at least presented lower courts with a task which they had grown familiar with from decades of experience employing the tiered-scrutiny framework in constitutional cases.[144] And the *Bruen* Court's emphasis on history and tradition denied lower courts access to certain default rules that were potentially available to resolve factual uncertainty under tiered-scrutiny reviews, such as deferring to the government's expert judgments regarding the importance of the interests being furthered and

138 *See* Borgmann, *supra* note 5, at 1188 ("Remarkably, considering the importance of [nonadjudicative] facts to constitutional rights litigation, the Supreme Court has neither answered the question" of whether clear error or de novo review applies to nonadjudicative fact-finding "nor addressed it in any detail.").

139 Yoshino, *supra* note 9, at 254 ("The consensus among appellate courts is that legislative facts are reviewed de novo.").

140 *Id.* at 254, 258.

141 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (quoting Baude & Sachs, *supra* note 84, at 811).

142 *See, e.g.*, Borgmann, *supra* note 5, at 1197 (observing that "courts will inevitably consider social facts when deciding whether a law is constitutional [under the tiered-scrutiny framework], because they must evaluate the state's asserted justifications for passing the law").

143 *See* Larsen, *supra* note 69, at 179–80 (discussing difficulty of screening even "easily debunked" empirical claims regarding nonadjudicative facts under current decision-making procedures, *id.* at 179).

144 *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007) (describing the emergence of tiered-scrutiny review in the 1960s and 1970s); *see also Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting) (contending that "[j]udges understand well how to weigh a law's objectives (its 'ends') against the methods used to achieve those objectives (its 'means')" but "are far less accustomed to resolving difficult historical questions").

the availability of adequate alternative means to achieve the same ends.[145]

To be sure, some might well believe that this is a good thing. It is hardly unreasonable to believe that the onus of establishing constitutional authority should be on the governmental actors seeking to restrict the rights of individuals rather than on the individuals seeking to assert such rights and that the government should thus be entitled to no special deference regarding the limits of its own constitutional powers. But the question remains: How should lower courts go about navigating the new jurisprudential terrain in which legal significance increasingly hinges on inquiries regarding nonadjudicative historical facts rather than (or, at least, in addition to)[146] inquiries regarding presently existing or predicted social facts?

V. THE PATH AHEAD

Unfortunately, it is far easier to describe the challenges that confront lower courts seeking to assess the types of historical facts emphasized by the *Bruen* decision than to prescribe concrete solutions to overcome such challenges. Recognizing that reliance on party presentation is unlikely to prove a panacea to the problems confronting historical-fact inquiries does not necessarily point the way toward a more obviously desirable set of alternatives.

As a threshold matter, it is worth noting that, despite the *Bruen* Court's emphasis on party presentation, it is probably reading that decision for more than it is worth to suggest that lower courts are required to depend upon party presentation, and party presentation alone, for the identification and assessment of all historical facts relevant to the parties' claims. The Court's specific instruction was that "[c]ourts are . . . *entitled* to decide a case based on the historical record compiled by the parties"—suggesting conferral of permission rather than imposition of an obligation.[147] And the *Bruen* majority's own

145 *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 161–65 (2007) (deferring to Congress's judgment regarding the lack of need for a medical necessity exception to a law restricting access to a particular abortion procedure); Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (deferring to a state-operated law school's judgment that racial diversity among its student body was "essential to its educational mission"); *see also* Haley N. Proctor, *"Will the Meaning of the Second Amendment Change . . . ?": Party Presentation and Stare Decisis in Text-and-History Cases*, 98 N.Y.U. L. REV. 453, 460 (2023) (observing that means-end scrutiny "calls for some measure of deference to legislative judgments, creating a broader zone in which factual developments can occur without disrupting the legal conclusion").

146 *See supra* note 71 and accompanying text (noting persisting relevance of at least some complex inquiries into presently existing nonadjudicative facts under the *Bruen* standard).

147 *Bruen*, 142 S. Ct. at 2130 n.6 (emphasis added).

discussion of copious extrarecord evidence in assessing the constitutionality of New York's licensing regulation certainly comports with this understanding of the opinion.[148]

Lower courts would thus seem permitted (though not required) to consider evidence of the relevant history beyond the materials submitted by the parties as part of the trial record, including submissions by third-party amici and the courts' own, independent historical research. But such alternative fact-finding methods present certain well-recognized problems of their own. For example, multiple scholars have observed that factual propositions set forth in amicus briefing are not subject to the type of adversarial testing and cross-examination that occurs among the parties in ordinary trial court proceedings.[149] Similar concerns attend independent factual research conducted by non-expert judges and court personnel, at least in those circumstances where parties are given no meaningful opportunity to challenge such research or present contrary evidence in rebuttal.[150] Such independent research is also likely to unduly tax the time and resources of court personnel who have no particular subject-matter expertise in historical research.[151]

In addition to practical efficiency and competence concerns, translating factual claims about history into binding precedential rules is also fraught with process concerns for the rights of third parties. An appellate court's conclusion that a given law is unconstitutional based on a determination that the governmental proponent of the law failed to meet its evidentiary burden to identify a historical analogue may bind other governmental litigants who had no meaningful opportunity to participate or present evidence in the original proceeding. Likewise, an appellate court's conclusion that a government proponent met its burden may foreclose meaningful opportunities for individual

148 *See supra* notes 88–90 and accompanying text (discussing *Bruen* Court's reliance on extrarecord historical evidence).

149 *See, e.g.*, Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1800–02 (2014) (opining that many factual assertions contained in amicus briefing to the Supreme Court likely would not "hold up on cross-examination had it come in at trial," *id.* at 1784); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 60–61 (2011) (noting lack of evidentiary testing and cross-examination for factual propositions asserted through third-party amicus appellate briefs).

150 *See, e.g.*, Larsen, *supra* note 10, at 1290–1302; Gorod, *supra* note 149, at 58 (observing that "when courts . . . attempt to find the relevant legislative facts on their own, they do so without the benefit of processes that will help ensure that those facts are accurate and properly applied"); *cf.* Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 58–59 (2019) (noting competence concerns confronting lower courts attempting to engage in independent originalist research without the aid of party briefing).

151 *See, e.g.*, Williams, *supra* note 32, at 334 (noting resource and competence concerns with independent historical research by lower-court judges).

rights-holders to challenge that conclusion in later proceedings by presenting contrary evidence or challenging the sufficiency of the analogy relied upon by the court. Such consequences stand in at least some tension with our traditional notions of each litigant's entitlement to a "day in court" to present their case unencumbered by findings made in cases where they lacked a meaningful right to participate.[152]

At this point, the temptation may be to simply throw up one's hands in despair at the seeming impossibility of constructing viable mechanisms for testing the veracity of empirical claims about historical facts given the limitations of our legal system's existing proof structures. But despair is not a practical option for judges seeking to fulfill their obligation to faithfully adjudicate constitutional claims to the best of their ability.

Thankfully, there are reasons to expect (or at least hope) that the difficulties that confront historical fact-finding in the context of any given case may become more tractable over time as multiple, geographically dispersed courts confront the same or similar issues repeatedly. It might be difficult to know, in any given case, whether the historical evidence being brought forth by the parties reflects an accurate view of historical reality, particularly given the lack of historical expertise among most members of the legal profession.[153] Similar skepticism seems appropriate with respect to the ability of courts of appeals to ferret out a comprehensive understanding of the background history through either their own independent research or through the participation of third-party amicus briefing.[154] But if similar issues come before the courts repeatedly—as has happened in the aftermath of *Bruen* with regard to a variety of issues, such as felon-in-possession restrictions, age restrictions, and bans on large-capacity magazines—courts may gradually grow more confident that the historical record

152 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) ("A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996))); *see also, e.g.*, Gorod, *supra* note 149, at 66 (noting concern that litigants may sometimes "end up virtually bound by the prior court's factual findings, even though they had no opportunity to present evidence regarding those findings"); *cf.* Trammell, *supra* note 3, at 595–96 (discussing tensions between precedent and preclusion more generally).

153 *See, e.g.*, Williams, *supra* note 32, at 335 (observing that, when it comes to historical research, "private litigants and their attorneys are likely to labor under similar resource and competency constraints as lower court judges").

154 *See, e.g.*, *id.* at 271–72 (noting various institutional advantages the Supreme Court possesses as compared to the lower courts, including greater time and resources and greater assistance from third-party amicus briefing).

canvassed in the prior cases provides a reasonably comprehensive account of the most plausible historical analogues.[155]

Intermediate appellate courts could foster this process of distributed deliberation and experimentation in the trial courts by adopting decisional strategies associated with constitutional "minimalism," such as focusing on the particular facts of the case at hand and avoiding dispositions that are broader than necessary to resolve the parties' dispute.[156] *Bruen*'s emphasis on party presentation provides an avenue toward such minimalist decision-making. For example, rather than conclusively declaring that history and tradition demonstrate the lack of any close historical analogue to a particular type of firearms restriction based on the historical evidence adduced by the parties—and whatever other assistance the court gleans from third-party briefing and the judges' own independent research—the appellate court might instead simply conclude that the government failed to meet its burden of persuasion in that particular case.[157] Such an opinion, if clearly and carefully framed, would not prejudice the ability of a future government litigant to attempt to establish a sufficient historical analogue in a future proceeding.[158] Nor would such a narrowly framed opinion necessarily short-circuit continued deliberation regarding the issue in subsequent trial court proceedings, which may unearth additional evidence and arguments about the relevant historical background (or, failing that, at least enhance the judiciary's confidence that no such evidence is likely to be found).

Of course, for such a process to work, courts must be willing to tolerate—at least for some period—the inefficiency, inconsistency, and

155 *Cf.* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 678 (1981) (observing that allowing judges on different courts to speak to the content of legal norms "generates a density of experience that produces information quickly").

156 *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–10 (1996) ("Minimalists try to decide cases rather than to set down broad rules . . . . They decide the case at hand; they do not decide other cases too unless they are forced to do so (except to the extent that one decision necessarily bears on other cases)." *Id.* at 15.); *see also* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 856–79 (2022) (arguing for minimalist decision-making in the lower courts more generally).

157 *Cf.* United States v. Stambaugh, 641 F. Supp. 3d 1185, 1193 (W.D. Okla. 2022) ("A historical analogue to support constitutional applications of [the challenged federal statute] might well exist, but the United States hasn't pointed to it. And because it is the United States' burden . . . that failure is fatal.").

158 Indeed, such a ruling might not even bar future relitigation of the same issue by the same governmental litigant in a case involving a different counterparty. *See* United States v. Mendoza, 464 U.S. 154, 155 (1984) (holding that offensive nonmutual issue preclusion may not be invoked against the United States).

uncertainty that necessarily comes with leaving things undecided.[159] Appellate courts may feel tempted to conclusively "settle" a question of historical fact that is likely to recur repeatedly in future litigation, both to minimize their own burdens of deciding the issue again in the future as well as the similar burdens on trial courts within their appellate jurisdiction. But doing so risks locking in place a potentially erroneous understanding of history based on an incomplete and underdeveloped evidentiary record.[160] And once accepted by a court of appeals and regarded as precedentially binding, such conclusions may be very difficult to dislodge.[161]

District courts too must resist the temptation to overread appellate decisions for more than they're worth—for example, by reading a decision declaring that a particular litigant failed to meet an applicable proof burden to mean that *no* similarly situated litigant could possibly satisfy that burden by presenting different evidence or arguments.[162] Again, such misreadings may be tempting for time-pressured and resource-constrained district courts seeking to avoid the difficult and time-consuming process of evaluating claims about historical evidence. But such shortcuts may tend to undermine the systemic accuracy of assessments of historical fact, leading to a distorted picture of what "history and tradition" require as a matter of present law. For the same reason, both district courts and courts of appeals should resist the temptations of other methods that promise to avoid the need for in-depth assessments of historical evidence, such as reliance on overbroad dicta in Supreme Court opinions or unthinking deference to determinations of other lower courts without any meaningful inquiry into the quality of those other courts' historical assessments.[163]

At some point, the usefulness of further historical inquiry may reach a point of diminishing returns. At such point, an appellate court

159 *See, e.g.*, Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 22 (2009).

160 *See, e.g.*, Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1588 (2020) ("A court that resolves an issue earlier in time will have less information. All else being equal, we should therefore expect the court to develop lower-quality legal rules than if it had decided the issue later in time." (footnote omitted)).

161 *See* Schmidt, *supra* note 156, at 866–67 (describing the "law of the circuit" doctrine, which accords binding precedential force to the decision of the first panel to address an issue, which can only be dislodged by a Supreme Court decision or through the "rare and cumbersome process" of going en banc, *id.* at 866).

162 *Cf.* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 662 (2015) (describing the phenomenon of "deference mistakes" in which a later decisionmaker misapplies a precedential decision established by another decisionmaker by failing to account for a "trans-substantive standard[] of review, burden[] of proof, [or] standard[] of evidence" applied in the original decision).

163 *See supra* notes 110–11 and accompanying text.

may rationally conclude that the costs associated with further delay of a conclusive precedential ruling on the disputed questions of historical fact outweigh any marginal benefit of further adversarial testing of the relevant factual claims. At this point, it seems reasonable for the court to conclude that the balance between having the law be settled and any countervailing interest in ensuring that it is "settled right" tilts in favor of settlement.[164] At this point, it seems both permissible and desirable for the court to step in with a broad ruling that incorporates the view of history and tradition that seems most plausible as part of a controlling legal rule that will guide and constrain courts bound by its rulings going forward.[165]

Of course, this leaves the problem of what to do if a factual precedent thus established is challenged or undermined by further historical research. Such problems confront all precedents that hinge on embedded factual conclusions. And though rulings premised on historical facts might seem less vulnerable to such undermining than rulings premised on contested views of currently existing or predicted future facts, the distinction may be less significant than one might think. As Professor H. Jefferson Powell has cautioned, "Nothing is more common in historical scholarship than the revisionist study," and constitutional interpreters who "rest absolute positions on the shifting sands of historical opinion" thus risk having their views "wash[ed] . . . away" by "the next doctoral dissertation."[166] Within living memory, consensus opinion among originalist scholars on at least some fundamental aspects of our constitutional order—including, perhaps most famously, the question of whether *Brown v. Board of Education*[167] was consistent with the original understanding of the Fourteenth Amendment—has shifted dramatically.[168]

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164 *See, e.g.*, Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1845 (2013) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)) (noting tension in the law of precedent between having the law be "settled" and "getting the law right," *id.* at 1846 (emphasis omitted)).

165 *Cf.* Larsen, *supra* note 11, at 108–12 (observing that the Supreme Court sometimes embeds a view about nonadjudicative fact within the legal rules it articulates and contending that such "premise facts" should bind lower courts provided the Supreme Court has stated its intention with sufficient clarity).

166 H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 680 (1987).

167 347 U.S. 483 (1954).

168 *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("In the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction."); *cf.* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 495 (2013) (observing that, in the years following publication of Professor McConnell's article, "the number of originalists willing to question *Brown*'s correctness has

It thus seems quite plausible that at least some legal conclusions premised on historical-fact determinations—no matter how cautiously and thoroughly vetted at the lower-court level—may come to be seen, in light of later historical research, as reflecting an inaccurate view of the relevant history and tradition.[169] At that point, it would seem that the ordinary demands of horizontal stare decisis would kick in, calling for a careful assessment of the value of correcting the apparent mistake when weighed against other competing values, such as interests in preserving the stability and predictability of legal rules and the protection of reasonable reliance interests.[170] But where such countervailing interests do not outweigh the interest in getting the history (and thus, the law) correct, a candid judge committed to faithfully adhering to *Bruen*'s history-and-tradition test should have little hesitancy correcting his or her error provided he or she is sufficiently persuaded that the revisionist account provides a more plausible description of the available historical evidence.[171]

CONCLUSION

Claims about history are, at bottom, claims about facts.[172] For the most part, however, the Supreme Court has largely been content to cabin its uses of history to the interpretive process, placing them firmly within the domain of questions our legal system has assigned to the "legal" rather than the "factual" side of the law/fact paradigm. Increasingly, however, the Supreme Court has looked to history as a guide to law application as well, rendering claims about history a central input into the determination of the legal consequences of present-day facts.

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declined, such that the ability of originalism to justify the Court's decision is now a widely shared assumption of originalist scholarship").

169 *See, e.g.*, Proctor, *supra* note 145, at 453–55 (discussing this challenge for the *Bruen* framework).

170 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (mentioning factors relevant to the assessment of whether a decision should be overruled, including the "workability" of the rules endorsed by the prior decision and whether the prior decision produced "concrete reliance" interests).

171 Of course, judges on the intermediate courts of appeals may face obstacles in correcting their mistakes, including the need for en banc review by the entire court rather than just the members of the original panel who made the seemingly erroneous decision. Such obstacles may provide an additional ground for caution, and call for a particularly high degree of confidence, before establishing broad precedential rulings based on contested readings of history. *Cf.* Schmidt, *supra* note 156, at 866–70 (contending that difficulty of overruling erroneous circuit precedent counsels in favor of minimalist decision-making).

172 *See, e.g.*, Larsen, *supra* note 10, at 1279 ("Historical sources are at bottom factual ones.").

Though *Bruen* epitomizes this recent trend, it is hardly the sole domain in which lower courts are confronting the challenges presented by historical-fact review.[173] And contrary to the *Bruen* Court's suggestion, it seems doubtful that party presentation and adversarial proof will provide a fully satisfactory mechanism for ameliorating the difficulties of sifting the historical record to determine the permissibility of modern practices. Nonetheless, there is at least some reason to hope that, in time, the judiciary might arrive at satisfactory mechanisms for identifying and assessing historical facts.

173 *See, e.g.*, Stevens v. Mich. State Ct. Admin. Off., No. 21-1727, 2022 WL 3500193, at *6 (6th Cir. Aug. 18, 2022) (discussing the challenges of historical-fact review in the context of a First Amendment challenge to a state policy denying access to audio recordings of court proceedings).