

Applying History as Law: The Role of Historical Facts in Implementing Constitutional Doctrine

Joseph Blocher* and Brandon L. Garrett**

The U.S. Supreme Court has long relied on historical evidence in constitutional cases, but recent years have seen a major change in how it does so: not only to interpret the meaning of constitutional text, but to establish doctrinal tests that call for historical evidence to be used in the application of those tests going forward. Broadly speaking, originalism has moved from the realm of legal interpretation to that of law declaration and then to law application. This transformation in the legal significance of history raises important questions for originalism as a practice of constitutional adjudication, not simply a theory of law. Most fundamentally: How are judges and litigants to implement the historical tests the Court has increasingly prescribed for them?

In Part I of this Article, we show how lower courts have been tasked with assessing history and tradition in applying constitutional standards, often with little guidance regarding how to proceed or what quality and quantity of historical evidence suffices to satisfy those standards. We taxonomize the Court's standards, describing the different burdens and challenges that judges face in carrying out their obligation to apply these standards while developing a record of historical facts.

In Part II, we show how lower courts and litigants have attempted to navigate this new doctrinal landscape. Their efforts reveal serious complications and debates about fundamental matters like the fact/law distinction, record development, expert witnesses, and independent judicial fact-finding. We draw particular attention to the largely underappreciated impact on litigants, who potentially face higher costs of research and briefing historical facts, as well as legal standards that are more obscure and unpredictable. The result has been incomplete and sometimes deeply flawed decision-making and—perversely—a growing disjunction between law and historical facts.

In Part III we provide some prescriptions. We argue that if constitutional cases are to turn on matters of historical fact, those factual determinations should be initially made with an opportunity for the parties to develop them. If no such trial-court record exists, appellate courts can, and often should, remand for one to be developed. Moreover, fixed standards of review must regulate

* Lanty L. Smith '67 Professor of Law and Senior Associate Dean of Faculty, Duke University School of Law.

** David W. Ichel Distinguished Professor of Law, Duke University School of Law.

review on appeal, accounting for the differences between questions of fact and law.

None of this will be easy; it will strain the system to provide a minimally fair, rule-bound process of assembling a record of historical facts. But if adequate rules and practices for finding and applying historical facts cannot be identified or soundly implemented, then constitutional standards that call for the application of such facts should be reconsidered—not necessarily because those standards fail in theory but because they fail in practice. The underlying problem may simply be that the Court’s originalist doctrinalism demands more of historical fact-finding than the legal process can legitimately (or legally) deliver. But one cannot solve that problem by calling facts law and giving judges power to find them. Insufficient rules for fact-development and appellate review generate ill-defined precedent and unworkable constitutional doctrine and call into question the judicial enterprise of applying history as constitutional law.

INTRODUCTION	681
I. THE NEW ORIGINALIST DOCTRINALISM	690
A. From Historical Meaning to Historical Doctrine	691
B. New Uses of Old Facts.....	700
1. Evaluating Regulations Based on Historical Analogy	700
2. Identifying Rights Based on Tradition	704
II. APPLYING HISTORICAL STANDARDS: THE LOWER COURTS	
RESPOND.....	707
A. Judicial Fact-Finding.....	708
B. The Impact on Litigants	711
C. Expert Evidence	713
III. TOWARD ADJUDICATION OF HISTORICAL FACTS.....	718
A. Ensuring an Adequate Historical Record.....	719
1. District Court Fact-Development	720
2. The Obligation to Remand	723
3. Specialized Fact-Finding and the Role of Experts	724
4. Historical Facts and Jury Trial Rights	727
B. Standards of Review for Constitutional Fact and Law	
Questions.....	728
1. Review of Questions of Fact	728
2. Review of Questions of Law and Mixed Questions.....	729
3. Rethinking the Legal Standard	730
CONCLUSION.....	733

Introduction

The relevance of historical facts to constitutional law has never been greater or more contested in our legal system. In an increasingly wide range of cases involving everything from abortion¹ and gun rights² to trademark law³ and agency funding,⁴ a majority of the Justices have invoked historical facts to ground their decisions, even as they express very different views about why that history matters (evidence of original public meaning or having independent legal force?)⁵, how much it matters (an exclusive source of constitutional meaning or working in concert with existing precedent?)⁶, and how much weight to give various kinds of history (Founding era-focused originalism or broader traditionalism?)⁷.

In some respects, this state of affairs reflects a triumph for the broad family of methods that give history pride of place when interpreting the Constitution. The growth of historical methods has revealed many

1. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022) (“The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions.”).

2. *See, e.g.*, *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (holding that if a gun law triggers Second Amendment analysis, then “the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms”); *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (modifying but maintaining *Bruen*’s test).

3. *See, e.g.*, *Vidal v. Elster*, 602 U.S. 286, 307 (2024) (“[H]istory and tradition establish that the particular restriction before us, the names clause in § 1052(c), does not violate the First Amendment.”).

4. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am.*, 144 S. Ct. 1474, 1481 (2024) (“Based on the Constitution’s text, the history against which that text was enacted, and congressional practice immediately following ratification, we conclude that appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause.”).

5. *See Vidal*, 144 S. Ct. at 1532 (Barrett, J., dissenting) (“Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test. And I do not see a good reason to resolve this case using that approach rather than by adopting a generally applicable principle.”); *Rahimi*, 602 U.S. at 740 (Jackson, J., dissenting) (discussing *Bruen* standard’s workability).

6. *See Vidal*, 144 S. Ct. at 1524 (Kavanaugh, J., concurring) (“[A] viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree.”).

7. *See Cmty. Fin. Servs. Ass’n of Am.*, 144 S. Ct. at 1492 (2024) (Kagan, J., concurring) (“As the Court describes, the Appropriations Clause’s text and founding-era history support the constitutionality of the CFPB’s funding. And so too does a continuing tradition.”); *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2164 (2024) (Sotomayor, J., dissenting) (arguing that majority’s historical approach “takes a wrecking ball to this settled law and stable government practice”).

approaches and labels, from various forms of originalism,⁸ to traditionalism,⁹ to liquidation,¹⁰ to historical gloss.¹¹ Though they may differ in important respects, they all rely in one way or another on historical fact-finding in the application of constitutional doctrine, and for simplicity's sake we refer to them under the broad banner of originalism. A common thread connecting these trends, questions, and methodological shifts is originalism's evolution from a theory of constitutional interpretation to a practice of constitutional adjudication—using history not simply to identify the Constitution's meaning but to construct and apply constitutional doctrine in individual cases.¹²

The challenges of this “originalist doctrinalism” go beyond the standard (and undoubtedly crucial) questions of whether and why history has normative force.¹³ The increasingly fundamental questions are about whether, how, and in what ways originalism can function as a method of constitutional decision-making—as a method of *implementing* constitutional meaning in individual cases, as opposed to (or in addition to) figuring out the Constitution's broad structure and meaning.¹⁴ As the Justices embrace

8. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 94–95 (Princeton Univ. Press ed. 2004) (describing “original meaning originalism”); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *LAW & HIST. REV.* 809, 810 (2019) (describing the “recent ‘positive turn’ in originalist scholarship”); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 *CONST. COMMENT.* 451, 467–69 (2018) (explaining the steps of a public meaning originalist inquiry); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 863–64 (1989) (defending originalism based in part on its grounding in history).

9. See Richard Primus, *Limits of Interpretivism*, 32 *HARV. J.L. & PUB. POL’Y* 159, 173 (2009) (differentiating originalism and tradition-based tests).

10. See William Baude, *Constitutional Liquidation*, 71 *STAN. L. REV.* 1, 4 (2019) (“Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes . . .”).

11. See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 *GEO. L.J.* 255, 262 (2017) (discussing the titular originalist approach).

12. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 648 (2013) (“[A]rguments about adoption history can offer mandatory answers only with respect to questions of interpretation; they cannot do so for questions of constitutional construction.”).

13. For a sample of the extensive debates regarding this question, see, for example, Charles L. Barzun, *The Positive U-Turn*, 69 *STAN. L. REV.* 1323, 1338 (2017) (distinguishing between interpretation and construction); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 *HARV. L. REV.* 2387, 2415 (2006) (describing originalism as providing a more “objective basis” for interpretation). For a recent exploration of the Roberts Court's reliance on history and the “exercise of agency and judgment” necessary to such rulings, see Melissa Murray, *Making History*, 133 *YALE L.J. F.* 990, 994–96 (2024) (introducing a collection of essays examining the use of history in *Dobbs*).

14. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *NW. U. L. REV.* 549, 550 (2009) (“Framework originalism . . . views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction.”).

“thick” originalism that pushes history further into the realm of doctrine,¹⁵ they must confront questions that originalism itself cannot answer. What evidentiary record must be assembled regarding historical facts? Are historian experts needed? What standards of proof apply? How and to what degree can lower courts, with far more cases and far fewer resources, perform the kinds of originalist analysis that the Justices do? What standards of review apply on appeal? Are the Justices applying those standards of review when reviewing cases retrospectively? And prospectively, when crafting doctrine, are they sensitive to the difficulties lower courts face in assembling the relevant historical fact record? Should they be? At what point does the accumulation of precedent preclude the need for historical fact-finding in individual cases?¹⁶ If constitutional law is to embrace originalism as a method of adjudication all the way down, then it must grapple with hard challenges regarding not only the nature of law but of adjudication. Otherwise, originalism will be the proverbial dog(ma) that caught the car.¹⁷

The ascendance of originalism and the tasks to which the Justices are putting it make these questions especially pressing now, but they are not entirely novel. Constitutional law has long relied on various kinds of facts as “inputs”¹⁸ and has developed doctrines and approaches for finding them. What is novel is the degree and type of reliance on historical facts.¹⁹ The Justices are not only using those facts to declare the content of constitutional tests (a development we have explored at length elsewhere),²⁰ but announcing tests that require lower courts to engage in their own historical-fact finding in order to resolve concrete disputes.²¹

15. See JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 106 (2024) (identifying “thick” originalism with the view that “today’s judges must interpret the Constitution in the way that people at the time of its adoption would have interpreted it or that judges must give the provisions of the Constitution the same legal effect that lawyers at the time of adoption would have given them”).

16. See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 *NW. U. L. REV.* 803, 836–38 (2009) (arguing that “entrenched precedent should take priority over original meaning”).

17. Thanks to Melissa Murray for suggesting the parenthetical addition to the proverb.

18. See Michael Coenen, *Characterizing Constitutional Inputs*, 67 *DUKE L.J.* 743, 753–54 (2018) (explaining the types of facts the Supreme Court considers as “inputs”).

19. We hold aside here the interesting question of whether the Justices can legitimately prescribe broad methodologies. See Randy Kozel, *Is the Bruen Test Binding Law – Part I*, *DUKE CTR. FOR FIREARMS L.* (Dec. 13, 2023), <https://firearmslaw.duke.edu/2023/12/is-the-bruen-test-binding-law-part-i> [<https://perma.cc/4TXP-QNT7>] (arguing that they cannot).

20. See Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 *GEO. L.J.* 669, 702–03, 707 (2024) [hereinafter, Blocher & Garrett *Historical Fact-Finding*] (discussing the use of historical facts in the Supreme Court’s development of constitutional tests).

21. We are grateful to the participants in a Duke Law Journal symposium that explored the challenges for federal district judges, litigants, and historians. For further exploration of those themes in a symposium issue, see Joseph Blocher, Brandon L. Garrett & Timothy Lovelace,

Our focus here is on the latter: The ways in which the Supreme Court has tasked courts and litigants (whose interests have generally received less attention in debates about originalism) with applying historical standards. In doing so, it has created new questions of fact and law wherein lower court judges must consider historical facts in order to adjudicate present-day constitutional disputes. The parties, in turn, must uncover and present historical evidence. Three recent examples are illustrative.²²

First, in *New York State Rifle & Pistol Association v. Bruen*,²³ the Supreme Court explicitly rejected the Second Amendment framework that had been adopted throughout the federal courts of appeal and replaced it with a test that measures gun laws' constitutionality based on whether they are consistent with historical tradition.²⁴ Justice Clarence Thomas wrote that courts should decide such cases "based on the historical record compiled by the parties,"²⁵ yet the case in *Bruen* itself had been resolved on a motion to dismiss and thus did not have a trial record.²⁶ The evidence, historical and otherwise, that the majority invoked was based on appellate submissions, mostly by amici.²⁷ Two years later in *United States v. Rahimi*, facing heavy criticism of *Bruen*'s historical fact-finding²⁸ and the chaos it unleashed in the

Historical Facts and Constitutional Law: New Challenges for Lawyers, Judges and Scholars, 75 Duke L.J. (forthcoming 2026) (manuscript at 8) (on file with authors).

22. See Emily Bazelon, *How History and Traditional Rulings are Changing American Law*, N.Y. TIMES MAG., May 5, 2024, at 41 (discussing *Rahimi*); Alanna Durkin Richer & Lindsay Whitehurst, *Supreme Court ruling creates turmoil over gun laws in lower courts*, PBS (Feb. 18, 2023), <https://www.pbs.org/newshour/nation/supreme-court-ruling-creates-turmoil-over-gun-laws-in-lower-courts> [<https://perma.cc/5B4Y-PZC2>] (discussing *Bruen*).

23. 142 S. Ct. 2111 (2022).

24. *Id.* at 2127.

25. *Id.* at 2131 n.6. For discussion of how lower courts have applied this test, see *infra* Part II. For criticism, see, for example, Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of New York State Pistol & Rifle Association v. Bruen*, 32 WM. & MARY BILL RTS. J. 1, 67–75 (2023) (criticizing the inconsistency of the *Bruen* test); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 71 n.12, 110–16 (2023) (criticizing the *Bruen* test's approach to the absence of regulation); Note, *Historians Wear Robes Now? Applying the History and Tradition Standard: A Practical Guide for Lower Courts*, 32 WM. & MARY BILL RTS. J. 479, 504 (2023) (criticizing the Supreme Court's lack of guidance).

26. See *New York State Rifle & Pistol Ass'n v. Beach*, 818 Fed. App'x 99, 100 (2d Cir. 2020) (affirming dismissal of appellant's complaint). The *Bruen* majority noted that "[b]oth courts relied on the Court of Appeals' prior decision . . . which had sustained New York's proper-cause standard, holding that the requirement was 'substantially related to the achievement of an important governmental interest.'" *Bruen*, 142 S. Ct. at 2125.

27. See, e.g., *Bruen*, 142 S. Ct. at 2143 (discussing historical arguments by "respondents [and] their amici").

28. See, e.g., Saul Cornell, *Cherry-picked history and ideology-driven outcomes: Bruen's originalist distortions*, SCOTUSBLOG (June 27, 2022), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [<https://perma.cc/DNY9-Z8TR>] ("Evidence of robust regulation of guns in public featured

lower courts,²⁹ the Court affirmed that *Bruen*'s historical-analogical test will continue to govern Second Amendment cases.³⁰ As in past cases like *Bruen*, the Justices declined to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,”³¹ deciding the case based almost exclusively on appellate and amicus fact-finding. (The defendant in *Rahimi* had already pleaded guilty when *Bruen* was decided; again, there was no historical fact-finding in the trial court.)³²

Second, in *Dobbs v. Jackson Women's Health Organization*, the same majority that decided *Bruen* eliminated the constitutional right to an abortion—accusing *Roe v. Wade* of resting on historical errors³³ and basing its own holding on contested assertions of historical fact.³⁴ The Court found that “the most important historical fact” regarding state regulation of abortion at the time of the Fourteenth Amendment was clear and provided “overwhelming” support for its conclusion.³⁵ Again, the majority relied on submissions by amici and other appellate briefs.³⁶ *Dobbs* has potentially profound implications for lower court cases litigating substantive due process claims.

Third, in *Kennedy v. Bremerton School District*,³⁷ the majority concluded that Establishment Clause claims should be evaluated according

prominently in the briefs filed in the case, but the majority either dismisses contrary evidence as unrepresentative or simply ignores evidence it finds inconvenient.”)

29. See sources cited *supra* note 25; see also Rebecca L. Brown, Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump*, 74 DUKE L.J. ONLINE. 81, 87 (2025) (examining trends in lower court decisions before and after *Bruen*).

30. United States v. *Rahimi*, 144 S. Ct. 1889, 1932 (2024) (“Under our precedent, then, we must resolve two questions to determine if [the challenged regulation] violates the Second Amendment: (1) Does [it] target conduct protected by the Second Amendment’s plain text; and (2) does the Government establish that [it] is consistent with the Nation’s historical tradition of firearm regulation?”).

31. New York State Rifle & Pistol Ass’n v. *Bruen*, 142 S. Ct. 2111, 2128 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

32. *Rahimi*, 144 S. Ct. at 1896.

33. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249 (2022) (“*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*’s faulty historical analysis. It is therefore important to set the record straight.”).

34. See, e.g., Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128 (2023) (calling the Court’s account “false” and arguing that “[s]ubstantial evidence suggests that as many as 12 of the 28 states on the majority’s list actually continued the centuries-old common law tradition of permitting pre-quickening abortions.”); *History, the Supreme Court, and Dobbs v. Jackson: Joint Statement from the AHA and the OAH*, AM. HIST. ASS’N (July 2022) [hereinafter *Joint Statement from the AHA and OAH*], [https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-\(july-2022\)](https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022)) [<https://perma.cc/DC57-UF3X>] (criticizing the *Dobbs* majority’s failure to meet “high standards of historical scholarship,” therefore establishing “a flawed and troubled precedent”).

35. *Dobbs*, 142 S. Ct. at 2267.

36. *Id.* at 2252–54.

37. 142 S. Ct. 2407 (2022).

to “analysis focused on original meaning and history,” rather than the longstanding endorsement test of *Lemon v. Kurtzman*.³⁸ The Supreme Court suggested it was obvious that a football coach’s religious exercise did not cross “any line” of coercion the “framers sought to prohibit,” but did not provide guidance about which historical facts would be relevant to this new approach, nor did it direct the parties to address the question on remand.³⁹ Lower courts must now conduct a “history and tradition” analysis with little direction regarding its standards, apart from the result under the specific and contested facts in the *Kennedy* case.

These cases are extremely significant both because of their holdings and because of what they demand of courts going forward. Each prescribes a history-focused approach that directs judges to engage in various kinds of historical fact-finding, but none provide a standard—nor a good model—for doing so.⁴⁰ None of the questions we posed earlier were addressed regarding the adequacy of the record, standards of proof, or standards of review. After all, the Supreme Court’s own attempts at historical fact-finding have hardly been a model either with regard to substance—given the Justices’ apparent historical errors⁴¹—or process, given their departure from standard rules for fact-finding and rights regarding development of a factual record.⁴² Relatedly, as we have noted in prior work, the voluminous scholarship on

38. *Id.* at 2427–28 (discussing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

39. *Id.* at 2429. The closest thing to an explanation of the Court’s historical inquiry came in a footnote pointing to an earlier concurring opinion, a quote from James Madison generally discussing compelled religious practice, and a law review article. *Id.* at 2429 n.5 (first citing *Lee v. Weisman*, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting); then citing *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1608–10 (Gorsuch, J., concurring); then citing 1 *Annals of Cong.* 758 (1789); and then citing Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 *WM. & MARY L. REV.* 2105, 2144–46 (2003)); see also *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting) (“The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on.”). Regarding whether the majority correctly understood the adjudicative facts in the case, see the discussion in Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 *DUKE L.J.* 1, 6 (2023) [hereinafter Blocher & Garrett, *Fact Stripping*].

40. For analysis of whether these cases are truly originalist, see Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 *NW. U. L. REV.* 433, 477–78 (2023) and Kermit Roosevelt III, *The Supreme Court Is Dooming America to Repeat History*, *TIME* (July 5, 2022), <https://time.com/6193496/supreme-court-dooming-america/> [https://perma.cc/ZV3P-7QE3].

41. See Blocher & Garrett, *Historical Fact-Finding*, *supra* note 20, at 703 n.22, 704 n.29 (identifying instances in which the Court has made mistakes in historical fact).

42. *Id.* at 732–33 (describing implications of historical fact-finding for traditional adversary process).

originalism has largely sidestepped, if not ignored,⁴³ the procedural and constitutional rules for fact-finding in civil and criminal cases.⁴⁴

Specialized fact-finding in constitutional cases is not a new phenomenon, and scholars such as David Faigman, Henry Monaghan, and others have developed useful taxonomies for how the Supreme Court and lower courts have handled atypical questions of fact that can arise in constitutional cases.⁴⁵ Allison Orr Larsen, Brianne Gorod, and others have described how the Justices find facts through sources like amicus briefs and their own research.⁴⁶ The novel challenge presented by the current turn in originalism is making sense of the Court's mandates of *historical* fact-finding not only with regard to constitutional interpretation but in the application of constitutional doctrine. In prior work, we have explored the Court's increasing invocation of historical facts to declare the content of constitutional law.⁴⁷ Here, we focus on the implementation and application of those tests.

As the Justices themselves have emphasized, a crucial dimension of the Supreme Court's role is to articulate workable doctrine that can be consistently and faithfully applied by the lower courts.⁴⁸ The experiences of lower courts and litigants are important sources of information in that regard. Indeed, a precedent's workability has traditionally been a factor in

43. As its title suggests, Stephen Sachs' recent work *In Praise of Ignoring Facts* indicates that the neglect is not accidental, and indeed that it is justified. Stephen Sachs, *In Praise of Ignoring Facts*, 33 WM & MARY BILL OF RTS. L.J. 411, 438 (2024). Sachs argues that more reliance on theory can guide us to better answers regarding "more consideration about *which* facts about the past" should be relied upon. *Id.* We argue that existing constitutional law and statutes provide rules—sometimes clear ones—for making those determinations, which originalist theories and judges have elided.

44. We mean this as a relative claim. There has been some very illuminating scholarship written on related issues, including for example the use of historians as expert witnesses, which we address in more detail below. See *infra* section III(A)(3).

45. See George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 55 (1992) (discussing how Court sometimes imposes clear and convincing standard when dealing with questions of fact); DAVID FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 46 (Oxford Univ. Press 2008) (explaining how the Court uses doctrinal facts to interpret the Constitution); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 264 (1985) (explaining how appellate courts analyze facts in First Amendment cases).

46. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 25–26, 50 (2011) (examining how appellate courts rely on briefing for factfinding and outside research studies); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1817 (2014) (discussing problems with relying on amicus briefs for fact-finding).

47. See Blocher & Garrett, *supra* note 20, at 748 (discussing how the Court in recent years has relied on historical facts).

48. Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 490 n.215 (2003) (“[C]ourts, particularly supreme courts, must construct doctrine that is easily administrable by lower courts and other addressees of the courts’ doctrines.”).

determining whether to accord it stare decisis effect,⁴⁹ and the Court has revisited constitutional doctrine precisely because it determined that lower courts could not sensibly apply a previous doctrinal standard.⁵⁰ It is therefore important to ask not only whether history-based doctrine is desirable in theory, but whether it *works* in practice.⁵¹

In Part I, we describe the shift to originalist doctrinalism and the extraordinary weight it places on historical facts. The Justices have long used history to inform the search for constitutional meaning at a broad level and have increasingly used it to support declaration of new doctrinal rules, as we have described elsewhere.⁵² And yet constitutional interpretation has never been as ostensibly fact-based as it is today. The Supreme Court has tasked lower courts with adjudicating specific claims by reference to historical facts through a variety of approaches ranging from historical analogy tests, to tradition-based tests, to more typical intent or purpose-focused tests. Those standards are vague, potentially highly subjective, and not defined either in the quantity or quality of evidence needed. And it is not just the dissenting Justices that have raised those concerns. Even the Court's self-professed originalists have fractured, particularly in the 2024–2025 Term, about whether these approaches are workable or appropriate, and what responsibility the Justices themselves have for adopting them.⁵³

In Part II, we show how lower courts and litigants have struggled to apply this welter of history-focused constitutional rules in new civil and criminal cases, often in procedural postures unsuited to specialized discovery

49. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2238 (2022); *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

50. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”).

51. This is not to say that “manageability” should be readily invoked to avoid constitutional claims, only that it is an important consideration in designing constitutional doctrine. Regarding the inconsistent and growing use of a “manageability prerequisite,” particularly in election litigation, and the malleability of such analysis, see Michael Gentithes, *A Manageable Constitution*, 64 B.C. L. REV. 1331, 1365 (2023).

52. *See Blocher & Garrett, Historical Fact-Finding, supra* note 20, at 701–03 (discussing the shift from the use of history as context to the use of history to determine the content of constitutional law).

53. *See infra* notes 117–20 (discussing division among the Court's originalists in *Vidal v. Elster*, 144 S. Ct. 1507 (2024)); Josh Gerstein, *Amy Coney Barrett May be Poised to Split Conservatives on the Supreme Court*, POLITICO (June 19, 2024), <https://www.politico.com/news/2024/06/19/amy-coney-barrett-supreme-court-conservatives-rift-00164047> [https://perma.cc/G8H7-M9HE]; Elias Neibart, *Trading Jabs Over Tradition*, HARV. L. REV. BLOG (June 28, 2024), <https://harvardlawreview.org/blog/2024/06/trading-jabs-over-tradition/> [https://perma.cc/2A77-PM3H] (discussing how Justice Barrett's views may differ from other originalists on the Court).

and fact-development.⁵⁴ Many lower courts understandably have sought to apply standard rules for fact-finding, even as the Supreme Court has failed to do so itself, much less explain what level of evidence is required to apply the law to historical sources and then to the facts of a given case.⁵⁵ For the same reason, but typically less recognized, the shift to history-based law application changes the burden on litigants, not all of whom can muster in-depth historical research on a briefing schedule or retain the appropriate historians as experts. Indeed, it remains unclear whether and how historians are treated as expert witnesses by judges, some of whom have asserted that they can evaluate historical facts without any expert assistance in building and interpreting the record.⁵⁶ And even if a trial judge does diligently assemble the appropriate factual record, it is unclear whether it will receive any deference on appeal, since the standards of review remain largely contested and often seem to be ignored.⁵⁷

In Part III, we suggest some initial steps toward adequate historical fact-finding in constitutional cases. These suggestions are partial and provisional, both because the problems are so broad and because the doctrinal targets are constantly changing. We have previously written about the possible role of Congress in addressing the appropriate standards for factual findings and appellate deference in constitutional cases.⁵⁸ Here, we emphasize how current constitutional law and statutes require, based on principles including jury trial and due process rights, that the parties have an opportunity to develop a record before constitutional claims are resolved on the merits. Lower courts should treat these factual disputes as they would disputes regarding any other area of technical or scientific evidence—relying on the parties but also, where needed, on experts applying appropriate and reliable methods. Appellate courts must insist on an adequate record, and they must respect the fact-finding ability of lower courts through deference and remands, to develop a factual record, as appropriate.

Much recent commentary has focused on how bedrock constitutional rights can be shaped—and threatened—by shifts in constitutional theory and

54. See Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 269–70 (2022) (arguing that a methodology is not necessarily suitable for use by lower courts simply because it is suitable for use by the Supreme Court, and vice versa).

55. Regarding the Court's own failures, see Blocher & Garrett, *Historical Fact-Finding*, *supra* note 20, at 743–45 (discussing the Supreme Court's failure to provide guidance on the standard of review of a trial court's historical fact-finding).

56. See Joseph Blocher & Brandon L. Garrett, *Historians as Experts in Constitutional Law*, at 13 (work in progress) (noting that many judges do not retain experts to assist with historical fact-finding).

57. Blocher & Garrett, *Historical Fact-Finding*, *supra* note 20, at 743–45.

58. Blocher & Garrett, *Fact Stripping*, *supra* note 39, at 37–39; see also Haley Proctor, “Just the Facts, Ma’am”? A Response to Professors Blocher & Garrett, 73 DUKE L.J. ONLINE 199, 200–02 (2024) (arguing that a “fuzzy line” distinguishes law and fact).

interpretation.⁵⁹ But that should not obscure the degree to which the threats are lurking, too, in the seemingly everyday details of litigation practice. In an area of what might be called “evolving standards of [history],”⁶⁰ concerns regarding vague and subjective constitutional standards come not from reliance on social science or public policy, but rather history and/or tradition. The concern with the “imperial” power of the Supreme Court stems not only from its constitutional law declaration role, but also from its role in shaping historical fact-finding.⁶¹ Whether lower courts can satisfy the demands placed upon them by these history-focused doctrines remains to be seen. And if it is not workable to rely so heavily on historical facts in constitutional doctrine, then judges should reorient interpretation—as in other contexts like the Sixth Amendment Confrontation Clause⁶²—to constitutional standards that do not require judges to apply history as law.

I. The New Originalist Doctrinalism

Constitutional doctrine has long been intertwined with fact-finding, including historical fact-finding. Judges have often looked to the specific history of particular textual provisions,⁶³ for example, or the broader backdrop against which they were enacted⁶⁴ to determine the meaning of the Constitution. But in recent years, the Justices have increasingly turned to history not simply as a way of finding the Constitution’s meaning but of implementing it—both by declaring doctrinal tests and by making those tests reliant on further fact-finding by lower courts in specific cases and controversies. And yet insufficient judicial and scholarly attention has been

59. See, e.g., Cary Franklin, *History and Tradition’s Equality Problem*, 133 YALE L.J. F. 946, 951 (2024) (describing implications of reliance on history in a manner inconsistent and unsupported by modern equality doctrines); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 110 (2022) (“[T]he Court’s recent history has been one of withdrawing rights from the public”); Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99, 127–32 (2023) (critiquing reliance on and origins of history and tradition arguments in interpretation).

60. See *infra* note 280 (discussing the analogy to the arc of Eighth Amendment evolving standards of decency jurisprudence first set out in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

61. See Lemley, *supra* note 59, at 110 (discussing individual rights that have been taken away by the Supreme Court); Kate Shaw, *The Imperial Supreme Court*, N.Y. TIMES (June 29, 2024), <https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html> [<https://perma.cc/8JRA-Z8HQ>] (noting the anti-democratic effects of the Supreme Court’s history and tradition approach in landmark cases).

62. See *infra* section III(C)(3).

63. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (“Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.”).

64. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

paid to the essential question of what type of fact-finding is necessary to conduct such inquiries and how.

In this Part, we first describe in broad strokes the increasingly prominent role of historical fact-finding in constitutional doctrine—a move from what originalists often call the realm of “interpretation” to that of “construction.” That shift raises new and difficult questions for originalism as a theory of adjudication, as opposed to a critical mode or a theory of interpretation. And as we then show, it has manifested in a variety of different tests, including the use of historical analogies to evaluate modern regulations (as in the Seventh and Second Amendment contexts) and reliance on tradition to identify rights (as in the Due Process context).

A. *From Historical Meaning to Historical Doctrine*

There is nothing new about the Supreme Court using historical evidence in constitutional cases,⁶⁵ but in recent years the Justices have come to rely on it more heavily and in different ways than ever before. The constantly rising high water mark⁶⁶ is pushed by an incoming tide that shows no sign of abating. Little wonder that “we are all originalists now” has become something of a catchphrase.⁶⁷

For simplicity’s sake, we will use “originalism” as a catch-all for the broad family of approaches that rely on historical evidence to interpret and implement the Constitution. As we note throughout, originalism comes in many different forms,⁶⁸ and travels alongside other approaches like “historical gloss” and “liquidation” that also rely on historical evidence. The complications that we discuss apply in one way or another to any approach to constitutional interpretation and application that relies on historical fact-finding.

65. See, e.g., *Ex Parte Bollman*, 8 U.S. 75, 95 (1807) (emphasizing that the first Congress “must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege [the writ of habeas corpus] should receive life and activity”); *McCulloch v. Maryland*, 17 U.S. 316, 362 (1819) (“But, surely, the framers of the constitution did not intend, that the exercise of all the powers of the national government should depend upon the discretion of the State governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate.”).

66. See Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325, 325 (2009) (describing *Heller* as a “high water” mark in originalism’s rise, noting that both the majority and dissent relied on originalist methods and promoting the claim that “we are all originalists now”).

67. See, e.g., ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011) (discussing the debate between originalism and living constitutionalism).

68. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (“A review of originalists’ work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.”).

The Supreme Court's current turn to history is characterized not simply by a change in volume—of ever-increasing citations to old materials—but in how history is being used; the transformation is a matter of quality as well as quantity. That change roughly maps onto the distinction between constitutional *interpretation* and constitutional *construction*.⁶⁹ As Larry Solum explains, “interpretation recognizes or discovers the linguistic meaning of an authoritative legal text.”⁷⁰ By contrast, “construction gives legal effect to the semantic content of a legal text.”⁷¹ Interpretation is a matter of figuring out what the Constitution means, while construction is the realm of doctrine—the rules and tests with which courts implement that meaning.⁷² Historical evidence can potentially be used for either of these tasks, or both, or neither.

Among the many ongoing shifts and debates in originalism, perhaps the most significant as a matter of adjudication is the growing prominence of historical fact-finding in the realm of construction—of announcing and applying constitutional tests. We call this the turn to “originalist doctrinalism,” and it raises the distinct challenges that are our focus here.

Although the line between interpretation and construction might not always be bright, there are important differences between using history to guide a broad search for constitutional meaning (interpretation) and using history to determine the outcome of specific controversies (construction). For example, courts might turn to history to illuminate whether the Second Amendment protects an “individual” right to keep and bear arms for private purposes or instead is limited to people, arms, and activities having some connection to the organized militia. That is a matter of *interpretation* that can be accomplished in originalist fashion, as it was in *District of Columbia v. Heller*.⁷³ In some cases, that might be enough to resolve a constitutional question; the meaning of the Constitution is determinate enough to resolve the eligibility of a twenty-five-year-old to be President.⁷⁴

But most constitutional disputes must be resolved by recourse to doctrine, not constitutional meaning alone. This is what some originalist

69. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010) (explaining the difference).

70. *Id.*

71. *Id.* at 103; see also KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 3 (1999) (defining construction as “the method of elaborating constitutional meaning in [the] political realm” and explaining that it “supplements other methods of determining constitutional meaning”).

72. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453, 455 (2013).

73. *District of Columbia v. Heller*, 554 U.S. 570, 577, 580–81 (2008).

74. U.S. CONST. art. II, § 1, cl. 5.

scholars call “the construction zone.”⁷⁵ Having found that the right to keep and bear arms is not limited to the organized militia does not answer the question of whether the right extends to non-citizens, or those under indictment, or minors. For nearly a decade after *Heller*, the federal courts answered such questions using a two-step framework that invoked history but was not solely reliant on it.⁷⁶ The result was a body of Second Amendment doctrine that relied on originalism for questions of meaning but employed scrutiny tests and other arguably⁷⁷ non-originalist methods to implement it.⁷⁸

That changed with *Bruen*, which ostensibly ruled out any reliance on means-end scrutiny and required instead that modern gun laws be evaluated on the basis of whether they are “consistent with this nation’s historical tradition of gun regulation.”⁷⁹ *Bruen* led to an enormous change in the method and substance of Second Amendment adjudication in the lower courts, generating substantial criticism from both scholars and judges.⁸⁰ And yet in *United States v. Rahimi*, the Court broadly reaffirmed this historical test (while casting it as a somewhat broader level of generality), even as it chided lower courts for misunderstanding *Bruen*’s instructions and applying the test too woodenly.⁸¹

Bruen and *Rahimi* represent a broader shift to history in the construction zone. This is true in at least two ways. One, as we have explored in detail elsewhere, is that the Justices are using historical facts to *declare* the content of constitutional law—not only the meaning of constitutional text (as in

75. Solum, *Originalism and Constitutional Construction*, *supra* note 72, at 458 (“We can call this domain of constitutional underdeterminacy ‘the construction zone.’”).

76. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1490–93 (2018) (hypothesizing that the Second Amendment cases in the decade following *Heller* rely on controlling precedent as well as history).

77. Inasmuch as the historical understanding just *was* that firearms could be restricted in the public interest, or when means and ends were appropriately tailored, the historical approach ends up looking a lot like scrutiny or even a reasonableness test. William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1466, 1471, 1489 (2024) (arguing, after *Bruen*, that the “general law” requires only that a gun restriction be reasonable); see also Andrew Willinger, *Text, History, and Tradition as Heightened Scrutiny*, 60 WAKE FOREST L. REV. 415, 459 (arguing that in practice the adoption of text, history, and tradition has led to the invalidation of more gun laws).

78. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1455, 1494 (2018) (empirically evaluating roughly 1000 post-*Heller* Second Amendment claims and finding heavy reliance on scrutiny tests).

79. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

80. See sources cited *supra* note 28.

81. See *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2022) (“[S]ome courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber.”).

Heller), but the doctrinal tests with which it will be implemented.⁸² In many areas, this has the effect of requiring judges and litigants to reason directly from historical sources unmediated by familiar doctrinal tests like the tiers of scrutiny. This in turn raises hard questions about whether history is being used as evidence of legal meaning or as *law*.⁸³ While originalists broadly agree that history is central to constitutional interpretation (i.e., figuring out the meaning of the document), they differ about whether and how historical sources can either determine the shape of doctrinal tests or guide the application of those tests in particular cases. As Gary Lawson puts it, “Originalism can be a theory of *interpretation*, a theory of *adjudication*, or both.”⁸⁴

Put another way, the Court’s use of history in cases like *Bruen* appears to go beyond public meaning originalism—generally considered the standard form of modern originalism⁸⁵—which seeks to identify the original public meaning of constitutional text.⁸⁶ Within the terminology of originalism, *Bruen* seems to come closer to *original expected applications* originalism.⁸⁷ As Jack Balkin explains, the latter “asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.”⁸⁸

82. Blocher & Garrett, *supra* note 20, at 703–04.

83. See *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) (arguing that evidence of “‘tradition’ unmoored from original meaning is not binding law” and adding that “this use of history walks a fine line between original meaning (which controls) and expectations about how the text would apply (which do not)”; see also *infra* notes 112–20).

84. Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1555 (2012).

85. See Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1424 (2021) (“The leading current version [of originalism] is public meaning originalism.”); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251 (2019) (“Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s.”).

86. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (Princeton Univ. Press 2005) (describing “original meaning originalism” as seeking “the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132–33 (2003) (describing a theory of “original, objective-public-meaning textualism”) (emphasis omitted).

87. See sources cited *supra* note 86 (noting that originalists tend to prefer original public meaning originalism); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1637 (“Original public meaning should be distinguished from what have been called ‘original expected application[s].’” (quoting Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–96 (2007))).

88. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296–97 (2007) (“[C]onstitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text.”).

Rahimi offered an opportunity to loosen *Bruen*'s focus on history. At issue was a federal law disarming people subject to certain qualifying domestic violence restraining orders (DVROs).⁸⁹ The Fifth Circuit, applying *Bruen*'s historical-analogical approach, concluded that the law was an “outlier[] that our ancestors never would have accepted” and thus inconsistent with “our nation’s historical tradition of firearm regulation,”⁹⁰ making it unconstitutional under *Bruen* despite changed understandings and attitudes regarding armed domestic violence.⁹¹

Many if not most commentators thought that the government would win, and that on the facts of the case it should not be difficult.⁹² After all, a judge had made an individualized, specific finding that *Rahimi* presented a credible threat of physical violence to his domestic partner, and—at a hearing of which *Rahimi* had notice and an opportunity to participate—entered an order forbidding him to have a gun.⁹³ When police later investigated *Rahimi* for a string of other gun-related offenses, they found both a gun and a copy of the order forbidding him to have one.⁹⁴ Even under a thoroughgoing historical approach, this would seem to fall within a principle that then-Judge Amy Coney Barrett had articulated years earlier when using history and tradition to identify the scope of the right and its limitations: “History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.”⁹⁵

The eight-Justice majority in *Rahimi* did emphasize that the historical inquiry should be focused on “principles” and not on the search for a “historical twin.”⁹⁶ But the specific principle it identified was narrow: “[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.”⁹⁷ Indeed, the Court specifically noted that it was not even affirming the entirety of the DVRO prohibitor, just one subpart of

89. 18 U.S.C. § 922(g)(8).

90. *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (quoting *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022)), *rev’d and remanded*, 144 S. Ct. 1889 (2024).

91. Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats under Bruen*, 98 N.Y.U. L. REV. 1795, 1827–28 (2023).

92. *See, e.g., id.* at 1829 (“[T]here is nothing in *Bruen* that requires federal judges to expose domestic partners—and others—to this heightened risk of gun violence.”).

93. *United States v. Rahimi*, 144 S. Ct. 1889, 1895 (2024).

94. *Id.*

95. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

96. *Rahimi*, 144 S. Ct. at 1898 (quoting *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022)).

97. *Id.* at 1903.

it, and only as applied to Rahimi’s extraordinary facts.⁹⁸ *Rahimi*, then, broadly reaffirms *Bruen*’s reliance on history as a matter of law application.

More significantly for our purposes here, the majority went on to explain (and recast) the holdings in *Bruen* and *Heller* and criticize lower courts for having misapplied them: “Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases.”⁹⁹ Rephrasing *Bruen*’s rule that modern gun laws be “consistent with this Nation’s historical tradition,”¹⁰⁰ the majority in *Rahimi* admonished: “As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with *the principles that underpin* our regulatory tradition.”¹⁰¹ Although the majority seemed to gloss over the shift to “principles,” commentators immediately noted its significance.¹⁰² Concurring opinions by Justices Gorsuch, Kavanaugh, and Barrett went on to provide broad defenses and explanations of originalist methodology, even as they disagreed with its application by Justice Thomas, author of *Bruen* and the lone dissenter in *Rahimi*. (In this methodological disagreement, *Rahimi* echoed *Vidal v. Elster*, which we discuss in more detail below.)¹⁰³

For our purposes here, what stands out from this passage in *Rahimi* is not the narrow result but the Justices’ apparent disregard—even disdain—for the difficulties faced by litigants and lower courts, and its assertion of the Court’s paramount role in setting standards for the use of historical facts.¹⁰⁴ Identifying the level of generality of the “principle” involved and canvassing historical sources in future cases will not necessarily be any easier for lower

98. *Id.* at 1902 (“Section 922(g)(8) can be applied lawfully to Rahimi.”).

99. *Id.* at 1897.

100. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

101. *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (emphasis added).

102. See, e.g., Albert W. Alschuler, *United States v. Rahimi: Let’s Cheer the Supreme Court’s Result But Boo Its Ever-Stranger Standard*, JUSTIA: VERDICT (July 2, 2024), <https://verdict.justia.com/2024/07/02/united-states-v-rahimi-lets-cheer-the-supreme-courts-result-but-boo-its-ever-stranger-standard> [<https://perma.cc/C8E4-29RP>] (noting the impact of the change in Second Amendment analysis that follows from the shift to “principles” analysis); Marcia Coyle, *No Earthquake, but Did the Supreme Court Shift a Bit in Its Approach to Guns?*, NAT’L CONST. CTR.: DAILY CONST. BLOG (June 24, 2024), <https://constitutioncenter.org/blog/no-earthquake-but-did-the-supreme-court-shift-a-bit-in-its-approach-to-guns> [<https://perma.cc/YE9R-TRHT>] (underscoring the importance of the shift to underlying principles analysis); Douglas Letter, *Rahimi Paves Way for Courts to Stop Seeking Historical ‘Twins’*, BLOOMBERG (June 24, 2024), <https://news.bloomberglaw.com/us-law-week/rahimi-paves-way-for-courts-to-stop-seeking-historical-twins> [<https://perma.cc/K7ND-RTKY>] (emphasizing the shift from “historical twins” to “underlying principles” analysis).

103. See *infra* notes 112–25 and accompanying text.

104. See *Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring) (“And whatever indeterminacy may be associated with seeking to honor the Constitution’s original meaning in modern disputes, that path offers surer footing than any other this Court has attempted from time to time.”).

courts.¹⁰⁵ The bottom line was to wave off the evidence that *Bruen*'s test (which itself had explicitly replaced a test developed by and adopted throughout the federal courts of appeals) presented difficulties in application: "Discerning and developing the law in this way is 'a commonplace task for any lawyer or judge.'"¹⁰⁶ Thus, the Court expressed supreme confidence in its power to step in and resolve resulting confusion, while placing the blame on lower courts for suffering such confusion.

The Court's dedication to historical tests despite these problems of administrability starkly demonstrates its dedication to top-down resolution of standards hinging on historical facts. What we are seeing is not so much a dialogue between the Supreme Court and lower courts about the practicality of various doctrines,¹⁰⁷ but the Justices' stubborn insistence that their new version of originalist doctrinalism is more "administrable" than doctrinal alternatives like the tiers of scrutiny.¹⁰⁸ Notably, the two Justices who once served as trial court judges have consistently registered different views. In her *Rahimi* concurrence, Justice Jackson argued that "[t]he message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness."¹⁰⁹ She added:

Consistent analyses and outcomes are likely to remain elusive because whether *Bruen*'s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified.¹¹⁰

Dissenting in *Kennedy v. Bremerton School District*, Justice Sonia Sotomayor asked, "If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt?"¹¹¹

105. Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 6, 8).

106. *Rahimi*, 144 S. Ct. at 1898 (quoting *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022)). The majority previewed as much in *Bruen*, following another overstatement of the degree to which originalism has been a part of doctrinal implementation: "We see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims." *Bruen*, 142 S. Ct. at 1234.

107. See, e.g., Deborah Beim, *Learning in the Judicial Hierarchy*, 79 J. POL. 591, 591–92 (2017) (discussing the Supreme Court's role in the judicial hierarchy with respect to its aggregation of lower court decisions in deciding which cases to review).

108. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130, 2130–31 n.6 (2022).

109. *United States v. Rahimi*, 144 S. Ct. 1889, 1927 (2024) (Jackson, J., concurring).

110. *Id.* at 1929 (Jackson, J., concurring).

111. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2450 (2022) (Sotomayor, J., dissenting).

The tensions evident in *Rahimi* had actually surfaced a week earlier in a remarkable series of opinions in *Vidal v. Elster*.¹¹² The Court in that case unanimously rejected a First Amendment challenge to the Lanham Act's name clause, which prohibits the registration of a trademark that "[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent."¹¹³ But the division amongst the Justices demonstrates the underlying difficulties of using historical evidence in law application.

Justice Clarence Thomas announced the opinion of the Court but could not hold a solid majority. Echoing his approach in *Bruen*, he concluded that the "names clause has deep roots in our legal tradition" and that "[w]e see no reason to disturb this longstanding tradition, which supports the restriction of the use of another's name in a trademark."¹¹⁴ Justice Brett Kavanaugh, joined by Chief Justice John Roberts, declined to join Part III of Justice Thomas's opinion, entering a concurrence suggesting that "a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree."¹¹⁵ Justice Sotomayor, joined by Justices Elena Kagan and Ketanji Brown Jackson, would have decided the case on the basis that speech was not being punished—a conclusion derived from existing doctrine, not direct historical analysis—and rejected the majority's test as replicating the same kind of confusion that *Bruen* had engendered.¹¹⁶

In some ways, the most notable opinion in *Vidal* was Justice Barrett's.¹¹⁷ Like Justice Thomas, she reviewed the historical sources but emphatically rejected what she characterized as using historical tradition *as* law: "To be sure, tradition has a legitimate role to play in constitutional adjudication. . . . But tradition is not an end in itself—and I fear that the Court uses it that way here."¹¹⁸ She went on to describe the difference between using history as evidence and history as law:

The Court does not (and could not) argue that the late-19th and early-20th century names-restriction tradition serves as evidence of the

112. *Vidal v. Elster*, 144 S. Ct. 1507 (2024).

113. *Id.* at 1512–13 (alteration in original) (internal quotation marks omitted) (quoting 15 U.S.C. § 1052(c)).

114. *Id.* at 1519, 1523.

115. *Id.* at 1524 (Kavanaugh, J., concurring).

116. *Id.* at 1534, 1537–38 (Sotomayor, J., concurring).

117. *See id.* at 1524–25 (Barrett, J., concurring) ("The Court claims that 'history and tradition' settle the constitutionality of the names clause . . . [t]hat is wrong twice over."). For appraisals, see, for example, Matt Ford, *Amy Coney Barrett Breaks With Supreme Court Originalists*, THE NEW REPUBLIC (June 19, 2024), <https://newrepublic.com/article/182870/amy-coney-barrett-breaks-supreme-court-originalists> [<https://perma.cc/JGR6-P4VT>] (discussing Justice Barrett's rejection of Justice Thomas's reasoning); Josh Gerstein, *Amy Coney Barrett May be Poised to Split Conservatives on the Supreme Court*, POLITICO (June 19, 2024), <https://www.politico.com/news/2024/06/19/amy-coney-barrett-supreme-court-conservatives-rift-00164047> [<https://perma.cc/G8H7-M9HE>] (same).

118. *Vidal*, 144 S. Ct. at 1531 (Barrett, J., concurring).

original meaning of the Free Speech Clause. Nor does it treat the history it recites as a persuasive data point. Instead, it presents tradition itself as the constitutional argument; the late-19th and early-20th century evidence is dispositive of the First Amendment issue. Yet what is the theoretical justification for using tradition that way?¹¹⁹

Nor, she argued, would doing so negate the role of judges: “Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test.”¹²⁰

Again, the use of historical evidence in resolving constitutional controversies is not novel in and of itself. Incorporation doctrine has long asked whether a particular Due Process liberty interest is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”¹²¹ Seventh Amendment doctrine, as we discuss in more detail below,¹²² was based on historical analogy long before *Bruen* adopted a similar test for the Second.¹²³ And scholarly and judicial attention to matters of “historical gloss”¹²⁴ and “liquidation”¹²⁵ has similarly increased the relevance of historical fact-finding. But for the most part, these approaches have been used to establish the *meaning* of constitutional text—to recognize a right or not, for example, rather than to evaluate the constitutionality of burdens on that right.¹²⁶

For our purposes, what is most significant about the shift to originalist doctrinalism is what it demands of judges and litigants—and at the same time, how it amasses more power for the Supreme Court. It is one thing for the Supreme Court to announce a major, law-changing decision on the basis of historical sources. It is another to do so in a way that also directs lower courts to resolve concrete disputes using additional sets of historical facts

119. *Id.* at 1531–32 (citation omitted).

120. *Id.* at 1532.

121. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The Court’s decision in *Dobbs* appears to signal a revitalization of the *Glucksberg* test, which added the gloss that the right in question must be “carefully” described or “formulat[ed].” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247, 2250 (2022) (quoting *Glucksberg*, 521 U.S. at 721).

122. *See infra* section II(B)(1).

123. Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 *YALE L.J.* 852, 872 (2013).

124. *See* Bradley & Siegel, *Historical Gloss*, *supra* note 11, at 4 (highlighting how the executive and judicial branches use history).

125. *See* Baude, *Constitutional Liquidation*, *supra* note 10, at 261–62 (explaining liquidation as a “specific way of looking at post-Founding practice to settle constitutional disputes”).

126. The distinction between interpretation and construction in this regard is not inevitably clear, of course. To approve or reject a particular restriction on a right (a matter of construction) is arguably to set the boundaries of that right’s meaning (a matter of interpretation). And yet even if only a matter of degree, the difference is significant—especially in terms of what it means for actors outside the Supreme Court, as we describe in more detail below. *See infra* subpart II(C).

going forward. The Court has arrogated a new role to itself, with power over lower courts, not in saying what the constitutional law is, but in saying what the facts are or should be and how to process them.

B. New Uses of Old Facts

Our focus here is on how the Supreme Court has tasked lower federal courts with applying historical standards in constitutional cases. Our claim thus far has been that the Court is increasingly creating doctrinal tests that incorporate historical fact-finding; it is moving beyond the traditional originalist use of history to find constitutional meaning and instead directing lower courts to use history to implement that meaning in particular cases and controversies. In doing so, it has created new questions of fact, law, and procedure for lower court judges and litigants, changing the nature of constitutional litigation practice and raising new constitutional concerns. Here, we highlight two doctrinal modes and identify some of the challenges they raise.

1. Evaluating Regulations Based on Historical Analogy.—One prominent pivot in the Court’s recent historical cases has been the turn to “originalism-by-analogy”—requiring lower courts to directly compare modern and historical laws, often with little guidance about the metrics that make them relevantly similar or not.¹²⁷

Elements of this approach can be found in isolated pockets of constitutional law. The Seventh Amendment jury trial right states that in “[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”¹²⁸ The Court has interpreted this text as calling for a “historical test”—an inquiry into whether a current cause of action would have required a jury trial at common law, by analogizing it to common law causes of action.¹²⁹ Following this historical analogy test, the Supreme Court asks whether the cause of action “either was tried at law at the time of the founding or is at least analogous to one that was” and, if so, asks “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”¹³⁰

The Seventh Amendment’s historical-analogical test, like the other historical tests described here, has been criticized as unclear and

127. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 *YALE L.J.* 99, 103, 105 (2023).

128. U.S. CONST. amend. VII.

129. *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974).

130. *Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996) (citations omitted).

manipulable.¹³¹ Justice William Brennan argued that often the “result is less the discovery of a historical analog than the manufacture of a historical fiction.”¹³² In *Markman v. Westview Instruments*, Justice David Souter, writing for the majority, acknowledged that “[w]here history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art.”¹³³ Ultimately, the Court decided on the basis of those functional considerations that the question of a patent’s construction should be for the judge, not jury, as a matter of comparative expertise and in the interest of uniformity.¹³⁴ Having settled that question, lower courts did not have to then make their own historical analogies regarding the topic of patent claim construction.

In other areas raising Seventh Amendment questions, however, lower courts must conduct the historical analysis themselves, and it remains unclear when a lack of historical evidence gives way to functional considerations. To give one recent example, the Supreme Court in *SEC v. Jarkesy* found that Securities and Exchange Commission adjudication violates the Seventh Amendment since the “close relationship” between federal securities laws and common-law fraud “confirms that this action is ‘legal in nature’” and entitles respondents to a jury trial.¹³⁵ The dissent countered that this approach “takes a wrecking ball to . . . settled law and stable government practice.”¹³⁶

The specific text of the Seventh Amendment calls for historical analogy more clearly than any other constitutional text.¹³⁷ However, the scope of that inquiry is not self-defining, nor will it always (or even often) provide clear answers, as *Markham* demonstrates. Further, the questions at issue in cases like *Jarkesy* regarding the scope of the public rights doctrine implicate the scope of judicial primacy over the decision whether jury trial rights attach to claims. Whether history provides answers by way of analogy and whether federal judges can turn to functional concerns are crucial questions in other

131. See, e.g., Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1005–07 (1992) (criticizing how courts have tried to find black letter law in the text of Seventh Amendment, which has led to hopelessly comparing modern and eighteenth-century cases); Rachael E. Schwartz, “Everything Depends on How You Draw the Lines”: An Alternative Interpretation of the Seventh Amendment, 6 SETON HALL CONST. L.J. 599, 603 (1996) (discussing the theory that the Seventh Amendment is not a guarantee of jury trial and proposing an alternative interpretation).

132. *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 578–79 n.7 (1990) (Brennan, J., concurring).

133. *Markman*, 517 U.S. at 388.

134. *Id.* at 390.

135. *Id.* at 2131 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)).

136. *Id.* at 2164 (Sotomayor, J., dissenting).

137. See U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

areas in which the constitutional text does not clearly call on courts to interpret historical records.

In recent years the most prominent site of historical-analogical reasoning has not been the Seventh Amendment but the Second. As noted above, the *Bruen* test directs judicial attention to “the historical tradition that delimits the outer bounds of the right to keep and bear arms.”¹³⁸ A law complies with the latter if it comports with “this Nation’s historical tradition of firearm regulation”¹³⁹ or, per *Rahimi*, the “principles that underpin our regulatory tradition.”¹⁴⁰ That is a potentially broad concept, requiring far more research and fact-finding than in the Seventh Amendment context.

Given our focus here on fact-finding and judicial process, it is worth noting that the district court in *Bruen* itself dismissed the complaint for failure to state a claim and the Court of Appeals affirmed based on prior binding precedent.¹⁴¹ Thus, the only question heard was the question of law—whether the complaint stated a claim under the Second Amendment. In its own decision, however, the Supreme Court cited a wide range of historical facts concerning current and past firearms regulations, despite the lack of any record in the courts below.¹⁴² The Court held that so long as a gun regulation falls within the scope of the Amendment, “the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.”¹⁴³ And yet, the Court did not remand to give the government a chance to make that showing. Instead, the Court “canvassed the historical record” itself and found the statute unconstitutional after a “long journey through the Anglo-American history of public carry. . . .”¹⁴⁴

Having failed to engage in traditional fact-finding itself,¹⁴⁵ the *Bruen* Court explained the new Second Amendment analysis as follows:

138. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

139. *Id.* at 2126.

140. *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

141. *New York State Rifle & Pistol Ass’n v. Beach*, 818 Fed. App’x 99, 100 (2d Cir. 2020).

142. *See Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting) (“[T]he Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record.”).

143. *Id.* at 2127.

144. *Id.* at 2127, 2156.

145. This lack of record evidence went beyond the historical, of course. Indeed, a central complaint was that the “proper cause” standard for granting a permit gave officials in New York far too much discretion, which they could abuse, and with limited judicial review. *See, e.g., id.* at 2161 (Kavanaugh, J., concurring) (asserting that the “open-ended discretion” granted to governmental officials made “the may-issue regime . . . constitutionally problematic”). As Justice Breyer asked in dissent: “[O]n what evidence does the Court base these characterizations? Recall that this case comes to us at the pleading stage. The parties have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record.” *Id.* at 2170 (Breyer, J., dissenting).

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”¹⁴⁶

It requires analogical reasoning “to apply faithfully the balance struck by the founding generation to modern circumstances”¹⁴⁷ And as noted above, the Court in *Rahimi* reiterated its commitment to this standard—albeit rephrased to focus on the “principles” underlying historical tradition.¹⁴⁸

It would be an understatement to say that *Bruen*’s test is under-specified and that it has caused substantial disruption in the lower courts.¹⁴⁹ The Court provided precious little guidance about what time periods are relevant for the necessary historical fact-finding,¹⁵⁰ or what kinds of evidence count,¹⁵¹ or how to deal with historical “outliers.”¹⁵² Though *Bruen* in practice has resulted in more victories for Second Amendment claims,¹⁵³ even those who favor that outcome have noted that “some serious difficulties that will arise in applying the new approach that *Bruen* adopts” and that “the majority’s test is inherently manipulable.”¹⁵⁴

146. *Id.* at 2129–30 (citation omitted).

147. *Id.* at 2133 n.7.

148. *United States v. Rahimi*, 144 S. Ct. 1898, 1898 (2024) (“As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.”).

149. *See* sources cited *supra* note 28.

150. *See, e.g., Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring) (“[T]he Court avoids another ‘ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868’ or when the Bill of Rights was ratified in 1791.”) (quoting *id.* at 2138 (majority opinion)); *Rahimi*, 144 S. Ct. at 1916 (Kavanaugh, J., concurring) (“When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important.”).

151. *See Rahimi*, 144 S. Ct. at 1916 (Kavanaugh, J., concurring) (“The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later.”). *But see id.* at 1929 (Jackson, J., concurring) (“To what historical era (or eras) should courts look to divine a historical tradition of gun regulation? How many analogues add up to a tradition? Must there be evidence that those analogues were enforced . . . ? How much support can nonstatutory sources lend? I could go on—as others have.”).

152. *See, e.g., Bruen*, 142 S. Ct. at 2153 (labelling a Texas statute and a pair of Texas cases as “outliers” and stating “we will not give disproportionate weight to a single state statute and a pair of state-court decisions”); *see also* Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 50 (“*Bruen*’s description of New York’s law as a contemporary and historical outlier raises fundamental questions about how the Justices define that term and the jurisprudential significance of that characterization.”).

153. *See* Blocher & Ruben, *supra* note 127, at 105 (discussing how courts have consistently struck down gun laws post-*Bruen*).

154. Nelson Lund, *Bruen’s Preliminary Preservation of the Second Amendment*, FEDERALIST SOC. REV., 2022, at 279, 280, 292; Brannon P. Denning & Glenn H. Reynolds, *Retconning Heller*:

The Justices insisted that this type of historical-analogical reasoning is “more legitimate and more administrable” than other types of constitutional tests,¹⁵⁵ and that its purported objectivity will limit judicial discretion.¹⁵⁶ The early returns suggest otherwise,¹⁵⁷ and it is not hard to see why. A text can only be administrable if lower courts know what they are supposed to administer.¹⁵⁸ The *Bruen* Court itself failed to adequately specify the relevant time period, quantum of evidence, standard of proof, or method of comparison. Little wonder that it has caused such disruption in the lower courts.

The majority opinion did invoke one evidentiary principle that courts should rely on when applying the test: “the principle of party presentation” under which “[c]ourts are . . . entitled to decide a case based on the historical record compiled by the parties.”¹⁵⁹ This was ironic, given that *Bruen* itself came up on a motion to dismiss without a full opportunity for record development. More fundamentally, though, the Court neither demonstrated nor described what it would mean for parties to compile a historical record. It is one thing to leave further development of the law for future cases. The Court, however, left for future cases the standards for the development of newly required *facts*.

2. *Identifying Rights Based on Tradition.*—A range of constitutional doctrines define rights based not just on historical facts but on a broader notion of tradition.¹⁶⁰ Such doctrines raise difficult questions both about what counts as “tradition” and what facts are probative in that regard.¹⁶¹ As a result, such

Five Takes on New York State Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. 79, 109–25 (2023) (analyzing lower courts’ interpretation of *Bruen*).

155. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

156. *See id.* at 2130 n.6 (noting that lower court judges will not have “to resolve historical questions in the abstract” because they will be able to decide “based on the historical records compiled by the parties”).

157. *See, e.g.*, Blocher & Ruben, *supra* note 127, at 103, 105 (describing how the historical analogy approach has led to inconsistent and “erratic” opinions); Charles, *supra* note 28, at 110–16 (explaining the problems and faulty assumptions within *Bruen*’s historical approach).

158. Lund, *supra* note 154, at 297 (“More legitimate for sure, at least when it comes to issues where history provides meaningful guidance. But it is not true that reliance on history is always more *administrable* than making difficult empirical judgments.”).

159. *Bruen*, 142 S. Ct. at 2130–31 n.6.

160. *See, e.g.*, Barnett & Solum, *supra* note 40, at 442 (“Constitutional traditions are practices or customs that are generally accepted in the United States, and which have been established for some time.”); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1477 (2023) (defining living traditionalism as “‘traditionalist’ because it looks to political traditions, and ‘living’ because the traditions postdate ratification.”).

161. Barnett & Solum, *supra* note 40, at 443 (“Inevitably, the ordinary meaning of ‘tradition’ is imprecise and open-textured. Some traditions may involve social norms; others may involve judicial, legislative, or executive practices.”).

tests create broad judicial authority to declare something inside or outside the scope of a tradition.

In *Dobbs*, the Court employed the historical test of *Washington v. Glucksberg*,¹⁶² finding that the right to abortion was not “deeply rooted in this Nation’s history and tradition.”¹⁶³ The Court focused in particular on the history and tradition regarding the adoption of the Fourteenth Amendment’s Due Process Clause¹⁶⁴ and found that “the most important historical fact” was “how the States regulated abortion when the Fourteenth Amendment was adopted.”¹⁶⁵ Counting state enactments at that time, the Court emphasized its view that “[b]y 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.”¹⁶⁶ Scholars immediately questioned whether even that supposedly straightforward head-counting was done correctly.¹⁶⁷

The *Dobbs* opinion also favorably cited the use of history and tradition in *Timbs v. Indiana*,¹⁶⁸ an incorporation case, noting that most states had clauses similar to the Excessive Fines Clause at the time the Fourteenth Amendment was ratified.¹⁶⁹ *Dobbs*, however, was dealing with statutes regulating abortion, and those statutes were very much in flux at the time the Fourteenth Amendment was ratified, as criminalization was fairly recent—hardly a “tradition” at that time.¹⁷⁰ The American Historical Association and the Organization of American Historians (which filed amicus briefs in the case) have commented on how the majority, while referring to “‘history’ 67 times,” engaged in “misrepresentation” of the historical record.¹⁷¹

Though most attention has been paid to its method and outcome, the procedural posture of *Dobbs* is independently significant. In 2018, Mississippi enacted a new restrictive abortion statute, prohibiting abortion after 15 weeks. The sole abortion clinic in the state filed suit, and the district court granted a temporary restraining order and eventually summary judgment to the plaintiffs, since the statute was clearly unconstitutional under

162. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (concluding that fundamental rights are those “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty”).

163. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

164. *Id.* at 2235–36.

165. *Id.* at 2267.

166. *Id.* at 2252–53.

167. See, e.g., Tang, *supra* note 34, at 1128 (undermining the claim in *Dobbs* that three-quarters of states banned abortions when the Fourteenth Amendment was ratified).

168. 586 U.S. 146 (2019).

169. *Id.* at 152–53.

170. See Murray, *supra* note 13, at 1002 (“[T]hese four essays strip *Dobbs* down to its bones, revealing the deliberately outcome-driven architecture that scaffolds its holding.”).

171. *Joint Statement from the AHA and OAH*, *supra* note 34.

then-governing law.¹⁷² The Fifth Circuit affirmed.¹⁷³ The Supreme Court reversed those lower court rulings, adopting its new tradition-based standard without giving the lower courts an opportunity to ask whether the historical evidence supported such a finding regarding tradition, but instead declaring that the Constitution offers no protection for any right to abortion.

There is a broad and ongoing debate about the legitimacy and normative force of tradition as a method of constitutional interpretation. Some argue that tradition-based tests can be anachronistic¹⁷⁴ and reinforce outdated prejudice and discrimination,¹⁷⁵ and that standards are needed to decide if a tradition has been supplanted by legal and social developments.¹⁷⁶ Others defend the use of tradition, at least in certain contexts, as a way to preserve continuity in legal institutions, constrain judicial discretion, and serve other values.¹⁷⁷ We take no position on those particular normative matters here; our goal is to emphasize that the application of such tests—as in *Dobbs*—depends on historical facts and thus the development of an adequate factual record.¹⁷⁸

Whatever scholars think of such tradition-based tests, lower courts now must apply them to new sets of claims and facts raised in litigation. This is already evident in other substantive due process cases involving the assertion

172. Jackson Women’s Health Org. v. Currier, 349 F. Supp. 3d 536, 540 (S.D. Miss. 2018).

173. Jackson Women’s Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019).

174. See, e.g., David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1046 (1991) (“Tradition is a highly edited anthology of the past, and much of the past fails to participate in it at all.”).

175. See, e.g., Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 74 (1995) (arguing that the Court’s “effort to define unifying traditions has systemically excluded the voices, perspectives, and counter-traditions of cultural minorities, leaving them at the mercy of the past practices, and embedded habits of majoritarian forces”); Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 MIAMI L. REV. 101, 102–04 (2002) (contending that, “in a nation in which subjugation has been more the norm than the exception, relying on tradition often legitimizes and perpetuates prior discrimination”).

176. See, e.g., Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 212–13 (1993) (arguing that a narrow focus on tradition neglects “another equally essential attribute of humanity: the capacity of discernment and judgment”).

177. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1038–68 (1990) (arguing that adhering to precedent and tradition preserves predictability and respect of past and future traditions); see also Marc DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. L. ISSUES 9, 40–46 (2023) (justifying traditionalism in law on the basis of human desire for social continuity, the long-term practice of the virtues of justice, and a grounding in natural law).

178. Regarding errors made even in the mechanical headcounting of states engaged in by the majority, see Tang, *supra* note 34, at 1128–50 (“[A]s many as 12 of the 28 states on the majority’s list actually continued the centuries-old, common-law tradition of permitting pre-quickenings abortions.”).

of rights subject to a *Glucksberg* analysis.¹⁷⁹ Such inquiries necessarily involve broad historical fact-finding, since tradition can include not just positive law or precedent, but other types of practices that bear on a legal question. At what level of generality the type of tradition itself is defined (e.g., the “regulatory tradition” relied on in *Rahimi*), and what type of evidence, during what time period, constitutes the tradition is not clear. Those open questions make the fact-finding process still more challenging.

In Part II we discuss in more detail how lower courts have struggled to apply these kinds of history-focused tests. Our goal is simply to illustrate some of the ways in which the Court has announced tests that require resorting to historical facts, unmediated by familiar methods of doctrinal analysis.

II. Applying Historical Standards: The Lower Courts Respond

When the Supreme Court relies on historical facts in declaring constitutional doctrine, it is in many important ways differently situated than the lower courts that are tasked with applying that doctrine going forward. Even in cases like *Bruen* that had no fact development at trial, the Justices had more than one hundred amicus briefs to draw from, as well as a bevy of extraordinary law clerks and just sixty-eight other cases on the docket that Term. None of those conditions guarantee good historical analysis, of course, but they are advantages not enjoyed by lower courts.

It is therefore unsurprising that many lower courts have bucked at the demands imposed on them by the history-focused doctrines described in Part I. Their resistance is not exclusively or even primarily about originalism as such, but about the proper role of originalism in doctrinal analysis. Consider the frustration expressed by District Judge Carlton Reeves in a Second Amendment case:

The justice system ordinarily operates like a pyramid. Thousands of disparate factual records are created in the trial courts. Thousands of those filter up to the circuit courts for error-correction and harmonization of the rule of law. And customarily, where that harmonization causes differences among the circuit courts will the Supreme Court weigh in to decide the contested issues. When it does so, the parties are given the opportunity to argue their respective positions, and amici weigh in too.¹⁸⁰

179. See, e.g., *Fowler v. Stitt*, 676 F. Supp. 3d 1084, 1117–18 (N.D. Okla. 2023) (analyzing a substantive due process claim for a right to amend sex designation on birth certificates under the *Glucksberg* framework).

180. *United States v. Bullock*, 679 F. Supp. 3d 501 (S.D. Miss. 2023).

And yet: “In Second Amendment cases, . . . the pyramid is turned on its head. . . . Is this the best way of doing justice?”¹⁸¹ Divergent outcomes in lower courts suggest that the question is serious and widespread.¹⁸²

Conversely, we should also be concerned about the lower court judges who have made findings of historical fact without sufficient care for factual development. They have sometimes endorsed quite flawed historical narratives. For example, Melissa Murray has detailed how, before *Dobbs*, several lower courts embraced narratives linking abortion to the eugenics movement with little support in historical fact.¹⁸³ The majority in *Dobbs* later relied on these historical statements.¹⁸⁴

The Supreme Court has largely dismissed such complications, insisting that the tasks it is requiring are “commonplace”¹⁸⁵ and faulting lower courts for misunderstanding or misapplying its novel historical tests. In this Part, we show that the lower courts have indeed been tasked with a new and exceedingly difficult role in assembling a record and applying legal standards to that record. The challenges include testing the boundaries of judicial fact-finding, assembling an adequate factual record, taking (or not taking) expert evidence, and applying the appropriate standard of review to that record. In Part III, we discuss prescriptions.

A. *Judicial Fact-Finding*

One hard question in this new regime of historical tests is what role judges themselves have in finding historical facts. Normally, judges are not fact-finders. For that reason, the ability of a judge to take judicial notice of facts is highly constrained and generally limited to facts so well-established that they are beyond “reasonable dispute.”¹⁸⁶ A judge may take notice of public records like statutes, regulations, or judicial opinions, but not if facts within them are subject to dispute.¹⁸⁷ And even for non-controvertible facts,

181. *Id.*

182. See Charles, *supra* note 25, at 122 (studying several hundred post-*Bruen* lower court cases and finding “they have reached inconsistent conclusions about what the test requires and how it works in practice”).

183. Melissa Murray, *Race-ing Roe, Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2071, 2087–88 (2021) (describing amicus briefs claiming to connect abortion laws to eugenics, following a concurring opinion by Justice Clarence Thomas). For discussion of inaccurate and incomplete history relied on in footnote 41 in *Dobbs* and pre-*Dobbs* lower court opinions, see Murray, *supra* note 13, at 1002–05.

184. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022).

185. See, e.g., *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (“Discerning and developing the law in this way is ‘a commonplace task for any lawyer or judge.’” (quoting *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022))).

186. FED. R. EVID. 201(b).

187. See *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (noting while a court may generally take judicial notice of public records, it “cannot take judicial notice of

in criminal cases the jury is instructed that the judge's determination of notice is not conclusive.¹⁸⁸

When judges are instead citing general factual support when interpreting the law, use of “legislative” or “social” fact is an accepted part of the judge's role in stating the law, where the parties already have notice that a judge is examining a legal question raised in a case.¹⁸⁹ Thus, “[a] court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties.”¹⁹⁰

As we have discussed in prior work, a judge can certainly cite historical evidence as a generally informative background matter.¹⁹¹ But the Supreme Court's recent historical tests ask for something different: for judges to apply the law to the facts at issue in a particular case, including by reference to history or tradition. In doing so, the Court has created new mixed questions of law and historical fact that demand a different kind of judicial role.

In their efforts to apply the Court's new historical doctrines, judges have classified the relevant historical facts in different ways. In a recent Second Amendment case, the Ninth Circuit concluded that “the historical research required under *Bruen* involves issues of so-called ‘legislative facts’ . . . rather than ‘adjudicative facts’” such that no additional inquiry from the district court was required.¹⁹² Yet as we have explained at some length, these are not the standard form of legislative facts being used for background, but facts used to declare the content of constitutional law.¹⁹³ Other judges have considered the relevant facts as requiring adversarial testing, as both fact-

disputed facts contained in such public records” and must “consider—and identify—which fact or facts it is noticing”).

188. FED. R. EVID. 201(f).

189. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404–07 (1942) (noting that the “great bulk” of judicial consideration consists of “adjudicative facts and strictly legal materials”); FED. R. EVID. 201 advisory committee's note to 1972 amendment (stating that there is not, for legislative facts, “any requirement of formal findings at any level,” but there must be notice, “already inherent in affording opportunity to hear and be heard and exchanging briefs”). Regarding the definition of legislative facts, see Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955 (2024) (“Loosely, legislative facts are general facts courts rely upon to formulate law or policy.”). Regarding appellate review, see Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016) (noting that “appellate courts generally grant clear error deference only to adjudicative facts” and review legislative facts “de novo,” though the Supreme Court has not provided clear guidance on this practice); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 514 (1986) (arguing that appellate courts “should not be bound by lower courts’ conclusions regarding empirical research” and “social science research”).

190. *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

191. Blocher & Garrett, *Historical Fact-Finding*, *supra* note 20, at 27.

192. *Teter v. Lopez*, 76 F.4th 938, 946–47 (9th Cir. 2023).

193. Blocher & Garrett, *Historical Fact-Finding*, *supra* note 20, at 723–25.

finding and mixed questions of law and fact should. As one district judge put it, such a process “helps the fact-finder ‘ascertain[] [the] truth’ and ‘minimiz[e] the risk of error,’ by subjecting witnesses to cross-examination on potential bias and credibility, and by excluding evidence that is irrelevant, prejudicial, or lacking indicia of reliability.”¹⁹⁴

Second Amendment challenges after *Bruen* raise complex issues not anticipated by Federal Rule of Criminal Procedure Rule 12, which governs pleadings and pre-trial motions in federal criminal cases.¹⁹⁵ Just like a suppression hearing would be improper if not on the record and providing an adequate opportunity for the defendant to explore potential constitutional defects with evidence of guilt, a judge must conduct an adequate inquiry into a Second Amendment claim. How to conduct that inquiry, however, was not at all set out by the Court in *Bruen*, nor does Rule 12 provide any guidance. As Judge Irene Berger put it, *Bruen* “requires original historical research into somewhat obscure statutory and common law authority from the eighteenth century by attorneys with no background or expertise in such research.”¹⁹⁶

At the trial level, the judge will depend on the parties to assemble adequate evidence. The typical pre-trial discovery and hearing rules for criminal cases were crafted with forensic reports and suppression hearings in mind, not disputes about legal history. To be sure, if the parties do not consult experts, then the court must rule upon what is presented—unless the judge decides to appoint an independent expert, which may be warranted in any situation in which there is complex evidence, including historical evidence. In a case regarding an asserted substantive due process right to refuse vaccination, a district court noted the need to address whether “the right is deeply rooted in this Nation’s history and tradition,” citing *Dobbs* and then emphasized that “[t]he parties have presented the Court with woefully meager briefing on this issue; however, the Court’s duty to say what the law is, and apply it faithfully, remains.”¹⁹⁷

One way to sidestep this problem is by minimizing the role of fact-finding. For example, in a Second Amendment case challenging the prohibition on gun possession by people under felony indictment, the federal government sought to simplify the issues by arguing that the problem was one of law, not facts. In *United States v. Quiroz*, the government argued:

Bruen instructs courts considering Second Amendment challenges to examine the Amendment’s text and the Nation’s historical tradition of firearms regulation. Although it has an important historical

194. *Oregon Firearms Fed’n v. Kotek Oregon All. for Gun Safety*, 682 F. Supp. 3d 874, 886 (D. Or. 2023) (alteration in original) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)).

195. FED. R. CRIM. P. 12.

196. *United States v. Nutter*, 624 F. Supp. 3d 636, 640 n.6 (S.D. W. Va. 2022).

197. *Brandon v. Bd. of Educ. of City of St. Louis*, No. 4:22-cv-00635-SRC, 2023 WL 4104293, at *10–11 (E.D. Mo. June 21, 2023) (internal quotations and citation omitted).

dimension, that is ultimately a legal inquiry into the meaning of the Second Amendment, not a factual one.¹⁹⁸

We agree that this is ultimately a question of law requiring an interpretation of the Constitution. But before that law application is done, facts must be determined. Thus, applying the standard set out in *Bruen* to a different statutory context first requires an analysis of a factual record, and then application of the legal standard to those facts. Addressing a legal question—like a constitutional claim by a defendant seeking to dismiss an indictment—without first assembling the factual record needed to apply the law to the relevant facts would raise real constitutional concerns.

Before applying a historical constitutional test to a record (a mixed question of the application of law and fact) there must be an evidentiary record. The existence of such a record is not a given, however, perhaps because neither side in some of the litigation is seeking to develop a record, as in the examples noted above. Indeed, in the Second Amendment context, not all of those courts deferred to or even discussed a district court record regarding historical facts. A recent en banc Third Circuit ruling regarding the federal felon in possession statute, for example, invoked precedent in other circuits but discussed historical gun laws without any remand to the district court to compile a record (which that court would not have done in the first instance, since it ruled pre-*Bruen*).¹⁹⁹

B. *The Impact on Litigants*

Discussions of originalism have often focused on whether the method expects or demands too much of the Justices or (albeit with less frequency) lower court judges and historians. Less attention has been paid to what it demands of litigants, but any accounting of the plausibility of doctrinal originalism must take litigants' interests into account as well. Justice Sotomayor flagged this very issue in her *Vidal* concurrence:

I am reluctant to go further down this precipice of looking for questionable historical analogues to resolve the constitutionality of Congress's legislation. To borrow Justice Scalia's criticism from a different context, such hunting "far into the dimmy past" is not just "a waste of research time and ink" but also "a false and disruptive lesson in the law . . . that . . . condemns litigants (who, unlike us, must pay

198. Supplemental Brief of the United States at 2, *United States v. Quiroz*, 125 F.4th 713 (5th Cir. 2025) (No. 22-50834); *see also* Brief for Appellee United States, *United States v. Collette*, 2023 WL 4350618 at *26 (5th Cir. Oct. 10, 2024) (arguing that *Bruen*'s text-and-history test is a question of law).

199. *See Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023), *cert. granted, judgment vacated sub nom. Garland v. Range*, 144 S. Ct. 2706 (2024), *aff'd*, 2024 WL 5199447 (3d Cir. Dec. 23, 2024) (applying *Bruen*'s "historical tradition" test to felon firearm possession and remanding only for entry of judgment).

for it out of their own pockets) to subsidizing historical research by lawyers.” [Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment)] I would instead apply this Court’s First Amendment precedent, just as the parties did in arguing this case.²⁰⁰

In this way, the Court’s originalist doctrinalism raises questions about access to justice, as well as the degree to which the inquiry is factual (shifting work to the parties) or legal (shifting it to judges). To the extent that it is factual, parties must now conduct complex historical research, as Justice Sotomayor describes. Making constitutional doctrine dependent on the development of historical facts outside the typical adjudicative facts in dispute raises both practical and constitutional questions, as we develop further in Part III. We underscore this problem here, though, because it is a running theme: reliance on historical facts may empower the Supreme Court, but it challenges lower courts and it can be costly to litigants, which in constitutional cases raises distinct due process and jury trial concerns.

Again, *Bruen* is instructive. Second Amendment challenges typically involve a criminal statute and thus place the initial demands of historical research on criminal defense lawyers and government attorneys—two groups for whom time and resources are at a premium.²⁰¹ Under the Supreme Court’s history-based tests, the outcome of cases—and thus the shape of precedent—will depend in large part on the parties’ ability to present historical evidence, which raises new risks of both divergent outcomes and the correlation of those outcomes with how well-resourced the parties are.

First, if different courts develop a factual record differently and with differing degrees of rigor, then applying the law to those facts will result in quite different rulings. District Judge David Counts noted that the same gun regulation could get different results in different courts “based on how adept at historical research the Government’s attorneys are in a particular location or the time they have to devote to the task.”²⁰² This possibility raises the importance of being clear on whether such historical findings are matters of fact or matters of law or something else entirely. *If* deference on appeal applies (which, as we discuss in more detail below, is not entirely clear), then those differing results at the trial level would lead to serious splits on appeal as well.

Moreover, these differential outcomes are likely to be correlated with the resources of the parties involved. It is of course nothing new that parties

200. Vidal v. Elster, 144 S. Ct. 1507, 1534–35 (2024) (Sotomayor, J., concurring).

201. See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1978 & n.32 (2008) (noting that high costs and limited resources pressure defense attorneys to prioritize plea bargaining over trial).

202. United States v. Perez-Gallan, 640 F. Supp. 3d 697, 713–14 (W.D. Tex. 2022), *aff’d*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023), *cert. granted, judgment vacated*, 144 S. Ct. 2707 (2024), *rev’d and remanded*, 125 F.4th 204 (5th Cir. 2024).

with more resources—whether in terms of money, expertise, or time—have a better shot at winning cases, which in turn generate precedent governing other cases, thus weaving litigants’ inequality into the tapestry of the law. That risk is, if anything, heightened in the context of the Court’s new historical tests, since there is not (at least not yet) a network of pro bono historians to help state and local lawyers trying to defend gun regulations, or public defenders challenging those laws, or individuals trying to assert rights under *Glucksberg*.²⁰³

A crucial factor here is the courts’ use and abuse of presumptions of legality. After *Bruen*, some courts have resolved cases simply by invoking the notion that the burden lies on the government to affirmatively prove the constitutionality of gun laws whenever the Second Amendment is at issue, often eliding the difficult question of whether and when it actually *is* at issue when, for example, a law regulates weapons or people who fall outside the scope of the Amendment entirely.²⁰⁴ That move is made easier by the fact that the Court itself has yet to clearly articulate what the government would need to do in order to carry such a burden. The result is that outcome-determinative work is being done not by history itself, but by a judge-created doctrine.

In short, the cases that win—and thus establish the law’s official understanding of history—are disproportionately likely to be those with the most well-heeled parties, including those that can hire experts, an issue to which we turn in the next section. This is a particularly perverse way of privilege shaping the historical record.²⁰⁵

C. *Expert Evidence*

It is well understood that in a range of types of litigation involving complex factual matters not easily interpreted by laypersons or judges, experts should be retained. Nearly every serious antitrust suit requires analysis by qualified economists; DNA evidence requires a trained analyst with access to the right laboratory equipment. Whether and how originalist doctrinalism requires historians remains unclear, however, at least if the highly inconsistent litigation and judicial practice are any indication. Although some parties and judges have turned to historians as expert witnesses, others have proceeded to review historical evidence on their own,

203. We focus on these groups because they appear to be those who bear the burdens of presenting historical evidence in those contests.

204. *See, e.g.,* United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022) (“After *Bruen*, the Government must prove that laws regulating conduct covered by the Second Amendment’s plain text align with this Nation’s historical tradition.”).

205. Our erstwhile colleague Walter Dellinger would often reflect on what a person would know about the history of racism in this country if they had only read the pages of the U.S. Reports.

perhaps because some of it involves legal texts and is therefore the kind of evidence that judges and their clerks are equipped to assess.

Judges have long relied on historians as experts in a variety of contexts, including to develop an adequate historical record for analysis.²⁰⁶ High profile examples include tobacco litigation, in which the public's historical level of awareness of the dangers of tobacco were crucially relevant, and in cases involving historical practices of race discrimination.²⁰⁷ One obvious role for expert historians is in vetting the historical facts that constitute a relevant record. Expert historians have specialized knowledge regarding “where to search for sources, formulating searches based on an understanding of the history of the period in question, and evaluating the reliability of the sources.”²⁰⁸ As the Second Circuit has put it, “[a] historian could, for example. . . helpfully synthesize dense or voluminous historical texts.”²⁰⁹ Such historical expert work involves, as the Third Circuit has put it, surveying the full array of available sources, evaluating the reliability of the sources, and thus “providing a basis for a ‘reliable narrative about the past.’”²¹⁰

In a range of constitutional cases, such historical expert evidence has been quite relevant. For example, the Supreme Court stated in the context of a Voting Rights Act claim that “the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and

206. For an excellent critical overview, see Jonathan Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Court*, 78 N.Y.U. L. REV. 1518, 1549 (2003) (“With increasing regularity, historians are appearing on witness stands across the country. They offer historical testimony on subjects ranging from eighteenth-century treaty conventions in Native American rights cases to modern site histories in toxic tort cases.”); see also Maxine D. Goodman, *Slipping Through the Gate: Trusting Daubert and Trial Procedures to Reveal the ‘Pseudo-Historian’ Expert Witness and to Enable the Reliable Historian Expert Witness—Troubling Lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824, 825–26, 838 (2008) (highlighting significant flaws in the current approach to screening historian expert witnesses).

207. See *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 436–37 (D. Md. 2005) (analyzing historian testimony pertaining to public awareness of dangers of smoking tobacco); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (relying on testimony of historians regarding the motivations behind the Alabama Constitutional Convention); *City of Mobile v. Bolden*, 446 U.S. 55, 59–60 (1980) (considering the history of Mobile’s municipal government).

208. *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 951 (N.D. Ill. 2010).

209. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135–36 (2d Cir. 2013); see also *Burton v. Am. Cyanamid*, No. 07-CV-0303, 2018 WL 3954858, at *4 (E.D. Wis. Aug. 16, 2018) (“[A] historian’s synthesis of various source materials that enables the jury to perceive patterns and trends can also be ‘helpful’ within the meaning of Rule 702. Courts have recognized the helpfulness of expert historians testifying in these ways.” (collecting cases)).

210. *Langbord v. United States Dep’t of Treasury*, 832 F.3d 170, 195 (3d Cir. 2016) (quoting *United States v. Kantengwa*, 781 F.3d 545, 562 (1st Cir. 2015)); see also Alvaro Hasani, *Putting History on the Stand: A Closer Look at the Legitimacy of Criticisms Levied Against Historians Who Testify As Expert Witnesses*, 34 WHITTIER L. REV. 345, 355 (2013) (describing the role of historian expert witnesses).

white voters to elect their preferred representatives,” making historical expert evidence highly relevant to those prior social and historical conditions.²¹¹ In the litigation that led to the Court’s ruling in *Romer v. Evans* striking down a Colorado constitutional amendment that would have barred any protected status to persons who identify as gay or lesbian,²¹² Martha Nussbaum and John Finnis testified as experts disagreeing about how to interpret the philosophy of Plato and Aristotle.²¹³

In post-*Bruen* Second Amendment cases, some judges have emphasized the potential utility of historians as experts.²¹⁴ Judge Reeves noted that in more than 120 federal rulings regarding the felon in possession statute and the Second Amendment, none of the judges had appointed an expert historian to “sift through the historical record.”²¹⁵ To be sure, some of those courts did not appoint historian experts because they concluded that the felon and possession statute was clearly constitutional based on pre-*Bruen* precedent that *Bruen* did not purport to disturb.²¹⁶ But by mandating historical analysis, *Bruen* made it harder to justify that approach, leading to a conundrum: “Judges are not historians. We were not trained as historians. We practiced law, not history. And we do not have historians on staff. Yet the standard articulated in *Bruen* expects us to ‘play historian in the name of constitutional adjudication.’”²¹⁷

In that case, Judge Reeves, not wanting “to be guilty of itself cherry-picking the history,” asked the parties “whether it should appoint a professional historian to serve as an independent expert in this matter.”²¹⁸ The parties both said no. Indeed, the federal government argued that “the

211. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added); see also Ala. NAACP v. Alabama, No. 2:16-CV-731-WKW, 2020 WL 579385, at *3–4 (M.D. Ala. Feb. 5, 2020) (“Dr. Gaylord’s testimony on the history and politics of judicial selection in the United States and in Alabama . . . is helpful to the court in its ‘searching practical evaluation of the ‘past and present reality’ of judicial elections in Alabama” (quoting *Gingles*, 478 U.S. at 45)).

212. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

213. See Martha Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1522–23 (1994) (describing her testimony regarding the “moral thought of Plato and Aristotle”).

214. See, e.g., *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 . . . with authority to solicit expert opinion.”).

215. *United States v. Bullock*, 679 F. Supp. 3d 501, 504–05 (S.D. Miss. 2023).

216. *United States v. Garrett*, 650 F. Supp. 3d 638, 642–43 (N.D. Ill. Jan. 11, 2023) (“[T]he Seventh Circuit’s pre-*Bruen* caselaw holds that § 922(g) is not unconstitutional in light of *Heller* and *McDonald*, and *Bruen* does not disturb that conclusion.”).

217. *Bullock*, 679 F. Supp. 3d at 507–08 (quoting Order at 3, *United States v. Bullock*, 679 F. Supp. 3d 501 (S.D. Miss. 2023) (No. 3:18-CR-165-CWR-FKB)).

218. *Bullock*, 679 F. Supp. 3d at 508–09.

prohibition against felons possessing firearms is so thoroughly established as to not require detailed exploration of the historical record.”²¹⁹

In response to a different government brief insisting that it need not retain an expert historian in order to satisfy its burden, another district judge agreed that doing so was unnecessary:

Judges should not delegate their discretion to experts or historians. One does not need to be a linguist, a historian, or an expert in every field to be a sound judge. The parties (in any case) have a variety of ways and means to present their respective positions to the Court, but then it is the judge’s duty to determine the law using as many, or as few, of those means as he or she deems necessary to fairly and impartially adjudicate the controversy.

The bottom line is that it is not the Court’s duty to “sift the historical materials for evidence to sustain [the constitutionality of the regulation]. That is [the Government’s] burden.” Thus, the Court leaves the matter in the hands of the Government. It bears the burden of persuasion in this case. If it would like to hire an expert to provide a report or amicus brief, it may do so. If it decides not to, that omission will not automatically doom its case so long as the historical analogues it offers are close, accurate, and persuasive. For its part, the Court will not appoint an expert.²²⁰

This exemplifies the point raised above about burdens and presumptions being outcome-determinative in cases demanding historical research that parties are unlikely to be able to perform or perhaps afford. And where there is a concern that adversarial presentation may not result in a complete picture of the relevant historical evidence being presented, including because many indigent or less-resourced parties will be unable to secure experts, judges can and should consider appointing experts themselves.²²¹ Of course, under Rule 702 of the Federal Rules of Evidence and accompanying caselaw, such a witness must be properly qualified, offer opinions that assist the jury, and

219. *United States v. Bullock*, 679 F. Supp. 3d 501, 509 (S.D. Miss. 2023) (quoting Submission Addressing the Need for a Court-Appointed Historian at 1, *United States v. Bullock*, 679 F. Supp. 3d 501 (S.D. Miss. 2023) (No. 3:18-CR-165-CWR-FKB)).

220. *United States v. Yates*, No. 1:21-CR-00116-DCN, 2023 WL 5016971, at *3 (D. Idaho Aug. 7, 2023) (internal citations omitted).

221. For recommendations along those lines regarding historian experts generally, see Martin, *supra* note 206, at 1549. Regarding the pressure of adversarialism on historians, see Paul Soifer, *The Litigation Historian: Objectivity, Responsibility, and Sources*, PUB. HISTORIAN, Spring 1983, at 47, 50. A range of legal scholars and judges have long recommended more use of court-appointed experts more generally. See, e.g., Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1220–30 (explaining that the flaw in current expert-appointment schemes is their underutilization and that therefore the obvious solution is to increase their use); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1539 (1999) (“[A] way to deal with the problem of the unintelligibility of complex expert testimony would be more frequent appointment of court-appointed experts”).

use reliable methods—applied reliably to the factual record—in generating conclusions. Rule 702 should be carefully and neutrally applied to any historian experts in constitutional cases, especially given the possibility that their findings will be used as a basis for declaring rules of constitutional law.²²²

The point is not that every Second Amendment case—or every case involving originalist doctrinalism more broadly—requires an expert historian. Indeed, there is a good argument that the Court in *Bruen* framed questions that require analysis inconsistent with sound historical methods. A professional historian might conclude that one should not be searching for particular legal analogues to a modern statute, or that doing so is simply impossible, especially on a briefing schedule.²²³ In general, sound historians may resist categorical answers to nuanced historical questions, especially where the documentary record is highly incomplete.²²⁴ There are particularly heightened concerns with making historical assumptions about the *absence* of regulations in the past, which is the focus of *Bruen*.²²⁵ A less professional poorly trained historical expert might be perfectly willing to engage in cherry picking of sources and anachronistic claims about causation.

While the Court’s doctrinal choices might requires historian experts in a range of constitutional cases, it is important under Rule 702 that “historical testimony adhere to the historical method.”²²⁶ As Darrell Miller has explored, there are important choices to be made in selecting the appropriate sources to examine when conducting a historical inquiry,²²⁷ and historians’ sources might differ significantly from lawyers’. Likewise, historians are typically

222. Regarding scrutiny of historian experts under the Federal Rules of Evidence, see Wendie Ellen Schneider, Case Note, *Past Imperfect*, 110 YALE L.J. 1531, 1535–45 (2001).

223. *E.g.*, Declaration of Zachary Schrag at 2, *Angelo v. District of Columbia*, 648 F. Supp. 3d 116 (D.D.C. 2022) (22-1878) (“[T]he District has asked whether I or a team of historians could adequately research the ‘Nation’s historical tradition’ of firearm regulation on mass transit within 60 days. The answer is ‘no,’ as I explain below.”).

224. See Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632–33 (1987) (“It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.”).

225. See Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami’s Traditionalism Rising*, 24 J. OF CONTEMP. LEGAL ISSUES 187, 192 (2024) (“Just as the number of nonenacted laws is infinite, so is the number of reasons why the legislature decides not to enact them, starting with the obvious possibility that no one thought of it.”); see also *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) (“[I]mposing a test that demands overly specific analogues has serious problems. . . . [I]t assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority. Such assumptions are flawed, and originalism does not require them.”).

226. Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1520–21 (2013).

227. See generally Darrell A.H. Miller, *Originalism’s Selection Problem*, 33 WM. MARY BILL OF RIGHTS J. 375 (2024) (noting how the problem of selection affects all types of originalism).

quite cautious about suggesting causal conclusions, while the Supreme Court now regularly makes a range of far-reaching historical claims, including those regarding “tradition,” broadly defined practices, analogies with different levels of specificity, and more general historical narratives.²²⁸ The best qualified and most eminent historians might be reluctant to engage in expert analysis regarding the types of causal claims about history and tradition that the Supreme Court has endorsed.

With the historical fact inquiry often poorly defined by the Supreme Court’s rulings, the role of an expert is also far less clear than it is when a scientist is speaking to a defined standard for proving causation or economic damages. Especially as courts confront and resolve frequently litigated issues like the constitutionality of the federal law prohibiting felons from possessing guns, case law and precedent may come to play a more significant role. But constitutional doctrines must also apply to new factual situations and newly enacted laws and regulations. And in the initial run of any set of cases applying the Court’s originalist doctrinal methods, the role of historians as experts is the kind of challenge that lower courts and litigants—particularly less well-resourced litigants who are typical in many cases raising constitutional questions—will continue to confront. Where impartial assessment of the appropriateness and reliability of an expert is needed, and where only comparatively more privileged litigants will have access and resources to retain such experts, the challenge in ensuring not just an adequate and fair record but basic access to justice will grow more acute. In the next Part of the Article, we suggest some possible solutions.

III. Toward Adjudication of Historical Facts

So long as historical fact is part of the application of a constitutional right to a litigant’s case, lower courts do not have the luxury of making determinations of law without making findings of historical fact. They must apply law to facts, including historical facts, and that requires adequate factual development. As the previous Part demonstrated, that is no mean feat.

Lower courts can make the best of a challenging and novel situation by applying historical standards as diligently as they can using the required tools of adjudication, and we describe here a few ways they can and must do so. Lower courts also need more guidance on what type of historical evidence satisfies the relevant constitutional tests, so as to avoid needless and wasteful

228. For a taxonomy of some of the general uses of history and tradition in recent opinions, see Barnett & Solum, *supra* note 40, at 440–42. There are similarly deep methodological issues with claims made about “original public meaning” and what factual evidence might support a conclusion about that topic. See, e.g., Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1434 (2021) (“Without clear criteria for identifying the truth conditions for claims about original public meanings in cases of actual historical disagreement, [public meaning originalism] appears to insist that ‘we know it when we see it.’”).

litigation—just as appellate courts need guidance on standards of review to avoid needless appeals. Most fundamentally, rules and practices at trial and on appeal must be calibrated to develop an adequate historical record, or else cases applying the Court’s originalist doctrinalism will lack anything approaching an adequate foundation.

Though we will focus here on the tools available to lower court judges, solutions could also come from elsewhere. The Supreme Court itself could replace or refine its originalist doctrinalism, as seemed to happen in *Rahimi*, which recast *Bruen* as being about historical “principles”²²⁹ and thus arguably lessened the need for detailed historical factfinding. But given that a majority of the Court seems dedicated to what it sees as originalism, we do not expect a broad course correction in that regard.

Another possibility is for Congress to intervene. We have described in prior work how Congress has the power to engage in “fact stripping” to safeguard the trial judge’s role in factfinding, for example, by statutorily mandating appellate deference to facts found at trial.²³⁰ To lessen the burden on trial courts and litigants, an administrative agency or even a nonprofit constitutional litigation group could pool resources to develop robust historical record evidence. There are strong arguments that such a record—at least as it pertains to matters of fact—would then be entitled to deference, just like agency expertise on scientific matters (although, to be sure, such deference is less predictable in the aftermath of *Loper Bright*).²³¹

Federal judges need assistance to meet the demands that the evolving standards of history have placed on them. Here, we focus on tools of self-help. They can provide funding for experts to indigent litigants, seek out independent experts, assemble a detailed factual record, and expect that appellate judges will respect their constitutional role in adjudicating trial-level disputes. They can also consider another response, on remand, if the Supreme Court or an appellate court rules without an adequate factual record: decline to follow pending litigation of the facts.

A. *Ensuring an Adequate Historical Record*

If constitutional rulings are to be made on the basis of historical facts, then it is essential that those facts be found in accordance with best practices. The Court’s turn to historical tests, as described in Part I, raises the importance of such fact-finding and presents the kinds of novel challenges

229. *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2022).

230. Blocher & Garrett, *Fact Stripping*, *supra* note 39, at 2.

231. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (rejecting deference to agency statutory interpretation). *But see* Adrian Vermeule, *The Old Regime and the Loper Bright “Revolution”*, 2024 SUP. CT. REV. 235, 237–38 (arguing that *Loper Bright* will have only a marginal impact on administrative law).

laid out in Part II. How can the existing tools and structures of fact-finding respond?

Even if review is *de novo*, there must be an adequate record to permit review and an initial ruling on a constitutional question. If the parties stipulate, or if no contested factual issues exist, then perhaps no record need exist. However, courts have been far too willing to proceed with inadequate party briefing regarding contested issues of historical fact.

1. District Court Fact-Development.—As Part II described, originalist doctrinalism has placed increased and novel demands on trial judges. Motion practice and discovery in federal criminal cases (which is where many of the new historical arguments arise) is typically quite limited, with preliminary hearings not required and generally focused on whether evidence exists to support probable cause. In civil cases, constitutional litigation raising questions of historical fact has occurred in Section 1983 cases at the preliminary motion to dismiss stage, without the benefit of any discovery, or in early temporary restraining order or preliminary injunction-stage litigation.²³² This remains true of the Court’s more recent historical tests. Simply put, the factual record should be developed in the lower court. As Ohio Supreme Court Justice Jennifer Brunner has put it, “[f]undamentally, no appellate court should be the fact-finder in determining the tradition of gun regulations during different eras of our nation’s history, including how and why guns may have been regulated.”²³³

Despite the increasingly difficult demands placed on lower courts, it is essential that their central role in fact-finding be maintained. As described in an amicus brief by former federal district judges in the context of Rule 52 deference to factual findings:

Deference to trial courts is not only deeply rooted in American law; it also serves important purposes for the federal judiciary: (1) it improves adjudication of disputed facts by placing the fact-finding function in the hands of trial judges who specialize in resolving factual disputes; (2) it is critical to judicial efficiency by reducing the number of appeals; and (3) it enhances the legitimacy of district courts and the federal judiciary as a whole.²³⁴

Or, as the Advisory Committee on the Federal Rules of Civil Procedure explained in the context of clarifying the essential role of trial court judges to conduct fact-finding: “To permit courts of appeals to share more actively

232. See, e.g., *Wolford v. Lopez*, 116 F.4th 959, 985, 972, 977, 982, 985 (9th Cir. 2024), *cert. granted in part* (reviewing a Section 1983 claim and preliminary injunction involving locational restrictions on firearms).

233. *State v. Philpotts*, 194 N.E.3d 371, 371–73 (Ohio Ct. App. 2022) (Brunner, J., dissenting).

234. Brief for Former Federal District Judges as Amici Curiae Supporting Respondents at 13, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966).

in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants.”²³⁵

As with other kinds of fact-finding, historical fact-finding in these contexts must arise through party participation, adversarial process, and testing of evidence. Whether appellate review is *de novo* or not (an issue to which we return below), the underlying question involves applying a legal standard to facts, and those facts must be properly found.

The first of these principles—that the parties must have an opportunity to contribute to the development of the historical record—has advantages with regard to the information it is likely to generate and, in some contexts, will be a constitutional mandate. A *sua sponte* ruling finding insufficient facts raises real due process concerns and, depending on the posture, may trigger jury trial rights concerns—for example, if the case involves an indigent criminal defendant or a plaintiff in a Section 1983 case who is denied relief without a chance to adequately develop historical support for a constitutional claim.

To the degree that lower court judges must make specific findings regarding a particular history or tradition and then apply a constitutional standard to them, they are doing something other than simply taking “notice” of general historical evidence or citing to general historical support.

In some cases, the parties themselves might choose not to extensively brief issues of historical fact. Perhaps they will rely instead on existing precedent. In one post-*Bruen* case, the Ninth Circuit denied a government request to remand to the trial court for additional fact-finding regarding historical evidence, finding these were issues of legislative and not adjudicative fact.²³⁶ Still other courts have found that a factual record is not needed when rulings by other courts can be relied on as a matter of precedent.²³⁷ Indeed, as noted above, some parties have decided, even after being invited, that it is not relevant or necessary to retain an expert historian to address questions of historical fact. But it is not hard to imagine that a judge would step in if the government, for example, found it unnecessary to retain an economist in an antitrust case, or a lab analyst to examine evidence for DNA in a criminal case (and the indigent defendant could not afford an expert to conduct the DNA testing), or if the parties in a toxic tort case simply failed to retain experts regarding causation.

The necessity of adequately grounding historical fact-finding is all the more important because of another shortcut that judges sometimes use when

235. FED. R. CIV. P. 52 advisory committee’s note to 1985 amendment.

236. *Teter v. Lopez*, 76 F.4th 938, 946–47 (9th Cir. 2023).

237. *See, e.g., United States v. Villalobos*, No. 3:19-cr-00040-DCN, 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.”).

analyzing historical fact—namely, citing each other’s opinions for what Allison Orr Larsen has called “historical precedents.”²³⁸ The result is that historical claims, even simple asides, not based on an adequate record get baked into the law in ways that distort doctrinal development and case outcomes.

Ensuring an adequate record raises serious practical challenges, and it is understandable that some trial judges have expressed real hesitation regarding the burden of developing evidence of legal practices during unfamiliar and ill-defined time periods. At least one district court has held a bench trial post-*Bruen* in a case involving a civil challenge to a state law regarding large-capacity firearms, with testimony from twenty witnesses, including expert historians.²³⁹ Other district courts have also engaged in that type of searching inquiry.²⁴⁰ Others have not, not only in situations where the parties do not seek a pretrial hearing and do not contest which historical sources are relevant to the inquiry, but also in situations where one or both parties have requested such an opportunity to develop a more robust record and have been denied that opportunity.²⁴¹ New local rules may be needed to provide guidance to judges regarding development of historical fact evidence relevant to constitutional claims that must be addressed during pretrial hearings.

The most problematic cases are those in which judges rule on a constitutional claim that relies on historical evidence, but without developing a full factual record. One possible explanation is that they are treating the issues before them as mixed questions of law and fact. To be sure, the Supreme Court *could* decide that its history-based tests should ultimately be treated as legal questions, in that the determination on the application of the constitutional rule to the relevant historical facts is a mixed question for which there would be de novo appellate review. The Court has taken different positions on what standard is appropriate when reviewing mixed questions of law and fact.²⁴²

238. Allison Orr Larsen, *Is History Precedent?*, 78 STAN. L. REV. 365, 365 (2026).

239. *Or. Firearms Fed’n v. Kotek*, 682 F. Supp. 3d 874, 885 (D. Or. 2023).

240. *See, e.g., Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 42 (1st Cir. 2024) (denying preliminary injunction after, in part, considering “numerous declarations from expert witnesses”).

241. *See, e.g., United States v. Agee*, No. 1:21-CR-00350-1, 2023 WL 6443924, *7 (N.D. Ill. Oct. 3, 2023) (denying the need for an evidentiary hearing because the defendant “mounts no counterattack on the accuracy of the [historical] sources”).

242. *See Monaghan, supra* note 45, at 233 (explaining that law and fact have a “nodal quality,” rather than “incoherence”); *see also* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1459 (2001) (arguing that the Supreme Court reclassified questions of fact as “questions of constitutional fact to ensure it has the final word”); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 238–47 (1991) (analyzing appellate courts using different standards of review).

Even so, legal application requires first that there be sufficient facts to conduct application of the law. If judges are applying a legal standard to a body of historical factual evidence, they must allow the parties to first develop the relevant body of factual evidence before ruling on whether that evidence supports the relevant claim. In some cases, the parties may see little need for additional factual submissions because they think that their case is extremely strong. In many cases, however, the parties never had any opportunity to develop a factual record, and as noted, appellate courts—including the Supreme Court—have ruled without any record in the court below. No theory of constitutional facts supports such adjudication, since courts at all levels have an obligation to ensure an adequate historical record—even if they have different roles in doing so.

2. *The Obligation to Remand.*—Appellate courts have a responsibility not necessarily to find facts, but rather, if they lack an adequate record, to remand for development of such a record in the trial court. As Stuart Benjamin has described, appellate courts commonly remand when important facts have changed and further proceedings are necessary.²⁴³ Similarly, remand is appropriate and maybe necessary when a new legal standard is announced and must be applied to not-yet-developed facts.²⁴⁴

The same should be true for appellate cases applying the Court’s new history-based tests. The Seventh Circuit’s ruling in *Atkinson v. Garland*,²⁴⁵ which involved application of *Bruen*’s test, stands out as perhaps the only prominent example in which a case was remanded for factual development. Finding that the parties did not sufficiently brief the question, and with the district court “best suited to conduct the required analysis in the first instance,” the court held that “[t]he best way forward, as we see it, is to return the case to the district court for a proper, fulsome analysis of the historical tradition supporting § 922(g)(1).”²⁴⁶ (In a concurring opinion in the Fifth Circuit, Judge Stephen Higginson similarly concluded that the evidentiary record be developed first in the trial court.²⁴⁷) However, Judge Diane Wood in the Seventh Circuit dissented, arguing that:

243. See Stuart M. Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEXAS L. REV. 269, 288–89 (1999) (describing appellate and Supreme Court examples).

244. Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court’s Role*, 96 NOTRE DAME L. REV. 172, 217 (2020) (“If an alternative ground for the judgment involves as-yet-unresolved factual disputes, then remand is necessary.”).

245. 70 F.4th 1018 (7th Cir. 2023).

246. *Id.* at 1022–23.

247. 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.”).

Only a professional historian would know how to evaluate often-conflicting claims about the social, cultural, and legal landscape of an earlier period, and that person likely would not jump to any conclusions without devoting significant time to an evaluation of original sources.²⁴⁸

She went on to describe the “vast and diverse array of gun laws stretching from the colonial period, through the Founding Era, through Reconstruction,”²⁴⁹ and noted that as lower and appellate courts “have begun to apply *Bruen*, this need for further research and further guidance has become clear.”²⁵⁰ Still, Judge Wood concluded that “the Supreme Court threw down a gauntlet, and it is our job to take it up.”²⁵¹

It is not just telling but deeply concerning as a practical and constitutional matter that there is still no uniform, coherent approach on a matter as fundamental as the obligation to develop an adequate factual record in the district court.

3. *Specialized Fact-Finding and the Role of Experts.*—In a wide range of litigation contexts, including constitutional cases, judges must assess claims that require a complex factual record regarding highly specialized subjects. In those contexts, judges have a variety of tools at their disposal, including the detailed standards set out in *Daubert v. Merrell Dow Pharmaceuticals*²⁵² and in Federal Rule of Evidence 702 regarding the helpfulness and reliability of expert evidence.²⁵³ Those tools have not been consistently used in the area of historical fact, nor are there uniform rules or even much judicial guidance to rely on. The predictable result has been deep division about foundational questions like whether to permit, solicit, or proceed without expert evaluation of the historical record. The consistency and quality of decisions have suffered accordingly.

Concern with judges making determinations of facts on technical subjects is longstanding. Judge Learned Hand put it this way:

That there can be issues of fact which courts would be altogether incompetent to decide, is plain. If the question were, for example, as to the chemical reaction between a number of elements, it would be idle to give power to a court to pass upon whether there was

248. *Atkinson*, 70 F.4th at 1028–29 (Wood, J., dissenting).

249. *Id.* at 1033.

250. *Id.* at 1038.

251. *Id.* at 1028–29.

252. 509 U.S. 579 (1993).

253. See FED. R. EVID. 702(a), (c) (emphasizing that expert testimony should “help the trier of fact to understand the evidence or to determine a fact in issue” and that it should be “the product of reliable principles and methods”).

“substantial” evidence to support the decision of a board of qualified chemists.²⁵⁴

Or take a recent antitrust ruling by the Court. In *National Collegiate Athletic Association v. Alston*,²⁵⁵ the Court noted: “Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis.”²⁵⁶ The concern with relative lack of expertise in scientific and technical matters is relevant regarding questions of expert evidence, but is also a much-developed topic in difficult questions regarding the level of review appropriate for agency regulatory determinations. Thus, the Court recognized in *American Electric Power Co. v. Connecticut*²⁵⁷ that “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”²⁵⁸

There are good reasons to think about historical facts and historical expertise in similar terms. If evaluating historical facts was part of what judges were trained to do and encompassed within their duty to find law, perhaps experts would not be needed. But historical fact-finding is not something that either laypeople or judges are typically tasked or equipped to do. And if the historical record is lacking or contested, resolving historical claims without experts raises real concerns that judges are claiming expertise that they lack and ultimately applying the law to an inadequate factual record, or simply a record of unknown adequacy based on their lack of expertise in assessing it.²⁵⁹

The issue is not whether historical study is or is not “factual”—many accounts of originalism argue that it is, and we have no quarrel with the notion that there *are* historical facts. But that does not mean that judges are particularly well-suited to find them, any more than they have the “scientific, economic, and technological resources” to answer questions in those fields. This makes it problematic for the Court to defend its originalist doctrinalism on the grounds that it is “more administrable and more legitimate” than other types of constitutional tests.²⁶⁰ Such an argument simultaneously elevates the importance of history and denigrates historical expertise.

One additional reason to consider carefully the role of experts in constitutional litigation is that Federal Rule of Evidence 702, which was revised in December 2023, reflects renewed emphasis on the role of judges

254. *NLRB v. Standard Oil Co.*, 138 F.2d 885, 887 (2d Cir. 1943).

255. 141 S. Ct. 2141 (2021).

256. *Id.* at 2158.

257. 564 U.S. 410 (2011).

258. *Id.* at 428.

259. Regarding the problem of selection, or the scope of the relevant historical record, in originalist decision-making, see Miller, *supra* note 227, at 387–88, 390.

260. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

in conducting gatekeeping to ensure the reliable application of methods to facts by experts proffered by parties in litigation. The amendment underscored the obligation of the party seeking to admit an expert to show that the expert satisfies the Rule 702 criteria by a preponderance of the evidence.²⁶¹ This change reflected a concern that judges were not being sufficiently careful or evenhanded in evaluating the reliability of expert evidence, including in criminal cases regarding forensic expert witnesses offered by the prosecution.²⁶² Those longstanding concerns regarding judicial application of *Daubert*, particularly to less-resourced litigants, should give us pause when considering whether judges can impartially evaluate historian experts in constitutional cases, particularly if lower court judges lack adequate guidance on what historical fact-finding is needed. Further, Rule 702 counsels not only an examination of the reliability of an expert's methods, but also the adequacy of the factual record and the reliability of the application of the methods to those facts.²⁶³ Each of those issues raises concerns regarding the sound use of historical evidence in constitutional cases.²⁶⁴

Accompanying that reliability inquiry into proffered expert evidence is the concern that laypeople do not deliver opinion evidence that in fact involves expert determinations.²⁶⁵ Indeed, under Rule 706, if the parties do not sufficiently address an issue requiring expert analysis, “the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations.”²⁶⁶

Why, then, is this particular area of historical fact-finding and expertise treated differently from others? Some judges and scholars proceed as if the required historical inquiries are simply *legal* determinations, with no factual component. In that case, treating these questions as historical is entirely unnecessary. If the Justices and judges are just interpreting the Constitution

261. FED. R. EVID. 702 (amended 2023).

262. See ADVISORY COMM. ON RULES OF PRAC. AND PROC., JUNE 2022 AGENDA BOOK 891–93 (2022) (detailing the Advisory Committee's analysis of amendments to Rule 702). Regarding the comparatively greater scrutiny of forensic expert witnesses offered by the defense, despite the relative lack of defense resources to retain expert witnesses, see Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559 (2018).

263. FED. R. EVID. 702.

264. There is a parallel challenge in relying on linguistic evidence in constitutional cases. See Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 796 (2020) (“These three fallacies—the Nonappearance Fallacy, the Uncommon Use Fallacy, and the Comparative Use Fallacy—each present an individual challenge to common interpretive arguments grounded in legal corpus linguistics data. But we should also note that these three arguments together threaten much of the current usefulness of legal corpus linguistics.”).

265. FED. R. EVID. 701 (stating that a lay witness may testify in the form of an opinion regarding what is rationally based on their perceptions, but “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702”).

266. FED. R. EVID. 706.

based on their best readings of historical or traditional law, and not historical practices grounded in findings of fact, then originalism should drop its claim to be a matter of historical fact. The underlying problem may simply be that the Court's originalist doctrinalism demands more of historical fact-finding than the legal process can legitimately deliver. But one cannot solve that problem by calling facts law and giving judges power to find them.

In some cases, experts might be unnecessary because the factual record is already clear, definitive, and strong. Or perhaps the needed expertise simply is not available. Professional training in history takes many years and tends to focus on narrow disciplines, after all. In the wake of *Bruen*, it quickly became apparent that the number of historians who seriously study gun laws is actually quite small; it would be impossible for them to serve as experts in every case, even if the litigants consistently had adequate resources to retain them. Again, the doctrine may be asking more than the system of historical knowledge can bear, but asking judges to fill the gaps themselves is hardly a solution—the answer lies in the doctrine.

4. *Historical Facts and Jury Trial Rights.*—The labeling of these inquires as involving fact, law, or both has important implications not only for the role of experts but of judges vis-à-vis juries, which in turn raises constitutional questions. Jurors, after all, are typically the fact-finders in our legal system, with a constitutionally enshrined role.²⁶⁷

Some judges seem to view historical facts as legally tied to constitutional tests while simultaneously treating them as preliminary to legal conclusions and therefore not for the fact-finder. Under such a view, we do not benefit from either lay common-sense assessment nor from reliable expert assessment of these facts. Judges, however, are not normally the fact-finders, unless they are resolving facts relevant to a question of law in a preliminary hearing or they are serving as the ultimate factfinder at a bench trial. Judges are not normally permitted to resolve facts that require technical expertise to evaluate any more than they can determine the credibility of lay witnesses in their role as a judge.

If historical factfinding is incorporated into a constitutional test, jurors must be instructed on the relevant law and have a role to play in deciding whether the legal standard (with its built-in historical inquiry) is satisfied under the facts of a case. Even if judges are more commonly assessing whether a constitutional standard is met in a preliminary posture, such as a motion to dismiss or summary judgment, they must consider whether reasonable jurors would find the standard satisfied, on the factual record,

267. See U.S. CONST. amends. VI, VII (protecting the jury trial right in criminal and civil cases, respectively); see also Blocher & Garrett, *Fact Stripping*, *supra* note 39, at 20–21 (describing the constitutional fact-finding role of the jury).

viewed in the light most favorable to the non-moving party,²⁶⁸ and appropriately crediting any relevant experts.²⁶⁹ Reasonableness must be assessed, based on the entire record, if the fact-finder is not reaching a judgment at a trial.

And where trials occur, the question arises whether the juror must make the relevant factual findings. The Supreme Court rulings we have discussed here call for judges to engage historical fact-finding, and they also call for judges to determine mixed questions applying the law to historical fact. Those distinctions matter in how the jury is instructed if a case proceeds to trial. Jury trial rights must be far more carefully considered regarding rules of practice for adjudicating historical fact in constitutional cases. And these distinctions between questions of fact and mixed questions also affect review on appeal, to which we turn next.

B. *Standards of Review for Constitutional Fact and Law Questions*

Once the Supreme Court has declared a constitutional rule that requires an analysis of history or tradition, that test must be applied to a factual record in future cases. This is a mixed question of law and fact. Such mixed questions arise in each of the contexts in which the Court has announced tests that call for application of doctrine to historical material, in order to decide future constitutional disputes. However, as described, the standards for applying those mixed questions in recent rulings have not been defined with any precision, or reference to prior bodies of law or standards of review. Further, as discussed, it takes some justification to adopt an independent review or de novo standard for a constitutional right, particularly with regard to questions of fact.

1. Review of Questions of Fact.—Once a record has been established, a judge or factfinder has applied the constitutional doctrine to that record, and a party appeals, the question arises what the appropriate standard of review should be on appeal. On questions of fact such as the correctness of the factual findings in the record below, substantial deference or clear error review

268. See FED. R. CIV. P. 56(a) (requiring movant for summary judgment show (1) “there is no genuine dispute as to any material fact” and (2) that the movant is “entitled to judgment as a matter of law”). However, in a Section 1983 case, the question of reasonableness raised for a qualified immunity motion is one for the judge, not the jury. Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 126 (1985).

269. For an overview, see Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court’s Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 L. & CONTEMP. PROBS., Spring/Summer 2001, at 289, 322.

applies.²⁷⁰ Appellate courts cannot substitute their own fact-finding or disregard facts already in the record.

There are also important policy reasons for this. Not only do trial courts typically have a comparative advantage in fact-finding, but the parties will not invest in developing an adequate district court record if they know that those findings will be supplemented or ignored by appellate courts. Thus, litigants “who know that they will not have any significant second chance to convince another tribunal on the facts must take the initial trial seriously. If there is any reason to believe in our adversary system of trial, more serious party effort should lead to better decisions.”²⁷¹

2. *Review of Questions of Law and Mixed Questions.*—For questions of law and mixed questions of law and fact, there is sometimes de novo review by appellate courts regarding questions of law and mixed questions of law application, but sometimes there is not, and quite often in constitutional law contexts the standard of review is entirely unstated.²⁷²

Whether a type of constitutional law application should call for de novo review, is a nuanced question as a policy matter. As Henry Monaghan has noted, it is not a given that judges, much less appellate judges, should have the final word on such questions: “Our system has not proceeded on the premise that judges, to say nothing of appellate judges, must render independent judgment on all law application.”²⁷³ There must be some justification for de novo review of the application of constitutional law to historical facts. One typical justification is an interest in uniformity across trial courts. But if such justification is grounded in comparative expertise, then it is entirely lost when the appellate court lacks any adequate record concerning the underlying historical evidence. Further, as Chief Justice William Rehnquist put it in a dissent, “sanctioning . . . factual second-guessing by appellate courts” will result in “lessened confidence in the judgments of lower courts.”²⁷⁴

270. FED. R. CIV. P. 52(a)(6). On the application of the clearly erroneous standard in criminal proceedings, see, for example, *United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1962) (en banc) (finding that appellate courts are “free to choose” between the clearly erroneous rule and substantial evidence rule in the criminal context, and selecting the clearly erroneous rule).

271. Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 652 (1988).

272. See Monaghan, *supra* note 45, at 232–33 (explaining the “vexing” distinction between questions of law and questions of fact). For early discussion of the doctrine in the context of review of agency determinations, see, for example, Arthur Larson, *The Doctrine of “Constitutional Fact”*, 15 TEMP. L.Q. 185, 185–86 (1941) (noting that the Supreme Court “is suspected of trying to forget about” its decision in *Cromwell v. Benson* that held that a lower court “properly permitted complete trial *de novo*” as to constitutional facts).

273. Monaghan, *supra* note 45, at 237.

274. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 520 (1984) (Rehnquist, J., dissenting).

At the very least, substantial fact-finding restricts the discretion of trial and appellate courts to interpret constitutional rights in whatever fashion they prefer. And preceding in the absence of such fact-finding raises serious jury trial and due process concerns. Moreover, in constitutional cases, the factual findings made by the district court are binding on appellate courts, absent a finding of clear error under Federal Rule of Civil Procedure 52.²⁷⁵ As Justice Antonin Scalia wrote, for an appellate court to overturn well-supported factual findings “makes evident that the parties to th[e] litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial.”²⁷⁶ The justifications for such deference are even greater when the fact-finding is on specialized matters such as scientific—or for that matter historical—questions of fact. Justice Thomas has noted, for example, that “deference is ‘[p]articularly’ appropriate when the issues require familiarity with ‘principles not usually contained in the general storehouse of knowledge and experience.’”²⁷⁷

3. *Rethinking the Legal Standard.*—Applying a constitutional test to an existing factual record, whether it involves a history-and-tradition test or something else, consists of a mixed question of law and fact. And as discussed, the United States Supreme Court has often not spoken clearly to the standards of review in these contexts.²⁷⁸ The relevant standards could evolve over time. Indeed, uniformity is not lost if appellate rulings are grounded in more reliable and more fairly developed factual records. A more factually informed body of law can then be made uniform. As Ryan Williams has argued:

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 facts of the case at hand and avoiding dispositions that are broader than necessary to resolve the parties’ particular dispute.²⁷⁹

That process cannot occur when the traditional litigation process is short-circuited, however, and fact-finding is not conducted at all at the trial level.

275. FED. R. CIV. P. 52(a)(6).

276. *United States v. Virginia*, 518 U.S. 515, 585 (1996) (Scalia, J., dissenting).

277. *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from the denial of certiorari) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 610 (1950)).

278. The Court has yet to adopt clear rules in the more ambiguous case of legislative facts cited for background support. Some of the high-profile disputes regarding whether factual information should be deferred to have involved those legislative facts, as Allison Orr Larsen has detailed. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 228–30 (2018).

279. Ryan C. Williams, *Historical Fact*, 99 NOTRE DAME L. REV. 1585, 1616 (2024).

In some areas, the Supreme Court has refined constitutional standards over time to add greater clarity for lower courts, specifically by avoiding the need for courts to examine challenging questions of historical fact. For example, in *Trop v. Dulles* the Supreme Court famously defined cruel and unusual punishment under the Eighth Amendment with regard to “evolving standards of decency.”²⁸⁰ One source of judicial and scholarly concern with that test was that the assessment of contemporary moral opinion could essentially consist in the Justices’ own independent judgment, and therefore not result in sustainable or legitimate constitutional doctrine.²⁸¹ Indeed, over time, the Court settled on a test requiring “objective indicia” of “national consensus,” before reaching such a judgment.²⁸² Thus, in the context of Eighth Amendment evolving standards of decency, the Supreme Court gradually defined a set of more objective criteria that it felt could be more readily administered by courts.

Such doctrinal requirements can lessen the need for lower courts to develop questions of historical fact. The Confrontation Clause provides an illustrative example of how this can work in the context of historical fact-finding. The Justices first announced in *Crawford v. Washington* that the test for deciding whether the Confrontation Clause prevents introduction of hearsay in a criminal case is whether the witnesses’ statements would have been considered “testimonial” statements “at the time of the founding.”²⁸³ However, the Justices have over time stepped away from a historically grounded test and have incorporated more of the existing law regarding

280. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

281. See, e.g., John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT. R. 87, 87 (2010) (“Unfortunately, the Supreme Court has effectively replaced this test with an unfettered reliance on its own ‘independent judgment,’ with no external constitutional standard to guide its decisions.”).

282. *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002); see also *id.* at 312 (“[t]he clearest and most objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (“[W]e look to objective indicia that reflect the public attitude toward a given sanction.”); Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORN. L. REV. 855, 875–80 (2019) (discussing Supreme Court’s previous rejection of empirical evidence concerning death sentencing patterns); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1150 (2006) (explaining the problem with looking to state legislation for evolving standards); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 275 n.121 (1995) (noting that the Court focuses on “evolving standards of decency” in its Eighth Amendment jurisprudence). But see Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 368–69 (2009) (noting that the Court conducts legislative majoritarian-consensus analyses in a range of constitutional contexts).

283. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (holding that the Sixth Amendment bars admission of “testimonial statements” by absent witnesses not previously cross-examined by the defense, “admitting only those exceptions established at the time of the founding”).

hearsay.²⁸⁴ This cabins the need to ask questions about what the framers of the Sixth Amendment would have thought about confrontation rights, focusing instead on the objective primary intent of the speakers themselves.²⁸⁵ Interestingly, the Sixth Amendment Confrontation Clause figured in the discussion in *Rahimi*, with Justice Gorsuch discussing that body of law as an example of the Supreme Court’s use of history and tradition to define and safeguard constitutional rights.²⁸⁶ But the Supreme Court’s Confrontation Clause jurisprudence should better be understood as a turn *away* from a test that was initially announced as an effort to ground doctrine in history. When that doctrine was eventually given specific content, the Justices settled on a doctrinal standard that contains an objective intent test, reliance on precedent, and conformity to longstanding rules of evidence.

Indeed, to the extent that the Justices have cited history and tradition in recent decisions, it has been more recent and non-constitutional precedent, drawn from the law of evidence.²⁸⁷ Concurring in part in *Samia v. United States*, Justice Barrett emphasized “a timing problem” with the historical evidence cited by the majority.²⁸⁸ Justice Barrett noted that the historical evidence invoked was “largely from the late 19th and early 20th centuries—far too late to inform the meaning of the Confrontation Clause ‘at the time of the founding,’” which was ostensibly the focus in *Crawford* when the Court’s testimonial standards were set out. In addition, these were evidentiary rulings, not Confrontation Clause rulings.²⁸⁹ Justice Barrett concluded that in suggesting that the history lends much support to the approach taken by the Court, “the Court overclaims.”²⁹⁰ And “[t]hat is unfortunate. While history is often important and sometimes dispositive, we should be discriminating in

284. Post-*Crawford* cases have focused far more on the “primary purpose” prong of the analysis, and whether the purpose of the statement was to provide testimony. *Michigan v. Bryant*, 562 U.S. 344, 358–59 (2011). That prong of the test is “objective,” focused on the intent of the declarant and questioner, and it is not history or tradition-related. *Id.* at 360. Further, the Court looks to “standard rules of hearsay, designed to identify some statements as reliable,” when conducting this inquiry. *Id.* at 358–59.

285. See, e.g., Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1869 (2012) (“[B]y severely restricting the admissibility of testimonial hearsay, *Crawford* and its progeny indisputably improve Confrontation Clause jurisprudence.”).

286. *Rahimi*, 144 S. Ct. 1889, 1908 (2024) (Gorsuch, J., concurring) (“[J]ust as here, when a party asks us to sustain some modern exception to the confrontation right, we require them to point to a close historic analogue to justify it.”).

287. Writing for the majority in *Samia v. United States*, 143 S. Ct. 2004 (2023), Justice Thomas relied on “historical practice,” but largely on more recent practice, to exempt co-defendant confession statements, redacted, from Confrontation Clause protection. *Id.* at 2014 (“[T]he Court’s precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly.”).

288. *Id.* at 2019 (Barrett, J., concurring).

289. *Id.* (Barrett, J., concurring).

290. *Id.* at 2020. (Barrett, J., concurring).

its use. Otherwise, we risk undermining the force of historical arguments when they matter most.”²⁹¹

One lesson from the Confrontation Clause doctrine’s evolution over the past two decades is that the Court has settled on a more workable doctrine, grounded in the law of evidence rather than exclusively based in historical fact. Outcomes involve the application of a multi-part constitutional standard, developed in response to cases that have come before the Court, accommodating the structure of related law. These cases suggest that when the Court claims to rely on historical facts but is actually doing something else, the resulting doctrine can step away from unsupported use of history.

Conclusion

The Supreme Court has tasked lower courts with applying constitutional standards using historical facts, but it has failed to grapple with how those facts should or even can be found and analyzed. The result has been disarray among parties and judges, both at trial and on appeal, concerning how to carry out their responsibilities in the wake of evolving standards of history in constitutional law.

This raises a concern that even if the Court’s increasing reliance on originalist doctrinalism works in theory, it fails in practice. If lower courts can decide cases based on a robust, adequately vetted factual record, then the historical turn in constitutional law might produce a body of coherent and grounded jurisprudence. But if litigants and lower courts cannot do so, or if they do so only to have that record disregarded on appeal, then constitutional doctrine’s fundamental legitimacy and grounding in historical or tradition-based fact will increasingly ring hollow. Just as judges and scholars have asked whether questions of scientific evidence should instead be handled by expert administrative agencies, rather than Article III judges, new questions will arise whether judicial expertise suffices to impartially, reliably and consistently develop, much less adjudicate, questions of historical fact.²⁹²

We have not seen local rules, appellate standards, or clear direction from the Supreme Court regarding development of historical fact. No courts at any level are providing guidance on the litigation of these questions of historical fact that the Court has tasked lower courts with implementing. The necessary

291. *Id.* (Barrett, J., concurring).

292. *See, e.g.*, David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORN. L. REV. 817, 822–23 n.19 (1977) (noting that judges are typically “technologically illiterate”); David L. Faigman, *Judges as “Amateur Scientists”*, 86 B.U. L. REV. 1207, 1211 (2006) (“Lawyers, of which judges are merely a subset, generally lack good training in the methods of science.”). Suggesting that the Supreme Court requires a research service, see Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 15 (1986) (“When the Court lacks the needed information, it usually makes guesses.”).

rules for applying history as law simply do not exist. And most concerning, the existing rules for fact development and for standards of review regarding questions of fact are being circumvented in ways that themselves raise deep constitutional and legal concerns.

The new originalist doctrinalism needs guardrails and principles, just like the use of factual evidence in other legal contexts. The alternative is vague, subjective, “know it when I see it”²⁹³ judge-made evolving standards of history. The Supreme Court is making history by setting out constitutional standards that require evaluation of historical facts.²⁹⁴ In doing so, the Court is substantially enhancing its own role and authority over not only constitutional law, but also constitutional facts. Without adequate standards for applying history as law, the resulting doctrine will fail to produce coherent, accurate, or fair rules of decision.

293. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to define the types of material encompassed in the Court’s definition of pornography).

294. *See Murray*, *supra* note 13, at 1014 (“[F]or the Court, ‘doing’ history is a dynamic enterprise—one in which the Justices may emphasize certain facts and accounts, while completely occluding others. In this regard, ‘doing’ history is often tantamount to ‘making’ history.”).