

# HISTORIANS WEAR ROBES NOW? APPLYING THE HISTORY AND TRADITION STANDARD: A PRACTICAL GUIDE FOR LOWER COURTS

Alexandra Michalak\*

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## INTRODUCTION

Never before has the Supreme Court relied on the history and tradition standard to such a magnitude as in the 2021 term to determine the scope of a range of constitutional rights. The Court in *New York State Rifle & Pistol Ass'n v. Bruen* doubled down on the historical standard established in *District of Columbia v. Heller*,<sup>1</sup> mandating that lower courts compare the modern firearms regulation in dispute against the Second Amendment's text and its vast (and often conflicting) historical understanding.<sup>2</sup> Alone, this standard is amorphous and far-reaching.<sup>3</sup> To further complicate matters, the Court's historical analyses in both *Dobbs v. Jackson Women's Health Organization* and *Kennedy v. Bremerton School District* fail to square neatly with the historical analyses the Court engaged in *Bruen*, leaving federal courts of appeal and district courts in difficult places in applying precedent.<sup>4</sup>

Post-*Bruen*, the Supreme Court has tasked judges with making value judgments on the significance of laws passed hundreds of years ago, with determining how these laws affected the public at large, and with deciding whether the historical laws are "relevantly similar" to the modern laws in question—tasks best completed when researched against the backdrop of U.S. history as a whole.<sup>5</sup> The reality is that most lawyers and judges are not trained historians, and that they are not experts on the subject. By nature of litigation, court-led historical inquiries are necessarily surface level and lopsided, favoring some historical evidence over the other, and often outright missing the proper historical context to frame the evidence provided. Applying certain facts of history and pronouncing those facts as the definitive answer by way of undercutting or dismissing other factual occurrences transforms the truth and fosters serious ramifications that stretch beyond the law and bleed into all facets of society, culture, and politics.<sup>6</sup>

Apart from truth-preserving concerns, an additional problem remains: the workability of the test itself. Lower courts lack the time and resources to engage in

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<sup>1</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008).

<sup>2</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

<sup>3</sup> See Adam Beam, *Federal Appeals Court Strikes Down Domestic Violence Gun Law*, ASSOCIATED PRESS (Feb. 2, 2023, 9:17 PM), <https://apnews.com/article/us-supreme-court-politics-crime-texas-violence-6d2af127ca14c65ca9a925645a5ee546> [<https://perma.cc/TG2Y-BNAK>] ("Thursday's ruling demonstrates the far-reaching impacts of the *Bruen* decision.").

<sup>4</sup> See *infra* Part III.

<sup>5</sup> *Bruen*, 142 S. Ct. at 2132. The Court has invited lower courts to answer questions that "are not legal—they do not involve the interpretation of a text" in the traditional sense, "nor do they involve a choice between competing rules that proscribe conduct." Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1256 (2012) [hereinafter Larsen, *Fact Finding*]. See also Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 62–63 (2023) (describing the Court's "growing appetite" for historical tests).

<sup>6</sup> See *infra* Section V.B.

proper, full-scale historical studies.<sup>7</sup> Supreme Court Justices have near unlimited resources at their fingertips to engage in lengthy historical inquiries. These Justices hire the top law students in the country as clerks, have the best access to legal resources, and most significantly, enjoy ample time to dig through mountains of historical documents and amicus briefs. Lower courts, however, face a much higher caseload, a much tighter timeline, and have far fewer hands on deck to help reach a proper decision using the history and tradition standard.

In reaffirming this standard, the Supreme Court provided no guidance to lower courts on how to apply and analyze the history and tradition standard. Along with balancing the lack of resources in deciding cases with the history and tradition framework, lower courts must face the reality that this standard presents ample opportunity for one-sided historical analysis. To combat the temptation of conducting unbalanced and cursory reviews of historical sources and to ensure consistent interpretation and application of the law, lower courts must administer a workable, practical, and predictable method to apply the history and tradition standard. Acting within the vague boundary lines set out by the Court in *Bruen*, *Dobbs*, and *Kennedy*, lower courts must evaluate the history and tradition surrounding a given right through finding historical evidence that the right, or foundations of the right, survived to become the law of the Founders or adopters.<sup>8</sup> But lower courts must recognize the pitfalls of the history and tradition test. Lower courts should avoid over-relying on amicus briefs,<sup>9</sup> listening to “law office history,”<sup>10</sup> or scrutinizing historical outliers in drawing conclusions.

Court of appeals judges have expressed their concerns regarding the impact of the Supreme Court’s 2021 term, as well as the political impact of the 2022 and 2023 terms.<sup>11</sup> Above all else, the doctrinal shift toward history and tradition weighed on

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<sup>7</sup> The Court does not seem blind to this concern, considering its insistence that they “are not obliged to sift the historical materials for evidence to sustain [the statute]. That is [the Government’s] burden.” *Bruen*, 142 S. Ct. at 2150. However, this reassurance provided by the Court further encourages the practice of law office history and one-sided analysis. See *infra* Section V.A.

<sup>8</sup> See *infra* Part IV; *Bruen*, 142 S. Ct. at 2131–32 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008)) (“[W]e will consider whether ‘historical precedent’ from before, during, and even after the founding evinces a comparable tradition of regulation.”).

<sup>9</sup> See Allison Orr Larsen, *The Supreme Court Decision on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249> [<https://perma.cc/3DBG-AXKH>]; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1784 (2014) [hereinafter Larsen, *Amicus Facts*].

<sup>10</sup> See Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1098 (2009).

<sup>11</sup> William & Mary Law School, *Supreme Court Preview*, YOUTUBE (Sept. 16, 2022), [https://www.youtube.com/watch?v=H4dK\\_IR1MGU](https://www.youtube.com/watch?v=H4dK_IR1MGU) [<https://perma.cc/73RH-VNDJ>] (beginning at 37:00).

the judges' minds. While speaking on a panel at William & Mary Law School, for example, Judge Kevin Newsom of the Eleventh Circuit, Judges Pamela Harris and Toby Heytens of the Fourth Circuit, and Judge Stephanos Bibas of the Third Circuit have all expressed concern on how to apply the history and tradition test.<sup>12</sup>

Judge Newsom urged academics to write more law review articles that include historical surveys on particular constitutional clauses.<sup>13</sup> Judge Harris expressed her concerns about dedicating an excessive amount of time to researching detailed history dating back to the Medieval Age while real litigants waited for answers.<sup>14</sup> The reoccurring theme of the panel distilled down to a few major concerns: workability, time and resources, briefing and law review articles, and ensuring just results. Judge Newsom summed up the panel well, explaining that “whether you love originalism or you hate it, it is a real thing, and it’s here.”<sup>15</sup>

Part I of this Note provides background on the origins of this test, the rise of originalism, and the evolution of the use of history and tradition. Part II discusses how lower federal courts have used history and tradition to inform its decisions thus far. Part III breaks down the modern doctrine at the Supreme Court, most significantly the use of the history and tradition test in the 2021 term. Part IV describes how lower courts have struggled to apply the history and tradition test. Part V establishes a practical way for lower courts to apply the history and tradition test, balancing the interests of justice with the realities of the limits of the lower courts. The workable standard suggests that lower courts, in tandem with the use of expert witnesses or special masters, must engage in “historical quarrying.”<sup>16</sup>

#### I. THE ORIGINS OF THE TEST AND ORIGINALISM’S INFLUENCE

To provide an adequate standard for lower courts to apply in navigating the history and tradition test, a recount of the origins of originalism is necessary to provide adequate context. Courts use the history and tradition test to assess constitutional rights, and the originalist theory of constitutional interpretation has necessarily informed the history and tradition test and its development. The use of history

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<sup>12</sup> *Id.* at 38:50–43:17.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 39:30–40:07; *see also* Blocher & Garrett, *supra* note 5, at 63 (quoting DAVID FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 46 (2008)) (noting that “originalism is ‘almost wholly fact based.’”).

<sup>16</sup> This proposed standard is derived from traditional historical methods of analysis, requiring lower courts to engage in a three-step process in properly weighing the historical evidence. *See infra* Part V. Historical quarrying also seeks to limit the relevant time period judges should be targeting, while also considering the historical analyses conducted by the Supreme Court in the 2021 term. The types of historical evidence used in *Bruen*, *Dobbs*, and *Kennedy* serve as guideposts in the historical quarrying process.

and tradition has morphed into several differing tests, ranging from serving as a step in a multipronged analysis to merely serving as a backdrop to evaluate fundamental rights.<sup>17</sup>

#### A. History and Tradition as a Test

According to Justice Antonin Scalia, perhaps the most prominent originalist to ever sit on the High Court, *Hurtado v. California* established “history’s proper role as distinguishing between past and future practice.”<sup>18</sup> Justice Scalia interpreted *Hurtado* to establish a framework of fundamental fairness: “[I]f the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process.”<sup>19</sup> This use of history rooted in *Hurtado* evolved into the modern use of “history and tradition,” which first appeared in Justice Lewis Powell’s 1977 *Moore v. City of East Cleveland* opinion: “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s *history and tradition*.”<sup>20</sup> Only a few years later, Justice Byron White declined to find a fundamental right to engage in sodomy in *Bowers v. Hardwick* partly because the right was not deeply rooted in history and tradition.<sup>21</sup> These foundations of the history and tradition test culminated in Justice Scalia’s opinion in *Michael H. v. Gerald D.*, in which the Court used the history and tradition test as an independent, stand-alone test to assess substantive due process rights.<sup>22</sup> A majority of the Court again adopted the application of history and tradition in determining substantive due process rights in *Washington v. Glucksberg*, which now serves as the fundamental case in history and tradition jurisprudence.<sup>23</sup>

History has been invoked by the Court in a number of ways outside of the stand-alone history and tradition test, often serving as a prong in a multifactor test. For

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<sup>17</sup> See generally, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Hurtado v. California*, 110 U.S. 516, 532 (1884).

<sup>18</sup> L. Benjamin Young, Jr., *Justice Scalia’s History and Tradition: The Chief Nightmare in Professor Tribe’s Anxiety Closet*, 78 VA. L. REV. 581, 594 (1992).

<sup>19</sup> *Id.* at 594 (quoting *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 31–32 (1991) (Scalia, J., concurring)).

<sup>20</sup> *Id.* at 588 (quoting *Moore*, 431 U.S. at 503).

<sup>21</sup> See *Bowers*, 478 U.S. at 192.

<sup>22</sup> See 491 U.S. at 121–25, 127 n.6.

<sup>23</sup> See 521 U.S. 702, 720–21, 728 (1997) (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”); see also Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 11–15 (2008) (describing the evolution of the history and tradition standard).

example, in *Pleasant Grove City v. Summum*, the Court established a test to determine whether the government engaged in its own speech, therefore placing it outside of the reach of the scrutiny of the First Amendment.<sup>24</sup> Lower courts must conduct a “holistic inquiry . . . driven by a case’s context,” observing a non-exhaustive list of three factors, including “the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.”<sup>25</sup> Thus, in government speech inquiries, courts must engage in mini-history and tradition analyses.<sup>26</sup> The Court in *Summum* accepted, without much pushback, that the government had historically spoken through monuments donated by private parties placed in public parks.<sup>27</sup> Conducting a surface-level, cursory analysis, the Court reasoned that “it is fair to say that throughout our Nation’s history, the general government practice with respect to donated monuments has been one of selective receptivity.”<sup>28</sup> Without explicitly citing historical documents or primary sources, the Court identified that “[s]ince ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance.”<sup>29</sup> The Court treated this history as common knowledge—history that is neither disputed nor controversial.<sup>30</sup> Now, the Court has shifted to prefer history and tradition alone as the test to adjudicate constitutional rights.

### B. Originalism’s Influence

The rise of originalism correlated with the increase in reliance on history and tradition in Supreme Court jurisprudence.<sup>31</sup> The test presents and functions as originalist constitutional interpretation. This development did not occur in a vacuum. Beginning in the 1960s and experiencing rapid growth in the 1980s, originalism developed as a major theory of constitutional interpretation used and promoted by

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<sup>24</sup> 555 U.S. 460, 468 (2009).

<sup>25</sup> *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1589–90 (2022) (citing *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–14 (2015)).

<sup>26</sup> *Summum*, 555 U.S. at 470–71.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 471.

<sup>29</sup> *Id.* at 470.

<sup>30</sup> *Compare Summum*, 555 U.S. at 470–72, with *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2138–56 (2022).

<sup>31</sup> Young, *supra* note 18, at 583 n.14. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV. 849 (1989); Lee J. Strang, *Originalism’s Promise, and Its Limits*, 63 CLEV. ST. L. REV. 81 (2014); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Kimberly Strawbridge Robinson, *Supreme Court Again Nods to History, Tradition in Religion Case*, BLOOMBERG L. (June 28, 2022, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/supreme-court-again-nods-to-history-tradition-in-religion-case> [<https://perma.cc/FN22-F5A7>].

conservative legal minds.<sup>32</sup> Originalist theory peaked in *District of Columbia v. Heller*, a decision that proved “unmistakably originalist” in adopting principles of originalism as the test to be applied to determine the extent of Second Amendment rights.<sup>33</sup> As evidenced by the Court’s recent decision in *Bruen*,<sup>34</sup> the history and tradition test embraces the full scope of originalist thought today.<sup>35</sup>

Justice Scalia contributed to the development of the use of history and tradition,<sup>36</sup> yet, ironically, “it was his solicitous regard for precedent that led Justice Scalia to describe himself as a ‘faint-hearted originalist.’”<sup>37</sup> From the day he took the Supreme Court bench on September 26, 1986, to the date of his death on February 13, 2016, forty-one Supreme Court cases have explicitly mentioned “history and tradition.”<sup>38</sup> Of those forty-one cases, nineteen majority opinions treated history and tradition as dispositive in determining the outcome of the case.<sup>39</sup>

Four Justices currently on the Supreme Court are self-proclaimed originalists.<sup>40</sup> Six of the nine Justices are Republican appointees.<sup>41</sup> Such a partisan divide has

<sup>32</sup> See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 13–16 (Grant Huscroft & Bradley W. Miller eds., 2011).

<sup>33</sup> *Id.* at 30.

<sup>34</sup> *Bruen*, 142 S. Ct. at 2156.

<sup>35</sup> Professors Randy Barnett and Lawrence Solum, however, treat history and tradition as distinct from originalist theory. See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 *NW. L. REV.* 433, 478–88 (2023). In addressing how non-originalist-majority “collegial courts” would apply the *Bruen* standard, Professors Barnett and Solum propose an “originalist approach” to history and tradition generally. See *id.* at 484–88. Interestingly, Professors Barnett and Solum claim that “the role of history and tradition in judicial decisions may be a function of compromise,” rather than of precedent. *Id.* at 484.

<sup>36</sup> See Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 179 (1993); Patrick J. Charles, *The “Originalism Is Not History” Disclaimer: A Historian’s Rebuttal*, 63 *CLEV. ST. L. REV. ET CETERA* 1, 10 n.56 (2015); Cornell, *supra* note 10, at 1095.

<sup>37</sup> Nicholas Iacono, *Stare (In)Decisis: The Elusive Role of Precedent in Originalist Theory & Practice*, 20 *GEO. J.L. & PUB. POL’Y* 389, 396 (2022).

<sup>38</sup> WestLaw search “history and tradition” using the date ranges September 26, 1986, to February 13, 2016. Further refined search by filtering by U.S. Supreme Court cases.

<sup>39</sup> The criteria used to determine whether the use of history and tradition proved “dispositive” was (1) whether the Court used history and tradition as part of a multistep test, (2) whether the Court used history and tradition as more than a backdrop to describe the state of the common law, and (3) whether the Court used history and tradition (as opposed to declining to apply this standard) to determine the case. Denials of certiorari that mentioned history and tradition as well as cases in which any mention of history and tradition appeared only in the concurrence or dissent were also excluded from this count.

<sup>40</sup> See David H. Gans, *This Court Has Revealed Conservative Originalism to Be a Hollow Shell*, *THE ATLANTIC* (July 20, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561/> [<https://perma.cc/6DEP-6WNK>].

<sup>41</sup> See generally Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 *SUP. CT. REV.* 301 (2016).

proven rare in the long history of the Supreme Court,<sup>42</sup> and such a divide has contributed to the frequency with which the Court engages in historical analyses, often analogous to pure originalist ideals, in deciding cases.<sup>43</sup> As the Court's membership became more and more originalist, the use of history in the Court's analysis increased.

Despite this reality, “more originalists are issuing the ‘originalism is not history’ disclaimer. . . . [I]t seeks to shield originalism from the history-in-law criticisms of non-originalists and historians alike—particularly criticisms of the subjectivity problems associated with originalism’s practice.”<sup>44</sup> Independent of these claims is “the reality . . . that the past can never be recreated in its entirety to include the drafting, ratification, and early interpretation of the Constitution,”<sup>45</sup> presenting practical issues for lower courts in applying standards that increasingly resemble originalist values.<sup>46</sup> For example, Justice Amy Coney Barrett serves as one of the four self-proclaimed originalists on the Court: “Her statements and writings reveal a firm commitment to what she calls a ‘weak’ version of stare decisis. This approach treats constitutional precedents as ‘presumptively controlling’ and rejects overruling a prior decision solely because the judge believes it was wrongly decided.”<sup>47</sup> Justice Samuel Alito, on the other hand, “does not care that the adopters would not have understood the right in the same way as a modern court.”<sup>48</sup> Judges are increasingly becoming more partisan, and public interest groups on both sides of the aisle have contributed to the reliance on empirical facts in deciding how courts resolve constitutional questions.<sup>49</sup> Traditionally, the “previous generation of conservative litigators ‘had insisted on ‘judicial restraint.’”<sup>50</sup> However, “second generation firms—groups

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<sup>42</sup> *Id.* at 301 (“Before 2010, the Court never had clear ideological blocs that coincided with party lines.”).

<sup>43</sup> *See id.* at 349–51 (showing empirical evidence that, unlike their predecessors, “the Republicans on the Roberts Court have remained steadfast in their conservatism”); *supra* notes 39–41 and accompanying text.

<sup>44</sup> Charles, *supra* note 36, at 2–3.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> *But see* Barnett & Solum, *supra* note 35, at 21–22, 40 (arguing that Justice Alito’s use of the history and tradition test in *Dobbs* “operat[ed] outside an originalist framework” and implemented some non-originalist reasoning); *but see also id.* at 15–16, 51–53 (recognizing the gravitational pull of originalism).

<sup>47</sup> Iacono, *supra* note 37, at 408.

<sup>48</sup> Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 670 (2013).

<sup>49</sup> *See generally* ANN SOUTHWORTH, *Mediator Organizations: The Heritage Foundation and the Federalist Society*, in *LAWYERS ON THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 124 (John M. Conley & Lynn Mather eds., 2008).

<sup>50</sup> *See* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 *N.Y.U. L. REV.* 175, 195 (2018) [hereinafter Larsen, *Age of Alternative Facts*] (quoting STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 221 (2008)); *see also* SOUTHWORTH, *supra* note 49.



like the Center for Individual Rights and the Institute for Justice—instead have adopted a more strategic approach to ‘actively us[e] courts to establish new or re-invigorate old rights.’”<sup>51</sup> This strategic approach has created a complicated dynamic both at the Supreme Court and in lower courts; presented with seemingly factual, empirical evidence, courts are now tempted to favor one-sided historical facts that support a specific agenda.<sup>52</sup>

## II. PRE-BRUEN, DOBBS, AND KENNEDY APPLICATION OF THE HISTORY AND TRADITION TEST

The Court introduced the history and tradition test, in its purest form, in *District of Columbia v. Heller*.<sup>53</sup> In *Heller*, the Court held that the Second and Fourteenth Amendments protect the individual right to keep and bear arms for self-defense, unconnected to service in a militia.<sup>54</sup> *Heller* combined elements of statutory interpretation confirmed by historical analysis.<sup>55</sup> The Court first engaged in a textual analysis of the Second Amendment.<sup>56</sup> Then, relying on analogous arms-bearing rights in state constitutions; the historical record surrounding the drafting of the Second Amendment; and post-ratification commentary, case law, and legislation, the *Heller* Court confirmed its textual determination against various historical sources.<sup>57</sup> The “test” pronounced in *Heller* tasks lower courts with examining “a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification” which serves as “a critical tool of constitutional interpretation.”<sup>58</sup> The Court implemented these steps to determine the original public understanding of the Second Amendment.<sup>59</sup>

However, rather than applying the history and tradition test alone, courts of appeal developed a two-part inquiry to evaluate Second Amendment cases.<sup>60</sup> The first step requires the government to justify its regulation by “establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally

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<sup>51</sup> See Larsen, *Age of Alternative Facts*, *supra* note 50, at 195 (quoting TELES, *supra* note 50, at 221); see also SOUTHWORTH, *supra* note 49, at 124–48.

<sup>52</sup> For more on agenda-setting at the Supreme Court, see generally Devins & Baum, *supra* note 41.

<sup>53</sup> See generally 554 U.S. 570 (2008).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 576–77.

<sup>56</sup> *Id.* at 576–77.

<sup>57</sup> *Id.* at 601–26.

<sup>58</sup> *Id.* at 605.

<sup>59</sup> *Id.* at 601–26.

<sup>60</sup> Most federal courts applied this two-step inquiry pre-*Bruen*. See Marcia Coyle, *Analysis: How a Supreme Court Ruling Led to the Overturning of a Guns and Domestic Violence Law*, PBS (Feb. 8, 2023, 3:56 PM), <https://www.pbs.org/newshour/politics/analysis-how-a-supreme-court-ruling-led-to-the-overturning-of-a-guns-and-domestic-violence-law> [<https://perma.cc/RV7F-HBSD>].

understood.”<sup>61</sup> If the government proves that the law regulates activity outside of the Second Amendment as originally understood, the analysis stops there: the activity is “categorically unprotected.”<sup>62</sup> However, if the history surrounding the activity proves inconclusive “or suggests that the regulated activity is *not* categorically unprotected,” the courts proceed to step two.<sup>63</sup> Step two requires courts to analyze “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.”<sup>64</sup> If the court finds that the Second Amendment right has been burdened, courts apply strict scrutiny.<sup>65</sup> If the activity is far from the core of the right or if the activity is not severely burdened, then the court applies intermediate scrutiny.<sup>66</sup> The Court in *Bruen*, however, preferred a pure application of the history and tradition test, striking down the two-part analysis.<sup>67</sup>

Despite the recent dominance in originalist decision-making, history has always loomed in the background of the law.<sup>68</sup> Even post-*Heller*, lower courts did not use the history and tradition as a stand-alone test.<sup>69</sup> A base knowledge of the history of the U.S. Constitution assists lower court judges in reaching conclusions to difficult legal questions every day.<sup>70</sup>

These same judges are not entirely new to the process of using history to inform their decisions, and, as the Court identified, reasoning by analogy serves as a commonplace task for any lawyer or judge.<sup>71</sup> Some federal district and court of appeals judges have spoken on the issue, recounting their experiences evaluating historical materials and briefs submitted to the court using historical evidence.<sup>72</sup> In discussing his application of a historical standard, Chief Judge Frank Easterbrook of the

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<sup>61</sup> *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019); *see, e.g., Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255–58 (3d Cir. 1992).

<sup>62</sup> *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012).

<sup>63</sup> *Kanter*, 919 F.3d at 441.

<sup>64</sup> *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

<sup>65</sup> *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017).

<sup>66</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

<sup>67</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

<sup>68</sup> After all, Chief Justice Marshall invoked the use of history in deciding *McCulloch v. Maryland*, 17 U.S. 316, 354–55, 383–86 (1819). Infamously, Chief Justice Taney relied on his slanted reading of history in *Dred Scott v. Sandford*. *See, e.g.,* 60 U.S. 393, 432–36 (1857), *superseded by constitutional amendment*, U.S. CONST. amend XIV. Even more notably, Justice McLean’s dissent in *Dred Scott* refuted Chief Justice Taney’s flawed reading, applying a wealth of contrary and more accurate history. *Id.* at 537–47 (McLean, J., dissenting). *See also* Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 919 (1993).

<sup>69</sup> *See, e.g., Kanter*, 919 F.3d at 441; *see also* Coyle, *supra* note 60.

<sup>70</sup> *See* Amanda L. Tyler et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1890 (2012) (talking with Judge Easterbrook); Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1176 (2009).

<sup>71</sup> *See Bruen*, 142 S. Ct. at 2131–32.

<sup>72</sup> *See* Tyler et al., *supra* note 70, at 1890; Sutton, *supra* note 70, at 1176.

Seventh Circuit explained that “[i]f briefs supply references to helpful sources, I am perfectly happy to go read them. . . . Real historians may have something useful to say even though the lawyers don’t.”<sup>73</sup> However, Chief Judge Easterbrook acknowledged the realities of using history and tradition as a legal standard, explaining that “[l]aw office history is an oxymoron. I don’t pay much attention to purported history in legal briefs because people are always taking things out of context.”<sup>74</sup> Judge Diane Wood also recognized that lower courts are limited by the Supreme Court’s precedent and “marching rules” surrounding historical standards.<sup>75</sup>

Originalist lower court judges themselves have often invoked historical evidence to support their judicial decisions, even without any sort of Supreme Court guidance.<sup>76</sup> To a certain extent, weighing historical statutes and the common law of the past against current statutes and potential fundamental rights is a practice that judges, in particular originalist judges, engage in all the time.<sup>77</sup> Even Chief Judge Easterbrook acknowledges that these “marching orders . . . trump our original views of the Constitution.”<sup>78</sup> However, the Supreme Court’s new expanded reliance on history and tradition to determine the scope or existence of certain fundamental rights reverses this presumption to a certain extent, requiring lower courts to work within the limits of precedent while also wading into a wide-ranging sea of historical documents, law review articles, amicus briefs, and other normative considerations.<sup>79</sup>

### III. MODERN DOCTRINE AT THE SUPREME COURT

With the development of the history and tradition test, the increased polarization of society and the Court, and the growth of originalism’s impact on constitutional interpretation, the current Court has injected history and tradition into much of its modern jurisprudence. Indeed, “[i]n virtually every area of constitutional law, the Supreme Court has increasingly relied on history and tradition to inform its decision-making,”<sup>80</sup> with the peak of such reliance forming in the 2021 term. Three blockbuster cases used history and tradition to inform the Court’s decision-making at an unprecedented magnitude.<sup>81</sup> Summaries of the Court’s application of history

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<sup>73</sup> Tyler et al., *supra* note 70, at 1890.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1918.

<sup>76</sup> See Josh Blackman, S. Tex. Coll. L., Inaugural Edwin Meese III Originalism Lecture at The Heritage Foundation, Originalism and Stare Decisis in the Lower Courts (Mar. 24, 2022), <https://www.heritage.org/sites/default/files/2022-05/HL1328.pdf> [<https://perma.cc/KP7W-6QMM>].

<sup>77</sup> *See id.*

<sup>78</sup> Tyler et al., *supra* note 70, at 1918.

<sup>79</sup> *See infra* Section V.A.

<sup>80</sup> Chemerinsky, *supra* note 68, at 901.

<sup>81</sup> *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); N.Y. State

and tradition in these three cases will provide further insight on how lower courts can implement history in its legal analysis as required by precedent, while using administrable methods.<sup>82</sup>

*A. New York State Rifle & Pistol Ass’n v. Bruen’s Expansion of District of Columbia v. Heller*

In perhaps its most rigorous use of history and tradition in the 2021 term, the Court in *New York State Rifle & Pistol Ass’n v. Bruen* reiterated the history and tradition test as established in *District of Columbia v. Heller*,<sup>83</sup> holding broadly that “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct . . . .”<sup>84</sup> As such, the government bears the burden of justifying the regulation by proving that the law is consistent with the United States’ historical tradition of gun regulation.<sup>85</sup>

*Bruen* ultimately rejected the approach developed by the lower courts post-*Heller*, where, after finding inconclusive historical evidence or evidence suggesting that the regulated activity is not categorically unprotected, the court would proceed to a second step in the analysis.<sup>86</sup> For the second step, lower courts would analyze “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.”<sup>87</sup> If the law burdened a core Second Amendment right, for example, the right to self-defense in the home, then the court would apply strict scrutiny.<sup>88</sup> Otherwise, courts apply intermediate scrutiny when the historical evidence proves unclear.<sup>89</sup> The Court dismissed the two-step test, insisting that instead, the test for Second Amendment questions is limited to the Second Amendment and its history itself.<sup>90</sup>

*Heller* demanded a “test rooted in the Second Amendment’s text, as informed by history,” and used English history sources dating from the 1600s, as well as

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Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>82</sup> See *infra* Section V.C.2.c for a comparison of each case.

<sup>83</sup> *Bruen*, 142 S. Ct. at 2126–28. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>84</sup> *Bruen*, 142 S. Ct. at 2129–30.

<sup>85</sup> See *id.* at 2130.

<sup>86</sup> *Id.* at 2126; see, e.g., *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019).

<sup>87</sup> *Bruen*, 142 S. Ct. at 2126 (quoting *Kanter*, 919 F.3d at 441).

<sup>88</sup> *Id.* at 2126.

<sup>89</sup> *Id.* at 2126–27.

<sup>90</sup> Josh Blackman, *Bruen Bids Farewell to the Two-Step Test*, VOLOKH CONSPIRACY (June 26, 2022, 4:16 PM), <https://reason.com/volokh/2022/06/26/bruen-bids-farewell-to-the-two-step-test/> [<https://perma.cc/5LV8-5699>].

American colonial views of the right to bear arms leading up to the ratification of the Constitution.<sup>91</sup> *Bruen* implemented the same test, requiring that the government “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.”<sup>92</sup> Justice Clarence Thomas, writing for the majority, explained that *Heller* relied on history because “it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right.”<sup>93</sup> The Court then narrows this test, clarifying that the *Heller* Court recognized that the right to bear arms is not unlimited, and the legal analysis need not undertake an exhaustive historical analysis of the entire scope of the Amendment.<sup>94</sup> Justice Thomas then highlighted the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’ . . . that are in common use at the time,” serving as an example of how the test can be limited by lower courts.<sup>95</sup> Overall, the test appears to be an analogical process, comparing the law in question to any Second Amendment historical evidence that either supports or undermines the legislative act. Not only does this test have enormous boundaries, but it also remains premised on the ability to find a factual source to either support or deny the statute, incentivizing confirmation bias.

The Court in *Bruen* then moves on to discuss the elephant in the room: How can this test be applied in an administrable fashion? The Court explains that some applications will be straightforward, and others not, again providing the example of *Heller* as a straightforward application of the Second Amendment.<sup>96</sup> In understanding the malleability of the test, the Court picks out two metrics hidden in both *Heller* and *McDonald v. City of Chicago*: “[H]ow and why the regulations burden a law-abiding citizens’ right to armed self-defense.”<sup>97</sup> However, these proposed metrics do little to reduce the volume of potential facts, sources, or conflicting evidence that lower courts have to wade through to reveal the original understanding surrounding the Second Amendment.

In implementing its own analysis, the Court evaluated and rebutted almost all of the historical evidence Respondents presented to the Court, striking down New York’s gun regulation requiring applicants to show proper cause to have and carry a pistol before obtaining an unrestricted license for public carry.<sup>98</sup> Respondents relied first on English history and custom predating the Founding, drawing directly from the Court’s suggestion in *Heller*.<sup>99</sup> Seeming to take a turn from its decision in

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<sup>91</sup> *Bruen*, 142 S. Ct. at 2127.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

<sup>94</sup> *Id.* at 2128.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 2129 (citing *Heller*, 554 U.S. at 570).

<sup>97</sup> *Id.* at 2133.

<sup>98</sup> *Id.* at 2138–56.

<sup>99</sup> *Id.* at 2138–39; *Heller*, 554 U.S. at 592 (describing the right to bear arms as a pre-existing right that the Constitution merely codified).

*Heller*, the Court rejected the English common law evidence, cautioning that that Constitution cannot be interpreted using common law dating back to the Medieval Ages, but rather, from “British institutions *as they were when the instrument was framed and adopted*.”<sup>100</sup> In evaluating the historical evidence from the colonial period and early founding of the United States offered by Respondents, the Court doubted that three colonial-period regulations alone “could suffice to show a tradition of public-carry regulation.”<sup>101</sup> The Court also took issue with the fact that the evidence revealed no more than early legislative bodies’ willingness to outlaw dangerous weapons, which did not speak uniquely to the New York law’s constitutionality, as the Court already acknowledged this fact in *Heller*.<sup>102</sup>

The Court appeared most responsive to the post-ratification common law offenses, statutory prohibitions, and surety statutes presented by Respondents, acknowledging that public-carry regulations multiplied after the ratification of the Second Amendment in 1791.<sup>103</sup> However, the Court again rejected the Respondents’ evidence, reasoning that the common law did not impair the “right of the general population to peaceable public carry,” and recognized that the historical consensus revealed that states could not ban public carry altogether as evidenced by Antebellum period case law.<sup>104</sup> The Court then underwent their own independent historical analysis after explaining that it is Respondents’ burden of proof to establish that historical evidence supports the law in question; the Court analyzed the history that Respondents did not adequately attend to in their briefing: evidence from around the adoption of the Fourteenth Amendment.<sup>105</sup> The Court found this evidence inconsistent with the scope of the New York law, even though pre- and post-Reconstruction regulations limited the right to generally keep and bear arms.<sup>106</sup>

Finally, the Court examined Respondents’ evidence from the late nineteenth century, with which Respondents emphasized an uptick in gun regulation in the Western Territories.<sup>107</sup> Unsurprisingly, the Court again found this evidence unpersuasive.<sup>108</sup> The Court explained that late nineteenth-century historical accounts, when in conflict with earlier historical accounts in the colonial or founding periods,

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<sup>100</sup> See *Bruen*, 142 S. Ct. at 2138–39 (citing *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925)).

<sup>101</sup> *Id.* at 2142.

<sup>102</sup> See *id.* at 2143. The Court also acknowledged that one of the laws presented by Respondents did not stay in effect for long, limiting its impact on the public understanding of the right to public carry in the colonial period. *Id.* at 2144.

<sup>103</sup> See *id.* at 2145.

<sup>104</sup> *Id.* at 2145–47.

<sup>105</sup> *Id.* at 2150.

<sup>106</sup> See *id.* at 2150–52 (explaining that regulations during this period remained consistent with a recognized right of the public to carry handguns for self-defense).

<sup>107</sup> *Id.* at 2153–54.

<sup>108</sup> See *id.*

“cannot provide much insight into the meaning of the Second Amendment . . . .”<sup>109</sup> It also took issue with the highly localized nature of these regulations, explaining that “these western restrictions were irrelevant to more than 99% of the American population.”<sup>110</sup>

In sum, the Court in *Bruen* provided little to no guidance to lower courts on how to engage in similar legal analysis, instead distinguishing, on an ad hoc basis, historical evidence brought to it by Respondents and amici.

### *B. Dobbs v. Jackson Women’s Health Organization and the Court’s Different Use of History and Tradition*

The Court in *Dobbs v. Jackson Women’s Health Organization* approached the use of history and tradition in a different manner. Rather than pinpointing a pre-existing right that the Constitution solidified into law and asking whether a regulation aligns with the historical practices surrounding that right, as in *Bruen*, the Court in *Dobbs* asked whether the right to an abortion was deeply rooted in the United States’ history and tradition, and whether it was essential to the United States’ scheme of ordered liberty.<sup>111</sup> Overturning *Roe v. Wade*, the long-standing precedent securing a woman’s right to choose, the Court rejected any suggestion that the right to an abortion is deeply rooted in our nation’s history and tradition.<sup>112</sup> The Court signaled to lower courts that:

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the “liberty” protected by the Due Process Clause because the term “liberty” alone provides little guidance. “Liberty” is a capricious term . . . [and] [i]n interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution.<sup>113</sup>

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<sup>109</sup> *Id.* at 2154.

<sup>110</sup> *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008)) (“[W]e will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city, ‘that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms’ in public for self-defense.”).

<sup>111</sup> *See* 142 S. Ct. 2228, 2246 (2022) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)). *See supra* Part I for a discussion on the origins of the history and tradition test from *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and its evolution through *Washington v. Glucksberg*, 521 U.S. 702 (1997), and other similar cases.

<sup>112</sup> *See Dobbs*, 142 S. Ct. at 2310.

<sup>113</sup> *Id.* at 2247 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)); *see also*

Justice Samuel Alito, writing for the majority, made clear to lower courts that in order to establish “new” fundamental rights, the court must engage in a historical analysis dating back to the Founding era, and perhaps even beyond.

Thus, the Court began introducing a historical analysis of its own without emphasizing the burden of either party in establishing a certain historical record around a right.<sup>114</sup> The Court makes a broad pronouncement of the fact that until the twentieth century, the U.S. legal system did not recognize a constitutional right to abortion.<sup>115</sup> The Court doubles down, explaining that long before *Roe*, abortion had been a crime “in every single State.”<sup>116</sup>

At the start of the Court’s detailed historical analysis, it first focused on common law that outlawed abortion after the first felt movement of the fetus in the womb, known as “quickening,” citing classic common law minds of the time including Blackstone, Coke, and Hale.<sup>117</sup> The Court also cited a thirteenth-century treatise—despite its previous disdain for medieval sources—to support its premise.<sup>118</sup> The Court ended its English common law analysis by concluding that “although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice.”<sup>119</sup>

Citing *Heller*, the Court placed emphasis on the “most important early American edition of Blackstone’s Commentaries” to begin its analysis of pre- and post-Founding American law.<sup>120</sup> The Court again recognized that Blackstone and Hale suggested criminal penalties for abortion of a quickened child and that manuals printed for justices of the peace in the colonies restated the common law prohibition on abortion.<sup>121</sup> These manuals restated the common law rule on abortion, stating that “anyone who prescribed medication ‘unlawfully to destroy the child’ would be guilty of murder if the woman died.”<sup>122</sup> The Court then briefly pointed to a subset of cases that supported that abortion was a crime in the early-colonial period, giving one specific example of a case out of Maryland in 1652 in which the indictment

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*Glucksberg*, 521 U.S. at 720 (“We must . . . ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”).

<sup>114</sup> Compare *Bruen*, 142 S. Ct. at 2150, with *Dobbs*, 142 S. Ct. at 2248–51. However, it is again appropriate to reemphasize the concerns of courts overly relying on or neglecting to fact-check the “law office history” inherently provided in the briefs submitted to the Court.

<sup>115</sup> *Dobbs*, 142 S. Ct. at 2248.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2249.

<sup>118</sup> See *id.* The Court subsequently relied on English cases also dating back to the thirteenth century, again contrary to its previous disdain for sources too far removed from the Founding in *Bruen*. See 142 S. Ct. at 2139.

<sup>119</sup> *Dobbs*, 142 S. Ct. at 2251.

<sup>120</sup> *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (quoting CONDUCTOR GENERALIS 220 (James Parker ed., 1788)).



charged that a man “[m]urtherously endeavoured to destroy or [m]urther the [c]hild by him begotten in the [w]omb.”<sup>123</sup>

In its analysis of the distinction between pre- and post-quickening abortions, the Court relies on similar sources.<sup>124</sup> The Court acknowledged how “[a]t that time” no scientific methods for detecting pregnancy at its early stages existed.<sup>125</sup> Then, the Court undercut the value of the pre- and post-quickening distinction altogether, claiming that the rule is of “little importance for present purposes because the rule was abandoned in the nineteenth century.”<sup>126</sup> To support this broad claim, the Court cited two sources which dismissed the distinction between pre- and post-quickening in the mid-nineteenth century,<sup>127</sup> as well as an Act of the British Parliament passed in 1803.<sup>128</sup> Curiously, not only does the Court cite to an Act of the British Parliament passed a few decades after American independence, but relies on “[o]ne scholar” from that period that suggested that the motivation behind Parliament’s Act *may* have been attributed to a rising concern that fetal life should be protected by the law.<sup>129</sup>

The Court then used the ratification of the Fourteenth Amendment as a benchmark to count the number of states which had criminalized abortion: twenty-eight out of thirty-seven states.<sup>130</sup> Out of the nine states that had not criminalized abortion by the time of the ratification of the Fourteenth Amendment, all had criminalized abortion by 1910.<sup>131</sup> Additionally, the thirteen remaining territories to eventually gain statehood also criminalized abortion between 1850 and 1919.<sup>132</sup> The Court then jumped forward a few decades to note that thirty states still had anti-abortion legislative dispositions a few years prior to *Roe*.<sup>133</sup> The Court also recognized that

<sup>123</sup> *Id.* (citing *Proprietary v. Mitchell*, 10 Md. Archives 80, 183 (1652) (W. Browne ed., 1891)).

<sup>124</sup> *Id.* at 2251–52.

<sup>125</sup> *Id.* at 2251. Note how the Court again references the historical record generally, rather than pinpointing a particular time period or narrowing the critical years lower courts should be examining.

<sup>126</sup> *See id.* at 2252.

<sup>127</sup> *See id.* (first citing F. WHARTON, *CRIMINAL LAW* § 1220, at 606 (rev. 4th ed. 1857); and then citing J. BECK, *RESEARCHES IN MEDICINE AND MEDICAL JURISPRUDENCE* 26–28 (2d ed. 1835)).

<sup>128</sup> *See id.* (citing Lord Ellenborough’s Act, 43 Geo. 3 ch. 58 (1803)).

<sup>129</sup> *See id.* Notably, the Court does not cite to a primary source here; instead, it opts to cite to a modern book: J. KEOWN, *ABORTION, DOCTORS, AND THE LAW* 22 (1988).

<sup>130</sup> Roughly three quarters of all states criminalized abortion in 1868. *Id.* at 2252–53. Here, the Court cites its lengthy Appendix A that lists every state’s legislative disposition on abortion. However, every statute listed in Appendix A was passed before women enjoyed a constitutional right to vote. Bernadette Meyler, *Dobbs and the Supreme Court’s Wrong Turn on Constitutional Rights*, BLOOMBERGL. (June 24, 2022, 6:53 PM), <https://news.bloomberglaw.com/us-law-week/the-supreme-courts-wrong-turn-on-constitutional-rights> [<https://perma.cc/32NL-55D3>].

<sup>131</sup> *Dobbs*, 142 S. Ct. at 2253.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

although one-third of states remained on the more liberal side of the subject, those states still criminalized some abortions.<sup>134</sup> Using all of this historical evidence, the Court concluded that, under the *Glucksberg* standard, the right to abortion is not deeply rooted in our nation's history and tradition.<sup>135</sup>

The Court then addressed (and rejected) the historical evidence and arguments of the Respondents and their amici.<sup>136</sup> The Court drew a clearer line here in evaluating Respondents' historical evidence, pointing out that they are unable to show "that a constitutional right to abortion was established when the Fourteenth Amendment was adopted . . . ."<sup>137</sup> However, the Court then broadened the scope of historical evidence again, criticizing Respondents for failing to produce any "support for the existence of an abortion right that predates the latter part of the twentieth century—no state constitutional provision, no statute, no judicial decision, no learned treatise."<sup>138</sup>

The Court does, however, draw at least one clear line on evidence [that would *not* be acceptable as valid historical or scientific support of a given right: discredited articles.<sup>139</sup> Specifically, the Court pointed to two articles the Court relied on in *Roe*, noting how each article has since been discredited and how the work appeared to promote impartial scholarship, but instead had an underlying agenda.<sup>140</sup> Besides these few criticisms, the Court did not provide many other substantive guideposts on how lower courts should even begin to engage in such an analysis.<sup>141</sup>

### C. *Kennedy v. Bremerton School District* and *the Replacement of the Lemon Test*

In the final blockbuster case of the 2021 trio that invoked history and tradition as a major part of the Court's reasoning, the Court in *Kennedy v. Bremerton School District*, in ruling in favor of a high school football coach who lost his job after praying midfield after games, discarded the Court's three-part test from *Lemon v. Kurtzman*.<sup>142</sup> Explaining that the Court has previously substituted "reference to historical practices and understandings" in place of the *Lemon* test and the endorsement test,<sup>143</sup> the Court reiterated the historical standard established in *Town of Greece v.*

<sup>134</sup> *Id.*

<sup>135</sup> *See Dobbs*, 142 S. Ct. at 2253–54.

<sup>136</sup> *Id.* at 2254.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See id.* at 2254–55.

<sup>140</sup> *See id.* at 2254–55; *see also id.* at 2255 n.38 (listing critiques of the two articles). Note how the Court again opens the door to other ambiguities: What exactly is a discredited article or study? How many scientists need to disavow such a study? More significantly, *who* gets to disavow such a study? *See infra* Section V.A.

<sup>141</sup> *See id.* at 2255–57.

<sup>142</sup> *See generally* *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>143</sup> *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

*Galloway*.<sup>144</sup> The Court in *Kennedy* emphasized that courts and governments must draw a line between the “permissible and the impermissible” that is in “accor[d] with history and faithfully reflec[ts] the understanding of the Founding Fathers.”<sup>145</sup>

The Court in *Kennedy* provided even less guidance to lower courts as to which historical evidence is preferred. First, it suggested that courts should look to a given law’s “place . . . in the First Amendment’s history.”<sup>146</sup> Differing from both *Bruen* and *Dobbs*, the Court engaged in a broader, more conclusive historical analysis.<sup>147</sup> The Court explained, “[n]o doubt, too, coercion [to attend church or engage in formal religious exercise] was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.”<sup>148</sup> Again using broad terms and conclusions, the Court responded to the school district’s proposed rule by indicating that it remained unaware of any “historically sound understanding of the Establishment Clause that begins to ‘mak[e] it necessary for government to be hostile to religion’ in this way.”<sup>149</sup> This analysis of historical evidence better reflects the traditional First Amendment historical analyses in which the Court previously engaged.<sup>150</sup> Regardless of the little guidance it provides, *Kennedy* serves as yet another data point for how the Court has transformed or avoided traditional legal analysis in favor of analyses labeled with, or more accurately, flavored as, originalism.<sup>151</sup>

#### IV. POST-BRUEN STRUGGLES

Lower courts have already grappled with the amorphous standard established in *Bruen*.<sup>152</sup> One such example is the Fifth Circuit’s decision in *United States v. Rahimi*,

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<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 437–40 (1961)).

<sup>147</sup> *Compare Kennedy*, 142 S. Ct. at 2429–30, with *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2150 (2022), and *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022).

<sup>148</sup> *Kennedy*, 142 S. Ct. at 2429.

<sup>149</sup> *See id.* at 2431 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

<sup>150</sup> *See supra* notes 24–30 and accompanying text.

<sup>151</sup> *See supra* Parts I–II.

<sup>152</sup> *See generally, e.g.*, *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023) (emphasizing Founding-era sources but not Reconstruction-era sources); *Range v. Att’y Gen.*, 69 F.4th 96 (3d Cir. 2023) (discussing a 1938 Act, status-based restrictions, and arguments from circuit court precedent, entirely sidestepping *Bruen* step 2); *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023) (finding sufficient analogue between the present law and laws restricting possession by certain groups); *Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317 (11th Cir. 2023), *vacated*, 72 F.4th 1346 (11th Cir. 2023); *United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023) (finding a violation of *Bruen* step 1 and therefore avoiding *Bruen* step 2); *United States v. Kittson*, 2023 WL 5015812, at \*2 (D. Or. Aug. 7, 2023) (pivoting away from *Bruen* by

for which the Supreme Court granted certiorari on June 30, 2023.<sup>153</sup> In *Rahimi*, the court considered the constitutionality of 18 U.S.C. § 922(g)(8), a federal statute making it unlawful for a person subject to a domestic violence restraining order to possess a firearm; the Fifth Circuit ultimately found the statute unconstitutional.<sup>154</sup>

The Fifth Circuit comfortably applied the first step of *Bruen*, holding that Rahimi’s possession of a pistol and a rifle “easily f[ell] within the purview of the Second Amendment,” because of his right “‘to keep’ firearms,” in which “‘possession’ is included within the meaning.”<sup>155</sup> The second step, the historical analysis, required the court to undertake heavier lifting. The *Rahimi* court rewords the second step of *Bruen*, explaining: “The Supreme Court distilled two metrics for courts to compare the Government’s proffered analogues against the challenged law: *how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right.”<sup>156</sup>

Relying solely on evidence introduced by the government, the court examined: “(1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of ‘dangerous’ people, (2) English and American ‘going armed’ laws, and (3) colonial and early state surety laws.”<sup>157</sup> Unlike the Court in *Bruen*, the court in *Rahimi* established a clear time period, analyzing all evidence presented but also paying mind to the fact that “greater weight attaches to laws nearer in time to the Second Amendment’s ratification.”<sup>158</sup>

As for the first type of evidence, the *Rahimi* court distinguished any historical evidence that suggested a tradition of disarming specific groups in society, doubting that “colonial and state laws disarming categories of ‘disloyal’ or ‘unacceptable’ people present tenable analogues to § 922(g)(8).”<sup>159</sup> Citing no primary sources (or any sources at all), the *Rahimi* court reasoned that *why* legislators disarmed people in the past differed from the present reason for disarmament under § 922(g)(8).<sup>160</sup> It explained that the “purpose of laws disarming ‘disloyal’ or ‘unacceptable’ groups was

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applying “*Heller* and Ninth Circuit precedent relying on *Heller*”). For a detailed discussion on the post-*Bruen* scramble by lower courts, see 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, 67–104 (2023).

<sup>153</sup> See 61 F.4th 443, 461 (5th Cir. 2023).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 454.

<sup>156</sup> *Id.* Given the Court’s preference for tests rooted in the Second Amendment’s text informed by history, one wonders if the Court will take issue with this subtle creation of a quasi-third step in the *Bruen* analysis. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

<sup>157</sup> *Rahimi*, 61 F.4th at 456.

<sup>158</sup> *Id.* Curiously, the *Rahimi* court provides no citation to *Bruen* after twice stating that the closer the law in time to the Second Amendment’s ratification, the greater the weight the law carries. See *id.*

<sup>159</sup> *Id.* at 457.

<sup>160</sup> *Id.*

ostensibly the preservation of political and social order, not the protection of a[] . . . person from the threat of ‘domestic gun abuse.’”<sup>161</sup> It seems, contrary to the Supreme Court, that the *Rahimi* court would accept only historical “twin[s],” rather than mere “analogue[s].”<sup>162</sup> The *Rahimi* court declared that using such laws as historical analogues “is therefore dubious, at best.”<sup>163</sup> The analysis surrounding laws disarming specific groups in society again reveals how amorphous and open to discretion the *Bruen* standard is; conducting a cursory review of the evidence without an expert’s opinion or any primary sources to guide the court, the court exercised discretion in deciding that laws disarming “dangerous” people were not analogous to the present law disarming domestic abusers—a group of people already civilly adjudicated by courts as “dangerous.”<sup>164</sup>

As for the second type of evidence, the *Rahimi* court used *Bruen* as an explicit benchmark.<sup>165</sup> The government introduced four examples of “going armed” laws.<sup>166</sup> Here, the court cited to the original “going armed” laws, but did not appear to conduct any true historical analysis of its own, aside from discussing the text of the laws.<sup>167</sup> But, again, without any historical analysis or citations to supporting sources, the *Rahimi* court instead cited *Bruen* to declare that “it is doubtful these ‘going armed’ laws are reflective of our Nation’s historical tradition of firearm regulation.”<sup>168</sup> In a parenthetical, the *Rahimi* court quoted the *Bruen* Court’s reservations, highlighting “doubt that *three* colonial regulations could suffice to show a tradition of public carry regulation.”<sup>169</sup> Through *Bruen*’s three-law benchmark, *Rahimi* decided that four colonial laws proved similarly insufficient.<sup>170</sup> The court then compared and contrasted the actual text of each law with § 922(g)(8), employing traditional methods of judicial analysis rather than outright extra-record historical research.<sup>171</sup> This analysis, although run-of-the-mill in ordinary cases, does not rise to the level of analysis traditionally employed by historians.<sup>172</sup>

<sup>161</sup> *Id.*

<sup>162</sup> *See* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

<sup>163</sup> *Rahimi*, 61 F.4th at 457.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.* at 458.

<sup>166</sup> The government presented laws from the Massachusetts Bay Colony, the Commonwealth of Virginia, and the colonies of New Hampshire and North Carolina. *Id.* at 457–58.

<sup>167</sup> *See id.* at 457–59.

<sup>168</sup> *Id.* at 458 (quoting N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2142 (2022)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See id.* at 458–59. The Court notes that “on substance, the early ‘going armed’ laws that led to weapons forfeiture are not relevantly similar to § 922(g)(8). . . . [T]hose laws only disarmed an offender after criminal proceedings and conviction . . . [yet the present law] disarms people who have merely been civilly adjudicated to be a threat to another person.” *Id.*

<sup>172</sup> *See infra* Part V (suggesting a more rigorous analytical process).

Finally, as for the last type of evidence considered, the *Rahimi* court rejected the analogue of historical surety laws.<sup>173</sup> The government cited to Blackstone, a source of evidence the Supreme Court in *Dobbs* deemed valid.<sup>174</sup> Yet, while acknowledging that the surety laws “c[a]me closer to being ‘relevantly similar,’” and were “more clearly a part of our tradition of firearm regulation,” the *Rahimi* court still refused to accept such laws as an analogue.<sup>175</sup> Citing *Bruen* throughout, the *Rahimi* court falls into line with the Supreme Court’s previous disposal of similar surety laws as a proper historical analogue.<sup>176</sup>

Although the *Rahimi* court applied the *Bruen* standard in a coherent, orderly manner, the major concern *Rahimi* resurfaced is the use of primary sources and the lower courts’ inability to undergo a rigorous, extra-record research expedition.<sup>177</sup> The *Rahimi* court relied only on government-presented evidence, accepting its truth at face value and conducting surface-level comparative review of such statutory text—a process lacking resemblance to typical historical inquiries. *Rahimi* does not serve as an outlier in recent Second Amendment jurisprudence, either.<sup>178</sup> Post-*Bruen*, courts have struck down old and new gun laws alike under this standard, even laws that courts had unanimously considered constitutional.<sup>179</sup> Lower courts have struck down more than thirty gun restrictions in the wake of *Bruen*.<sup>180</sup>

#### V. RECOMMENDATION: EVIDENTIARY TOOLS AND HISTORICAL QUARRYING

As demonstrated in Parts III and IV, recent Supreme Court and lower court decisions employing the history and tradition standard reveal no clear pattern, often contradicting their own value judgments on certain types of historical evidence, picking and choosing from various briefs submitted to the courts, and, on occasion, rejecting certain pieces of evidence without rhyme or reason. However, several solutions exist for lower courts in applying the daunting history and tradition standard, including a combination of evidentiary tools and other methods to refine the growing mound of historical evidence available to the courts.

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<sup>173</sup> See *Rahimi*, 61 F.4th at 459–60.

<sup>174</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249 (2022). *But see* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2148–50 (2022) (similarly rejecting surety laws as a proper analogue).

<sup>175</sup> See *Rahimi*, 61 F.4th at 459–60.

<sup>176</sup> See *id.*

<sup>177</sup> See *infra* Part V.

<sup>178</sup> See *supra* note 152.

<sup>179</sup> Alanna Durkin Richer & Lindsay Whitehurst, *Supreme Court Ruling Creates Turmoil over Gun Laws in Lower Courts*, PBS (Feb. 18, 2023, 2:05 PM), <https://www.pbs.org/news/hour/nation/supreme-court-ruling-creates-turmoil-over-gun-laws-in-lower-courts> [<https://perma.cc/U42C-GS8M>].

<sup>180</sup> Lydia Wheeler, *Judges Confused by Supreme Court’s Historical Test for Gun Laws*, BLOOMBERGL (July 12, 2023, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/judges-confused-by-supreme-courts-historical-test-for-gun-laws> [<https://perma.cc/GP2J-TXUS>].

*A. Why a Workable Standard Is Necessary: Lower Court Application*

First, outlining why it matters that lower courts have a workable standard to implement is in order. Lower courts face a significantly higher caseload than the Supreme Court of the United States but with significantly fewer resources.<sup>181</sup> In delivering justice, lower courts must act swiftly, efficiently, and fairly, all while following the necessary procedures to maintain the integrity of the judicial branch. Thus, lower courts must adopt methods to swiftly, efficiently, and fairly apply the history and tradition standard.

Although it may state the obvious, a workable standard also matters for lower courts because courts of appeal and district courts must properly apply Supreme Court precedent. While the Supreme Court serves as the end of the line for legal jurisprudence, allowing Justices to shape, alter, and enunciate law for the entire nation, lower courts must interpret these Supreme Court decisions to ensure that justice is applied evenhandedly. While Supreme Court Justices can take ample time to research niche historical and constitutional questions, “once a Supreme Court majority has spoken on these points,” lower courts must follow.<sup>182</sup> Lower court decisions are “necessarily informed and, indeed, controlled by extensive Supreme Court precedent.”<sup>183</sup> By nature of the construction of the federal courts, lower courts must function within the confines of binding Supreme Court precedent, while also finding practical, effective ways to carry out justice.<sup>184</sup> As a result, contrasted to the Supreme Court, lower courts must square binding precedent with the entirety of U.S. history. “Constitutional questions of first impression are a rare event” in the lower courts. As such, most of the cases lower courts hear have some sort of precedent to pull from.<sup>185</sup> In such cases, historical materials are less useful.<sup>186</sup> However, under the new history and tradition test, the historical sources cited by the Supreme Court now *serve* as precedent. This new test poses a unique problem when lower courts must follow binding precedent, that is, the history cited by the Supreme Court. Placed in a double bind, lower courts must apply the history and tradition test, which the Supreme Court

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<sup>181</sup> ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS, MARCH 2022—SUMMARY (2022), <https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2022> [<https://perma.cc/N947-PVD3>] (reporting 33,582 pending appeals across all federal courts of appeal; reporting 745,867 pending cases across all federal district courts).

<sup>182</sup> Former Judge Reena Raggi for the Second Circuit Court of Appeals accurately summed up the distinction between Supreme Court decision-making and lower court decision-making: When the Supreme Court speaks, “we mere mortals can only follow.” Tyler et al., *supra* note 70, at 1893–94.

<sup>183</sup> *Id.* at 1893.

<sup>184</sup> U.S. CONST. art. III, § 1, cl. 1 (establishing a hierarchical court system of both a Supreme Court and other inferior courts).

<sup>185</sup> Tyler et al., *supra* note 70, at 1892.

<sup>186</sup> *Id.*

established with no guidance, but they must also reconcile each historical argument with the truth of U.S. history, irrespective of what the Supreme Court enunciates.

In addition to creating vexing problems for lower courts to practically work through, the history and tradition standard has faced countless criticisms.<sup>187</sup> Law office history,<sup>188</sup> the evolving nature of history and tradition, and susceptibility to cherry-picking not only undermine the test's legitimacy but pose an additional layer of precaution that the lower courts must address to ensure just decisions.

One of the major criticisms of the history and tradition test is that it requires lawyers and judges to attempt to do the job of historians. Perhaps unsurprisingly, lawyers and judges tend to do a subpar job. A historian's job is to interpret the facts of history in a neutral manner, drawing conclusions about the reasons that informed the historical decision-maker's choices and actions or unraveling context to shed light on a particular situation. For a historian, "it makes far more sense to rationalize from known historical truths."<sup>189</sup> Lawyers, on the other hand, are built to persuade. Even more, it is the job of lawyers to persuade judges who may lack a deep understanding of history while having "much less professional historical training."<sup>190</sup>

To effectuate a proper historical analysis of a constitutional provision and to find the true original meaning of such a provision, one must "take careful account of the sources, explaining how and why a document was drafted, debated, and finally approved. It would involve immersion in the kinds of sources that historians ordinarily use and would need to consider the array of purposes shaping their action."<sup>191</sup> Lawyers and judges alike often do not engage in that sort of inquiry,

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<sup>187</sup> See, e.g., Balkin, *supra* note 48, at 665; Charles, *supra* note 36, at 2–5; Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 *FORDHAM L. REV. RES GESTAE* 1, 2–3 (2014); SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788–1828* (1999); see also *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (Breyer, J., dissenting); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>188</sup> See Cornell, *supra* note 10, at 1095; Charles, *supra* note 36; Randy Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, *THE VOLOKH CONSPIRACY* (Aug. 19, 2013, 4:22 PM), <https://volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/> [<https://perma.cc/8CV2-VQ4Y>].

<sup>189</sup> Charles, *supra* note 36, at 5.

<sup>190</sup> Balkin, *supra* note 48, at 690–91.

<sup>191</sup> Jack Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *SAN DIEGO L. REV.* 575, 580 (2011). Professor Allison Orr Larsen uses the term "legislative facts" to describe the types of analyses now required by the Supreme Court. See Larsen, *Fact Finding*, *supra* note 5, at 1255–57 (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 *HARV. L. REV.* 364, 365–66 (1942)) (recognizing that Professor Kenneth C. Davis coined the term legislative fact). Rather than stemming from the actual legislature, she refers to facts relating to the "legislative function' or policy-making function of a court . . . that 'transcend[] the particular



instead relying on briefing alone. In fact, Alfred H. Kelly coined the term “law office history” to describe the phenomenon of when legal advocates, in seeking the most favorable outcome for their clients, “select[] . . . data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”<sup>192</sup> Of course, no one can fault lawyers for doing so; after all, it is a lawyer’s duty to put their client’s best case forward. But, in conducting historical inquiries, lower courts must remain wary of the pitfalls of depending on briefs and the briefs’ inherent one-sided analyses.<sup>193</sup> Relying on briefs alone cannot represent a true historical analysis and leaves courts vulnerable to missing key historical facts, sources, and truths.

Yet, neither Supreme Court Justices nor lower court judges have time to review hundreds or thousands of Founding-era documents, and then produce a definitive answer on the issue. It takes years, or perhaps a lifetime of study, for historians to find the answers to these questions, much less the average ten months per case from a notice of appeal to disposition at federal courts of appeal.<sup>194</sup> To accurately and wholly “plumb the original understanding of an ancient text” is often “exceedingly difficult.”<sup>195</sup> To conduct the historical review, “the task requires the consideration of an enormous mass of material . . . [and] immersing oneself in the political and intellectual atmosphere of the time.”<sup>196</sup> Lawyers have even less time to conjure up a persuasive argument of the true original meaning of a constitutional provision. In pursuing the best course of action for any client, it is the lawyer’s job to pick and choose the history most favorable to their case, not the objective truth: the information most persuasive and accurate in the grand scheme of the nation’s history.

Another criticism of the history and tradition test is that history and tradition evolve over time. Particularly in Fourteenth Amendment jurisprudence, lower courts

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dispute” as legislative facts. *See id.* at 1256–57. For further scholarship on fact-based inquiries conducted by lower courts, see generally Larsen, *Age of Alternative Facts*, *supra* note 50; John McGinnis & Charles Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2008); Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251 (2016); David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991). For a discussion of how collective memories influence outcomes in constitutional law, see also Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 311–15 (2022).

<sup>192</sup> Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (1965).

<sup>193</sup> *See* Larsen, *Age of Alternative Facts*, *supra* note 50, at 224–27 (discussing the difference between trial and appellate courts’ abilities to analyze facts and leverage the parties’ fact-finding abilities).

<sup>194</sup> ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 181 (reporting that as of March 31, 2022, the national median time from notice of appeal to disposition is 9.9 months for federal appeals courts).

<sup>195</sup> Scalia, *supra* note 31, at 856.

<sup>196</sup> *Id.*

must make value judgments when construing the lengthy history of the past against the rapid pace of evolving technology and social norms pervasive in the twenty-first century.<sup>197</sup> The Supreme Court neither provides guidance on how to determine whether a tradition is outdated, nor ascertains when history has officially been determined to be “egregiously wrong,” requiring a break from that history.<sup>198</sup> Of course, these judgments depend mostly on one’s political disposition, presenting another issue in delivering just results. History and tradition may not produce definitive results because “[t]here may be no univocal tradition; the claimed tradition may be an invented tradition, or a parochial interpretation of a much more complicated set of practices that are honored in the breach as much as the observance.”<sup>199</sup> Primary documents are often the result of compromise, particularly within the context of the Constitutional Convention and in the early years of the Founding era.<sup>200</sup> The Founding era and the ratifiers of the Fourteenth Amendment also disproportionately form the context for constitutional questions: The “Founders, Framers, and adopters have disproportionate power over American political imaginations because of the way that American cultural memory has been constituted.”<sup>201</sup>

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<sup>197</sup> See Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1033 (1977) (“Because conditions have changed greatly since the Constitution was written, we should expect that some of the results and rationales for decisions generated by a historical interpretation will be unappealing.”).

<sup>198</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022). The Court’s decision in *Dobbs* showcases the subjective nature of evolving history and tradition rationalized against the current volatile tides of political, social, and cultural realities, begging the question: When can a historical decision, movement, or ideology be deemed “egregiously wrong,” and by whom can it be so deemed? The 2022 election revealed that the public generally wanted to preserve the right to reproductive autonomy, with voters in all five of the abortion-related state constitutional amendment ballot initiatives favoring the pro-choice option. See *Abortion on the Ballot*, N.Y. TIMES (Dec. 20, 2022), <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html> [<https://perma.cc/LXA2-QK8Q>]. On August 2, 2022, citizens of Kansas voted in favor of abortion rights on a similar ballot initiative. See also Associated Press, *Kansas Recount Confirms Results in Favor of Abortion Rights*, POLITICO (Aug. 21, 2022, 8:58 PM), <https://www.politico.com/news/2022/08/21/kansas-recount-favor-abortion-rights-00053046> [<https://perma.cc/HQX7-WP5A>]. These ballot initiatives represent the difficulty with drawing a bright-line rule in breaking step with historical practices and traditions.

<sup>199</sup> Balkin, *supra* note 48, at 688.

<sup>200</sup> Texts like Madison’s notes on the convention or *The Federalist Papers* might reflect compromise, but “they may not reflect a consensus either of the ratifiers or of the general public. Indeed, in some respects they may not even represent Madison’s, Hamilton’s or Jay’s own views.” *Id.* at 703.

<sup>201</sup> *Id.* at 695. Limiting historical analysis to the Founding period has its benefits and drawbacks. On the one hand, observing the context directly surrounding the Framers’ and ratifiers’ decisions may illuminate original public meaning in its purest form. However, if one ignores the history leading up to a constitutional provision, one may miss key factors that contributed

No part of history is accurately and completely documented, and historians, let alone courts, do not always produce the truth. Law and history stand on unequal footing; the law requires outcomes,<sup>202</sup> while history allows multiple interpretations.<sup>203</sup> “[U]nlike historians, the bench and bar cannot forego making a historical determination simply because the evidentiary record is lacking, incomplete, or indeterminate. The reality is that the law is history, history is the law, and determinations about the importance of the past must be made.”<sup>204</sup> The evolution of society over time serves as a gaping hole in the history and tradition test that lower courts, and eventually the Supreme Court, must somehow overcome.

Cherry-picking also serves as a dominant criticism of the history and tradition test. Although scholars consider the United States a young nation, its history spans approximately 400 years, and its legal history can be traced back to English common law with roots in the Medieval Period.<sup>205</sup> Millions of documents describe centuries of history. As a result, lawyers and judges must reduce their historical analyses to the most pertinent evidence. A side effect of this distilling process is that lawyers and judges often cherry-pick the facts, either intentionally or inadvertently, to produce a legal outcome. This side effect of the history and tradition test is seemingly unavoidable because of the strict timeline imposed on lower courts. No matter how practical the application of the test may be, no judge, clerk, or lawyer can unearth every relevant document and weigh every opposing viewpoint surrounding a constitutional issue to properly determine an outcome.

### *B. Using Facts as Law and Alternative Facts*

Even when considering all of the above criticisms, application of the history and tradition test faces an additional obstacle to overcome: alternative facts.<sup>206</sup> In an age where internet echo chambers and false information disguised as legitimate sources overwhelm society, lower courts are susceptible to the risk of misapplying factually

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to the decisions which directly stemmed from original public meaning. Additionally, narrowing the time period to examine only the time periods surrounding the adoption of the constitutional provision also eliminates any context that may shed light on the meaning of the constitutional provision as applied today. If courts only examined the Fourteenth Amendment against the anti-slavery context, courts would completely exclude several decades of modern application of the Amendment for dozens of fundamental rights recognized under the Fourteenth Amendment.

<sup>202</sup> Charles, *supra* note 36, at 8–9.

<sup>203</sup> See Chemerinsky, *supra* note 68, at 915 (citing R. COLLINGWOOD, *THE IDEA OF HISTORY* 218–19 (1946)) (“Historians long have taught that history is a matter of interpretation.”).

<sup>204</sup> Charles, *supra* note 36, at 8.

<sup>205</sup> See generally JOHN BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY* 16 (5th ed. 2019).

<sup>206</sup> See Larsen, *Age of Alternative Facts*, *supra* note 50, at 175.

false information.<sup>207</sup> Historical evidence consists of empirical facts. Therefore, the increased reliance on empirical facts when determining questions of constitutional law is all the more unstable. The United States is at the height of a legal and political era where empirical facts, such as historical evidence, serve as the baseline of constitutional analysis.<sup>208</sup> In today's digital age, "[f]acts are not just easier to access . . . they are also easier to legitimize. Factual claims that may have once been labeled as outrageous assertions from fringe players are now easily distributed in a way that makes them seem more mainstream."<sup>209</sup>

Considering the looming presence of "post-truths" and fake news along with the ever-increasing polarization of interest groups filing results-oriented litigation, lower courts must engage in thorough fact-checking. "One way to resist the power of alternative facts . . . is to shift focus away from the factual claim itself and instead to highlight the source from which it comes."<sup>210</sup> Fortunately, "judges are uniquely positioned to spot the 'surprising source' of factual information."<sup>211</sup> Above all else, lower courts must, throughout the interpretive and decision-making process, operate within the confines of what has been established as historically accurate.<sup>212</sup> Operating within these confines also includes exploring relevant historical context to the greatest extent possible.<sup>213</sup> Truth will stabilize an otherwise malleable standard, but relying on inaccurate or incomplete historical accounts has the potential to manifest adverse results in the corresponding legal jurisprudence, but more significantly, in American society.

### *C. How to Apply History and Tradition in the Lower Courts*

There are two approaches to solving the conundrum presented by *Bruen* and other conflicting analytical methods outlined in *Dobbs* and *Kennedy*. The first one involves relying on practical tools that lower courts already possess: the use of expert testimony and special masters. The second method involves weighing the types of historical evidence used by the Supreme Court to narrow research methods and historical resources in conducting what is known as historical quarrying. In conjunction, both the use of practical tools and precedential history will provide lower courts with a more concrete method of analyzing hundreds of years of history, and, as a result, shape a more unified, consistent constitutional jurisprudence.

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<sup>207</sup> *See id.* at 188.

<sup>208</sup> *See id.* at 183–84.

<sup>209</sup> *Id.* at 188.

<sup>210</sup> *Id.* at 222.

<sup>211</sup> *Id.*

<sup>212</sup> For a criticism of the way originalist theory functions, see Charles, *supra* note 36, at 10 ("But throughout the interpretive process, originalism needs to at least operate within the constraints of what is historically certain, and must elicit historical context to the greatest detail. Currently, originalism does not operate in this manner.").

<sup>213</sup> *See id.*

### 1. Relying on Experts

The Federal Rules of Evidence can help relieve much of the burden of historical research from lower court judges and clerks alike.<sup>214</sup> Rule 706 of the Federal Rules of Evidence provides relief to lower courts, governing the rules surrounding expert witnesses.<sup>215</sup> To avoid succumbing to the pitfalls of law office history and to ensure that the empirical data conveyed to the lower court is legitimate, the use of expert witnesses can provide both the parties and the court with trusted, factual information, while removing much of the heavy lifting by practitioners and judges.<sup>216</sup> The rule gives a court the power, on its own,<sup>217</sup> to appoint an expert witness of its choosing as long as the expert witness themselves consents to appear.<sup>218</sup> Lower courts have also directed the parties themselves to call expert witnesses, with one judge describing the government's lack of an expert witness a "disappointing failure," especially when "fundamental constitutional rights are at stake."<sup>219</sup> The same judge further recognized that "[j]udges are not historians. We were not trained as historians. We practiced law, not history."<sup>220</sup> Even Justice Scalia himself admitted that conducting full-scale historical inquiries "is, in short, a task sometimes better suited to the historian than the lawyer . . . . Do you have any doubt that this system does not present the ideal environment for entirely accurate historical inquiry? Nor, speaking for myself at least, does it employ the ideal personnel."<sup>221</sup> The problem that the history and tradition test places on lower courts is not that it requires judges and lawyers to read and analyze written material. Instead, the problem is that the test tasks judges and lawyers with making value judgments on the persuasiveness of history—evidence that should be fixed and true. This task cannot be completed unless researched against the backdrop of a full panoply of laws, regulations, social structures, and other considerations, which presents a daunting learning curve and

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<sup>214</sup> See Larsen, *Age of Alternative Facts*, *supra* note 50, at 225.

<sup>215</sup> See FED. R. EVID. 706.

<sup>216</sup> See *supra* notes 181–203 and accompanying text.

<sup>217</sup> See John M. Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 S. CAL. L. REV. 195, 210 (1956).

<sup>218</sup> See FED. R. EVID. 706(a).

<sup>219</sup> *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at \*15 & n.14 (S.D. Miss. June 28, 2023).

<sup>220</sup> *Id.* at \*4. The Court continues to recognize the problems lower courts face without expert witnesses:

In this case, no historian has expressed an opinion regarding the history of felon disarmament. Neither the government nor Mr. Bullock submitted an expert report on the historical analogues to modern felon-in-possession laws, if any. No interested organization or member of the academy filed an amicus brief. All we have are appellate judges' interpretations of the historical record.

*Id.*

<sup>221</sup> Scalia, *supra* note 31, at 856–57, 861.

time commitment for lower courts to face. Expert historian witnesses, however, do not face the same daunting challenge.

Rather than collecting primary and secondary sources themselves, parties would be able to introduce empirical evidence into the record through the use of a court-appointed expert witness who: (1) would have the requisite historical education that judges and lawyers often lack, and (2) would exhibit a more neutral, fact-based stance on the witness stand.<sup>222</sup> A non-partisan, disinterested, impartial witness would ensure that the most historically accurate information is introduced into the record or presented to the court, which, in turn, results in a more just legal conclusion.<sup>223</sup> The beneficial effects of the use of an expert witness would trickle up to the courts of appeal through the district courts' records.

Courts should also make use of special masters to further gather, organize, and present historical evidence.<sup>224</sup> The courts' ability to appoint a special master derives from Federal Rule of Civil Procedure 53, which states that a court may appoint a special master to hold trial proceedings or conduct other discovery or evidence-based processes.<sup>225</sup> Special masters are court-appointed officers instructed to hear evidence and make recommendations about that evidence to a judge.<sup>226</sup> Unfortunately, special masters are "rarely used by federal courts, but could be exceedingly valuable to a trial judge strapped for time and constrained with limited expertise in the relevant subject matter."<sup>227</sup> Contrasted with the use of an expert witness, special masters can limit the pool of evidence presented to the trial court in the pretrial stages of litigation.<sup>228</sup>

Although special masters are almost always attorneys, Rule 53 does not specify who can serve as a special master.<sup>229</sup> The value of the use of a special master is akin to the use of an expert witness; the individual serves as a neutral third party whose main task is to limit and organize historical evidence before the court. The court may choose to appoint another attorney to fill this role, or, ideally, appoint a trained historian able to set boundaries of which time periods and types of sources the court and the parties should examine. In this context, the special master's true value is the ability to limit the scope of the evidence presented to the court. Therefore, a trained historian serves as the ideal appointee.

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<sup>222</sup> Cf. Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341, 400 (1998) (explaining the importance of the expert's role as an independent and impartial source in settlement negotiations).

<sup>223</sup> See Larsen, *Age of Alternative Facts*, *supra* note 50, at 225; Sink, *supra* note 217, at 197.

<sup>224</sup> See Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 481–86 (2009).

<sup>225</sup> See FED. R. CIV. P. 53(a)(1).

<sup>226</sup> Larsen, *Age of Alternative Facts*, *supra* note 50, at 225.

<sup>227</sup> *Id.* (citing Stephanie Domtrovich, *Fulfilling Daubert's Gatekeeping Mandate Through Court-Appointed Experts*, 106 J. CRIM. L. & CRIMINOLOGY 35, 42 (2016)).

<sup>228</sup> See Deason, *supra* note 222, at 397.

<sup>229</sup> See FED. R. CIV. P. 53.

## 2. The Workable Standard: Historical Quarrying

In tandem with these evidentiary tools, judges still must engage in some level of weighing of the historical evidence, especially at the appellate level. If courts are to rely only on the briefing of the parties to find and investigate the relevant historical evidence, then courts run the risk of missing significant historical events, informative context, and failing to view the state of the law in the context of that period against a full backdrop—all elements typically assessed by historians. To minimize the time needed to review historical evidence, lower courts can first undertake a multipart process to weigh the strength of historical evidence necessary: historical quarrying.

Quarrying is the process of cutting into and excavating rock or land so as to form a quarry and obtain stone.<sup>230</sup> In historical analysis, quarrying involves a multistep process of extracting various types of materials from the earth, digging deeper to find the proper material to in turn convert to another use. To conduct a proper historical analysis, judges must: (1) limit their analysis to the proper time period, (2) recognize counterfactual analysis, and (3) compare methods and factual conclusions. In any other kind of legal analysis, courts hear evidence or argument put on by the parties and then use their independent judgment to decide the value, persuasiveness, and validity of such information. Often, this process involves extra-record research and independent inquiries into the sources presented by the parties.<sup>231</sup> Previously a jurisprudential choice, the Supreme Court, by way of expansion of the history and tradition test, has now indirectly mandated the use of primary and secondary sources to inform lower courts' decision-making.<sup>232</sup>

No consensus exists on “how to read the Constitution,” so a multistep, multifactor process is warranted.<sup>233</sup> As Chief Judge Easterbrook has recognized, in the end, “when one has consulted all of the sources that seem helpful to understand the actual text that was put down[,]” it is a fallacy “to think that you’re going to decide that the case itself has a fixed and clear meaning. You may come to the conclusion that the drafters intended to create an open-ended provision” or that they “intended to pin an idea down very specifically . . . . I don’t think we should confuse

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<sup>230</sup> *Quarry*, DICTIONARY.COM, <https://www.dictionary.com/browse/quarry> [<https://perma.cc/AD98-URYA>] (last visited Dec. 4, 2023).

<sup>231</sup> Which raises yet another question surrounding the *Bruen* mandate: Do we trust judges to conduct such extra-record research? To conduct a proper full-scale historical analysis, such research proves required. 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.”).

<sup>232</sup> See Larsen, *Fact Finding*, *supra* note 5, at 1260 (“Independent judicial research of legislative facts is certainly not a new phenomenon.”).

<sup>233</sup> Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821, 839 (2019).

the end result of that inquiry with the nature of the inquiry itself.”<sup>234</sup> Regardless of these difficulties, judges must not rely on “historical imagination,” in which courts distort the truth to become something purely theoretical.<sup>235</sup> Thus, historical quarrying is necessary for lower courts to solidify the amorphous “marching order” demanded by the Supreme Court in analyzing history and tradition.<sup>236</sup>

*a. Limiting the Relevant Time Period*

One thing is for certain: relying on the history referenced by the Supreme Court in its opinions is always fair game.<sup>237</sup> Not only does this type of evidence serve as precedent, but the Court, in ignoring such evidence and flip-flopping between the preferred kinds of evidence, risks calling its legitimacy into question.<sup>238</sup> Depending on the type of claim in front of the lower court, historical evidence from either the founding period or the time of the Fourteenth Amendment’s ratification should serve as the main focus in reducing the scope of historical evidence available for the courts’ considerations. This is revealed by the Supreme Court’s reliance on particular time periods in both *Bruen* and *Dobbs*.

Based on the Court’s recent decision in *Bruen*, any reference to common law as understood at the ratification of the Constitution serves as a safe bet.<sup>239</sup> The Court also places a particular emphasis on Founding-era understandings of Second Amendment rights, rejecting breaks in history from the original understanding of the Constitution.<sup>240</sup> In fact, in one of the only directives to lower courts by the Supreme Court in its 2022 history and tradition jurisprudence, the Court narrows the timeline by emphasizing researching “institutions as they were when the instrument was framed and adopted.”<sup>241</sup> Lower courts should also find colonial- and Founding-era

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<sup>234</sup> See Tyler et al., *supra* note 70, at 1892.

<sup>235</sup> See Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1855 (2012). Charles proposes a “historically conscious” Second Amendment jurisprudence that considers “total historical context, a substantiated evidentiary foundation,” and requires courts to remain “true as to what the historical record provides.” *Id.* Rather than rooting the methodology in the jurisprudence itself as suggested by Charles, the historical quarrying method provides judges with a “practical guide” to interpreting the new history and tradition mandates handed down by the Supreme Court.

<sup>236</sup> See *supra* notes 75–79 and accompanying text.

<sup>237</sup> See generally Tyler et al., *supra* note 70, at 1905, 1918.

<sup>238</sup> Cf. Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 247–57 (2011). *But see id.* at 265 (“Even if originalism does not succeed in providing an adequate referent for deciding cases, it has been quite successful in awarding the Court with descriptive legitimacy.”).

<sup>239</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2139 (2022) (citing *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925)).

<sup>240</sup> See *id.* at 2154.

<sup>241</sup> *Id.* at 2139 (citing *Ex parte Grossman*, 267 U.S. at 108–09).



historical evidence more compelling, considering that the *Bruen* Court resolved conflicting historical evidence between earlier historical accounts and those from the late nineteenth and twentieth centuries in favor of the colonial or Founding periods.<sup>242</sup>

The *Dobbs* Court relied heavily on state and local laws adopted between the ratification of the Fourteenth Amendment up until *Roe v. Wade*.<sup>243</sup> However, the Court in *Dobbs* engaged in a review of medieval sources—the precise type of source the same Court found disdain for in *Bruen*—and reasoned that medieval sources were too far removed from the founding period to shed light on the meaning of the Second Amendment.<sup>244</sup> Although a mixed signal from the Supreme Court, and perhaps a result of one-sided historical analysis, lower courts, with their limited resources, should focus on historical evidence surrounding the corresponding ratification era.

### *b. Recognizing Counterfactual Analysis*

In this stage of historical quarrying, courts must remain conscious of its susceptibility to fall into a partisan or persuasive trap. In doing so, it must properly weigh evidence supporting both parties, rather than engaging in a one-sided analysis.<sup>245</sup> As the lawyers advocating for their clients understand, the way a court frames an issue and “which historical periods or pieces of historical evidence” a court relies on is “outcome determinative,” especially in such an empirically bound test as history and tradition.<sup>246</sup> To avoid this trap, courts must look beyond amicus briefs and law office history to conduct their own research and confirm or deny the factual accuracy of the evidence presented before them.<sup>247</sup> The truth—that is, historically certain evidence surrounded by the proper context—will guide lower courts to the correct result within the given framework. At this stage of historical quarrying, the use of expert witnesses and special masters at the trial level and a close reading of the record at the appellate level are crucial.

### *c. Comparing Methods and Factual Conclusions*

In the final stage of historical quarrying, the historical evidence courts use must, in some way or another, be likely to have influenced the Founders or adopters in their drafting of the relevant amendment. This step in the analysis would function

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<sup>242</sup> *Id.* at 2154 (explaining that late nineteenth- and twentieth-century history does not “provide much insight” into the Second Amendment).

<sup>243</sup> *See Dobbs*, 142 S. Ct. at 2248, 2252–53.

<sup>244</sup> *Id.* at 2249; *see Bruen*, 142 S. Ct. at 2123, 2139.

<sup>245</sup> *See Bruen*, 142 S. Ct. at 2150; *Dobbs*, 142 S. Ct. at 2242–43; *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429–30 (2022).

<sup>246</sup> Patrick J. Charles, *The Fugazi Second Amendment: Bruen’s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 625 (2023).

<sup>247</sup> *See Larsen, Amicus Facts*, *supra* note 9, at 1784.

analogously to finding legislative history. The role of expert witnesses and special masters is again vital at this stage of historical quarrying; otherwise, courts run the risk of missing key historical sources and facts and over-relying on briefs and other heavily biased, or even partisan, sources.

The *Bruen* Court emphasized several times that in evaluating historical evidence, the court is “not obliged to sift the historical materials for evidence to sustain New York’s statute” because the burden falls on the government to find the historical evidence and to convince the court that such evidence serves as a sufficient analogous historical example of gun regulation.<sup>248</sup> However, to conduct a historical analysis, courts at least have to take on a cursory review of the available data from a variety of sources—the most reliable being primary historical sources.

The Court in both *Bruen* and *Dobbs* relied on classic legal minds such as Blackstone, Coke, and Hale.<sup>249</sup> Therefore, sources rooted in legal philosophy or written by major historical figures within the ratification period would provide strong historical support.<sup>250</sup> Previous laws enacted or in force during the relevant ratification period also serve as reliable, accurate sources for lower courts to examine and compare.<sup>251</sup> Regardless of which sources lower courts use to inform their analysis, it is crucial that lower courts avoid engaging in broad, conclusive historical analysis as the Supreme Court did in *Kennedy*.<sup>252</sup> By using primary sources and trusted secondary sources, researching beyond the sources presented by amici and the parties before the courts, and relying on the expertise of historians as expert witnesses or special masters, lower courts would have a workable research routine. The resulting routine would not overly burden courts, would reduce partisan tendencies, and would provide a framework to determine cases justly under the history and tradition standard.

#### CONCLUSION

Practically speaking, the Supreme Court has adopted an unworkable, malleable, and subjective standard, which on its face invites misapplication of not only the law,

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<sup>248</sup> See *Bruen*, 142 S. Ct. at 2150. Note that this test encourages courts to consider historical analogues that the government presents, determine whether these analogues prove sufficient, and if not, determine by way of omission that the Founder’s inaction (or the government’s inability to find a sufficient analogue) suggests that they did not act out of respect for a particular right. See Alschuler, *supra* note 152, at 24–25; 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).

<sup>249</sup> See *Bruen*, 142 S. Ct. at 2149 (citing Blackstone for the proposition that surety laws were meant to be preventative, not punitive); *Dobbs*, 142 S. Ct. at 2249 (discussing Blackstone, Coke, and Hale’s views on whether abortion of a quickened fetus is criminal).

<sup>250</sup> See *Dobbs*, 142 S. Ct. at 2251.

<sup>251</sup> See *id.* at 2248, 2252–53.

<sup>252</sup> See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022).

but the facts that inform the very history of the United States. Lower courts must employ a standard that is workable, practical, and legitimate to ensure that the courts are reaching a fair result, but also to remain within the bounds of binding precedent. Applying the law typically revolves around principled determinations that draw from finite, systematic sources. The history and tradition standard as presented by the Supreme Court offers no obvious path for lower courts to take, nor does it align with routine application of the law, particularly at the trial court level.

The Supreme Court has provided little direction to the lower courts in applying the history and tradition standard and the application of the standard to other constitutional questions proves likely. In ensuring that lower courts are reaching a fair result, they must be equipped with the proper tools for review. Lower courts should lean on available resources, specifically by using expert witnesses and appointing special masters as necessary. Not only does this relieve much of the burden of thorough historical research from the lower court itself, but it will lead to a more accurate, truthful, and just result. In the interest of justice, lower courts must avoid becoming bogged down by the endless sources of U.S. history and focus their attention on the relevant time periods and traditions. Rather than adopting a more traditional, cherry-picking, law-office-history-like method of applying the standard, it is crucial that lower courts engage in historical quarrying and weigh the historical evidence as *historians* would—using primary and secondary sources, immersing themselves in the political atmosphere and general context of the time, and weighing the counter-facts. If lower courts were to fail to engage in proper historical analysis, then this nation's history would devolve into inaccurate, contradictory chaos, with the law following close behind. As Judge Newsom so aptly stated, originalism and the history and tradition standard are here to stay in constitutional jurisprudence for the foreseeable future, whether one likes it or not. To make the best of what the Supreme Court has mandated, lower courts must engage in the most rigorous historical analysis feasible using the available resources to secure our constitutional freedoms.