ORIGINALISM AND HISTORICAL FACT-FINDING

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ABSTRACT

Historical facts are more central to constitutional litigation than ever before, given the Supreme Court's increasing reliance on originalism and other modes of interpretation that invoke historical practice and tradition. This raises a central tension. The case for originalism has rested largely on its being simultaneously fact-bound and a theory of adjudication capable of resolving questions of constitutional law. In practice, however, the historical facts central to originalism typically are not litigated in accordance with standard practices for fact-finding: introduction at trial, expert testimony, adversarial testing, deference on appeal, and so on.

In the absence of the usual fact-finding protocols, many recent Supreme Court rulings have based the scope of constitutional rights on claims of historical fact—with those claims drawn primarily from amicus briefs, and involving some serious factual errors. This is significant in two broad sets of cases: those that rely on history to *apply* a constitutional rule (as lower courts are doing with the historical-analogical test prescribed by *New York State Rifle & Pistol Association v. Bruen*) and those that rely on history to set the *content* of a constitutional rule (for example in *Dobbs v. Jackson Women's Health Organization*'s rejection of a constitutional right to abortion). The latter—which we call "declarative historical fact"—have become especially prominent in recent years.

In this Article, we explore the promise and peril of treating historical fact-finding like other kinds of fact-finding in our legal system. Doing so calls into doubt originalism's near-exclusive focus on historical fact-finding at the appellate level, informed by amicus briefs and judges' or Justices' own historical research. Our legal system gives trial courts primary authority over fact-finding, and many trial judges attempting to implement the Supreme Court's originalist decisions have turned to historians as experts, holding hearings and calling for briefing at trial level. Such trial-level historical fact-finding imposes serious

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burdens and faces important limitations, but also has important institutional and constitutional advantages over appellate findings of historical fact.

In addition to emphasizing the proper role of trial courts, our analysis suggests a more important role for Congress both in finding historical facts and in regulating appellate review of historical facts. Courts arguably owe deference—perhaps substantial deference—to congressional fact-finding, and it is not immediately apparent why historical fact-finding should be any different. Congress might also legislate standards of review for judicial fact-finding, including for historical facts used in constitutional litigation. This type of "fact-stripping," a form of jurisdiction stripping, is consistent with congressional power over Article III courts, as we have developed in prior work.

If originalism is to maintain its claim on being fact-based, it must grapple with these fundamental issues regarding the litigation of facts in our legal system. If it is *not* practically possible for judges develop a sound record of historical facts, then any approach to interpretation relying on such facts will not produce convincing, legitimate, or lasting interpretations of the Constitution.

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INTRODUCTION

Constitutional adjudication—and any constitutional theory that seeks to explain or guide it—depends in part on fact-finding.[1] Different constitutional claims, doctrines, and theories prioritize different kinds of facts and direct judges how to identify and evaluate them. One might look to empirical evidence about the contemporary functioning of a challenged law,[2] for example, or evidence about whether a particular practice comports with contemporary constitutional commitments.[3] Under the familiar tiers of scrutiny, judges must evaluate whether the government has asserted a sufficient interest and whether the challenged action is sufficiently tailored to serve that interest.[4] Such familiar uses of facts involve the application of a constitutional standard to a set of relevant facts, whether they be economic, psychological, medical, statistical, or scientific. Judges' reliance on expertise from a range of academic disciplines is both essential and appropriate.

In originalist constitutional approaches, historical facts are privileged above other types of fact.[5] Originalism is "almost wholly fact based,"[6] and "[o]riginalism supposes that historical facts can be used to select among multiple, competing interpretations of the Constitution."[7] Indeed, many originalists argue that a central benefit of grounding constitutional law in this type of historical fact is providing a degree of objectivity perceived as lacking in other constitutional theories. As Justice Antonin Scalia put it, "[t]exts and

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[1] *See, e.g.*, DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008); Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75 (1960); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018).

[2] *See, e.g.* Glossip v. Gross, 576 U.S. 863 (2015) (Breyer, J. dissenting) (discussing empirical evidence concerning administration of the death penalty).

[3] Trop v. Dulles, 356 U.S. 86, 78, 100-01 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. … The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[4] For an overview, see RICHARD H. FALLON, JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY (2019).

[5] *See infra* Part I. *See also* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 8 (2011) ("Proponents of originalism agree that historical facts at the time of a constitutional provision's adoption normally determine its meaning."); Mark A. Graber, *Original Expectations*, 52 CONN. L. REV. 1573, 1579–80 (2021) ("Both original public meaning and original intentions/expectations purport to be facts about constitutional politics at the time the constitution was ratified."); Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 5 (2009) ("What unites all forms of Originalism is deference to history: It is facts about what was intended, written, or understood in the past that decide the meaning of laws that contemporary judges are to apply.").

[6] FAIGMAN, *supra* note 1, at 46.

[7] Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1623 (1997).

traditions are facts to study, not convictions to demonstrate about."[8] Critics argue that the very notion of historical fact is far more complicated than originalism suggests.[9] They point to examples of judges making basic historical errors.[10] They show originalism has not delivered the kind of restraint that its advocates promise, and, relatedly, that it has proven malleable for ideological ends.[11]

How historical facts matter within originalism is a complicated question,[12] as in any kind of constitutional interpretation. Sometimes facts are used to set the *content* of a constitutional rule—what we here call "declarative" facts. Such was partially the case in *Roe v. Wade*'s much-criticized trimester framework. The distinction between the first and second trimesters was explicitly based upon "now-established medical fact" concerning the relative risk of abortion as compared to carrying a pregnancy to term.[13] The second dividing line in the trimester framework was not solely grounded in factual findings, because the Court relied on more theoretical "logical and biological justifications" for permitting regulation of abortion in the third trimester after

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[8] Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). *See also* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is empirical, not normative.").

[9] PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 1 (1988) ("Historical objectivity is not a single idea, but rather a sprawling collection of assumptions, attitudes, aspirations, and antipathies" (internal quotation marks omitted)); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660–61 (1987) ("My specific concern is to argue that the turn to history does not obviate the personal responsibility of the originalist interpreter for the positions he takes, because historical research itself, when undertaken responsibly, requires of the interpreter the constant exercise of judgment. Historical judgments, while by no means exercises in unconstrained or subjective creativity, necessarily involve elements of creativity and interpretative choice.").

[10] *See infra* notes 20 & 26.

[11] *See infra* Section I.B.

[12] For simplicity's sake, we will address our analysis to "originalism," acknowledging that it is a broad family of theories. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) ("A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label."). For an argument that neither *Bruen* nor *Dobbs* was truly originalist, see Kermit R. Roosevelt, *The Supreme Court is Dooming America to Repeat History*, TIME (July 5, 2022).

But whatever label one applies, our analysis here applies *mutatis mutandis* to, for example, theories and doctrines that look to "historical tradition," *Bruen*, 142 S. Ct. at 2126, or whether a particular right is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty.'" *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997). Indeed, our broad point is that any approach to adjudication that relies on historical facts must take account of how those facts are adjudicated.

[13] 410 U.S. 113, 163 (1973).

the point of viability.[14] Even so, the Court in *Planned Parenthood v. Casey* rejected the trimester framework, concluding that "time has overtaken some of *Roe's* factual assumptions" regarding maternal and neonatal safety.[15]

In *Dobbs v. Jackson Women's Health Organization*, the Court—having accused *Roe v. Wade* of resting on historical errors[16]—eliminated the constitutional right to an abortion, again basing its holding on deeply contestable assertions of historical fact. The majority effectively rejected the entire category of medical facts invoked in *Roe* and *Casey*, saying that abortion was "fraught with medical and scientific uncertainties."[17] Instead, the Court found that "the most important historical fact" regarding state regulation of abortion at the time of the Fourteenth Amendment, was clear and provided "overwhelming" support.[18] These were not simply claims about what laws were on the books at what time, but also about historical context and facts in the world.[19] Professional historians cried foul.[20]

Even as the current Court has rejected *Roe*, it has adopted approaches that—like *Roe*—not only require (historical) fact-finding, but also purportedly rely on (historical) facts to set the content of constitutional tests. This represents a major doctrinal shift, emphasizing the importance of facts in defining constitutional rules. Even in cases like *Brown v. Board of Education,* which famously cited historical and social science evidence, that evidence was relied on as general support rather than the central basis for recognizing and defining the content of a constitutional right.[21]

In other cases, the Justices have articulated legal tests that must be *applied* using historical facts. In *New York State Rifle & Pistol Association v. Bruen*, the majority rejected the two-part Second Amendment framework employed throughout the federal courts of appeal and replaced it with a test that measures

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[14] *Id.* at 163.

[15] 505 U.S. 833, 860 (1992).

[16] 142 S. Ct. 2228, 2236 (2022) ("*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight. ")

[17] *Id.* at 2267.

[18] *Id.* at 2268.

[19] Some forms of originalism seek to focus exclusively on legal materials like statutes and cases. We are skeptical that this is possible, and in any event most originalist scholarship and doctrine looks to broader historical sources. *See infra* notes 160-171 and accompanying text.

[20] *See, e.g.*, HISTORY, THE SUPREME COURT, AND *DOBBS V. JACKSON*: JOINT STATEMENT FROM THE AMERICAN HISTORICAL ASSOCATION AND THE ORGANIZATION OF AMERICAN HISTORIANS (July 2022), at https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022) (criticizing *Dobbs* for its "misrepresentation" and "mischaracterization" of the historical record, and concluding that it "inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime").

[21] 347 U.S. 483, 494-95 (1954) (noting modern "psychological knowledge" concerning the effects of segregation on children).

gun laws' constitutionality based solely on whether they are consistent with historical tradition.[22] Such an approach, the majority declared, is "more legitimate" and "more administrable" than other types of constitutional doctrine.[23] Justice Clarence Thomas wrote that "in our adversarial system of adjudication, we follow the principle of party presentation"[24] and courts "decide a case based on the historical record compiled by the parties."[25] And yet *Bruen* itself had never actually gone to trial, meaning that the normal processes of fact-finding "in our adversarial system" never occurred—instead, the majority based its historical fact-finding on appellate briefing, much of it by amici. Notably, many commentators identified mistakes of historical fact in the Court's analysis.[26]

Similarly, in *Kennedy v. Bremerton School District,* the majority concluded that Establishment Clause claims should be evaluated according to "analysis focused on original meaning and history," rather than the endorsement test of *Lemon v. Kurtzman*.[27] The Court suggested it was obvious that a football coach's religious exercise did not cross "any line" as set out by the types of coercion the "framers sought to prohibit," but did not provide any real guidance about what historical facts are relevant to this new approach.[28]

These history-focused approaches shift the judicial gaze from contemporary to historical facts, and thus raise the question of how fact-finding rules that developed with attention to the former will be used to analyze the latter. Wide-ranging as it has been, the originalism debate has largely neglected this issue,[29] perhaps because so much of the focus has been on the seemingly-

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[22] *Bruen*, 142 S. Ct. at 2126 ("the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."). For analysis of *Bruen*'s method, see Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023).

[23] *Id.* at 2130.

[24] *Id.* at 2130 n.6 (quoting U.S. v. Sineneng-Smith, 590 U.S. __ (2020)).

[25] *Id.*

[26] *See, e.g.*, Isaac Chotiner, *The Historical Cherry-Picking at the Heart of the Supreme Court's Gun-Rights Expansion*, NEW YORKER (Jun. 23, 2022), https://www.newyorker.com/news/q-and-a/the-historical-cherry-picking-at-the-heart-of-the-supreme-courts-gun-rights-expansion (interviewing Adam Winkler); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (Jun. 27, 2022), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/.

[27] 142 S. Ct. 2228, 2427-28 (2022)

[28] *Id.* at 2429. The closest explanation came in a footnote pointing to an earlier concurring opinion, a quote from James Madison generally discussing compelled religious practice, and a law review article. *Id.* at 2429 n.5 (citing Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003)). *See also Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J. dissenting) ("The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on.").

[29] We mean this as a relative claim—there has been some very illuminating scholarship

predicate matter of whether and why historical facts should be privileged at all.

If they do matter—and they clearly do to some judges—hard questions of legal practice arise. Where will these facts come from? How will they be found? Will they be found only by appellate courts when mentioned in amicus briefs, or will there be adversarial litigation, development of a factual record, and expert historians providing a judge or jury with learned examination of the factual record?

These are not new questions, but they take on a new urgency when the Court uses such historical fact-finding both to define and to apply constitutional rights. In a number of post-*Bruen* cases, for example, courts have struggled with whether application of the new historical-analogical test is a question of law or of fact, and whether the facts need to be developed first at the trial level.[30] In one case, the Fifth Circuit Office of the Clerk asked the Solicitor General of the United States to brief that very question: "In both *Heller* and *Bruen*, the Supreme Court instructs parties to compile historical precedents germane to firearms restrictions. Is this analysis best conceptualized as a question of law or as a question of fact?"[31]

This question, however novel in the context of constitutional litigation, seems to have a simple and traditional answer: it is a question of fact, to which *Bruen*'s new legal standard will apply. Still, what *kinds* of facts are at issue—adjudicative, legislative, or something else entirely—remains a hard question, and the answer carries important consequences, because constitutional adjudication is embedded in a broader set of rules about fact-finding. The Federal Rules of Evidence set limits on what facts are admissible, how they can

written on related issues, including for example the use of historians as expert witnesses, which we address in more detail below. *See infra* Section III.A.2.

[30] *Compare* Atkinson v. Garland, No. 22-1557, 2023 WL 4071542, at *1 (7th Cir. June 20, 2023) (remanding "to allow the district court to undertake the *Bruen* analysis in the first instance") *with id.* at *6 (Wood, J., dissenting) ("This is a pure question of law, … Remanding this case to the district court will not reduce our responsibility to evaluate that question independently when the case inevitably returns to us."); *compare* Young v. Hawaii, 45 F.4th 1087, 1089 (9th Cir. 2022) (en banc) (remanding to district court) *with id.* (O'Scannlain, J., dissenting) ("We are bound, now, by *Bruen*, so there is no good reason why we could not issue a narrow, unanimous opinion in this case. The traditional justifications for remand are absent here. The issue before us is purely legal, and not one that requires further factual development."); *compare* Teter v. Lopez, No. 20-15948, 2023 WL 5008203, at *6 (9th Cir. Aug. 7, 2023) ("Because the issue does not require further development of adjudicative facts to apply *Bruen*'s new standard, it does not trigger our "standard practice" in favor of remanding when an intervening change in law requires additional inquiry concerning adjudicative facts.") *with* United States v. Daniels, No. 22-60596, 2023 WL 5091317, at *19 (5th Cir. Aug. 9, 2023) (Higginson, J., concurring) ("In my view, this suggests that *Bruen* requires that an evidentiary inquiry first be conducted in courts of original jurisdiction, subject to party presentation principles, aided by discovery and cross-examination and with authority to solicit expert opinion.").

[31] Letter to Solicitor General, Fifth Circuit Office of the Clerk, Re. Case No. 22-50834, U.S. v. Quiroz, February 16, 2023 (on file with authors).

be proved, and by whom.[32] The Federal Rules of Civil Procedure provide that factual findings are subject to review only for clear error, in contrast to findings of law, which are reviewable *de novo*.[33] Such rules typically apply in constitutional cases with the same force as they do elsewhere.[34] Indeed, some of these rules are mandated by the Constitution, such as due process rules regarding fair litigation process and jury trial rights.

There are scarcely any principles more fundamental to the structure of U.S. courts than the notion that "[t]he trial judge's major role is the determination of fact,"[35] typically with a constitutionally-protected role for lay jurors to determine factual questions at a trial—the Seventh Amendment jury trial right applies to constitutional cases brought under Section 1983.[36] Facts found at trial are entitled to substantial deference on appeal.[37] And yet, to the consternation of some judges,[38] constitutional arguments about historical facts are primarily directed to the appellate courts, and in particular the Supreme Court, which does not seem to defer to lower court fact-finding.[39] Appellate amicus briefing, not adversarialism in the trial court, has been the standard mode of originalism in adjudication, and it carries significant risk of error and ideological bias.[40] Taking seriously the role of trial court historical fact-finding

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[32] *See, e.g.*, Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 390-92 (1996) (describing adoption of federal rules of evidence and their weight).

[33] FED. R. CIV. P. 52(a)(6). *See also* Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion.')").

[34] There are exceptions for cases not governed by the civil rules, such as constitutional claims raised in criminal cases or on post-conviction review of criminal convictions. Further, there are exceptions for preliminary rulings in civil cases, such as regarding preliminary injunctions. For a discussion of each of these exceptions, including the manner in which "shadow docket" rulings by the Supreme Court can evade fact-review standards and how Congress could respond, *see* Joseph Blocher & Brandon L. Garrett, *Fact-Stripping*, DUKE L.J. at *17-20 (forthcoming 2023), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304132.

[35] Anderson v. City of Bessemer, 470 U.S. 564, 574 (1984).

[36] Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687 (1999); *see also* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second,* 122 YALE L.J. 852 (2013).

[37] *See, e.g.* Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 208 (1937) ("This is a canon of decision so well accepted that it is scarcely necessary to cite specific instances"); FED. R. CIV. P. 52(a)(6).

[38] Moderated by Amanda L. Tyler et. al., *A Dialogue with Federal Judges on the Role of History in Interpretation A Discussion Held on November 4, 2011, at the George Washington University Law School*, 80 GEO. WASH. L. REV. 1889, 1905-06 (2012) [hereinafter *A Dialogue*] ("If one believes in the adversarial process, as I do, the court's efforts to construe history accurately will only improve if the history is presented earlier rather than later in the litigation process.") (comments of Hon. Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit).

[39] For an overview, *see* Blocher & Garrett, *supra* note 34.

[40] *See, e.g.*, Brianne J. Gorod, *The Adversarial Myth: Appellate Extra-Record Factfinding*, 61 DUKE

would shift the focus toward party participation, record development, use of historians as experts, and greater deference on appeal.

In Part I of this Article, we illustrate the centrality of historical factfinding to constitutional adjudication, but highlight how its centrality to constitutional interpretation has become only recently ascendant under various forms of originalism. If social science studies or international norms were used to fix constitutional meaning, enormous literatures would be dedicated to the subject. Such sources have been relied on as supportive evidence by judges, but not as the content from which rights are made. Now that has changed.

In Part II, we analyze what kinds of facts are central to the enterprise, focusing on on a few significant and cross-cutting classifications. In familiar and common settings, many facts, including historical facts, are classified as *legislative* rather than *adjudicative*—that is, they are informative on broad issues of law and policy rather than the who, what, and where of a case.[41] Whether legislative facts are entitled to deference on appeal is disputed,[42] but there is no doubt that such facts must still be *found*, and hard questions arise about who bears responsibility for that job and how. Those questions are especially significant in the context of "declarative constitutional facts," which as described above are those used to set the content of constitutional rules. Using historical facts to form the stated premise for a doctrinal rule is different from invoking legislative facts for social science background, and there is an especially powerful institutional and constitutional case for centering such historical fact-finding in trial courts.

In Part III, we explore how judicial reliance on historical facts intersects with background legal doctrines regarding fact-finding in constitutional adjudication.[43] That analysis suggests increased roles for both lower courts and Congress and a move away from the current, near-exclusive practice of "appellate originalism." In addition to re-centering the role of trial courts, our approach also has implications for legislatures—both in conducting their own independent historical fact-finding (which should be entitled to judicial deference[44]) and in statutorily regulating the way that courts do theirs. As we have described in related prior work, Congress can engage in "fact-stripping" by setting out rules for appellate deference to factual findings in the trial courts,

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L.J. 1 (2011); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014).

[41] Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 407 (1942). For a creative new approach to the issue, see Haley Proctor, *Legislative Facts*, 99 NOTRE DAME L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392025.

[42] *See infra* notes 268-271 and accompanying text.

[43] *See also* Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57 (2015) (exploring the unique challenges raised by the intersection of constitutional rights adjudication and the law of evidence, and suggesting ways that courts can better employ tools like standards of constitutional review, standards for avoidance, and canons of interpretation).

[44] *See generally* William Araiza, *Deference to Congressional Factfinding in Rights-Enforcing and Rights-Limiting Legislation,* 88 N.Y.U. L. REV. 878 (2013).

including in constitutional cases.[45] We describe here why there may be sound reasons do to so given the historical-fact-finding role the Court has accorded itself in cases like *Bruen* and *Dobbs*.[46]

Our primary goal here is not to endorse or condemn the use of historical facts in constitutional adjudication, nor judicial reliance on other types of expertise in economics, psychiatry, psychology, or statistics. But there is not currently a prominent push to ground constitutional interpretation solely—or even primarily—in economic facts or in statistical analyses. By contrast, that is what theorists, and now Justices, have done with regard to historical facts. We do not mean to suggest that it is practical or sufficient for judges to convene historical experts to conduct the type of laborious research required to carefully develop the type of factual record needed to answer many of the important questions relevant to constitutional interpretation. Indeed, to do so in accordance with best practices of historical research might simply be impossible on a briefing schedule.[47] However, it is doubtful that historical facts can be established more easily and with less oversight, than scientific evidence presented by experts regarding far more confined issues litigated by parties.

Whether or not we are all originalists now[48] or none faithfully adhere to the theory in practice, judges, lawyers, and scholars—ourselves included—widely believe that matters of fact and of historical fact can be and long have been relevant in constitutional cases. If and when constitutional law and theory does rest on facts, including historical facts, legal practice must treat them as such. If it is not feasible to conduct sound fact-finding regarding the material from which constitutional rights are made, then historicized legal interpretation must drop its pretense to be rooted in historical facts.

I. THE ROLE OF HISTORICAL FACT-FINDING IN CONSTITUTIONAL LITIGATION

While nearly all modes of constitutional interpretation rely on facts in some fashion, the past few years have seen a markedly increased reliance on historical facts to interpret the constitution. That is a product of the Court's turn to originalism (which we here use as a shorthand for the many modes of historicist constitutional interpretation), because any conceivable approach to originalism must—almost tautologically—rest significantly on the identification

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[45] *See* Blocher & Garrett, *supra* note 34.

[46] *See infra* Part III.D.

[47] *See infra* notes 258-260 and accompanying text.

[48] ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011) (positing "We are all Originalists now"); *see also* James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1788 (2013) ("If we define originalism so inclusively—and we are all now in this big tent—it may not be very useful to say that we are all originalists now.")

of historical facts that go beyond the parties' own dispute.[49] Our goal in this Part is to illustrate as much, and to show some ways in which originalism and other approaches that rely on historical fact-finding intersect with the legal rules for fact adjudication.

A. Historical Facts in Constitutional Interpretation

The Supreme Court has long cited factual evidence—including historical evidence—when engaging in constitutional interpretation, and such evidence can be highly informative and relevant. As far back as the Marshall Court, the Justices have invoked the intents and understandings of drafters.[50] And many modern doctrinal tests direct attention to historical facts, such as in analyzing whether a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and thereby justify incorporation against the states under the Fourteenth Amendment Due Process Clause,[51] or whether a particular Due Process liberty interest is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."[52]

Although there are innumerable examples, *Obergefell v. Hodges*[53] provides a useful illustration of how the scope of a constitutional right—there, the due process right to marry—can depend on a contested historical record and contested methods for examining that record. Writing for the majority, Justice Anthony Kennedy emphasized that historical evidence showed "the history of marriage is one of both continuity and change,"[54] in response to a dissenting opinion by Chief Justice John Roberts arguing that marriage was an "unvarying

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[49] André LeDuc, *Originalism's Claims and Their Implications*, 70 ARK. L. REV. 1007, 1010–11 (2018) ("Originalism, most fundamentally, claims that certain original facts about the constitutional text—intentions, expectations, or linguistic understandings—generate privileged interpretations of that text that determine constitutional controversies."); Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071, 1075–76 (2021) (arguing that public meaning originalism "depend[s] heavily on assessing historical facts").

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

[51] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[52] Washington v. Glucksberg, 521 U. S. 702, 721 (1997). The Court's decision in *Dobbs* appears to signal a revitalization of the *Glucksberg* test, which added the gloss that the right in question must be "carefully" described or "formulat[ed]." *Id.* at 722. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247-48, 2259-2260, 2283 (2022) (relying on *Glucksberg*).

[53] 576 U.S. 644 (2015).

[54] *Id.* at 659.

social institution" and no right to same-sex marriage was "deeply rooted."[55] The majority cited amicus briefs filed by the American Historical Association and the Organization of American Historians showing that the structure of marriage in the United States had evolved to accommodate new notions of due process and equality.[56] In addition, expert historians had testified at the trial level. In the Michigan case that was ultimately consolidated with others in the *Obergefell* litigation, the trial involved five plaintiffs and five defense experts from a range of disciplines, including historians.[57] The Supreme Court concluded that the right to marry was firmly recognized, foundational, and could not be selectively denied to same-sex couples,[58] while the Chief Justice argued in dissent that the historical evidence pointed the other way.[59] Their different readings of the historical facts pointed toward different outcomes.

Approaches rooted in appeals to "tradition"—an increasingly prominent feature of the Supreme Court's jurisprudence[60]—similarly rely on historical facts. As Richard Primus explains, "Originalism locates legal authority in some set of facts that existed at a specific prior time when a law came into being. Tradition, in contrast, looks to the whole continuum of time leading up to the present."[61] In *Bruen*, the Court concluded that gun laws must be "consistent with this Nation's historical tradition of firearm regulation,"[62] and spent most of its opinion parsing the historical record. Even as it overturned *Roe v. Wade*, the *Dobbs* Court noted that the Due Process Clause "has been held to guarantee some rights that are not mentioned in the Constitution, but any

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[55] *Id.* at 706 (Roberts, C.J., dissenting).

[56] *Id.* at 660-61 ("For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman... As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity… As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned.").

[57] DeBoer v. Snyder, 772 F.3d 388 (2014). *See also* Jared Firestone, *Expert Witnesses Contribute to Same Sex Marriage Litigation*, EXPERT INSTITUTE (June 23, 2020), at https://www.expertinstitute.com/resources/insights/expert-witnesses-contribute-to-same-sex-marriage-litigation/.

[58] *Obergefell*, 576 U.S. at 660-64, 671-72 ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.").

[59] *Id.* at 706 (Roberts, C.J., dissenting).

[60] Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. L. ISSUES (forthcoming 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351; Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019.

[61] Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL'Y 159, 173 (2009).

[62] *Bruen*, 142 S.Ct. at 2126.

such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[63] That *Dobbs* preserved this test while overturning precedent demonstrates it was the Court's view of the historical record that had changed.

Habeas doctrine provides additional examples. In several decisions, the Court has assumed that the Suspension Clause of the Constitution might "at the absolute minimum" protect the writ "as it existed in 1789."[64] In *Boumediene v. Bush*, Justice Anthony Kennedy's majority opinion and Justice Antonin Scalia's dissenting opinion engaged in an extensive debate regarding what the scope of the right might have been at that time.[65] As Justice Kennedy noted, "The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction."[66] Pointing to the relevant historiography, Justice Kennedy noted that both arguments depend "upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us," but recent scholarship had uncovered "inherent shortcomings in the historical record."[67] Justice Scalia, by contrast, had no doubts about the extant record: "The writ of habeas corpus does not, and never has, run in favor of aliens abroad."[68] Legal historians concluded that the majority was largely correct, and that neither geography nor the status of the person mattered at common law.[69]

In short, historical fact-finding is central to many of the Court's significant decisions involving constitutional rights. So, too, do contested questions of historical fact—and not of law—also play an important role in structural constitutional law.[70] Entire families of doctrine—non-delegation and

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[63] *Dobbs*, 142 S. Ct. at 2247-48 (quoting *Glucksberg*, 521 U. S. at 721 (some internal quotation marks omitted)).

[64] INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 663-64 (1996)).

[65] Boumediene v. Bush, 553 U.S. 723 (2008). *See also* Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1.

[66] *Id.* at 746-747.

[67] *Id.* at 752.

[68] *Id.* at 827 (Scalia, J., dissenting).

[69] Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 586–87 (2008) ("The clear message of our historical account is that it was not the location of an incarceration that was taken as controlling the issuance of the writ, but the sovereign status of the officials holding a prisoner in custody. So long as officials of the king, or his equivalent, were exercising custody over the bodies of prisoners in a territory, the basis of that custody could be challenged by prisoners through habeas writs."); *id* ("Even aliens who were subjects of foreign princes at war with the English king—typically styled 'alien enemies'—enjoyed ready access to the English king's courts.").

[70] The Court's recent decision in *Haalen v. Brakeen*, No. 21–376 (2023), featured debate regarding the historical understanding of the Indian Commerce Clause, particularly as between

anti-commandeering being two obvious illustrations—are predicated on disputed understandings of historical fact involving federal and state practices.[71]

To be clear, originalism is not the only interpretive method that relies on facts, and therefore is not the only approach that faces the questions we raise here about how facts should be adjudicated. As we will discuss, when courts have relied on fact-finding in constitutional cases, they have generally done so to broadly inform their reasoning or to apply constitutional rules to the facts of a case. Such uses are not necessarily problematic. The shift to originalism, however, has not only meant focusing on a particular type of fact—historical fact—but according it a newly important role in declaring the content of constitutional law.

B. Historical Facts and Originalism

As with other interpretive approaches, there is no single role for historical fact-finding in originalism. One reason for this diversity is that there are several different forms of originalism, each relying on different types of historical evidence.[72] Some originalists look for evidence regarding the intentions of the Framers. On this approach, the relevant evidence will include historical facts tending to demonstrate what those intentions were, such as contemporaneous notes and debates.[73] Other originalists, in the now-predominant approach, seek to ascertain the original public meaning of the ratified text.[74] On this approach, the relevant evidence might include

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the concurring opinion by Justice Neil Gorsuch and the dissenting opinion by Justice Clarence Thomas. Justice Thomas asserted that "[t]he historical record thus provides scant support for the view, advocated by some scholars, that the term 'commerce' meant (in the context of Indians) all interactions with Indians." *Id.* at *23. In doing so, the opinion ignored "substantial contrary evidence" to the contrary, as noted by a legal historian. Gregory Ablavsky, *Clarence Thomas Went After My Work. His Criticisms Reveal a Disturbing Fact About Originalism*, SLATE, June 20, 2023.

[71] Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013) (arguing that the Supreme Court has misunderstood Founding-era historical consensus that in fact favored constitutionality of commandeering); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding,* 121 COLUM. L. REV. 277 (2021) (arguing that historical evidence supports the view that any non-delegation doctrine recognized at the Founding supported extremely broad delegations); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing that historical evidence supports a broader notion of non-delegation at the Founding).

[72] For an overview, *see* Fleming, *supra* note 48, at 1810-12.

[73] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 403 (2d ed., Liberty Fund 1997) (1977); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

[74] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 94-95 (Princeton Univ. Press rev. ed. 2014) (describing "original meaning originalism," under which one "seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment"); Vasan Kesavan

dictionaries, evidence of common historical use, or the more recent reliance on corpus linguistics, a "big data" approach to historical language use.[75]

One well-articulated and influential account of originalist facts comes in the work of Larry Solum. In his aptly-subtitled "The Fixation Thesis: The Role of Historical Fact in Original Meaning," Solum puts it simply: "Meanings … are facts determined by the evidence."[76] Solum explains that interpretation is the task of discerning the linguistic meaning of constitutional text based on facts:

> Interpretation is an empirical inquiry. The communicative content of a text is determined by linguistic facts (facts about conventional semantic meanings and syntax) and by facts about the context in which the text was written. Interpretations are either true or false—although in some cases we may not have sufficient evidence to show that a particular interpretation is true or false.[77]

Solum emphasizes that this is a claim about "meaning in the communicative sense"—and not, for example, a claim about "the purposes for which the text was adopted" or "the correct applications of the constitutional text to particular fact patters or to general types of fact patterns."[78] The focus instead is on semantic meaning, which is fixed by two things: "linguistic facts" such as "conventional semantic meanings of the words and phrases comprised by the sentence and the grammatical relationships between those units of meaning," and "contextual facts" that might resolve ambiguities in conventional semantic meaning.[79]

How might we identify these historical linguistic and contextual facts? The former are "regularities in usage," and "the relevant linguistic facts are those that formed the basis for public understanding of the document, from the

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& Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132-33 (2003).

[75] James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20 (2016).

[76] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 36 (2015) [hereinafter Solum, *The Fixation Thesis*]. The article has been cited 140 times. *See also* Charles Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1338 (2017) (surveying the interpretation/construction debate in originalism, a "basic idea" of which is that "the linguistic content of a particular constitutional provision …. is a factual or historical question"); Ash McMurray, *Semantic Originalism, Moral Kinds, and the Meaning of the Constitution*, 2018 B.Y.U. L. REV. 695, 699–700 (2018) ("Semantic theories, on the other hand, are descriptive and purport to tell us things as they *are*. … So understood, semantic theories can be compared to scientific theories.").

[77] *Id.* at 12.

[78] Solum, *The Fixation Thesis*, *supra* note 76, at 21. So, for example, "if you are reading a thirteenth-century letter that uses the word 'deer' and you learn that 'deer' meant four-legged mammal at the time the letter was written, you are very likely to accept this linguistic fact as crucially important to understanding the letter." *Id.* at 22.

[79] *Id.* at 23-25.

promulgation of the text in 1787 and throughout the process of ratification."[80] This type of historical fact-finding involves searching a potentially broad record, which itself might not be complete, in order to reach conclusions about both language and this broader context. For example, Solum describes the majority opinion in *District of Columbia v. Heller*[81]—lauded by some as among the most prominent originalist opinions ever issued[82]—as being "premised on the notion that the linguistic meaning of the Second Amendment was fixed by linguistic facts—patterns of usage—at the time of utterance, not before and not after."[83] And "the warrants for the Court's conclusions about the meaning of 'the right to keep and bear arms' were facts about patterns of language use. Such evidence consisted of direct evidence—actual examples of usage—and indirect evidence—dictionaries that summarized or reported observations about usage."[84]

Contextual facts, meanwhile, are "the facts about the context of constitutional communication that were accessible to the members of the general public at the time the constitutional text was made public and subsequently ratified."[85] In establishing the communicative content of the Constitution of 1789, for example, "it seems likely that the public would have had access to facts about the American Revolution, experience under the Articles of Confederation, and the general shape of the common law legal regime in effect throughout the United States (and perhaps awareness of regional variations within that regime)."[86]

Other originalist or history-focused approaches to constitutional interpretation rely on different forms of historical fact-finding.[87] Some scholars have explored the notion of "constitutional liquidation," which "would allow initial post-Founding practice to resolve ambiguities in the Constitution's original meaning and thereby 'fix' the meaning against subsequent change."[88]

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[80] *Id.* at 28.

[81] 554 U.S. 570 (2008).

[82] *See, e.g.*, Randy Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J. VIA THE CATO INST. (June 27, 2008), https://www.cato.org/publications/commentary/news-flash-constitution-means-what-it-says (calling *Heller* "the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court").

[83] Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 940–47 (2009).

[84] *Id.* at 942.

[85] *Id.* Solum recognizes that "[a] full account of clause meaning would include a theory of the criteria for inclusion in the set of facts that constitute the publicly available context of constitutional utterance." Solum, *The Fixation Thesis*, *supra* note 76, at 54.

[86] *Id.* at 28-29.

[87] Some originalists endorse the "positive turn," which would treat the inquiry as one of law all the way down. *See infra* notes 168-171 (arguing that this approach, too, must grapple with historical fact-finding).

[88] Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 29 (2014). *See also* William Baude,

This approach was a prominent part of the Court's reasoning in *N.L.R.B. v. Noel Canning*,[89] which considered the scope of the President's appointment power. The Court there concluded that "the longstanding practice of the government can inform our determination of what the law is."[90] It continued:

> That principle is neither new nor controversial. As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter ... and that it might require a regular course of practice to liquidate & settle the meaning of some of them." And our cases have continually confirmed Madison's view.[91]

Whatever the merits and demerits of this particular approach to historical practice as an interpretive tool, it relies on findings of historical fact—"a regular course of practice"—and not simply old laws.

The same is true of approaches that employ "historical gloss"[92] to resolve separation of powers disputes. Under this approach, "practices of governmental institutions since the constitutional Founding are a potential source of normative guidance in separation of powers controversies" by "inform[ing] the content of constitutional law."[93] Obviously, evidence of what those practices actually *were* is crucial.

The foregoing discussion has focused on originalism as a method of constitutional interpretation—a search for constitutional *meaning*. But as cases like *Dobbs* and *Bruen* illustrate, historical facts can play an important role not only in the search for constitutional meaning, but in the adjudication of constitutional cases through doctrinal tests—the legal rules and tests with which one implements constitutional meanings.[94] The two need not travel together. One could, for example, use originalist methods to determine that the right to keep and bear arms encompasses a right to keep a handgun in the home for self-

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Constitutional Liquidation, 71 STAN. L. REV. 1, 65 (2019) ("[L]iquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise.").

[89] 573 U.S. 513 (2014).

[90] *Id.* at 525 (internal quotation marks and citations omitted).

[91] *Id.* (quoting Letter to Spencer Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)) (case citations omitted).

[92] Indeed, the two approaches appear to have much in common, though liquidation has not been discussed as thoroughly. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 262 (2017) ("The relationship between the historical gloss approach and the concept of liquidation is uncertain because little has been written about liquidation.").

[93] *Id.* at 257.

[94] Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1555 (2012) ("Originalism can be a theory of *interpretation*, a theory of *adjudication*, or both."); *see generally* RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (2001).

defense, and then subject any restrictions on that right to heightened scrutiny.[95] As Steve Sachs notes, "Legal rules can take as their inputs (or incorporate by reference) a variety of different things: empirical facts about the world, mathematics, social customs, other legal systems' rules, perhaps moral judgments, and so on."[96] Originalism does, however, tend to lend itself to what Kathleen Sullivan calls a "rule-like structure," precisely because it seeks "to find rules in the facts of the authoritative past."[97] This preference for bright-line rules is surely tied to the background arguments in favor of originalism as a fact-bound and judge-constraining enterprise. Ernest Young explains, "By grounding rules in the original understanding of the Constitution, judges can claim that their attempts to craft rules out of these amorphous areas of the law are not judicial legislation, but rather legitimate products of constrained interpretation."[98] This approach—call it "originalist doctrinalism"—is appealing to some precisely to the degree that it substitutes historical fact-finding for judicial preferences. And it raises the importance of conducting that fact-finding in accord with best legal practices, to which we now turn.

B. The Appeal and Critiques of Historical Fact in Originalism

Our goal thus far has been largely descriptive: to situate the role of historical fact-finding in originalism and other history-based approaches to constitutional interpretation. Before turning in Parts II and III to the question of how those facts should be identified and adjudicated, it will be useful to make two prelimary points about the normative debates regarding originalism. The first is that for both defenders and critics of originalism, the strength of the theory is deeply intertwined with the feasibility of historical fact-finding. The second is a point on which historians and originalists largely agree: There are important methodological differences between what trained historians do in conducting research and what judges do in resolving cases.[99] We consider each

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[95] Indeed, this was the approach overwhelmingly favored by federal courts until *Bruen* was decided. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433 (2018) (empirically evaluating roughly 1000 post-*Heller* Second Amendment claims, and finding heavy reliance on scrutiny tests).

[96] Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 853 (2015).

[97] Kathleen M. Sullivan, *The Supreme Court, 1991 Term--Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 114 (1992).

[98] Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 641 (1994) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184-85 (1989)). There are, to be clear, other ways to defend originalism. Lawson, *supra* note 94, at 1561 ("A good deal of originalism undeniably presents itself to the world as an, or even the, interpretative theory that can significantly constrain results. As indicated above, any such effort is profoundly mistaken, both factually and aspirationally. Interpretative theory should aim for correct interpretations, not institutional or political goals.").

[99] *See* Jack M. Balkin, *Lawyers and Historians Argue about the Constitution*, 2020 CONST. COMM.

point briefly in turn.

For many originalists, a central virtue of the approach is that however difficult it might be to do in practice, rooting constitutional meaning and doctrine in historical facts will help limit the risk of judges writing their own preferences into law. The *Bruen* majority claimed as much in stating that a focus on history and tradition is more "legitimate" and "administrable" than means-end analysis.[100] Emphasizing this theme in "Originalism: The Lesser Evil," Justice Scalia argued that looking to history "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[101] Precisely because it is rooted in historical facts, the argument goes, originalism lessens the chance that "judges will mistake their own predilections for the law."[102] Similar points appear in descriptions of originalism as being "objective" or at least "intersubjective,"[103] presumably as opposed to being subjective. Broadly speaking, arguments for originalism—or even for particular variants within the camp of originalist theories—tend to ride on their ability to deliver greater objectivity,[104] which the concept of historical fact connotes.

Naturally, judicial and scholarly invocations of and reliance on historical facts have been subject to a variety of critiques. One is that the supposed objectivity of the enterprise is doomed from the beginning, because the very notion of "objectivity" is more complicated than originalism allows.[105] Justice Robert Jackson famously put it this way in *Youngstown Sheet & Tube Co. v. Sawyer*: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[106] Thus, for example, the search for historical semantic meaning as Solum describes it above could be doomed for the simple reason that it is impossible to separate supposedly factual meanings from subjective values.[107] At the very

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1209; Logan Everett Sawyer, III, *Method and Dialogue in History and Originalism*, 37 LAW & HIST. REV. 847 (2019).

[100] *Bruen*, 142 S. Ct. at 2130.

[101] Antonin Scalia, *Originalism: The Lesser Evil*, 57 CINCINNATI L. REV. 849, 863-64 (1989).

[102] *Id.* at 863-64. *See also* James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 BRIT. J. AM. LEGAL STUD. 25, 35 (2017) ("Originalism … asks you to look to external historical facts to find your answer, and so that answer might (and sometimes will) be one you dislike morally or politically or on efficiency grounds."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (describing originalism as providing "an objective basis for judgment that does not merely reflect the judge's own ideological stance").

[103] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 195 (1999) (arguing that originalist interpretation involves "intersubjective standards of evaluation").

[104] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 94 (2004) (arguing that public understanding originalism is an advance "from subjective to objective meaning").

[105] *See supra* note 9 and sources quoted therein.

[106] 343 U.S. 579, 634 (1952).

[107] Steven Semeraro, *Interpreting the Constitution's Elegant Specificities*, 65 BUFF. L. REV. 547,

least, historical inquiry constantly demands interpretive choice,[108] since "the past is a different world."[109] Historians have prominently leveled such critiques against originalist methods generally, and also against particular originalist claims. They have highlighted the dangers inherent in examining words that had very different meanings in their historical context.[110] They have argued that public meaning originalism, in particular, "offers a way to invoke history without actually doing history."[111]

And, critics go on, judges and other actors in the legal system are poorly suited to find historical facts; at a minimum, they must adhere to some of the appropriate limits of the historians' discipline.[112] As Gary Lawson—himself an originalist, albeit not of the type Solum describes—puts it: "If the goal of interpretation really is to identify the historically real mental states of some group of persons … then, at the very least, judges, lawyers, and law professors are likely not the people best suited to interpret. Rather, it would seem that historians, linguists, psychologists, and semioticians are better qualified for the job."[113] This is especially so because the historical record from which facts might be identified is simultaneously overwhelming[114] and incomplete[115]—and usually missing the

548-51 (2017) ("Significant scholarly work contends that what we perceive as incontestable facts actually depends on a shared value structure from which the language used to convey those facts emerged. If this view is correct, fact and value cannot be meaningfully separated in the way that semantic originalism requires.").

[108] Powell, *supra* note 9, at 660-61. *See also* Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. Rev. 1717, 1730 (2006) ("The misplaced search for historical 'facts' prevents any acknowledgment of the inherently selective and interpretive nature of historical research. Relatedly, jurists often fail to understand the indeterminacy of the historical record. Again, concrete historical 'facts' or 'truths' rarely exist.").

[109] BERNARD BAILYN, SOMETIMES AN ART: NINE ESSAYS ON HISTORY 22 (2015).

[110] *See, e.g.*, Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES GESTAE 1, 8-10 (2015) ("Semantic originalism's pursuit of the linguistic facts makes no distinction between different types of texts, rhetorical styles, or the settings in which speech occurs; nor does Solum's model deal with the divergent interpretive practices that were in place in different speech communities during the Founding era."); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 945 (2015); Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism,* 84 FORDHAM L. REV. 969, 972–73 (2015).

[111] Martin S. Flaherty*, Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 913 (2015).

[112] Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 962 (2015).

[113] Lawson, *supra* note 98, at 1553.

[114] Scalia, *Originalism: The Lesser Evil*, *supra* note 101, at 856 ("Properly done, the task requires the consideration of an enormous mass of material.... Even beyond that, it requires an evaluation of the reliability of that material.... And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.").

[115] Green, *supra* note 108, at 1730 ("[I]t must be recognized that the historical record of any

voices of everyone but a few white men.[116]

Some originalist responses to these challenges have been methodological. Among the more significant developments in originalist practice in recent years has been increased use of corpus linguistics, which employs massive databases of digitized historical material to identify patterns in useage of language.[117] It is not hard to see how such an approach would be attractive to those who subscribe to the semantic meaning approach described above, and indeed Solum writes that "[t]he best approach to recovering the original semantic meaning of the words and phrases would utilize corpus linguistics …. Corpus analysis provides primary evidence of patterns of useage, which are constitutive of semantic meaning."[118] Corpus linguistics is not without its critics, and there are undoubtedly many challenges to the approach.[119] For our purposes, though, what is particularly notable is just how similar it is to other forms of evidence-gathering that are clearly recognized—and treated—as involving fact-finding in a traditional legal sense. Those who employ corpus linguistics are using expert methods to make claims of *fact* that might well be outcome-determinative.

The turn to corpus linguistics illustrates the second point, however, which is the fundamental tension between the task of the historian and the task of the originalist scholar or judge. Many scholars argue that historians simply do not seek "to answer the kinds of questions that constitutional interpreters must resolve."[120] Some originalists take this as a solid defense against the

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period—the Founding period being no exception—is always incomplete.").

[116] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2324 (2022) (Breyer, Sotomayor, and Kagan, dissenting) ("[O]f course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.").

[117] *See generally* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 300 (2021); Kevin Tobia, *The Corpus and the Courts,* 3/5/2021 U. CHI. L. REV. ONLINE 1 (2021).

[118] Lawrence B. Solum, *Originalist Theory and Precedent: An Original Public Meaning Approach*, 33 CONST. COMMENT. 451, 468 (2018). *See also* Shlomo Klapper, *(Mis)judging Ordinary Meaning?: Corpus Linguistics, the Frequency Fallacy, and the Extension-Abstraction Distinction in "Ordinary Meaning" Textualism*, 8 BRIT. J. AM. LEGAL STUD. 327, 341 (2019) ("[C]orpus analysis enables the litigants or conversants to share a set of common facts. Justice Scalia touted a common set of relevant adjudicatory facts as one benefit of originalism; the same applies equally to corpus linguistics.").

[119] *See, e.g.*, Anya Bernstein*, Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397 (2021); Gienapp, *supra* note 110, at 955-56 (arguing that "[k]eyword searches or corpus linguistics will miss too much of what went into meaning by losing sight of holistic connections *between* meanings"); Kevin P. Tobia, *Testing Ordinary Meaning,* 134 HARV. L. REV. 726, 753-77 (2020); Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401, 430-35 (2019).

[120] Rebecca L. Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL'Y 69, 71 (2003). *See also* MARK TUSHNET, RED, WHITE, AND BLUE 35-41 (1988) (arguing that historical research cannot provide the the historical facts that are necessary for originalism)

condemnation of their approach by historians, emphasizing that the two groups are pursuing different questions[121] and that the former therefore cannot be judged by the standards of the latter.[122] Or, to make the claim more moderate, "the historian and the constitutional lawyer have legitimately different roles. The constitutional lawyer interested in history need not be a politically motivated scavenger of real historical work, but a different sort of creature altogether, with a special and not dishonorable function."[123]

As with originalism, there are of course innumerable methodologies employed by historical scholars, which seek to uncover or interpret (in various ways) a wide range of different historical facts. Our goal here is not to fully canvass what Amy Kapczynski has dubbed "constitutional historiography,"[124] but to emphasize the ways in which historical work is interpretive and yet distinct from legal and constitutional interpretation. Historians would not focus on the same hierarchy of authority as judges might when answering a historical question, nor would they interpret texts in the same way. In some respects that is because they are not seeking to answer a legal question or to interpret the constitution,[125] nor even to compile "historical facts." As William Nelson notes:

> In its starkest and least sophisticated form, the model of history as description considers a historical report to be composed solely of objective evidence. Historical truth is understood to be embodied in the statements or artifacts bequeathed by the people of the past; the historian's role is merely to assemble this objective evidence into a credible story.[126]

But as Nelson explains, for "a sophisticated descriptivist, the record of the past becomes good history only when sifted through and synthesized into a coherent

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[121] Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 111, 1155 (2015). For a critique, see Gienapp, *supra* note 110, at 935 (identifying "several fatal difficulties" with the argument that originalist interpretation "can be accomplished largely without traditional historical knowledge or practice").

[122] Randy E. Barnett, *Challenging the Priesthood of Professional Historians*, THE VOLOKH CONSPIRACY (Mar. 28, 2017, 11:51 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/; Mike Rappaport, *An Important Difference Between Historians and Originalist Law Professors*, LAW & LIBERTY (Oct. 11, 2018), https://old.lawliberty.org/2018/10/11/an-important-difference-between-historians-and-originalist-law-professors/.

Analogous issues arise with regard to empirical legal scholarship. *Compare* Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002) *with* Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 191 (2002).

[123] Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995).

[124] *See* Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1066-67 (2005).

[125] For example, legal historians might "seek not more authoritative constitutional meanings, but new or renewed constitutional readings that might be pressed by movements that engage with courts and legislatures, and thereby become authoritative." *Id.* at 1107.

[126] William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1246 (1986).

whole by a competent historian."[127] Doing so will require further fact-fnding, as well as—crucially—decisions about how to contextualize those facts and make sense of them.[128]

It would be easy to go on enumerating ways in which the tasks of originalism and historical research differ. But that does not mean that the two are incompatible—historical method and historical facts can be useful in answering concrete legal questions. As Cass Sunstein notes, "No one ought to doubt that nations, including the United States, have had a past; no one should doubt that there are really facts to which any historical account must attempt to conform."[129] And constitutional lawyers "owe a duty of 'fit' to the materials; they cannot disregard the actual events, which therefore discipline their accounts."[130]

The point, instead, is that originalism relies on historical facts of some kind. And those facts are produced by disciplinary standards *outside* of the legal system—just like scientific, economic, medical, or other kinds of facts of which the law might take account. When such non-historical facts enter the legal system, they are subject to a wide range of legal rules—those regarding evidence, appellate deference, and so on. The intersection of those legal rules and the originalist enterprise is our main focus here.

II. WHAT KIND OF FACTS ARE ORIGINALIST FACTS?

Although the debate about the role of facts in originalism has been raging for decades, there is a surprising lack of clarity not only about which historical facts are relevant—those regarding original intent, original public meaning, and so on—but also what *kind* of facts are at issue, legally speaking. That is not merely a matter of attaching clear labels, because within the broad category of legal "facts," there are many distinctions that have important implications for the application of legal principles. The typology matters, in other words, for legal practice.

We explore three such typological questions especially important to the categorization of historical facts. The first is whether they are adjudicative (specific to the case) or legislative (broadly applicable to questions of law and policy). Historical facts come in both varieties, but more commonly the latter, which in turn impacts how they should be treated on appeal. The second is whether historical facts are treated as inputs to inform the application of a doctrinal test, or whether they are used to *establish* the test in the first place and declare the content for a constitutional rule. Here, we emphasize the novel

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[127] *Id.*

[128] *See* Jack M. Balkin, "Constitutional Memories," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106635 (May 11, 2022); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J. L. & PUB. POL'Y 19 (2022).

[129] *See* Sunstein, *supra* note 123, at 601.

[130] *Id.* at 602.

category of declarative constitutional fact-finding, in which fact-finding is used to set out the content of a constitutional right. We view this as largely a new function for fact-finding in constitutional interpretation and adjudication.

However novel the Court's increasing use of declarative constitutional fact-finding may be, we describe how this use of facts maps onto the traditional division between appellate courts' core functions of law application (historical facts as inputs) and law declaration (historical facts as rule-setters).[131] Standard rules for fact-finding apply, requiring that factual findings be made in lower courts, under typical rules, and with appellate standards of review. Finally, there is the thorny question of whether and how to treat certain kinds of historical fact-finding as binding on future courts and litigants—a different angle on the long-recognized tension between originalism and precedent.

A. Adjudicative and Legislative Facts

In his foundational typology of legal facts, Kenneth Culp Davis famously distinguished between "adjudicative" facts relevant to the parties to a case and "legislative" facts used to inform questions of law and policy.[132] The latter are generalized facts that transcend the immediate case; the former (also known, confusingly for present purposes, as "historical" facts) are those involving the who, what, where, and when of the parties to the particular case.[133] As Alli Orr Larsen notes, "Despite its name, 'legislative fact' does not mean facts found by a legislature. The label refers to the nature of the fact: generalized observations about the world that often involve predictions and are not limited to the named individuals before the court."[134] The difference between the two is admittedly a spectrum rather than a clear line,[135] but it is one that has been deeply influential,[136] and carries concrete legal consequences.

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[131] *See* DANIEL JOHN MEADOR, APPELLATE COURTS IN THE UNITED STATES 3 (2d ed. 2006) ("Error correcting and lawmaking are the core appellate functions.").

[132] *See* Davis, *supra* note 41, at 407.

[133] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) ("'Historical facts' are alternatively referred to as 'pure' facts, 'basic' facts, 'adjudicative' facts, or 'primary' facts. The paradigmatic illustration of historical facts is that they answer the question 'what happened here?'").

[134] *See* Larsen, *Alternative Facts*, *supra* note 1, at 232; Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM & MARY L. REV. 251, 254 (2016) (calling this "a hopeless (but hopelessly entrenched) misnomer").

[135] Even within each category, there are important distinctions. In an insightful recent article, Haley Proctor argues that the category of legislative facts should be divided into "premise facts"—akin to what we call declarative facts—and those that pertain to a law's application. Proctor, *supra* note 41.

[136] *See* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975) (noting that the distinction is "only an approach"); *see also* Ann Woolhandler, *Rethinking the Judicial Reception of Legislation Facts*, 41 VAND. L. REV. 111, 114 (1988) ("The line between adjudicative and legislative facts is indistinct … because decision makers use even the most particularized

Historical fact-finding occurs across this spectrum. Some historical facts are limited to the context of a particular case and thus can be considered adjudicative. Whether a state voting practice was animated by racial prejudice will involve a historical inquiry into the enactment of that statute, and that inquiry might properly focus on the who, what, where, and why of the case.[137] Such questions of fact must be resolved at the trial court level. Unless summary judgment or some other motion is decided by the judge, in a constitutional case under Section 1983, the Seventh Amendment ensures the right to a trial.[138] The parties typically have clearer notice that such facts are implicated in their dispute and will form the basis for adjudicating it. Further, it is clear that

But most originalist claims involve legislative facts. When judges attempt to discern the semantic meaning of constitutional text based on historical facts they are making determinations that clearly go beyond the who, what, where, and why of the immediate case. Answering that question may involve factual evidence concerning language at the time of drafting, including lay usage, legal usage, and usage in analogous legal contexts.

Judicial notice is restricted to adjudicative facts, with an opportunity for the parties to be heard on the issue, that are "not subject to a reasonable dispute."[139] However, as Federal Rule of Evidence Rule 201(a) provides,[140] and as the Advisory Committee Notes explain, legislative facts are not restricted by formal rules of any kind, apart from the rule concerning judicial notice concerning foreign law, since the facts are general and "part of the judicial reasoning process."[141] (Whether a foreign jurisdiction had a type of law in place at a given time cannot be judicially noticed, and may be treated as a question of fact or a question of law which the judge must address after submission of evidence from the parties).[142] While no formal rules permit judicial notice or set out standards of review for legislative facts, it is clear—and the Advisory Committee Notes are not to the contrary—that the parties should receive notice

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facts to make legal rules.").

[137] *E.g.*, Hansi Lo Wang, *Deceased GOP Strategist's Daughter Makes Files Public That Republicans Wanted Sealed*, NPR (Jan. 5, 2020) (describing legal fight over a a cache of computer files saved on the hard drives of a prominent Republican strategist, which were cited by courts in challenges to a state redistricting scheme).

[138] *See infra* note 36.

[139] FED. R. EVID. 201(b).

[140] FED. R. EVID. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact").

[141] Advisory Committee Notes, Rule 201.

[142] *See, e.g.* Griffin v. Mark Travel Corp., 724 N.W.2d 900 (Wis. Ct. App. 2006) ("Thus, the issue of what the law of a foreign country requires is one of pure fact that must be proved. A trial courts findings of fact may not be set aside on appeal unless they are clearly erroneous."). For the federal approach, see FED. R. CIV. P. 44.1 (describing the relative competence of a judge to determine foreign law, but also procedures for addressing such questions through factfinding: "the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.")

and an opportunity to provide evidence.[143]

When legislative facts are simply invoked as background or as the equivalent of informative support, due process and notice to the parties might not be essential. If a judge decides to cite a social science study or the Federalist Papers as supportive evidence, for example, there might be no need for adversarial testing or other procedural guarantees. But the more that a judge accords weight to such legislative facts, and the more that they involve distant, contested, and unfamiliar material, the higher the risk of error. This is emphatically true of historical fact-finding, since even originalists recognize the need for "contextual" knowledge,[144] which a judge is unlikely to independently possess. How to fill that gap—for example through the use of expert witnesses—is something we discuss in more detail below.[145]

However and to whatever degree they are found at trial, legislative facts might not be entitled to the same deference on appeal as adjudicative facts. We discuss this below as well,[146] and note for present purposes that while there are good arguments for and against de novo review of legislative facts, such review does raise the importance of having a reviewable record—a longstanding problem in constitutional litigation, which may be exacerbated in cases raising issues of historical fact.[147]

These issues are relatively minor if the evidence is merely background evidence cited as general support—something judges have long done when discussing constitutional interpretation. Such facts are not load-bearing, as it were. However, in a growing set of contexts, Supreme Court Justices and now lower court judges are chiefly relying on historical facts to *declare* the content of constitutional law. As we show in the next Section, this goes far beyond any familiar concept of legislative fact, instead involving what we term "declarative constitutional facts."

B. Declarative Constitutional Facts

One standard way to conceptualize the relationship between law and fact is that a decisionmaker must first identify the applicable law, then make findings of fact, and then apply the law to the facts.[148] Applying the strict scrutiny

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[143] Advisory Committee Notes, Rule 201 (legislative facts "render[] inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations.").

[144] Solum, *The Fixation Thesis*, *supra* note 76, at 23-25.

[145] *See* infra Part III.A.

[146] *See infra* Part III.A.3.

[147] For an extended discussion, *see* Blocher & Garrett, *supra* note 34, at Part I.

[148] HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374-75 (William N. Eskridge, Jr. & Philip P. Frickey eds.,

test to a racially discriminatory statute, for example, is a mixed question of law and fact, where an established legal test is applied to the facts of a case.[149]

But the recent burst of factfinding in constitutional law does not fit this mold, at least where historical facts are not adjudicative and are not being used to apply a rule to the facts of a case. Nor are the relevant historical facts simply legislative facts, treated as useful but inessential background knowledge, as courts commonly treat social science, economic, and historical evidence. The claim in many recent cases is that these historical facts establish the *content* of doctrine. Rather than apply the law to the facts, courts are using facts to declare the content of law.[150]

We call these "declarative constitutional facts," and they go far beyond the category of merely informative legislative fact.[151] One could imagine a court relying on social science evidence, or public opinion evidence, or other factual evidence to determine the content of a right. But the U.S. Supreme Court—and especially the Justices in the current majority—have typically rejected this, instead treating these sources at most as legislative facts which can inform development of doctrine. The partial reliance on medical fact in setting out the trimester framework in *Roe* is one rare exception.[152] The novel and unusual development is the degree to which historical facts are increasingly treated as constitutive of constitutional law doctrine.

Bruen illustrates this use of historical facts to *create* constitutional rules, and not simply to apply them or provide additional informative support for an interpretation. Whereas *Dobbs* purported to apply an existing legal framework—the *Glucksberg* test—*Bruen* emphatically rejected one: the two-part Second Amendment framework adopted by every federal court to have considered the issue.[153] Invoking *Heller*, the majority said that "the balance was struck by the founding generation"[154] and precluded the kind of history-and-scrutiny analysis that had predominated in the run of cases (more than 1,000) since *Heller* was decided.[155] Instead courts would have to evaluate modern gun laws based on whether they are consistent with historical tradition. To support its adoption of this rule—which it would of course then go on to apply by reference to yet more

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Foundation Press 1994) (1958) (identifying the three judicial steps of judicial "law declaration," "fact identification," and "law application").

[149] *See infra* note 156 and sources cited therein regarding defining mixed questions.

[150] For a broader discussion of what standard of proof should be needed to justify propositions of law, *see*

[151] *See* Faigman, *supra* note 1.

[152] *See supra* notes 13-15 and accompanying text.

[153] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2125-26 (2022) ("In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Today, we decline to adopt that two-part approach.").

[154] *Id.* at 2133 n.7 ("Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances").

[155] Ruben & Blocher, *supra* note 95.

historical facts—the majority invoked historical facts capturing what it saw as a commitment to broad gun rights.

1. Distinguishing Judicial Factfinding

Such doctrinal use of historical fact is very different from judicial factual findings antecedent to a ruling on a question of law, which is commonplace, and is also distinct from fact-finding that informs a question of law in a more tangential way. Jury trial rights and due process rights do not mandate that all fact-finding be done by a jury or a judge as fact-finder. In specific and quite confined situations, a judge makes a factual determination as part of a legal ruling. Thus, it may be a straightforward legal determination that a two-year statute of limitations applies and was tolled when an injury was discoverable. But it will be a crucial preliminary factual question (potentially for the jury) when the injury was discoverable or whether instead, a three-year statute of limitations applies because the case largely sounds in federal civil rights rather than state tort law. The latter kind of factfinding is typically more significant than the types of everyday consideration of legislative fact that may provide a social or policy backdrop to a legal determination.

The type of fact-finding we discuss here is a matter of constitutional interpretation and application, and is far more consequential than fact-finding preliminary to a ruling on a legal question in a specific case. This kind of declarative fact-finding is not the application of a rule to facts. Again, it is the reverse: using facts to determine the content of the rule. It would be highly problematic for fact-finding concerning the discoverability of an injury to occur for the first time on appeal in a tort case. It would be even more problematic for that same appellate judge to decide, for the first time, how long a statute of limitations should beby relying solely on a study or a historical record. And yet that is the equivalent of what cases like *Bruen* have done in conducting historical fact-finding for the first time on appeal.

2. Distinguishing Mixed Questions of Law and Fact

One possible response to this intertwining of historical fact and legal doctrine might be to say that it demonstrates that the focus is not really on historical fact-finding as such, but rather on "mixed" questions of law and fact.[156] Some courts, as noted,[157] have begun to ask whether these issues are ones of fact, law, or mixed questions, facing understandable confusion about what

[156] For a description of the distinction as used by the Supreme Court, *see* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U.L. REV. 1769, 1770 (2003) ("[T]he concepts 'law' and 'fact' do not denote distinct ontological categories").

[157] *See supra* note 31 and sources cited therein.

exactly is happening in these cases in which historical fact-finding is used to declare the content of constitutional rights.

The mixed questions category is admittedly blurry, but we think it probably does not apply to the situation in which facts are used to declare the content of a constitutional rule. It instead describes a constitutional or legal rule that is already established and must then be applied to the adjudicative facts of a case. To be sure, the mixed questions label would carry some significant consequences, for example in generally justifying more searching review on appeal.[158] It might also be conceptually attractive for originalists who want to resist the challenges we have described with regard to making historical fact-finding as rigorous as other kinds of fact-finding in the legal system. For them, the issue is not one of proving facts but—to adopt Gary Lawson's terminology—"proving law."[159]

We accept that some originalist decisionmaking, like legal decisionmaking more generally, can involve "mixed" questions, but only after the law itself is settled. Mixed questions involve applying the law to facts. If rulings apply established rules to adjudicative facts, there should be no need to "find" facts on appeal; adjudicative facts are found, or should be, at the trial level.

Thus, it is not accurate to describe originalist use of historical facts as the answering of mixed questions. The types of rulings in which a mixed question of law and fact is examined instead involve settled law, and then application of that settled law to the specific facts of a case. There is no need to delve into history to conduct such application of law to the facts. What we describe here is fact-finding used to declare generally-applicable constitutional law, and not to apply law to the facts of a case.

3. Distinguishing Questions of Law

Another response might be that the exercise of locating historical facts and relying on them to interpret the constitution is *entirely* one of law, when the result is that the constitution is interpreted and a constitutional rule is declared. The *result* of originalist fact-finding is a declaration of law. And to be sure, in a hierarchical system, the Supreme Court and appellate courts have primacy in such matters of law declaration. As Henry Monaghan puts it, "Law declaration,

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[158] Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U.L. REV. 916, 922 (1992); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict,* 64 SO. CAL. L. REV. 235, 238-47 (1991). *See, e.g.*, US. v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989) ("On mixed questions of fact and law, there is no bright-line standard but rather a sliding scale depending on the 'mix' of the mixed question."); Miller v. Fenton, 474 U.S. 104 (1985) ("The fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is in a better position than another to decide the issue in question.").

[159] Gary S. Lawson, *Proving the Law, 86* NORTHWESTERN U. L. REV. 859 (1992).

not law application, is the appellate courts' only constitutionally mandated duty."[160]

Some originalists have argued in effect that the exercise is law all the way down, particularly if the historical facts themselves have a legal character.[161] Advocates of the "positive turn" emphasize a different use—and type—of facts. The basic claim is that "originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law."[162] The "modern social facts"[163] needed to make this claim are not historical in quite the same way as, for example, whether the phrase "bear arms" was primarily used in connection with military service.[164] Indeed, as Stephen Sachs notes, even within positivism "[e]xperts disagree about which facts actually matter—which people in a society have to hold which customs, conventions, beliefs, norms, and so on, for something to be the law."[165] Advocates of the positive turn take pains to distinguish their defense of originalism from those rooted in "original" facts,[166] and instead look to *legal* sources to determine what the law was at the time a constitutional provision was ratified.[167]

The positive argument is primarily an argument about whether originalism is our law, not about how originalist cases should be decided,[168] and so in that sense it is somewhat beyond our focus on the adjudication of historical facts. Still, the original public meaning, or positive meaning, of constitutional text might be a legal question, but the evidence necessary to show it will be in

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[160] Monaghan, *supra* note 133, at 289; *see also* George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 56 (1992) ("In the end, we would all agree with Monaghan that the primary job of appellate courts is to establish law.").

[161] William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 814 (2019). *See also* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015).

[162] Sachs, *supra* note 96, at 819; *see also* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015).

[163] *See* Baude, *supra* note 161, at 2364

[164] Indeed, it is not entirely clear what kinds of facts are relevant to the positive argument in favor of originalism. And as Charles Barzun notes, this is a significant omission from within positivism, "because legal positivists have long debated which facts are the important ones in determining the existence and content of law." Barzun, *supra* note 76, at 1329; *id.* at 1341 (identifying different sets of social facts which different prominent positivists prioritize; "Without knowing which facts are law-determining ones, judges cannot know which interpretive rules they are under a legal obligation to apply.").

[165] Sachs, *supra* note 161, at 825.

[166] Sachs, *supra* note 161, at 828-29 (noting but not adopting the conceptual defense of originalism that "if the meaning of a text always and everywhere depends on 'original' facts--what its author originally intended it to mean, what a reasonable reader in its historical context would have taken it to mean, and so on--then the Constitution's meaning depends on those 'original' facts too.")

[167] *See* Baude & Sachs, *supra* note 161.

[168] Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 830 (2022)

part factual[169]: actual uses of language in the relevant time period, or actual judicial decisions and statutes, in the relevant time period, for example.[170] Thus, these are not purely *legal* questions, such as the existence of state law on a question, which a judge might take judicial notice of, but rather historical facts used to determine a legal premise,[171] and then used to move from that premise to determine the shape of a doctrinal test. Whatever they are themselves called, these historical facts must still be found somehow—just like other facts are. That initial fact-finding is separate and forms the premise for the second step, which involves constitutional law interpretation and declaration.

In any event, an argument that originalist inquiry is really one of law and not of facts cuts squarely against the originalist claim laid out in Section I.A, which emphasizes that the project is a search for objective *facts*. To quote Justice Scalia again: "Texts and traditions are facts to study, not convictions to demonstrate about."[172] If there is no preliminary step in which historical facts are found, then there is no fact-finding, and just an undefined mix of legally salient facts, which a judge then uses to determine law. If originalism is all law, then the debate is one over reliably chosen legal sources and interpretations—a a self-referential claim that "we got the law right"—rather than historical *fact*.

And that brings matters back yet again to the central tension we have identified between originalism's claim to reliability based on a reliance on historical facts, whether the claim is that it is a question of law or mixed question in the end, and its approach to the preliminary fact-finding essential to reach such questions. The latter departs from the usual approach to fact-finding in our system of law. That raises not only substantial questions of reliability, but, as we have described, real constitutional concerns.[173] If anything, this tension would seem to be especially pronounced for the positivist originalists, whose argument is predicated on the supposed consistency of originalism with "our law." *Our*

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[169] Indeed, the positivist claim itself—and not simply its application—seems to depend in part on claims of historical fact that go beyond legal sources. Barzun, *supra* note 76, at 1371 (noting that "Baude and Sachs (at times) argue that we should look to facts about the Founding to determine which interpretive methods we should use today").

[170] Sachs, *supra* note 161, at 855 ("To find out the Founders' law, we have to apply our positivist toolbox to facts about the past. To find out their rules of change, and what changes have actually been made under them, we have to look and see. This means that the rules of change—and the sorts of lawful changes that have been made—depend on history, not constitutional theory, and could upend some conventional views of originalism.").

[171] Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN L. REV. 2241 (1988) (calling "premise facts" those "that explicitly or implicitly serve as premises used to decide issues of law").

[172] Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[173] If anything, this tension would seem to be especially pronounced for the positivist originalists, whose argument is predicated on the supposed consistency of originalism with "our law." *See* Baude, *supra* note 161, "Our law" has foundational rules and practices governing fact-finding, which originalist approaches have tended to ignore.

law has foundational rules and practices governing fact-finding, which originalist approaches have tended to ignore.

C. Historical Facts and Stare Decisis

One implication of judicial reliance on historical facts as premises for deciding constitutional questions, and of casting a constitutional theory such as originalism as fact-bound, is that resulting constitutional holdings are in principle subject to falsification. That occurred when *Roe* relied on medical facts, and *Casey* then determined that "advances in maternal health care," made the pre-existing framework out-of-date.[174] Similarly, if a declaration of law is premised on historical facts and the historical evidence changes or is disproven, then the opinions on which they rest may be called into question—which in turn raises serious complications in our system of stare decisis and vertical precedent.[175]

Some of the Court's most prominent originalist decisions have been criticized as resting on false historical claims.[176] What counts as a "wrong" historical claim is of course itself a matter of significant contestation—hence the basic objection to originalism's claims of objectivity.[177] But nearly everyone accepts that there are some matters of historical fact that cannot be denied, and which originalist cases have simply gotten wrong. Some of the historical claims in *District of Columbia v. Heller*, for example, have been undermined by corpus linguistics.[178]

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[174] 505 U.S. at 860.

[175] Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 630 (1995) ("Because the judgments of courts (when tackling conventional legal questions) acquire greater fixity than those of historians, it is that much more embarrassing for judges—and threatening to the law's legitimacy—when judicial decisions embodying historical interpretations fail to stand 'the test of time.").

[176] *See, e.g.*, William G. Merkel, Heller *As Hubris, and How* McDonald v. City of Chicago *May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1225 (2010) ("My own objections to Justice Scalia's work product in *Heller* focus on the fact that his allegedly history-driven method depends fundamentally on numerous false historical claims."); *see also* Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Cour*t, 37 CARDOZO L. REV. 623, 624 (2015) ("In both *Heller* and *McDonald* the Court bases its conclusions on a false history that is, for the most part, a fantasy of the majority of the Court and opponents of reasonable firearms regulation."); Charles R. McKirdy, *Misreading the Past: The Faulty Historical Basis Behind the Supreme Court's Decision* in District of Columbia v. Heller, 45 CAP. U. L. REV. 107, 156 (2017).

[177] *See supra* Part I.B.

[178] *See, e.g.*, Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509 (2019); Neil Goldfarb, *Corpora and the Second Amendment*, LAWNLINGUISTICS, https://lawnlinguistics.com/corpora-and-the-second-amendment/ (last visited July 13, 2022); Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, THE PANORAMA (August 3, 2018), https://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/.

Rooting constitutional interpretation in historical facts complicates the role and scope of precedent. In some sense, this is a familiar challenge; originalists have long recognized that "[]precedent poses a notoriously difficult problem for originalists."[179] The usual question is whether and how originalist jurists should respect precedents that they think depart from the original understanding.[180]

The problem we are exploring is different: What is the precedential status of historical facts?[181] To the degree they are adjudicative and limited to the parties and narrow controversy before a court, standard principles of res judicata may suffice. But what about cases like *Dobbs* and *Bruen*, which based landmark constitutional holdings on a wide range of broadly applicable historical-factual determinations? The implications cash out differently for horizontal precedent—and attendant principles of stare decisis[182]—than for vertical and precedent and the obligations of lower courts to follow appellate precedent.

As to horizontal precedent and stare decisis, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court explained that one factor relevant to overturning prior precedent is whether the Court's "understanding of the facts" or the "factual underpinnings" of a precedent has changed.[183] *Casey* explained, for example, that "the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required."[184] In *Dobbs*, the Court pointed to a range of factual considerations justifying overruling prior precedent, including experience with whether the *Casey* rule was "workable," and before discussing departure from stare decisis, reliance on historical facts to ask whether an abortion right was "deeply rooted" under the test it adopted.[185] Whether the Court's understanding of the facts and decision

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Whether these errors matter for the outcome of the case is a separate question, though even supporters of *Heller*'s basic outcome have acknowledged that "[a]pplying corpus linguistics to the Second Amendment leads to potentially uncomfortable criticisms for both the majority and dissenting opinions in *Heller*." Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (August 7, 2018), https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/

[179] Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 1 (2016).

[180] *Id.*

[181] United States v. Daniels, No. 22-60596, 2023 WL 5091317, at *18 (5th Cir. Aug. 9, 2023) (Higginson, J., concurring) (asking, in the context of *Bruen*, "does the constitutionality of any given provision rise or fall with the strength of the historical record as to a specific case, or will rulings be treated as establishing a single historical truth?")

[182] Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 202 (2014) (distinguishing horizontal and vertical precedent).

[183] 505 U.S. 833, 862-63 (1992).

[184] *Id.*

[185] 142 S. Ct. at 2247-54.

of which facts were relevant was correct in *Casey* or in *Dobbs,* the rulings both highlight how factual weaknesses in precedent can undermine its weight. That is particularly true when the precedent is fact-dependent. *Dobbs* claims to be fact-dependent, overturning *Roe v. Wade* in part based on asserted historical errors in that opinion, while relying on a new body of historical facts.[186] That may make the precedent far more vulnerable to historical correction, if the Court were willing to acknowledge error in historical factfinding.

One example in which the Supreme Court has done just that was *Monell v. Dept. Social Services,* where the Court reviewed the legislative history of the adoption of the Civil Rights Act of 1971 and concluded, contrary to its earlier ruling in *Monroe v. Pape*,[187] that the drafters did in fact anticipate liability of municipalities for constitutional violations.[188] The analysis of the legislative history, the Court concluded, "compel[led]" a different conclusion than had been reached in *Monroe.* [189]

Whether and how the Supreme Court decides to correct its own errors is one thing—a matter for stare decisis, the application of which is not wholly consistent or formed as a practice. The issue is still more complicated once those historical errors are embedded in a system of vertical precedent where lower courts are bound by those holdings—erroneous though they might be.[190] This is often said to be one of the major obstacles to lower court originalism, after all. As Allison Orr Larsen has detailed, for questions of vertical precedent, Supreme Court fact-finding need not and should not have the force of law, since the Court is not a fact-finding body.[191] However, when that fact-finding is connected to a legal conclusion, then that fact-finding may have precedential force.[192] If those findings are later determined erroneous, what weight to give to those legal conclusions may be more doubtful. As Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit puts it, "It is well to remember that even at the U.S. Supreme Court there are not a lot of first-time constitutional interpretation cases. That is what made *Heller* so fascinating, and it is that kind of case where history is most relevant."[193]

In yet another gun case—which eventually led to the Supreme Court's

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[186] *Id.* at 2254 ("A few of respondents' amici muster historical arguments, but they are very weak.").

[187] 365 U.S. 167 (1961).

[188] Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 665 (1978) (providing a "fresh analysis of the debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support").

[189] *Id.* at 690-91.

[190] Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1186 (2009) ("It is an unavoidable attribute of common-law decision-making . . . not only to repeat, but also to amplify, the paths marked by those who traveled before, whether their ways were wise or happenstance.").

[191] Allison Orr Larsen, *Factual Precedent*, 162 U. PENN. L. REV. 59 (2013).

[192] *Id.* at 63.

[193] *A Dialogue*, *supra* note 38, at 1918.

decision in *McDonald v. City of Chicago*[194]—the Seventh Circuit was faced with the question of whether to incorporate the Second Amendment against state and local governments.[195] The challengers' primary argument was that this should be done under the Privileges or Immunities Clause of the Fourteenth Amendment—which would mean overturning, on originalist grounds, the Supreme Court's widely-criticized decision in *The Slaughterhouse Cases*, which effectively gutted that clause.[196] Writing for the panel, Judge Frank Easterbrook declined to do so, though it seemed clear in his opinion (and he later confirmed in public remarks[197]) that he agreed with the historical critique of *Slaughterhouse*, but thought himself nonetheless bound by it.

Perhaps the matter would be different, though, if the underlying facts were different and more clearly wrong. Some prominent historical claims, after all, have been exposed not only as falling below the standards of scholarly discipline, but actually outright falsehoods. Again, one prominent example involves guns, and the errors and falsehoods in the work of historian Michael Bellesiles, who had won the Bancroft Prize for a book arguing that few Americans owned guns in the Founding era. His work was later exposed as fraudulent, and the prize rescinded.[198] A court decision—even from an appellate court—resting on Bellesiles' claims would presumably be suspect.

III. IMPLICATIONS: EMBEDDING HISTORICAL FACT-FINDING IN OUR LEGAL SYSTEM

In our legal system, questions of fact are subject to various rules and practices that are different than those governing findings of law. Fact-finding, even when antecedent to questions of law, is primarily done by lower courts, subject to adversarial testing and various rules of evidence, entitled to strong deference on appeal, and sometimes receives deference even when the facts are found by the legislature itself. The jury trial rights enshrined in the Sixth and Seventh Amendments, as well as the Due Process Clauses, safeguard trial court fact-finding and the right to jury fact-finding.[199]

None of those constitutionally protected methods for fact-finding fit the current practice of originalism, which is almost solely conducted through appellate briefing, not subject to adversarialism, fair process, or the usual rules of gatekeeping, and is usually determined *de novo* by an appellate court—

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[194] 561 U.S. 742 (2010).

[195] NRA, Inc. v. Chicago, 567 F.3d 856, 857, 858 (7th Cir. 2009).

[196] 83 U.S. 36 (1873).

[197] *See* Dialogue, *supra* note 38, at 1918 ("I agree with Justice Thomas's opinion in *McDonald*, although I didn't think that as a judge of the Seventh Circuit I could overrule the Slaughterhouse Cases all by myself.").

[198] James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (book review).

[199] For a more in-depth discussion, *see* Blocher & Garrett, *supra* note 7, at Part I.

sometimes the Supreme Court. This is especially troubling when it involves declarative constitutional facts that implicate the rights of parties, accuracy of interpretation, and stability of precedent.

Our goal in this final Part is not to develop "something like a 'Restatement of the Law of Originalism' or the 'Federal Rules of Originalism,"[200] but rather to investigate how historical fact-finding can be conducted in keeping with the traditional rules of fact-finding. Those rules govern constitutional as well as non-constitutional cases, and typically do not bend to accommodate constitutional adjudication. If anything, constitutional questions demand greater fidelity to sound fact-finding. Rules of procedure and evidence are largely transsubstantive, and generally apply in constitutional cases just as they do in others. As described below, historical fact-finding to declare the content of the constitution does not fit well in our system of adjudication. It raises real legitimacy and constitutional concerns. Trial courts will and already do struggle with the role that the Supreme Court has set out, by relying on historical facts to declare constitutional meaning. There are solutions, however, well within the power of Congress, which we outline in this Part.

A. Trial Court Originalism: The Lesser Evil?[201]

Perhaps the most striking disjunction between the fact-based case for originalism and the actual legal practice of originalism is in *who*—that is, which court—is the focus of analysis. In our legal system, lower courts have primary authority for fact-finding, and a variety of legal rules emphasize the importance of adversarial testing, management of witnesses, and the "clear error" deference that appellate courts accord to facts found. And yet originalism has primarily been practiced via amicus briefing at the appellate level, further concentrating interpretive power in the Supreme Court. There are undoubtedly serious complications with moving the locus of originalist argument to the trial level. But they should be considered in comparison to the constitutional defects and practical weaknesses of the existing system of originalism-on-appeal, which may well present the proverbial greater evil.

1. History on Trial: Adversarial and Appellate Alternatives

Speaking recently as part of a panel of judges on the role of history in interpretation, The Hon. Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit raised a "process based problem with the usage of history today":

> Most lawyers save it for the Supreme Court. If lawyers care about getting this right, they should follow the normal rules of presenting the information as early in the process as possible.

[200] Lawson, *supra* note 98, at 1560

[201] *Cf.*, of course, Scalia, *Originalism: The Lesser Evil*, *supra* note 101.

> At a minimum, the history ought to be presented at the courts of appeals. It allows one set of judges to construe it and it gives the losing side a chance to respond. If one believes in the adversarial process, as I do, the court's efforts to construe history accurately will only improve if the history is presented earlier rather than later in the litigation process.[202]

Originalist scholar Josh Blackman strikes a similar note when he writes that "when judges do their own homework, it's not vetted through the adversarial process. Lawyers may receive an adverse judgment based on a flawed historical analysis."[203] He argues for "adversarial originalism"—essentially, that lower courts "[h]ave the parties brief it."[204]

This is, of course, a basic principle of fact-finding in our legal system. Though they also face significant institutional limitations,[205] lower courts should presumptively be the forum for initial definition of declarative constitutional facts, including historical facts. Lower courts are far more able to conduct a hearing, consult expert witnesses, and provide the parties with adequate notice of the factual issues in dispute. As discussed in more detail above,[206] it is not always straightforward to even determine what types of historical evidence is relevant for constitutional interpretation, much less whether the record is adequate, and what work must be done to assess it. It may take time to adequately review such questions, and lower courts have more flexibility to schedule discovery and expert review in response to the complexity of a factual question.

The Supreme Court has said that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" most effectively "attack[s] shaky but admissible evidence."[207] Those approaches might be most associated with testimony about adjudicative facts—the who, what, when of a trial, or perhaps modern empirical evidence—but they can be and have been used to test historical claims as well.[208] If it were

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[202] *A Dialogue*, *supra* note 38, at 1905-06; Josh Blackman, "Originalism and Stare Decisis in the Lower Courts," Inaugural Edwin Meese III Originalism Lecture, Heritage Foundation, at 4 (May 22, 2022) https://www.heritage.org/sites/default/files/2022-05/HL1328.pdf ("Circuit courts seldom receive the wealth of originalist briefing that is directed to the U.S. Supreme Court."); *id.* at 8 ("In the lower courts, originalist friends are far and few between.").

[203] Blackman, *supra* note 202, at 8.

[204] *Id.*

[205] *See infra* Section III.A.

[206] *See supra* Section I.B.

[207] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993).

[208] Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. REV. 101, 128 (1989) ("[T]he courtroom helps keep the academics honest .... If experts do not testify fully, logically, convincingly, and honestly, then the process of cross-examination by skillful attorneys is likely to expose their faults."); Reuel E. Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witnes*s, 49 HASTINGS L.J. 1169, 1172 (1998) (arguing that cross-examination is "an excellent

otherwise—if historical facts are some entirely different kind of fact that does not lend itself to testing at trial—then the notion of factual objectivity in the originalist enterprise is substantially shaken, and the fact that originalism is practiced mostly through appellate amicus briefs that are not subject to adversarial testing would seem to be a major flaw.[209] The Advisory Committee Note accompanying Federal Rule of Civil Procedure Rule 52(a)(6)—mandating clear error review of facts found by district courts—emphasizes that "recognizing that the trial court, not the appellate tribunal, should be the finder of facts" promotes the "public interest in … stability and judicial economy" and "the legitimacy of the district courts in the eyes of litigants."[210] Those reasons counsel particularly strongly for trial court fact-finding, in the first instance, of historical facts relevant to constitutional claims.[211]

IThere are, of course, practical limitations on what kind of historical fact-finding a lower court can do. In *Bruen,* Justice Stephen Breyer noted "practical" concerns with historical fact-finding: "Lower courts—especially district courts—typically have fewer research resources, less assistance from amici historians, and higher caseloads than we do."[212] Some recent scholarship has explored the possibility of lower court originalism, generally acknowledging that lower courts *can* engage in originalist interpretation while emphasizing the hurdles that they face in doing so.[213] The most obvious of these, as noted above, is that lower courts are bound vertically by precedent, regardless of how they might have weighed the historical evidence themselves.[214] That might still allow for some interpretive space—deciding not to extend a historically dubious precedent, for example[215]—but is more constraining than the principles that bind the Supreme Court to its own prior judgments.

Someone seeking to defend the current practice of what we might call "appellate originalism" could argue that originalist fact-finding is precisely the kind of fact-finding with regard to which lower courts *don't* have any kind of

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buffer against those who would abuse historical truths in the interests of their client" and that "[t]hrough the use of rival experts and impeaching cross-examination, lawyers put historians' testimony through a crucible that uncovers biases, flawed data, laughable interpretations, and outright deceit").

[209] Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 705 (2008) ("Factual information offered by amici curiae . . . is not subject to a high level of judicial scrutiny (indeed, there are so few procedural checks in place, it is impossible to decipher a uniform process invoked by judges to review the content of amicus briefs).").

[210] FED. R. CIV. P. 52(a) advisory committee note.

[211] *See* Blocher & Garrett, *supra* note 7, at Part III.

[212] *Bruen*, 142 S. Ct. at 2179 (Breyer, J., dissenting).

[213] *See also* Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J. L. & PUB. POL'Y 257 (2022).

[214] Blackman, *supra* note 202, at 4 ("No matter how *wrong* a given Supreme Court precedent is from an originalist perspective, the precedent must be adhered to.").

[215] *Id.* at 6 ("If a Supreme Court precedent is unequivocally wrong as an original matter, a lower court should tread carefully before extending that precedent to a novel context.").

institutional advantage, and thus should be left to appellate courts. But the question is whether doing such fact-finding through amicus briefs at the appellate level is any better. Recent scholarship highlighting the weaknesses of appellate court fact-finding suggests many reasons for caution. Scholars have highlighted how appellate courts have sometimes cherry-picked evidence from parties or amicus submissions, or conducted their own research online and cited questionable or erroneous sources. Allison Orr Larsen, for example, has documented a range of "alternative facts" that have surfaced on appeal, outside the factual record and rules of admissibility, in important constitutional cases.[216] The Supreme Court is a prime offender.[217] It seems likely that the same problems and critiques apply with equal force to historical fact-finding on appeal. Indeed, some appellate judges have specifically noted the deficiencies of historical briefing.[218]

Trial courts could be tasked with that briefing, and ensuring adequate expert preparation and reports to inform a decision regarding a complex area of fact. Trial courts often conduct complex inquiries regarding scientific evidence questions, and they do so regarding historical fact as well. For example, in a post-*Bruen* Second Amendment challenge to Rhode Island's prohibition on large capacity magazines, the district court acknowledged Justice Breyer's point in *Bruen* that "[l]ower courts – especially district courts – typically have fewer research resources, less assistance from amici historians, and higher caseloads than we do."[219] But, the court went on, "[t]here is another difference beyond resources between the Supreme Court and district courts, however, that redounds to our benefit. Unlike the Supreme Court, trial courts have the ability to receive evidence and rely on that evidence to find facts that support the legal reasoning and lead to conclusions."[220] Moreover, "[u]nlike the *Bruen* Court, this Court *has* an evidentiary record upon which to base its findings," and "[w]hile this Court professes no independent scholarly historical knowledge, it does have solid experience in resolving disputes between experts."[221]

None of this means that lower courts can or should shoulder the sole obligation for "doing" originalism. Lower courts will face enormous challenges and the exercise raises real questions regarding the proper role of judges, the rights of parties, and the workability of originalism. But the matter is one of

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[216] Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 178 (2018); Larsen, *Amicus Facts*, *supra* note 40; *see also* Gorod, *supra* note 40.

[217] *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

[218] *A Dialogue*, *supra* note 38, at 1890 ("Law 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.") (comments of the Hon. Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit.)

[219] *Bruen*, 142 S. Ct. at 2179 (Breyer, J., dissenting).

[220] Ocean State Tactical, LLC v. State of Rhode Island, No. 22-CV-246 JJM-PAS, 2022 WL 17721175, at *6 (D.R.I. Dec. 14, 2022).

[221] *Id.* at *7.

comparative institutional advantage, and it at the very least calls into question the reflexive reliance on appellate courts and amicus briefing.

2. The Proper Role of Historians

Legal approaches that prioritize historical facts inevitably raise the question of what role historians can or should play in the enterprise. As Justice Scalia himself noted, the task of fact-finding in originalism "is, in short, a task sometimes better suited to the historian than the lawyer."[222] It is already common—and apparently increasingly so[223]—for historians to sign Supreme Court amicus briefs. But if we take seriously both the importance of historical fact-finding and the role of trial courts in performing it, another possibility emerges: more active use of historical experts—both those proposed by the parties and those appointed directly by the court.[224]

One analogy in this regard is the treatment of customary international law (CIL), which flows from a "general and consistent" practice of states based on "a sense of legal obligation."[225] The status and proper scope of CIL usage in federal courts is much debated.[226] Our interest here is in how federal courts approach fact-finding relevant to deciding the scope, if any, of CIL. As the Supreme Court put it in *Sosa v. Alvarez-Machain,* such claims "must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized."[227] Referring to the work of international law scholars, the Supreme Court explained in its 1900 ruling in *The Paquette Habana*:

> [R]esort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by

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[222] Antonin Scalia, *Originalism: The Lesser Evil*, 57 CINCINNATI L. REV. 849, 856-57 (1989).

[223] *See, e.g.*, Nell Gluckman, *Why More Historians Are Embracing the Amicus Brief*, CHRON. OF HIGHER EDUC. (May 3, 2017), https://www.chronicle.com/article/why-more-historians-are-embracing-the-amicus-brief/ ("Historians say they feel that they are being asked to write or sign amicus briefs in Supreme Court cases more frequently.").

[224] Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 552-53 (2008) ("The best practice for courts would be to use court-appointed historical experts in addition to—but not to the exclusion of—those proffered by the parties.... If we invite historians ... we will end up with better and more accurate history in the law.").

[225] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

[226] For discussion of the proper role and scope of CIL, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 896 (2007); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 380 (1997).

[227] 542 U.S. 692, 732 (2004).

> judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[228]

The Restatement (Third) of the Foreign Relations Law of the United States notes that expert testimony may be appropriate on such questions,[229] and courts do in fact to rely on expert witnesses and declarations in conducting such inquiries.[230] To be sure, determining the content of international law is ultimately a question of *law*, subject to de novo review on appeal. Our point is that, to the extent that it depends on expert knowledge about distant legal practices, legal practices directs judges to utilize experts for "trustworthy evidence of what the law really is." It is not hard to see how the same arguments apply, mutatis mutandis, to the law of another "foreign country"—the past.[231]

In grappling with the Supreme Court's reliance on what we term declarative constitutional facts, some parties and trial judges have begun to take similar approaches in the wake of the Supreme Court's decision in *Bruen*, retaining or appointing historical experts to address whether a challenged gun law is "consistent with this Nation's historical tradition" of regulation. In one particularly notable order, Judge Carlton Reeves of the U.S. District Court for the Southern District of Mississippi, noted that "[t]he justices of the Supreme Court, as distinguished as they may be, are not trained historians," and that *Bruen* requires district court judges to "play historian in the name of constitutional adjudication."[232] As Judge Reeves put it, "we are not experts in what white, wealthy and male property owners thought about firearms regulation in 1791."[233] Thus, "[n]ot wanting to itself cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in

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[228] 175 U.S. 677, 700 (1900).

[229] RESTATEMENT (THIRD), *supra* note 225, at § 113 ("No federal statute or rule deals with procedures for presenting customary international law in courts in the United States. Both federal and State courts often take judicial notice of customary international law without requesting "proof" of the law. See Comment b. Some judges have adopted the practice of receiving evidence, including expert testimony, on questions of international law... In any event, questions of international law, like questions of foreign law, are to be decided by the judge, not the jury, and determinations are considered rulings of law.").

[230] Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts*, 25 G. J. INT'L L. & COMP. 205, 213 (1995) ("Expert witnesses on customary international legal matters, therefore, testify at trial both about the verbal forms of rules and about how the rules' norms operate under the facts of the case at bar."). For a broader discussion and critique of how the International Court of Justice and domestic courts research and examine questions of CIL, see Cedric M. J. Ryngaert & Duco W. Hora Siccama, *Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts*, 65 NETHERLANDS INT'L L. REV. 1 (2018).

[231] L.P. HARTLEY, THE GO-BETWEEN xvi (1953) ("The past is a foreign country: they do things differently there.").

[232] United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022).

[233] *Id.*

this matter."[234] Both the challenger and the government ultimately replied that a historian was not required,[235] but that does not mean that it would be inappropriate, and indeed many other litigants and courts have pursued them.[236]

Though the Court's recent historicism makes this practice increasingly prominent, it is not new; professional historians have long played an important role in trial-level litigation in a range of legal contexts.[237] Dan Farber highlights, for example, the centrality of historical testimony in cases involving Native American treaty rights.[238] Historical evidence was also a major and much-discussed part of the litigation in *EEOC v. Sears, Roebuck*, a significant sex discrimination case.[239] Both the company and the government put professional historians on the stand to testify about whether disparities in hiring were due to discrimination by the company or historical differences in women's attitudes toward work.[240] Historians have been a "near-constant presence in voting rights cases" in which the question is whether a voting qualification or procedure was adopted with a discriminatory intent.[241] The U.S. Supreme Court discussed expert reports by historians, who also conducted empirical analysis of prior elections, in *League of United Latin American Citizens v. Perry*, noting a lack of "clear error" in rejecting a "questionable showing" given inconsistent analysis by one of the parties' experts.[242]

None of those instances involve originalism as such, and the stakes are far higher in contexts, like Second Amendment cases post-*Bruen,* in which the historical fact-finding is central to interpreting or implementing the

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[234] *Id.* at *3.

[235] Ariane de Vogue, *DOJ Says Judge Doesn't Need to Hire Historian to Understand Supreme Court Gun Ruling*, CNN (Dec. 13, 2022), https://www.cnn.com/2022/12/13/politics/supreme-court-historian-gun-ruling/index.html.

[236] *See, e.g.*, Baird v. Bonta, No. 2:19-CV-00617-KJM-AC, 2022 WL 17542432, at *9 (E.D. Cal. Dec. 8, 2022).

[237] Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1519 (2003) ("Historians are increasingly being called to testify as expert witnesses. They appear in cases adjudicating a vast array of matters ...."); Kritika Agarwal, *Historians as Expert Witnesses*, PERSPS. ON HIST. (Feb. 1, 2017), https://www.historians.org/publications-and-directories/perspectives-on-history/february-2017/historians-as-expert-witnesses-can-scholars-help-save-the-voting-rights-act ("Historians' testimony has had significant impact in voting rights cases."). For examples of the latter, *see, e.g.*, Hunter v. Underwood, 471 U.S. 222, 229 (1985); NAACP v. City of Niagara Falls, 65 F.3d 1002, 1020 (2d Cir. 1995); Irby v. Fitz-Hugh, 692 F. Supp. 610, 613 (E.D. Va. 1988).

[238] Daniel A. Farber, *Adjudication of Things Past: Reflections on History on Evidence*, 49 HASTINGS L.J. 1009, 1012-13 (1998) (discussing examples).

[239] 839 F.2d 302 (7th Cir. 1988).

[240] For an overview, see Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1620 (1988).

[241] Kritika Agarwal, *Historians as Expert Witnesses*, PERSP. ON HIST. (Feb. 1, 2017), https://www.historians.org/publications-and-directories/perspectives-on-history/february-2017/historians-as-expert-witnesses-can-scholars-help-save-the-voting-rights-act.

[242] 548 U.S. 399, 445 (2006).

Constitution. But the preliminary point is the same: Historical fact-finding can be and has been part of the traditional system of fact-finding at trial. Courts can and should consider a developed factual record, potentially consider expert testimony, and apply familiar standards of review on appeal. We emphasize at least two complications for this new enterprise of historical fact-finding.

One is whether and how trial court judges should engage in gatekeeping. In *Daubert v. Merrell Dow*,[243] the Court established standards for the admission of scientific evidence under the Federal Rules of Evidence, pointing to factors for a trial judges to consider: a theory's testability, whether it "has been a subject of peer review or publication," the "known or potential rate of error," and the "degree of acceptance ... within the relevant scientific community."[244] One possible argument against using *Daubert* to qualify historians is that their craft simply does not lend itself to the factors generally associated with expert witnesses—replicability of studies, for example. Judge Sutton has noted this point: "I am not going to say there ought to be a *Daubert* test for historian amicus briefs. But some historians are better, and more disinterested, than others. Gordon Wood would pass, and so would many others."[245]

In *Kumho Tire Co. v. Carmichael*,[246] the Supreme Court expressly approved the application of *Daubert* standards to non-scientific experts, and Rule 702 very clearly applies to the full range of qualified expert witnesses.[247] As Justice Antonin Scalia put it in a concurrence, "I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function."[248] Trial courts thus can and must maintain their gatekeeping function when it comes to more applied expert testimony, including expert historians. That judges may struggle with how to do so raises real concerns regarding the quality of the factual record that will result. But judges treating themselves as the experts based solely on amicus briefs and party submissions, raises still more cause for concern. How judges choose to examine expert evidence—and the Court has made clear that they have some discretion as to method—will have enormous implications for the development of originalist constitutional law. At stake in those debates is public memory and the understanding of history[249]; which historians' voices are heard will make an

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[243] 509 U.S. 579 (1993).

[244] *Id.* at 594.

[245] *A Dialogue*, *supra* note 38, at 1908; Holly Morgan, *Painting the Past and Paying for It: The Demise of* Daubert *in the Context of Historian Expert Witnesses*, 44 WAKE FOREST L. REV. 101 (2009); Rebecca Piller, *History in the Making: Why Courts Are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187, 209-11 (2015).

[246] 526 U.S. 137 (1999)

[247] FED. R. EVID. 702.

[248] *Id.*

[249] Balkin, *supra* note 128; Siegel, *supra* note 128.

enormous difference.

Perhaps the more fundamental challenge to the use of historians as expert witnesses, if they are used—a challenge that extends more broadly to their role in litigation at all—comes from the tensions that arise between the norms of their profession and the nature of legal advocacy.[250] Alfred Kelly, a historian who assisted the challengers in *Brown v. Board of Education*, later questioned whether in doing so he had essentially breached the norms of historical work. This was not because the briefing contained historical untruths. Rather, in his words:

> [T]he problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of a[] historical case. . . . It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to do.[251]

Kelly's self-accounting is often credited as the origin of the phrase "law office history."[252]

The tension between the historians' craft and the demands of advocacy has occasionally spilled into the open, as for example in the controversial amicus brief filed by 281 historians in *Webster v. Reproductive Health Services*[253]—a brief that contained factual assertions apparently inconsistent with some of the research published by those who had signed the brief.[254] Tensions between statements in litigation and one's scholarly work are, of course, not limited to claims of historical fact made by historians. Indeed, this would seem to be an argument for the traditional vetting of an adversary trial, as outlined above.

A further practical challenge to the possibility of assembling a sound record regarding questions of historical fact can take years to complete, and is

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[250] *See generally* Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359 (2013).

Even judges who are receptive to the use of history in adjudication have been attentive to this tension. In the words of the Hon. Reena Raggi of the U.S. Court of Appeals for the Second Circuit: "I would not be looking to encourage more briefing by historians. I mean I'm not quite sure what role they're playing. Are they experts before the appellate court, or are they advocates?" *A Dialogue*, *supra* note 38, at 1907.

[251] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 643 (1976).

[252] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 ("By 'law-office' history, I mean the selection of 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.").

[253] Brief for 281 American Historians as Amici Curiae Supporting Appellees, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127701.

[254] James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the* Webster *Process*, THE PUB. HISTORIAN, Summer 1990, at 1926.

not coordinated with the timing of litigation. Consider Justice Scalia's claim in his *Boumediene* dissent:

> In sum, all available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. Despite three opening briefs, three reply briefs, and support from a legion of amici, petitioners have failed to identify a single case in the history of Anglo–American law that supports their claim to jurisdiction.[255]

The majority responded by highlighting the shortcomings of the available historical evidence, and that new work, digging into the archives of non-reported decisions, had uncovered a far broader common law habeas corpus practice: "Recent scholarship points to the inherent shortcomings in the historical record."[256] That scholarship (by legal historian Paul Halliday) was not conducted with an eye to War on Terror detention at Guantanamo bay or any other contemporary problem. It instead followed many years of archival work in English, hide-bound rolls, resulting in a quadrennial survey of King's Bench records, including over 2,700 writs of habeas corpus (in contrast, historians had previously relied on written reports of 143 habeas cases).[257] Research on that scale would not have been possible within the confines of a litigation schedule; it was a happy coincidence that this substantial body of scholarship had been completed just as the federal courts were considering questions that could potentially hinge on the scope of the common law writ of habeas corpus.

These serious practical issues have already arisen in some of the post-*Bruen* cases discussed above. One district court, for example, noted the impossibility of doing historical research on a preliminary injunction schedule: "[T]here is no possibility this Court would expect Defendants to be able to present the type of historical analysis conducted in Bruen on 31 days' notice (or even 54 days' notice)."[258] And in a case challenging, *inter alia*, the prohibition of guns on the DC Metro, the government retained as an expert a historian who had written books both on historical research[259] and on the history of the Metro itself.[260] Nonetheless, in his expert declaration he concluded, "[T]he District has asked whether I or a team of historians could adequately research the "Nation's historical tradition" of firearm regulation on mass transit within 60 days. The

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[255] 553 U.S. at 847 (Scalia, J. dissenting).

[256] *Id.* at 752 (citing Halliday & White, *supra* note 69).

[257] Halliday & White, *supra* note 69; *see also* PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

[258] Def. Distributed v. Bonta, No. CV 22-6200-GW-AGRX, 2022 WL 15524977, at *5 n.9 (C.D. Cal. Oct. 21, 2022), adopted, No. CV 22-6200-GW-AGRX, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

[259] ZACHARY M. SCHRAG, THE PRINCETON GUIDE TO HISTORICAL RESEARCH (2021).

[260] ZACHARY M. SCHRAG, THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO (2006).

answer is 'no,' as I explain below."[261]

Courts can try to respond to this square-peg-round-table problem in a variety of ways—extending the time for historical fact-finding, for example, or simply acknowledging that the history is unavailable. It would be a mistake, however, to mistake a lack of expert historical testimony for evidence that the historical record is silent. As the *Boumediene* example and others show,[262] a lack of historical evidence might simply reflect the fact that it has yet to be found.[263]

If it is not feasible to adequately develop a sound historical record to answer pressing constitutional questions, that then begs the question whether heavily relying on such historical facts is a sound method of interpretation.

3. Standards of Review for Historical Facts

If and when lower courts make findings of historical facts and their decisions are appealed, the question then arises how the appellate court should treat those factual findings in the record. Questions of fact are entitled to deference on appeal, generally being reviewed only for clear error, as opposed to questions of law, which are reviewed *de novo*.[264] Like all standards of review, these rules allocate power among levels of the judiciary, generally giving trial courts primary authority over fact-development,[265] and the standard arguments in favor of this division of power derive not only from constitutional jury trial rights, but from comparative institutional competence.[266] The Supreme Court has made it clear that this argument for deference to trial court fact-finding

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[261] *See* Angelo v. District of Columbia, 1:22-cv-01878-RDM 51 (D.D.C. Sept. 16, 2022), at https://michellawyers.com/wp-content/uploads/2022/09/2022-09-16-Defendants-Exhibits-ISO-Opp-to-MPI.pdf.

[262] Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545.

[263] *See supra* Part I.A.

[264] Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion'"). *See also* Clark & Stone, *supra* note 37, at 208 ("This is a canon of decision so well accepted that it is scarcely necessary to cite specific instances"); Samuel H. Hofstadter, *Appellate Theory and Practice*, 15 N.Y. CO. B. BULL. 34, 34 (1957) ("The principle that the trier of the facts, whether judge or jury, is in a far better position to determine where the truth lies than an appellate court with only the cold trial record before it has been stated and restated so often that it has become a truism.").

[265] Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 997 (1986) ("Scope of review … is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels.").

[266] Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759 (1982) ("The trial court's direct contact with the witnesses places it in a superior position to perform this task.").

extends not only to credibility determinations—perhaps the most obvious situation in which proximity can theoretically be an advantage—but also to "physical or documentary evidence or inferences from other facts."[267]

Are historical facts among these "other facts"? Certainly fact-finding used to declare the content of the constitution should be conducted carefully and with procedural fairness. But whether appellate review of those facts is de novo or more deferential is a question which is not easily answered based on current law. The institutional arguments in favor of an increased role for lower courts in historical fact-finding—canvassed above in Section III.A—apply equally to suggest that such fact-finding should be entitled to deference on appeal. Of course, as also noted above, the arguments are not without complication, but the relevant question is whether appellate fact-finding (or, equivalently, de novo appellate review) is any better.

One argument against appellate deference might be that originalist facts tend to be legislative facts for which appellate deference is not due. And as Section II.A discusses, that is true of some originalist facts—like whether there was a general social practice of X or Y at the time of the Founding. But, as Section II.A also illustrates, not all originalist facts can be characterized in this way—some are more easily recognizable as adjudicative, for which the standard arguments about deference have full force. And one rationale for treating legislative facts as subject to little or no appellate deference is that they are simply background material, an argument that falls away when those facts are used to declare the content of the law.

Moreover, as Kenji Yoshino notes, the Supreme Court "has not consistently adhered to the view that legislative facts should be reviewed de novo."[268] There may be good reasons for this, as Caitlin Borgmann explores in her work arguing for appellate deference to "social" facts found at trial. After all, as she notes, the alternative is for appellate courts to find those facts themselves, and "[t]his informal, unscreened factfinding deprives the parties of the opportunity to contest or develop facts 'found' by the appellate court. There is no reason to think that this system is better at resolving social fact disputes than the tried-and-true process of a trial."[269] In contrast, some scholars, such as John Monahan and Laurens Walker, have argued that legislative facts should be reviewed de novo, since they are not bound by lower court determinations on questions of law, and arguing social science research should be treated as a type

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[267] Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (internal citations omitted) ("This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.").

[268] Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM & MARY L. REV. 251, 258-65 (2016) (pointing to Justice Alito's majority opinion in *Glossip v. Gross*, 576 U.S. 863 (2015), which accorded clear error deference to district court's factfinding regarding a drug used in executions).

[269] Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CAL. L. REV. 1185, 1190-91 (2013)

of authority, akin to precedent.[270]

Again, when legislative facts are treated as a source of potentially useful and objective background or framework evidence, then the role of appellate and trial courts would be quite different. Errors with regard to that kind of fact could well be "harmless" in the sense that they would not change a case outcome—or at least not alter the shape of constitutional doctrine. But Supreme Court practice and originalist theory use historical facts to fix the meaning of constitutional law, which makes the case for robust, traditional fact-finding and deference much stronger.

Moreover, to denote a question as mixed is not necessarily to remove it from the realm of deference.[271] As the Court itself has observed, "the fact/law distinction at times has turned on a determination that … one judicial actor is better positioned than another to decide the issue in question."[272] Sometimes this comparative consideration will favor deference, however, even for mixed questions, as the Court has noted that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[273]

In short, the Supreme Court must clearly address what standard of review applies to historical facts that are used to inform constitutional interpretation. Without stating what the standard of review is, the Court cannot legitimately disregard lower court fact-finding. Parties to constitutional litigation deserve advance notice of what the standard of review should be, as a matter of basic due process and fairness. What the appropriate standard is depends on questions of institutional competence, which we have outlined here. The standard of review will depend on how informative the preliminary factfinding is on the content of the law. If historical facts are simply background or legislative facts, then a less deferential standard of review may be appropriate. However, if they are seen as dispositive—as declarative constitutional facts—then robust fact-finding and highly deferential review should be required. Further, as noted below, that standard of review can also be shaped and defined defined by Congress.

B. Legislative Historical Fact-finding

Whether or not it is "emphatically the province and duty of the judicial

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[270] *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 514 (1986).

[271] Lee, *supra* note 158, at 238-47.

[272] Miller v. Fenton, 474 U.S. 104, 114 (1985). *See also* Monaghan, *supra* note 133, at 237 ("The real issue is not analytic, but allocative: what decisionmaker should decide the issue?").

[273] Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (internal citation omitted).

department to say what the law is,"[274] it is *not* the exclusive role of the courts—especially the appellate courts—to say what the facts are. In at least two ways, legislatures might also have an important role to play in historical fact-finding.

1. Legislative Historical Fact-finding

Law and scholarship have long explored whether and how judges should defer to legislative fact-finding.[275] The standard debates have tended to focus on legislative fact-finding with regard to different kinds of facts—typically those regarding the contemporary wisdom and effectiveness of policy. This makes sense under a tiers-of-scrutiny type approach, when the primary constitutional questions are about the ends a legislature has chosen to pursue, and the means with which it is doing so. But as the Court moves to a more thoroughgoing originalism in which the sole questions are historical, policy-relevant facts will presumably give some way to historical facts.

The legal treatment of historical fact-finding as part of the law-making process raises distinct questions for originalism. Then-professor Amy Coney Barrett and her co-author John Nagle have noted that "originalists have paid little attention to how the theory might function in Congress."[276] Still, they say, "when a legislative act is subject to judicial review, things might run smoothest if Congress and the courts are on the same page. If a legislator committed to originalism in adjudication got the courts she preferred, she might assume an originalist perspective to predict whether a given statute would survive judicial review."[277]

Legislatures seeking to insulate their work from constitutional challenge could respond by developing not only evidence of a policy's effectiveness, but its consonance with tradition. This will require a different approach, with more attention to historical research and fact-finding. Legislative hearings, for example, might now include a higher proportion of historians; members of Congress might frame their arguments in originalist terms;[278] the precatory language in statutes might invoke history as well as policy.[279] Or Congress might

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[274] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[275] *See, e.g.* Araiza, *supra* note 44. Here we mean factual findings made by lawmakers, not the category of legislative as opposed to adjudicative fact discussed earlier.

[276] Barrett & Nagle, *supra* note 179, at 9. They acknowledge Joel Alicea as a "notable exception." *Id.* at 9 n.22. *See, e.g.*, Jose Joel Alicea, *Originalism and the Legislature*, 56 LOYOLA L. REV. 513 (2010) ("This paper contends that some of the principal schools of originalist thought require originalism in congressional constitutional interpretation, though it does not offer a descriptive account of how Congress interprets.").

[277] Barrett & Nagle, *supra* note 179.

[278] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861 xiii, 130 (2005) (providing examples of originalist argument in Congress).

[279] N.J. A4769 1(g) (2022) ("The sensitive-place prohibitions on dangerous weapons set forth in this act are rooted in history and tradition. They are analogous to historical laws that can be found from the Founding era to Reconstruction, which are also found in modern laws

create a specialized office whose job is to evaluate the historical record with regard to proposed legislation, and to enter into the record—through legislative history or precatory language—the kinds of historical facts that would be needed to defend the law from an originalist challenge.

The question then arises: Will and should courts defer to legislative determinations of *historical* fact? Many originalist scholars and judges argue against legislative deference on the basis that the Constitution is supreme and that its content is substantially fixed by historical facts. But those premises—the latter of which is of course quite contested—only serve to argue against deference to legislative fact-finding with regard to *non*-historical facts, or those that are not declarative of constitutional law. After all, one can accept both propositions without thinking that *judges* have an exclusive or even privileged role in determining what the law-determining historical facts are. While that might be true for adjudicative facts, it is not at all evident why it should be true of broader historical facts like the original public meaning of constitutional text. In fact, this is one way in which the two meanings of "legislative" fact might overlap. To the degree that originalists want to describe historical facts as legislative in the sense of implicating broader considerations of law and policy (and thus, arguably, *not* the kinds of things for which trial experts are appropriate), they would also seem to be legislative in the other sense: matters on which the resources and expertise of the legislative branch might be appropriate.

2. Stripping Historical Fact-finding

A final implication of constitutional interpretation resting upon historical fact-finding is that it may be subject to regulation by Congress. We have elsewhere discussed "fact-stripping" and the power of Congress to regulate appellate standards for reviewing the factual record in federal cases. What we call fact-stripping is distinct from its better-known cousin, jurisdiction-stripping, through which Congress alters federal courts' subject-matter jurisdiction. Congress has Article III power to regulate federal courts' "appellate jurisdiction, both as to Law and Fact."[280] While jurisdiction stripping focuses on the "Law," fact-stripping relates to the jurisdiction over "Fact," including historical fact-finding. Quite simply, there is no constitutional entitlement for appellate courts to find facts (and there are Constitutional reasons why they should defer to lower courts, even as to mixed questions of law and fact).[281]

To do so would simply be an instantiation of Congress's power to

in many states."), at https://www.njleg.state.nj.us/bill-search/2022/A4769/bill-text?f=A5000&n=4769_I1.

[280] *See* Blocher & Garrett, *supra* note 34.

[281] Monaghan, *supra* note 133, at 238 (arguing that "constitutional fact review at the appellate level is a matter for judicial (and legislative) discretion, not a constitutional imperative").

allocate factfinding authority as between lower and appellate courts.[282] Congress could declare, or task a rules advisory committee with considering, procedural rules concerning adequate development of historical facts at the trial level, as well as the standards for appellate deference. Congress could require clearly erroneous review of district court historical fact-finding or it could require another standard. We are not aware of any congressional efforts to regulate explicitly the practice of historical fact-finding, but Congress has regulated fact-finding and review standards in contexts involving constitutional litigation, most prominently federal habeas corpus rulings and review of immigration agency decisions.[283] Congress could do the same for historical fact-finding specifically.

Whether and how Congress should do so comes back again to the question of relative competence as between trial and appellate courts, an issue we have discussed in some detail above.[284] While we do not think that there is a single simple answer to how the balance should be struck, we do not think that the reflexive acceptance of appellate power over historical fact-finding is problematic. As lower courts develop practices and procedures for historical fact-finding at trial,[285] and as appellate courts—especially the Supreme Court—continue to asser ever-broader power while making basic historical errors, the argument for fact-stripping by legislatures looks stronger and stronger.

CONCLUSION

Recent constitutional theory and practice has doubled down on the importance of historical facts not only in applying but in declaring the content of constitutional law.Yet even when invoking and relying the factual nature of these claims, originalist theories and judges have not treated historical facts as such—or, at least, not as subject to the usual rules of legal practice for fact-finding. If courts are to "decide a case based on the historical record compiled by the parties" in a way that is "more legitimate" and "more administrable" than other types of constitutional interpretation, as *Bruen* puts it,[286] then courts must adhere to proper procedural and evidentiary standards for fact-development. If originalism is "our law," and if it is rooted in historical facts, then originalist judges must grapple with how our law treats facts. At the most basic level, judges should aim to permit better development of facts in the lower courts. Appellate judges should generally defer to that body of factual findings, and to legislative findings regarding historical facts. If federal judges do not do so, then Congress

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[282] Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 324 (2017) ("As for Article III, … Congress has near-plenary control over the jurisdiction of inferior federal courts and the standards of review that apply to their judgments where courts are concerned.").

[283] Blocher & Garrett, *supra* note 34, at Part II.

[284] *See supra* Section III.B.

[285] *See supra* Section III.A.

[286] *Bruen*, 142 S. Ct. at 2130.

can and should intervene using its power to regulate appellate fact-finding.

Alternatively, originalism's claims to be a fact-based theory of adjudication must loosen their grip. The entire enterprise may not be tenable or feasible, because premising constitutional interpretation on historical facts may place impossible demands that the facts themselves and our system of adjudication cannot bear. If that is the case, then originalism as a system of adjudication based on historical fact-finding cannot succeed either.