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ARTICLE

Is History Precedent?

Allison Orr Larsen*

Abstract. It has been just over three years since the Supreme Court instructed lower courts to evaluate Second Amendment challenges by examining history and tradition. And it is no secret that the courts have struggled. This Article tackles a phenomenon that is born of that struggle. Overwhelmed by the task of evaluating historical claims, lower courts instead are turning to other judges as authorities on history. They are using what I call in this Article "historical precedents"—meaning language about history from an older decision that the subsequent judge then treats as authority, not as part of a legal rule but for the truth of the matter asserted. This practice presents a very interesting puzzle: Once the Supreme Court blesses a historical source or a historical narrative, does that conclusion—in and of itself—bind other courts to the same answer about what happened in the past?

The question is more than just an academic head-scratcher. It creates significant practical concerns. The Supreme Court is not designed to be a fact-finding institution, nor are the Justices trained historians. They can make mistakes, or our understanding of the history can change, and, in any event, some language that recites historical claims—particularly when appearing in separate opinions—is not contemplated with the kind of scrutiny that comes when a legal rule is debated. These realities make entrenching historical precedents throughout the judicial hierarchy a risky endeavor.

To be sure, lower court judges are in a tight spot when it comes to managing Second Amendment litigation, and this Article seeks to help. I assume a good-faith judge trying to comply with the Supreme Court's instructions and tempted to clear issues off the docket by citing someone else's answers to a historical question. That shortcut is not always appropriate. Not all historical claims are the same, nor were they all similarly thought through by the first decisionmaker. We must look under the hood, so to speak, before accepting the work and the conclusion as truth. Ultimately, my goal in this Article is to draw attention to an unappreciated real-world consequence of the Supreme Court's turn to history and tradition, and to begin the task of reckoning with it.

* Alfred Wilson and Mary I.W. Lee Professor of Law, William & Mary Law School. For their helpful thoughts on this project, I thank Jud Campbell, Marin Levy, Sam Bray, Richard Re, Maggie Gardner, Neal Devins, Jake Charles, Joseph Blocher, Eric Ruben, Larry Solum, and workshop participants at Duke University School of Law, University of Virginia School of Law, and SMU Dedman School of Law. For excellent research assistance I thank Will Burchett, Caroline Olsen, Caitlin Vasko, Ryan Zimmerman, and Ethan Downs-Decker.

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Introduction

When the Supreme Court heard oral argument in the 2022 Second Amendment case *New York State Rifle & Pistol Ass'n v. Bruen*, Justice Amy Coney Barrett asked a very interesting question: Are we bound by history as we characterized it in *District of Columbia v. Heller*?[1]

Put to the side the answer to her question for her Supreme Court colleagues.[2] Contemplate instead the answer if Justice Barrett had still been sitting on the Seventh Circuit. She was not asking whether lower courts were bound by the holding in *Heller*. That is an obvious yes. Her question was instead about the precedential effect of the history itself—the history cited by the Court on its journey to announcing the rule that the Second Amendment protects an individual right to bear arms. Another way to ask her question is this: Once the Supreme Court blesses a historical source or a historical narrative, does that conclusion—in and of itself—bind other courts to the same answer about what happened in the past?

This puzzle pervades constitutional law, but the Second Amendment is an important case study because of a recent doctrinal change that asks courts to tackle history head-on. After *Bruen*, lower courts must now "undertake a comprehensive review of history to determine if Second Amendment restrictions are 'consistent with the Nation's historical tradition of firearm regulation.'"[3] According to the Supreme Court, "[t]he job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies . . . based on the historical record compiled by the parties."[4]

This has turned out to be a tough assignment. Lower courts across the country are wrestling with just how to evaluate gun regulations in a way that is consistent with our history and tradition, and they seem "baffled" about whether to take testimony from historical experts and which questions about the past are

1. Her exact question was: "Do you think that we are bound by the way that we characterized history in that opinion?" Transcript of Oral Argument at 90, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 6051152; *see* District of Columbia v. Heller, 554 U.S. 570, 592-95 (2008) (discussing the history of the Second Amendment).

2. I admit that this is a really interesting question and one that can reveal a lot about stare decisis and change over time. Let us tackle one puzzle at a time, though.

3. United States v. Bullock, No. 18-CR-165, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) (quoting *Bruen*, 142 S. Ct. at 2130).

4. *Bruen*, 142 S. Ct. at 2130 n.6. For interesting thoughts on the risks and rewards of the party presentation aspect of the *Bruen* assignment, see Randy E. Barnett & Lawrence B. Solum, *Originalism and the Party Presentation Principle*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 25-26), https://perma.cc/HL6A-CUWJ.

relevant to their present assignment.[5] The struggles in the lower courts since *Bruen* are well-documented, and the debates about using history in constitutional interpretation are well-known.[6] This Article tackles something more specific.

In the course of the judicial struggle comes the tempting option for lower courts to defer to the work of past judges who have processed the same history, even if those prior judges do not (and cannot) claim to be authorities on the past. To take a familiar analogy I have used before: "[W]hen a law professor makes a claim about physics in an article, a dutiful law review editor will ask her for a footnote. That editor takes comfort if the physics footnote comes from another law review article, even if that second law professor has no relevant expertise with physics."[7] Familiarity breeds authority, and there is evidence that exactly this phenomenon is happening for judges on the front lines in the wake of *Bruen*.

To understand the puzzle, it is imperative to distinguish two important concepts: (1) the precedential effect of the decision reached by the higher court and (2) the precedential effect of the statements used along the way to reach that decision. To illustrate, consider an example outside of historical claims (what I have called "factual precedents").[8] Although perhaps not what we think of when we hear the word *precedent*, it is actually quite common for a lower court to cite a Supreme Court decision as authority for a factual claim.[9] Rather than citing, for example, evidence from the record to establish that carpal tunnel syndrome resolves without surgery in mild cases, lower courts instead cite language from a Supreme Court opinion for that point.[10]

In this example, the citation in the second case is *not* about the legal rule coming out of the first case; the second judge is instead using the first case as

5. *See* Adam Liptak, *Supreme Court's Gun Rulings Leave Baffled Judges Asking for Help*, N.Y. TIMES (Sept. 23, 2024), https://perma.cc/3RAA-STBA (quoting judges on the U.S. courts of appeals). Chief Judge Diaz of the Fourth Circuit recently called modern Second Amendment litigation "a labyrinth for lower courts, including our own, with only the one-dimensional history-and-tradition test as a compass." Bianchi v. Brown, 111 F.4th 438, 473-74 (4th Cir. 2024) (en banc) (Diaz, C.J., concurring) (footnote omitted).

6. *See, e.g.*, Joseph Blocher & Eric Rubin, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 111 (2023); Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699, 708 (2024); Haley N. Proctor, Essay, *"Will the Meaning of the Second Amendment Change . . . ?": Party Presentation and Stare Decisis in Text-and-History Cases*, 98 N.Y.U. L. REV. ONLINE 453, 453-55 (2023); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of Histor*y, 73 DUKE L.J. 67, 76-79 (2023).

7. Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 79 (2013).

8. *See id.* at 73 (capitalization altered).

9. *Id.* at 64-65.

10. *See, e.g.*, Heimann v. Roadway Express, Inc., 228 F. Supp. 2d 886, 904 (N.D. Ill. 2002) (citing Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 199 (2002), for the proposition that "one quarter of the carpal tunnel cases resolve within one month without surgical intervention").

authority on the factual assertion itself—that the underlying claim about carpal tunnel is in fact true. This practice, as I have argued before, is problematic. It risks entrenching factual mistakes or cementing outdated data. "At bottom, the fear is that lower court judges will take something as authoritative from one who is not an authority on the subject."[11]

The goal for this Article is to examine the same phenomenon happening with history in the context of the Second Amendment. Lower courts (both state and federal) are using what I call in this Article "historical precedents"—meaning language about history from an older decision that the second judge then treats as authority. As one circuit judge put it when describing the historical narrative in *Heller*: "All this is debatable of course, but we are bound by the Supreme Court's historical analysis . . . ."[12] Is that true?

One thing is for sure: Whether they feel bound or not, lower court judges are certainly *using* historical precedents. Much like how the 1L is all too tempted to borrow an outline from a 3L, even without confidence the 3L knows the subject matter, historical precedents are popping up all over the lower courts. Part of my project, therefore, collects examples to demonstrate how this is happening in Second Amendment cases. To get a rough estimate of scale, there are over 900 lower federal and state court decisions citing the pages of the *Bruen* opinion that discuss its historical analysis—and the *Bruen* decision is only three years old.[13] I certainly do not attempt to classify or somehow empirically measure all of these citations, but there is significant variation among them, which I do demonstrate in a taxonomy.

Not all historical claims are the same, and thus, not all historical precedents are the same either. Some historical statements ("X happened on Y day") seem easily verifiable with traditional legal authorities.[14] Other claims ("X was pretty common back in the day") are quasi-empirical but still can be fact-checked—although perhaps not easily in chambers. Claims about purpose ("X was enacted because people back then thought Y") lie on the outer edge of a judge's expertise and thus raise greater concerns since they can easily be taken out of context. Relatedly, historical statements that seem like rhetorical flourishes may not have been issued with significant thought or attention, so repeating them below

11. Larsen, *supra* note 7, at 63.

12. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).

13. This number reflects all cases that cite *Bruen* within the section of the majority opinion that is historical analysis. WESTLAW, "597 U.S." +3 (39 4* 5* 6* 70)) OR ("597 U.S." +50 (id +3 (39 4* 5* 6* 70)))) OR (("142 S. Ct." +3 (2139 214* 2150 2151 2152 2153 2154 2155 2156)) OR ("142 S. Ct." +50 (id +3 (2139 214* 2150 2151 2152 2153 2154 2155 2156)))), 968 results (Jan. 8, 2026) (on file with the *Stanford Law Review*) (filtered by "Jurisdiction" to exclude the Supreme Court).

14. *See* Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 498-99 (2000) (defining nonlegal authorities as those not typically found in a regular law library).

seems sloppy and risky. Finally, there are some historical claims ("people alive at the founding talked about 'bearing arms' in this way") that seem so linked to interpretative methodology that they meld into the legal rule they assist in creating.[15]

A fair question should arise for the careful reader at this point: Isn't history different? Whatever your definition of *fact* is (and I have struggled mightily with defining the concept before), historical claims aren't as "fact-y"[16] as, say, statistics on carpal tunnel healing rates.[17] Some say history questions fall under the umbrella of legal inquiry and—just like with case law—judges are perfectly capable of sifting through historical authorities and spotting patterns.[18] William Baude and Stephen Sachs have thoughtfully made an argument along these lines, asserting that historical research falls within the ambit of "ordinary lawyering."[19] They suggest, by analogy, contemplating a search through property records to resolve a legal dispute about a parcel of land today: "Tracing a chain of title or a chain of legal authority decades into the past is normal lawyers' work."[20]

Moreover, there is perhaps an inevitable relationship between history and law that makes it meaningfully distinct from run-of-the-mill facts like my carpal tunnel example.[21] As Jack Balkin writes in his recent book, "people believe that history bestows authority on their arguments . . . . History matters . . . because authority matters."[22] Given the symbiotic relationship between legal and

15. For examples of each variety, see Part II below.

16. "Fact-y" is a word I made up and insist on using, like "fetch" from *Mean Girls*. *See* MEAN GIRLS (Mark Waters dir., 2004). It is meant to describe the fact side of the law-fact spectrum.

17. *See supra* note 10 and accompanying text.

18. *See, e.g.*, William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1488 (2024) ("One might frequently describe the scope of a common-law doctrine by looking to a wide range of cases, parsing the close cases, setting aside unusual outliers, and trying to distill the general principles. This is a common task for a treatise writer, a restatement reporter, or a traditional common-law judge. . . . [W]e think it was what the Court was doing in *Bruen*.").

19. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019).

20. *See id.* at 809-10. For an important critique of this type of argument, see Jud Campbell, *Tradition, Originalism, and General Fundamental Law*, 47 HARV. J.L. & PUB. POL'Y 635, 638, 644-45 (2024) [hereinafter Campbell, *Tradition*] (describing this brand of originalism as using "*modern criteria* for identifying earlier constitutional content" and exploring concerns with this). Campbell argues that the conventional lawyer's use of history is decidedly presentist—meaning not informed by an intellectual historian's sensitivity to conceptual gaps in past and present ways of thinking. Jud Campbell, *Originalism's Two Tracks*, 104 B.U. L. REV. 1435, 1447-48 (2024) [hereinafter Campbell, *Two Tracks*].

21. *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

22. *Id.* at 3.

historical arguments, perhaps it is unavoidable that courts will look to each other as authorities for historical claims.[23]

There are, however, some serious practical consequences to the use of historical precedents, consequences that mirror my worries about giving precedential value to factual claims generally. Our understanding of history changes as we change, for one thing. And no court is infallible in its digestion of historical claims to begin with. If some of the history in *Heller* was faulty, as many say it was, the consequences of that mistake are magnified when the historical narrative is repeated without testing in lower courts across the country.[24] It makes it virtually impossible to course correct.[25]

It is also worth asking a big question: Do Supreme Court Justices get to be—or even want to be—the ultimate arbiters of history? Several past members of the Court have expressed doubt on that score. In *Seminole Tribe of Florida v. Florida*, for example, Justice Souter wrote that an "*ipse dixit*" assertion of historical fact in an earlier opinion "does not make it so."[26] Similarly, in *Wallace v. Jaffree*, Justice Rehnquist complained that repetitions of a historical error in judicial opinions "can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."[27]

Consider in this regard the distinction between dicta and a legal holding.[28] One reason for not giving dicta precedential effect—a "fundamental norm[] of American law"—is the concern that language in a judicial opinion that is not part of the holding is not as carefully considered and does not reflect the wisdom of

23. In a prior article, I more fully explore whether historical claims are legal or factual or something in between. *See* Allison Orr Larsen, *History's Identity Crisis*, 78 SMU L. REV. 293, 314-16 (2025). The upshot to my exploration is that it depends on the circumstances. *See id.* at 317. Similarly, here, there is no one-size-fits-all answer to the question of whether a lower court should rely on a prior judicial decisionmaker's historical narratives. To answer both questions, I suggest nuance and caution.

24. Indeed, several scholars have worried about the quality of some of the historical claims *Heller* incorporated. *See* Darrell A.H. Miller, *Owning* Heller, 30 U. FLA. J.L. & PUB. POL'Y 153, 153-54 (2020); James C. Phillips & Josh Blackman, *Corpus Linguistics and* Heller, 56 WAKE FOREST L. REV. 609, 616 (2021).

25. This concern has been raised repeatedly by Senator Sheldon Whitehouse as he worries about the consequences of Supreme Court fact-finding. *See, e.g.*, Sheldon Whitehouse, *Knights-Errant: The Roberts Court and Erroneous Fact-Finding*, 84 OHIO ST. L.J. 837, 853 (2024).

26. 517 U.S. 44, 106 n.5 (1996) (Souter, J., dissenting).

27. 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting); *see also Seminole Tribe*, 517 U.S. at 106 n.5 (Souter, J., dissenting) ("This Court's opinions frequently make assertions of historical fact, but those assertions are not authoritative as to history in the same way that our interpretations of laws are authoritative as to them.").

28. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2027-28 (2013).

multiple decisionmakers.[29] Our common-law tradition is steeped in the normative belief that "legal principles develop incrementally, with any one decision having only a limited impact."[30] This assumption is fueled by the risk-averse, small-c conservative belief that saying more risks getting more wrong.[31] Not every word of a judicial opinion is written with the intent to bind others. Thus, treating nine lawyers on the Supreme Court (or just one of those lawyers) as the ultimate referee of historical claims is not only an odd concept for historians to grasp, but it defies the reality of how judicial opinions are written and gives authority to statements not meant to be authoritative.

To be sure, I acknowledge throughout this Article that lower court judges are in a tight spot when it comes to managing Second Amendment litigation. It is inefficient to have a free-for-all on all historical claims in every court across the country, but it also seems unwise to put all that responsibility on nine individuals who are not trained historians. Given the resource constraints in lower courts and the daunting nature of the task *Bruen* sets forth, it is certainly understandable that judges want to treat many historical claims as settled. That kind of time-saver, however, has very significant ramifications and should not be taken lightly.

In addition to pointing out the risks of historical precedents, therefore, this Article also seeks to help. Ultimately, I recommend nuance and caution in the lower courts' use of historical precedents. Whether a historical claim from one judge should be treated as authority by a subsequent judge depends on the answers to several fundamental questions: How was the history used the first time? Was it subject to adversarial testing originally? Is it the type of claim a judge can verify on her own? And was the history central to (and indivisible from) the original legal holding to begin with?[32]

To explore these questions, I unpack the nature of precedent, the variance of historical claims, and the procedural reality of opinion writing. In the end, I

29. *See id.*

30. *Id.* at 2025 n.8.

31. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) ("Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law."); *see* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 713 (1999).

32. Legal philosophers may recognize some of these questions as relevant to the idea of "social epistemology." Without wading too deeply into these waters (waters that are not my own), the idea behind this school of thought is that there are circumstances in which taking someone else's word for something is preferable to just doing the work on our own. *See* Cailin O'Connor, Sanford Goldberg & Alvin Goldman, *Social Epistemology*, STAN. ENCYCLOPEDIA PHIL. (updated Mar. 22, 2024), https://perma.cc/L59X-NPJL; Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1003 (2006); LINDA TRINKAUS ZAGZEBSKI, EPISTEMIC AUTHORITY: A THEORY OF TRUST, AUTHORITY, AND AUTONOMY IN BELIEF 5-7 (2012). As I argue below, however, judges are rarely epistemic authorities on history.

argue that historical precedents should be rare. Judges should not just accept on-point historical language from other judicial opinions as reflecting the truth about the past without looking under the hood to see how that conclusion was reached the first time around. My ultimate goal is to draw attention to an unappreciated real-world consequence of the Supreme Court's turn to history and tradition and to begin the task of reckoning with it.[33]

Part I of this Article sets the table with some foundational thoughts on what historical precedents are and why they are tempting to judges. Part II then offers a taxonomy of the different ways lower courts are using historical precedents in the wake of *Bruen* and *United States v. Rahimi*.[34] Part III articulates risks of historical precedents, and Part IV sketches preliminary thoughts on a way forward.

I. What Are Historical Precedents and Why Do They Appear?

Every first-year law student quickly encounters precedent. As Fred Schauer explains, "legal decision-makers are expected to follow previous decisions just because of the very existence of those decisions . . . . It is the very 'pastness' of previous decisions, and not necessarily the current decision-maker's view of the correctness of those previous decisions, that gives the previous decisions their authority."[35]

There are, of course, variations of precedent: Vertical precedents are handed down in a judicial hierarchy while horizontal precedents come from the same court but from the past.[36] And, as explored below, lawyers sometimes are sloppy with the word *precedent*, using it to cover situations not just when they are obligated to follow a past decision but when they think it is a good idea.[37] Generally speaking, however, precedent means today's legal decision maker must follow an on-point decision from yesterday.[38]

Most of the time when we talk about precedent, we are talking about *legal* precedents, or decisions about what the law requires. Identifying what is actually

33. A few people have referenced this puzzle about stare decisis and the history-and-tradition test before. *See, e.g.*, Proctor, *supra* note 6, at 453, 462; Whitehouse, *supra* note 25, at 883-84; Case Comment, *Article II—Presidential Immunity—State Criminal Investigation*—Trump v. Vance, 134 HARV. L. REV. 430, 438-39 (2020); Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 2004-05 (2017).

34. 144 S. Ct. 1889 (2024).

35. Frederick Schauer, *Precedent*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 123, 123 (Andrei Marmor ed., 2012).

36. *Id.* at 124.

37. *See id.* at 126-27; *see also infra* Part IV.A (discussing the meanings of *precedent*).

38. Schauer, *supra* note 35, at 123, 127.

covered by a legal precedent can be tricky,[39] but typically we say the holding of a case is precedential (meaning it binds others) and that the language around that holding (dicta) is not.[40] Academics have spent much time debating the line between the two, but the gist of the distinction is that a holding is that which is necessary to decide the case, and dicta is everything else.[41]

In practice, the use of precedent goes well beyond legal holdings.[42] In a 2013 paper, I identified what I called "factual precedents."[43] I argued that due to changing methods in legal research (a turn from digests and Shepardizing to Google word searching) and a growing emphasis on empirical claims in Supreme Court decisionmaking, lower courts are now tempted to cite Supreme Court decisions as authority for factual matters, not just legal ones.[44] These courts tend "to over-rely on Supreme Court opinions and to apply generalized statements of fact from old cases to new ones."[45] I argued in that paper that statements of fact should not "receive separate precedential force, distinct from the precedential force of whatever legal conclusions they contributed to originally."[46]

More than a decade has passed since I wrote about factual precedents, and in that time the Supreme Court has taken a significant step towards tests that favor "history and tradition."[47] I once lumped historical precedents into the broader category of factual precedents,[48] but I think that step deserves further thought. There are at least two specific reasons why historical precedents are even more tempting to judges than ordinary factual precedents might be, and relatedly, why we might treat them differently.

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39. For very thoughtful analysis on this score, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 935-36 (2016); and Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185-87, 198-99 (2014).

40. *See* Klein & Devins, *supra* note 28, at 2024-25 ("A court's holding defines the scope of its power; holdings must be obeyed . . . . Dicta is the stuff that doesn't have to be obeyed." (alteration in original) (quoting David Post, *Commerce Clause "Holding v. Dictum Mess" Not So Simple*, VOLOKH CONSPIRACY (July 3, 2012, 8:17 AM EDT), https://perma.cc/2UML-9ZQP)).

41. EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, ELEMENTS OF LAW 64 (2d ed. 2010) (defining dicta as "passing observations, generalizations, analogies, illustrations, or asides not necessary to the resolution of the case").

42. *See* Klein & Devins, *supra* note 28, at 2025 ("But theory is one thing, practice another.").

43. Larsen, *supra* note 7, at 62.

44. *Id.* at 74-79.

45. *Id.* at 62.

46. *Id.* at 63.

47. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126, 2128 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

48. Larsen, *supra* note 7, at 92.

First, there is an awkward "identity crisis" facing history in judicial decisions more generally.[49] As I have explained in recent work, "nobody is quite sure what a judge is actually doing when she evaluates claims about what happened in the past."[50] Is it straight-up legal reasoning? Is it fact-finding of the sort we think expert historians should testify about—conveying to a trial judge the best evidence we have about the purpose of colonial gun laws, for example? Or is it a different sort of fact-finding—generalized and closer to policy—such that we want appellate judges to make the calls after studying in the law library or digesting dozens of amicus briefs? This identity crisis leads to significant frustration on seemingly basic questions like the difference between law and fact and what kind of evidence needs to be introduced when.

Without wading too deeply (again!) into the murky waters of the law-fact distinction, allow me a few words on what makes a claim "fact-y"—a word I invented and stubbornly cling to.[51] My working definition of *fact* is twofold: A claim is factual that (1) can theoretically be proven true or false and (2) is supported by evidence not typically found in a law library.[52] "[H]istory is fact-y in some ways and not so fact-y in others."[53]

Consider three assertions from the Supreme Court's decision in *Bruen* (all from the same part of the opinion):

1. The 1328 Statute of Northampton was "passed shortly after Edward II was deposed by force of arms and his son, Edward III, took the throne of a kingdom where 'tendency to turmoil and rebellion was everywhere apparent throughout the realm.'"[54]
2. "[T]he Statute of Northampton—at least as it was understood during the Middle Ages—has little bearing on the Second Amendment adopted in 1791. . . . The Statute's prohibition on going or riding 'armed' obviously

49. Larsen, *supra* note 23, at 295-97.

50. *Id.* at 295.

51. For my prior thoughts on the law-fact divide (and prior attempts to make "fact-y" happen), see Larsen, *supra* note 7, at 67-68; Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 183-85 (2018); and Larsen, *supra* note 23, at 299-300.

52. To borrow insight once again from Fred Schauer, "All distinctions potentially have borderline cases . . . . And although lawyers, particularly, are likely to be preoccupied with dusk when people ask them about the distinction between night and day," this does not take away the basic value of the distinction in the first place. Schauer & Wise, *supra* note 14, at 498 (footnote omitted). Schauer's work has been very influential on my own in this regard, and his working definition of "nonlegal" forms the basis for my definition of "fact-y." *See id.* at 499.

53. Larsen, *supra* note 23, at 300.

54. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2139 (2022) (quoting Norman Maclaren Trenholme, *The Risings in the English Monastic Towns in 1327*, 6 AM. HIST. REV. 650, 651 (1901)).

did not contemplate handguns, given they did not appear in Europe until about the mid-1500s."[55]

3. "Henry VIII issued several proclamations decrying the proliferation of handguns, and Parliament passed several statutes restricting their possession. But Henry VIII's displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy."[56]

None of these three sentences are purely factual under my working definition. But none of them are strictly legal conclusions either. They involve narratives about what happened in the past (claims theoretically verifiable by someone but probably not in a law library), but they also reach conclusions about those stories that are relevant to legal rules today. History and law have a unique relationship.

On the one hand, the task of creating the above three sentences includes functions lawyers do well: evidence gathering, deducting purpose, and analogical reasoning. As Cass Sunstein puts it, lawyers are allowed and even encouraged to leverage the "idea of a useable past" without being thought to engage in junior-varsity historian work.[57] At some level the entire practice of precedent is about using the useable past: We do it this way because our predecessors did too.

On this view, as a practical matter, doing history as it relates to legal analysis is an act that is not foreign to lawyers or judges, as Will Baude and Steve Sachs argue.[58] Tracing a chain of title or a chain of legal authority decades into the past, as Baude and Sachs point out, is "normal lawyers' work."[59] Thus, in the eyes of some, historical statements are not facts at all, but rather are closer to the law end of the fact-law spectrum, placing them squarely in the laps of appellate tribunals and perhaps subject to some sort of stare decisis treatment.[60]

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55. *Id.* at 2139-40.

56. *Id.* at 2140 (citations omitted).

57. Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 603, 605 (1995) ("On this view, the historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria.").

58. Baude & Sachs, *supra* note 19, at 809-10; *see also* Baude & Leider, *supra* note 18, at 1496 ("Thus, while the effort to determine legal custom looks backward to history, the endeavor is decidedly legal and belongs to the judge based on his legal training, not to the professor of history.").

59. Baude & Sachs, *supra* note 19, at 809-10.

60. *See* Blocher & Garrett, *supra* note 6, at 727 ("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." (citing Baude & Sachs, *supra* note 19, at 814)). For examples of such originalist thinkers, see William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351-52 (2015); and Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015).

On the other hand, some of the above three claims involve research into the practices and intentions of people long since dead. Putting those statements in context, and noting important differences between then and now, are not easy tasks using sources typically found in a law office. They are the bread and butter of trained historians. On this view it is difficult—if not impossible—to evaluate the words chosen by people of the past without understanding the world those people inhabited.[61] And to do that second task requires an appreciation for context and a grip on a larger field of research that perhaps lawyers lack.[62]

To further complicate things, we must recognize that lawyers and historians do not use or even think about history in the same way. As Jack Balkin has helpfully explained, lawyers "are taught to assert and dispute claims about legal authority, to enter into and win arguments about what the law is or should be. They think about history and use history in ways that reflect this adversarial culture of authority claiming."[63] Conversely, Balkin goes on, "[h]istorians are trained differently. Their central task is not winning legal arguments, or establishing or demolishing legal authority. They are interested in the past for many reasons other than present-day legal debates."[64] Historians, Balkin explains, "are taught to relish and respect ambiguity, the inevitability of multiple interpretations, the complexity and multivocality of the past, [and] the fact that the world of the past was quite different from the world of the present," and they appreciate "that the concerns and understandings of people living in the past were often very different from concerns and understandings of people living in the present."[65]

The perhaps inevitable link between law and history might partially explain the existence of historical precedents, but there is also a very practical dynamic at work: time constraints. Supreme Court Justices hear about 70 cases a year (and sometimes far fewer).[66] Compare that to the average circuit court judge who participates in approximately 350 decisions a year or the average district court judge who handles over 500 cases annually, including sometimes

61. Elias Neibart, Essay, *Originalism as Intellectual History*, HARV. J.L. & PUB. POL'Y PER CURIAM, Fall 2022, art. 28, at 1, https://perma.cc/7JGP-SSLL ("[I]f American jurists want to uncover rights 'deeply rooted in the Nation's history' or if they wish to determine which regulations are a part of our 'historical tradition,' then they must adopt a historical method that accounts for the totality of the historical experience." (footnotes omitted) (first quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022); and then quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022))); *see* Campbell, *Tradition*, *supra* note 20, at 645; Campbell, *Two Tracks*, *supra* note 20, at 1439.

62. For further development of this argument, see Larsen, *supra* note 23, at 303-04.

63. Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 347 (2020).

64. *Id.*

65. *Id.*

66. *Oral Arguments*, SUP. CT. U.S., https://perma.cc/ZQ3T-Q7G2 (archived Oct. 28, 2025).

time-consuming trials.[67] These lower court judges absolutely need to move cases off of their dockets—which is a difficult task when a governing test in Second Amendment challenges includes a history assignment. Finding a historical precedent—someone who has done the work already—is a fast way to clear the decks.

In this regard, it is interesting that many of the opinions lower courts rely on for historical precedents are authored by well-respected and relatively famous judges: Supreme Court Justices, of course, but also then-Judge Barrett while she sat on the Seventh Circuit, Judge Hardiman (himself a Supreme Court contender[68]) on the Third Circuit, and Judge Posner (a legend).[69]

On occasion, the lower court judges who cite to historical precedents tell us why they are doing so. For example: "We largely rely on then-Judge Amy Coney Barrett's *Kanter* dissent because she is credited with first compiling and analyzing these historical materials in one opinion" and because "[o]ther judges have since extensively relied on her work."[70]

I am not sure why being the first to compile history bestows authority, but I believe the second reason can be explained by the feeling of familiarity.[71] For a trial judge with little time and much to do, it is perhaps a good shortcut to cite history blessed by another judge whom lots of people trust. Again, to take a familiar analogy, think of the 1L looking for the 3L outline that has been passed

67. Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 402-03 (2013); Henry J. Dickman, Note, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1366 & n.122 (2020) (noting that the average circuit judge (in 2018) participated in about 365 decisions and that there were (also in 2018) about 61,000 panel seatings by active circuit judges). For district court caseloads, see *U.S. District Courts—Weighted and Unweighted Filings per Authorized Judgeship, During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2023*, U.S. COURTS: DATA & NEWS, https://perma.cc/ZF4Y-647J (archived Jan. 13, 2026).

68. Amy Howe, *Potential Nominee Profile: Judge Thomas Hardiman, a Close Second to Gorsuch and a Shortlister Again*, SCOTUSBLOG (July 2, 2018), https://perma.cc/KHE7-GF8N.

69. *See, e.g.*, Simpson v. State, 368 So. 3d 513, 526 n.3 (Fla. Dist. Ct. App. 2023) (Pratt, J., concurring) ("We largely rely on then-Judge Amy Coney Barrett's *Kanter* dissent . . . building upon Judge Thomas Hardiman's earlier analysis."); Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) ("I draw heavily on then-Judge Barrett's research below . . . ."); GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 38 F. Supp. 3d 1365, 1375 (N.D. Ga. 2014) (citing Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012)), *aff'd*, 788 F.3d 1318 (11th Cir. 2015).

70. *See, e.g.*, *Simpson*, 368 So. 3d at 526 n.3 (Pratt, J., concurring) (citing *Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting)).

71. *See* Bruce W.A. Whittlesea & Lisa D. Williams, *The Source of Feelings of Familiarity: The Discrepancy-Attribution Hypothesis*, 26 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY, & COGNITION 547, 547-48 (2000) (detailing how familiarity influences psychological processing). For more on the epistemic authority and why we trust certain authorities more than others, see the sources cited in note 32 above.

around the student grapevine and has good reviews or comes from the law review.

As post-*Bruen* Second Amendment challenges wind their way through trial courts, they bring with them significant confusion about how to proceed, leaving lower court judges to say they are baffled by the "labyrinth" task of "sifting through the sands of time."[72] At times the frustration is palpable. Judge Carlton Reeves, a federal district judge in Mississippi, wrote in an order that contemplated hiring an expert witness, "This Court is not a trained historian. . . . We lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform."[73]

What is Judge Reeves (or another judge like him) to do?[74] Call an evidentiary hearing with competing historians? Employ a special master? Rely on amicus briefs with perhaps a motivated historical narrative? Given these options, resorting to another trusted judge's work product looks pretty darn appealing despite the fact that (as described below) the practice comes with some significant risks.

II. A Taxonomy of Historical Precedents

The identity of historical claims in Second Amendment litigation is hard to pin down: These claims are part factual, part legal, part connective narrative, part evaluative judgment that comes to conclusions.[75] To complicate matters, the nature of precedent is also multifaceted.[76] Judges cite other judges because they feel obligated to, or because they trust their work, or because their law clerks did a Google search and found a great sound bite that could settle an issue in a footnote and reduce a chamber's workload. Given all of this, it is useful to do a deep dive into the *ways* the lower courts are using historical claims as decided by other courts before we can address whether we are worried about the practice.

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72. *See* Liptak, *supra* note 5.

73. United States v. Bullock, No. 18-CR-165, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting)).

74. For more on Judge Reeves's frustration with applying *Bruen*, see Larsen, *supra* note 23, at 313.

75. This doesn't even begin to pick at the problem of trying to agree on what history is: Is there one knowable truth we are excavating, or is it all just competing narratives written by the winners? That is a very deep and interesting question, but one outside of my expertise and beyond the scope of this Article.

76. *See generally* Re, *supra* note 39 (exploring how lower courts narrowly interpret Supreme Court precedent); Kozel, *supra* note 39 (exploring how courts determine whether and how to apply Supreme Court precedent).

This taxonomy is not meant to be exhaustive.[77] And certainly some of the examples could qualify in multiple categories. But, as described below, there is significant variation among these examples which will, I think, affect our normative evaluation of the practice. I have divided my examples of historical precedents into four categories: (1) those used as shorthand for describing that an "old law" existed, (2) quasi-empirical statements of how common a historical practice was, (3) historical claims about purpose (or why something happened in the past), and (4) historical statements used as rhetorical flourishes.

A. Historical Precedents on the Existence of "Old Law"

Let us start with the simplest form of historical precedent. It is quite common for a judge to rely on a prior judicial decisionmaker simply to make the observation that an old law existed. These courts cite to *Bruen* or *Heller* or *Rahimi* as shorthand for authority that, for example, certain states had constitutional provisions that protected the right to bear arms[78] or that American colonies outlawed "bearing arms to terrorize the people" by statute.[79]

Some of these shorthand descriptions are bare-bones, and others include description of what the old laws actually said or how they operated,[80] but on the whole this garden-variety historical precedent is just piggybacking on the work of a member of the judiciary who has had better briefing and more time to do historical homework. It is, of course, possible that the first jurist got it wrong, but generally speaking, whether an old law existed or what it said is easily verifiable by legal sources—the stuff in law libraries—and not likely to raise considerable normative concerns.

There is one important caveat to my nonchalant shrug in this category: As every person who has ever written a brief knows, when describing an old law, the narrator gets significant discretion in what parts of the law she emphasizes. So, for example, take the many district courts who cite then-Judge Barrett's dissent in the Seventh Circuit's *Kanter* case about felon disarmament.[81] Some cite her opinion for the fact that the English "'disarmed Catholics' because they were

77. To get a rough estimate of scale, as stated above, there are over 900 lower federal and state court decisions citing the pages of the *Bruen* opinion that discuss its historical analysis—and the *Bruen* decision is less than three years old. See note 13 above for the search terms used.

78. *See, e.g.*, Grace v. District of Columbia, 187 F. Supp. 3d 124, 137 (D.D.C. 2016) (quoting District of Columbia v. Heller, 554 U.S. 570, 584-85 (2008)), *vacated sub nom.*, Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).

79. *See, e.g.*, Koons v. Platkin, 673 F. Supp. 3d 515, 565 (D.N.J. 2023) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2142 (2022)).

80. *See, e.g.*, United States v. Simien, 655 F. Supp. 3d 540, 551-52 (W.D. Tex. 2023) (describing how Massachusetts's colonial-era surety statute operated in practice).

81. Kanter v. Barr, 919 F.3d 437, 451-69 (7th Cir. 2019) (Barrett, J., dissenting); *see supra* notes 69-70 and accompanying text.

presumptively thought to pose a . . . threat,'"[82] while others cite it for the descriptive elaboration that "Catholics who were '"willing to swear undivided allegiance to the sovereign" were permitted to keep their arms.'"[83] All of this is still shorthand piggybacking to show the existence and contours of an old law, to be sure, but it is also true that the description chosen by the authors gets a lot of power in the future.

B. Quasi-Empirical Descriptions of History

A second type of historical precedents inserts more context and makes comparative judgments; we can call these "quasi-empirical" historical claims.

Because *Bruen* asks courts to canvas the historical landscape of firearm regulations, there is, in effect, a weighing aspect to their job: a need to count, to figure out outliers, or to get a lay of the land. Under these conditions, it is very tempting for a trial court to cite a prior case to quantify the number of old laws or old decisions that went a certain way. Examples include language such as: "And as *Heller* noted, 'the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful'"[84] or "[Surety] laws were widespread."[85]

Lower courts thus tend to rely on precedent from other judges to decide which old laws are outliers and which ones instead are enough to form traditions. The typical move is for a lower court to recite what the government presents as old law that supports the present regulation, and then to use another judicial statement to characterize the government's evidence as an outlier or a "narrow exception[]"[86] that is insufficient "to show a tradition."[87]

Similarly, lower courts tend to cite higher courts as authority for a scholarly consensus among historians. A great example comes from the *Kanter* case mentioned previously. Then-Judge Barrett's dissent in that case—which was about a felon disarmament law—declares that "at least thus far, scholars have not been able to identify any" founding-era laws that permanently dispossessed

82. *See, e.g.*, United States v. Silvers, 671 F. Supp. 3d 755, 771 (W.D. Ky. 2023) (alteration in original) (quoting *Kanter*, 919 F.3d at 457 (Barrett, J., dissenting)).

83. *See, e.g.*, United States v. Diaz, No. 20 CR 597, 2023 WL 8019691, at *7 (N.D. Ill. Nov. 30, 2023) (quoting *Kanter*, 919 F.3d at 456-58 (Barrett, J., dissenting)).

84. Kachalsky v. County of Westchester, 701 F.3d 81, 95 (2d Cir. 2012) (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

85. *Silvers*, 671 F. Supp. 3d at 772 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2148 (2022)).

86. Koons v. Reynolds, 649 F. Supp. 3d 14, 33 (D.N.J. 2023) (finding that although the State pointed to an old law to support its regulation, "[t]he *Bruen* Court recognized that several like jurisdictions codified narrow exceptions to, but generally permitted open carry").

87. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 458 (5th Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2142), *rev'd*, 144 S. Ct. 1889 (2024).

felons of firearms.[88] This conclusion has subsequently been cited multiple times by lower courts for the point that historians agree there is no historical analogue.[89] That is not quite what then-Judge Barrett said about the evidence before her; her observation was more modest—that she had not seen a proper analogue *yet*.

Another example of history repeated from the felon-disarmament context originates from a counterargument made by some that the lack of a historical law disarming felons is due to the fact that felons in colonial times generally received the death penalty (making the disarmament law unnecessary).[90] This argument was considered and rejected by then-Judge Barrett in her *Kanter* dissent; she concluded that "[c]apital punishment was less pervasive than one might think" in colonial times.[91] That language seems to have settled the argument in the lower courts—or at least it provides a precedent for judges who want to agree. Judges now cite her dissent as an authority on this point—as authority for the historical truth that capital punishment was not that common in the colonies—praising then-Judge Barrett for her "thorough examination of the historical record."[92]

What is really interesting about this particular example is some pretty thick irony. Justice Amy Coney Barrett is perhaps the jurist who has put the most thought into the puzzle of historical precedents. Remember that she was the one who asked the question in the *Bruen* oral argument about whether the Court was bound to prior Supreme Court characterizations of history.[93] The reason she asked the question is likely because she had contemplated the same one while sitting on the Seventh Circuit and deliberating the *Kanter* case.

One might recall that Justice Scalia's majority opinion in *Heller* referenced "longstanding" laws disarming felons.[94] A few years later, then-Judge Barrett did not find she was bound by the historical aspect of this language, even while

88. *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

89. *See, e.g.*, United States v. Neal, 715 F. Supp. 3d 1084, 1098 (N.D. Ill. 2024); Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, 545 F. Supp. 3d 1247, 1263 (N.D. Fla. 2021) ("Looking first to the Founding, 'scholars have not been able to identify any' Founding-Era state laws prohibiting felons from possessing firearms." (quoting *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting))).

90. *Cf. Swearingen*, 545 F. Supp. 3d at 1263 (acknowledging but dismissing this counterargument).

91. *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting).

92. *See, e.g.*, United States v. Barber, No. 20-CR-384, 2023 WL 1073667, at *8 (E.D. Tex. Jan. 27, 2023) (citing *Kanter*, 919 F.3d at 453-64 (Barrett, J., dissenting)); United States v. Diaz, No. 20 CR 597, 2023 WL 8019691, at *11 (N.D. Ill. Nov. 30, 2023) (citing *Kanter*, 919 F.3d at 459-61 (Barrett, J., dissenting)); United States v. Leblanc, 707 F. Supp. 3d 617, 630 (M.D. La. 2023) (citing *Kanter*, 919 F.3d at 459 (Barrett, J., dissenting)).

93. Transcript of Oral Argument, *supra* note 1, at 90 ("Do you think that we are bound by the way that we characterized history in [*District of Columbia v. Heller*]?").

94. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

sitting on a lower court. She wrote, "I am 'reluctant to place more weight on these passing references . . . .' The constitutionality of felon dispossession was not before the Court in *Heller*."[95] Calling the historical language in *Heller* about felon disarmament "dict[a]," she went on to say that "judicial opinions are not statutes, and we don't dissect them word-by-word as if they were."[96]

And yet despite her warning, that is exactly what is happening—even to her own words. Lower courts have relied on then-Judge Barrett's dissent in *Kanter* 413 times since it was issued in 2019, often praising the historical parts of her opinion for being "thorough"[97] and going "well beyond the sources" canvassed in other cases.[98] This is all despite the fact that in the very same opinion she cast doubt on using historical precedents, at least in every circumstance.

C. Historical Narratives: Claims About Purpose

A third category of historical precedents involves claims that tell a story, most commonly a story about purpose. The claims about colonial surety laws are a good example here. At the risk of oversimplifying things, surety laws in colonial America required certain individuals (people who had been accused in a complaint of being dangerous) to post a monetary bond before carrying a firearm in public.[99] Given the implications for modern Second Amendment challenges, trial courts are often inundated with claims about the purpose of these surety laws: Were they a form of punishment or an insignificant inconvenience? Did they reflect a broader concern for community safety or were they intended to prevent only specific imminent threats from specific people?

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95. *Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) (quoting *id.* at 445 (majority opinion)).

96. *Id.* at 454 (citing United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010)). Just to be clear, my point above is about then-Judge Barrett's use of the history in *Heller*. I make no claim about how lower court judges should interpret the scope of the *Heller* holding.

97. *See, e.g.*, *Barber*, 2023 WL 1073667, at *8.

98. Citing References for Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019), 413 results (Jan. 8, 2026), WESTLAW (on file with the *Stanford Law Review*) (searching "Barrett., J., dissenting" and excluding the Supreme Court using the "Jurisdiction" filter); *see, e.g.*, Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) ("I draw heavily on then-Judge Barrett's research below, which goes well beyond the sources in *Binderup*.").

99. In an ironic move, I am going to cite a judicial opinion for this point. *See* United States v. Rahimi, 144 S. Ct. 1889, 1899-902 (2024). But, for reasons that are explained further in Part IV.B below, it matters to me that colonial surety laws were referenced in the briefing and oral argument in *Rahimi*. *See, e.g.*, Transcript of Oral Argument at 42, 49-50, *Rahimi*, 144 S. Ct. 1889 (No. 22-915); Brief for the United States at 43, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 5322645 (mentioning surety laws as an example of historical laws seeking to protect "identified individuals"); Brief for Amici Curiae Professors of History and Law in Support of Petitioner at 14-15, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 5489062 (discussing specific colonial and early American surety laws as an analogue for disarmament in certain situations).

To answer these "why" questions, trial courts look to language from judges of the past. The *Bruen* opinion described surety laws as "'intended merely for prevention' and . . . 'not meant as any degree of punishment.'"[100] After 2022, this language has been cited by lower courts as if settling the purpose of surety laws once and for all.[101] According to one district court, for example, the goal of these laws was "not to shift the risk of gun violence away from victims to all arms bearers as the State claims."[102] And the authority cited for this historical truth is . . . the Supreme Court's opinion in *Bruen*. Notice in this example that the citation to *Bruen* is not about the scope of the Second Amendment, but about the purpose of colonial surety laws. The decision is cited as providing an answer to why people alive in 1789 moved to adopt these sorts of laws. Certainly, the history was relevant to the ultimate interpretation of the Second Amendment in *Bruen*, but often the lower courts do not distinguish between the two points. The Supreme Court is used as authority on both: as proof that both the legal rule and the characterization of history to support that legal rule are now settled.

This practice matters a great deal in a very practical sense. In modern Second Amendment litigation, the state is charged with coming up with a history or tradition that supports whatever firearm regulation is being challenged. When it does, challengers (and some trial courts) are turning to language from the Supreme Court to shoot down the government's historical evidence as irrelevant because it was enacted with a different purpose. The difference in origin stories between the old law and the new law, in other words, is used to refute the analogy between them.

For example, in an Oklahoma case about felon disarmament, the government pointed to a 1759 New Hampshire surety law to demonstrate a history of disarming dangerous individuals.[103] The trial judge dismissed that claim in a footnote, citing *Bruen* to conclude the New Hampshire law was irrelevant because it was not passed for the same purpose.[104] It seems doubtful that the origin of the old New Hampshire law was central to the case in *Bruen*, a

100. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct 2111, 2149 (2022) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 249 (Oxford, Clarendon Press 1st ed. 1769)).

101. *See, e.g.*, Nat'l Ass'n for Gun Rights, Inc. v. City of San Jose, 618 F. Supp. 3d 901, 917 (N.D. Cal. 2022); United States v. Combs, 654 F. Supp. 3d 612, 619 (E.D. Ky. 2023) ("'[T]he burden these surety statutes may have had on the right to public carry was likely . . . insignificant,' and there is 'little reason to think that the hypothetical possibility of posting a bond would have prevented anyone from carrying a firearm for self-defense in the 19th century.'" (alterations in original) (quoting *Bruen*, 142 S. Ct. at 2149)).

102. Koons v. Platkin, 673 F. Supp. 3d 515, 587-88 (D.N.J. 2023) (citing *Bruen*, 142 S. Ct. at 2149).

103. United States v. Stambaugh, 641 F. Supp. 3d 1185, 1191 n.25 (W.D. Okla. 2022).

104. *Id.* ("At the hearing, the United States also pointed to a 1759 New Hampshire law that it claimed was a surety statute . . . . As the Supreme Court noted in *Bruen*, the New Hampshire law 'merely codified the existing common-law offense of bearing arms to terrorize the people.'" (quoting *Bruen*, 142 S. Ct. at 2143)).

case which came from New York. Nonetheless Justice Thomas's characterization of the New Hampshire law—his historical narrative explaining what the law was intended to do—was enough for the subsequent Oklahoma judge to take it as settled and clear it off his desk.

Beyond surety laws, lower courts cite other judges as authority on a whole host of firearm-related historical claims: the purpose of old insurance requirements to hold firearms,[105] the reasons behind disarming Native Americans and enslaved persons,[106] and, of course, the motivations of the founders to protect the right to bear arms in the first place.[107]

The use of historical precedents in this way—to tell a story—is an understandable consequence of the way modern judicial opinions in the United States are written. Recall Cass Sunstein's essay on a "useable past."[108] The nature of legal advocacy (and its consumption by judges) means that decisions will be explained with historical narratives, whether those narratives are key to the cases' outcome or not. As opinions get longer and fatter—meaning they come with more background and more citations—the pool of historical quotes to cite is only going to grow.[109]

D. Rhetorical Flourishes

Finally, the last category of historical precedents I have seen cites language that is used initially for rhetorical flourish, but then is repeated for the truth of the matter asserted in a subsequent opinion. An instructive example in the Second Amendment context (although not a historical claim) is Judge Posner's language from a challenge to open carry laws. Judge Posner says, "[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."[110] This statement—made without citation—is then repeated by a handful of other courts as authority for the factual proposition that the need for self-defense is greater

105. *Nat'l Ass'n for Gun Rights*, 618 F. Supp. 3d at 917.

106. United States v. Benito, 739 F. Supp. 3d 486, 494 (S.D. Miss. 2024) (citing Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting)); United States v. Jackson, No. 23-CR-62, 2024 WL 1160304, at *10 (N.D. Miss. Mar. 18, 2024) (citing *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting)).

107. United States v. Goins, 647 F. Supp. 3d 538, 549 (E.D. Ky. 2022) (citing *Kanter*, 919 F.3d at 454-55 (Barrett, J., dissenting)).

108. *See generally* Sunstein, *supra* note 57 (explaining how lawyers use history to build arguments).

109. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1620-21 (2020) (criticizing the overuse of imprecise legal citations).

110. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).

outside the home than inside it.[111] What makes this category distinctive is that the factual claim is initially used as an aside, most likely to make an argument more accessible or entertaining to a reader.

Heller provides a good example. At the end of his opinion, responding to the dissent, Justice Scalia says:

> All of [the laws cited by Justice Breyer] punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking.[112]

The analogy to jaywalking is certainly memorable. Like so many of Justice Scalia's turns of phrase, it was most likely added to provide color and stick in the mind. But fast-forward a little more than a decade, and after *Bruen*'s instructions to find historical analogies, this language from Justice Scalia comparing colonial gun laws to jaywalking takes on a greater significance.

In *Koons v. Platkin*, which challenged (among other things) New Jersey's 2022 law requiring insurance to obtain a firearm-carry permit, the government relied on nineteenth-century surety laws as a historical analogue.[113] Because surety laws were imposed as a preventive measure in colonial times, the analogy to modern insurance mandates (also preventative in nature) is rather tempting.[114] After acknowledging that surety laws and insurance mandates were both motivated by crime prevention, the district judge in *Koons* quoted another judge quoting Justice Scalia's language from *Heller*, concluding that these historical analogues "were 'akin to modern public safety infractions like speeding or jaywalking,'" and thus insufficient to support the modern law requiring insurance to own a firearm.[115]

But the jaywalking language from *Heller* was decidedly not about insurance mandates. Justice Breyer brought up three different colonial laws—in Philadelphia (passed in 1721), Boston (passed in 1746 and revived in 1778), and New York (passed in 1771)—each of which imposed fines for the *discharge* of a

111. *See, e.g.*, Solomon v. Cook Cnty. Bd. of Comm'rs, 559 F. Supp. 3d 675, 699 (N.D. Ill. 2021) (quoting *Moore*, 702 F.3d at 937); GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 38 F. Supp. 3d 1365, 1375 (N.D. Ga. 2014) (same), *aff'd*, 788 F.3d 1318 (11th Cir. 2015); Grace v. District of Columbia, 187 F. Supp. 3d 124, 144 (D.D.C. 2016) (same); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022) (same).

112. District of Columbia v. Heller, 554 U.S. 570, 633 (2008) (footnote omitted).

113. 673 F. Supp. 3d 515, 580, 587-88 (D.N.J. 2023).

114. See *id.* at 587-88 for a discussion of the analogy.

115. *Id.* (quoting Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017) (quoting *Heller*, 554 U.S. at 633)). For other examples of lower courts using this jaywalking language from *Heller*, see *Wrenn*, 864 F.3d at 661; and Young v. Hawaii, 896 F.3d 1044, 1062 (9th Cir. 2018), *rev'd en banc*, 992 F.3d 765 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022).

weapon in certain circumstances (within city limits).[116] Justice Scalia was not convinced, saying in response that these laws were so trivial in their punishment that it was "implausible that [they] would have been enforced against a citizen acting in self-defense."[117]

Justice Scalia's language—which was issued on page 64 of a 67-page opinion[118]—was then repeated fifteen years later as authority to dismiss a new kind of law about a different type of firearm restriction.[119] The relevant part of *Koons v. Platkin* was not about fines for the discharge of weapons; it was about insurance mandates.[120] It takes an additional step to conclude that surety laws—like the laws from the Breyer opinion refuted by Justice Scalia—were also trivial in nature. Instead of reasoning through that move, the district court judge relied on Justice Scalia's language about jaywalking.[121] She did so despite the fact that Justice Scalia did not claim to be evaluating surety laws nor was he commenting on whether surety laws were analogous to insurance mandates. Indeed, that would have been unusual for him to do because neither issue was in front of the Court in *Heller*.

Maybe the New Jersey district judge would have reached the same result with or without the jaywalking quote from *Heller*. But authorities matter in the law. The authority for this particular point were the words of a Supreme Court Justice weighing in on history he was not fully briefed on and used to settle a debate he likely did not think he was settling at all. If you are left scratching your head at this point, you are not alone.

III. Risks to Making Historical Precedents

Why does it matter if judges are citing each other for history? I think it matters for at least three practical reasons: (1) courts can get history wrong, particularly given the procedures they use to research it; (2) our understanding of history changes, which means cementing it into precedent is unwise; and (3) we cannot be confident the characterizations of history in judicial opinions are intended to be authoritative and thus made with the level of care that comes with that intent.

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116. *See Heller*, 554 U.S. at 683-84 (Breyer, J., dissenting); Act of Feb. 16, 1771, ch. 1501, *in* 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 244, 244-45 (Albany, James B. Lyon, State Printer 1894) (imposing fines for firing any firearm around New Year's Day).

117. *Heller*, 554 U.S. at 633-34 (majority opinion).

118. *See id.* at 633.

119. *See Koons*, 673 F. Supp. 3d at 587-88.

120. *See id.* The litigation involved a whole host of challenges, but the relevant excerpted language came in the discussion of the insurance mandate.

121. *Id.*

A. Historical Mistakes

First, because courts are not institutionally structured to sort through historical authorities, the risk of missing important context is particularly acute. One need not look further than the reception of *Bruen* to see historians crying foul after a Supreme Court opinion was handed down.[122] Historians claimed that the Court misunderstood context, cherry-picked its authorities, or perpetuated a myth that gun culture in America has stayed the same since the colonial era, ignoring profound differences between then and now.[123]

There are good reasons to worry that the courts will get the history wrong. Factual claims and historical authorities come to the Supreme Court's attention in a procedurally haphazard way. Sometimes these sources are brought in through expert testimony at trial; other times they come in through amicus practice (at the eleventh hour and barely tested by the adversarial system); still other times they come in through judicial in-house research.[124]

The confusion comes from a well-entrenched—although highly confusing—distinction between so-called "legislative facts" and "adjudicative facts."[125] The latter are the stuff of normal litigation—"the who / what / where / why questions" that would typically "go to a jury."[126] The former, however,

122. *See, e.g.*, JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 218 (2024) ("The [*Bruen*] Court looked in the wrong place . . . out of historical ignorance. By failing to understand how early U.S. law worked, by assuming that law must have worked as law works now, the Court obscured the very historical traditions it sought to recover.").

123. *See, e.g.*, Saul Cornell, *Founding Fantasies vs. Historical Realities in the Second Amendment Debate*, DUKE CTR. FOR FIREARMS L. (July 27, 2023), https://perma.cc/9JLB-LJZU ("It would be tempting to conclude that historical reality is irrelevant to modern Second Amendment jurisprudence given the trio of decisions by the Supreme Court in *Heller*, *McDonald* [*v. City of Chicago*, 561 U.S. 742, 773 (2010)], and *Bruen*."); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (June 27, 2022), https://perma.cc/D9LD-MUFA; Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 630 (2023) ("[A] small contingent of writers have willfully and repeatedly distorted historical evidence in the Second Amendment context and, in the process, put forth countless baseless historical claims—claims no less that *Bruen* accepted as historically viable. By this author's count, there are more than a dozen examples in *Bruen*." (footnote omitted)); Brian DeLay, Bruen *& The Myth of Continuity in American Gun Culture*, DUKE CTR. FOR FIREARMS L. (Sept. 18, 2023), https://perma.cc/ED6J-7H82 (criticizing the *Bruen* opinion for perpetuating the "myth of continuity" and arguing that "[n]o one who seriously studies guns in eighteenth century American life can fail to appreciate the profound differences between then and now").

124. For examples from all three of these procedural avenues, see generally Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) [hereinafter Larsen, *Confronting*]; Larsen, *supra* note 51; and Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) [hereinafter Larsen, *Trouble*].

125. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-06 (1942).

126. *See* Larsen, *Confronting*, *supra* note 124, at 1256-57.

are generalized facts about the way the world works, not limited to any particular case.[127]

This line is notoriously difficult to draw, but it matters a great deal because legislative facts are exempt from the Federal Rules of Evidence.[128] Indeed, the Advisory Committee's notes to the rule about judicial notice actually "encourage unfettered use" of these facts about the world.[129] This "free-for-all" process for legislative facts leads David Faigman—a leading scholar in this field—to conclude that the law on this procedural question is unregulated, "chaotic," and "a slapdash affair."[130]

Ultimately, as I have fretted before, both the Supreme Court and lower appellate courts are inundated with untested claims from motivated groups in amicus briefs, without the institutional staff or time to fact-check them.[131] Having a wide-open field of factual assertions at one's fingertips exacerbates confirmation bias and—even assuming the best-intentioned jurist—inevitably leads to mistakes.[132] I have found evidence in the past, for example, of factual claims cited by the Supreme Court that rely on shaky authority—as in sources no longer in existence, studies funded by motivated actors, or articles written by minority players in their fields.[133]

For historical claims, the Ninth Circuit provides an instructive example. After *Heller* in 2008 but before *Bruen* in 2022, a panel of the Ninth Circuit confronted a Second Amendment challenge to California's ban on high-capacity magazines in a case called *Duncan v. Bonta*.[134] Because this was a pre-*Bruen* case, circuit courts were still mostly avoiding history-and-tradition analysis and

127. Note that despite the name, a "legislative fact" does not mean the fact needs to have been found by a legislature. It can be, but it does not have to be. The name derives from the "legislative" role of the judiciary: making predictions and using descriptive claims as "building blocks" to form a legal argument. *See id.* (quoting Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988)); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991).

128. *See* FED. R. EVID. 201(a) & accompanying Advisory Committee's note; Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 153 (2008).

129. *See* Thornburg, *supra* note 128, at 153 ("The Federal Rules of Evidence and their state counterparts limit only judicial notice of adjudicative facts. Further, the Advisory Committee Notes encourage unfettered use of legislative facts, arguing that judicial access to legislative facts should not be restricted to any limitation in the form of indisputability or formal notice." (footnote omitted)).

130. *See* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS at xii, 98 (2008).

131. Larsen, *Trouble*, *supra* note 124, at 1784-800.

132. *See id.*

133. *Id.*

134. 19 F.4th 1087, 1095-96 (9th Cir. 2021) (en banc), *vacated*, 142 S. Ct. 2895 (2022).

instead employing an interest-balancing test known as intermediate scrutiny.[135] The dissent by Judge Bumatay, however, embraced history and tradition as the relevant touchstone to decide the case and then went on to elaborate what the judge perceived to be the history of semi-automatic or multi-shot weapons in the United States.[136]

Asserting that "[f]irearms and magazines capable of firing more than ten rounds have existed since before the Founding of the nation," Judge Bumatay cited multiple examples from the past, including something "called the Girandoni air rifle," which had a "22-shot magazine capacity."[137] Judge Bumatay called the Girandoni a "state-of the-art [sic] firearm" at the time of the Founding.[138] Buttressing his claim, he also referenced a firearm created in the 1500s that could fire up to sixteen rounds.[139] And he discussed "Pepperbox" guns, which Judge Bumatay said were "commercially successful" in the 1830s,[140] close to the time of the Fourteenth Amendment's ratification.

But this historical account suffers from a lack of context on multiple fronts.[141] As Robert Spitzer explains in an article tracking the history of multi-shot firearms—in the way Judge Bumatay purports to do—the 1500s firearm capable of firing sixteen rounds is "described in a book titled, *Firearms Curiosa*. But this book's very title indicates why this narrative is irrelevant to the modern gun debate. The definition of 'curiosa' is something that is rare or unusual."[142] Moreover, regarding the Girandoni rifle, Spitzer writes: "'The Girandoni air rifle is a might-have been; a footnote to military history.' In fact, the rifles never caught on as they proved to be impractical on the battlefield, and even more so for civilian use."[143] And finally, regarding the Pepperbox guns, Spitzer explains that, although they found some popularity in the early 1800s, they rapidly lost

135. *Id.* at 1096, 1100.

136. *Id.* at 1140, 1154-55 (Bumatay, J., dissenting).

137. *Id.* at 1140, 1154.

138. *Id.* at 1154.

139. *Id.*

140. *Id.*

141. In the interest of time, I have only provided a few examples, but for an in-depth historical analysis that contradicts Judge Bumatay's historical claims, see Robert J. Spitzer, *Understanding Gun Law History After* Bruen*: Moving Forward by Looking Back*, 51 FORDHAM URB. L.J. 57, 72-84 (2023).

142. *Id.* at 72.

143. *Id.* at 76 (footnote omitted) (quoting Mike Markowitz, *The Girandoni Air Rifle: A Weapon Ahead of Its Time?*, DEF. MEDIA NETWORK (May 14, 2013), https://perma.cc/Z7AL-BNGA).

popularity due to "frightening flaws," including their weight, short range, and "nasty habit of discharging all their barrels at once."[144]

Judge Bumatay's historical account—written in dissent in a case in which the challengers eventually lost en banc a second time[145]—might not seem like that big of a deal, even if it was faulty. But, as demonstrated above in Part I, the consequences of these historical claims can be far-reaching if they are repeated by future courts as authoritative.[146]

And that is happening. Indeed, in a 2024 case about a high-capacity magazine ban in Washington, D.C., Judge Walker's dissent cited Judge Bumatay as authority on the history of regulation of such weapons.[147] He asserted confidently that "[p]lus-ten magazines also have 'a long historical lineage.' 'They enjoyed widespread use throughout the nineteenth and twentieth centuries,' with 'no longstanding prohibitions against them.'"[148] And the only authority cited for this claim was Judge Bumatay's dissent in *Duncan*.[149]

Even putting aside the possibility of judicial error, flawed history in judicial opinions is perhaps inevitable because of the modern reality that "new old laws" are being discovered every day. Not all archives have been digitized, and they are not all in the same place. Even the repository of gun laws kept by the formidable Duke Center for Firearms Law explicitly disclaims having a comprehensive set of historical regulations.[150] This means that the search for "history and tradition" of firearm regulation must often take place in dusty old rooms of courthouses across the country, leading gun control groups like Moms Demand Action to "dispatch[] volunteers . . . to courthouse basements and local

144. *Id.* at 78 (first quoting Will Adams, *Pepperbox Pistols: Last Line of Defense*, RELICRECORD, https://perma.cc/9Q5Q-SNN5 (archived Nov. 20, 2025); and then quoting LARRY KOLLER, THE FIRESIDE BOOK OF GUNS 154 (1959)).

145. Duncan v. Bonta, 133 F.4th 852, 883-84 (9th Cir. 2025) (en banc).

146. As for this specific example, some courts have indeed cited Judge Bumatay's account of the historical pedigree of high-capacity firearms, but others have treated his account with skepticism, likely owing to the Spitzer article. *Contrast* Arnold v. Kotek, No. 22CV41008, 2023 WL 12078798, at *3-5 (Or. Cir. Ct. Nov. 24, 2023) (recounting a history of Pepperbox guns similar to Judge Bumatay's dissent), *rev'd*, 566 P.3d 1208 (Or. Ct. App. 2025), *review allowed*, 571 P.3d 1096 (Or.), *with* Or. Firearms Fed'n v. Kotek, 682 F. Supp. 3d 874, 900, 928 (D. Or. 2023) (relying on Spitzer as an expert witness in analyzing historical gun regulations). That skepticism is, I think, desirable, but of course not inevitable.

147. Hanson v. District of Columbia, 120 F.4th 223, 270 n.176 (D.C. Cir. 2024) (Walker, J., dissenting), *cert. denied*, 45 S. Ct. 2778 (2025).

148. *Id.* (citation omitted) (quoting Duncan v. Bonta, 19 F.4th 1087, 1140 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting), *vacated*, 142 S. Ct. 2895 (2022)).

149. *Id.*

150. *Repository of Historical Guns Laws*, DUKE CTR. FOR FIREARMS L., https://perma.cc/5RUF-6TU6 (archived Nov. 20, 2025) ("Although the Repository seeks to be substantial, it is not comprehensive. The absence of a certain type of law in the Repository does not necessarily mean that such a law did not exist." (emphasis omitted)).

archives all over the country to dig up some of the oldest, most overlooked gun laws in the nation's history."[151] That reality—that new old laws are discovered every day—presents another reason to pause and think about the use of historical precedents.

B. Changes in Our Understanding of History

Even if the courts get the history right, we quickly run into another concern: Our understanding of history can change, which means cementing it as final in the U.S. Reports is unwise.

A good example here comes from an employment discrimination lawsuit in the 1980s, *EEOC v. Sears, Roebuck & Co.*[152] Although perhaps not as prominent a case as *Bruen* or *Rahimi*, historians often cite this case as an example of putting history on trial and asking the law to side with one account or the other.[153] The case involved the Equal Employment Opportunity Commission hiring guidelines, passed after Title VII, requiring companies to increase hiring and salary equity for racial minorities and for women.[154] When Sears challenged the authority of the agency to require this, it argued that the reason for its lack of female managers was a historical preference of women to seek "familiar or nonthreatening" jobs.[155] This preference, they argued, explained the absence of women from sales jobs that work on commission and particularly those jobs selling "traditionally male products" like plumbing and automobile parts.[156]

Two notable historians, Alice Kessler-Harris and Rosalind Rosenberg, testified at the *Sears* trial.[157] Rosenberg took the position that "[h]istorically, men and women have had different interests, goals, and aspirations regarding work. These differences in interests and attitudes, though in many instances diminishing, have persisted into the present."[158] Her testimony was thoroughly

151. 99% INVISIBLE: *Fact Checking the Supreme Court* (June 4, 2024), https://perma.cc/65K8-GUZP. For more on this story—and insights into the group's progress so far—see Mark Joseph Stern, *The Volunteer Moms Poring Over Archives to Prove Clarence Thomas Wrong*, SLATE (Aug. 31, 2023, 5:45 AM EDT), https://perma.cc/LQM6-6XA7.

152. 839 F.2d 302 (7th Cir. 1988).

153. *See, e.g.*, Jacquelyn Dowd Hall, *Preface by the Board of Associate Editors* to *Women's History Goes to Trial:* EEOC v. Sears, Roebuck and Company, 11 SIGNS: J. WOMEN CULTURE & SOC'Y 751, 751-52 (1986) [hereinafter *Women's History Goes to Trial*]; JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 167-70 (1988).

154. Sandi E. Cooper, *Introduction to the Documents*, *in Women's History Goes to Trial*, *supra* note 153, at 753, 753-54.

155. *See id.* at 754-55.

156. *Id.* at 754.

157. *Id.* at 755.

158. Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79 C 4373), *in Women's History Goes to Trial*, *supra* note 153, at 757, 757.

researched and supported.[159] Kessler-Harris disagreed, however, and testified that "new historical information calls into question the idea that women can 'choose' not to work in certain areas, and insists that choice can be understood only within the framework of available opportunity."[160] Her work, too, was thoroughly supported by (different) primary sources.[161]

Ultimately, the trial court sided with Sears and Rosenberg, and the Seventh Circuit affirmed.[162] The case stirred up significant controversy among historians on multiple fronts—including the propriety of historians "put[ting] their work at the service of policymakers" at all.[163] One specific brand of criticism, however, is particularly interesting because it involves the worry of cementing the state of historical knowledge at one moment in time. Jacquelyn Dowd Hall explained it this way:

> Although the expert witnesses in the Sears case cited numerous scholarly sources, the literature on working women, particularly in the twentieth century, is relatively thin. Has the emphasis of the new scholarship on white middle-class women in the nineteenth century distorted the female past? Have we ignored diversity in our search for commonalities? How different would this debate have been if black women, for instance, were fully represented in the literature? Why was there so little mention of labor segmentation theory, and what bearing might those theories have on antidiscrimination law?[164]

The concern here is not that the judge in *Sears* was sloppy or overly casual with historical sources; indeed, the litigation involved a full trial with qualified and well-documented experts testifying on both sides. Instead, the worry is more fundamental than that. There is a basic mismatch between law and history that this example exposes: Law seeks finality (a firm answer), but history rejects finality—our understanding of it changes as we change. It is therefore risky business to cement one account of history into a judicial decision that then becomes authority for other future judicial decisions. Stare decisis in general promotes stability but inhibits change.[165] That cost-benefit analysis is one thing when talking about legal interpretations, but another when thinking about historical accounts.

This calculus is made even more complicated by technological advances. Judge John Bush of the Sixth Circuit recently suggested that artificial

159. *See id.* at 759-63.

160. Written Testimony of Alice Kessler-Harris, *Sears*, 628 F. Supp. 1264 (No. 79 C 4373), *in Women's History Goes to Trial*, *supra* note 153, at 767, 767.

161. *See id.* at 768-78.

162. EEOC v. Sears, Roebuck & Co, 839 F.2d 302, 360 (7th Cir. 1988).

163. Hall, *supra* note 153, at 751.

164. *Id.* at 752.

165. *See generally* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017) (exploring the benefits and costs of stare decisis).

intelligence (AI) could help judges research and evaluate historical records necessary for originalist historical analysis.[166] He suggested that

> the technology could, if it had a sufficiently comprehensive database of historic writings, show a judge how a particular constitutional provision would have been understood at the time it was ratified. Such a database could also draw on personal letters and other materials to show how language was understood by the general public, not just the drafters . . . .[167]

Put to the side for the moment the risk of AI hallucination or the danger that judges will not know enough to recognize a historical hallucination when they see one. The data upon which such a model would draw changes all the time.

Consider, for example, *Heller*—a decision that is only seventeen years old. In that short amount of time, we have learned some new history about the usage of the phrase "right to bear arms." Darrell Miller and others have written about how the historical sources cited in *Heller* on the use of those words in the Second Amendment were woefully incomplete, and perhaps inevitably so.[168] Miller wrote:

> Whereas a decade ago the linguistic briefing on the meaning of "bear arms" was confined to a sample of just 115 sources, today, through big data sets of historical materials—like the Corpus of Founding Era American English ("COFEA"), the Corpus of Early Modern English ("COEME"), and Google books—historical and linguistic researchers can comb through billions of words to find these terms.[169]

My point today is not to criticize the history in *Heller*, but to recognize the reality that the passage of time has shown wear and tear on the decision since it came down. Because new historical sources are always getting digitized or discovered, binding ourselves to one canvas of sources risks cementing the law to an outdated account of the past.[170]

Haley Proctor wrote about this concern—that history changes—in a recent thoughtful essay.[171] In the context of *Bruen*, Proctor assumes that the Second

166. *See* Suzanne Monyak, *AI to Make Originalist Historical Analysis Easier, US Judge Says*, BLOOMBERG L.: U.S. L. WEEK (Apr. 1, 2024, 2:55 PM PDT), https://perma.cc/GYA9-F23H.

167. *Id.* (citing John Bush, Circuit Judge, U.S. Ct. of Appeals for the 6th Cir., Remarks to the University of Chicago Federalist Society (Apr. 1, 2024)).

168. Miller, *supra* note 24, at 159-62; *see also* Phillips & Blackman, *supra* note 24, 612-14 ("[The opinions in *Heller*] considered only a fairly narrow range of sources to interpret the text.").

169. Miller, *supra* note 24, at 160 (footnote omitted).

170. Similarly, the *Heller* majority declared that the term "bear arms" only had a clear military meaning when preceding the word "against." District of Columbia v. Heller, 554 U.S. 570, 586 (2008). *But see* Phillips & Blackman, *supra* note 24, at 625-27 (criticizing this distinction and finding the cited amicus brief not to support it).

171. *See generally* Proctor, *supra* note 6 (exploring the impact of evolving understandings of history on precedent). Proctor focused in particular on the concern as it was posed by

footnote continued on next page

Amendment "'codif[ied] a *pre-existing* right' [with] a definite meaning," which she calls "a shape."[172] She then points out that even if the outlines of that shape look fuzzy to us at any given point in time because we don't know enough history, the doctrine of stare decisis allows us to change course if we uncover new historical evidence that "sharpen[s] our picture" of the true shape of that pre-existing right.[173] Because history often forms the premise of a legal rule, she argues, it does not matter if history comprises questions of fact or questions of law; either way, stare decisis—specifically the view of stare decisis espoused by Justice Thomas and others that "demonstrably erroneous" precedents can be overturned—allows us to course-correct when necessary.[174]

I think Proctor is right that stare decisis allows some wiggle room when the facts change. Even the discussion of the concept in *Planned Parenthood of Southeastern Pennsylvania v. Casey* accounts for pivots when our "understanding of the facts" evolves.[175] But consider the practical reality of the pace of that evolution, or the likelihood of the Supreme Court revisiting its precedent when only the facts have evolved. The change in our understanding of the fuzzy shape would have to, in reality, be dramatic enough to generate consensus. Then it would still need to work its way up through the courts and culminate in a certiorari grant, which in turn would depend on the Justices being motivated to make a big shift in the law. Absent a significant personnel change at the Court, this all seems highly unlikely to happen.

And what are lower courts to do in the meantime? If the practice of citing historical precedents remains rampant, the reach of that faulty history will only continue to grow in the lower courts over time until the drumbeat for change loudens and perhaps the actors in a position to make a pivot are changed themselves.

Relying on stare decisis to fix outdated history, in other words, is clunky, slow, and only going to work in correcting the most egregious of errors. And perhaps even that prediction is optimistic. Louis Fisher has studied historical evidence used in an old 1936 Supreme Court decision about executive power that historians (and even new generations of law students reading primary source material) agree was taken out of context and does not stand for the proposition

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the dissent in *Bruen*: "Will the meaning of the Second Amendment change if or when new historical evidence becomes available?" *Id.* at 454 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting)).

172. *Id.* at 459 (first alteration in original) (quoting *Bruen*, 142 S. Ct. at 2130 (majority opinion)).

173. *Id.* at 459-60, 462-65.

174. *See id.* at 464-65.

175. *See* 505 U.S. 833, 863 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

it is cited for.[176] But it has been almost 100 years, and no correction is in sight.[177] Language in the Supreme Court—even erroneous dicta that are demonstrably false—tends to "stick." As he says, "There's something about the legal profession . . . . If it's a precedent, it has a magic to it no matter how erroneous."[178]

C. Process Worries: Misplaced Authority

Finally, we come to the big question: Can Supreme Court Justices (or their counterparts on the appellate courts) even claim to be authorities on history? Do they want to be? Just as it is doubtful that Justice O'Connor was purporting to bind all future judges to one answer on a medical question about carpal tunnel,[179] it seems peculiar to assign to nine lawyers the job of refereeing the validity and context of historical sources and then settling those disputes for everyone for the foreseeable future.

To understand the oddity, we need to return to the distinction between dicta and holding. In a lecture at New York University about two decades ago, Judge Pierre Leval spoke about his concern that "dicta no longer have the insignificance they deserve" and have unfortunately begun "flex[ing] muscle."[180] In addition to constitutional concerns, Judge Leval articulated practical ones: He argued that when judges utter dicta, they are "more likely to exercise flawed, ill-considered judgment."[181] This means "[g]iving dictum the force of law increases the likelihood that the law we produce will be bad law."[182]

What did he mean by this? I think his concern had to do with the process through which dicta are included in an opinion. Judge Leval pointed out that when a judge utters dicta, he is more often than not working in a space where the briefing is thin and the "salutary adversity is often absent."[183] But even more

176. Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 150, 172 (2016) (arguing that in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), Justice Sutherland "wholly mischaracterized the 'sole organ' speech given by John Marshall in 1800 when he served in the House of Representatives, distorting his remarks to imply expansive presidential powers in external affairs"); Jamie Schuman, *Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?*, NAT'L L.J. (Nov. 3, 2014), https://perma.cc/CD9R-37QP.

177. *See* Fisher, *supra* note 176, at 207 (noting that although the Supreme Court in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), declined to use *Curtiss-Wright* to further expand executive power, it "did not explain how Justice Sutherland flagrantly misrepresented the speech by John Marshall" and "left in place Sutherland's erroneous dicta").

178. Schuman, *supra* note 176 (quoting interview with Louis Fisher).

179. *See* note 10 and accompanying text.

180. Pierre N. Leval, Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

181. *Id.* at 1255.

182. *Id.*

183. *Id.* at 1261.

than that, the narrative claims that accompany a judicial decision are often *not* the product of collective deliberation. Judge Leval's insight here is into the inner workings of judicial decisionmaking, and it is powerful:

> When a panel of judges confers on a case, the judges generally focus on the outcome and on the reasoning upon which the outcome depends. Judges work under great time pressure. When the concurring chambers receive the writing judge's draft for their review, they are likely to look primarily at whether the opinion fulfills their expectations as to the judgement and the reasoning given in support. There is a high likelihood that peripheral observations, alternative explanations, and dicta will receive scant attention.[184]

Dictum, in other words, is made on the cheap.[185] It is not always briefed; it is not always argued; and it is not even always deliberated among those charged with making the decision. To give those statements authority later flies in the face of the process that generated them. In the words of Judge Leval, judges "pay[] no price" for dicta—and paying no price consequently means paying little attention.[186]

Think about what you imagine takes place in "conference"—the meeting between judges after a case is argued. Conferences are short. Rationales are only briefly discussed. "Let's see how it writes" is a phrase most law clerks are familiar with. Given what we know about collective judicial decisionmaking, it seems unlikely that details about historical evidence are actually voted on in a judicial conference, at least in most cases. They are more likely instead written in chambers by a solo author—whether she calls them narrative, stylistic choices, or factual underpinnings of the holding. The judges might vote on the bottom line drawn from the history, but the historical claims themselves are not given the spotlight or the scrutiny that judicial holdings receive.

My ultimate worry, therefore, relates to process. I am concerned that the quality of the deliberation when it comes to historical claims does not justify allowing them to bind—or at least heavily influence—decisionmakers in the future. To treat judicial historical narratives as authority, in other words, defies the reality of how those narratives actually came to be.

Indeed, to put a finer point on it, recall that the history that spawns precedents often comes from concurrences and dissents.[187] A concurring or dissenting judge is typically writing for himself or herself, but, in any event, by

184. *Id.* at 1262.

185. *Id.* at 1263 ("When a rule is uttered in dictum, the court pays no price; the statement comes free, as it has no consequence for the case. In my experience, when courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged.").

186. *Id.*

187. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); Duncan v. Bonta, 19 F.4th 1087, 1154-55 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting), *vacated*, 142 S. Ct. 2895 (2022); *see also supra* Part II (discussing other such cases).

definition not for the majority of the decisionmakers. On the courts of appeals in particular, no other judge on the panel would likely speak up to criticize the history contained in those separate opinions because, frankly, it is not really their business. That means that many of the historical claims that go on to become historical precedents are written without the type of collective scrutiny that we expect from appellate decisions. Not only is the risk of mistake heightened, but, more fundamentally, the citing judge is giving authority to a statement that cannot really claim to be authoritative.

It is interesting to think once more about then-Judge Barrett's *Kanter* opinion on the history of felon disarmament laws in this light. She was writing a dissent in that case,[188] which meant her words were not going to change anyone's legal rights, and she was not responsible for articulating the holding of the case. She had just concluded that Justice Scalia's history in *Heller* was dicta and did not bind her.[189] In *Kanter* itself, she says, "[J]udicial opinions are not statutes, and we don't dissect them word-by-word as if they were."[190] And then in her actual description of the history, then-Judge Barrett is careful not to overclaim. (She effectively says, "I have not seen," not "There is not.")[191] In light of all this, I am not confident then-Judge Barrett thought she was deciding for subsequent judges whether in colonial times the connection between capital punishment and felonies was "fray[ing]," or what the historical landscape of rights retained by felons looked like at the time of the Founding.[192] Her opinion reflects careful study, but it does not contain bold proclamations. It reads like a judge's take on the evidence before her, not a judge tasked with deciding for others the merit of historical claims. And yet—ironically—over 200 other judges have cited her dissent as authority.[193]

Once again we return to the fundamental tension between what history is and what law wants history to be. Judges are asked to reach a verdict, and that means canvassing the evidence and coming to a conclusion. But even if that conclusion binds other judges (e.g., the Second Amendment does or does not allow laws to forbid felon possessions of firearms), the historical narrative that leads to the conclusion is something different. Can a judge claim to be an authority on the history itself? I, at least, am skeptical.

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188. *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).

189. *Id.* at 453-54.

190. *Id.* at 454.

191. *See id.* ("[A]t least thus far, scholars have not been able to identify any such laws.").

192. *Id.* at 459, 461.

193. The actual number of opinions that cite then-Judge Barrett's *Kanter* dissent at the time of this writing is 413, although I do not know how many of those cite her for her historical claims (presumably, most of them, since it is a dissent and not the opinion that contains the holding). *See supra* notes 97-98 and accompanying text.

In this regard, consider one other cautionary tale. Citations to historical narratives in the Supreme Court can also alter the calculus of whether any particular historian is credible. In Colorado, for example, a lawsuit challenged a new law requiring a three-day waiting period and a background check before purchasing firearms.[194] The challengers to the law relied on history curated by Clayton Cramer, who testified as an expert witness.[195] The cross-examination of Cramer revealed some holes in his testimony—enough to raise the trial court's eyebrows and implicate doubts about Cramer's neutrality and expertise.[196]

But the judge then questioned his own skepticism because the relevant historian had been cited before by the Supreme Court. The judge explained, "Although it might be reasonable to question whether Professor Cramer is sufficiently qualified under Federal Rule of [Evidence] 702 to provide that [expert testimony], the Supreme Court has relied on his historical analysis on multiple occasions."[197] Interestingly, despite the boost in credibility from the blessing of a Supreme Court citation, the trial judge in this case went with his own instincts: "With respect, I find his testimony had significant shortcomings in persuasiveness and credibility."[198]

This example is remarkable because the Supreme Court is not just being treated as an authority on history, but as an authority on *historians*. If we worry that dicta are not reflective of five votes at the Court, what do we make of a single citation to a particular historian by a lone Justice?

IV. Going Forward: The Case for Nuance and Caution

So what should be done about historical precedents? As stated above, I have much sympathy for the lower court judge with a Second Amendment challenge on her docket. It is unrealistic—and certainly inefficient—to expect every historical claim made by a litigant to be evaluated by every trial judge in every district in the country. My goal in this concluding Part is to offer guidance to the good-faith lower court judge on *when* historical precedents should be deployed, and when they should not.[199]

194. Rocky Mountain Gun Owners v. Polis, 701 F. Supp. 3d 1121, 1124 (D. Colo. 2023).

195. *Id.* at 1128, 1130.

196. *Id.* at 1130-31, 1130 nn.5-6.

197. *Id.* at 1130 (first citing McDonald v. City of Chicago, 561 U.S. 742, 773 (2010); and then citing District of Columbia v. Heller, 554 U.S. 570, 588 (2008)). The trial judge went on to deny the challengers' request for a preliminary injunction, *id.* at 1149, but my point is about the court's evaluation of Cramer's credibility, a calculus influenced by the Supreme Court's past citation of Cramer's work.

198. *Id.* at 1131.

199. In this regard, I align myself with the good company of Maggie Gardner, who in her *Dangerous Citations* article explained, "Put another way, the effort here is to help judges

footnote continued on next page

As explained below, ultimately this question is all about the nature of authority; under what circumstances can a lower court trust that another judge is an authority on history?[200] Not all historical claims are the same, nor were they all similarly thought through by the initial decisionmaker. And so we need to look under the hood, so to speak, before we just accept the work and the conclusion as truth. My proposed solution, therefore, calls for nuance and caution.

To guide courts in handling historical precedent, I propose evaluating three dimensions: (1) the source of the historical claim and its legal status, (2) the procedural rigor behind the claim's development, and (3) the function the historical claim served in the original legal reasoning. By examining these three dimensions, courts can better determine when historical assertions deserve deference.

A. Source Authority: What Makes a Precedent a Precedent?

The first place for caution comes with a deceptively easy question: What is a precedent, anyway? At a basic level, in the words of Fred Schauer, "[p]recedent is centrally about the (not necessarily conclusive) obligation of a decisionmaker to make the same decision that has been made on a previous occasion about the same or similar matters."[201]

But, of course, it is more complicated than that, as Schauer explains. A decision can be precedent in the vertical sense—meaning it binds judges below it in the judicial hierarchy.[202] A decision can also be precedent in the horizontal sense—meaning a judge is obligated to follow a previous decision made by the same court but at an earlier time (this is what lawyers generally mean when they use the phrase "stare decisis").[203] These two forms of precedent share a very important feature, however: They are both constraining. In the strictest sense of the word, a "precedent" has force precisely when the second decisionmaker disagrees with the first decision but feels obligated to go with it anyway.[204] We can call this "binding precedent."

Going back to the examples of Second Amendment historical precedents discussed above, some judges on lower courts speak as if statements about history from other judges are in fact binding on another decisionmaker's judgment—that is, they imply the prior statements restrict the current judge's

and their law clerks who are trying to get it right to get it right more often." Gardner, *supra* note 109, at 1624.

200. As noted above, related questions have been addressed by philosophers who study social epistemology. *See supra* note 32.

201. Schauer, *supra* note 35, at 123.

202. *Id.* at 124.

203. *Id.*

204. *Id.*

option to interpret the historical evidence in another way. For example, in a very recent case, a panel from the Sixth Circuit explained that they were "bound" not just by the legal rule of a prior panel, but by the "historical analysis" in the opinion as well.[205]

But that can't be right, or at least it can't explain every instance of a historical precedent. For one thing, remember that many of the prior opinions the lower courts are relying upon are actually concurrences or dissents—and separate opinions don't bind anyone.[206] But even beyond those easier examples, there are certainly times when the history is being used by the first judge rhetorically—as in not core to the legal reasoning or even close.[207] And those historical descriptions are also not binding on subsequent judges, even if they appear in a majority opinion.

Most of these lower court judges, therefore, must be using precedent in a different sense of the word. And that imprecision is understandable. Lawyers tend to call all citations to prior cases "precedent," but that label is not quite right and potentially misleading.[208]

In the same essay on precedent, Fred Schauer explains that it is a common mistake to equate arguments from analogy with arguments from precedent.[209] The former are a form "of persuasion . . . but not of constraint."[210] And that distinction matters. "Analogical argument," Schauer tells us, "involves the selection of a source analog . . . that the maker of the argument believes will be persuasive, but genuine precedential decisionmaking is neither about choice nor persuasion."[211] It is not unusual, for example, for a lawyer to say to a judge in New Jersey "there is precedent in Montana for this result," even though all agree the New Jersey court is not bound to follow what the Montana court did.[212] It is

205. United States v. Morton, 123 F.4th 492, 497 n.2 (6th Cir. 2024) ("We are bound by [a prior Sixth Circuit case's] historical analysis and the conclusions drawn from it as applied to felons who . . . have committed violent crimes against a person.").

206. For examples, see Part II above (discussing, inter alia, cases that rely on then-Judge Barrett's dissent in *Kanter* or on Judge Bumatay's dissent in *Duncan*).

207. A good example of this would be Justice Scalia's comparison of old firearm laws to jaywalking at the end of his opinion in *District of Columbia v. Heller*, 554 U.S. 570, 633 (2008). *See also supra* Part II.D.

208. Schauer, *supra* note 35, at 127 (noting that "in legal discourse the source analogs are frequently referred to as 'precedents,' which in much of law is the umbrella term used to designate any previous decision of any court," and that this broad use of the term "encourages the failure to distinguish genuinely constraining precedents from those previous decisions of various courts that . . . did not deal with precisely the same question").

209. *Id.* at 125.

210. *Id.*

211. *Id.* at 126 (citation omitted).

212. *Id.* at 127.

"precedent," I suppose, in the loose understanding of the word, but it is not constraining a judge's discretion.

Lawyers commonly call this type of precedent "persuasive authority," even though, as Schauer explains, that phrase is a bit of an oxymoron since "persuasion and authority are inherently opposed notions."[213] "A judge who is genuinely persuaded by an opinion from another jurisdiction is not taking the other jurisdiction's conclusion as authoritative," Schauer explains.[214] Instead, "she is learning from it, and in this sense she is treating it no differently in her own decisionmaking processes than she would treat a persuasive argument that she has heard from her brother-in-law or in the hardware store."[215]

Applying that persuasive authority/binding authority distinction to our current puzzle is quite revealing. Consider if a judge today says, "Surety laws were widespread in colonial times, *see Bruen*."[216] Maybe that is not a precedent in the strictest sense of the word because the judge is not really saying, "I am restricted by the historical/empirical conclusion reached by five Justices on the Supreme Court."[217] It is rather more of a shorthand: "I looked at the *Bruen* discussion of the history around colonial surety laws, and I am persuaded by the work those Justices did in analyzing it/counting them, so I am adopting it as my own."

So if not binding, what would make a historical claim by a first judge persuasive to a second judge? Part of the persuasive power has to do with the source of the statement in question. Fred Schauer had characteristically wise things to say on that score too in his essay *Authority and Authorities*: "[L]aw is, at bottom, an authoritative practice, a practice in which there is far more reliance than in, say, mathematics or the natural sciences on the source rather than the content (or even the correctness) of ideas, arguments, and conclusions."[218]

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213. Frederick Schauer, Essay, *Authority and Authorities*, 94 VA. L. REV. 1931, 1940, 1943-44 (2008) ("Is 'persuasive authority' an oxymoron?" (capitalization altered)).

214. *Id.* at 1943.

215. *Id.* (emphasis omitted).

216. *Cf., e.g.*, United States v. Silvers, 671 F. Supp. 3d 755, 771-72 (W.D. Ky. 2023) ("These statutes were widespread: numerous states enacted surety statutes, which targeted 'those threatening to do harm.' Indeed, *Bruen* itself identified ten surety statutes over a broad period of time." (citation omitted) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2148 (2022))).

217. I do acknowledge, as I have in the past, that Supreme Court dicta are not a throwaway. A good quote from the Supreme Court—even if dicta—can go a long way. *See* Larsen, *supra* note 7, at 62; *see also* Re, *supra* note 39, at 967 ("However, the Second Circuit—like most federal courts of appeals—recognizes that Supreme Court dicta 'must be given considerable weight,' despite its lack of formal precedential status." (quoting United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975))).

218. *See* Schauer, *supra* note 213, at 1934 (footnote omitted).

Like a parent who tells a child, "Because I said so," what matters in legal argument is often "not what the reason says but where it comes from."[219] Even if not binding, therefore, this is part of what is happening with historical precedents. It explains why in many of the examples I found the first judge or justice who was cited is, for lack of a better word, famous. The reason to cite Amy Coney Barrett or Dick Posner or John Roberts is because those are people we have heard of, and perhaps admire.

This is consistent with citation practice in the law generally. Courts often cite legal sources not because they are bound to do so—or even because they are persuaded by their reasoning—but because the first judge deserves "respect" or because they are found to be "trustworthy."[220] A legal argument is "often understood to be a better legal argument just because someone has made it before . . . . [It is] the legal equivalent of [saying] 'I am not making this up.'"[221] That is particularly true when the first speaker is well-known and respected.

But when it comes to judicial consumption of historical claims, this dynamic "hits different" (as the kids say).[222] Very few judges are trained historians. There is a real danger with citing historical evidence as true just because a famous judge said it once before. For one thing, it can lead to a distorting game of telephone—repeating factual claims and then soundbites of factual claims and then soundbites of soundbites of factual claims.[223] For another, it will certainly elevate specific voices, perhaps idiosyncratically, and not because they have any particular aptitude for historical analysis.

Furthermore, as Maggie Gardner has persuasively argued, sometimes unnecessary citations are not just gratuitous, but can cause harm: "[R]eliance on non-binding authority—and all case law when cited for factual assertions is non-binding authority—can obscure the weak foundation of factual assertions in individual opinions; . . . it may also make it more difficult for litigants to overcome those factual assumptions with updated information."[224] Historical

219. *Id.* at 1936. As Schauer explores, it is "highly controversial whether authority in this precise sense is a good idea." *Id.* at 1937.

220. *See id.* at 1944-48 (citing examples of persuasive authority where the reasoning is not described at all and calling this "optional authority" as opposed to "persuasive authority"); *see also* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING, ch. 4 (2009) (exploring why courts rely on "merely persuasive" sources and how they gain authority).

221. Schauer, *supra* note 213, at 1950 (citing DAVE BARRY, DAVE BARRY IS NOT MAKING THIS UP (1994)).

222. I am very aware that this is a Taylor Swift lyric. TAYLOR SWIFT, *Hits Different*, *on* Midnights (The Til Dawn Edition) (Spotify, Republic Recs. May 26, 2025). I cite her as persuasive authority because of both her stature and her air-tight logic.

223. For a similar worry, see Charles, *supra* note 6, at 70-71 (describing what he calls "Ctrl+F" historical research).

224. Gardner, *supra* note 109, at 1621.

precedents from judges that are seen as persuasive solely because of their source seem shaky for the simple truth that judges are not historians.

There is, however, another aspect of what makes an authority authoritative—one distinct from the source of the statement. Authorities are more or less persuasive according to the quantity/quality of procedural rigor behind them. Return to then-Judge Barrett's explanation in *Kanter* for why she did not take Justice Scalia (her former boss) as settling the history of felon disarmament laws in *Heller*. She said his analysis of this particular issue was only a "passing reference[]," and she cautioned against "dissect[ing] [judicial opinions] word-by-word."[225]

What does it mean to discount a passing reference? I think her worry was that the first decisionmaker (here Justice Scalia) had not given the history of felon disarmament his full attention. Thus, even though he was an authoritative *source*—particularly to her, a former law clerk—he was not speaking as an authority *in that moment on this topic.* And this sort of hesitation about the level of attention given to a particular judicial statement is foundational; indeed, it runs through the fabric of other areas of the law that are well-developed.

B. Procedural Rigor: Was the Historical Claim "Actually Decided" with a "Full and Fair Opportunity to Litigate?"

In many respects, there is no need to reinvent the wheel to resolve the puzzle presented in this paper. Much ink has been spilled in other areas of the law about the precedential effects when factual issues resurface over time.

Consider, for example, the law of issue preclusion (or collateral estoppel), which is the legal doctrine that prevents the same issue from being litigated repeatedly in subsequent claims.[226] The rationale behind the doctrine is to avoid "needless and costly relitigation of issues already decided."[227] There is a similar consideration when it comes to Second Amendment litigation; it seems wasteful to have dozens of trial courts across the country all looking at colonial surety laws, for example, and trying to figure out why these old laws were enacted by the framing generation.

And yet there is also a sensible hesitation in the collateral estoppel context to casually declare an issue settled and off the table. The doctrine thus has many

225. Kanter v. Barr, 919 F.3d 437, 453-54 (7th Cir. 2019) (Barrett, J., dissenting) (quoting *id.* at 445 (majority opinion)). This caution is consistent with what Richard Re has called the "narrowing" of Supreme Court precedent. Re, *supra* note 39, at 935-51. Re explains that it is common for a lower court judge not to read a Supreme Court precedent for all it is worth. *Id.* at 926, 935-36 ("In short, narrowing occurs when a court interprets a precedent more narrowly than it is best read.").

226. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (A.L.I. 1982).

227. Marvin A. Tenenbaum, *Offensive Collateral Estoppel and the Law of Conspiracy: A New Application for a New Pragmatism*, 14 J. MARSHALL L. REV. 605, 605-06 (1981).

requirements and recognizes several exceptions.[228] Among those requirements, (1) the first claim needs to be actually decided;[229] (2) it must have been "essential to the [first] judgment";[230] and (3) the party resisting preclusion must have had a "full and fair opportunity" to litigate the issue.[231]

To be sure, issue preclusion is not the doctrinal answer to my puzzle because rarely are the litigants the same from one Second Amendment challenge to the next (which is the most common situation when collateral estoppel applies), and also because the government enjoys important exceptional status when it comes to issue preclusion.[232] Let us ponder not the doctrine itself, but the reasons behind it. Certainly, the chief values served are fairness and efficiency—it would be a waste of judicial resources to relitigate the same issue over and over again, on the one hand, and everyone deserves their day in court, on the other.[233]

There are, however, other values behind this doctrine that can be seen in the details. First, as explained above, to declare an issue "settled" under collateral estoppel, we require the claim in the first lawsuit to have been "actually litigated," and the party must have a "full and fair opportunity" to litigate the issue. What do those conditions mean, and why do we require them? Part of the reason—and perhaps the most obvious one—involves fairness to the parties. If you actually litigated an issue once, then you got your shot. It is unfair to give you a second chance.

But there is another normative value working behind the doctrinal scenes here, and it is particularly relevant for present purposes. In the collateral estoppel context, judges and scholars seem to care about whether the attention of the first decisionmaker was primed.[234] There is a worry, for example, "that the jury may not have devoted sufficient attention on the issue."[235] According to Moore's *Federal Practice* treatise, "Issue preclusion does not preclude relitigation if there is reason to doubt the quality, extensiveness, or fairness of procedures

228. *Id.* at 617-22; RESTATEMENT (SECOND) OF JUDGMENTS § 28 (A.L.I. 1982); *see* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 129-42 (2001).

229. *See* Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 845 (1952); Aaron Gershonowitz, *Issue Preclusion: The Return of the Multiple Claimant Anomaly*, 14 U. BALT. L. REV. 227, 229-30 & 230 n.16 (1985) (discussing the Restatement (Second) of Judgments and the "actually litigated" factor).

230. Tenenbaum, *supra* note 227, at 614 n.48 (quoting Cont'l Can Co. v. Marshall, 603 F.2d 590, 594 n.6 (7th Cir. 1979)).

231. 18 MOORE'S FEDERAL PRACTICE § 132.05[1] (3d ed. 2023).

232. Gershonowitz, *supra* note 229, at 230-31, 248.

233. *See* CASAD & CLERMONT, *supra* note 228, at 29-38 (describing the traditional justifications behind collateral estoppel and its exceptions).

234. *See* Tenenbaum, *supra* note 227, at 617.

235. RICHARD D. FREER, CIVIL PROCEDURE § 11.4.3 (5th ed. 2022).

followed in prior litigation."[236] Or, put another way (in the words of Wright and Miller), "the tendency is to allow preclusion unless the first court followed severely limited procedures" denying the "full and fair opportunity" to contest the issues.[237]

Think about those phrases: "actually litigated," "quality" of the procedures, and "full and fair opportunity" to contest. They evoke more than just fairness concerns. Courts do not want to deem an issue "settled" if they are not confident that the past presentation of the issue allowed full-throated debate. And this strikes a chord in terms of institutional values, not just individual fairness ones.

Consider, by comparison, the history of felon disarmament mentioned by Justice Scalia in *Heller*[238] and the analysis of historical surety laws given by the Chief Justice in *Rahimi*.[239] *Rahimi* involved a challenge to a federal law prohibiting individuals subject to domestic violence restraining orders from carrying guns.[240] The discussion of historical surety laws in that decision was not an aside. It was fully briefed.[241] It was central to the holding that the Second Amendment did not prohibit modern domestic violence disarmament laws.[242] The history of surety laws came up and was fully discussed in oral argument.[243] It was mentioned and debated by multiple Justices in separate opinions.[244]

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236. 18 MOORE'S FEDERAL PRACTICE § 132.03[5][a]; *see also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." (quoting Montana v. United States, 440 U.S. 147, 164 n.11 (1979))).

237. 18 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 4423 (West 2025).

238. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

239. United States v. Rahimi, 144 S. Ct. 1889, 1899-902 (2024).

240. *Id.* at 1894.

241. By my count, twenty-two briefs—including the reply brief for the United States—discussed colonial surety laws. Citing References for United States v. Rahimi, 602 U.S. 680, 22 results (Jan. 8, 2026), WESTLAW (on file with the *Stanford Law Review*) (searching "surety"); *see, e.g.*, Reply Brief for the United States at 14, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 7106695 (listing surety laws as an example of early legislative authority); Brief for the United States, *supra* note 99, at 43; Brief of Amicus Curiae Center for Human Liberty in Support of Respondent and Affirmance at 10-14, *Rahimi*, 144 S. Ct. 1889 (No. 22-915).

242. *Rahimi*, 144 S. Ct. at 1901.

243. *See* Transcript of Oral Argument, *supra* note 99, at 42, 49 (referring to "surety laws" by name); *see also id.* at 34-35 (explaining the English and American histories of disarmament because of a legislative or judicial finding of dangerousness); *id.* at 33-34 (Solic. Gen. Elizabeth B. Prelogar) ("It is not the case that the only disarmament provisions that have existed over time targeting those who are dangerous are provisions that focused on those with criminal convictions. . . . I think that there is a longstanding tradition here of recognizing that individuals can be determined through this predictive judgment to be dangerous even in the absence of a criminal conviction.").

244. *Rahimi*, 144 S. Ct. at 1904 (Sotomayor, J., concurring); *id.* at 1908-10 (Gorsuch, J., concurring); *id.* at 1923 (Kavanaugh, J., concurring); *id.* at 1928 (Jackson, J., concurring); *id.* at 1932-33, 1938-41 (Thomas, J., dissenting).

By contrast, in *Heller*, the 2008 decision that the Second Amendment protected an individual right to possess a firearm for self-defense in the home,[245] the question of the history of laws that disarmed people with a felony conviction was not front and center. Justice Scalia mentioned that history in his majority opinion (when he referred to those laws as "longstanding"),[246] but the history was not featured in the briefs, and it was mentioned by the lawyers in oral argument only twice and without further probing from the Justices.[247]

This matters for the same reason that collateral estoppel is not offered unless an issue was "actually litigated" with each side having an "opportunity . . . to obtain a full and fair adjudication" of that issue.[248] We are concerned that the first decisionmaker did not think about it all that hard, and that means (going back to Fred Schauer) the "persuasive" part of "persuasive authority" is missing.[249]

Part of the nuance I am calling for, therefore, must be about process: Did the first decisionmakers have a chance to fully debate this history? Did multiple historians weigh in? Was it central to the dispute such that we can be confident more than one pair of eyes was on the historical record? Was it subject to a check from the adversarial system, or did it come in after the fact?

It seems I have arrived at the same conclusion then-Judge Barrett reached when she sat on the Seventh Circuit contemplating the *Kanter* case and reading the history from the U.S. Supreme Court in *Heller*.[250] Raising the question of historical precedents back in 2019, recall that she wrote, "I am 'reluctant to place

245. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

246. *Heller*, 554 U.S. at 626.

247. Only a handful of briefs mentioned felon disarmament laws at all, and of those only one brief included more than just a reference to such laws in a string cite. *See* Brief for State Firearm Ass'ns as Amici Curiae in Support of Respondent at 18-20, 18 n.17, *Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 383519 (referencing colonial and English attitudes toward felon disarmament and discussing several older federal statutes that limit firearm possession by felons). I could only find two such references in the oral argument, and neither was probed in depth. Transcript of Oral Argument at 40, *Heller*, 554 U.S. 570 (No. 07-290), 2008 WL 731297 (Solic. Gen. Paul D. Clement) ("This Court has recognized that there are certain pre-existing exceptions that are so well established that you don't really even view them as Second Amendment or First Amendment infringement. . . . Like libel, and I would say like laws barring felons from possessing handguns."); *id.* at 78 (Alan Gura) ("[T]he way that [the Fifth Circuit] has examined the Second Amendment when they get these felon and [sic] possession bans and drug addict and [sic] possession challenges, what they say is, these people simply are outside the right, as historically understood in our country.").

248. RESTATEMENT (SECOND) OF JUDGMENTS § 28 (A.L.I. 1982); *see* FREER, *supra* note 235, § 11.4.3.

249. *See supra* text accompanying notes 209-15.

250. Kanter v. Barr, 919 F.3d 437, 453-54 (7th Cir. 2019) (Barrett, J., dissenting).

more weight on these passing references . . . .' The constitutionality of felon dispossession was not before the Court in *Heller*."[251]

She might have been persuaded by Justice Scalia's history in *Heller* (or not), but she was not obligated to follow it just because he was a Justice and she (back then) was not. And the fact that she was not persuaded had little to do with the reasoning he used and more to do with the fact that the process leading to that "passing reference[]" was not robust and not deserving of "dissect[ion]."[252] The second place for caution and nuance, therefore, is not just about sorting the binding from the non-binding authority, but sorting the historical citations that come after full briefing and discussion from the ones that do not.

C. Function of the Original Historical Claim: Distinguishing Different Uses for History

Finally, the last suggestion I have for the good-faith judge thinking of using history blessed by another judge is to think critically about the relationship between the historical fact in question and the legal rule it helped produce in the first instance.

As demonstrated in Part II above, not all historical claims are the same, and they thus are not all equally good candidates for precedential treatment. Historical statements endorsed by prior courts can include (1) factoids (was this thing done?); (2) connective narrative (educated guesses about ideas/motivations of the actors in the past); or (3) history that is intrinsically linked to the chosen interpretative methodology, something we might call "premise history."

The first two categories—history as factoid and history as connective narrative—can be evaluated based on the quality and thoroughness of the process that led to their conclusions, and the attention they received the first time around. Passing references should not be persuasive authority. Well-thought-out historical conclusions from a prior judicial actor deserve more weight, but that depends on the quality of the work, not the fanciness of the source. If a factoid seems easily verifiable (e.g., "this statute existed at this time"), that seems like a relatively safe place to rely on a prior judge. If a narrative, by contrast, seems contestable (e.g., "everyone thought of surety laws like jaywalking"), then this requires more scrutiny by the second judge into the "quality" of the presentation of this history the first time around.[253]

But the last category—premise history—is particularly puzzling. Consider the following hypothetical. Imagine a federal district court judge who is skeptical about the historical evidence that Justice Scalia relied on in *Heller* to

251. *Id.* at 453 (quoting *id.* at 445 (majority opinion)). Reasonable minds can debate whether the felon dispossession exception was part of the *Heller* holding. That is not a debate I enter today. My concern is only with the precedential force of the history in *Heller*.

252. *Id.* at 453-54 (quoting *id.* at 445 (majority opinion)).

253. See discussions of these examples in the taxonomy in Part II above.

conclude that members of the founding generation used the phrase "bear arms" to refer to an individual right, unconnected to military service.[254] Now imagine if that judge decided to hold a trial, complete with testimony from historical linguistic experts aided by new technology, and ultimately concluded—as a factual finding—that when people alive in 1787 said "bear arms," that had only a clear military meaning.

This conclusion—whether one calls it a factual finding or a legal ruling or just corrective history—would amount to an overruling of *Heller* by a lower federal court. And that can't be the right outcome. If every district court across the country were authorized to probe every historical fact uttered by the Supreme Court in any context, the judicial hierarchy would unravel quickly, resulting in chaos.

So what makes that thought experiment different from other examples of historical precedents discussed above, the ones I do not think deserve precedential effect, like the jaywalking quote or the reference to "longstanding" felon disarmament laws in *Heller*? Part of the distinction is that the "bear arms" history was well briefed in *Heller*, adverse parties (not to mention amici) had a "full and fair opportunity" to contest it,[255] and Justice Scalia's ultimate conclusion was certainly not a "passing reference[]"[256] in the opinion—it was instead central to it.[257]

But I think there is something more at work. Consider in this regard Judge O'Scannlain's 2014 opinion when a panel of the Ninth Circuit considered whether the Second Amendment protected a right to carry handguns outside of the home (before the *Bruen* decision).[258] *Heller* did not answer this question; indeed Judge O'Scannlain opened his opinion by stating, "It doesn't take a lawyer to see that straightforward application of the rule in *Heller* will not dispose of

254. District of Columbia v. Heller, 554 U.S. 570, 586 (2008). This is not a far-fetched hypothetical considering the work of several prominent scholars—even noted conservative ones—who have cast doubt on this history in *Heller*, at least as revealed over the passage of time. *See* Miller, *supra* note 24, at 153; Phillips & Blackman, *supra* note 24, at 613-14; Neal Goldfarb, A (Mostly Corpus-Based) Linguistic Reexamination of *D.C. v. Heller* and the Second Amendment (2023) (unpublished manuscript at 2-3), https://perma.cc/C5JC-9Q6T.

255. That language of course comes from the collateral estoppel context. *See supra* Part IV.B. Justice Scalia pointed to the parties' briefs, as well as amicus briefs, throughout his analysis. *See, e.g.*, *Heller*, 554 U.S. at 582-83, 586, 596.

256. *Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) (quoting *id.* at 445 (majority opinion)).

257. *Heller*, 554 U.S. at 584-89.

258. Peruta v. County of San Diego, 742 F.3d 1144, 1147 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (2016). Ultimately, Judge O'Scannlain's position was vindicated in 2022 when the Supreme Court decided in *Bruen* that the Second Amendment protects a right to carry firearms outside the home for ordinary self-defense needs. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022). Hat-tip to Jud Campbell for this example and for many of the observations that follow.

this case."[259] So there was no legal precedent constraining the Ninth Circuit (in 2014) at least in the strictest sense of the word "precedent." Nonetheless, in Judge O'Scannlain's view, *Heller* still limited the universe of permissible historical arguments for him to consider, and it is important to disentangle the reasons why.

First, Judge O'Scannlain writes, *Heller* decides once and for all "that the keeping and bearing of arms is, and has always been, an individual right."[260] Second, *Heller* also decides that "the right is, and has always been, oriented to the end of self-defense."[261] These two Supreme Court conclusions from the past have agenda-setting implications for the present. "What that means for our review," Judge O'Scannlain explains, "is that historical interpretations of the right's scope are of varying probative worth" depending on whether they are consistent with *Heller*'s historical conclusions.[262] "Any contrary interpretation of the right, whether propounded in 1791 or just last week, is error."[263] And historical arguments that conclude the Second Amendment does not protect an individual right "are of no help."[264]

Armed with this premise, Judge O'Scannlain then describes and evaluates the history of open-carry laws, but he uses consistency with *Heller* as a sorting mechanism—a way to rank the authorities. If a historical argument proceeds from an errant premise—one rejected by the Supreme Court in *Heller*—then Judge O'Scannlain thinks there is no reason to credit it.[265] It is "of no help."[266]

This move is controversial. On the one hand, in Jud Campbell's view, "it seems perfectly sensible . . . that modern judges—who constantly have to assess the persuasiveness of conflicting factual evidence and legal opinions—should disregard an argument or conclusion that rests on a faulty premise."[267] On the other hand, in Darrell Miller's opinion, giving this extra heft to *Heller*'s historical

259. *Peruta*, 742 F.3d at 1150.

260. *Id.* at 1155 (emphasis omitted).

261. *Id.* (emphasis omitted).

262. *Id.* at 1155-56.

263. *Id.* at 1155.

264. *Id.* at 1156.

265. *See, e.g.*, *id.* at 1159.

266. *Id.* at 1156.

267. Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 31, 49. For more on this controversy, see Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-*Heller *Second Amendment Cases*, 29 WM. & MARY BILL OF RTS. J. 413, 437-38 (2020) (arguing that the *Peruta* opinion should have explained why *Heller*'s historical findings are binding precedent); and Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597, 624-25 (2014) (praising the *Peruta* opinion for recognizing other Second Amendment interpretations and giving them varying weight, rather than completely ignoring any interpretation that is not consistent with *Heller*).

narrative ignores other evidence about the past and exacerbates the risks of cementing mistaken history—or at least outdated history—into inflexible law that is very hard to change.[268]

In any event, whether you agree with Judge O'Scannlain's sorting methodology or not, for present purposes it is enough to recognize what is behind his logic. Implicit behind this opinion is the conclusion that the Supreme Court's history in *Heller*—at least some of it—constrained his authority to view the past in another way.[269] The history itself was precedential in the true sense of that word: not because it was persuasive or came from a fancy judge, but because it could not be separated from the rule it helped create. Because *Heller* followed an originalist methodology, the legal rule that came out of the case (enshrining what the Second Amendment covers) was intrinsically linked to that particular history (describing what "bear arms" meant to people alive in the past).

This relationship embedded the history—our understanding of what happened in the past—in the modern legal rule—our conclusion of which behavior is restricted today. The history of the usage of the words "bear arms" is no longer up for debate. In the framing of Will Baude and Stephen Sachs, "[c]ourts must answer contested historical questions because so much of our *current* law makes 'the law of the past' binding."[270] There are situations, in other words, in which the stare decisis power coming out of a legal rule attaches to the historical analysis on the same topic.

So a good-faith judge contemplating a historical precedent must ask yet another question: When is the law of the past binding on the present? As I have demonstrated, it should certainly not be in every instance when another judge talks about the past. There are serious risks that come with a loose understanding of the precedential power of judicially consumed historical claims. This shortcut, in other words, can lead to sloppy results with dangerous consequences.

Rather, I think judge-found history should only have precedential effect (in the true meaning of precedent, as in binding one's discretion) if the history was fully briefed the first time and central to the legal rule that it helped create. And this is what one might call a "premise historical precedent": history that forms

268. Darrell A.H. Miller, Peruta*, the Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238, 239-40, 242 (2014) (arguing that *Peruta* contradicts core originalist principles by giving greater weight to *Heller*'s historical analysis than to actual historical evidence that *Heller* may not have considered).

269. It is also important to recognize that Judge O'Scannlain does not cite *Heller*'s history and stop; on the contrary, his opinion does a deep dive on the history around open-carry laws. *See Peruta*, 742 F.3d at 1156-65. He is not using *Heller* as a short-cut; rather he used consistency with *Heller* as a metric to evaluate the history.

270. Proctor, *supra* note 6, at 457 (quoting Baude & Sachs, *supra* note 19, at 811-12).

the premise of a legal rule. The "bear arms" history in *Heller*, in other words, has moved from the fact-y end of the law-fact spectrum to the legal end.[271]

We are back to the law-fact distinction and the unusual way history fits into that. As I have said before, not all historical claims fit in the same place on the law-fact spectrum.[272] Some are more "fact-y"—meaning closer to the fact end of the spectrum because they can be theoretically falsified by evidence—than others.[273] To figure out any historical statement's true "identity," therefore, requires a slow, deliberate untangling.

Consider the following statement common in the Second Amendment context: "People of the past did X for Y reason, and so analogously today we can do Z for the same reason." Take each part of that sentence apart slowly. Claims about the motivations of people long-since gone require a collection of true/false facts *and also* a judgment about what to make of them. Some of that is fact-y, and some of it is not.[274]

Now take it a step further: "Because people thought Y a long time ago (fact-y), we are going to interpret today's law as X (not fact-y)." When that happens—as it did in *Heller* with the "bear arms" language—I think the fact-y premise melds into the legal rule such that the two cannot be separated.[275] This does not mean that the faulty history is forever enshrined in the U.S. Reports. It can be corrected, but only if the legal holding in *Heller* is also revisited.[276] And that, of course, is a job for the nine members of the U.S. Supreme Court.

Even with the concession that "premise history precedents" are essentially legal and thus sticky and binding throughout the judicial hierarchy, there is still plenty of work for the good-faith judge contemplating the use of a historical precedent. Luckily, it is work courts are used to doing. Much like we expect judges to look under the hood and separate the dicta from the holding of a prior precedent, so too should we expect them to separate the "premise historical precedents" from the shortcuts or the factoids or the connective tissue of an opinion.

Will a judge's normative priors influence this task? Certainly. As Richard Re has taught us, lower courts narrow Supreme Court precedents they don't

271. Although I do think it is debatable whether Judge O'Scannlain moved beyond this history when interpreting what bound his discretion coming out of *Heller*.

272. Larsen, *supra* note 23, at 299.

273. *Id.* at 299-300.

274. And for that reason some have taken the position that the historical facts relevant to constitutional claims should go to trial. *See* Blocher & Garrett, *supra* note 6, at 733-37 (proposing that trial courts should make factual determinations, "in the first instance, of historical facts relevant to constitutional claims" using the Federal Rules of Evidence rather than having appellate courts make these factual determinations through amici).

275. *Cf.* Larsen, *supra* note 7, at 94 (discussing premise facts).

276. For a related argument, see Proctor, *supra* note 6, at 465-66.

agree with all the time.[277] But even that narrowing needs to be intentional and thought-through; it should be more than a convenient shortcut or an unthinking borrowing of work done by another.

Conclusion

When an author asks a question in her title, she had better produce an answer. Is history precedent? My ultimate answer: It depends. It depends not just on how that history was used the first time around, but also on whether it was subject to rigorous testing in round one, whether it is the sort of claim that can be easily verified by a judge, and whether it was central to the legal holding in the first case. Like with application of precedents generally, therefore, this requires much careful work.

The Supreme Court's foray into history-and-tradition-based tests has produced some bumps in the road for lower courts tasked with applying them—and those bumps are particularly visible in the Second Amendment context. It is certainly understandable in the midst of that change that courts are looking to clear issues off their desks when they can. But this move is risky. Judicial historical research can be faulty, is vulnerable to change, and the conclusions do not always (or even often) carry the force of law. Relying on a judge as an authority on history is complicated. It should not be done without thought. Like many attractive shortcuts, this one is no substitute for slow and careful thinking.

277. Re, *supra* note 39, at 924-25.