

“WILL THE MEANING OF THE SECOND AMENDMENT CHANGE . . . ?”: PARTY PRESENTATION AND STARE DECISIS IN TEXT-AND-HISTORY CASES

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In the wake of the Supreme Court’s decision in New York State Rifle & Pistol Association v. Bruen, more Second Amendment challenges will turn on courts’ answers to factual questions about history—answers courts may formulate based on the historical evidence compiled by the parties to the dispute. These answers will become precedents that tell us what types of regulations the Second Amendment does and does not permit. What happens to those precedents when new historical evidence comes to light? This Essay argues that the Court should be willing to revisit its precedents when historical evidence demonstrates error in an earlier decision. Revisiting erroneous precedents coheres with the Bruen Court’s theory of constitutional meaning, and it answers the dissent’s concern about the imperfect nature of the historical inquiry that occurs in litigation.

INTRODUCTION	1
I. <i>BRUEN</i> AND THE PROBLEM OF HISTORY	455
II. REFRAMING THE QUESTION	458
A. <i>A Simple Answer</i>	458
B. <i>A New Question</i>	460
C. <i>A Framework for Answering</i>	461
III. DEMONSTRABLY ERRONEOUS CONCLUSIONS ABOUT THE PAST ..	465
CONCLUSION.....	469

INTRODUCTION

In *New York State Rifle & Pistol Ass’n v. Bruen*, the Court rejected the test lower courts had adopted to adjudicate Second Amendment challenges.¹ The forsaken framework permitted judges to determine that the government interest furthered by firearms regulations justified the burden those regulations placed on the right of the People to keep and bear arms.² In its

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¹ 142 S. Ct. 2111, 2127 (2022).

² *Id.* at 2129; see also Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right To Bear Arms*, in *NEW HISTORIES OF GUN RIGHTS AND REGULATIONS* (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, eds.) (forthcoming Oct. 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761

place, the Court adopted a text-and-history framework—one that directs courts to look to history to ascertain the traditional scope of the Second Amendment right.³

The Court’s decision to substitute historical inquiry for a more-or-less deferential scrutiny of legislative policy provoked the usual criticism that history is a task courts are ill equipped to perform.⁴ The majority responded by pointing to devices that enable courts to settle the controversies before them in the face of uncertainty about history.⁵ The exchange shines a light on interesting questions that arise when the process of ascertaining—and not merely applying—a rule of decision requires a court to find facts. The dissent lists several.⁶ This Essay focuses on one: “Will the meaning of the Second Amendment change if or when new historical evidence becomes available?”⁷

The answer to that question depends on one’s theory of constitutional meaning: Is the content of the rules the Constitution enacts fixed in time or subject to common-law-like elaboration? This Essay adopts the *Bruen* majority’s theory, for it is to that theory that the dissent poses its question. According to that theory, the Second Amendment adopts (and the Fourteenth Amendment incorporates) a pre-existing right whose meaning is largely determinate and unchanging.⁸

If one accepts this premise, then the simple answer to the dissent’s question is “no, the meaning of the Second Amendment will not change.” The Court’s *knowledge* of that meaning, however, is another matter. The “refined” historical inquiry in which the Court engages to ascertain the amendment’s meaning has its limits.⁹ For example, the “‘principle of party presentation’ . . . entitle[s] [courts] to decide a case based on the historical

[<https://perma.cc/WT4Y-U795>] (describing shift); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT’L AFFS. 72, 77 (2019) (characterizing tiers-of-scrutiny analysis).

³ See *Bruen*, 142 S. Ct. at 2126, 2129–30.

⁴ See *id.* at 2131 (describing the “judicial deference to legislative interest balancing” inherent in the displaced framework); see, e.g., *id.* at 2177–81 (Breyer, J., dissenting) (questioning judicial competence at historical inquiry); DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS 91 (2008) (same).

⁵ *Bruen*, 142 S. Ct. at 2130 n.6 (providing default rules and evidence principles as examples).

⁶ *Id.* at 2177 (Breyer, J., dissenting) (raising questions about how courts will go about locating and weighing historical evidence).

⁷ *Id.*

⁸ *Id.* at 2127 (majority opinion). I put to one side the theory of liquidation, which holds that a longstanding, deliberate practice may settle the meaning of an indeterminate legal provision, and the related question whether the meaning of a provision once liquidated may change through reliquidation. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21, 53–59 (2019); see also Leider, *supra* note 2 (manuscript at 2) (arguing that “the full scope of the American right to bear arms was not settled in 1791” but would instead be settled by liquidation).

⁹ *Bruen*, 142 S. Ct. at 2130 n.6 (quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810–11 (2019)).

record compiled by the parties.”¹⁰ That historical record will sometimes be materially incomplete. What happens when the next party improves it? Should the first court’s pronouncement on the meaning of the Second Amendment bind the court with the more complete historical record?

The answer depends on several variables: whether the courts in question are trial or appellate courts, whether the parties are the same, etc. Here, I am interested in the narrow question whether a decision of the Supreme Court concerning the meaning of a provision of the Constitution binds the Supreme Court in future cases presenting the same question about the meaning of the same constitutional provision.¹¹

The modern doctrine of *stare decisis* holds that courts should adhere to prior legal determinations in the absence of special circumstances beyond mere error.¹² Traditionally, however, when a court concluded that a precedent was “demonstrably erroneous,” it did not have to adhere to the precedent.¹³ I argue that the traditional, demonstrably erroneous standard is preferable to the modern one in a world in which courts are interpreting the Constitution based on its text and history.

Part I of this Essay describes how *Bruen* changes courts’ approach to adjudicating challenges to laws alleged to infringe on the right to keep and bear arms. Part II confronts the dissent’s question and reframes it as a question about *stare decisis*. Part III concludes by arguing that the traditional model of *stare decisis* offers the most satisfactory answer to the dissent’s question.

I

BRUEN AND THE PROBLEM OF HISTORY

Over a decade ago, the Court issued in quick succession two watershed decisions concerning the right to keep and bear arms. In *District of Columbia v. Heller*, the Court recognized that the Second Amendment protects an *individual* right to keep and bear arms that the People enjoyed outside the militia in 1791.¹⁴ Two years later, in *McDonald v. City of Chicago*, the Court recognized that the Fourteenth Amendment protects that right against State interference.¹⁵

¹⁰ *Id.* (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)).

¹¹ See Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1763 (2015) (“Same-court precedent is the most important for theories of constitutional interpretation . . .”).

¹² See *id.*

¹³ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001).

¹⁴ 554 U.S. 570, 595 (2008).

¹⁵ 561 U.S. 742, 791 (2010).

Then came silence. For twelve years, the Court repeatedly denied or deferred questions about the Second Amendment right (and its Fourteenth Amendment counterpart).¹⁶ The Court's silence left the lower courts to work out the mechanics of adjudicating claims that regulations infringed the right to keep and bear arms.¹⁷ The courts of appeals "coalesced around a 'two-step' framework."¹⁸ First, a court would determine whether the regulated activity fell within the scope of the right to keep and bear arms. If it did—or if the answer was inconclusive—then the court would select and apply the appropriate level of means-ends scrutiny.¹⁹

The *Bruen* Court repudiated the second step and held that courts should stop after asking whether the regulated conduct falls within the scope of the right to keep and bear arms. Within the scope of the right, the Court held, the Constitution's command is "unqualified."²⁰ Courts must now begin their inquiry by asking whether "the Second Amendment's plain text covers an individual's conduct . . ."²¹ If it does, then "[t]he government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."²²

There is no denying that the task the Court has set will sometimes be a difficult one. The text-and-history framework requires courts to make decisions about the signification and significance of evidence sometimes centuries old.²³ The path to understanding that evidence is strewn with perils that thwart even trained historians.²⁴ The discredited two-step framework called for this fraught inquiry, too, but it provided an escape route well-trod by the lower courts: assuming that the challenge implicated the right at Step

¹⁶ *E.g.*, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (vacating on mootness grounds after having granted certiorari on the question whether a carriage ban violated the Second Amendment); *see id.* at 1527 (Alito, J., dissenting) (criticizing the Court's refusal to take up Second Amendment questions in the wake of *McDonald*). A notable exception to the Court's inaction during this period—which nevertheless proves the rule of jurisprudential silence that prevailed between *McDonald* and *Bruen*—is the Court's summary reversal in *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam).

¹⁷ *E.g.*, *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *on reh'g en banc*, 614 F.3d 638, 639 (2010) (considering whether 18 U.S.C. § 922(g)(9), which makes it unlawful for those with domestic violence convictions to carry firearms in interstate commerce, comports with the Second Amendment as interpreted in *Heller*); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (considering 18 U.S.C. § 922(k), which prohibits the transport of a gun with the serial number removed).

¹⁸ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2125.

¹⁹ *Id.* at 2126.

²⁰ *Id.* at 2129–30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

²¹ *Id.*

²² *Id.* at 2130.

²³ *See, e.g., id.* at 2139–40 (1328 Statute of Northampton); Leider, *supra* note 2 (manuscript at 19–22) (referring to early American surety laws).

²⁴ *See* Larry D. Kramer, *When Lawyers Do History*, 72 *GEO. WASH. L. REV.* 387, 394–401 (2003) (describing challenges historians face in understanding the past).

One, while concluding that the regulation survived scrutiny at Step Two.²⁵

By cutting off that escape route, the *Bruen* decision has drawn a criticism commonly leveled at originalist theories of interpretation. The dissent, for example, labeled the decision “deeply impractical” because judges “typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.”²⁶ The criticism is not new,²⁷ and originalists over the years have met it with a variety of responses, from the Kantian (“It may be difficult, but it is a duty”)²⁸ to the Churchillian (“It is the worst method of interpretation—except for all the others that have been tried”).²⁹

The originalist response that interests me today challenges a premise of the argument: that judges “typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.”³⁰ William Baude and Stephen Sachs have recently argued that the day-in-day-out work of courts in our legal system in fact consists of just that.³¹ Courts must answer contested historical questions because so much of our *current* law makes “the law of the past” binding.³² Citing Baude and Sachs, the *Bruen* majority points out that “[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.”³³

²⁵ See, e.g., *Kanter v. Barr*, 919 F.3d 437, 447, 451 (7th Cir. 2019); *Gould v. Morgan*, 907 F.3d 659, 670, 677 (1st Cir. 2018); *United States v. Jimenez*, 895 F.3d 228, 234 (2d Cir. 2018); *Stimmel v. Sessions*, 879 F.3d 198, 205 (6th Cir. 2018); see also *Duncan v. Bonta*, 19 F.4th 1087, 1103 (9th Cir. 2021) (collecting other examples of this approach).

²⁶ *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting); see also Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming) (expanding on the dissent’s criticism); Lawrence Rosenthal, *Nonoriginalist Laws in an Originalist World: Litigating Original Meaning from Heller to Bruen*, 73 AM. U. L. REV. (forthcoming 2023) (manuscript at 50), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425067 [<https://perma.cc/HZ3G-JW2B>].

²⁷ See, e.g., McConnell, *supra* note 11, at 1761 (collecting examples).

²⁸ See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 3–4 (1999) (arguing that originalism best fulfills the judicial commitment to correct constitutional interpretation but acknowledging that “it cannot be expected to free judges from the exercise of contestable interpretive judgment”).

²⁹ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989); see also *McDonald v. City of Chi.*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring) (“[T]he question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world.”). *Bruen* includes a version of this argument, too. 142 S. Ct. at 2130 (arguing that a historically focused method is “more legitimate, and more administrable” than the alternative).

³⁰ *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

³¹ Baude & Sachs, *supra* note 9, at 810–11.

³² *Id.* at 811–12.

³³ *Bruen*, 142 S. Ct. at 2130 n.6; see also *id.* at 2130 (describing historical inquiry required by other constitutional provisions).

Cases and controversies demand answers. One feature of “‘legal inquiry [as] a refined subset’ of a ‘broader historical inquiry,’”³⁴ then, is that it is more determinate than abstract historical inquiry. Where a historian may doubt his ability to tell you the status of “Maryland’s riparian rights dating precisely from 1801,” a court must determine that status if it is to resolve a dispute turning on those rights.³⁵ At least, it must if that is what current law requires it to do.³⁶ So the law has developed conventions that enable the court to arrive at an answer when necessary.³⁷ One of those conventions is “the principle of party presentation”: “Courts are . . . entitled to decide a case based on the historical record compiled by the parties.”³⁸ That is what *Bruen* instructs courts to do.

II

REFRAMING THE QUESTION

And so we arrive at the dissent’s question: “Will the meaning of the Second Amendment change if or when new historical evidence becomes available?”³⁹

A. A Simple Answer

The dissent poses this question of the text-and-history test, and the

³⁴ *Id.* at 2130 n.6 (quoting Baude & Sachs, *supra* note 9, at 810).

³⁵ Baude & Sachs, *supra* note 9, at 816–17; *see also id.* at 820 (noting that “judges cannot” “disclaim the ability to say whether one reading of [a legal text] is more compelling than another”).

³⁶ *Id.* at 817. Of course, it is possible that current law would require the Court not to recognize a legal right in the absence of sufficiently definite historical evidence of its existence. *See* Gary Lawson, *Proving the Law*, 86 NW. L. REV. 859, 894–95 (1992). To refuse to recognize a right is not to deny its existence. *See id.* at 896. Depending on the allocation of the burden and the standard of proof, then, a court may avoid resolving the dispute of historical fact. In other cases—under *Bruen*’s test, for example—it cannot.

³⁷ Baude & Sachs, *supra* note 9, at 810–11. *Cf.* Henry P. Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 704 (2012) (describing cases in which the Supreme Court “acted on an assumed state of legal affairs”). Conventions may also regularize the Court’s reception of evidence of a historical fact about the law, as the rules of evidence do for other types of factual disputes. *See* Lawson, *supra* note 36, at 874–93 (describing standards of proof in legal interpretation). In fact, *Bruen* begins the process of developing a sort of “evidence” code for its text-and-history method. *See, Bruen*, 142 S. Ct. at 2131–34, 2136–37 (identifying rules for assessing relevance and probative value of different types of historical evidence); *see also* United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *15–17 (S.D. Miss. June 28, 2023) (reflecting on the process courts should use to resolve factual disputes about historical regulatory traditions); *id.* at *25 (lamenting the lack of rules for the reception of historical evidence).

³⁸ *Bruen*, 142 S. Ct. at 2130 n.6 (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)). *Cf.* Rosenthal, *supra* note 26 (manuscript at 30–36) (examining the influence of party presentation in Second Amendment decisions).

³⁹ *Id.* at 2177 (Breyer, J., dissenting).

premises of that test offer an answer. One premise is that “underlying rules of decision exist with or without judicial decisions, and they themselves dictate the decisions that conscientious judges must reach.”⁴⁰ In other words, the Second Amendment has a core of determinate meaning that binds courts, although there may be indeterminacies at the margins.⁴¹ Another premise is that the determinate meaning is now what it was at the time the right was codified.⁴²

Accepting these premises, history may play at least two roles in adjudicating a claim under the Second Amendment. First, it may reveal what the meaning of the Second Amendment was at the time it was adopted by revealing what the People thought the meaning to be.⁴³ Second, it may reveal a deliberate practice that settled a meaning where the Second Amendment was indeterminate—a process called liquidation.⁴⁴ The *Bruen* Court “does not conclusively determine the manner and circumstances” in which evidence of historical practice “may bear on the original meaning of the Constitution.”⁴⁵ But it contemplates that, at a minimum, sufficiently compelling historical evidence of a regulatory tradition will reflect accepted boundaries of the right to keep and bear arms.⁴⁶ It is on *this* type of evidence—not evidence of liquidation—that I focus.⁴⁷

According to the Court, the Second Amendment “codif[ied] a *pre-existing* right” that has a definite meaning—a shape.⁴⁸ We discern that shape by looking to the text and to history, including regulatory practices that were understood to coexist with (and thus not to infringe upon) the right.⁴⁹ The outlines of the shape may *look* fuzzy to us, but that is due to our imperfect

⁴⁰ Nelson, *supra* note 13, at 83.

⁴¹ See *Bruen*, 142 S. Ct. at 2136 (acknowledging the potential for indeterminacies). *But see* Leider, *supra* note 2 (manuscript at 6–7) (arguing that the Second Amendment suffers from considerable indeterminacy).

⁴² *Bruen*, 142 S. Ct. at 2132 (arguing that a constitutional provision’s “meaning is fixed according to the understandings of those who ratified it”).

⁴³ See, e.g., *id.* at 2128, 2131, 2136 (describing the role of historical understanding).

⁴⁴ See *id.* at 2136–37; Leider, *supra* note 2 (manuscript at 6); see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1450 (2009) (noting that “[S]ome [may] view tradition as an important source of a right’s scope” because the tradition is “independently constitutionally relevant.”).

⁴⁵ *Bruen*, 142 S. Ct. at 2162 (Barrett, J., concurring). Justice Barrett was speaking specifically about historical evidence of post-ratification practice.

⁴⁶ *Id.* at 2136 (majority opinion).

⁴⁷ The observations in this Essay may hold even if the meaning of the Second Amendment is less determinate than the *Bruen* Court assumes to the extent that its meaning has been liquidated over the course of the Nineteenth Century and is not subject to reliquidation. See Leider, *supra* note 2 (manuscript at 2–3) (describing one way in which the meaning of the Second Amendment was liquidated during the antebellum period).

⁴⁸ *Bruen*, 142 S. Ct. at 2130.

⁴⁹ *Id.*

perception. New historical evidence may sharpen our picture of the right, but if the Court is correct that the right's content is largely fixed, then the new historical evidence does not change the underlying shape. The simple answer to the dissent's question, therefore, is "no."

B. A New Question

In sharpening our picture, however, new evidence may well change a court's understanding of the Second Amendment in a way that would change the outcome of a case or controversy before it. I would therefore reformulate the dissent's question as follows: Should the next court resolve the case or controversy based on the new, sharper picture generated by new historical evidence, or is it confined to the fuzzier picture formed by the parties to the previous litigation?

The problem of shifting facts is not unique to text-and-history tests. Other varieties of interpretive rules rely on facts, too.⁵⁰ In *Lee v. Weisman*, for example, the Court relied on research showing that "adolescents are often susceptible to pressure from their peers towards conformity," to derive a First Amendment principle that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and secondary public schools."⁵¹ Would new evidence that peer pressure exerts a weaker influence than the Court believed in *Weisman* justify revisiting the precedent?⁵² Any legal rule that is built upon facts is vulnerable to facts.

We might think that the vulnerability is more acute with a text-and-history analysis than it is with the means-ends scrutiny it displaces. The latter calls for some measure of deference to legislative judgments, creating a broader zone in which factual developments can occur without disrupting the legal conclusion.⁵³ I am not convinced the problem is more acute in text-and-

⁵⁰ In fact, the extensive literature on problems of judicial factfinding in constitutional adjudication focuses primarily on non-originalist scrutiny of the need for or effect of laws. *E.g.*, FAIGMAN, *supra* note 4, at 43–63; Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988); Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966).

⁵¹ 505 U.S. 577, 592–93 (1992).

⁵² Problems created by founding legal rules on sociological facts are not unique to First Amendment cases. For example, lower courts resisted following *Brown v. Board of Education*, 347 U.S. 483 (1954), in part by citing competing psychological studies about the effects of segregated and integrated education. *See, e.g.*, *Stell v. Savannah-Chatham Cnty. Bd. of Educ.*, 220 F. Supp. 667, 668–75, 685 (S.D. Ga. 1963) (denying the injunction to desegregate on this ground), *rev'd*, 333 F.2d 55 (5th Cir. 1964); FAIGMAN, *supra* note 4, at 19 (discussing *Stell*); *see also* Fisher v. Univ. of Tex., 570 U.S. 297, 316–18, 320 (2013) (Thomas, J., concurring) (rejecting the notion that constitutional prohibition on racial discrimination should turn on such speculative evidence).

⁵³ *See Bruen*, 142 S. Ct. at 2131; *id.* at 2167–68 (Breyer, J., dissenting).

history cases.⁵⁴ But for now, it is enough that the question has been asked in a text-and-history case. The bounded nature of legal-historical inquiry contemplates that courts will ascertain legal rules with less than all the evidence, and that, in turn, means that future litigants may uncover evidence that the legal precedent is wrong. Courts need to know what to do when this happens.

C. A Framework for Answering

Courts typically resort to one of two doctrines when thinking about how they should handle potential errors in prior decisions. First is the doctrine of preclusion. To oversimplify things a good deal, that doctrine prevents parties to a prior litigation from questioning prior findings of fact and conclusions of law on claims and issues litigated to final judgment.⁵⁵ Strangers to the litigation are not bound by the judgment under the preclusion doctrine.⁵⁶ The other doctrine is the doctrine of precedent, or *stare decisis*. Under this doctrine, holdings from prior decisions provide principles of law that either bind or persuade courts in future cases, even those involving new parties.⁵⁷ Although broader in the sense that it encompasses more people, the doctrine of precedent is also more forgiving than the doctrine of preclusion in that courts may, under certain circumstances, revisit precedents.⁵⁸

⁵⁴ If anything, the form of deference seen in pre-*Bruen* Second Amendment cases arose from a need to stabilize the law in the face of unstable facts and the dearth of evidence about the efficacy of gun regulation. *What Science Tells Us About the Effects of Gun Policies*, RAND CORP., <https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html> [<https://perma.cc/Y3D7-3YJW>] (last updated Jan. 10, 2023) (describing limited evidence on the efficacy of most gun control policies); *Duncan v. Becerra*, 970 F.3d 1133, 1166–67 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021) (criticizing some appellate courts for applying an unusually deferential form of intermediate scrutiny that “approximates rational basis”).

⁵⁵ RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 27 (AM. L. INST. 1982); *see also* Lawson, *supra* note 36, at 902.

⁵⁶ Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012–13 (2003); *see also* Lawson, *supra* note 36, at 902 (“[F]indings of fact entered in a case involving different parties have no precedential effect.”).

⁵⁷ Lawson, *supra* note 36, at 903; Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 73 (2013). This statement also oversimplifies the doctrine. For example, there are different accounts of what element of a prior decision qualifies as a “holding.” *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1552–56 (2020) (describing variants of the rule that a “statement of law is a holding only if it was necessary for the outcome of the prior case” and identifying the alternative view that “a holding is any ruling expressly resolving an issue that was part of the case”).

⁵⁸ *See generally* Barrett, *supra* note 56 (comparing doctrine of precedent to doctrine of preclusion). Whether and when a court may decline to follow an on-point precedent depends on the court’s relationship to the court that issued the prior precedent. Inferior courts must follow precedents from their superiors. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part); *see also* McConnell, *supra*

Stare decisis tells us how to handle legal errors, not factual ones.⁵⁹ But statements of law sometimes rest on factual premises.⁶⁰ Indeed, judicial statements of law are a species of fact, in that they are factual propositions about what the law is.⁶¹ A holding that gets the law wrong makes a factual mistake about what the law is.⁶² There could be any number of reasons for this factual error. Mistaken historical analysis is one of them: A legal holding that gets the law wrong based on incomplete historical evidence makes a factual mistake about what the law is because it makes a factual mistake about what the law was.⁶³ *Stare decisis* is therefore the doctrine that will tell us whether and how the Supreme Court should revisit its interpretation of the Second Amendment when new parties bring new historical evidence to its attention.

The principle of party presentation sits easily when the factual dispute the court resolves is one of so-called adjudicative fact—the who, what, where, when, why, and how of the controversy before the court.⁶⁴ The resolution of such a factual dispute binds the parties under the doctrine of preclusion, but it has no precedential force.⁶⁵ If the court is deciding whether Smith entered the intersection when the stoplight was red, and Smith fails to put into evidence security footage showing that the light was green, well, that is too bad for Smith. He may lose, and he will not be able to relitigate the fact in the future.⁶⁶ But the next litigants who get into an accident in that intersection will be no worse off.⁶⁷

The principle sits less easily when the factual dispute the court resolves

note 11, at 1763 (noting that there are unique reasons—having to do with “the nature of hierarchy”—for lower courts to follow Supreme Court precedent). Precedents from a prior sitting of the same appellate court are binding but may be overturned. Thomas Bennett, *There Is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1685–86 (2023). Precedents from a prior sitting of the same trial court, from an inferior court, or from a court in another jurisdiction are merely persuasive. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (1987); see Barrett, *supra* note 56, at 1016 nn.16–17 (discussing the difference between “horizontal” and “vertical” *stare decisis*). Rules governing a court’s decision to overturn its own precedent may be substantive or procedural. See *id.* at 1018–19.

⁵⁹ Cf. Larsen, *supra* note 57, at 73 (critiquing the practice of treating factual findings as precedents).

⁶⁰ FAIGMAN, *supra* note 4, at 46.

⁶¹ Lawson, *supra* note 36, at 863. This is most obviously true if one believes that the meaning of the law is determinate, such that its content can be described as a matter of fact. Lawson argues that is true even if judges “make” the law as they go along. *Id.* at 864. Because I take Bruen’s theory of constitutional meaning as a given here, I take no position on whether adherents to other theories should view rules of decision as factual statements.

⁶² *Id.* at 864.

⁶³ See Baude & Sachs, *supra* note 9, at 811.

⁶⁴ Borgmann, *supra* note 50, at 1187; FAIGMAN, *supra* note 4, at 45.

⁶⁵ Lawson, *supra* note 36, at 902–03.

⁶⁶ RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982); Barrett, *supra* note 56, at 1034.

⁶⁷ Lawson, *supra* note 36, at 903.

will support a description of the law.⁶⁸ The description of the law that results from the court's resolution of the factual dispute may create a precedent that will govern in future cases and controversies.⁶⁹ If the court is deciding whether the right to keep and bear arms extends to adults under the age of twenty-one, and Smith fails to submit evidence that people commonly understood that eighteen-year-olds enjoyed such a right in 1791, then that is too bad for anyone else in the jurisdiction who has not obtained the age of twenty-one and wishes to keep and bear arms. Unless the court opts to supplement Smith's submission with its own historical research,⁷⁰ Smith may lose his claim and appeal, and all future claimants must proceed under the shadow of a precedent that the Second Amendment protects no right for eighteen-to-twenty-year-old adults.⁷¹ By the same token, if the court is deciding whether there is a historical tradition of regulating the storage of firearms, and California fails to submit evidence of an analogous state law from 1791, then that is too bad for people who favor California's safe storage prescription.⁷² Unless the court opts to supplement California's submission with its own historical research, California may fail to justify the law, including on appeal, and all other States (in the relevant jurisdiction) must legislate under the shadow of a precedent that the Second Amendment includes the right to keep a firearm in some manner other than the one California prescribed.⁷³

⁶⁸ See FAIGMAN *supra* note 4, at 48–49 (expressing this uneasiness). Such facts are commonly called “legislative facts.” See, e.g., *Teter v. Lopez*, No. 20-15948, 2023 WL 5008203, at *6 (9th Cir., Aug. 7, 2023); Stephen Hallbrook, *Should Courts Appoint Historians as Experts in Second Amendment Cases?*, VOLOKH CONSPIRACY (Dec. 15, 2022), <https://reason.com/volokh/2022/12/15/should-courts-appoint-historians-as-experts-in-second-amendment-cases/> [https://perma.cc/8CVM-URF4]. For reasons I have written about elsewhere, Haley N. Proctor, *Against Legislative Facts*, 99 NOTRE DAME L. REV. (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392025 [https://perma.cc/5YJ5-K4DG], I find this term to be imprecise and do not use it here.

⁶⁹ Barrett, *supra* note 56, at 1038–42.

⁷⁰ See Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 471–81 (2009) (describing the judicial practice of supplementing party presentation on legal issues). Independent research corrects for deficiencies in party presentation but presents its own set of concerns about the accuracy of the resulting decision. See, e.g., Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 231 (2018). See generally *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (discussing limitations on courts' ability to take an “initiating role”).

⁷¹ See, e.g., *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019) (denying plaintiffs the opportunity to develop a factual record related to their Second Amendment challenge).

⁷² See, e.g., *Teter*, 2023 WL 5008203, at *6, *9 (emphasizing failures in Hawaii's evidentiary presentation in support of a knife ban).

⁷³ See, e.g., *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (noting that functionally identical photo identification voting laws cannot be invalid in Wisconsin and valid in Indiana); *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) (holding that Illinois's public carriage prohibition is invalid on the force of “the Supreme Court's historical analysis” that was “central to

To what extent these rulings will limit future litigants with new evidence depends upon one's theory of *stare decisis*. In our federal judicial system, the rules of *stare decisis* differ depending on the precedent's source and whether the court that applies it is a district court, a circuit court, or the Supreme Court.⁷⁴ This Essay focuses on what the Supreme Court should do when it concludes that its own precedent is incorrect.

The modern doctrine of *stare decisis* holds that the Court should adhere to a precedent, notwithstanding a belief that it is wrong, in the absence of special considerations supporting a departure. The Court has developed factors that it considers in deciding whether to overturn an erroneous precedent.⁷⁵

It was not always so. Traditionally, *stare decisis* was both weaker and narrower. Weaker because precedential value accumulated over time. A single decision would not settle a legal question.⁷⁶ Narrower because *stare decisis* operated only where the law was indeterminate:

Americans viewed *stare decisis* as a way to restrain the 'arbitrary discretion' of courts. But this sort of discretion was thought to exist only within a certain space, created by the indeterminacy of the external sources of law that courts were supposed to apply. Outside of that space, presumptions against overruling precedents were not considered necessary⁷⁷

Where a precedent was “demonstrably erroneous”—demonstrable because one could demonstrate the error with unambiguous indicators of legal meaning—courts would not adhere to it.⁷⁸

The traditional standard has gained increased traction since Caleb Nelson unearthed it two decades ago. Most notably for present purposes, the author of the *Bruen* majority opinion—Justice Thomas—has applied it in separate writings.⁷⁹ This is not surprising. The “demonstrably erroneous”

the Court's holding in *Heller*”); *see generally* Frost, *supra* note 70, at 474 (identifying *stare decisis* as a doctrine that “require[s] judges to accept flawed legal determinations and incorporate them into current decisions”); *id.* at 492 (“[I]f litigants fail to fairly, completely, and accurately describe the law, judicial opinions may themselves contain flawed statements of law that will bind all who come after.”).

⁷⁴ *See supra* note 58.

⁷⁵ *See, e.g.,* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) (collecting a non-exhaustive list of five such factors, including “the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance”). There is no “definitive list of *stare decisis* factors.” Alicea & Ohlendorf, *supra* note 2, at 82.

⁷⁶ Baude, *supra* note 8, at 37.

⁷⁷ Nelson, *supra* note 13, at 5.

⁷⁸ *Id.* at 3, 5.

⁷⁹ *Dobbs*, 142 S. Ct., at 2301 (Thomas, J., concurring); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring in judgment); *Gamble v. United States*, 139 S. Ct. 1960, 1984–85 (2019) (Thomas, J., concurring).

standard is founded upon the same jurisprudential premise that underpins the text-and-history approach: namely, that written laws have a determinate meaning, and thus precedents can be “objectively wrong.”⁸⁰

That premise does not *compel* adherence to the “demonstrably erroneous” standard; indeed, many who share the conviction that written laws have a determinate meaning adhere to a more robust form of *stare decisis*.⁸¹ But there is a natural affinity between the “demonstrably erroneous” standard and *Bruen*’s text-and-history approach. Moreover, as I suggest in the next Part, the “demonstrably erroneous” standard is better suited to accommodate the process of resolving successive cases and controversies under a text-and-history framework than is the modern doctrine of precedent.

III

DEMONSTRABLY ERRONEOUS CONCLUSIONS ABOUT THE PAST

Courts and scholars assess theories of *stare decisis* on a variety of criteria. Some consider whether positive law requires or longstanding tradition supports one form of *stare decisis* or another.⁸² The primary criteria, however, are functional: This or that approach to *stare decisis* will promote values, such as accuracy, legitimacy, and stability, that we prize as a matter of sound judicial administration.⁸³ The *Bruen* dissent’s question gestures to these functional concerns: What if we get the history wrong? Will we correct ourselves? Will this delegitimize the judiciary? Destabilize the law?⁸⁴ Just as I use the majority’s framework to answer the dissent’s question, I will use the dissent’s framework to evaluate that answer.

The demonstrably erroneous standard’s strongest claim is that it

⁸⁰ Nelson, *supra* note 13, at 54.

⁸¹ See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (noting that the majority’s use of a weaker form of *stare decisis* overlooks the significant reliance the long-standing decision had generated); Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Samuel Alito*, 87 GEO. WASH. L. REV. 507, 539–40 (2019) (concluding that the law’s unchanging meaning is Alito’s primary judicial consideration).

⁸² See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (arguing that *stare decisis* has “constitutional status”); Nelson, *supra* note 13, at 8–9 (describing historical practice).

⁸³ Barrett, *supra* note 56, at 1012 (“Courts and commentators . . . have traditionally devoted the study of *stare decisis* to the doctrine’s systemic costs and benefits.”); e.g., Tyler, *supra* note 57, at 1584–85 (clarity and quality of legal decisions); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273 (2005) (judicial restraint); Nelson, *supra* note 13, at 62–73 (accuracy, uncertainty, and legitimacy).

⁸⁴ This Essay focuses on the values of accuracy, legitimacy, and stability because these are the prominent ones against which theories of *stare decisis* are conventionally tested. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022); *id.* at 2319–20 (Breyer, Sotomayor, & Kagan, JJ., dissenting); Nelson, *supra* note 13, at 54–73.

increases accuracy in judicial decisionmaking. This claim is strongest when one accepts that law has a determinate meaning against which we might measure a holding for accuracy. The standard's claim to legitimacy is also strengthened when one accepts the premise—posited by the *Bruen* majority—that a law's meaning is determinate and fixed. The most prominent drawback of the demonstrably erroneous standard is that it destabilizes the law. But this concern is less pronounced when one accepts that the Second Amendment's meaning is fixed because the factual record to which one addresses the inquiry into meaning is fixed, too.

Accuracy. To whatever extent one is concerned that the bounded historical inquiry in which courts engage to ascertain the scope of the Second Amendment is likely to result in error, one should value the ability to correct that error when parties come forward with evidence that demonstrates the error. Not all new historical evidence will demonstrate error: Isolated practices are not regulatory traditions.⁸⁵ But it is at least conceivable that future litigants will come to the Court with new evidence that reflects a meaning of the Second Amendment that the Court did not previously apprehend. The demonstrably erroneous standard would allow the Court to correct course, even in the absence of special circumstances. Nelson has ably explained why we would expect this iterative process to result in more accurate legal holdings in the long run,⁸⁶ and in the interest of space, I will not repeat his arguments here. Of course, that iterative process improves the accuracy of any method of interpretation; the point here is that the “demonstrably erroneous” standard goes a long way toward answering the concerns about error embedded in the *Bruen* dissent's question.

Legitimacy. Advocates of robust *stare decisis* place great weight on this value, arguing that courts undermine their legitimacy when they contradict earlier rulings.⁸⁷ Legitimacy is a word with many meanings whose finer shades are beyond the scope of this Essay.⁸⁸ Suffice it to say that any theory holding that courts derive legitimacy from the stability of their precedents will be weaker under a framework that stipulates that text and history communicate determinate meaning. As Nelson points out, under a strong view of *stare decisis*, courts must either openly resolve to adhere to a demonstrably erroneous interpretation of the Second Amendment, or else dissemble.⁸⁹ Now that the Court has frankly acknowledged that it is engaging

⁸⁵ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2142 (2022).

⁸⁶ Nelson, *supra* note 13, at 54–61 (stating, in brief, that if one assumes that some laws have a determinate meaning that is difficult to discern, it is reasonable to conclude that an iterative process with more judges applying themselves to the problem of interpretation is more likely to uncover the correct meaning).

⁸⁷ *See, e.g., Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

⁸⁸ *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

⁸⁹ Nelson, *supra* note 13, at 68–73.

in a historical inquiry bounded by party presentation, legitimacy would seem to call for equally frank error correction in the face of new evidence.⁹⁰

Stability. The problem with correcting errors, of course, is that it can be destabilizing. After *Bruen*, six states and the District of Columbia must rework their licensing regimes to rely only on objective criteria⁹¹—no mean administrative feat. Suppose a historian unearths new evidence of an analogous regulatory tradition next year.⁹² New York tries discretionary licensing once more, and disappointed applicants sue. The case makes its way to the Court, which adjusts the boundaries on force of the evidence. States with regulatory ambitions rework their licensing regimes again. And so on.

One might well believe that getting the Constitution right is worth this loss in stability.⁹³ After all, perhaps one would prefer future New Yorkers to be able to elect representatives who enact discretionary licensing regimes if that is, in fact, something the Constitution allows States to do. Nevertheless, the process described above does have costs.⁹⁴ To some, those costs justify a stronger version of *stare decisis*,⁹⁵ so it is worth considering their scale.

I do not think that the costs will be as large in text-and-history cases as they would be for other methods of interpretation. That is, I think the

⁹⁰ Cf. Frost, *supra* note 70, at 473–74 (noting that courts may qualify or limit precedent to mitigate concerns arising from reliance on party presentation); *id.* at 494 (positing that reliance on party presentation is more compatible with a legal system in which judicial decisions are not binding but serve only as evidence of the law).

⁹¹ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2123–24, 2138 n.9 (2022). Objective criteria identified by the Court include, for example, a requirement that a licensee pass a background check or complete a safety course. *Id.* at 2138 n.9. Efforts to rework licensing regimes are currently underway in the jurisdictions the Court identified. See, e.g., MASS. GEN. LAWS ch. 140 § 131(d) (2022); Hannah Wiley, *Bill to strengthen concealed-carry gun restrictions dies in California Legislature*, L.A. TIMES (Sept. 1, 2022), <https://www.latimes.com/california/story/2022-09-01/concealed-carry-fails-in-legislature> [https://perma.cc/J289-TXRF].

⁹² For example, historians recently located the long-missing official report of an English decision cited to cast doubt on the dual-sovereignty exception to the Double Jeopardy Clause. Jimmy Hoover, *UK Scholars Track Down 17th Century Murder Case, Prove Supreme Court Wrong*, NATIONAL L. J. (June 14, 2023), <https://www.law.com/nationallawjournal/2023/06/14/uk-legal-scholars-track-down-17th-century-murder-case-prove-supreme-court-wrong/> [https://perma.cc/8CEE-EUUQ]. A few years before, the Supreme Court had upheld the dual-sovereignty exception, in part, because the parties had been unable to substantiate the historical practice purportedly reflected in the missing report. *Gamble v. United States*, 139 S. Ct. 1960, 1970 (2019). Thank you to Joel Alicea for bringing this example to my attention.

⁹³ See Nelson, *supra* note 13, at 67–68 (“[O]ne might rationally surmise that the weaker version of *stare decisis* will increase the accuracy of our case law enough to justify the costs of the extra changes it generates.”).

⁹⁴ See *id.* at 63 (describing economic transition costs of investments that “public and private actors must make . . . to understand and conform to the new rule, and . . . spen[d] on litigation to refine and clarify it”).

⁹⁵ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2343–44 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

shortcomings of historical inquiry are overstated. One reason for this is that the historical record that is relevant to legal inquiry is finite and static. Any evidence that bears on the Court's inquiry under a text-and-history approach already exists.⁹⁶ True, future litigants may *discover* evidence that already exists but is currently unknown,⁹⁷ or courts may learn to understand old evidence in new ways.⁹⁸ But recall the sort of inquiry in which the Court is engaged: in *Bruen*, discerning the shape of the right to keep and bear arms based on its reflection in roughly contemporary practices.⁹⁹ It will take more than a tiny fragment of contemporary practice—an isolated law—or a slight shift in perspective to change the picture.¹⁰⁰ Add to this the immense amount of academic and legal attention given to questions concerning the right to keep and bear arms as they work their way up to the Supreme Court,¹⁰¹ together with the fact that the Court is not *bound* by party presentation but may consider historical argument by amici,¹⁰² and it seems likely that future litigants will only infrequently uncover decisive evidence of historical meaning *after* the Court has spoken.¹⁰³

⁹⁶ And exists in a comparatively accessible form. The most relevant records—contemporaneous statutes, court records, and legal treatises—will exist on the regularized and well-preserved end of the spectrum of historical evidence.

⁹⁷ See, e.g., *supra* note 91.

⁹⁸ For example, judicial understanding of the Statute of Northampton has evolved. Compare *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2140–41 (2022) (interpreting the statute narrowly to prohibit carrying only offensive weapons or going armed to terrify the people), with *Young v. Hawaii*, 992 F.3d 765, 787–88 (9th Cir. 2021) (interpreting it as a “complete prohibition on carrying weapons in public”).

⁹⁹ *Bruen*, 142 S. Ct. at 2137–38.

¹⁰⁰ Cf. McConnell, *supra* note 11, at 1758 (noting that significant theoretical differences about how to look at history sometimes fail to produce “nontrivial” differences in legal conclusions).

¹⁰¹ See Woolhandler, *supra* note 50, at 118; see generally Volokh, *supra* note 44 (setting an agenda for historical research concerning the meaning of the Second Amendment). In the example mentioned at *supra* note 91, it took a team of historians three years to uncover a single piece of historical evidence missed by the parties and amici in *Gamble*.

¹⁰² Frost, *supra* note 70, at 465–67. The *Bruen* Court considered historical evidence cited by amici. See, e.g., Brief of Professors Robert Leider and Nelson Lund, and the Buckeye Firearms Ass'n as Amici Curiae in Support Of Petitioners, in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (cited by the Court for its presentation of historical evidence concerning surety laws); Brief for Amici Curiae Professors of History and Law in Support Of Respondents., in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (presenting evidence concerning colonial laws that was discussed, but ultimately rejected, by the Court).

¹⁰³ Of course, it is possible that the marginal piece of evidence future litigants dig up would have been conclusive in the original inquiry, but that fails to overcome an implicit status-quo bias in subsequent litigation. This would, however, be an example of a court purporting to apply the demonstrably erroneous standard but in fact harboring undisclosed elements of the modern *stare decisis* doctrine. Every doctrine suffers from the drawback that it may be misapplied. I acknowledge that the status-quo bias may be difficult to overcome, but it is also true that many elements of the modern *stare decisis* doctrine are subjective in ways that allow courts imperceptibly to raise or lower the bar for overcoming past precedent. Compare *Dobbs*, 142 S. Ct., at 2272–75 (arguing that

This assumes, of course, that the Court speaks after adversarial vetting. In *Heller*, the majority mused in passing that felon dispossession was “presumptively lawful.”¹⁰⁴ Although subsequent analysis has cast doubt on the historical pedigree of statutes dispossessing non-violent offenders,¹⁰⁵ lower courts have, until recently, largely accepted *Heller*’s dictum.¹⁰⁶ Ongoing presentations of historical evidence therefore have the potential to disrupt the hitherto “settled” meaning of the Second Amendment in this area.¹⁰⁷

Make no mistake: There will be some instability, as has always been the case when the Court recognizes a right that has gone unenforced. The Court will sometimes reach demonstrably erroneous decisions, either because it lacks complete evidence of historical meaning, or because it misunderstands the evidence it does have.¹⁰⁸ And the Court, unleashed from the restraints of modern *stare decisis*, may overturn arguably correct precedent because it reads the evidence differently. My point is only that “new historical evidence” is unlikely to contribute significantly to that instability.

CONCLUSION

Thus far, I have focused on the compatibility between *Bruen*’s text-and-history approach and the traditional doctrine of *stare decisis*. I would like to close with some observations about the compatibility between means-ends scrutiny and the modern doctrine of *stare decisis*—more specifically, to

the “undue burden” standard for abortion regulation was unworkable), *with id.* at 2337 (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that it is “known, workable, and predictable”).

¹⁰⁴ *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

¹⁰⁵ *E.g.*, *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *Binderup v. Att’y Gen.*, 836 F.3d 336, 367 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments).

¹⁰⁶ *See Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2019) (collecting cases); *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *14 (S.D. Miss. June 28, 2023) (describing a “consensus” that felon dispossession is constitutional); *see, e.g.*, *United States v. Bogle*, 717 F.3d 281, 281 (2d Cir. 2013) (mem.) (“[T]he Supreme Court clearly emphasized that recent developments in Second Amendment jurisprudence should not ‘be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’” (citing *Heller*, 554 U.S. at 626)). *See generally* Keaton Campbell, Comment, *A Final Shot at Federal Felon Dispossession: Bruen, Heller’s Haven, and Non-Violent Felons*, 88 MO. L. REV. (forthcoming 2024) (reviewing lower court rulings on felon dispossession).

¹⁰⁷ *See, e.g.*, *Range v. Att’y Gen.*, 69 F.4th 96 (3d Cir. 2023) (en banc) (finding felon disarmament unconstitutional as applied to a nonviolent offender); *Bullock*, 2023 WL 4232309, at *31 (finding felon disarmament unconstitutional as applied to a violent offender).

¹⁰⁸ The historical meaning of provisions of the Constitution remain contested even in an era of widespread originalist scholarship, but many of these disagreements are the product of methodological differences instead of the discovery of new historical evidence. *See, e.g.*, Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1938 (1995) (attributing divide over the originalist case for *Brown v. Board of Education* to methodological disagreements).

suggest that much of the perceived need for a stronger form of *stare decisis* arises from modern legal doctrines that call for courts to resolve constitutional questions using means-ends scrutiny and similar balancing tests.

What distinguishes history-based tests from balancing tests is that the former look backward, while the latter look forward. A text-and-history approach asks what the law was in the past. Balancing tests ask what the effect of the law will be in the future.¹⁰⁹ Unlike a finite and static historical record, the body of evidence upon which courts base predictions is infinite and ever changing.¹¹⁰ With every passing hour, new empirical data emerges to validate or contradict those predictions, costs climb or fall, needs materialize or dissipate, and the state of the art of the social sciences on which so many of these predictions are based shifts.¹¹¹

True enough, balancing tests often call for some measure of deference to legislative judgment. Within the zone of deference, legal conclusions can withstand a greater degree of factual change. And in a world where empirical support may be found for almost any claim,¹¹² intermediate scrutiny often translates into insurmountable deference.¹¹³ But in any case in which the Court actively enforces a right, its holding is built on shifting sand. On this terrain, the impulse to stabilize precedents is understandable. On the firmer ground of text and history, it is less so.

¹⁰⁹ Woolhandler, *supra* note 50, at 114.

¹¹⁰ See FAIGMAN *supra* note 4, at 26–27 (noting that empirical knowledge is probabilistically described and thus will only be “true” for some of the time).

¹¹¹ Alicea & Ohlendorf, *supra* note 2, at 81; *see, e.g.*, John J. Donohue, Abhay Aneja, & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime*, 16 J. EMPIRICAL LEGAL STUD. 198, 198–201 (2019) (describing significant advances in analysis of the impact of public carriage on crime rates over the past two decades).

¹¹² See Larsen, *supra* note 70, at 198–202 (describing the recent proliferation of amici briefs growing the factual dimensions of constitutional litigation).

¹¹³ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2131 (2022); *see, e.g.*, Duncan v. Bonta, 19 F.4th 1087, 1108 (9th Cir. 2021).