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HISTORIANS AS EXPERTS IN CONSTITUTIONAL LAW

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ABSTRACT

The Supreme Court’s growing embrace of “history and tradition” in constitutional law has raised new questions about how historical evidence enters the legal system—especially in the lower courts with primary responsibility for enforcing the Court’s new historical tests. In the past, the kinds of evidence relevant to originalist doctrine were typically presented at the appellate level, often before the Supreme Court itself and mostly through amicus briefs. But as the Justices have directed lower courts to adjudicate constitutional claims via “reference to historical practices and understandings,” “historical tradition,” and other guideposts of the past, some commentators and judges have suggested that lower courts are or should be relying on historians, allowing or appointing them to submit expert reports and testify in constitutional cases.

This Article investigates changes in the uses of historical expertise in constitutional cases and what the implications of those changes might be. At the heart of the Article is a novel, hand-coded dataset of twenty-five years of constitutional litigation involving historian experts. We examine 100 federal district court constitutional cases involving historian experts, from 2000-2025, as well as the larger number of expert reports in those cases. This dataset allows us to concretely situate the role of historians in the midst of a broader shift in constitutional method, and also to provide specific suggestions about how to improve the use of expert historians.

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These data capture a snapshot of historical expertise at a moment of doctrinal transformation. That picture shows that historians are indeed being employed more frequently as experts—especially in Second Amendment cases—but that judges are loath to engage with the reliability of historian expert evidence through traditional gatekeeping tools like Rule 702 and *Daubert*. This raises potential problems. If originalist doctrines are, as their defenders often assert, rooted in empirical claims of historical fact, then there is no obvious reason why the experts with knowledge of those facts should be treated any differently than the economists, doctors, engineers, and other experts that trial courts regularly evaluate. Such work is challenging, but faithful implementation of current constitutional doctrine requires careful attention to historical evidence, which in turn requires consulting experts. To the degree that standard legal practice cannot perform the tasks that constitutional doctrines purport to make mandatory, it is not clear why the former should give way, including because the failure to permit parties to carefully develop the factual basis for their claims itself implicates constitutional concerns.

TABLE OF CONTENTS

ABSTRACT	1
TABLE OF CONTENTS	2
INTRODUCTION.....	4
I. HISTORICAL EVIDENCE AND EXPERTISE IN CONSTITUTIONAL LITIGATION.....	7
II. HISTORICAL EXPERTS IN CONSTITUTIONAL CASES: 2000-2025	11
A. OVERVIEW OF THE DATASET.....	12
B. JUDICIAL RULINGS ON HISTORIAN EXPERTS	14
1. <i>Qualification of Experts</i>	16
2. <i>Reliability and Daubert Analysis</i>	17
3. <i>Judicial Rulings on Weight</i>	18
4. <i>Deposition or Trial Testimony by Historian Experts</i>	20
C. EXPERT REPORTS	21
D. APPELLATE RULINGS ON HISTORIAN EXPERTS	23
III. IMPROVING THE USE OF EXPERT HISTORIANS	26
A. FOUR POTENTIAL IMPROVEMENTS.....	26
B. GRASPING THE NETTLE	30
CONCLUSION	33
APPENDIX: CONSTITUTIONAL CASES WITH EXPERT HISTORIANS, 2000-2025	34

INTRODUCTION

Constitutional doctrine has increasingly come to rely on historical evidence, triggering a rich judicial and scholarly debate about the proper role of history in constitutional interpretation and implementation.¹ That debate, which can lay claim to have been the central battleground of constitutional theory for decades, will surely continue so long as the Supreme Court remains committed to originalism.²

But alongside—and in some sense underneath—broad inquiries about the relationship of law and history lies a set of seemingly more quotidian questions about evidence and procedure.³ How do historical facts enter the legal system? Are they “adjudicative” or “legislative”? Are they entitled to deference on appeal? Such questions are especially pressing for the lower courts tasked with implementing the Court’s originalist doctrines.

In this Article, we focus on the use of historians as experts in constitutional cases, an issue that is both theoretically rich—a matter of epistemic authority⁴—and also concretely practical—a matter of legal practice

¹ The literature is too vast for a string cite; for a few recent notable contributions, see JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* (2025); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778 (2022); Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. PUB. POL’Y 563, 579 (2025).

² As in prior work, in using the term “originalism,” we mean to capture a wide range of interpretive methods that rest substantially on claims about the past. We recognize, of course, that originalism comes in many different varieties: original intent, original public meaning, original law, and so on. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009). What they have in common is a reliance on some type of historical evidence, which is our focus here.

For examples of such tests, see, *United States v. Rahimi*, 602 U.S. 680, 694 (2024) (holding that modern gun laws must be “consistent with the principles that underpin our regulatory tradition.”); *Kennedy v. Bremerton*, 597 U.S. 507, 535 (2022) (suggesting that Free Exercise claims must be resolved by “reference to historical practices and understandings”); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (asking whether an asserted right is “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty”).

³ For a broader discussion of traditional and newer uses of historical evidence in constitutional doctrine that must be applied by lower courts, see Joseph Blocher & Brandon L. Garrett, *Applying History as Law*, 104 TEX. L. REV. 679 (2026). This project is part of a more detailed exploration of fact-finding in constitutional cases. See JOSEPH BLOCHER & BRANDON L. GARRETT, *CLEAR ERRORS: PROTECTING CONSTITUTIONAL RIGHTS FROM UNSOUND JUDICIAL FACT-FINDING* (in contract, Harvard U. Press); Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Factfinding*, 112 GEO. L.J. 699 (2024); Joseph Blocher, Brandon L. Garrett & Timothy Lovelace, *Historical Facts and Constitutional Law: New Challenges for Originalist Doctrine*, 75 DUKE L.J. 1243 (2026); Brandon Garrett & Joseph Blocher, *Standards of Fact Review in Constitutional Litigation*, COLUM. L. REV. (forthcoming 2027) (unpublished manuscript on file with authors).

⁴ As one court has put it: “The ultimate irony is that the version of history endorsed in these

and procedure at trial. And we approach that issue inductively, grounding our descriptive and normative analysis in a novel, hand-coded data set of cases listed in the Appendix and available in an online repository.⁵

Though the data and analysis we present is novel, the role of historians in constitutional cases has long been a question of judicial and scholarly concern.⁶ As Justice Antonin Scalia noted in a seminal law review article, examining historical evidence “is, in short, a task sometimes better suited to the historian than the lawyer.”⁷ That task raises serious challenges, especially as the Court increasingly uses history and tradition not only to discern the semantic meaning of the Constitution, but as an element of the doctrinal tests that lower courts must implement. Dissenting in *New York State Rifle and Pistol Association v. Bruen*, Justice Stephen Breyer asked: “Do lower courts have the research resources necessary to conduct exhaustive historical analysis in every Second Amendment case?”⁸ Moreover, “How will judges determine which historians have the better view of close historical questions?”⁹ Those challenges are particularly salient in Second Amendment cases, given the centrality of history to the *Bruen* framework, but they are increasingly endemic in constitutional litigation more broadly.¹⁰

Our analysis proceeds in three parts. Part I explores the role of historical evidence in constitutional litigation. Rather than revisiting the well-known debates about the overlaps and differences between how judges and historians think about history, we build on prior work¹¹ in highlighting questions of legal practice. Those questions invite the use of familiar tools. The standards set out in *Daubert v. Merrell Dow Pharmaceuticals*¹² and Federal Rule of Evidence 702 require a degree of reliability in the work of experts of all types, and application of those standards is bread and butter for lower courts. As one district judge put it in a recent Second Amendment case, “[w]hile this Court professes no independent scholarly historical knowledge, it does have solid experience in

(and other) decisions has itself been deemed untrustworthy by actual historians.” United States v. Brown, 764 F. Supp. 3d 456, 465 (S.D. Miss. 2025). See *infra* notes 25-36 and sources cited therein.

⁵ These data are available for review and can be downloaded at: Joseph Blocher and Brandon L. Garrett, “District Court Use of Historical Expert Evidence in Constitutional Cases,” at <http://constitutionalfacts.law.duke.edu>. This digital collection was created by Joseph Blocher and Brandon Garrett at Duke Law, with the help of Olivier Binette at the Duke Law Data Lab.

⁶ Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

⁷ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁸ 597 U.S. 1, 107 (Breyer, J. dissenting).

⁹ *Id.*

¹⁰ See Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. 633 (2026); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023).

¹¹ See *supra* note 3 and sources cited therein.

¹² 509 U.S. 579 (1993).

resolving disputes between experts.”¹³ If originalism is indeed rooted in questions of historical fact¹⁴ and historians are experts with regard to those facts, why should they be treated any differently than the economists, doctors, engineers, and other experts with whom trial judges regularly deal?

To account for the treatment of historian expert testimony in federal constitutional litigation, Part II presents an original dataset detailing the role of historical experts in constitutional cases from 2000 through 2025. To compile it, we located and coded detailed information regarding 100 such cases, which we identified through searches of written opinions, dockets, and appearances by particular experts in federal courts. We included all constitutional cases, with a ruling by a federal judge, in which an expert was retained to report on historical analysis, whether that person was a Ph.D. or academic historian, an academic from another discipline, or a non-academic prepared to testify about historical matters.

In Section II.A, we provide an overview of that data. In the early 2000s, constitutional cases with historian experts were uncommon, and tended to involve Equal Protection, voting rights,¹⁵ marriage, or the religion clauses. In recent years, however, constitutional cases with historians as experts have become increasingly common and increasingly dominated by litigation regarding Second Amendment claims,¹⁶ a shift undoubtedly triggered by the Supreme Court’s adoption of a historical test in *Bruen*. Our dataset includes 71 cases since 2020, more than two-thirds of which were Second Amendment cases.¹⁷ Given that *Bruen* is often treated as a vanguard of broader reliance on history and tradition throughout constitutional law,¹⁸ we might expect to see similar trends in other areas where tests like *Bruen* take hold.

Our dataset also allows us to examine what types of historical evidence these experts provide, which we describe in Section II.B. We located 328 expert reports, including 222 expert reports in Second Amendment cases, as well as some depositions, judicial rulings, and *Daubert* hearing transcripts. Few of these rulings include any analysis regarding the admissibility of these experts under

¹³ *Ocean State Tactical, LLC v. State of Rhode Island*, No. 22-CV-246 JJM-PAS, 2022 WL 17721175, at *7 (D.R.I. Dec. 14, 2022).

¹⁴ Blocher & Garrett, *Originalism and Historical Fact-Finding*, *supra* note 3, at 712-16 (collecting originalist sources describing the method as an empirical enterprise rooted in fact-finding).

¹⁵ See Kritika Agarwal, *Historians as Expert Witnesses*, Perspectives on History, Feb. 1, 2017, at <https://www.historians.org/perspectives-article/historians-as-expert-witnesses-can-scholars-help-save-the-voting-rights-act-february-2017/> (“[H]istorians have become a near-constant presence in voting rights cases”).

¹⁶ Shawn Hubler, *In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791*, N.Y. TIMES (Mar. 14, 2023).

¹⁷ Most were civil cases, though in some criminal cases the judges discussed whether to request that the parties call experts or explicitly concluded that no expert was needed. *U.S. v. DeBorba*, 713 F. Supp. 3d 1042, 1068 (W.D. Wash. 2024); *U.S. v. Bernabe-Martinez*, No. 1:22-CR-00276-AKB-1, 2024 WL 778114, at *1 (D. Idaho Feb. 26, 2024).

¹⁸ See *supra* note 10 and sources cited therein.

Daubert or Federal Rule of Evidence 702, and indeed in many cases, the sides appeared not to contest admissibility. The experts' approaches and findings varied considerably in form, level of detail, and in the materials cited and presented.

Finally, in Part III, we conclude by discussing some implications of these findings for development of constitutional doctrine through the reliance on historical facts. To the degree that historical evidence must be examined in order to apply constitutional standards to the facts of a case, the role of experts and the reliability of their analyses is crucial. This makes it troubling that judges so rarely engage with required reliability analysis when evaluating historian experts in constitutional cases or—what is perhaps even worse—they ignore the contributions of expert historians entirely.

At the same time, we are mindful of the impossible position in which lower courts find themselves. The cost of relying on historians as experts are enormous in terms of both time and money, and might well represent a bill that originalism cannot pay. If so, the fault lies not the trial judges, litigants, or with the historians seeking to inform the courts, but rather our constitutional doctrine, which simultaneously claim to be rooted in historical facts and makes it prohibitively difficult for those facts to be reliably proven and evaluated.

I. HISTORICAL EVIDENCE AND EXPERTISE IN CONSTITUTIONAL LITIGATION

This Part begins by introducing the ways in which historical evidence is relevant in constitutional law and the ways in which historians might be involved in constitutional cases. By focusing on matters of evidence and expertise we do not mean to downplay important issues of theory and method that arise when lawyers and historians argue about the Constitution.¹⁹ Our interest is in how that broad intellectual debate is intertwined with a number of intensely practical questions about how law “knows” history. How is historical evidence used in constitutional law, and how has that changed as originalism and related theories of interpretation have become more prevalent? What types of historians have been called in constitutional cases and on what types of constitutional questions? What is the judge's role when an expert is called in a case? How is that role different if the expert is an historian?

Parties and amici have long made arguments from history,²⁰ and have occasionally relied on historians as experts in a variety of contexts,²¹ but the

¹⁹ Cf. Jack M. Balkin, *Lawyers and Historians Argue about the Constitution*, 35 CONST. COMMENT. 345 (2020).

²⁰ See G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002).

²¹ For an excellent critical overview, see Jonathan Martin, *Historians at the Gate: Accommodating*

demand and supply curves for historical expertise in constitutional law have changed markedly in recent years, thanks to the Supreme Court's growing reliance on historical methods and evidence. And yet this apparent shift in the market for historical expertise has not yet generated an equivalently robust discussion amongst Justices and scholars about best practices for expert historical evidence in constitutional law. Despite Justice Scalia's acknowledgement that the examination of historical evidence "is, in short, a task sometimes better suited to the historian than the lawyer,"²² it is not immediately clear whether and how the Justices make use of historians in pursuing that task. As an appellate court, the Supreme Court is not in a position to retain experts and build a factual record; at most the Justices can rely on the parties and on amicus briefs²³ (some of them filed by historians, to be sure) or the Justices and their clerks' own research.²⁴ But the doctrines the Court announces shape the demand curve for historical fact-finding in the lower courts, which have primary responsibility for implementing them.

Meanwhile, in the legal academy, originalist scholars have spent generations broadening and deepening their theories of interpretation, but have while paying comparatively little attention to the details of how a historical record should be compiled in the course of litigation.²⁵ To be sure, many originalist legal scholars have discussed historians' work, sometimes minimizing or outright dismissing it as being of limited reliance to the interpretive questions originalism poses. Randy Barnett, for example, has critiqued "history department history," in part on the basis that historians focus on historical facts not geared towards solving legal problems.²⁶ Sai Prakash similarly responded to

Expert Historical Testimony in Federal Court, 78 N.Y.U. L. REV. 1518, 1541 (2003). See also *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 436-37 (D. Md. 2005); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985); *City of Mobile v. Bolden*, 446 U.S. 55, 59-60 (1980).

²² See Scalia, *supra* note 7.

²³ For examples of historian amicus briefs see *infra* note xxx. For one view of the track record of consideration of such briefs, see Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 359-60 (2013) ("In spite of their enthusiastic participation, historians are neither getting the results they would like nor using means they particularly want to employ.").

²⁴ See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 25-26, 49-50 (2011); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1817 (2014); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 757 (2000).

²⁵ Proving such a negative is always tricky; for one example of a thoughtful piece developing the evolution of originalist approaches to constitutional interpretation while making no mention of the work of or approaches of historians, see, e.g. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 558 (2003). For notable exceptions that do engage with the nuts and bolts of historical fact-finding, see Josh Blackman, "Originalism and Stare Decisis in the Lower Courts," Inaugural Edwin Meese III Originalism Lecture, Heritage Foundation, at 4 (May 22, 2022) <https://www.heritage.org/sites/default/files/2022-05/HL1328.pdf>; Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J. L. & PUB. POL'Y 257 (2022).

²⁶ Randy E. Barnett, *Challenging the Priesthood of Professional Historians*, THE VOLOKH

historian Jack Rakove's critique of originalism by saying that Rakove's "primary problem" is that he "approaches the law as a historian."²⁷ Gary Lawson and Guy Seidman argue that "[h]istorians, psychologists, and linguists may have something, and even much, to contribute to this legal enterprise, but constitutional interpretation remains a distinctively legal, rather than a distinctively historical, linguistic, or psychological, task."²⁸ Others have advocated for bringing originalism and history closer together, while acknowledging that "the lessons of history are ambiguous and not easily adapted to our present situation."²⁹

Historians, in turn, have often criticized originalism and its relationship to historical evidence.³⁰ Eric Foner has described how the Supreme Court seems to use history instrumentally to reach preferred conclusions.³¹ Jill Lepore has compared originalism to a form of "historical fundamentalism, which is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution."³² Allison LaCroix has written that it "[i]t is simply false to suggest that the Court's conservative majority is doing anything that resembles 'history.' ... [D]etermining what the text of the Constitution meant when it was adopted is a complex undertaking. Historians have a word for this process: 'research.'"³³ Other historians note that some versions of originalism "bypass history by way of philosophy," as Jonathan Gienapp has put it, by turning to linguistic theory.³⁴

Some historians have questioned whether they should properly serve as experts at all, if ultimately judges will engage in law office history or ask them to

CONSPIRACY (Mar. 28, 2017, 11:51 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/>; see also Mike Rappaport, *An Important Difference Between Historians and Originalist Law Professors*, LAW & LIBERTY (Oct. 11, 2018), <https://old.lawliberty.org/2018/10/11/an-important-difference-between-historians-and-originalist-law-professors/>.

²⁷ See Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 539 (1998).

²⁸ See Gary Lawson & Guy Seidman, *Originalism As A Legal Enterprise*, 23 CONST. COMMENT. 47, 50 (2006).

²⁹ See JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 6, 10 (2024).

³⁰ For an overview of historian criticisms, see, e.g. Martin, *supra* note 21, at 1525-27; Stein, *supra* note 23, at 362.

³¹ See Eric Foner, *The Supreme Court and the History of Reconstruction--And Vice-Versa*, 112 COLUM. L. REV. 1585, 1604 (2012).

³² See JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 123-24 (2011); Gordon Wood, *No Thanks for the Memories*, N.Y. REV. BOOKS (Jan. 13, 2011).

³³ See Alison L. LaCroix, *James Madison v. Originalism*, PROJECT SYNDICATE (Aug. 26, 2022), <https://www.project-syndicate.org/commentary/james-madison-rejected-originalist-interpretation-by-alison-l-lacroix-2022-08>.

³⁴ See Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 945 (2015).

answer questions that cannot be answered using appropriate historical methods. One historian commented that history “is much too complicated. Courts don’t like complicated. They want history to prove something, and history doesn’t do that.”³⁵ Saul Cornell, who features prominently in our dataset as a post-*Bruen* historical expert, earlier described *Heller* as showing that originalism is “a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion.”³⁶ To be sure, this is not a problem unique to history; it is a challenge for a wide range of scholarly disciplines that are invoked in law.³⁷ And just as in those areas, the possibility of selective citation and argument does not exempt historical expertise and historical experts from the same obligations as the other areas of expertise and experts that the law makes relevant.

That problem should be ameliorated at least in part by the familiar practices and rules governing expert witnesses in those areas—a matter of evidentiary procedure. When judges review a proffered expert in a case, they apply the test set out in the Supreme Court’s ruling in *Daubert*, which establishes a non-exclusive list of factors to be considered when evaluating the reliability of an expert’s methods, including falsification, peer review and publication, the known or potential rate of error of a scientific technique, and whether it has been “generally accepted” in the relevant scientific community.³⁸

More specific than the *Daubert* framework, Federal Rule of Evidence Rule 702 directs judges to review experts’ qualifications, the reliability of the expert’s methods the reliability of the factual record relied upon by the expert, and the reliability of the application of the methods to the facts.³⁹ The rule was amended in 2023 in order to emphasize the burden on the party seeking to introduce the expert and the need to review the reliability of the conclusions the expert reaches applying their methods to the facts.⁴⁰ Thus, the judge clearly has the obligation to address these reliability issues, even if the party does not affirmatively raise them or contest them; the burden is on the party seeking to introduce an expert. That said, there is no obligation to hold a full-fledged *Daubert* / Rule 702 hearing, and admissibility questions are often addressed closer to the time of a trial.

The Supreme Court has emphasized the flexibility of these inquiries,⁴¹ making them easier to apply to a wide range of disciplines. While some of the *Daubert* reliability-related factors, like peer review and general acceptance within

³⁵ Stein, *supra* note 20, at 364 (quoting author interview).

³⁶ See Saul Cornell, Heller, *New Originalism, and Law Office History: Meet the New Boss, Same as the Old Boss*, 56 UCLA L. REV. 1095, 1098 (2009).

³⁷ See, e.g., Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 176 (2006).

³⁸ 509 U.S. 579, 593-95 (1993).

³⁹ FED. R. EVID. 702.

⁴⁰ *Id.*

⁴¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999).

the scholarly community, are quite useful when assessing a historian, factors like rates of error and replicability might be less so. (This is not to say that they are irrelevant; some basic principles regarding error and replicability are important for any type of expert, including historians.⁴²) Interestingly, prominent historians of science joined an amicus brief in the *Daubert* case, raising concerns with any inflexible use of standards suited towards other disciplines.⁴³

A judge may also, under Rule 706, appoint an independent expert not retained by the parties.⁴⁴ As we discuss in more detail below, this practice appears quite rare—we see only one case in our dataset in which a judge appointed an expert historian, and that case involved a pro set plaintiff who presumably could not have hired a historian on their own.⁴⁵

The type of historian who can provide relevant and reliable testimony will vary depending on the question at issue, as Matthew Festa has pointed out: “Must Jack Rakove or Gordon Wood get haled into court every time there is a question of historical interpretation? Of course not.”⁴⁶ Broad questions involving Founding-era history might very well call for leading academic historians like Rakove or Wood, while local questions like the history of a particular church, land-use law, or school, might call for a different kind of expert.

Our goal here is not to fully capture the relationship between law and history, but to highlight some ways in which interpretive theory and method make claims on historical expertise and historical facts. That, in turn, highlights questions about how evidentiary rules and trial practice can account for the kind of historical fact-finding that the Court’s doctrine increasingly requires. If originalism is “our law,”⁴⁷ and if it depends on claims of historical fact,⁴⁸ then presumably historical fact-finding must be answerable to our rules of evidence.

II. HISTORICAL EXPERTS IN CONSTITUTIONAL CASES: 2000-2025

⁴² In one prominent case, Michael Bellesiles, an historian whose work was widely cited in legal circles, was later found to have falsified his research. See James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002).

Interestingly, citations to Bellesiles’ work (albeit not *Arming America*, the disgraced book) have spiked upward since 2022—the year that *Brien* mandated reliance on historical sources. See Seth Barrett Tillman, “A Phenomenon in Search of a Theory / Recent Citations to Michael Bellesiles’ Publications” (June 25, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5318644.

⁴³ See Brief Amici Curiae of Physicians, Scientists, and Historians of Science in Support of Petitioners at 11, *Daubert* (No. 92-102).

⁴⁴ FED. R. EVID. 706.

⁴⁵ *Weinbaum v. Las Cruces Public School*, 465 F.Supp.2d 1116 (D.N.M. 2005).

⁴⁶ See Matthew J. Festa, *Applying A Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 543 (2008).

⁴⁷ William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

⁴⁸ See *supra* note 14.

In Part I, we broadly described some of the underlying debates and legal rules governing historical expertise in constitutional law. In this Part, we describe our analysis of more than twenty-five years of reported rulings regarding experts in constitutional cases. The dataset contains 100 cases and 328 expert reports. We begin by providing an overview of the general characteristics of those cases, the trends over time, the experts, and the judicial rulings regarding expert admissibility and the weight to be given to such historical expert evidence. Second, we look at the larger volume of underlying materials in these cases, including the several hundred expert reports that we were able to obtain. Third, we briefly examine the relatively few cases in which appellate courts discussed that expert historian evidence.

A. Overview of the Dataset

The dataset consists of federal cases from 2000 to 2025 in which experts testified regarding historical evidence relevant to constitutional claims. We built the dataset based on searches of the Westlaw expert and federal district court databases, and thus we could not identify retention of experts in cases in which there were neither docket entries referencing historian experts nor reported decisions (perhaps because the litigation was still in initial stages at the time). We did not limit our search to cases in which the expert was a professional or academic historian, because we were interested in whether people from different disciplines or with non-academic credentials were proffered as experts regarding historical matters in constitutional cases.⁴⁹ Our initial searches turned up 58 cases; we located additional cases by conducting searches for further cases involving the same experts included in that original group of 58 cases. Because many experts were repeat-participants in constitutional litigation, these follow-up searches turned up 38 additional cases. To cross-check our work, we compared our list with two publicly available compilations of expert reports in Second Amendment cases, which turned up 4 additional cases.⁵⁰ As noted, all 100 cases are listed in the Appendix and online repository.

One obvious trend is that reliance on expert historians has spiked in recent years. We located only 8 cases from 2000 to 2010, and another 22 from 2011 to 2020.⁵¹ But there were 70 cases from 2021 to 2025, a remarkable increase

⁴⁹ Federal Rule of Evidence 702 does not require specialized credentials. It provides that an expert may, if satisfying the other requirements, be one “who is qualified as an expert by knowledge, skill, experience, training, or education.”

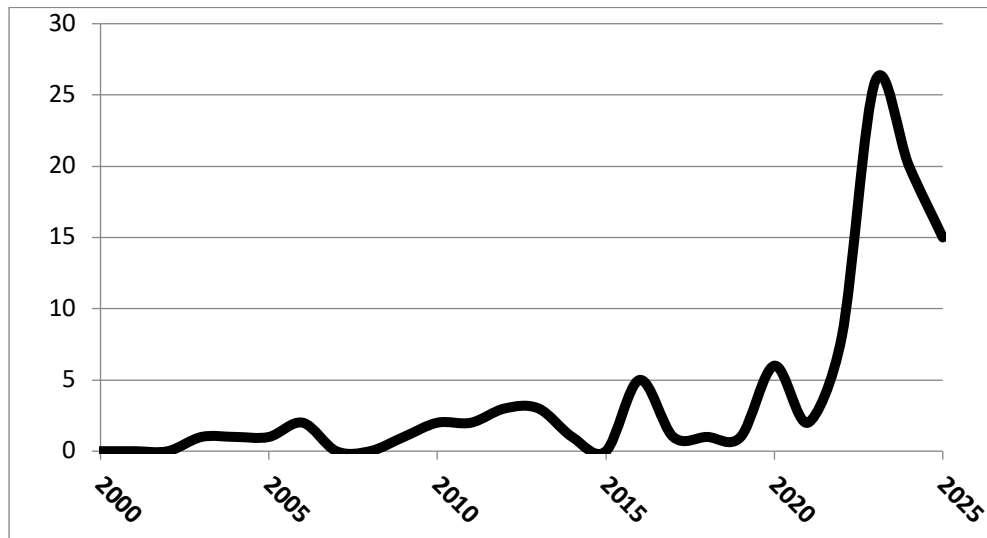
⁵⁰ EVERYTOWN FOR GUN SAFETY, EXPERT WITNESSES, <https://everytownlaw.org/everytown-center-for-the-defense-of-gun-safety/expert-witnesses/>; GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, SECOND AMENDMENT EXPERT WITNESS REPORTS, <https://giffords.org/lawcenter/gun-laws/litigation/second-amendment-expert-reports/>.

⁵¹ In some cases, there were reported federal decisions in several years; in such situations we chose the first reported decision with a ruling discussing historical experts and/or evidence.

that accounts for two-thirds of our set. Of those 70 cases, 54 involved Second Amendment claims, and the other 16 were Fourteenth Amendment or First Amendment religious freedom cases. There were just two Second Amendment cases featuring historical experts before 2020,⁵² but 50 from 2023 to present, all in cases with rulings after *New York State Rifle & Pistol Ass. v. Bruen* was decided in June 2022.⁵³

The figure below displays how many cases we located in each year.

Figure 1. Constitutional Cases with Historian Experts, 2000-2025



Almost all of the constitutional cases in this database were civil. We located just two cases in which criminal defendants retained historian experts to support Second Amendment challenges.⁵⁴ Still, experts might well have played a larger role in criminal cases than our data reflects, since it seems plausible that judges are less likely to write opinions regarding expert admissibility issues in criminal cases given the predominance of plea bargaining.

The historians themselves are often repeat witnesses. The 100 cases include 295 expert witnesses, but only 96 unique individual expert witnesses. Many cases involved multiple experts, sometimes on both sides, and many experts served in multiple cases. As for the historians' backgrounds, many were PhD historians. Others had a PhD in another field such as political science, sociology, or education. However, some were lawyers or had master's degrees

⁵² *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F.Supp.2d 349 (2013); *Miller v. Becerra*, 488 F.Supp.3d 949 (2020).

⁵³ 597 U.S. 1, 3 (2022).

⁵⁴ The cases are: *U.S. v. DeBorba*, 713 F. Supp. 3d 1042, 1068 (W.D. Wash. 2024); *U.S. v. Bernabe-Martinez*, No. 1:22-CR-00276-AKB-1, 2024 WL 778114 (D. Idaho Feb. 26, 2024).

in history. And in Second Amendment cases, experts were proffered to speak to diverse historical questions with equally varied backgrounds in martial arts, law enforcement, or the Bureau of Alcohol Tobacco and Firearms (ATF).

The Second Amendment area appears particularly concentrated and specialized. Six people in the database served as experts in more than ten cases, all of them PhDs, albeit not all PhDs in history.⁵⁵ As Jake McAuliffe has detailed based on a insightful review of 1,600 post-*Bruen* Second Amendment cases, “only sixteen historians with general expertise in the history of eighteenth-century firearms ... have been retained and disclosed as expert witnesses in Bruen-era federal district court rulings.”⁵⁶ Repeat experts are also prevalent in voting rights cases and cases involving the religion clauses.⁵⁷ Equal Protection used to be an area where historian experts play a prominent role, but it has been eclipsed by those other areas in which the doctrine has become particularly focused on history.

B. Judicial Rulings on Historian Experts

In constitutional cases involving historian experts, judges must ensure that “testimony adhere to the historical method,” relying on sound uses of history.⁵⁸ As with any expert, a judge must ensure by a preponderance of the evidence that the party seeking to introduce the expert shows that the reliability requirements of Rule 702 and *Daubert* are satisfied as to the reliability of the methods, the underlying facts relied upon, and the conclusions drawn from applying those methods to the facts. The 2023 Rule 702 amendments re-emphasized the importance of that gatekeeping inquiry.⁵⁹

We do not observe many Rule 702 or *Daubert* rulings in our dataset. Of the 100 cases, only 23 included rulings on expert admissibility. We know from the reported decisions that in 22 cases the district judge held a *Daubert* hearing regarding the experts proffered. In five cases, experts were excluded, at least in part, by the judge.⁶⁰ In two of the cases, this was based on the expert’s

⁵⁵ These were: Robert Spitzer (27 cases), Saul Cornell (22), Brennan Rivas (22), Louis Klarevas (19), Randolph Roth (14), Brian DeLay (11), and Dennis Baron (10).

⁵⁶ Jake McAuliffe, *Historians for Hire: Evaluating Historian Expert Witnesses After Bruen*, 75 DUKE L.J. 1363, 1380 (2026).

⁵⁷ For example, two First Amendment Establishment Clause cases, with the same experts on both sides, are *Cave v. Jester*, 2025 WL 2814613 (E.D. Ark. Sept. 30, 2025) and *Nathan v. Alamo Heights Indep.*, 795 F. Supp. 3d 910, 944 (W.D. Tex. 2025). For voting rights cases with repeat experts, see, e.g. *N. Carolina State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 426 (M.D.N.C.); *Feldman v. Arizona Secretary of State's Office*, 208 F.Supp.3d 1074 (D.Ariz. 2006).

⁵⁸ See Martin, *supra* note 21, at 1521.

⁵⁹ FED. R. EVID. 702(d). See also Memorandum from the Chair of the Committee on Rules of Practice and Procedure to the Clerk of the Supreme Court 227 (Oct. 19, 2022), https://www.uscourts.gov/sites/default/files/2022_sctus_package_0.pdf.

⁶⁰ The cases are: *Virginia State Conf. NAACP v. Cnty. Sch. Bd. of Shenandoah Cnty.*, No.

qualifications and in 4 cases the exclusion had to do with impermissible legal conclusions reached by the expert. In cases in which expert admissibility was not challenged, we sometimes can observe that the parties stipulated to the admissibility of each others' experts or that judges found that expert issues were not yet ripe. Often, the posture was at a preliminary injunction stage, where judges need not address formal admissibility of evidence, even if likely success on the merits is part of the analysis.

A post-*Bruen* Second Amendment challenge to California laws prohibiting unlicensed open carry usefully illustrates many of the challenges. The district judge in that case, *Baird v. Bonta*, noted that: "It is not an easy task to make principled decisions about similarities and differences between modern regulations and laws passed hundreds of years ago, as required here."⁶¹ She concluded that "[t]he historical record reveals no obviously correct answers,"⁶² and thus that a deeper review of historical materials would be required. The judge then turned to expert testimony and reports "to explain the context of the cited laws and how to interpret them," including how the English concept of "peace" and the police power to promote health and safety were understood to provide states and localities broad power to regulate firearms.⁶³

Both sides retained experts and presented their reports and deposition testimony. The plaintiffs retained an expert with a master's degree in history,⁶⁴ while the state retained three PhDs—two senior scholars who had researched the history of firearms regulation in early America for many decades and one post-doctoral researcher.⁶⁵ The plaintiffs' expert did not offer "affirmative" evidence regarding the history of firearms evidence, but rather focused on critiquing the three defense experts.⁶⁶ The defense experts described evidence of the regulation of public carry of weapons in the early American legal tradition, including "wide-ranging regulation and restriction."⁶⁷

Responding to this expert evidence, the judge noted, "When historians serve as retained experts, they like lawyers can be guilty of 'law-office history.'"⁶⁸ Ultimately, though, she praised the "measured, persuasive, and thorough" evidence presented by the experts⁶⁹ and concluded that the California statutes

5:24-CV-040, 2025 WL 3516866, at *3 (W.D. Va. Dec. 8, 2025); *City of South Miami v. DeSantis*, 561 F.Supp.3d 1211 (S.D.Fla. 2021); *Buending v. Town of Redington Beach*, 2020 WL 3250218 (M.D.Fla. Feb. 19, 2020)); *N. Carolina State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 426 (M.D.N.C. 2016); *Weinbaum v. Las Cruces Public School*, 465 F.Supp.2d 1116 (D.NM. 2005).

⁶¹ 709 F. Supp. 3d 1091, 1093 (E.D. Cal. 2023).

⁶² *Id.*

⁶³ *Id.* at 1101.

⁶⁴ *Id.* at 1101-2.

⁶⁵ *Id.* at 1102.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1140.

fit comfortably within the historical tradition of regulation and were thus constitutional.⁷⁰

The thorough discussion of historical expertise in *Baird* is useful and interesting because it surfaces many of the issues motivating our study: the kinds of historical questions that originalist doctrine generates, the potential utility of historians in assessing those questions, and the challenges trial courts face when confronted with contrasting expert perspectives. But precisely because *Baird* is so thorough and thoughtful, is decidedly not a representative case; we most instances, such issues simmer below the surface.

1. Qualification of Experts

The central question under Rule 702 of the Federal Rules of Evidence, which governs admissibility of expert witnesses, is whether such a witness can assist the jury. The rule does not require any particular credentials in order to serve as an expert—relevant experience can suffice⁷¹—and judges typically view those qualifications broadly.

In our database, challenges to the qualifications of historian experts were generally not successful, even when the proposed expert was not an academic historians.⁷² In two cases, experts were excluded for lack of qualifications. In one case, the plaintiffs case argued that the proffered expert “lacks qualifications as a historian, medical professional, psychologist, or sociologist.”⁷³ The judge agreed after reading the “report, deposition, and the briefing on the topic,”⁷⁴ ruling that the expert’s testimony would be highly limited given that the report “does not fall within the confines of permissible expert opinion testimony under Federal Rule of Evidence 702 relevant to this case.”⁷⁵ In a second case, a historian was found not qualified to address legal questions.⁷⁶

⁷⁰ *Id.* at 1129-30.

⁷¹ FED. R. EVID. 702 (an expert may be qualified by “by knowledge, skill, experience, training, or education”).

⁷² *See, e.g.,* Barnett v. Raoul, No. 23-CV-00141-SPM, 2024 WL 4728375 at *13 (S.D. Ill. Nov. 8, 2024) (emphasizing that the expert “has written multiple books on [the history of firearms] indicates that he possesses more knowledge than a layperson and that he has engaged with this material in-depth”); Alabama State Conf. of Nat’l Ass’n for Advancement of Colored People v. Alabama, No. 2:16-CV-731-WKW, 2020 WL 579385, at *4 (M.D. Ala. Feb. 5, 2020) (“The court cannot say that [the expert’s] opinion on Alabama’s reasons for adopting its present system is unreliable, or that he is not qualified to give it. Although all agree that [the expert] is not a historian, he has done extensive research, writing, and speaking on the issue of the development of judicial selection in the states.”).

⁷³ Virginia State Conf. NAACP v. Cnty. Sch. Bd. of Shenandoah Cnty., No. 5:24-CV-040, 2025 WL 3516866, at *3 (W.D. Va. Dec. 8, 2025).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Weinbaum v. Las Cruces Public School, 465 F.Supp.2d 1116 (D.N.M. 2005).

In general, though, qualifications did not present much of a hurdle for expert historian. To the degree that gatekeeping was done, it happened in discussions of reliability or—more often—weight, as the next two sections show.

2. Reliability and *Daubert* Analysis

Of 100 cases in our dataset, only 23 included Rule 702 or *Daubert* rulings on the admissibility of experts. Rarely did we see any detailed discussions of whether the expert’s opinion was “based on sufficient facts or data” or reflected a “reliable application” of those “principles or methods to the facts of the case.”⁷⁷ Nor did we find detailed discussions of the *Daubert* factors concerning the scientific rigor of the methods used.

The judicial rulings that did touch on expert reliability tended to generally discuss whether the experts provided sound historical evidence that shed appropriate light on the questions before the courts. Five cases excluded experts, at least in part. In four cases, the concern was that experts opined on ultimate questions of law, which are for the court to decide.⁷⁸ In the final case, the Court found that a purported expert was both unqualified (as noted above) and had also rendered opinions based on personal opinion rather than scientific methods.⁷⁹

Eighteen other cases discussed Rule 702 or *Daubert* issues and ultimately found the expert evidence admissible. These decisions did not always accept the evidence uncritically, though. In one Takings and First Amendment retaliation case, for example, the judge excluded a portion of a historian expert’s report that reached a legal conclusion, but otherwise found admissible testimony about “historical recreational customary use of beaches” in the town.⁸⁰ In an election law case, the trial court found the expert’s testimony “reliable and helpful” but excluded the part of the testimony concluding that a Florida law was adopted with animus, which amounted to “offering expert testimony on the ultimate legal questions to be determined by the trier of fact in this case.”⁸¹ On the other hand, courts have sometimes rejected efforts to exclude historical evidence as irrelevant to legal questions; in another election-related case, a court rejected

⁷⁷ FED. R. EVID. 702.

⁷⁸ N. Carolina State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C.); City of South Miami v. DeSantis, 561 F.Supp.3d 1211 (S.D. Fl. 2001); *Weinbaum*, 465 F.Supp.2d 1116; *Buending v. Town of Redington Beach*, 2020 WL 3250218 (M.D.Fl. 2020).

⁷⁹ Virginia State Conf. NAACP v. Cnty. Sch. Bd. of Shenandoah Cnty., No. 5:24-CV-040, 2025 WL 3516866, at *3 (W.D. Va. Dec. 8, 2025).

⁸⁰ See *Buending*, 2020 WL 3250218, at *6.

⁸¹ *City of South Miami*, 561 F. Supp. 3d at 1226 n.4.

“Defendants’ argument that history is irrelevant to claims of discriminatory effect.”⁸²

It is not always easy to separate admissible expert testimony on historical facts from inadmissible expert testimony on legal conclusions, given that the Court’s originalist doctrine sometimes appears to treat historical facts *as* law or as fact-finding that must be conducted to satisfy the constitutional standard set out in doctrine. Elsewhere, we have called this originalist doctrinalism, elsewhere.⁸³

In one illustrative Second Amendment case involving dueling *Daubert* motions, the judge noted: “Defendants are advised that their experts may not offer opinions as to whether [the Oregon] regulations are ‘relevantly similar’ and ‘they may not opine on whether [the law at issue] and historical regulations ‘impose a comparable burden on the right’ ... as that is an ultimate issue of law.’”⁸⁴ However, the judge concluded that an expert’s opinion that “lawmakers acted consistently with American tradition and practice dating back to the early colonial era” was not “an opinion on an ultimate issue of law.”⁸⁵ An expert could “offer an opinion as to what this Nation’s historical tradition of firearm regulation entailed and whether historical regulations fell within this tradition” but could not offer an opinion as to whether the law at issue “falls within this tradition.”⁸⁶ Another expert was found to have “sufficient experience as a historian to testify to the historical development of firearms technology,” and if that “testimony is based on misleading or incomplete methodology, those arguments go to the testimony’s weight rather than its admissibility.”⁸⁷ In general, the judge described the judicial obligation as screening out “unreliable nonsense opinions,” but not opinions that are merely impeachable.⁸⁸

To conclude, judges understandably focused on the boundary between historical facts and the doctrinal standards, but it is also telling how rarely they examined the reliability of the factual record, methods, or conclusions reached by historian experts, much less whether such conclusions could be reached *without* the assistance of qualified experts.

3. Judicial Rulings on Weight

Even when courts do not formally exclude historians’ testimony, they can limit the weight it receives, by taking limits of its probative value into

⁸² Fair Fight Action, Inc. v. Raffensperger, No. 1:18-CV-5391-SCJ, 2020 WL 13561776, at *5 (N.D. Ga. Dec. 4, 2020).

⁸³ Blocher & Garrett, *Applying History as Law*, *supra* note 3.

⁸⁴ See Oregon Firearms Fed’n v. Kotek, No. 2:22-CV-01815-IM, 2023 WL 4698752, at *1 (D. Or. May 31, 2023).

⁸⁵ *Id.* at *3.

⁸⁶ *Id.*

⁸⁷ *Id.* at *4.

⁸⁸ *Id.*

consideration. When it is the trial judge that is deciding a preliminary constitutional or procedural question, admissibility at trial may not be the focus, but the reliability of the expert evidence can nevertheless be central.

In one Second Amendment case, for example, the trial judge noted real concerns with the plaintiff's expert, giving no weight to "opinions regarding legal standards," or those that were "irrelevant to the present facts," or that "are unsupported," and noting that it "might be reasonable to question" whether the expert was sufficiently qualified under Rule 702.⁸⁹ The judge did not completely exclude the witness, but noted: "I find his testimony had significant shortcomings in persuasiveness and credibility."⁹⁰ In another Second Amendment case, a judge concluded that an expert's "statistical analysis ha[d] minimal indicia of accuracy or reliability," in part because it was based on "anecdotal statements, often from bystanders, reported in news media."⁹¹

In other battles of historical experts, judges expressed the view that one side had the better of the historical case, even if they did not formally apply *Daubert*. In a Second Amendment case in New York, the judge concluded: "While the State, through its expert, engages in substantial historical analysis, plaintiffs respond with arguments devoid of evidence. The historical record is clear."⁹² In a case regarding the Establishment and Free Exercise Clauses, the judge found the plaintiff's expert's "opinions concerning the intent of the Founders regarding the First Amendment to be more persuasive" than those of the government expert.⁹³ In an expert-intensive voting rights case, the three-judge panel accepted "the experts' findings that the State has a long and cyclical history of minority voter suppression over the nineteenth and twentieth centuries."⁹⁴

In many cases, the procedural posture was preliminary, such that the judge did not have to conduct a full *Daubert* and Rule 702 analysis.⁹⁵ In one case at the preliminary injunction stage, for example, the judge emphasized that while not making "final findings of fact," the judge was asking basic questions as one would about the utility of any expert, ultimately concluding: "The Court must discount to some extent the declaration of both the plaintiffs' experts because

⁸⁹ *Rocky Mountain Gun Owners v. Polis*, 701 F. Supp. 3d 1121, 1130–31 (D. Colo. 2023).

⁹⁰ *Id.*

⁹¹ *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1232, 1228 (S.D. Cal. 2023), *rev'd and remanded*, 133 F.4th 852 (9th Cir. 2025).

⁹² *McGregor v. James*, 2025 WL 3704289, at *3 (E.D.N.Y. Dec. 22, 2025).

⁹³ *See Nathan v. Alamo Heights Indep.*, 795 F. Supp. 3d 910, 944 (W.D. Tex. 2025).

⁹⁴ *Williams v. Hall*, No. 1:23-CV-1057, 2025 WL 3240456, at *50 (M.D.N.C. Nov. 20, 2025).

⁹⁵ *See Rupp v. Bonta*, 8:17-cv-00746-JLS-JDE (C.D.C.A. April 26, 2023) (deferring decision regarding five experts retained by the parties, where "in a bench trial, gatekeeper and factfinder are one and the same").

neither has been engaged in relevant neutral scholarly research.”⁹⁶ In contrast, the “State’s historians are more traditional neutral academics.”⁹⁷

Some courts have emphasized that they rely not on the expert’s conclusions but rather the materials that they share with the court. As one district judge put it, “[t]he historical record itself, and not expert arguments or opinions, informs the analysis.”⁹⁸ Other courts have explained that the Supreme Court has indicated that ultimately the judge must make the decision regarding what the historical record means: “*Bruen* indicates that judges, not party-selected experts, will assess the Second Amendment’s history; there was no summary-judgment record before the Court—the district court dismissed the complaint—and no mention of experts.”⁹⁹ But other judges heavily relied on expert submissions in Second Amendment cases, in combination with other historical evidence submitted. As McAuliffe has described, “evidence generated by party-hired historian experts has been incredibly influential.”¹⁰⁰ Another judge, for example, “relied on the historical record presented by the parties, that is, the States’ experts’ declarations and both parties’ recitation of past laws, some of which are provided in cases they cited.”¹⁰¹ As noted, however, the reliability of those materials, and how they were selected, is a crucial question, under Rule 702, and regarding the weight to be placed on those materials generally.

4. Deposition or Trial Testimony by Historian Experts

With the benefit of testimony, trial judges often expressed more nuanced and specific views regarding the expert evidence, as exemplified in an election case: “During their cross examinations, both of them offered careful explanations for their opinions, and we observed no internal inconsistencies, overstatements, or other reasons to question the reliability of their testimony.”¹⁰²

Depositions and hearing testimony regarding historian experts were located in only a handful of our cases. Perhaps most notably, several of the marriage rights cases leading up to the Supreme Court’s landmark ruling in *Obergefell v. Hodges* involved expert testimony by historians about the history of marriage, as exemplified here:

Nancy Cott, a historian, testified as an expert in the history of marriage in the United States. Cott testified that marriage has always been a secular institution in the United States, that

⁹⁶ *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 379 (D.R.I. 2022), *aff’d*, 95 F.4th 38 (1st Cir. 2024).

⁹⁷ *Id.*

⁹⁸ *Christian v. Nigrelli*, 642 F. Supp. 3d 393, 400 (W.D.N.Y. 2022).

⁹⁹ *Bevis v. City of Naperville, Illinois*, 657 F. Supp. 3d 1052, 1066 (N.D. Ill.), *aff’d*, 85 F.4th 1175 (7th Cir. 2023).

¹⁰⁰ McAuliffe, *supra* note 56, at 1367.

¹⁰¹ *Pinales v. Lopez*, 765 F. Supp. 3d 1024, 1041 (D. Haw. 2025).

¹⁰² *Singleton v. Merrill*, 582 F.Supp.3d 924 (N.D. Al. 2022).

regulation of marriage eased the state's burden to govern an amorphous populace and that marriage in the United States has undergone a series of transformations since the country was founded.¹⁰³

In the *Students for Fair Admissions vs. University of North Carolina* litigation, most of the experts at trial focused on quantitative analysis of college admissions data. One expert, however, was a Southern historian who “provided the Court with credible evidence that UNC ‘has been a strong and active promoter of white supremacy and racist exclusion for most of its history.’”¹⁰⁴ The U.S. Supreme Court ultimately reversed both that trial result and the trial verdict in a Harvard-related case. A concurring opinion by Justice Clarence Thomas noted that “UNC also has a checkered history, dating back to its time as a segregated university.”¹⁰⁵ But neither the majority nor the concurring opinion discussed any of the expert reports at trial, as Justice Sonia Sotomayor pointed out in dissent.¹⁰⁶

C. Expert Reports

Our dataset also allows us to examine what types of historical evidence these experts provided by examining their expert reports. Of the 100 constitutional cases involving historian experts, we found expert reports in 92 cases. Some of these included multiple reports, giving us a total of 328 expert reports, including 222 in Second Amendment cases, 71 in Fourteenth Amendment cases, 17 in Free Exercise or Establishment Clause cases, and 8 in free speech cases. Those reports are strikingly diverse in their length, detail, and methodological approaches—both within academic history and as between academic and non-academic historians—and we can offer only high-level observations.

Some cases involved not just multiple experts, but also multiple reports per expert, with experts filing supplementary and rebuttal reports responding to reports filed by the other side. For example, in First Amendment litigation challenging a Florida law requiring “an annual assessment of intellectual freedom and viewpoint diversity” at post-secondary institutions, the plaintiff's expert described in detail “historical efforts by decision-makers in the Florida government to investigate and discriminate against those who they believe threaten their ideology, particularly in education.”¹⁰⁷ The plaintiff's expert

¹⁰³ Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 940 (N.D. Cal. 2010).

¹⁰⁴ 567 F.Supp.3d 580, 590 n.5 (M.D.N.C. 2021).

¹⁰⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 257 (2023).

¹⁰⁶ *Id.* at 343 (Sotomayor, J. dissenting) (“Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts.”).

¹⁰⁷ Reply Expert Report of Allan J. Lichtman, Ph.D., *Link v. Diaz*, 2022 WL 17732153

argued that the state's expert had offered "opinions about the intent and effect of this legislation without a methodological framework."¹⁰⁸ The critique pointed to a "lack of supporting documentation" on the other side, including just 14 footnotes, some which were duplicates or merely pointed to opinion pieces.¹⁰⁹ After a bench trial, the judge dismissed the case for lack of standing, but found the expert analysis "credible."¹¹⁰

In the Second Amendment area, we obtained many reports by the same historian experts, with multiple experts filing more than ten reports each. These reports varied quite a bit in length and style, and not all were filed by professional historians, especially in Second Amendment cases. For example, one described his credentials as follows:

I was the DOJ's principal firearms instructor for many years, and I am an FBI-certified range master. I also participated in the firearm training that was part of the FBI National Academy Program in Quantico, VA. I am a member of the American Society of Arms Collectors and a technical advisor to the Association of Firearm and Tool Mark Examiners. For well over two decades, I was first a state liaison and, then later, a consultant to the National Rifle Association, where I was heavily involved in "assault weapon" and magazine legislative issues. For the past ten years I have also served as the historian for the London-based company, John Rigby & Co. (Gunmakers, Ltd.). Rigby is the oldest continuously operating gun maker in the English-speaking world, having been established in 1775.¹¹¹

Compare an academic historian, who described: "My scholarship on the regulation of firearms has appeared in leading law reviews and top peer-reviewed legal history journals. I authored the chapter on the right to bear arms in the Oxford Companion to the U.S. Constitution and co-authored the chapter in The Cambridge History of Law in America on the Founding Era and the Marshall Court, the period that includes the adoption of the Constitution and the Second Amendment."¹¹² Another firearms historian explained that an academic background was not necessary desirable, because historical scholarship can be "technically flawed," where "[m]ore commonly though, scholarship surrounding firearms has been done by collectors, curators, and non-traditional researchers."¹¹³

(N.D.Fla. Aug. 31, 2022).

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Id.* at *5.

¹¹⁰ *Link v. Diaz*, 4:21cv271-MW /MAF (N.D.Fla. April 17, 2023).

¹¹¹ Declaration of Stephen Helsley in Support of Plaintiffs' Supplemental Brief, *Duncan v. Becerra*, No. 17-cv-1017-BEN-JLB (S.D.C.A. Dec. 12, 2022).

¹¹² Expert Declaration and Report of Professor Saul Cornell, Ph.D., *Baird v. Bonta*, Case No. 2:19-cv-00617-KJM-AC (C.D.C.A. April 9, 2019).

¹¹³ Expert Report of Ashley Lynn Hlebinsky, M.A., Ass'n of New Jersey Rifle & Pistole

In voting rights cases, historians wrote reports examining the history and persistence of racial discrimination regarding districting. A report in a North Carolina challenge to a photo identification law provided a detailed overview of more than a century of voter suppression based on race in the state. The expert discussed the instant case as “the latest chapter in North Carolina’s long and cyclical history of struggle over minority voting rights.”¹¹⁴ Similarly, in a Virginia case, the dispute revolved around whether the uncontested history of voter suppression de jure and embrace of “white supremacy” in the past, was simply a “point of reference,” or whether such conditions “no longer exist.”¹¹⁵

By contrast, battles of the experts in Establishment Clause cases often involved deep disagreements about the relevant history. In a case regarding display of the Ten Commandments in Texas, an academic historian expert for the plaintiffs concluded that “there is no historical basis for singling out the Ten Commandments as seminal in the formation of American law and government,” and noted that they played no meaningful role in education, almost none of which was public.¹¹⁶ In response, an expert with a Ph.D. in Government concluded that “there is a long history and tradition of displaying the Ten Commandments on public property and exposing children to them,” viewing it as not necessary to show a “long history of civic authorities engaging” in the specific practice.¹¹⁷ There, too, the disagreement between the experts, at least in part, was legal (although they also differed regarding the meaning of a wide variety of sources and cited very different sources).

D. Appellate Rulings on Historian Experts

While our primary focus here is on trial court practice, we also reviewed appellate rulings discussing the historian expert evidence in our dataset. Few engaged with the substance of the historical evidence or even cited expert reports by historians.¹¹⁸ However, the small number of appellate cases that

Clubs, Inc v. Grewal, 2023 WL 9378798 (D.N.J.).

¹¹⁴ Preliminary Expert Report of James L. Leloudis for Purposes of Preliminary Injunction, NAACP v. Cooper, 2019 WL 6173861 (M.D.N.C.).

¹¹⁵ Report of Daniel Palazzolo in Lee v. Virginia State Bd. Elections, 3:15-cv-00357-HEH-RCY (E.D.Va. Feb. 8, 2016).

¹¹⁶ Expert Report of Seven K. Green, J.D., Ph.D., Ringer v. Comal Independent School District, 5:35-cv-01181 (W.D.Tex. Sept. 23, 20025).

¹¹⁷ Expert Report of Mark David Hall, Ringer v. Comal Independent School District, 5:35-cv-01181 (W.D. Tex. Oct. 20, 20025).

¹¹⁸ See, e.g., Granata v. Campbell, 2023 WL 4145911 (1st Cir. 2023) (summary order remanding in light of *Bruen*); Frey v. City of New York, 157 F.4th 118 (2d Cir. 2025) (discussing historical evidence in some detail, but not discussing expert reports); Hason v. D.C., 120 F.4th 223 (D.C. Cir. 2024) (citing expert reports on lethality of firearms in question, but not regarding historical evidence); Buending v. Town of Redington Beach, 10 F.4th 1125, 1134 (11th Cir. 2021) (reversing on summary judgment finding issues of material fact, but not discussing historian expert report); N. Carolina State Conf. of the NAACP v. Raymond, 981 F.3d 295, 309

substantively engaged with historian expert issues looked very much like what we found at the trial court level: judges struggling with different views regarding how to meet the challenge of adequately mustering and reviewing historical evidence, and infrequent reliance on expert evidence.

These anxieties are particularly manifest in the Second Amendment context. Concurring in a Fifth Circuit case, Judge Stephen Higginson wrote: “More foundationally, courts are laboring to give meaning to the *Bruen* requirement of historical inquiry. Must the Government provide expert testimony to prevail, or could a district court independently seek such evidence?”¹¹⁹ In another Second Amendment case, Judge Diane Wood of the Seventh Circuit wrote in dissent that “[o]nly a professional historian would know how to evaluate often-conflicting claims about the social, cultural, and legal landscape of an earlier period, and that person likely would not jump to any conclusions without devoting significant time to an evaluation of original sources.”¹²⁰ Quoting that statement, a Tenth Circuit panel noted: “Judges are not trained historians. Neither are most lawyers,”¹²¹ and that “we must be mindful of our limitations as we attempt to implement the prescribed methodology.”¹²² Other courts of appeals have acknowledged the burdens lower courts face in conducting “extensive historical analysis” which depends on “research resources” and “amici historians.”¹²³

The years of same-sex marriage litigation leading up to *Obergefell v. Hodges* involved a wide range of experts at the trial level, including historians.¹²⁴ Appellate rulings in those cases generally did not discuss expert historical evidence extensively,¹²⁵ although some decisions discussed non-historian expert

(4th Cir. 2020) (reversing district court, noting “neither party nor the district court has brought to our attention any discriminatory remarks made by legislators during or about the legislation’s passage,” but not discussing historian expert reports).

For an exception, see *Schoenthal v. Raoul*, 150 F.4th 889, 921 (7th Cir. 2025), cert. denied, No. 25-541, 2026 WL 922526 (U.S. Apr. 6, 2026) (upholding gun law and emphasizing that this conclusion was “supported in the record, where an expert report from Dr. Brennan Rivas explains that legislatures made special arrangements to authorize railway police to protect the peace of passengers in transit.”).

¹¹⁹ *United States v. Daniels*, 77 F.4th 337, 359–60 (5th Cir. 2023).

¹²⁰ *Atkinson v. Garland*, 70 F.4th 1018, 1028–29 (7th Cir. 2023) (Wood, J., dissenting).

¹²¹ *United States v. Harrison*, 153 F.4th 998, 1024 (10th Cir. 2025).

¹²² *Id.*

¹²³ *United States v. Perez-Garcia*, 96 F.4th 1166, 1174 (9th Cir. 2024).

¹²⁴ *DeBoer v. Snyder*, 772 F.3d 388, 424 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015) (“The bench trial lasted for eight days and consisted of testimony from sociologists, economists, law professors, a psychologist, a historian, a demographer, and a county clerk.”)

¹²⁵ In the Second Circuit, a concurring opinion did cite to a historian’s amicus brief: “Windsor and various amici argue that ‘[t]he federal government [has always] accepted states’ determinations of who was validly married—no matter how far states’ criteria for validity diverged from one other.’ *Windsor v. United States*, 699 F.3d 169, 202 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013).

evidence.¹²⁶ The majority opinion in *Obergefell* discussed historical evidence extensively, but focused on amicus briefs after than the expert reports in the trial courts.¹²⁷ Chief Justice Roberts and Justice Scalia, in dissent, though, made light of the majority's reference to the "'extensive litigation,' 'many thoughtful District Court decisions,' 'countless studies, papers, books, and other popular and scholarly writings,' and 'more than 100' amicus briefs in these cases alone."¹²⁸

We did not locate any First Amendment cases discussing historian experts at the court of appeals level. Perhaps the closest is a recent Fifth Circuit case vacating a district court ruling regarding display of the Ten Commandments in school classrooms, under a Louisiana statute. The district court in that case extensively discussed the expert report of Professor Steven K. Greene, which described how "the historical evidence showed that the instances of using the Ten Commandments in public schools were too 'scattered' to amount to 'convincing evidence that it was common' at the time of the Founding or incorporation of the First Amendment to utilize the Decalogue in public-school education."¹²⁹ In response, the state argued that this type of historical evidence, regarding the specific practice at issue (display of the Ten Commandments, was irrelevant: "Whether Ten Commandments displays existed in public or private schools in prior centuries, or whether the Ten Commandments were taught in public or private schools, is not determinative of the relationship between today's displays and the historical hallmarks identified by the Supreme Court," regarding the coercion that must be shown under the Establishment Clause.¹³⁰ Indeed, these "hallmarks" were identified so that lower courts would not need to "scour the historical record or look to experts."¹³¹

That ruling was vacated en banc by the Fifth Circuit, on ripeness grounds, without addressing the historical evidence (although a concurring opinion did so briefly).¹³² But in a concurring opinion, Judge James C. Ho discussed Greene's expert report, noting that the Ten Commandments were included in two primers used to teach students in religious schools—albeit not discussing Greene's conclusion that those references were brief, not primarily used, and shortly thereafter removed from those books.¹³³

¹²⁶ *Latta v. Otter*, 771 F.3d 456, 469 (9th Cir. 2014) ("As one of the Nevada plaintiffs' experts testified, there is no empirical support for the idea that legalizing same-sex marriage would harm—or indeed, affect—opposite-sex marriages or relationships.").

¹²⁷ *Obergefell v. Hodges*, 576 U.S. 644, 676 (2015).

¹²⁸ *Id.* at 708-09 (Roberts, C.J. dissenting).

¹²⁹ *Roake v. Brumley*, 756 F.Supp.3d 93, 118 (M.D. La. 2024).

¹³⁰ *Id.* at 177.

¹³¹ *Id.*

¹³² *Roake v. Brumley*, 170 F.4th 292, 300 (5th Cir. 2026).

¹³³ *Id.* at 304 (Ho, J., concurring).

III. IMPROVING THE USE OF EXPERT HISTORIANS

Our primary goal in this Article is descriptive: To capture a snapshot of how courts have been dealing with historians as experts in constitutional cases over a twenty five year period. That period—and especially the past few years—has seen an enormous shift in the use of expert historians, driven by the Supreme Court’s adoption of originalist doctrines that require lower courts to engage in historical fact-finding, particularly but not exclusively in Second Amendment cases. The full scope and impact of those changes remain to be seen, and in that respect our contribution here is a report from the front rather than a retrospective.

Based on what we have seen so far, though, we offer here some preliminary thoughts about how trial courts and appellate courts, respectively, can improve the use of expert historians. We recognize that these changes would be difficult fully to implement, and perhaps even impossible as a matter of practice. But if so, the solution cannot be simply to ignore or override the standard processes governing expertise in the legal system, as if originalist doctrine has some kind of exemption from the usual rules of fact-finding. The better solution is to rethink constitutional doctrines that demand a kind of expert-intensive fact-finding the legal system cannot deliver.

A. Four Improvements to Judicial Use of Expert Historians

First, it is important for trial courts to apply the standards set out in *Daubert* and Rule 702 when considering historians as experts—recognizing that those standards are flexible and will apply differently to many types of historical expertise than to, for example, many types of scientific expertise. Nevertheless, many common factors apply similarly, as they were designed to do, to any type of proffered expert, like the adequacy and reliability of the factual record, or the consistency and reliability of the methods applied to that record.

As described in Part II, judges in our dataset generally did not engage with the underlying factual record and its adequacy, the reliability of the methods, or reliability in the application of those methods to the facts, for these historian experts. The specific Rule 702 and *Daubert* factors were rarely described, much less analyzed, in the written opinions that we reviewed. They could have been considered, of course, and not all reasoned district court rulings are set out in written opinions. We suspect, however, that judges with busy dockets facing technical historical issues are reluctant to conduct such gatekeeping regarding historian experts, not least because it feels unfamiliar. As one district judge put it in the course of an extensive evidentiary hearing examining two historian experts¹³⁴:

¹³⁴ 107 pages of the 358-page transcript consisted of examination of the two historians. See Reporter’s Transcript of Proceedings Evidentiary Hearing - Day 1 at 133–56, 255, Boland v.

What are the metrics that I'm supposed to use . . .? What am I supposed to look for in this case? [T]he experts [are] not even in the same parking lot of the same stadium. They seem to be very diverse. And I don't know if one's wrong or if they're both a little wrong or both right.¹³⁵

And yet the alternative—judicial finding of historical facts—raises serious problems of its own since judges are not well-positioned to examine raw historical without engaging with the reliability of the corpus and the appropriate methods to be used to examine it and reach conclusions. The solution is not to place judges in the position of opining as historian experts on the bench. Doing so is inconsistent with Rule 702 and *Daubert*, which permits consideration by the relevant fact-finder of expert conclusions regarding the facts only in the hands of judicially-screened experts.

As a result, we view the paucity of meaningful Rule 702 and *Daubert* analysis as troubling, and suggest that trial judges take a more active role. Even if the case is at a preliminary stage and even if the parties stipulate or do not raise issues beyond credentials of experts, the judge should examine these issues carefully. If the parties and the judges are not reviewing the choices made by experts and assessing their work, both in assembling the relevant archive and applying methods to reach conclusions based on that archive, then the resulting conclusions may be untested. Rule 702 was revised in 2024 to emphasize the obligation of parties to demonstrate the reliability of their experts, as discussed. While admissibility questions may generally not need to be addressed at the preliminary injunction stage, if admissibility overlaps completely with reliability, which it does in the context of each of the prongs of Rule 702 and *Daubert*, then reliability (and admissibility) should be a focus.

The second suggestion essentially presents the converse problem: Not a failure to review historians' credentials and methods, but failure to engage with them at all. Our dataset, after all, shows a marked growth in the use of historians as experts, but it represents only a tiny fraction of the constitutional litigation currently being conducted under the Court's originalist or history-and-tradition-related doctrines. Even accounting for the fact that we have inevitably missed some examples, particularly if cases settled without producing written judicial opinions, it appears that historians are not playing the same role in historical cases as we see with economists in antitrust cases, doctors in medical malpractice cases, lab analysts in criminal cases involving DNA evidence, and engineers in patent cases.

To be clear, we do not think that historical experts are *always* required, and indeed the number of cases in which they are needed might ultimately decline as some matters currently subject to history-and-tradition analysis

Bonta, No. 23-55276, (9th Cir. Jan. 23, 2023).

¹³⁵ See Reporter's Transcript of Proceedings Evidentiary Hearing - Day 2 at 54, 90, Bolland v. Bonta, No. 23-55276, (9th Cir. Jan. 23, 2023).

become governed by circuit precedent. In the meantime, though, we share the concern articulated by Judge Carlton Reeves of the Southern District of Mississippi, who noted in a prominent decision that in more than 120 federal rulings regarding the felon in possession statute and the Second Amendment, *none* of the judges had appointed an expert historian.¹³⁶ Judge Reeves noted:

Judges are not historians. We were not trained as historians. We practiced law, not history. And we do not have historians on staff. Yet the standard articulated in *Bruen* expects us to play historian in the name of constitutional adjudication.¹³⁷

In that case, the judge, not wanting “to be guilty of ... cherry-picking the history,” asked the parties “whether it should appoint a professional historian to serve as an independent expert in this matter.”¹³⁸

Some other judges have argued, as one did in the course of declining to appoint an expert, that “[j]udges should not delegate their discretion to experts or historians. One does not need to be a linguist, a historian, or an expert in every field to be a sound judge.”¹³⁹ Of course we agree; our suggestion is not that judges should delegate their discretion to expert historians, only that they should allow experts to inform their judgment just as they would in other fields. Expert historians have specialized knowledge regarding “where to search for sources, formulating searches based on an understanding of the history of the period in question, and evaluating the reliability of the sources.”¹⁴⁰ As the Second Circuit Court of Appeals put it, a “historian could, for example ... helpfully synthesize dense or voluminous historical texts.”¹⁴¹

The alternative, all too often, is simply to invoke judicially created default rules about party presentation and burdens of proof. The same district judge who declined to appoint an expert historian on the basis that it would delegate judicial discretion decided instead to “leave[] the matter in the hands of the Government. It bears the burden of persuasion in this case. If it would like to hire an expert to provide a report or amicus brief, it may do so.”¹⁴² The

¹³⁶ *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *5 (S.D. Miss. June 28, 2023).

¹³⁷ *Id.* at *1 (internal quotation omitted).

¹³⁸ *Id.*

¹³⁹ *United States v. Yates*, No. 1:21-CR-00116-DCN, 2023 WL 5016971, at *3 (D. Idaho Aug. 7, 2023).

¹⁴⁰ *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 951 (N.D. Ill. 2010).

¹⁴¹ See e.g., *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135-36 (2d Cir. 2013) (“Burton v. Am. Cyanamid, 2018 WL 3954858, at *4 (E.D. Wis. Aug. 16, 2018) (“[A] historian’s synthesis of various source materials that enables the jury to perceive patterns and trends can also be ‘helpful’ within the meaning of Rule 702. Courts have recognized the helpfulness of expert historians testifying in these ways.”) (collecting cases).

¹⁴² *Yates*, 2023 WL 5016971, at *3; *Antonyuk v. Hochul*, 639 F. Supp. 3d 232, 297 (N.D.N.Y. 2022) (“As for how to interpret these laws, in this Court’s experience, what would be most helpful in properly applying the NYSRPA standard is not a court-appointed expert historian under Fed. R. Evid. 706 (who the losing party might argue was more like a court-appointed expert

invocation of burden-shifting rules seems increasingly common as courts try to allocate responsibility for historical fact-finding in originalist cases, but it can also be quite problematic for the development of the doctrine, as prominent originalist scholars have recognized.¹⁴³

Third, and relatedly, we see a greater need for financial and other forms of support at the district court level. While we do not typically have information about the costs of retaining historian experts, when fee disputes or awards are reported, they do give us a sense of the expense involved. One district court reported as follows:

Among the disclosed hourly consulting rates of expert witnesses hired by the Attorney General's office in other Second Amendment cases pending in this Court are hourly rates of \$500 for reviewing materials and \$750 per hour for depositions and court appearances; \$600 per hour for testimony (in deposition and in court) and \$480 per hour for all other services; \$130 per hour; \$250 per hour; \$500 per hour; \$250 per hour; \$150 per hour; \$350 per hour; and \$1,050 per hour.¹⁴⁴

Regarding the larger institutional challenges, Judge Reeves put it well: “We need the historical community’s guidance and expertise. And to accomplish that, we might need to rearrange the incentive scheme. Not just by paying people what they are worth, but also by ensuring that historical questions are predicated upon a solid foundation of facts, not abstract legal questions reserved only for judges.”¹⁴⁵

Providing additional funding for appointment is one way to address those concerns, at least partially. Judges may also appoint independent experts themselves, as noted, under Rule 706.

There are additional possible institutional approaches towards the use of history in constitutional cases. For example, Peter Charles Hoffer and Matthew Festa have advocated for judges calling historians as special masters in cases involving historical issues.¹⁴⁶ Others have called for a role of the Supreme Court historian.¹⁴⁷ Notably, advocacy and non-profit groups have increasingly

historian). The State Defendants are fully capable of meeting their burden of producing analogues (especially when prodded to do so), and judges appear uniquely qualified at interpreting the meaning of statutes.”).

¹⁴³ Randy E. Barnett & Lawrence B. Solum, *Making the Party Presentation Principle Safe for Originalism*, 174 U. PA. L. REV. 947 (2026).

¹⁴⁴ *S. Bay Rod & Gun Club, Inc. v. Bonta*, 646 F. Supp. 3d 1232, 1240 (S.D. Cal. 2022).

¹⁴⁵ *United States v. Bullock*, 679 F. Supp. 3d 501, 521–22 (S.D. Miss. 2023), *rev’d and remanded*, 123 F.4th 183 (5th Cir. 2024).

¹⁴⁶ See Festa, *supra* 46, at 552–53 (“The best practice for courts would be to use court-appointed historical experts in addition to—but not to the exclusion of—those proffered by the parties.... If we invite historians ... we will end up with better and more accurate history in the law.”); Peter Charles Hoffer, *Historians and the Impeachment Imbroglia: In Search of a Serviceable History*, 31 RUTGERS L.J. 473, 489–90 (2000).

¹⁴⁷ Festa, *supra* 46, at 528 (attributing the idea to See LEONARD W. LEVY, ORIGINAL

solicited the views of historians as potential experts in litigation, as well as for amicus briefs and scholarly reports. In 2024, the Brennan Center for Justice created a “Historians Council on the Constitution,” with a group of “expert historians from leading institutions nationwide” that would offer amicus briefs and scholarship on important constitutional topics.¹⁴⁸ In 2025, the Heritage Foundation published a book with judges’ views on originalism and historical evidence concerning a range of constitutional questions.¹⁴⁹

Fourth, our arguments have significant implications for appellate practice as well. We have focused primarily on developments in district courts, because factual evidence—including historical evidence—is developed at trial. But if courts of appeal—including the Supreme Court—do not accord appropriate deference to facts found at trial, the hard work of building a record using historian experts will be pointless, replaced by the current practice of relying on unvetted amicus briefs and independent research. For that matter, courts of appeal continue to struggle with the question of when remand is appropriate in cases involving historical evidence, with some judges concluding that “*Bruen* requires that an evidentiary inquiry first be conducted in courts of original jurisdiction, subject to party presentation principles, aided by discovery and cross-examination and with authority to solicit expert opinion,”¹⁵⁰ and others treating the inquiry as being purely a matter of law subject to appellate decision without a need for remand or deferential review.¹⁵¹

B. Grasping the Nettle

INTENT AND THE FRAMERS’ CONSTITUTION (1988)); *id.* (“Though unrealistic as a practical matter, it is an interesting idea coming from one of the most prominent American constitutional historians. The benefit of this institution would presumably be the ability of the Justices to consult the advice of a professional historian steeped in the standards and methodological norms of academic history.”).

¹⁴⁸ See BRENNAN CENTER FOR JUSTICE, HISTORIANS COUNCIL ON THE CONSTITUTION, <https://www.brennancenter.org/historians-council-constitution>.

¹⁴⁹ See THE HERITAGE GUIDE TO THE CONSTITUTION (2025), at <https://www.heritage.org/constitution>.

¹⁵⁰ See *United States v. Daniels*, 77 F.4th 337, 360-61 (5th Cir. 2023) (Higginson, J., concurring); *Atkinson v. Garland* 70 F.4th 1018, 1022-23 (7th Cir. 2023) (remanding).

¹⁵¹ *Atkinson*, 70 F.4th at 1028-29 (Wood, J., dissenting). At the same time, Judge Wood recognized that “[o]nly a professional historian would know how to evaluate often-conflicting claims about the social, cultural, and legal landscape of an earlier period, and that person likely would not jump to any conclusions without devoting significant time to an evaluation of original sources.” *Id.*

See also *Range v. Att’y Gen. United States*, 53 F.4th 262, 268 (3d Cir. 2022) (“[T]he appeal raises ‘purely legal questions upon which an appellate court exercises plenary review,’ . . . so we can apply *Bruen* and resolve this matter without remand.”); *Zherka v. Bondi*, 140 F.4th 68, 74 (2d Cir. 2025) (“In the absence of material questions of fact, we are just as well equipped as the district court to resolve the outstanding legal issues in this case. Accordingly, we decline to vacate and remand.”).

We are keenly aware that may well be as a practical matter impossible to implement all of the foregoing. District courts facing busy dockets and tight schedules cannot possibly conduct full *Daubert* hearings, nor appoint their own experts, nor carefully sift through competing historical narratives, in every one of the thousands of constitutional cases currently pending that implicate historical analysis. The system would collapse under its own weight.

Our concern is that the system has avoided that collapse by delicately sidestepping, if not sometimes outright flouting, the rules of evidence and legal practice—simultaneously treating originalist doctrine as being rooted in claims of historical fact and ignoring the standard practices governing fact-finding and expertise. There are at least two responses to this critique: That the full suite of legal processes—including use of experts—are unnecessary for originalism or that they are simply impossible.

As to the former, we agree that the use of historians as experts is not always necessary in a case involving history, just as it is not always necessary to have an economist as an expert in an antitrust case. Sometimes the parties have briefed the history adequately, or the matter is governed by binding precedent such that original historical research is not required. Indeed, as the Court’s newly announced historical tests take hold, we expect circuit doctrine to partially displace the need for historical fact-finding at trial.

We are less sanguine about the common argument that historians as experts are unnecessary because originalism relies on legislative rather than adjudicative facts.¹⁵² Prominent gun rights advocate Stephen Halbrook, for example, has noted that most of the Supreme Court’s Second Amendment cases came to the Justices without a trial record and stand for the proposition that “[e]xpert testimony by historians and others addressing the Second Amendment’s meaning is unnecessary and should be discouraged by the Supreme Court,” since the underlying facts are purely legislative.¹⁵³

The fact the Court has made such significant originalist decisions without a developed record is the *problem*, not a solution: to invoke the rule of party presentation, as *Bruen* does, in a case that came to the Court on a motion to dismiss, as *Bruen* did, is almost mind-bending. One cannot purport to rely on rules involving trial practice in a case with presentation of the issue at all, pretrial, and of course, no trial.

The question of how the longstanding categories of adjudicative and legislative fact interact with the historical fact-finding required by the Court’s

¹⁵² *United States v. Neal*, 715 F. Supp. 3d 1084, 1091 (N.D. Ill. 2024) (noting government argument “that not only should the Court not appoint an expert historian but that the government does not need expert testimony to carry its burden because *Bruen* depends on ‘legislative facts,’ which are ‘simply a part of the judicial reasoning process.’”).

¹⁵³ See Stephen P. Halbrook, *Expert Historian Testimony is Unnecessary in Second Amendment Litigation*, THE INDEPENDENT INSTITUTE (Jan. 20, 2026), at <https://www.independent.org/article/2026/01/20/expert-historian-testimony-is-unnecessary-in-second-amendment-litigation/>.

new originalist doctrines is a complex one that has occasioned much recent commentary¹⁵⁴ and which we address in more detail elsewhere.¹⁵⁵ Certainly when a judge cites the Federalist Papers for some general proposition about the Framers' constitutional disposition, she need not appoint an expert. But the kinds of fact-finding demanded in a case like *Bruen* sometimes go far beyond the kinds of legislative fact that Kenneth Culp Davis described when he devised the adjudicative/legislative fact distinction.¹⁵⁶ The details of alcohol use at the Founding, because the constitutional claim itself *requires* the parties to identify for the court relevant Founding-era analogous regulations¹⁵⁷ or post-*Dobbs*, the burden of a litigant to identify highly particularized and continuous evidence of a relevant tradition supporting recognition of a substantial due process right, are both more specific and more load-bearing than a general background claim about the world. Such historical facts are not simply "generalized observations about the world,"¹⁵⁸ but rather are being used to define the content of constitutional rules. Perhaps they are a new species of fact altogether.¹⁵⁹ Regardless, what they are called, the parties must litigate these facts for the judge to be able to adjudicate a constitutional claim. They have a right to do so, not just out of an interest in "party presentation," but because they have constitutional rights to do so under the Due Process Clauses, and jury trial rights to have facts found by the fact-finder, if indeed they are case-specific.¹⁶⁰

The second argument against reliance on experts and other standard *accoutrements* of fact-finding is that doing so would be practically impossible. (We suspect that the argument from impossibility motivates some forms of the argument against necessity.) One judge in our dataset noted that, while other cases had involved historian experts, "this court doubts that it can be scaled to the level that would be required by the federal courts' massive docket of gun prosecutions."¹⁶¹ Further, the judge raised the concern that "relying too heavily on party presentation to resolve a dispute about constitutional history opens the door to other problems," including that "courts faced with virtually identical issues could easily reach different conclusions based not on a complete or accurate picture of the relevant aspects of the nation's history and tradition of

¹⁵⁴ See, e.g., Allison Orr Larsen, *Is History Precedent?*, 78 STAN. L. REV. 365, 388 (2026) Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955 (2024); Stephen E. Sachs, *In Praise of Ignoring Facts*, 33 WM. & MARY BILL RTS. J. 411 (2024).

¹⁵⁵ See Blocher and Garrett, *Applying History as Law*, *supra* note 3.

¹⁵⁶ Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-05 (1942).

¹⁵⁷ *United States v. Hemani*, 146 S. Ct. 1677, 1688 (2026).

¹⁵⁸ Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 232 (2018).

¹⁵⁹ See Blocher & Garrett, *Originalism and Historical Fact-Finding*, *supra* note 3, at 724-29 (describing category of "declarative constitutional facts").

¹⁶⁰ See Blocher and Garrett, *Applying History as Law*, *supra* note 3.

¹⁶¹ *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *3 (M.D. Tenn. Nov. 16, 2022).

firearms regulation, but on something as ahistorical as expert witness availability or the researching acumen of the litigants appearing before them.”¹⁶²

At risk of over-emphasis, we agree with much of this and are entirely sympathetic with the plight of lower court judges, which is not of their own creation. But that is where our suggestions for practice become critiques of method. We have described the bill that the Court’s originalist doctrines would have to pay in order to comply with the standard rules of fact-finding. To the degree that the legal system cannot perform the tasks that originalism purports to require, it is not clear why the former should give way. A theory of adjudication that makes impossible demands on judges is flawed for that very reason.¹⁶³

CONCLUSION

As constitutional law has increasingly relied on historical evidence, the use of historians as experts, while growing, remains quite uneven. As one district judge observed, this has led to a divide, where the “ultimate irony is that the version of history endorsed” in a range of important constitutional rulings “has itself been deemed untrustworthy by actual historians.”¹⁶⁴ In response, however, lower courts are similarly quite divided regarding relevance and uses of historical experts, particularly in Second Amendment cases, but also more broadly.

The battles of historical experts that we describe in a wide range of cases reflect the divided approaches of litigants, the government, and judges, towards the use of historical evidence in constitutional cases. What is urgently needed is a common set of criteria for developing an adequate historical record, a body of careful decisional law concerning the historical methods suitable for expert reports and testimony, and standards of review deferring to that record. As we argue here, the traditional rules, set out in Rule 702, regarding expert evidence and the reliability of the factual record, the methods, and the conclusions reached from that record, set out a simple set of steps for litigants and judges.

If courts are to make plausible use of historical evidence, district courts that labor to develop the relevant facts deserve more than vague guiding principles, but rather clear doctrine and clear error deference to the factfinding that they supervise. If the constitutional rights, including due process and jury trial rights, of litigants are to be respected, they similar deserve a meaningful opportunity to develop the relevant facts, including historical facts, in constitutional cases. And, overall, we have observed how rare it is for judges to engage with Rule 702 and *Daubert* reliability issues concerning historical evidence

¹⁶² *Worth v. Harrington*, 666 F. Supp. 3d 902, 917 (D. Minn. 2023).

¹⁶³ To be clear, this is a critique of originalism as a theory of *adjudication*, not interpretation.

¹⁶⁴ *U.S. v. Brown*, 764 F.Supp.3d 456, 465 (S.D.Miss 2025) (“The experts don’t think lawyers and judges have gotten it right. And, unfortunately, the lack of trust inherent in these decisions cannot be untangled from the public’s declining trust in Article III itself.”).

in constitutional cases. If historical evidence is to remain at the core of decisionmaking concerning constitutional claims, then litigants and judges should carefully examine the reliability of that historical evidence, including regarding the methods and conclusions of historian experts. They should do that even at preliminary stages, given how pivotal historical evidence will often be for a wide range of constitutional claims. And not only will factfinders benefit from careful judicial gatekeeping regarding the reliability of historical evidence in constitutional cases, but sound use of historian experts will improve the quality of our constitutional doctrine. If constitutional doctrine, conversely, relies on historical findings without relying on historical expertise, then the reliability and legitimacy of that doctrine will suffer. The result may be a turn away from reliance on historical evidence to define constitutional doctrine.

APPENDIX: CONSTITUTIONAL CASES WITH EXPERT HISTORIANS, 2000-2025

Case Citation	Year	State	Types of Constitutional Claims	Criminal or Civil	Daubert or 702 Ruling
Granata v. Campbell, 798 F. Supp. 3d 46 (D. Mass. 2025)	2025	MA	Second Amendment	Civil	N
Beckwith v. Frey, 766 F.Supp.3d 123 (D.Maine Fe. 13. 2025)	2025	ME	Second Amendment	Civil	N
Lane v. James, No. 7:22-cv-10989 (S.D.N.Y. March 25, 2025)	2025	NY	Second Amendment	Civil	Y
O'Neil v. Neronha, 2025 WL 2197313 (D.RI 2025).	2025	RI	Second Amendment	Civil	N
Ringer v. Comal Independent School District No. 5:25-cv-01181 (W.D. Tex. 2025)	2025	TX	First Amendment (Establishment)	Civil	N
Hoffman v. Bonta, 789 F. Supp. 3d 995, 1002 (S.D. Cal. 2025)	2025	CA	Second Amendment	Civil	N
Williams v. Hall, No. 1:23-CV-1057, 2025 WL 3240456 (M.D.N.C. Nov. 20, 2025)	2025	NC	Fourteenth Amendment	Civil	N
Cave v. Jester, 2025 WL 2814613 (E.D. Ark. Sept. 30, 2025)	2025	AR	First Amendment (Establishment)	Civil	Y
Nathan v. Alamo Heights Indep. School Dist., 795 F. Supp. 3d 910, 944 (W.D. Tex. 2025)	2025	TX	First Amendment (Establishment and Free Exercise)	Civil	N
Nastri v. Dykes, No. 3:23-CV-00056 (VAB), 2025 WL	2025	CT	Second Amendment	Civil	N

2884945 (D. Conn. Sept. 30, 2025)					
McGregor v. James, No. 23-1130 (GRB) (ARL), 2025 WL 3704289 (E.D.N.Y. Dec. 22, 2025)	2025	NY	Second Amendment	Civil	N
Pinales v. Lopez, 765 F. Supp. 3d 1024, 1041 (D. Haw. 2025)	2025	HA	Second Amendment	Civil	N
Stinson v. Fayetteville Sch. Dist. No. 1, 798 F. Supp. 3d 931, 949 (W.D. Ark. 2025)	2025	AR	First Amendment (Establishment and Free Exercise)	Civil	N
Russell v. D.C., No. CV 24-1820 (JDB), 2025 WL 2719342, (D.D.C. Sept. 24, 2025)	2025	DC	Second Amendment	Civil	N
Virginia State Conf. NAACP v. Cnty. Sch. Bd. of Shenandoah Cnty., No. 5:24-CV-040, 2025 WL 3516866 (W.D. Va. Dec. 8, 2025)	2025	VA	Fourteenth Amendment	Civil	Y
Nat'l Shooting Sports Found. v. Bonta, 718 F.Supp.3d 1244 (S.D. Cal. Feb. 21, 2024)	2024	CA	Second Amendment	Civil	N
Rhode v. Bonta, 713 F. Supp. 3d 865 (S.D. Cal. 2024)	2024	CA	Second Amendment	Civil	N
Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Platkin, 742 F.Supp.3d 421 (D.N.J. 2024)	2024	NJ	Second Amendment	Civil	N
Barnett v. Raoul, 756 F.Supp.3d 564 (S.D. Ill. 2024)	2024	IL	Second Amendment	Civil	N
Fouts v. Bonta, 718 F.Supp.3d 1276 (S.D. Cal. 2024)	2024	CA	Second Amendment	Civil	N
Gates v. Polis, 2023 WL 8431705 (D.Co. 2024)	2024	CO	Second Amendment	Civil	N
Knife Rights, Inc. v. Bonta, 2024 WL 4224809 (S.D.Cal. 2024)	2024	CA	Second Amendment	Civil	N
Ortega v. Lujan Grisham, 741 F.Supp.3d 1027 (D.N.M. 2024)	2024	NM	Second Amendment	Civil	N
Rocky Mountain Gun Owners v. Town of Superior, 2024 WL 4427765 (D.Co.)	2024	CO	Second Amendment	Civil	N
Rupp v. Bonta, 723 F.Supp.3d 837 (C.D.Cal. 2024)	2024	CA	Second Amendment	Civil	Y

Vermont Federation of Sportsmen's Clubs v. Birmingham, 741 F.Supp.3d 172 (D.Vt. 2024)	2024	VT	Second Amendment	Civil	Y
Roake v. Brumley, 756 F.Supp.3d 93 (M.D.La. 2024)	2024	LA	First Amendment (Establishment)	Civil	Y
Palmer v. Sisolak, No. 3:21-CV-00268-MMD-CSD, 2024 WL 4432818 (D. Nev. Oct. 7, 2024)	2024	NV	Second Amendment	Civil	N
Schoenthal v. Raoul, No. 3:22-CV-50326, 2024 WL 4007792 (N.D. Ill. Aug. 30, 2024)	2024	Ill	Second Amendment	Civil	N
Nguyen v. Bonta, 720 F.Supp.3d 921 (S.D.Cal. 2024)	2024	CA	Second Amendment	Civil	Y
Oregon Firearms Federation v. Koteck, 682 F.Supp.3d 874 (D.Or. 2024)	2024	OR	Second Amendment	Civil	Y
United States v. DeBorba, 713 F. Supp. 3d 1042, 1068 (W.D. Wash. 2024)	2024	WA	Second Amendment	Criminal	N
United States v. Bernabe-Martinez, No. 1:22-CR-00276-AKB-1, 2024 WL 778114 (D. Idaho Feb. 26, 2024)	2024	ID	Second Amendment	Criminal	N
LaFave v. Cnty. of Fairfax, Virginia, No. 1:23-CV-1605 (WBP), 2024 WL 3928883 (E.D. Va. Aug. 23, 2024)	2024	VA	Second Amendment	Civil	N
Duncan v. Bonta, 695 F.Supp.3d 1206 (S.D. Cal, September 22, 2023).	2023	CA	Second Amendment	Civil	Y
Brumback v. Ferguson, 343 F.R.D. 335 (E.D. Wash. 2023)	2023	WA	Second Amendment	Civil	N
Goldstein v. Hochul, 680 F. Supp. 3d 370 (S.D.N.Y. 2023)	2023	NY	Second Amendment	Civil	N
B&L Productions, Inc. v. Newsom, 700 F.Supp.3d 894 (C.D.Cal. 2023)	2023	CA	Second Amendment; First Amendment (Speech)	Civil	N
Baird v. Bonta, 709 F.Supp.3d 1091 (E.D.Cal 2023)	2023	CA	Second Amendment	Civil	N
Boland v. Bonta, 662 F. Supp. 3d 1077, 1088 (C.D. Cal. 2023)	2023	CA	Second Amendment	Civil	N

Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Security, 664 F.Supp.3d 584 (D.D.E. 2023)	2023	DE	Second Amendment	Civil	N
Capen v. Campbell, 708 F. Supp. 3d 65, 82 (D. Mass. 2023)	2023	MA	Second Amendment	Civil	N
Kipke v. Moore, 695 F. Supp. 3d 638, 655 (D. Md. 2023)	2023	MD	Second Amendment	Civil	N
Frey v. Nigrelli, 661 F. Supp. 3d 176, 205 (S.D.N.Y. 2023)	2023	NY	Second Amendment	Civil	N
Hartford v. Ferguson, 676 F. Supp. 3d 897, 904 (W.D. Wash. 2023)	2023	WA	Second Amendment	Civil	M
Koons v. Platkin, 673 F. Supp. 3d 515, 656 (D.N.J. 2023)	2023	NJ	Second Amendment	Civil	N
Herrera v. Raoul, 670 F.Supp.3d 665. (N.D. Ill. 2023)	2023	IL	Second Amendment	Civil	N
May v. Bonta, 709 F.Supp.3d 940 (C.D.Cal. 2023)	2023	CA	Second Amendment	Civil	N
Miller v. Bonta, 699 F.Supp.3d 956 (S.D.Cal. 2023)	2023	CA	Second Amendment	Civil	N
Jones v. Bonta, 705 F. Supp. 3d 1121, 1134 (S.D. Cal. 2023)	2023	CA	Second Amendment	Civil	N
Nat'l Ass'n for Gun Rts. v. Lamont, 685 F. Supp. 3d 63, 102 (D. Conn. 2023)	2023	CT	Second Amendment	Civil	N
Sullivan v. Ferguson, 636 F.Supp.3d 1276 (D.Wa. 2023)	2023	WA	Second Amendment	Civil	N
Colorado Montana Wyoming Area State Conference of the NAACP v. U.S. Election Integrity Plan, 653 F.Supp.3d 861 (CO 2023).	2023	CO	Fourteenth Amendment	Civil	N
Rocky Mountain Gun Owners v. Polis, 701 F. Supp. 3d 1121, 1128 (D. Colo. 2023)	2023	CO	Second Amendment	Civil	Y
Grant v. Raffensperger, 2023 WL 9423257 (D.Ga. 2023)	2023	GA	Fourteenth Amendment	Civil	N
Link v. Diaz, 669 F.Supp.3d 1192 (N.D.Fla. 2023)	2023	FL	First Amendment (Speech)	Civil	N

Hanson v. D.C., 671 F. Supp. 3d 1, 13 (D.D.C. 2023), <i>aff'd</i> , 120 F.4th 223 (D.C. Cir. 2024)	2023	DC	Second Amendment	Civil	N
Renna v. Bonta, 667 F. Supp. 3d 1048, 1066 (S.D. Cal. 2023)	2023	CA	Second Amendment	Civil	N
Worth v. Harrington, 666 F. Supp. 3d 902, 921 (D. Minn. 2023)	2023	MN	Second Amendment	Civil	N
Wolford v. Lopez, 686 F. Supp. 3d 1034, 1063 (D. Haw. 2023)	2023	HA	Second Amendment	Civil	N
Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1315 (N.D. Ga. 2022)	2022	GA	Fourteenth Amendment	Civil	N
Christian v. Nigrelli, 642 F. Supp. 3d 393, 400 (W.D.N.Y. 2022)	2022	NY	Second Amendment	Civil	N
Rigby v. Jennings, 630 F. Supp. 3d 602 (D. Del. 2022)	2022	DE	Second Amendment	Civil	N
Miller v. Smith, 2022 WL 782735 (C.D. Ill)	2022	IL	Second Amendment	Civil	N
Singleton v. Merrill, 582 F.Supp.3d 924 (N.D. AL 2022)	2022	AL	Fourteenth Amendment	Civil	N
McGriff v. City of Miami Beach, 594 F.Supp.3d 1302 (S.D.Fla. 2022)	2022	FL	First Amendment (Speech)	Civil	N
Stevens v. Brigham Young Univ. - Idaho, 588 F.Supp.3d 1117 (D.Id. 2022)	2022	ID	First Amendment (Establishment)	Civil	Y
Ocean State Tactical v. Rhode Island, 646 F.Supp.3d 368 (D.R.I. 2022)	2022	RI	Second Amendment	Civil	N
City of South Miami v. DeSantis, 561 F.Supp.3d 1211 (S.D.Fla. 2021)	2021	FL	Fourteenth Amendment	Civil	Y
Students for Fair Admission v. Univ. of North Carolina, 567 F.Supp.3d 580 (M.D.N.C. 2020)	2021	NC	Fourteenth Amendment	Civil	N
Alabama State Conf. of Nat'l Ass'n for Advancement of Colored People v. Alabama, 612 F. Supp. 3d 1232, 1280 (M.D. Ala. 2020)	2020	AL	Fourteenth Amendment	Civil	Y
Thompson v. Merrill, 505 F. Supp. 3d 1239, 1260 (M.D. Ala. 2020)	2020	AL	Fourteenth Amendment	Civil	Y

Miller v. Becerra, 488 F.Supp.3d 949 (S.D.CA. 2020)	2020	CA	Second Amendment	Civil	N
Texas Alliance for Retired Americans v. Hughs, 489 F.Supp.3d 667 (S.D. Tex. 2020)	2020	TX	Fourteenth Amendment	Civil	N
Buending v. Town of Redington Beach, 2020 WL 3250218 (M.D.F.L. 2020)	2020	FL	First Amendment (Speech)	Civil	Y
Fair Fight Action, Inc. v. Raffensperger, 2020 WL 13561776 (N.D. Ga. Dec. 4, 2020)	2020	GA	Fourteenth Amendment	Civil	Y
Freedom From Religion Foundation, Inc. v. Mack, 2018 WL 6981152 (S.D. Tex. 2017)	2018	TX	First Amendment (Establishment)	Civil	N
Georgia State Conference of the NAACP v. State of Georgia, 269 F.Supp.3d 1266 (N.D.G.A. 2017)	2017	GA	Fourteenth Amendment	Civil	N
N. Carolina State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 426 (M.D.N.C.)	2016	NC	Fourteenth Amendment	Civil	N
Feldman v. Arizona Secretary of State's Office, 208 F.Supp.3d 1074 (D.Ariz. 2016)	2016	AZ	Fourteenth Amendment	Civil	Y
Juliana v. United States, 217 F.Supp.3d 1224 (D. Or. 2016)	2016	OR	Fourteenth Amendment	Civil	N
Guardian News & Media LLC v. Ryan, 225 F. Supp. 3d 859 (D.Ariz. 2016)	2016	AZ	First Amendment (Speech)	Civil	N
Lee v. Virginia State Bd. of Elections, 188 F. Supp. 3d 577, 595 (E.D. Va.)	2016	VA	Equal Protection, First Amendment	Civil	N
DeBoer v. Snyder, 973 F. Supp. 2d 757, 764 (E.D. Mich.)	2014	MI	Equal Protection	Civil	N
Acosta v. Huppenthal, 2013 WL 871892 (D.Ariz. 2013)	2013	AZ	Fourteenth Amendment	Civil	N
New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 990 F.Supp.2d 349 (W.D.N.Y. 2013)	2013	NY	Second Amendment	Civil	N
Cooper-Harris v. United States, 965 F.Supp.2d 1139 (C.D.C.A. 2013)	2013	CA	Fourteenth Amendment	Civil	Y
Golinski v. U.S. Office of Personnel Management, 824 F.Supp.2d 968 (N.D. Ca. 2012)	2012	CA	Fourteenth Amendment	Civil	N

Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y. 2012)	2012	NY	Fourteenth Amendment	Civil	N
Pedersen v. Office of Personnel Management, 881 F.Supp.2d 294 (D.Ct. 2012)	2012	CT	Fourteenth Amendment	Civil	N
Perez v. Perry, 835 F.Supp.2d 209 (W.D.Tex. 2011)	2011	TX	Fourteenth Amendment	Civil	N
Dragovich v. U.S. Dep't of Treasury, 764 F.Supp.2d 1178 (N.D. Ca. 2011)	2011	CA	Fourteenth Amendment	Civil	N
Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 940 (N.D. Cal. 2010)	2010	CA	Fourteenth Amendment, Due Process	Civil	Y
Walden v. City of Chicago, 755 F. Supp. 2d 942, 949–50 (N.D. Ill. 2010)	2010	IL	Fourteenth Amendment	Civil	Y
Andersen v. Haynes, 2009 WL 2591277 (N.D.W. Va. 2009)	2009	WV	First Amendment (Speech), Fourth Amendment	Civil	N
Hurst v. Newman, 1:06cv00036 (E.D.Ca. 2006)	2006	CA	First Amendment (Establishment)	Civil	N
United States v. Osceola County, Florida, 475 F.Supp.2d 1220 (Md.Fla. 2006)	2006	FL	Fourteenth Amendment	Civil	N
Weinbaum v. Las Cruces Public School, 465 F.Supp.2d 1116 (D.Nm. 2005)	2005	NM	First Amendment (Establishment)	Civil	Y
Utah Gospel Mission v. Salt Lake City Co., 316 F.Supp.2d 1201 (D.Ut. 2004)	2004	UT	First Amendment (Establishment)	Civil	N
Doe v. Barrow County, Georgia, 219 F.R.D. 189 (N.D. Ga. 2003)	2003	GA	First Amendment (Establishment)	Civil	N