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MISSING PIECES: GAPS IN THE RECORD OF EARLY AMERICAN DECISIONAL LAW

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ABSTRACT

In its most recent major Second Amendment decision, New York State Rifle & Pistol Association v. Bruen*, the Supreme Court suggested that historical laws "rarely subject to judicial scrutiny" are not especially illuminating because "we do not know the basis of their perceived legality." Legal scholars have defended* Bruen*'s approach to historical evidence in part by arguing that the decision requires merely an artificially-limited historical inquiry into internal legal sources to discern overarching principles accepted across the country in the Founding Era. But modern-day lawyers and judges actually know far less than they might believe about whether certain laws were subject to judicial scrutiny during crucial eras of American history because many court decisions—especially from the Founding Era—were simply never recorded for posterity. Those omissions were not random, and they do not represent merely what we today would consider insignificant holdings. Rather, omissions from the surviving record of decisional law are the product of curation by early court reporters, newspaper editors, and other actors often motivated by profit or partisan bias. Therefore, it is often perilous to extrapolate "the general law" from the extant, unrepresentative caselaw that happens to be preserved today.*

This Essay examines how the non-legal choices and preferences of those who recorded early American case law prior to the gradual

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emergence of more consistent reporting of judicial decisions in the late nineteenth century shaped the historical record of early decisional law that exists today. Part I chronicles the largely inconsistent and at times chaotic practice of court reporting at and after the Founding and explores how judicial decisions were preserved and published during that time. Part II addresses how modern originalist theories should approach and appreciate the "curated" nature of legal history from that time. I argue that the record of early American decisional law has been profoundly influenced by various actors (legal and non-legal) according to considerations other than preserving an accurate, comprehensive snapshot of "general law" at the time—namely, based on motives including profit and partisanship. This reality, I suggest, means that it is crucial to expand the universe of historical sources when possible to capture what may be missing from the universe of preserved decisional law.

INTRODUCTION

Sometime in 1881, a man named Ah Lung who lived in Sacramento, California, was charged with and convicted of violating a city ordinance that prohibited the carrying of concealed weapons.[1] Ah Lung was convicted and then challenged (under a writ of habeas corpus) the constitutionality of the ordinance on several grounds, but a local judge rejected his main arguments and "held that there could be no question as to the power of the Board of City Trustees to . . . prohibit[] the carrying of concealed weapons, under the general police power of the municipality."[2] The judge saw potentially greater merit in other contentions, including that the law's exception for police officers was drafted too broadly and that the law's permitting scheme might be constitutionally problematic—but found those insufficient grounds to vacate Ah Lung's sentence.[3]

It is not particularly notable that the judge upheld the Sacramento ordinance. Many states and municipalities banned the concealed carry of certain weapons in the mid-to-late-nineteenth century, and the Supreme Court has explained that "the majority of the [nineteenth]-century courts to consider the question held that prohibitions on

1. *Habeas Corpus Case*, SACRAMENTO DAILY REC.-UNION, Nov. 19, 1881 (*Local Intelligence*), at 5; *see also Ordinance no. 84: Prohibiting the Carrying of Concealed Deadly Weapons, April 24, 1876*, *reprinted in* CHARTER AND ORDINANCES OF THE CITY OF SACRAMENTO TOGETHER WITH STATUTES AS ARE ESPECIALLY IMPORTANT AND AN APPENDIX OF CITY OFFICERS FROM 1849 TO 1897, INCLUSIVE 173 (R. M. Clarken ed., 1896).

2. *Habeas Corpus Case*, *supra* note 1, at 5.

3. *See id.*

carrying concealed weapons were lawful under the Second Amendment."[4] What is notable is that we know about Ah Lung's case *at all*. There is no preserved judicial opinion in the case, if the local judge (identified as Judge Denton) even issued one.[5] There was also no organized system for reporting decisions issued by state courts below the state supreme court in California at the time, so even if Ah Lung chose to appeal Judge Denton's decision we likely would not have a record of that appeal unless it went all the way to the California supreme court.[6] Rather, the only reason anyone today is aware of the decision—and the judge's conclusion that there was "no question" that the city's police power allowed it to ban concealed weapons—is because a newspaper editor decided to include a summary of the hearing before Judge Denton in the "Local Intelligence" column of the *Sacramento Daily Record-Union*. Perhaps it was a slow news day, or perhaps the editor had a personal interest in the case or had published blurbs on similar cases in the past and believed the paper's readers would be interested in the matter,[7] or perhaps the paper was simply following up on an earlier report about the Police Court proceedings.

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

5. Ah Lung was appealing his earlier conviction in the "Police Court" for violating Sacramento's concealed carry ordinance, likely to the state Superior Court—a higher level court of appeal that would nevertheless be akin to a state trial court today. *See Habeas Corpus Case*, SACRAMENTO DAILY REC.-UNION, Nov. 15, 1881 (*Local Intelligence*), at 3*;* (an additional account of the proceedings that provides background about the Police Court trial and identifies the Judge as "Judge Denson"). Some jurisdictions at the time provided for initial proceedings in a Police or Mayor's Court, with the appeal then taken to a more traditional forum (and such localized justice persists in certain forms to this day). *See, e.g.*, LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910, at 39 (1981); Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 968, 994–98 (2021) (noting that "municipal courts have structural features and political dynamics that distinguish them from lower state courts in significant and sometimes startling ways" and criticizing these courts as "often run in informal fashion by interested parties"). California's state constitution has required, since 1879, that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated"; but the constitution says nothing about the decisions of state trial courts. CAL. CONST. art. VI, § 14.

6. For example, official reports of decisions from California state intermediate appellate courts are only available starting in 1905, as that level of the court system simply didn't exist prior to November 1904 when it was established by a state constitutional amendment to address court congestion. *See California Case Materials Checklist: Finding California Cases*, UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIB., https://libguides.law.ucla.edu/c.php?g=183352&p=1208543 [https://perma.cc/9EQV-EZPN]; *Appellate Courts Provided for by Amendment*, SAN FRANCISCO EXAMINER (Aug. 15, 1904), at 6. California—like almost every other state—does not publish state trial court decisions to this day. *See California Case Materials Checklist*, *supra.*

7. At least one account suggests popular concern about Chinese immigrants "who have been shooting at or among their countrymen on I street lately." *Habeas Corpus*, *supra* note 5, at 3.

There is no way to know for sure why the newspaper reported on the case, but in doing so it shaped the historical record of judicial decisions opining on state concealed carry regulations.

Such choices, especially when aggregated across the country over decades prior to the emergence of comprehensive and consistent case-law reporting systems in the late nineteenth century, may be especially impactful as the Supreme Court turns to historical regulatory practice and historical sources to construe the scope and content of constitutional rights.[8] Take, for example, the Court's statement in its most recent Second Amendment decision—*NYSRPA v. Bruen*[9]—that historical laws "rarely subject to judicial scrutiny" are not especially illuminating because "we do not know the basis of their perceived legality."[10] While *Bruen* seems to assume the ability to determine past judicial scrutiny, many historical laws may have been subject to scrutiny—perhaps even across a large number of cases—but scrutiny which did not lead to a published decision preserved to the present. These omissions from the historical record of decisional law were neither random nor always, or perhaps often, based on the modern concept of precedential value. Rather, in many instances, decisions were likely omitted for reasons such as the need to sell volumes or newspapers or capture public attention.

Both originalists and non-originalist legal scholars are familiar with the challenge of an incomplete and in some ways unknowable historical record. Judges and scholars have long grappled with the fact that originalism's focus on public meaning elevates only the views of those who were part of the political community at the time and largely excludes marginalized groups whose views on crucial issues of constitutional interpretation would not have been preserved.[11] But

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8. *See, e.g.*, Marc. O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming); Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023).

9. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

10. *Id.* at 68. *Bruen* is by no means a model of consistency on this front, elsewhere suggesting that the lack of decisional law relating to a certain type of gun regulation might *instead* suggest that the law was widely accepted as constitutional. *See id.* at 30 ("Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited . . . *we are also aware of no disputes regarding the lawfulness of such prohibitions*.") (emphasis added).

11. *E.g.*, Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 75 ("Almost all notions of originalism are subject to the criticism that they ask black concerns to defer to white concerns."); *but see* Christina Mulligan,

many likely assume that *decisional* history—the record of court decisions—is, at the very least, not systematically unrepresentative of what the law was at a given time in American history. And yet the historical record of court decisions, too, is not only incomplete but curated by historical actors based on underlying motivations foreign to most modern-day lawyers and legal scholars.

This Essay explores how actors including newspaper and court reporters shaped the record of historical judicial decisions that exists today and assesses what the curated nature of preserved decisional law might mean for a jurisprudence that is increasingly focused on historical sources. To the extent courts applying *Bruen* are required to determine what the "general law" approach to regulating firearms was at key points in American history—in other words, what general legal principles were commonly accepted and applied by courts at a certain point in time—they must have some confidence that a representative set of judicial decisions is preserved from that time. Yet this Essay observes several ways in which the record of decisional law, especially decisional law from lower levels of state court systems[12], was curated and culled based on criteria that do not necessarily reflect or serve our modern-day uses of history.[13] In other words, the record of decisional

Diverse Originalism, 21 U. PA. J. CONST. L. 379, 412–13 (2018) (arguing that including diverse historical speakers within the originalist inquiry may address or mitigate such concerns).

12. These state trial courts were (and remain) the primary location for misdemeanor criminal charges to be adjudicated, yet despite handling the vast majority of such cases have largely eluded academic attention. *See, e.g.*, Natapoff, *supra* note 5, at 966–67; Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 477 (1998) (observing that "academics tend to focus on appellate courts and cases, perhaps because appellate opinions are so much more accessible than the doings of trial courts"); FRIEDMAN & PERCIVAL, THE ROOTS OF JUSTICE, *supra* note 5, at 67 (stating, of California police court proceedings, that "when we lump all the[] experience [of defendants] together, what happened to people in these dingy precincts had great importance in society"); Lawrence M. Friedman, *Comparing Courts Across Time and Space*, *in* EMPIRICAL THEORIES ABOUT COURTS 9, 24–25 (Keith O. Boyum & Lynn Mather eds., 1983) (observing that, in early America, the lowest levels of the court system "deeply [] penetrated into the life of the community" in large part because towns "lacked institutions other than courts for settling disputes"). That said, the historical reporting practices even for higher-level courts, up to and including the Supreme Court, were far spottier than our modern-day expectations. *E.g.*, JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 799 (1971).

13. Scholars have made similar observations in the context of high-level data about how local courts functioned historically. *See, e.g.*, Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 129, 135 (2014) (observing the importance of state trial-court records for reconstructing judicial trends and lamenting that "the data from which long-term studies of the state trial judiciaries might be constructed, where it was collected at all, lies moldering in the basements of a thousand county courthouses, unless it has

law is not only incomplete, but was not compiled in the way a modern-day treatise might be, by compiling the most important and representative legal decisions. In fact, it is likely that in some instances the record of decisional law is skewed *against* being representative because external forces caused reporters to underreport cases involving well-established legal principles in favor of disruptive developments. Ultimately, the Essay argues in favor of recognizing the inherent limitations of the historical record of decisional law from early America and consulting non-legal sources when available for a complete picture of society's approach to firearms and gun regulation.

I. THE RISE OF WRITTEN JUDICIAL DECISIONS AND COURT REPORTING

This section will briefly summarize the history of court reporting, or the public dissemination of information about judicial proceedings and rulings, in early America prior to the rise of the type of consistent, widespread reporting of written decisions that exists today. First, in a continuation of British practice, specialized court reporters emerged following independence in the various states, writing volumes geared toward a popular audience and competing for readership. Second, American newspapers increasingly began to cover legal and judicial developments in the nineteenth century.

A. Dedicated Court Reporting

The history of recording judicial decisions—as opposed to statutory law—dates to medieval England and the jurist Henry de Bracton, who published a noted legal treatise on English common law around 1250 that cited and discussed hundreds of legal cases and the judge's decision in each case.[14] The foreword to a 1999 edition of Bracton's *Note Book* observes how groundbreaking this catalogue of decisional law was for its time:[15]

> Nothing is more remarkable in Bracton's book than his profuse references to decisions. His law is case law. Now this is remarkable. It

already been destroyed by floods, eaten by vermin, or discarded to make space for newer records or an air-conditioning system").

14. *See* Susan Brenner, *Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 461, 466 (1990); BRACTON'S NOTE BOOK. A COLLECTION OF CASES DECIDED IN THE KING'S COURTS DURING THE REIGN OF HENRY THE THIRD (F.W. Maitland ed., 1999) [hereinafter BRACTON'S NOTE BOOK].

15. F.W. Maitland, *Introduction* to 1 BRACTON'S NOTE BOOK, *supra* note 14, at 11.

> is very seldom indeed that any other mediaeval writer . . . ever cites a case . . . . Shall we say that Bracton foresaw what after the lapse of centuries would become the most distinctive characteristic of English law?

Bracton's treatise was also notable for pioneering a "mode of legitimation . . . [based on] reference to custom, insofar as it relied upon reference to past practice, that is, judicial decisions that had been rendered in the past."[16] In other words, past judicial decisions—almost invariably, at the time, decisions issued orally by a jurist and then transcribed—might *themselves* legitimize the outcomes in current and future cases.

While preserved decisional case law ultimately cohered into a foundation of American jurisprudence, early American "case reporting was an idiosyncratic affair which replicated the English experience in many respects."[17] American lawyers during the colonial period looked primarily to existing English treatises and case law reports and, "prior to independence, very few local decisions were published" at all.[18] With American independence this gradually changed, although the influence of English decisional law persisted and nothing like the modern system of court reporting developed until much later in the nineteenth century. For one, it took time for American states to mandate that judges reduce their decisions to writing as opposed to issuing them orally from the bench[19]—in which case, they may or may not have been recorded and preserved, depending on who happened to be in the courtroom at the time and how those individuals shared their contemporaneous impressions. States gradually implemented requirements for written decisions from the late 1700s through the mid-1800s, although "[i]t is not clear in all jurisdictions whether written opinions were required by statute or begun by a voluntary decision of the court."[20] Thus, over the course of

16. Brenner, *supra* note 14, at 476.

17. *Id*. at 489.

18. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 54 (1981). In fact, the U.S. Supreme Court and state high courts only gradually adopted the practice of issuing an opinion "of the court" with clear precedential value—rather than the earlier practice of individual judges issuing opinions *seriatim*—in the late eighteenth and early nineteenth century. *See, e.g.*, WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION 62–72 (2007).

19. *See* Surrency, *supra* note 18, at 55 (noting that states, starting with Connecticut in 1785, gradually required judges to reduce decisions to writing in the late eighteenth and early nineteenth centuries); POPKIN, *supra* note 18, at 183–236 (describing case reporting practices in all early American states, including official mandates that judicial opinions be reduced to writing).

20. Surrency, *supra* note 18, at 55.

the nineteenth century, court reporting evolved from the English system of private reporters publishing a selected subset of orally-issued decisions that were transcribed and annotated by the reporters to a more organized enterprise of selecting a set of written decisions to include in a volume.

As scholar Erwin Surrency observes, early American "reporters were not copying cases with the end in mind of constructing a scientific superstructure upon their foundation, . . . [but rather were] merely making notes for their own use or for the use of friends in a small cohesive bar."[21] Court reporting emerged in America, often with implicit or official support from state governments, in the early 1800s.[22] While the proliferation of written judicial decisions would eventually turn American court reporting into the more formalized process that it is today, early reporting was anything but the mere *publication* of a pre-determined set of cases. Rather, reporters frequently interspersed their own remarks and observations, and the reports "situated adjudication in a world of ongoing political commentary in the public press"—exposing judicial analysis to potential public criticism at least as much as they were designed to say *what* the law was.[23] It is a near certainty that many judicial decisions from this critical time in American history are simply lost, because the nascent reporting system did not deem them worthy of preservation, was not aware of them, or because the decisions were never written down in the first place.[24] One scholar, for example, has estimated that "somewhat less than half of the dispositions made by *the Supreme Court* in the first decade of its existence are reported," to say nothing of decisions by lower federal

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21. *Id.* at 51; *see also* Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263, 268 n.20 (1998).

22. Duffey, *supra* note 21, at 265–66.

23. *Id.* at 266–68.

24. For example, in the preface to his volume of Supreme Court decisions, early American case reporter William Cranch lamented that

> [u]niformity . . . can not be expected where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment can not be maintained if its adjudications are suffered to be forgotten. It is therefore much to be regretted that so few of the gentlemen of the bar have been willing to undertake the task of reporting.

Cranch's Preface, 5 U.S. (1 Cranch) iii (1804). Another source observes that, "[t]wenty-five years after the start of the American Revolution most American jurisdictions still depended largely on the available English law reports" because they did not have their own reporters. Richard A. Danner, *Cases and Case-Lawyers*, 35 LEGAL REFERENCE SERVS. Q. 117–156 (2016), manuscript at 4, https://scholarship.law.duke.edu/faculty_scholarship/3613 [https://perma.cc/2VFD-J89W].

and state courts.[25] As another example, a written New York state trial court opinion from 1810 refers to a prior case mentioned during oral argument by name—that case, the judge writes, was "decided in this court, many years since, of which no report is extant."[26] These unpreserved decisions almost certainly came mostly from the lower levels of state court systems, but their importance, especially in terms of what they might reveal about social attitudes toward the law, should not be underestimated.[27]

The inconsistent nature of early reporting comes into sharp focus when one considers that the reports themselves were often shaped by considerations which today feel improper: the twin desires for popular acclaim and financial success. Reporter volumes were reviewed in the popular press and at times criticized for their content. For example, Richard Danner chronicles popular reviews of early American reports—including one Massachusetts reporter who was admonished for "engaging in 'book-making' by padding a volume with unnecessary material[.]"[28] In other words, because the reporter volumes were products marketed and sold to the American public, there was a strong incentive for the reporter to be succinct and to omit cases that did not meet the bar for noteworthiness or public interest. Otherwise, the volume would not sell. Another early review "emphasiz[ed] that a reporter's 'principle merit' was to include only useful cases and

25. JULIUS GOEBEL JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 799 (New York, Macmillan 1971) (emphasis added); *see also* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1302 (1985) (noting that, during the late 1790s and early 1800s, the incompleteness of private Supreme Court reporter volumes and absence of contemporary newspaper coverage led "counsel who were unable to attend the sessions of the Supreme Court of the United States in Philadelphia . . . to inquire of friends at the seat of government whether the Court had decided various issues of interest to them").

26. Sands v. Taylor, 5 Johns. 395, 406 (N.Y. Sup. Ct. 1810). The judge, after observing that no record of that case or the court's decision was preserved, went on to note in somewhat conclusory fashion that "I recollect the case: the principle now adopted was recognised in that case." *Id. Sands* introduces yet another element of uncertainty: to some extent, the strength of early American decisional precedent and the possibility of that precedent being preserved for future generations may have turned solely on judges' own memories.

27. *See, e.g.*, Friedman, *Comparing Courts Across Time and Space*, *supra* note 12, at 24–25; Yeazall, *Courting Ignorance*, *supra* note 13, at 129 ("[T]he United States depends on state trial courts to run the world's largest economy and coordinate its mechanisms of social control. But as we drown in data about everything else under the sun, we know remarkably little about how those courts actually work.").

28. Richard A. Danner, *More than Decisions: Reviews of American Law Reports in the Pre-West Era* 9 (Duke L. Sch. Pub. L. & Legal Theory Series No. 2015-27), https://ssrn.com/abstract=2622299 [https://perma.cc/LB3Q-LF78].

accurate[ly] stat[e] facts and arguments."[29] The broader point is that these early American reporters were not always (or, perhaps, even often) conducting their work with an eye toward broadly preserving the record of judicial decisions for perpetuity so that *future* audiences would know what the law was at the time. Rather, early court reporters were primarily concerned with producing a popular volume that would receive positive reviews and sell well to the general public.[30]

Reporters were writing for the public, not for lawyers and scholars hundreds of years in the future, and "[t]he[ir] compensation . . . came from the sale of reports to the public and from state purchases."[31] As Surrency notes, "[b]ecause the accuracy of these early nominative reports depended on the skill and efforts of the reporters, some were more highly regarded than others."[32] This system of private reporters for each jurisdiction largely persisted until the 1880s, when the West Publishing Company acquired various regional reporters and inaugurated a "comprehensive system" that it proclaimed would "alternatively prevail over any local and fragmentary enterprises of the same character."[33] The West system coincided with an increasing focus on comprehensiveness over selectivity, as West's "philosophy ha[d] always been to publish every decision to which it . . . gain[ed] access regardless of whether or not that decision appeared in an 'official'

29. *Id.* at 10 (citing William Coleman, *Cases of Practice adjudged in the Supreme Court of the State of New-York: together with the Rules and Orders of the Court, from October Term, 1791, to October Term, 1800*, 1 AM. REV. & LITERARY J. 39, 40 (1801)).

30. *See, e.g.*, Joyce, *supra* note 25, at 1301 (observing that "it would be strange if [early Supreme Court reporters such as Alexander] Dallas had not been heavily influenced by commercial considerations . . . [and] design[ed] . . . volumes in such a way as to maintain [a] readership as a core for sales"); Surrency, *supra* note 18, at 54 (noting the small size of the early American bar and observing that "obviously it is not commercially or economically feasible to publish books for only a very few individuals").

31. Surrency, *supra* note 18, at 58. Some evidence indicates that there was not much popular demand for case reports around the time of the Founding, *see, e.g.*, JOSEPH L. GERKEN, THE INVENTION OF LEGAL RESEARCH 28 (2016) (noting that "[s]ales of Wheaton's *Reports* [an early Supreme Court reporter] chronically lagged throughout his time as reporter"), and lawyers as a class were viewed with great suspicion and approbation in early America due in part to their association with England, *see, e.g.*, Anton-Hermann Chroust, *Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME L. REV. 48, 52 (1959) (referencing "general distrust and dislike of the legal profession" in America in the 1790s).

32. Surrency, *supra* note 18, at 57; *see also id.* at 58 ("Because these early reports were cited by the name of the reporter, a definite feeling persisted that the reporter was far more important than the judges who rendered the decisions."). Court reporters were also criticized for delay, as "[t]he fact that early decisions could not be read by judges, lawyers, or the public for years dramatically undercut both the legal impact of those decisions and the court's role as declarer of the law." GERKEN, *supra* note 31, at 22.

33. Surrency, *supra* note 18, at 62 (quoting 21 AM. L. REV. 963 (1887)).

reporter."[34] The West system was the culmination of a movement toward the reporter "packag[ing] a largely preexisting product for distribution" rather than acting as an "individual entrepreneur[] or craftsm[a]n."[35]

B. Newspaper Coverage of Judicial Decisions and Cases

The other major way that judicial proceedings and opinions were publicly reported to the American public in the eighteenth and nineteenth centuries was through newspapers and periodicals. Newspaper coverage of major cases represented continuity, at least initially, with English practice. In England, "[l]ate eighteenth-century metropolitan newspapers reflect[ed] a growing interest in the business of the magistrates' (or petty) courts and . . . summaries of court proceedings . . . ."[36] Similarly in early America, "[t]here is no doubt that [] newspapers were covering [] local courts in the eighteenth century."[37] Yet, according to one source, that coverage was spotty and newspaper coverage of court proceedings did not reach any kind of critical volume until the middle of the nineteenth century.[38] Moreover, especially for newspaper reports in the colonial and Founding eras, "it is impossible to know whether the journalists were using court records, clerks' or judges' memories, other sources or their own firsthand observation to obtain the information" for their stories.[39]

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34. Brenner, *supra* note 14, at 498; *see also* Gerken, *supra* note 31, at 36 ("No longer was the reporter obliged to sit in court, every session, taking down counsels' arguments, the judges' questions and the rendering of oral opinions. Now he could simply collect the judges' written opinions."); Danner, *supra* note 28, at 4 ("In the last quarter of the nineteenth century, the entrance of West Publishing Company and other publishers into the market for publishing federal and state reports radically changed the environment of law publishing.").

35. Duffey, *supra* note 21, at 270. While West Publishing began as a publisher of Minnesota state court decisions, the company soon purchased competitors and began publishing more comprehensive digests to "provide a solution for lawyers struggling to locate precedents" as court decisions proliferated in the post-Civil War period. Richard A. Danner, *Influences of the Digest Classification System: What Can We Know?*, 33 LEGAL REFERENCE SERVS. Q. 117, 122 (2014). Ultimately, "[o]fficial publications of court reports and statutory codes on the state level were discontinued in many jurisdictions, yielding to the widespread preference for their commercial competitors," namely West. Morris L. Cohen, *An Historical Overview of American Law Publishing*, 31 INT'L J. LEGAL INFO. 168, 176 (2003).

36. Rosalind Crone, *Crime Reporting*, BRITISH LIBRARY NEWSPAPERS (2007), https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/intl-gps/intl-gps-essays/full-ghn-contextual-essays/ghn_essay_bln_crone1_website.pdf [https://perma.cc/XG4V-KSGE].

37. ROBERT E. DRECHSEL, NEWS MAKING IN THE TRIAL COURTS 41 (1983).

38. *Id.* at 43–46.

39. *Id.* at 48.

The early American press was also intensely partisan—even compared to today.[40] As purely partisan papers gave way to the so-called "penny press" in the early-to-mid 1800s,[41] papers remained closely tied to political parties[42] and may have included judicial summaries and information about court-related proceedings only to the extent that content would sell papers to the intended audience. For example, *The New York Sun* "first popularized publishing police and court reports, . . . [which] proved to be an enormous success," in the 1830s.[43] Some have argued that modern norms of journalistic objectivity and unbiased presentation simply did not develop until the early twentieth century when "journalists as an occupational group developed loyalties more to their audiences and to themselves as an occupational community than to their publishers or their publishers' favored political parties."[44] It is not immediately clear how much the partisan nature of much early American journalism carried over to court reporting, and one source notes that, "[e]ven during and after the penny press days of the nineteenth century, much court reporting was surprisingly neutral and balanced."[45] That said, it is possible that a newspaper's partisan bent had a greater impact on the decision of which cases to report on in the first instance rather than on the *nature* of that reporting.

The limited primary source data that exist regarding newspaper reports of case law in the eighteenth and nineteenth century appear to confirm both that this reporting frequently included cases that went

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40. *See, e.g.*, HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 37 (1989) ("Beginning with the debate over ratification of the new Constitution, each side used the press, and any new or controversial idea could become the basis for establishing a newspaper to promote it."); Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 PENN. L. REV. 221, 225 (1992) ("The early American press broke down along fiercely political lines, reflecting close ties between editors and party machinery. These interlocking political relationships manifested themselves in aggressively partisan newspaper content.").

41. MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 18 (1978).

42. HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA, *supra* note 40, at 175–78 (noting that, despite rising criticism of partisanship in the American press in the late 1800s, many Americans "struggled to conceive of a press divorced from politics" and that "partisanism did not die").

43. *American Newspapers, 1800–1860: City Newspapers*, UNIVERSITY OF ILLINOIS HISTORY, PHILOSOPHY, AND NEWSPAPER LIBRARY, https://www.library.illinois.edu/hpnl/tutorials/antebellum-newspapers-city [https://perma.cc/5UYG-5FX3].

44. Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149, 161 (2001).

45. DRECHSEL, *supra* note 37, at 54.

unreported in formal court reporting compendiums of the era (such as Ah Lung's case that is described in the Introduction to this Essay), and that newspaper case reporting across the country in any given area was itself far from comprehensive.[46] One scholar has compiled a multi-volume collection of "newspaper stories about [court] decisions of which the reporters and contemporary pamphlets provide no, or an incomplete account."[47] According to the editor, the collection "reveal[s] a good deal about the gap between the law on the books and the law in action in that era."[48] But the reporting of judicial decisions in popular newspapers was no substitute for formal court reporting and, in the case of newspaper printing of court proceedings and judicial decisions, there was likely an even stronger bias in favor of excluding decisions not likely to capture public attention. For example, one Mississippi newspaper editor lamented in 1839 that—while the state "High Court of Errors and Public Appeals" had recently issued "many opinions of great learning and ability"—most of those decisions were lost to history.[49] That is because, according to the story, "no reporter is employed [at that court, and] [a]ll the information relative to decisions and the opinions of Judges are only to be obtained through the columns of the State paper."[50] The editor could not "conceive how [his] legal friends practise with any degree of certainty without knowledge of precedents."[51]

II. CURATED LEGAL HISTORY, GENERAL LAW, AND ORIGINALISM

What does it mean to say that our modern-day view of decisional law at early points in American history is "curated"? As a general matter, the available materials that show us what judge-made law was

46. For further detail, see this author's discussion of the relatively comprehensive reporting of concealed carry prosecutions by popular newspapers in Wilmington, North Carolina from 1879–1909. Andrew Willinger, Bruen*'s Enforcement Puzzle: Unearthing and Adjudicating the Historical Enforcement Record in Second Amendment Cases*, 99 NOTRE DAME L. REV. (forthcoming 2024). Historian Brennan Rivas, by contrast, observed an almost complete lack of newspaper coverage of concealed carry prosecutions and cases in Texas around the same time. *See generally* Brennan Gardner Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 U.C. DAVIS L. REV. 2603 (2022).

47. STANTON KRAUSS, NEWSPAPER REPORTS OF DECISIONS IN COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801, at xxv (Stanton Krauss ed. 2018).

48. *Id.*

49. *See High Court of Errors and Appeals*, SOUTHERN ARGUS (Columbus, Miss.), Apr. 16, 1839, at 2.

50. *See id.*

51. *Id.*

at any given time prior to the emergence of West-style court reporting (and, in some instances, even up to the present day[52]) are a collection shaped in numerous ways by the decisions of both legal and non-legal actors—decisions which often had surprisingly little to do with a desire to accurately present the state of the law at the time, as opposed to other desires such as the need to sell volumes or newspapers or capture public attention. The choices of *which* decisions to preserve, then, were often based on objectives and concerns that seem foreign or even improper to lawyers today.

A. Evaluating the Potential Gaps in our Understanding of Legal History

One basic problem presented by the curated nature of the historical record of decisional law is that we know some substantial number of judicial decisions from early American history are simply lost. From the Founding Era through the early nineteenth century, many judicial decisions were not required to be reduced to writing and thus could only have survived through secondhand accounts provided to reporters.[53] The record of decisional law, then, is shaped by such fundamental factors as the ability and willingness of a specific reporter to actually sit in court for the length of a proceeding, the reporter's choice about which proceedings to attend, and the reporter's

52. For example, state trial courts often are not required to (and do not) issue published, publicly-available opinions. *See, e.g.*, N.J. Rules of Ct. 1:36-2(b) (2022), https://www.njcourts.gov/attorneys/rules-of-court [https://perma.cc/RYU9-XLMZ] (stating that only trial court opinions submitted by the judge for publication and approved by a committee may be published); Cal. Rules of Ct. 8.1120 (2024), https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1120 [https://perma.cc/SFS8-8HKT] (establishing a similar process for trial court decisions in California). The non-publication approach began at both the federal and state levels in the 1960s, spurred by concern about the mounting volume of precedential opinions that could be cited in briefs. *See, e.g.*, Lauren S. Wood, Note, *Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts' Unpublished Opinion Practices*," 45 U. BALT. L. REV. 561, 564–65 (2016). Looking further back in American history, however, the broader concern is that "unimportant" decisions were simply not preserved at all, thus obscuring the *strength* of certain kinds of legal precedent and leading modern interpreters to believe that a certain application of law to fact was not as roundly accepted at the time as it may have been.

53. Surrency notes that, while Connecticut required written decisions by state court judges as early as 1785, Pennsylvania did not institute a written-decision requirement (unless specifically requested by a party or his attorney) until 1845. Surrency, *supra* note 18, at 55. The Supreme Court's own opinion-delivery practices, in fact, were in flux from 1790 up to at least 1800 and the advent of the so-called "Marshall Supreme Court" and "the Court used no set form in presenting its opinions." John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L. Q. 137, 139–40 (1990).

connections within the bar.[54] Notably, some of these early American court reporters would not have had the formal legal training of a lawyer today and were not necessarily writing for a legal audience at all.[55] The entire case reporting enterprise, in fact, was oriented toward a different purpose than it is today: "decisions were used in an artifactual, rather than a precedential, sense; as 'evidence' of underlying 'principles' of law rather than as law in and of themselves."[56]

Moreover, what is preserved for modern-day judges and constitutional lawyers is not likely to be anywhere near the complete record of decisional law that we have come to expect today.[57] Because there was no comprehensive publishing system for reporting those decisions that *were* recorded, and often little demand for the formalized system of publication that exists today, the opinions and accounts of opinions that have survived to the present day do not necessarily overlap with the set of opinions that judges or legal scholars *today* would deem important or "precedential" (and vice versa). Rather, decisions were included or omitted according to the standards of the time and the business considerations that motivated contemporary court reporters.[58] Early American court reporters were occasionally, and perhaps often, criticized for including extraneous cases in volumes that were not actually interesting or noteworthy to popular audiences of the day.[59] Therefore, one imagines that they

54. *See, e.g.*, Surrency, *supra* note 18, at 48 (noting that early court reporting required much more effort on the part of the reporter, who "took down . . . the opinions of the judges, to which he added his own summary of the facts and of the arguments of counsel").

55. *See, e.g.*, *Preface*, EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT iv (1789) (stating that the volume "avoid[s] technical terms and phrases as much as possible, that it might be intelligible to all classes of men"); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 291–93 (noting that, in early America "[t]he bar was open to almost all men, in a technical sense" and that "[s]ome lawyers wandered from town to town, almost like itinerant peddlers, until they found the right opening for their talents").

56. Brenner, *supra* note 14, at 490.

57. In some respects, this "gap" may resemble the underappreciated divergence between statutes as enacted and statutes as codified. *See, e.g.*, Will Baude, *Reminder: The United States Code Is Not the Law*, WASH. POST (May 15, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/15/reminder-the-united-states-code-is-not-the-law [https://perma.cc/X3AX-UDF7]; Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283 (Spring 2007).

58. *See* Joyce, *supra* note 25, at 1300–02.

59. *See, e.g.*, Danner, *supra* note 28, at 9–10 (highlighting critiques of court reports from 1801–1802 which "included too many jury charges," induced "fatigu[e]" in readers with the copious reasoning of advocates and judges, and contained "too much detail on cases dealing with procedure").

carefully selected only those opinions that would be appealing to their intended audiences and with critical reviewers in mind. This is especially true given the cutthroat commercial climate and the fact that many reporters appeared to struggle to sell volumes around the time of the Founding.[60] Consider, for example, a legal provision or doctrine that was long dormant and only re-emerged after decades or even centuries of latency.[61] During the period of dormancy, the court reporting system present around the time of the Founding presumably would not have preserved decisions dealing with that provision because reporters would have considered such information extraneous, useless, or uninteresting to popular audiences. To be clear, these gaps in the record of decisional law will primarily be at the lower levels of the state court system—municipal and state trial courts, for example—but decisions from those courts are nevertheless important to understanding the legal environment at a given point in American history.[62]

In addition to the bias imparted by editorial standards and business considerations—factors largely foreign to us today—early American court reporting likely was likely slanted toward disruptive legal developments. The modern system of reporting inaugurated by West, which is focused on publishing most released judicial decisions with limited discretion, preserves decisions reaching legal conclusions that are well-established and settled. As just one example, the Supreme Court upheld the federal status-based gun prohibitions in 18 U.S.C. § 922(g) as within the Commerce Clause power in a 1976 decision, and all federal courts of appeal have subsequently rejected Commerce Clause challenges to those laws—many brought in the immediate aftermath of the Court's major 1995 decision in *United States v. Lopez*.[63] Numerous *unpublished* decisions also exist upholding federal

60. *See* Surrency, *supra* note 18, at 58–59 (noting that "[t]here are hints that th[e] method of compensation [for early American court reporters] was inadequate"); Joyce, *supra* note 25, at 1301 (explaining the logic behind how "heavily influenced" early Supreme Court reporters were "by commercial considerations").

61. Indeed, the federal Second Amendment itself is a prime example—no federal court invalidated a law under the amendment from 1791 until 1999. JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT 13, 13 n.1 (2018).

62. *See* Yeazall, *Courting Ignorance*, *supra* note 13, at 129; FRIEDMAN & PERCIVAL, THE ROOTS OF JUSTICE, *supra* note 5, at 125–133 (describing the high volume of criminal misdemeanor cases adjudicated in a California police court in the late 1800s and characterizing the courts as "vital parts of the system of order and discipline").

63. *See* Scarborough v. United States, 431 U.S. 563 (1977); *see also* United States v. Smith, 101 F.3d 202, 215 (1st Cir. 1996); United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995);

status-based gun prohibitions against the same type of constitutional challenge.[64] The availability of these decisions enables a lawyer to argue effectively that it is a well-established legal principle that banning the individual possession of a firearm that has traveled in interstate commerce is within the federal government's commerce power.[65]

However, the reporting system that existed from the Founding Era up through the late 1800s may not have allowed this type of argument, or at least not facilitated it to the same extent. That system almost certainly prioritized *disruptive* developments—in other words, decisions that broke with precedent, struck down laws rather than upheld them, or addressed novel legal questions—over decisions that merely affirmed a long-standing and relatively uncontroversial (at the time) application of law to fact. Disruptive decisions would have been more engaging to non-legal audiences, whereas decisions that merely confirmed an uncontroversial view of the law would not be nearly as noteworthy. In this vein, Ah Lung's case is potentially instructive. The newspaper report of the ruling in the case noted that "there could be no question as to the power of the [city to]. . . prohibit[] the carrying of concealed weapons, under the general police power."[66] Because that was an uncontroversial view,[67] it is likely that nineteenth-century opinions affirming the constitutionality of concealed weapons ordinances may be under-reported in relation to other types of cases: it simply was not an interesting topic for a newspaper story. While those in the legal profession at the time would have had a clear sense that many judges were issuing such opinions with little fanfare, the historical record of decisional law does not necessarily reflect that common understanding or the volume of similar applications of law.

United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996); United States v. Wells, 98 F.3d 808, 811 (4th Cir. 1996); United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996); United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996); United States v. Lewis, 100 F.3d 49, 52 (7th Cir. 1996); United States v. Barry, 98 F.3d 373, 378 (8th Cir. 1996); United States v. Nguyen, 88 F.3d 812, 820–21 (9th Cir. 1996); United States v. Bolton, 68 F.3d 396, 400 (10th Cir. 1995); United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996); Fraternal Order of Police v. United States, 173 F.3d 898, 907 (D.C. Cir. 1999).

64. A Westlaw search for "922(g) /25 'commerce clause'" yields a staggering 1,311 unreported federal court decisions.

65. *See, e.g.*, Brief for the United States in Opposition, United States v. Seekins (No. 22-6853), filed May 22, 2023, at 10 (including a long string cite with several unpublished circuit decisions).

66. *Habeas Corpus*, supra note 1, at 3.

67. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (noting that "the majority of the nineteenth-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues").

Some may object that the opinions that early American court reporters failed to report are precisely the kind that do not represent "elite" legal opinion that forms the core of general law. Namely, because the omitted opinions were likely from lower courts, they are inconsequential so long as they are generally in line with the decisional law that *is* preserved. As previously observed, information about how these lower levels of the judicial system functioned in early America should not be dismissed out of hand as unimportant given how deeply intertwined these tribunals were with everyday life and the potential that their records might appreciably increase our understanding of societal understanding of law at the time.[68] Even accepting the general premise, moreover, the curated nature of the decisional legal record still obscures the *strength* of a legal principle by presenting a slanted view of just how many courts embraced it at the time. Curation also frustrates *Bruen*'s emphasis on the absence of judicial scrutiny even if omissions are only from lower levels of the court system. In fact, it's possible that certain laws were so well established as constitutional that cases were not appealed to higher levels such as state appellate and supreme courts. In that instance, what appears as a lack of scrutiny from *Bruen*'s perspective, and cuts against modern-day constitutionality, could in fact be the exact opposite: the law may have been so roundly accepted as a legitimate exercise of state power that relevant decisions came almost exclusively from lower state courts.

B. Curated Legal History & General-Law Originalism

Approaches to historically-focused jurisprudence that emphasize only decisional law from early America are likely to miss the forest for the trees, in many instances, if they assume that the record of case law from that period was compiled and preserved in the same way and with the same underlying motivations as it is today. In *Bruen*, the Supreme Court set forth a methodology for Second Amendment cases that is heavily focused on history and the historical record of judicial decisions. The majority opinion observes, for example, that historical gun regulations that "were rarely subject to judicial scrutiny" often will not provide sufficient historical support for otherwise relevantly similar modern laws because there is no way to discern "the basis of

68. *E.g.*, Lawrence M. Friedman, *Comparing Courts Across Time and Space*, *supra* note 12, at 24–25 (stating that the lowest levels of the state court pyramid "penetrated into the life of the community").

their perceived legality."[69] The majority makes a similar point about enforcement—"the absence of recorded cases involving surety laws," it says, signals that these laws were rarely enforced rather than that they were widely followed.[70] The general proposition is the same: if the historical record does not tell us something about *why* those who lived around the time a law was enacted thought that law was constitutional and should be broadly enforced or applied, then it is not appropriate to rely on the law within the historical-analogical inquiry.

The curated nature of legal history presents a nearly existential problem for *Bruen*'s emphasis on the lack of judicial scrutiny as a major factor in discrediting potential historical analogues. If there is no way to be confident that a near-complete record of decisional law from the relevant time period has survived to the present day, then it makes little sense to presume that the lack of a *preserved* decision upholding a law means that the law was *not* considered constitutional at the time. *Bruen* makes this observation with regard to territorial regulations, where it is even less clear that established reporting systems would have been in place and thus more likely that decisions were either never preserved or lost to history because they were not included in state-focused reporter volumes.[71] And this reference to the lack of judicial scrutiny also grafts our modern-day conception of what constitutes an important judicial decision onto the historical record of decisional law by assuming that a court reporter in the early 1800s would have recognized that judicial decisions regarding public-carry restrictions would be important over 130 years later.

This problem is particularly acute when considered as to Founding Era decisional law. Consider a gun law passed in 1791, for example, when written judicial decisions were few and far between and court reporting was in a nascent stage and highly inconsistent. The lack of judicial scrutiny of that law, in terms of what is actually preserved to this day, should be almost wholly inconsequential in light of these facts. And an inquiry into decisional precedent—as opposed to general legal principles—would *feel* foreign to those who compiled case law

69. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 68 (2022).

70. *Id.* at 58 & n.25. For a more in-depth discussion of *Bruen*'s treatment of evidence about how a historical gun law was enforced, see Andrew Willinger, Bruen*'s Enforcement Puzzle*, 99 NOTRE DAME L. REV. __ (forthcoming 2024).

71. *Cf. Bruen*, 597 U.S. at 67 (referencing "improvisational" legislative structures that existed in the Western territories).

compendiums at that time.[72] It is even possible that, by privileging lack of judicial scrutiny, *Bruen* approaches the historical record entirely backwards. For example, "the absence of recorded cases involving surety laws" might indicate that such laws were widely accepted as permissible and unobjectionable—the exact opposite of the conclusion that *Bruen* seems to require judges to draw.[73]

Scholars have argued persuasively that *Bruen* represents an embrace of "general law" principles, at least in some form.[74] General law refers to "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions."[75] This approach reads *Bruen* as "describ[ing] the scope of a common law doctrine by looking to a wide range of cases, parsing the close cases, setting aside unusual outliers, and trying to distill the general principles."[76] The "*Bruen* as general law" theory requires an inquiry into which legal principles were widely accepted across many American jurisdictions around the time of the Founding, and then applies those principles to the modern case at bar. General law advocates suggest that the inquiry into the "law of the past" should be limited to "internal legal sources"—in other words, "operative legal texts and [] 'internal' accounts of legal doctrine (e.g., treatises and court cases), rather than [] 'external' accounts of law's wider reception and operation—unless, of course, the doctrines themselves direct attention to these widespread understandings."[77]

In this way, general law advocates argue in favor of separating the general law inquiry from historiographical approaches, "which usually avoid such restrictive accounts in favor of broader reconstructions of

72. *See* Surrency, *supra* note 18, at 48–49 ("Lawyers in different eras have reported cases to suit their needs . . . .").

73. *Bruen*, 597 U.S. at 126 (Breyer, J., dissenting). *Bruen* makes this very observation with regard to locational firearm restrictions. *See id.* at 30 (explaining that the absence of case law on "settled places" allowed the court to "assume it settled that these locations were 'sensitive places' where arm carrying could be prohibited consistent with the Second Amendment").

74. *See generally* William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024), https://ssrn.com/abstract=4618350 [https://perma.cc/M6Z2-GWC7] (describing *Bruen*'s general law approach to the Second Amendment).

75. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006). Nelson offers an alternative formulation: "[r]ather than simply reflecting the law in one jurisdiction, [general law] instead reflect[s] doctrines that *most* states have adopted as a matter of state law." *Id.* at 568; *see also* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 817–18 (2019).

76. Baude & Leider, *supra* note 74 (manuscript at 17).

77. Baude & Sachs, *supra* note 75, at 813.

the past."[78] The rationale for this limitation is that originalism is concerned only with "*internalist* conclusions about the substance of past law, which is what current law happens to make relevant" and thus justifies an artificially limited historical inquiry focused primarily on legal sources and culture.[79] While there are outstanding questions about the *extent* to which *Bruen* embraced general law as the touchstone for constitutionality in the Second Amendment context, it seems reasonable to conclude the Court intended to adopt at least some aspects of the general law approach in *Bruen*.[80] The general law approach also more fully overlaps with the rationale behind the preservation of decisional law in early America: to memorialize enduring principles, rather than to dictate results in specific future cases.[81]

This Essay's brief survey of case reporting in early America,[82] however, should provide serious reasons to doubt that such an approach—at least, when limited to "internal legal sources"—is likely to uncover an accurate picture of common legal practices and understandings across jurisdictions that can be harnessed in the ways that *Bruen* suggests. If legal history is the primary, or potentially only, source for "legal principles [that can] be adapted to novel regulations,"[83] and the general law requires deriving overarching principles widely accepted by state courts and lawyers around the Founding Era, it would seem a necessary prerequisite that we must be able to discern accurately *what* the general law *is* in the first instance before determining that certain types of regulation did or did not violate rights or legal principles.[84] And that requires a certain level of confidence that the relevant internal legal sources have actually been preserved—or, that what is preserved is a representative snapshot of legal understanding and thought at the relevant time.

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78. *Id.* at 813–14.

79. *Id.* at 814 (emphasis added and omitted).

80. *See, e.g.*, *Bruen*, 597 U.S. 1 (2022) at 25–26 n.6 (citing Baude & Sachs, *supra* note 75, at 810–11).

81. *See* Brenner, *supra* note 14, at 490.

82. Specifically, this Essay focuses on the period from about 1789 to 1868, prior to the widespread adoption of West-style reporting beginning in the 1880s. This same time period is especially crucial for Second Amendment cases. *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 108 n.2 (3d Cir. 2023) (Porter, J., concurring) ("*Bruen* defines relevant history . . . as the period between approximately 1791 and 1868.").

83. Baude & Leider, *supra* note 74 (manuscript at 20).

84. *See Bruen*, 597 U.S. at 67–68 (emphasizing the lack of judicial scrutiny as an important factor within the historical-analogical inquiry).

By contrast, as this Essay has identified, internal legal sources (namely decisional law) from early America have likely gone through at least two significant stages of culling. First, the sources that we have today are necessarily limited to the judicial decisions and commentary that were reduced to writing—and that is largely a product of chance, in terms of when states began to require written decisions and how early court reporters chose to allocate their time. Second, the cases included in reporter volumes and newspapers were not selected solely with an eye toward accurately presenting a picture of "general law" at the time—rather, selection was often heavily influenced by non-legal considerations such as popular appeal, marketability, and partisanship. Therefore, while early court reporting often did focus on deriving and preserving the overarching legal principles that general-law advocates emphasize, the reporting enterprise was not an insulated legal endeavor but rather an evolving industry heavily influenced by non-legal considerations. The best that a modern-day interpreter can do, then, is to recognize these influences and look to a broader array of sources (both legal and non-legal) to derive general law principles.[85]

CONCLUSION

Recognizing that legal history—especially decisional law from the Founding Era and the early-to-mid 1800s—has been shaped and curated in ways that may prevent drawing conclusions from the *absence* of law on a certain topic and obtaining an accurate view of high-level principles from exclusively legal sources does not necessarily mean abandoning hope in historically-focused methods of constitutional interpretation and adjudication. Rather, it counsels in favor of broadening (rather than narrowing) the historical inquiry, appreciating historical nuance and complexity instead of brushing over those challenges, and approaching the inquiry with humility about our modern-day ability to discern legal principles from the Founding Era.

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85. Specifically, this would mean carving out a larger role within the historical-analogical test for evidence of social practice surrounding firearms rather than merely decisional law or legal evidence—an approach supported by a number of prominent firearms historians. *See, e.g.*, Jennifer Tucker, Glenn Adamson, Jonathan S. Ferguson, Josh Garrett-Davis, Erik Goldstein, Ashley Hlebinsky, David D. Miller & Susanne Slavick, *Display of Arms: A Roundtable Discussion about the Public Exhibition of Firearms and Their History*, 59 TECH. & CULTURE 719, 730 (2018) ("By engaging with [depictions of guns in popular art], visitors will learn about the social and political history of firearms . . . ."); David Yamane, *The Sociology of U.S. Gun Culture*, 11 SOCIO. COMPASS 1, 7 (2017) ("The social world of gun culture is shaped by broader social institutions including the legal system, economy, and technology, and these require[] greater attention as well.").

In other words, the response to critiques of *Bruen*-style originalism as exacerbating the pitfalls of so-called "law office history"[86] should be to welcome a broader array of historical perspectives and sources into the historical-analogical inquiry to better discern the state of the law at critical points in American history—the exact opposite of a narrowing, artificially-constrained approach, relying solely on the adversarial system, that some "general law" advocates support.

The point is not necessarily that lawyers should follow professional norms of historians or that expert-witness historians should become commonplace in Second Amendment cases.[87] Rather, this Essay advocates expanding the universe of *inputs* for the historical-analogical inquiry beyond merely internal legal sources, when those additional sources are available. The general-law approach suggests that lawyers are uniquely well-qualified to parse and interpret historical sources internal to the law, primarily decisional law from around the time of the Founding.[88] Once one recognizes the myriad ways in which the corpus of "internal" legal sources that survives to the present day has been shaped and narrowed by external, often non-legal, considerations, however, the rationale for such a limited inquiry quickly evaporates. Just as legal decisions in early America did not necessarily have standalone value but rather "were valued only as artifacts of an underlying legitimation source," the modern-day inquiry into the past should not ignore the extra-legal forces and considerations that shaped the legal culture.[89]

86. *See, e.g.*, Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 498 (2008) (identifying the concern "that because historical inquiry can lead to diametrically opposing or ambiguous conclusions, historical evidence should itself be treated with extreme caution"); Alfred H. Kelly, Clio *and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (criticizing "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

87. *See, e.g.*, United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *3 (S.D. Miss. Oct. 27, 2022).

88. Baude & Sachs, *supra* note 75, at 814–15 ("Often it is immersion into *legal* culture that is required. When faced with modern questions of French law, American judges consult French lawyers rather than sociologists; the same is true for the past.").

89. Brenner, *supra* note 14, at 486.