

# Genealogy in Constitutional Law

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*Genealogy is a form of argument that seeks to discredit social phenomena by exposing their pernicious ancestry. In recent years, the U.S. Supreme Court has used genealogy to undermine key provisions of written law, doctrinal rules, longstanding practices, and private conduct in cases involving a wide range of constitutional issues.*

*After comprehensively documenting this development, this Article contends that genealogy can advance conclusions within several widely recognized modalities of constitutional interpretation. More specifically, genealogy can be used to undermine assertions of authority implicit in arguments from precedent, tradition, and ethos. And it can be used to reveal its object's function in ways that are relevant to arguments from text, consequences, and history.*

*The Article then suggests some improvements to the current allocation of institutional responsibility in evaluating genealogical arguments. Presently, genealogical arguments tend to surface for the first time in the opinions of appellate courts—often the Supreme Court. This is unfortunate because genealogy often depends on idiosyncratic and nuanced inquiries of historical fact, which appellate courts are poorly equipped to conduct. A better approach would be for trial courts to have primary responsibility for judicial factfinding relevant to genealogical critiques of laws, rules, and practices.*

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## INTRODUCTION

Genealogy is a form of argument that seeks to reveal the ancestry of social phenomena, typically as a way of demonstrating their lowliness.<sup>1</sup> Nietzsche, for example, attempted to undermine certain beliefs about morality by showing they were the products of slave resentment, the debtor-creditor relation, and the priestly caste's desire

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1. See Matthieu Queloz, *Genealogy, Evaluation, and Engineering*, 105 THE MONIST 435, 437 (2022) (genealogies “characteristically trace the higher to the lower”); Mark Bevir, *What Is Genealogy?*, 2 J. PHIL. HIST. 263, 264 (2008) (observing that genealogy exposes “the contingent and ‘shameful’ origins of cherished ideas and entrenched practices”); Chin-Tai Kim, *A Critique of Genealogies*, 21 METAPHIL. 391, 398 (1990) (“A genealogy is an argument to discredit a belief or a belief system by exposing its genesis . . . .”); MICHEL FOUCAULT, *Nietzsche, Genealogy, History, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS* 144–46 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977) (observing that genealogy identifies “the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us”).

to dominate.<sup>2</sup> Similarly, Freud can be read as subverting certain religious beliefs by arguing that they originated in “man’s need to make his helplessness tolerable.”<sup>3</sup> And critical theorists have used genealogy to impugn a wide variety of beliefs and practices—from concepts central to scientific discourse,<sup>4</sup> to patriarchal<sup>5</sup> and imperialist<sup>6</sup> ideologies implicit in Western practices.<sup>7</sup>

The U.S. Supreme Court is by no means a natural forum for arguments associated with critical theory. Yet, in recent cases, the Court’s constitutional decisionmaking has taken a page straight from the critical theorists’ playbook. In the Court’s 2020 decision in *Ramos v. Louisiana*,<sup>8</sup> for example, three separate opinions invoked the origin of Louisiana’s Constitution to explain why a provision allowing nonunanimous verdicts in serious criminal cases was unconstitutional. The rule allowing nonunanimous verdicts was first adopted during an 1898 constitutional convention, the avowed purpose of which was “to establish the supremacy of the white race.”<sup>9</sup> Although the rule was readopted in 1974 for different reasons, several Justices in *Ramos* concluded that the rule’s legacy of racism was relevant to its

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2. See Amia Srinivasan, *The Archimedean Urge*, 29 PHIL. PERSP. 325, 326 (2015) (offering this reading of Nietzsche). See generally FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Carol Diethe trans., Cambridge Univ. Press 2007) (1887).

3. SIGMUND FREUD, THE FUTURE OF AN ILLUSION 18 (James Strachey ed. & trans., W.W. Norton & Company 1989) (1927).

4. See, e.g., GASTON BACHELARD, LE RATIONALISME APPLIQUÉ (1949); GEORGES CANGUILHEM, IDEOLOGY AND RATIONALITY IN THE HISTORY OF THE LIFE SCIENCES (1988); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES (Vintage Books 1994) (1966) (applying a genealogical approach to explain how historical contingencies led to human sciences).

5. See, e.g., SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., Bantam Books 1961) (1949) (tracing historical and social roots of patriarchy to deconstruct myths and stereotypes about women); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (arguing that patriarchy is not a natural or inevitable state but instead is historically contingent and socially constructed); JUDITH BUTLER, SENSES OF THE SUBJECT (2015) (using genealogy to uncover the ways patriarchal norms are reproduced through various institutions).

6. See, e.g., CHANDRA TALPADE MOHANTY, FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY (2003) (arguing against imperialist ideology, which assumes Western standards and experiences are universal, by tracing historical contributions to these stereotypes); EDWARD W. SAID, ORIENTALISM (Vintage Books 1979) (1978) (employing genealogy to examine the West’s portrayal of Eastern societies).

7. For an illuminating synthesis of genealogical arguments across a large range of sources, see Srinivasan, *supra* note 2; Amia Srinivasan, *Genealogy, Epistemology and Worldmaking*, 119 PROC. ARISTOTELIAN SOC’Y 127 (2019).

8. See 590 U.S. 83 (2020).

9. *Id.* at 87 (quoting Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 375 (H. Hearsay ed. 1898)) (internal quotation marks omitted); see Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1597, 1615 (2018) (discussing the racist history of the 1898 Louisiana constitutional convention); THOMAS AIELLO, JIM CROW’S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 16–26 (2015) (same).

constitutional validity.<sup>10</sup> In their view, the manifest bigotry in Louisiana's 1898 constitutional convention undermined the validity of a provision ratified seven decades later. That reasoning is genealogical; it seeks to subvert a law in force today by unmasking its hideous ancestry.

*Ramos* is just one of many examples of the Supreme Court employing genealogical critiques. The Justices have used genealogy to argue that provisions of written law are rooted in white supremacy and religious bigotry,<sup>11</sup> that judicial precedents are the products of perverse ideologies,<sup>12</sup> that longstanding practices reflect racial and religious animus,<sup>13</sup> and that social practices are the products of slavery and the eugenics movement.<sup>14</sup> These critiques have implicated constitutional issues as diverse as due process, abortion, criminal procedure, firearm regulation, Indian law, race discrimination, religious liberty, sovereign

10. See *Ramos*, 590 U.S. at 99 n.44 (arguing that the provision's genealogy was relevant because it revealed "the very functions" the rule was "adopted to serve"); *id.* at 114–15 (Sotomayor, J., concurring in part) (arguing that the law's "legacy of racism" warranted the Court's attention because the state's legislature had "never truly grappled with" the law's "sordid history"); *id.* at 120–32 (Kavanaugh, J., concurring in part) (concluding that the racist history of Louisiana's law constituted the kind of "special justification" needed to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

11. See *id.* at 87–88 (majority opinion); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 498 (2020) (Alito, J., concurring) ("[T]he amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants."); see also *infra* Subsection II.A.1 (explaining that the Court has used genealogy to undermine provisions of written law).

12. See *Gamble v. United States*, 587 U.S. 678, 756 (2019) (Gorsuch, J., dissenting) (contending that the "first real roots" of the dual-sovereignty doctrine were in a case that "did violence to the Constitution in the name of protecting slavery and slaveowners"); *United States v. Vaello Madero*, 596 U.S. 159, 184–85 (2022) (Gorsuch, J., concurring) (commenting on the "shameful" flaws in the *Insular Cases*); *Haaland v. Brackeen*, 599 U.S. 255, 327–28 (2023) (Gorsuch, J., concurring) (attacking the plenary-power doctrine); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 39 n.3 (2019) (Thomas, J., concurring) (noting the possible influence of anti-Catholic hostility on the Court's decisionmaking); *Espinoza*, 591 U.S. at 494 (Thomas, J., concurring) (contending that the "Court's adoption of a separationist interpretation [of the Establishment Clause] . . . bordered on religious hostility"); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (admonishing the Court for an Establishment Clause jurisprudence that has "sometimes bordered on religious hostility"); see also *infra* Subsection II.A.2 (explaining that the Court has used genealogy to undermine judicial doctrine).

13. See *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999) (plurality opinion) (concluding that the history of anti-loitering laws calls their authoritativeness into question); *Espinoza*, 591 U.S. at 482 (observing that state no-aid provisions have a "checkered history" that undermines the respect owed to them); see also *infra* Subsection II.A.3 (explaining that the Court has used genealogy to undermine deference to historical government practices).

14. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 494 (2019) (Thomas, J., concurring) (contending that certain restrictions on abortion "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics"); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968) ("Just as the Black Codes, enacted after the Civil War to restrict the free exercise of . . . rights, were substitutes for the slave [sic] system, so the exclusion of Negroes from white communities became a substitute for the Black Codes."); see also *infra* Subsection II.A.4 (explaining that the Court has used genealogy to undermine deference to certain forms of private conduct).

immunity, and the application of constitutional rights in the U.S. territories.<sup>15</sup> Genealogy has thus been a fixture in the Court’s recent constitutional jurisprudence.

What should we make of genealogy in constitutional law?<sup>16</sup> It responds to a natural urge to understand the etiology of things we care about—to understand, as it were, how the leopard got his spots.<sup>17</sup> But is information about the law’s ancestry relevant to its constitutionality? Or is our interest in the law’s genealogy nothing more than a “fetish for origins”?<sup>18</sup> This Article maintains that genealogy is a legitimate form of constitutional argument when it is used to advance conclusions within several widely accepted “modalities” of constitutional interpretation.<sup>19</sup> Genealogy can do this in two ways.

First, genealogy can undermine assertions of authority, which are pervasive in constitutional adjudication. Consider arguments from precedent. Genealogy can undermine such arguments by showing that a doctrinal rule emerged from reprehensible attitudes or impulses, rather than sound reasoning about the Constitution. The plenary-power

15. See *supra* notes 10–14 and accompanying text.

16. Due to space constraints, this Article focuses on genealogy’s relevance to constitutional law rather than public law more generally. Some of the Article’s conclusions, however, may be extended mutatis mutandis to other areas of public law.

17. See, e.g., RUDYARD KIPLING, *HOW THE LEOPARD GOT HIS SPOTS* (1942).

18. Srinivasan, *Genealogy, Epistemology and Worldmaking*, *supra* note 7, at 129. This question is just one part of a larger scholarly debate about the proper role of history in constitutional law. For representative contributions to that debate, see JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* (2024); JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* (2024); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–17 (1980); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997); and Cass R. Sunstein, *The Idea of a Usable Past*, 95 COLUM. L. REV. 601 (1995).

19. The “modalities” are recurrent categories of argument that are widely accepted as legitimate within constitutional law. See David E. Pozen & Adam M. Samaha, *Anti-modalities*, 119 MICH. L. REV. 729, 734–35 (2021). The term derives from the work of Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 6 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 9 (1991); see also Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 178 (2018) (“Since Bobbitt coined the term . . . ‘modalities’ has caught on as the standard way to describe the basic forms of argument in constitutional law.”). In addition to Bobbitt, numerous commentators have offered various catalogs of the modalities. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1750–86 (2015); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990); Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1421–22 (2013); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 652 (2013).

doctrine in foreign affairs, for example, originated in *Chae Chan Ping v. United States*,<sup>20</sup> which invoked ugly racial stereotypes in upholding a statute that barred the return of Chinese laborers to the United States. The doctrine was thus originally based on “Anglo-Saxon racial superiority,”<sup>21</sup> rather than good-faith constitutional interpretation.<sup>22</sup> Accordingly, the plenary-power doctrine’s genealogy gives courts today a reason not to afford the doctrine the level of deference ordinarily given to precedent.<sup>23</sup> Similarly, genealogy can advance conclusions within other modalities that rely on assertions of authority, such as arguments from tradition and national ethos.

Second, genealogical investigation can provide evidence of the function that the law performs. It may, for instance, reveal the racist function of an earlier law and, in doing so, suggest that the law’s progeny serves the same ends today.<sup>24</sup> In *Ramos*, Justice Kavanaugh

20. *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

21. Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 461–62 (2020); see Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 560–62 (2008) (noting that the Chinese Exclusion Act “markedly shape[d] immigrant communities in the United States”); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12–52 (1998); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1602–05 (2011).

22. Several amici in *Trump v. Hawai’i* urged the Court to abandon the branch of the plenary-power doctrine pertaining to foreign affairs because of its ancestry in the *Chinese Exclusion Case*. See Brief of Karen Korematsu et al. as Amici Curiae Supporting Respondents at 8, *Trump v. Hawai’i*, 585 U.S. 667 (2018) (No. 17-965) (arguing that the plenary-power doctrine is “infected with long-repudiated racial and nativist precepts”); Brief of Amici Curiae Constitutional Law Scholars in Support of Respondents at 18–19, *Trump v. Hawai’i*, 585 U.S. 667 (2018) (No. 17-965) (“[T]he plenary power doctrine has its origins . . . in the widespread racial and ethnic prejudices of the same era that gave rise to Jim Crow segregation and *Plessy v. Ferguson* . . .”). The Court, however, declined that invitation, instead citing numerous cases that rest on the *Chinese Exclusion Case*. See *Trump v. Hawai’i*, 585 U.S. 667, 696–709 (2018) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972); and *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952)).

23. Charles Barzun and Ahilan Arulanantham have also argued that a doctrinal rule’s troubling origin can undermine its authority. See Charles L. Barzun, *The Genetic Fallacy and a Living Constitution*, 34 CONST. COMMENT. 101, 106–28 (2019) (“[I]n many cases where courts do look to a proffered source’s pedigree as an explanation for its authoritativeness[,] it often does so for reasons of political morality.”); Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1639 (2013); Ahilan T. Arulanantham, *Reversing Racist Precedent*, 112 GEO. L.J. 439, 444 (2024).

24. In an important article, Kerrel Murray analyzes the law’s treatment of discriminatory policy “lineages.” Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1192 (2022). He argues that contemporary policies are “tainted” when they “carry forward” the “functional operation” of an earlier, discriminatory policy. *Id.* at 1220–24. The scope and focus of this Article are different from Murray’s in several important respects. This Article shows that the phenomenon Murray identifies should affect not only our thinking about policy successors but also our thinking about precedents, traditions, social practices, and interpretive practices. Moreover, while Murray focuses on the *substance* of a constitutional decision rule for antidiscrimination cases, this Article raises questions about which *institutions* are best equipped to make assessments about the law’s

argued that the “whole point” of adopting Louisiana’s original nonunanimous-verdict rule was to “make a difference in practice” in cases “involving black defendants, victims, [and] jurors.”<sup>25</sup> It should therefore be “no surprise,” he explained, that the rule continues to perform the same function today—to “silence the voices and negate the votes of black jurors.”<sup>26</sup> As explained below, by revealing a law’s function, genealogy can be relevant to several modalities of constitutional argument, including arguments from text, consequences, and history.<sup>27</sup>

The Article thus concludes that historical facts about the origin of a law, rule, or practice can be relevant to constitutional analysis. But who should determine those facts and according to what rules and procedures? The current practice is for appellate courts—often the U.S. Supreme Court—to determine the historical facts central to genealogical arguments with little assistance from trial courts. This Article maintains, however, that this allocation of institutional responsibility is far from ideal.<sup>28</sup> That is because many historical questions central to genealogical investigation would benefit from evidentiary practices that are commonly associated with trial courts—the admission of evidence at trial, adversarial testing, and expert testimony. The facts central to most genealogical arguments should therefore be determined by trial courts rather than appellate courts.<sup>29</sup>

The role of genealogy in constitutional law is a particularly important and timely topic for scholarly inquiry. For one thing, the

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genealogy. See *infra* Part IV (arguing that appellate factfinding related to genealogical arguments is problematic because of structural limitations of the appellate courts).

25. *Ramos v. Louisiana*, 590 U.S. 83, 127 (2020) (Kavanaugh, J., concurring in part).

26. *Id.*

27. See *infra* Section III.B.

28. This Article thus contributes to the academic literature on courts’ capacities to answer certain kinds of questions. For representative examples of that literature, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); ANDREW COAN, *RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING* (2019); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996); Andrew Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); and Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

29. As explained below, the one caveat to this proposal is the determination of facts underlying genealogical critiques of judicial precedent. It makes sense that appellate courts are primarily responsible for the re-evaluation of precedent because doing so is well within the limits of their institutional competence. Appellate courts are well equipped to evaluate the content of earlier judicial opinions, and it would be highly disruptive to our legal system’s commitment to vertical precedent to allow trial courts to engage in such an inquiry. See *infra* note 293.

current Court seems divided on the topic. While several Justices wrote opinions in *Ramos* explaining why a law's ancestry can be critical to its constitutional status, a three-Justice dissent written by Justice Alito argued that the ancestry of Louisiana's nonunanimous-verdict rule was simply irrelevant.<sup>30</sup> Interestingly, Justice Gorsuch's majority opinion invoking genealogy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh, while Justice Alito's objection to the use of genealogical argument was joined by Chief Justice Roberts and Justice Kagan. These votes suggest that the Justices' views about the role of this form of argument may not track traditional ideological lines.

For another thing, genealogical investigation often brings to light "much that is false, crude, inhuman, absurd, [or] violent."<sup>31</sup> Indeed, almost every facet of our legal system can be traced in some way or another to conquest, slavery, racial animus, religious bigotry, or something else that we now wish to repudiate.<sup>32</sup> Foundational rules of property law grew out of the enslavement of African peoples and the conquest of Native Americans.<sup>33</sup> Private contracts, commercial practices, and zoning laws have been used to maintain racially

30. *Ramos*, 590 U.S. at 141 (Alito, J., dissenting) (arguing that the *Ramos* majority had resorted to "ad hominem rhetoric" that "attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents").

31. FRIEDRICH NIETZSCHE, *On the Uses and Disadvantages of History for Life*, in FRIEDRICH NIETZSCHE, *UNTIMELY MEDITATIONS* 57, 95 (Daniel Breazeale ed., R.J. Hollingdale trans., Cambridge 1997) (1876); see Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 575 (2000) (noting that Nietzsche thought the study of history was "disillusioning").

32. See Darrell A.H. Miller, *Tainted Precedent*, 74 ARK. L. REV. 291, 295 (2021) ("[T]he history of all law in America is tainted with white supremacy."); Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 543 (2022) ("[M]any areas of the law have historically been used to perpetuate racial discrimination . . ."); see also Chris Ford, Stephenie Johnson & Lisette Partelow, *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017, 11:59 PM), <http://tinyurl.com/2324n7ze> [<https://perma.cc/783J-BBVK>] ("No matter how well intentioned, widespread voucher programs risk exacerbating segregation in schools . . ."); John Rosales & Tim Walker, *The Racist Beginnings of Standardized Testing*, NAT'L EDUC. ASSOC. (Mar. 20, 2021), <http://tinyurl.com/4j9x5kcc> [<https://perma.cc/3L46-DBKV>]; Wilfred U. Codrington III, *The Electoral College's Racist Origins*, BRENNAN CTR. FOR JUST. (Apr. 1, 2020), <http://tinyurl.com/4dfky45f> [<https://perma.cc/EE42-XNKZ>]; Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, AM. CIV. LIBERTIES UNION (July 1, 2020), <http://tinyurl.com/m9axnhbv> [<https://perma.cc/3WHM-4LHP>]; Sabrina Strings & Lindo Bacon, *The Racist Roots of Fighting Obesity*, SCI. AM. (June 4, 2020), <http://tinyurl.com/3xdknnv8> [<https://perma.cc/AUB5-CGEL>]; Julian Go, *The Racist Origins of U.S. Policing*, FOREIGN AFFS. (July 16, 2020), <http://tinyurl.com/bdzk2rm5> [<https://perma.cc/T4B8-TGP2>].

33. See generally K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022); K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977 (2020) (reviewing JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* (2019)); K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L.J. 1487 (2024).

segregated communities.<sup>34</sup> The hearsay rule originated as a means of insulating slaveholders from the threat of their slaves' petitions for freedom.<sup>35</sup> And so on. The ubiquity of hideous origins thus threatens to undermine a great many of our laws, rules, and practices. It is therefore crucial that courts and commentators determine the appropriate ambit, if any, for genealogical critique within constitutional discourse, lest it be thought to undermine the entire legal system.

The Article proceeds as follows. Part I provides a more precise definition of genealogy and distinguishes it from several other forms of historical argument in constitutional law. Part II canvasses numerous examples from the Court's recent jurisprudence and suggests possible reasons why the current Court has been attracted to an argument style often associated with critical theory. Part III argues that genealogy is relevant to constitutional law because it can be used to motivate conclusions within several widely accepted modalities of constitutional interpretation. Part IV then proposes a greater role for trial courts in evaluating genealogical arguments.

## I. PRELIMINARIES

This Part sets the stage for this Article's main arguments. Section I.A provides a more precise definition of genealogy. Section I.B then distinguishes genealogy from several other forms of historical argument commonly encountered in constitutional law.

### A. Defining Genealogy

The word "genealogy" can refer to many different types of argument and forms of rhetoric. Some scholarship, for example, uses the term to refer to any investigation tracing the evolution of a social phenomenon.<sup>36</sup> In this sense, we can sensibly speak about the "genealogy" of a particular person's family. In order to focus attention

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34. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at XII (2017) ("[R]acially explicit laws, regulations, and government practices combined to create a nationwide system of urban ghettos, surrounded by white suburbs."); see also Deborah N. Archer, "White Men's Roads Through Black Men's Homes": *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1260 (2020) ("[T]he highway system was a tool of a segregationist agenda, erecting a wall that separated White and Black communities and protected White people from Black migration.").

35. See David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering Queen v. Hepburn*, 2022 SUP. CT. REV. 413, 442 ("[E]nslaved plaintiffs almost never could introduce any evidence other than hearsay regarding the race or status of their ancestors.").

36. See, e.g., Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L L. 166, 175 (2013) ("International law is inherently genealogical, depending as it does upon the transmission of concepts, languages[,] and norms across time and space.").

on the particular form of argument that appears in recent Supreme Court decisions, this Article uses the terms “genealogy” and “genealogical argument” in a more technical sense. In this Article’s idiom, genealogical arguments have the following three components: (1) they *trace* the distant past to the present, (2) they make a *normative judgment* about the distant past that is grounded in constitutional values, and (3) they *impute* that normative judgment to the present.

First, genealogical arguments trace distinct phenomena from the distant past to current laws, rules, and practices.<sup>37</sup> The nature of the tracing relationship varies depending on a genealogy’s object. In *Ramos*, for example, the Justices traced the modern nonunanimous-verdict rule to a rule adopted in Louisiana’s 1898 constitutional convention because the two provisions have similar language and operate in the same jurisdiction.<sup>38</sup> A court could also trace a current law to an earlier one by finding that it performs the same basic function within a jurisdiction, even if it was codified using different text.<sup>39</sup> Or a court could trace a doctrinal rule through a chain of citations back to a single foundational decision. In all instances, genealogical arguments seek to causally connect a present phenomenon to distinct phenomena in the past.

Second, genealogical arguments make present-day normative judgments about the past.<sup>40</sup> The grounds for those judgments can vary from case to case. In *Ramos*, some Justices contended that the history of the nonunanimous-verdict rule was normatively problematic because it evinced anti-Black racism. But other genealogies might purport to trace their objects to religious bigotry, or slavery, or improper bias, or something else. In all cases, however, the relevant normative criteria should have some basis in the Constitution. The normative judgment that racism should be rejected, for example, is grounded in the Equal Protection Clause. Similarly, the Religion Clauses renounce religious bigotry, the Due Process Clauses renounce improper bias, the Thirteenth Amendment renounces slavery, and so forth. Genealogical argument should not permit a constitutional interpreter to undermine the past based on normative criteria that cannot plausibly be attributed to the Constitution. Without this limitation, judges could use genealogy

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37. In many cases, genealogies trace their objects to their alleged “origins,” but a genealogy can also trace a present phenomenon to any point in its lineage.

38. *Ramos v. Louisiana*, 590 U.S. 83, 87 (2020).

39. See Murray, *supra* note 24, at 1236 (offering an account of the link between a present policy and a past policy for purposes of establishing discriminatory taint).

40. Those judgments can be either positive or negative. Genealogies can thus be vindictory or critical; they can either buttress their objects or undermine them. This Article is primarily concerned with the critical variety because the recent emergence of genealogy in case law and legal scholarship has been almost exclusively critical.

to advance their own personal preferences because the relevant normative criteria would be completely unmoored from the Constitution.

Third, genealogical arguments impute their normative judgments about the past to the present. They conclude, in other words, that modern legal phenomena have the same normative valence as their historical predecessors. In *Ramos*, several Justices concluded that the modern nonunanimous-verdict rule promoted the same ends as the 1898 rule because the modern rule was modeled after the earlier one. Similarly, if a putative constitutional tradition can be traced to historical conduct that was motivated by white supremacy, a genealogical argument may contend that the tradition itself is white supremacist.

### *B. Distinguishing Genealogy*

Genealogy differs from other forms of historical argument commonly encountered in constitutional law. This Section mentions three: (1) the doctrinal test for determining a policy's intent or purpose, (2) various forms of constitutional originalism, and (3) legal scholarship that seeks to diminish the significance of specific constitutional provisions by showing that they were motivated by slavery.

#### 1. Intent or Purpose Test

Genealogy is different from the doctrinal test for determining a policy's intent or purpose. In equal protection and free exercise cases, the Court applies heightened scrutiny only where a government policy or action was made with discriminatory intent or purpose.<sup>41</sup> The Court's 1977 decision in *Arlington Heights* supplies the test for determining whether the government had such an intent or purpose.<sup>42</sup> As relevant here, *Arlington Heights* holds that a policy's "historical background" can serve as an "evidentiary source" for identifying the government's intent.<sup>43</sup> For example, suppose a court finds that a state legislature

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41. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."); *Pers. Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) ("[P]urposeful discrimination is the condition that offends the Constitution." (internal quotation marks omitted)); *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (holding that denying Jehovah's Witnesses entrance to a public park "open to all religious groups" based on a dislike of their views violated the First and Fourteenth Amendments).

42. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (following the *Arlington Heights* framework in a case involving the Free Exercise Clause).

43. *Arlington Heights*, 429 U.S. at 267.

gerrymandered the state's legislative map to dilute the power of minority voters. And suppose that shortly thereafter, the legislature replaces that map with a new one that has much the same shape.<sup>44</sup> Under the test articulated in *Arlington Heights*, the racially discriminatory intent of the earlier map provides some evidence that the legislature intended the later map to continue to dilute the power of minority voters.

Arguments of this form resemble genealogy because they trace the past to the present, make normative judgments about the past, and impute those judgments to the present. They differ from genealogy, however, with respect to the amount of time that separates the present from the past. In the typical case where a policy's historical background is viewed as an evidentiary source for determining whether it was enacted with discriminatory intent, little time has passed between the current policy and its predecessor. In *Abbott v. Perez*, for example, only two years had passed between the initial redistricting plan and the plan that replaced it.<sup>45</sup> But in cases where decades separate a policy from its predecessor, this sort of evidence will have little to no probative value in determining a later policy's intent or purpose.<sup>46</sup> Genealogy may nonetheless make the law's ancestry relevant for other reasons. Genealogical argument is thus different from the doctrinal test for identifying discriminatory intent.

## 2. Originalism

While it shares a certain facial resemblance, genealogy is also different from originalism. Originalism is a family of constitutional theories that treat the moment of a constitutional provision's ratification as essential for understanding its legal significance.<sup>47</sup>

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44. This example is loosely based on the facts of *Abbott v. Perez*, 585 U.S. 579, 604–05 (2018).

45. See *id.* at 590.

46. See Murray, *supra* note 24, at 1233 (explaining that if “taint matters merely as evidence of specific proscribed intent,” then “the mere passage of time w[ill] render it progressively irrelevant”). It bears mention, however, that an original policymaker's intent may sometimes be imputed to a subsequent policymaker. See Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1104–05 (2022) (advancing this kind of argument in a critique of federal statutes that criminalize unlawful entry and re-entry into the United States).

47. See Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 130 (2023) (“Originalism is not monolithic but is rather a family of theories and practices united by a focus on interpreting the Constitution by reference to the past.”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (noting that originalist theories generally treat “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present”); cf. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (“A review of originalists' work reveals originalism to be not a single, coherent, unified theory of

Today, there are many versions of originalism, which focus on different facts about the past, such as original public meaning,<sup>48</sup> original intent,<sup>49</sup> original methods,<sup>50</sup> or original law.<sup>51</sup> But all versions of originalism posit that constitutional provisions should be interpreted in accordance with something fixed at the time of their ratification.<sup>52</sup> Genealogy and originalism are thus both interested in “origins,” broadly understood. But they are different in several respects.

First, normative judgment plays a different role in the two forms of argument. Originalists are committed to a normative thesis that operates at wholesale: that constitutional interpretation should be constrained by facts fixed at the time of a provision’s ratification. But originalists generally seek to exclude normative judgment from an individual decisionmaker’s interpretive task.<sup>53</sup> Genealogy, by contrast, requires judges to make normative judgments in deciding cases at the retail level. It is thus in some tension with originalists’ goal of perfecting a method that is objective and empirical.<sup>54</sup>

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constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.”).

48. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1247 (2019); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1957 (2021); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4 (2015).

49. See Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011) (“[T]he proper way to interpret the Constitution . . . is to seek its authors’ intended meanings . . .”).

50. See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1326 (2018); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009).

51. See William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 875 (2015).

52. See Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 8 (2011) (“Proponents of originalism agree that historical facts at the time of a constitutional provision’s adoption normally determine its meaning.”); Mark A. Graber, *Original Expectations*, 52 CONN. L. REV. 1573, 1579 (2021) (“Both original public meaning and original intentions/expectations purport to be facts about constitutional politics at the time the constitution was ratified.”).

53. See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269–70 (2017); Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 439 (2023); see also Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO L.J. 699, 702 (“[M]any originalists argue that a central benefit of grounding constitutional law in . . . historical fact is providing a degree of objectivity perceived as lacking in other constitutional theories.”).

54. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 641 (1994) (“By grounding rules in the original understanding of the Constitution, judges can claim that their attempts to craft rules out of these

Second, originalism and genealogy have different orientations toward the past. While originalism treats the past as something to be followed, genealogical arguments tend to regard the past as a bad place to which we should not return.

Third, theories of originalism do not attempt to trace *distinct* legal phenomena from the past to legal phenomena in the present. Indeed, the originalist inquires into a particular constitutional provision's original intent (or meaning, or law, etc.) because that provision and the provision that operates today are one and the same. Genealogy, by contrast, seeks to trace distinct legal phenomena from the past (e.g., the Louisiana Constitution of 1898) to legal phenomena in the present (e.g., the current Louisiana Constitution).

### 3. Scholarship on Slavery Provisions

Genealogical arguments are also different from legal scholarship that seeks to diminish the significance of specific constitutional provisions by showing that they were motivated by slavery. Professors Erik Jensen and Bruce Ackerman, for example, have each argued that the Direct Tax Clause was intended to entrench the institution of chattel slavery.<sup>55</sup> Similarly, Professors Carol Anderson and Carl Bogus have separately argued that the Second Amendment was the product of a constitutional bargain to protect slavery from various threats.<sup>56</sup> This scholarship does not seek to causally link provisions of the Constitution to distinct phenomena in the past; rather, it seeks to uncover the original purposes or intent of the provisions themselves. It thus lacks the tracing relationship that partly defines genealogy.

## II. GENEALOGY IN CONSTITUTIONAL LAW

This Part describes genealogy's recent prominence in constitutional law. Section II.A canvasses numerous examples from recent Supreme Court decisions. Section II.B then speculates about

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amorphous areas of the law are not judicial legislation, but rather legitimate products of constrained interpretation.”); cf. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (observing that originalists strive to achieve these objectives but arguing that the “new originalism” sacrifices them).

55. See Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does it Matter Today?*, 108 NW. U.L. REV. 799, 809 n.61 (2014); Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2385 (1997); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4 (1999).

56. See CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 25–38 (2021); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

possible reasons why the current Court has been attracted to this mode of argument.

### *A. Recent Examples*

This Section explores recent decisions where the Supreme Court has used genealogy to undermine features of our legal system, including written law, doctrinal rules, longstanding government practices, and social practices.<sup>57</sup> Some of the examples, I should caution, are based on contentious historical claims. The point of this Section, however, is descriptive rather than normative. It aims to demonstrate the existence of genealogical arguments in the Court's cases, not to determine whether particular examples are sound.<sup>58</sup>

#### 1. Written Law

Some of the Court's recent cases have treated the mere fact that a provision of written law can be traced to an earlier one as reason to conclude that the later provision partakes in the normative status of the earlier one. The Introduction of this Article mentioned one example—*Ramos v. Louisiana*. As noted, three separate opinions in *Ramos* argued that the white supremacy evident in Louisiana's 1898 constitutional convention was relevant to the constitutionality of a state constitutional provision ratified more than seventy-five years later.<sup>59</sup>

A second example is Justice Alito's concurring opinion in *Espinoza v. Montana Department of Revenue*.<sup>60</sup> That case involved a free exercise challenge to a Montana constitutional provision barring state-funded scholarships for children attending "sectarian" schools.<sup>61</sup> Although Justice Alito had criticized the *Ramos* majority's use of

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57. This Section focuses on the Court's recent cases, though a few earlier opinions also have a genealogical flavor. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 6 (1967):

Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War.

Yet genealogical arguments seem to be on the rise. Indeed, with only a few exceptions, all the examples canvassed in this Section occurred during or after 2019. One could empirically test the hypothesis that the Court has used genealogical arguments more frequently in recent years using modern data-analytics techniques. While that sort of inquiry is beyond the scope of this Article, nothing in the main text turns on it. The mere fact that genealogy has been invoked as often as it has in recent cases demands its own explanation.

58. For a similar project on a related form of judicial argument, see Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. 577, 591 (2023).

59. See *supra* notes 8–11 and accompanying text.

60. 591 U.S. 464, 497 (2020) (Alito, J., concurring).

61. *Id.* at 470 (majority opinion) (quoting MONT. CONST., art. X, § 6(1)).

genealogical reasoning earlier in the same term,<sup>62</sup> his concurring opinion in *Espinoza* explicitly employed the same reasoning.<sup>63</sup> While the operative provision of Montana's constitution was ratified in the early 1970s,<sup>64</sup> Justice Alito provided a detailed account of its "origin" in the 1889 Montana Constitution.<sup>65</sup> That constitution, he argued, was the product of "virulent prejudice against immigrants, particularly Catholic immigrants."<sup>66</sup> And that history was relevant to the free exercise claim in *Espinoza* because the people of the state had not "'confront[ed]' the provision's 'tawdry past in reenacting it.'"<sup>67</sup> Montana's constitution was therefore tarnished by the bigotry of its nineteenth-century predecessor.<sup>68</sup>

## 2. Doctrinal Rules

The Justices have also aired the Court's own dirty laundry by exposing the stains of racism and xenophobia in its case law. In these cases, the Justices trace well-established doctrinal rules to their original sources. They then reveal normative flaws in those decisions as a way of discrediting the doctrinal rules.

Consider, for example, the Court's recent decision in *Haaland v. Brackeen*, which rejected various challenges to the Indian Child Welfare Act.<sup>69</sup> In a concurring opinion in *Brackeen*, Justice Gorsuch traced the origin of the "plenary-power doctrine,"<sup>70</sup> which posits that the Constitution imposes few constraints on the exercise of Congress's power with respect to the Native American tribes and that exercises of

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62. See *Ramos v. Louisiana*, 590 U.S. 83, 141 (2020) (Alito, J., dissenting) (arguing that the *Ramos* majority had resorted to "*ad hominem* rhetoric" that "attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents").

63. See *Espinoza*, 591 U.S. at 497 (Alito, J., concurring) ("*Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.").

64. See *id.* (citing MONT. CONST., art. X, § 6(1) (1972)).

65. *Id.* at 497–505.

66. *Id.* at 498.

67. *Id.* at 507 (Sotomayor, J., concurring in part) (quoting *Ramos*, 590 U.S. at 115 (alteration in original)).

68. In *Dobbs v. Jackson Women's Health Organization*, Justice Alito denied that anti-Catholic bigotry during the same period was responsible for nineteenth-century criminal statutes banning abortions. 697 U.S. 215, 253–54 (2022). That conclusion is not necessarily incompatible with his opinion in *Espinoza*, but it raises the possibility that the evaluation of genealogical arguments will often be biased and may therefore benefit from the more rigorous factfinding procedures associated with trial courts. See *infra* Part IV.

69. 599 U.S. 255, 272–78 (2023).

70. *Id.* at 325–26 (Gorsuch, J., concurring). Early cases describing federal power over the tribes as "plenary" include *Winton v. Amos*, 255 U.S. 373, 391 (1921), and *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

such power are significantly insulated from judicial review.<sup>71</sup> He argued that the doctrine can be traced to the Court's 1886 decision in *United States v. Kagama*, which stated that the federal government has total power over "th[e] remnants of a race once powerful, now weak."<sup>72</sup> Justice Gorsuch thus argued that the plenary-power doctrine was distorted from the beginning by "the prejudices of the [late nineteenth century]"<sup>73</sup> and is therefore not authoritative.

Justice Gorsuch seems particularly enamored with this rhetorical device, as he has used genealogy to undermine well-established doctrine not just in *Brackeen* but in numerous recent cases.<sup>74</sup> But genealogies of judicial precedent are not confined to Justice Gorsuch's opinions. In several cases, Justice Thomas has suggested that some of the Court's Establishment Clause jurisprudence can be traced to decisions motivated by "anti-Catholic hostility."<sup>75</sup> Similarly, Justice Souter's dissent in *Seminole Tribe v. Florida* argued that a core aspect of the Court's Eleventh Amendment jurisprudence originated in *Hans v. Louisiana*, which was motivated by the Court's desire to avoid embarrassment rather than the Court's desire to get the law correct.<sup>76</sup> In each case, a Justice has traced a judicial doctrine to decisions that are shameful, insidious, or unreliable and, for that reason, has argued that the doctrine does not deserve the respect ordinarily given to precedent.

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71. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 8 (2002).

72. *Brackeen*, 599 U.S. at 326–27 (Gorsuch, J., concurring) (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886) (alteration in original)).

73. *Id.* at 327.

74. See *Gamble v. United States*, 587 U.S. 678, 756 (2019) (Gorsuch, J., dissenting) (tracing the "dual sovereignty" doctrine to its "first real roots" in *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1852), which observed that the doctrine was essential for states "to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals"); *United States v. Vaello Madero*, 594 U.S. 159, 183–85 (2022) (Gorsuch, J., concurring) (tracing the Court's treatment of U.S. territories to the *Insular Cases*).

75. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 77 n.3 (2019) (Thomas, J., concurring); see *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 494 (2020) (Thomas, J., concurring) (stating that the Court's separationist interpretation of the Establishment Clause has "sometimes bordered on religious hostility"); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (criticizing historical hostility toward sectarian schools and the Catholic Church); see also John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 280 (2001) (observing that "[t]he constitutional disfavor of 'pervasively sectarian' institutions is indeed a doctrine born, if not of bigotry, at least of a highly partisan understanding of laws 'respecting an establishment of religion'" (footnotes omitted)).

76. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 121 (1996) (Souter, J., dissenting) ("Given the likelihood that a judgment against the State could not be enforced, it is not wholly surprising that the *Hans* Court found a way to avoid the certainty of the State's contempt." (discussing *Hans v. Louisiana*, 134 U.S. 1 (1890))). This example is discussed extensively in Barzun, *Impeaching Precedent*, *supra* note 23, at 1629–30, 1638–39, 1650–51.

### 3. Longstanding Government Practices

The Justices have also used genealogy to debunk the authority of longstanding government practices. Consider *City of Chicago v. Morales*.<sup>77</sup> In that case, the City of Chicago argued that an ordinance prohibiting public loitering was constitutional in part because it accorded with a longstanding Anglo-American tradition of anti-loitering laws, dating as far back as the sixteenth century.<sup>78</sup> Justice Stevens, however, concluded that the putative tradition had a troubling “pedigree” and was therefore undeserving of respect.<sup>79</sup> In particular, he noted that the tradition began with the sixteenth-century “Slavery acts,” that “many American vagrancy laws were patterned” on those laws, that vagrancy laws reappeared “after the Civil War to keep former slaves in a state of quasi slavery,” and that those “Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children.”<sup>80</sup> Having thus exposed the tradition’s reprehensible origins, Justice Stevens concluded that deference to it was unwarranted.

The majority opinion in *Espinoza* proceeds similarly. As noted, that case involved a free exercise challenge to a Montana constitutional provision barring state-funded scholarships for children attending “sectarian” schools.<sup>81</sup> Montana defended its constitution by referencing “a tradition against state support for religious schools,” which emerged when more than thirty states adopted provisions similar to Montana’s in the late nineteenth century.<sup>82</sup> The Court concluded, however, that this putative tradition had a “checkered” history.<sup>83</sup> The various nineteenth-century laws to which Montana adverted were based on a

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77. 527 U.S. 41 (1999) (plurality opinion).

78. *Id.* at 53 n.20 (plurality opinion). Justice Thomas endorsed that argument, concluding that Chicago’s ordinance was supported by “our Nation’s history, legal traditions, and practices.” *Id.* at 102 (Thomas, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

79. *Id.* at 53 n.20 (plurality opinion).

80. *Id.* For scholarship recounting this history, see Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 788 (1999) (explaining the racist history of anti-vagrancy and anti-loitering statutes); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-gang Civil Injunctions*, 107 YALE L.J. 2249, 2257–63 (1998) (“The history of vagrancy laws reveals most vividly the dangerous implications for racial minorities . . .”).

81. See *supra* note 61 and accompanying text.

82. *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 482 (2020).

83. *Id.* In addition to the argument summarized in the main text, the Court also questioned the existence of the tradition on account of its age. See *id.* (“The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. Such a development, of course, cannot by itself establish an early American tradition.” (citation omitted)).

proposed federal constitutional amendment—the “Blaine Amendment”—that would have prohibited states from aiding “sectarian” schools.<sup>84</sup> The Blaine Amendment, the Court explained, was “born of bigotry” and “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.”<sup>85</sup> And many of the state laws patterned on the Amendment had a similarly “shameful pedigree.”<sup>86</sup> For those reasons, the Court concluded, the “no-aid provisions of the nineteenth century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.”<sup>87</sup> Here again, a troubling genealogy stripped a putative tradition of its justificatory force.

#### 4. Private Conduct

The Justices have genealogized not only sources of law but also private conduct to which the law is applied. Genealogical arguments of this form connect the conduct that people engage in today with the conduct of generations past and argue that the modern conduct is causally related to, and partakes in the same ugliness as, the past.

Consider, for example, Justice Thomas’s opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*<sup>88</sup> *Box* is a pre-*Dobbs*<sup>89</sup> case in which the Court was asked to determine whether an Indiana law barring certain trait-selective abortions was unconstitutional.<sup>90</sup> Although he voted to deny certiorari on that issue,<sup>91</sup> Justice Thomas wrote separately to explain that the Indiana law “promote[d] a State’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”<sup>92</sup> To support that claim, he traced the origins of trait-selective abortions to the eugenics

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84. See H.R.J. Res. 1, 44th Cong., 4 CONG. REC. 205 (1875):

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor[e], nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

quoted in *Hile v. Michigan*, 86 F.4th 269, 272 (6th Cir. 2023).

85. *Espinoza*, 591 U.S. at 482 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion)).

86. *Id.* (internal quotation marks omitted).

87. *Id.*

88. 587 U.S. 490 (2019).

89. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

90. See *Box*, 587 U.S. at 490–91.

91. *Id.* at 512 (Thomas, J., concurring).

92. *Id.* at 494.

movement.<sup>93</sup> He noted that several of Planned Parenthood's leaders supported birth control and abortion for "eugenic reasons."<sup>94</sup> He then linked that history to the present, arguing that abortion is a "disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics" when it is paired with modern medical technologies.<sup>95</sup> For Justice Thomas, recognizing a constitutional right to a trait-selective abortion would "constitutionalize the views of the [twentieth]-century eugenics movement."<sup>96</sup> He thus sought to impugn the conduct of today's abortion seekers and providers by connecting that conduct to an unseemly past.<sup>97</sup>

### B. Why Now?

Genealogy is an ancient form of argument,<sup>98</sup> but it seems that it has only recently become a fixture in the Court's jurisprudence. In some sense, the timing is rather peculiar. As the Introduction noted,

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93. See *id.* at 501 ("From the beginning, birth control and abortion were promoted as means of effectuating eugenics."). Mary Ziegler has argued that Justice Thomas's opinion greatly "oversimplif[ies] a complex history to the point of incoherence." Mary Ziegler, *Bad Effects: The Misuses of History in Box v. Planned Parenthood*, 105 CORNELL L. REV. ONLINE 165, 200 (2020), <https://www.cornelllawreview.org/wp-content/uploads/2020/07/Ziegler-online-essay-final-version-6-15-20.pdf> [https://perma.cc/WQ4N-V8HZ]. In particular, she notes that his opinion omits reference to a wealth of scholarship on the history of abortion in the United States. *Id.* at 200–02. For examples of that scholarship, see JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978); MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA (1992); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (1997); and Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 WM. & MARY J. WOMEN & L. 107 (2007).

94. *Box*, 587 U.S. at 501–02; *id.* at 495 (noting that Planned Parenthood Founder Margaret Sanger had argued that birth control was "accepted by the most clear thinking and far seeing of the Eugenists themselves as the most constructive and necessary of the means to racial health" (quoting MARGARET SANGER, PIVOT OF CIVILIZATION 189 (1922))).

95. *Id.* at 507–08.

96. *Id.* at 511.

97. In a much earlier decision, the Supreme Court genealogized the conduct of other private citizens who discriminated on the basis of race in the sale of real estate. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968):

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of . . . rights, were substitutes for the salve [sic] system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

For more on the use of genealogy in that case, see *infra* notes 203–204 and accompanying text.

98. See Srinivasan, *Genealogy, Epistemology and Worldmaking*, *supra* note 7, at 128 (detecting genealogical argument in the thought of the pre-Socratic philosopher, Xenophanes); see also Xenophanes, *Fragments*, in THE FIRST PHILOSOPHERS OF GREECE 66–77 (Arthur Fairbanks, ed. and trans., 1898) (suggesting that the origin of ancient Greek religious beliefs lies in human narcissism, rather than reason or divine revelation).

genealogy is often associated with critical theory.<sup>99</sup> And when it has appeared in legal scholarship, it has typically been a tool for progressive scholars seeking to redress persistent forms of injustice.<sup>100</sup> The current Court, by contrast, is the most conservative Court in decades.<sup>101</sup> And political conservatives these days are loathe to be seen within a country mile of anything remotely connected to critical theory.<sup>102</sup> What, then, explains the current Court's infatuation with genealogy?

While the question permits only a speculative answer, one plausible hypothesis is that the Court's recent use of genealogy is a product of the ends that genealogy can achieve. While genealogical arguments have historically been used to support left-leaning political positions, the form of argument is indifferent to ideology. At its core, genealogy is a type of undoing project<sup>103</sup>—one that seeks to subvert beliefs, concepts, practices, or rules, whether they are favored by the left or the right. Genealogy is thus a particularly convenient tool for a Court—like the current Court—reigning over a period of constitutional transformation. If a Justice wants to undermine some aspect of current law or legal practice, what better way than to show that it is the product of some national disgrace, such as slavery? This is why, for example, Professor Melissa Murray surmises that Justice Thomas's opinion connecting laws protecting abortion to the eugenics movement was intended to lay the groundwork for the kind of “special justification”

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99. See *supra* notes 1–7 and accompanying text.

100. See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 8 (2019) (arguing that genealogizing the modern criminal punishment system may unsettle contemporary police practices and help “transform our society from a slavery-based one to a free one”); Murray, *supra* note 24, at 1212, 1216 (arguing that allowing courts to review contemporary laws for “discriminatory taint” can prevent past unconstitutional conduct from “extend[ing] into the present” and thus better “effectuat[e] constitutional mandates”); Arulanantham, *supra* note 23, at 444 (suggesting that reconsidering precedents motivated by animus would give “advocates and judges a new tool to help eradicate racism in our precedent and more aggressively challenge its ongoing effects”).

101. See LEE EPSTEIN, ANDREW D. MARTIN & KEVIN QUINN, PROVISIONAL DATA REPORT ON THE 2022 TERM (2023), <https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/64a03b22e94ea863778347be/1688222498509/2022TermDataReport.pdf> [<https://perma.cc/SZG4-QYJU>].

102. See, e.g., Bryan Anderson, *Critical Race Theory Is a Flashpoint for Conservatives, but What Does It Mean?*, PBS (Nov. 4, 2021, 9:18 AM), <https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory> [<https://perma.cc/75NQ-D4C3>]; Anthony Izaguirre, *DeSantis Pushes Ban on Diversity Programs in State Colleges*, ASSOCIATED PRESS NEWS (Feb. 1, 2023, 9:55 AM), <https://apnews.com/article/ron-desantis-florida-state-government-race-and-ethnicity-b1d847ddc5e1f136b17f254f71fd15dc> [<https://perma.cc/3F92-89YU>].

103. See MICHAEL LEWIS, THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2016).

needed to overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>104</sup>

Moreover, genealogy can be understood as a strategy for mollifying critics of the current majority's historicist methodology. The recent rise of several forms of historicism in the Court's jurisprudence—from originalism, to traditionalism, to genealogy—has coincided with some of the most racially regressive decisions the Court has reached in decades.<sup>105</sup> That is at least a public relations problem for the Court's conservatives and their defenders. But genealogy shows that historicist methods can also be used to leech entrenched forms of injustice from the law. Hence Justice Gorsuch's repeated insistence that *stare decisis* should not impede taking a fresh look at case law with unseemly beginnings.<sup>106</sup> Relatedly, genealogical arguments can be used to wrong-foot the Court's detractors by showing that some of the left's own favored positions have ugly racial origins. Hence the attempts to link firearm regulations with the Black Codes and the Ku Klux Klan in *Bruen* and *McDonald*,<sup>107</sup> or Justice Thomas's genealogy of modern abortion practices in *Box*,<sup>108</sup> or the opinions in *Espinoza* associating state constitutional bans on aid to religious institutions with anti-Catholic bigotry.<sup>109</sup>

The point, to be clear, is not to endorse or reject any of these arguments or to suggest that they are equally valid. The point is that genealogy can be used to support outcomes that appeal to a wide range of normative visions. Indeed, in recent years genealogy has been used on both sides of numerous constitutional debates. It has been used to

104. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2030 (2021).

105. See, e.g., *Trump v. Hawai'i*, 585 U.S. 667, 707–11 (2018) (upholding travel ban targeting Middle Eastern countries); *Shelby County v. Holder*, 570 U.S. 529, 534–35 (2013) (invalidating § 5 of the Voting Rights Act of 1965 because the racial discrimination “that originally justified these measures no longer characterize voting”); *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230–31 (2023) (overturning precedent that allowed race-conscious admission programs). See generally AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 4 (2021) (explaining that the Court's rightward turn is partially responsible for the lack of constitutional remedies for individual-rights plaintiffs); Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 26 (2022) (arguing that “the Roberts Court's theory of racism is partial”).

106. See *supra* notes 69–73 and accompanying text.

107. See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 59–63 (2022) (associating restrictions on publicly carrying firearms with *Dred Scott v. Sandford*, the Black Codes, and the Ku Klux Klan); *McDonald v. City of Chicago*, 561 U.S. 742, 757 (2010) (associating deprivations of the right to bear arms with the Colfax Massacre); *id.* at 771 (noting Southern states' “systematic efforts” to disarm Black Americans after the Civil War). See generally Danny Y. Li, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1824 (2023) (offering a historical account of the “racialized development of the contemporary Second Amendment”).

108. See *supra* notes 14, 88–97 and accompanying text.

109. See *supra* notes 60–68, 81–87 and accompanying text.

argue, on one hand, that the origins of affirmative action were antisemitic<sup>110</sup> and, on the other, that the idea of “colorblindness”<sup>111</sup> at the heart of the Court’s skepticism of affirmative action has racist beginnings.<sup>112</sup> Genealogy has been used to argue that federal labor law has racist origins<sup>113</sup> and that exemptions and exclusions from federal labor law have such origins.<sup>114</sup> And it has been used to argue that laws permitting abortions have eugenicist origins,<sup>115</sup> that laws limiting

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110. In *Students for Fair Admissions*, the Petitioners highlighted the anti-Jewish history of Harvard’s holistic admissions process. See Brief for Petitioner at 12–13, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199) (noting that in the 1920s, Harvard adopted a “holistic admissions” system “designed to reduce the number of Jews” admitted and arguing that Harvard uses “the same kind of system” today (internal quotation marks omitted)); see also *id.* at 14 (“Harvard now admits that it used holistic admissions to discriminate against Jews. . . . Yet Harvard makes the same claims about its use of race today as it did over the past century.”).

111. See *Students for Fair Admissions*, 600 U.S. at 227 (tracing the notion of colorblindness to cherished decisions, such as *Loving v. Virginia*, 388 U.S. 1 (1967), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (describing a “moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality” (alteration in original) (internal quotation marks omitted)).

112. Some advocates of race consciousness, for example, have traced the notion of “colorblindness” to backlash against desegregation. See Dorothy E. Roberts, *Loving v. Virginia as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 204 (2014) (noting that “[a] backlash movement intent on crushing black empowerment and preserving white dominance latched onto the concept of colorblindness as an ideological tool of retrenchment”).

113. See David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 L. & CONTEMP. PROBS. 177, 191 (2009) (arguing that the “Davis-Bacon Act of 1931 was designed to exclude African Americans and other workers deemed ‘defective’ from the labor market for federal construction projects”); *id.* at 198 (arguing that New Dealers had a “blasé attitude” toward unemployment among African Americans caused by the Fair Labor Standards Act in part because of progressive ideology); see also Thomas C. Leonard, “More Merciful and Not Less Effective”: *Eugenics and American Economics in the Progressive Era*, 35 HIST. POL. ECON. 687, 700–01 (2003) (documenting hostility to poor workers belonging to classes deemed to cause low wages); Thomas C. Leonard, *Protecting Family and Race: The Progressive Case for Regulating Women’s Work*, 64 AM. J. ECON. & SOCIO. 757, 758 (2005) (documenting progressive opposition to women’s labor-force participation).

114. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011) (discussing the racist origins of the domestic-worker and farm-worker exclusions from the National Labor Relations Act); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335 (1987) (discussing the discriminatory origins of the farm-worker exclusion from the Fair Labor Standards Act); SARU JAYARAMAN, *FORKED: A NEW STANDARD FOR AMERICAN DINING* 33–35 (2016) (discussing the Fair Labor Standards Act’s special treatment of tipped employees).

115. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 494–506 (Thomas, J., concurring); Brief for African-American, Hispanic, Roman Catholic & Protestant Religious & Civil Rights Organizations & Leaders as Amici Curiae Supporting Petitioner at 14–21, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) (arguing that proponents of liberal access to abortion have been motivated by a desire to suppress the size of the U.S. Black population).

abortions have similar origins,<sup>116</sup> and that the notion of “substantive due process,” which once protected the right to an abortion,<sup>117</sup> originated in *Dred Scott*.<sup>118</sup>

Genealogy is therefore ideologically ecumenical. It will achieve different ends in the hands of judges with Justice Alito’s ideological preferences than it will in the hands of judges with Justice Sotomayor’s ideological preferences. Depending on one’s worldview, it may be used to cleanse the legal system of the persistent stains of oppression or to do just the opposite.<sup>119</sup>

### III. GENEALOGY’S RELEVANCE TO CONSTITUTIONAL ANALYSIS

The previous Part showed that genealogical argument has recently been a popular rhetorical device in Supreme Court opinions. This Part asks whether genealogy is *purely* a rhetorical device, akin to a well-timed joke or an apt metaphor, or whether it performs real analytic work in constitutional analysis.

Some twentieth-century analytic philosophy may suggest that genealogy is purely rhetorical. After exiling himself from Germany on account of his Jewish ancestry,<sup>120</sup> Professor Hans Reichenbach aimed to counter the Nazis’ obsession with genealogy by distinguishing between what he called a theory’s “context of discovery” and its “context

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116. See Brief for Am. Hist. Ass’n & Org. of Am. Historians as Amici Curiae Supporting Respondents at 21–22, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) (arguing that mid nineteenth-century bans on abortion were propagated for “ethnocentric” reasons).

117. See *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

118. See *Obergefell v. Hodges*, 576 U.S. 644, 695 (2015) (Roberts, C.J., dissenting) (“The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*.”); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011 (2003) (“The substantive due process reasoning of *Roe* most nearly resembles, of any historical precedent, the substantive due process reasoning of *Dred Scott v. Sandford*, *Roe*’s doctrinal great-grandfather.”); Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case*, 37 U. CHI. OCCASIONAL PAPER 1, 2 (1996) (“*Dred Scott* was the birthplace of the controversial idea of ‘substantive due process,’ used in *Roe v. Wade*.”).

119. Of course, this is true to some extent of all forms of constitutional argument. A judge who is sufficiently willing to rely on implausible premises can often reach the conclusions they want to reach, no matter what menu of rhetorical tools is available to them. Cf. Charles W. Tyler, *Common Law Statutes*, 99 NOTRE DAME L. REV. 669, 695 (2023) (“Nothing but force can constrain the willful judge, who seeks to impose her personal or ideological preferences notwithstanding the clear law against her.”).

120. According to the Nazis, Reichenbach counted as Jewish, though he was the child of “a half-Jewish but baptized father and a non-Jewish mother.” Clark Glymour & Frederick Eberhardt, *Hans Reichenbach*, STAN. ENCYC. OF PHIL. (Mar. 23, 2021), <https://plato.stanford.edu/entries/reichenbach/> [https://perma.cc/TBU8-2QR6].

of justification.”<sup>121</sup> The fact that a theory was first propounded by a person of “Jewish origin,” Reichenbach insisted, is simply irrelevant to whether it is valid.<sup>122</sup> Generalizing from Reichenbach’s concerns, a critic may believe that genealogy should have no place in constitutional law because the ancestry of a law, rule, or practice is simply irrelevant to its constitutional validity. What unites the examples canvassed in the previous Part, the critic might say, is merely a failure to avoid the “genetic fallacy” or, as Justice Alito put it in *Ramos*, a failure to avoid “*ad hominem* rhetoric.”<sup>123</sup>

This Part, however, maintains that genealogy is relevant to constitutional analysis because it can advance conclusions within several widely accepted modalities of constitutional interpretation. To use Jamal Greene’s terminology, genealogy is a “mode of persuasion” that a constitutional interpreter can use to convince an audience of a modality’s valence in a particular case.<sup>124</sup> Genealogy thus enters constitutional law by “hitching” itself to the modalities.<sup>125</sup>

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121. See HANS REICHENBACH, *EXPERIENCE AND PREDICTION: AN ANALYSIS OF THE FOUNDATIONS AND THE STRUCTURE OF KNOWLEDGE* 6–7 (Phoenix Books 1961) (1938) (defining “the difference between the thinker’s way of finding this theorem and his way of presenting it before a public” as the “context of discovery” and the “context of justification”); Srinivasan, *Genealogy, Epistemology, and Worldmaking*, *supra* note 7, at 130 (“Reichenbach appears to have been motivated to draw this distinction . . . to counter the Nazis’ condemnation of theories of ‘Jewish origin’ . . .”); Queloz, *supra* note 1, at 443 (observing that logical positivists felt a “need to counter the widespread and blatantly fallacious use of genetic reasoning to discredit ideas on the grounds of their alleged ‘Jewish origins’”).

122. In the decades after Reichenbach formulated this distinction, analytic philosophers generally thought that origins are irrelevant to whether a belief is likely to be true, a concept is likely to be apt, or an action is likely to be justified. See, e.g., Catarina Dutilh Novaes, *Conceptual Genealogy for Analytic Philosophy*, in BEYOND THE ANALYTIC-CONTINENTAL DIVIDE 75, 100–01 (Jeffrey A. Bell, Andrew Culroffello & Paul M. Livingston eds., 2016); Hans-Johann Glock, *Analytic Philosophy and History: A Mismatch?*, 117 MIND 867, 868 (2008); T.A. Goudge, *The Genetic Fallacy*, in 13 SYNTHESIS 41, 43 (1961); David Couzens Hoy, *Nietzsche, Hume, and the Genealogical Method*, in NIETZSCHE, GENEALOGY, MORALITY: ESSAYS ON NIETZSCHE’S ON THE GENEALOGY OF MORALS 249 (Richard Schacht ed., 1994); Philip P. Wiener, *Logical Significance of the History of Thought*, 7 J. HIST. IDEAS 366, 368 (1946). But, as Amia Srinivasan has argued, analytic philosophers’ attitudes about the value of genealogy appear to have shifted in recent years. See Srinivasan, *Genealogy, Epistemology, and Worldmaking*, *supra* note 7, at 129–130 (comparing the view of earlier generations of analytic philosophers to the views of analytic philosophers in the last thirty years).

123. *Ramos v. Louisiana*, 590 U.S. 83, 141 (2020) (Alito, J., dissenting). Logic texts often associate “*ad hominem*” rhetoric with the “genetic fallacy.” See, e.g., Margaret A. Crouch, *A “Limited” Defense of the Genetic Fallacy*, 24 METAPHIL. 227, 230 (1997); Kevin C. Klement, *When Is Genetic Reasoning Not Fallacious?*, 16 ARGUMENTATION 383, 384 (2002).

124. Greene, *supra* note 19, at 1395–96; see Balkin, *Uses of History*, *supra* note 19, at 652 (arguing that history is not a “distinct mode of argument” but rather a tool for making arguments related to each modality).

125. Pozen & Samaha, *supra* note 19, at 773 (defining “modalization” as the rhetorical strategy of “hitching an . . . argument to a modality”).

Genealogy does so when it is used in one of two ways. First, genealogy can undermine assertions of authority by showing that the source of an authoritative directive is untrustworthy. This alone provides a substantial foothold for genealogy in constitutional law because arguments from authority are pervasive in constitutional analysis. Arguments from precedent, for example, rely on assertions of authority, as do arguments from tradition and national ethos. Second, genealogy can be used to provide evidence of a law's function by revealing the function that its ancestors performed. Here again, genealogy can advance conclusions relevant to several modes of constitutional argument. For instance, the correct application of the constitutional text to a particular social practice will sometimes depend on the function of that social practice. And arguments from consequences and history are subject to a similar analysis.<sup>126</sup> Genealogy is thus not only ideologically ecumenical but methodologically ecumenical as well. Because it can support conclusions relevant to numerous modalities, genealogy will often be palatable to both constitutional pluralists and to those who adhere to more parsimonious theories of constitutional interpretation.<sup>127</sup>

### *A. Undermining Authority*

According to the standard account, authorities provide “content-independent” reasons for action to the persons to whom they are directed.<sup>128</sup> Put another way, authorities provide reasons that are

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126. Attentive readers may notice that the main text mentions all of Bobbitt's modalities except structural argument. That is intentional. My research has not turned up any examples of genealogical argument used to advance premises within a purely structural argument. There are, to be sure, some examples that involve what one might characterize as “structural” ideas. Justice Gorsuch, for example, has criticized the origin of the dual-sovereignty doctrine by connecting it to slavery. *See supra* note 74. Justice Gorsuch's critique, however, is better characterized as a critique of precedent because his primary aim is to cast doubt on the *case* that first recognized the dual-sovereignty idea in the Double Jeopardy context.

127. Pluralists believe that constitutional law consists of multiple, incommensurable forms of argument. *See, e.g.*, BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 19, at 155–62; Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994); Fallon, *supra* note 19; Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013); Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755, 1795 (2018). By contrast, parsimonious theories of constitutional interpretation, such as originalism, tend to view the modalities more hierarchically. For a discussion of the relationship between pluralism and originalism, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism*, *supra* note 48, at 1271–76.

128. H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 261–66 (1982); *see* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35–37 (1986); FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 62 (2009); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382, 400 (Jules Coleman & Scott Shapiro

unrelated to the nature of the actions suggested. Clients, for instance, often treat their attorneys as authorities on legal matters. If a lawyer advises her client to plead guilty to a criminal charge in exchange for a reduced sentence, the client may treat that advice as a reason to do as the lawyer suggests. In fact, many clients will follow their lawyer's advice even when they do not comprehend the underlying strategic and legal considerations for the advice. But why listen to advice when one does not understand its rationale? One obvious reason is the belief that the source of the advice is more likely to be sound than one's own judgment. This is the hallmark of an authority—that an authority's force derives from its *source*, rather than its *content*.

Arguments from authority are integral to several modalities of constitutional interpretation, including arguments from judicial precedent, tradition, and ethos. And this Section argues that genealogy is relevant to each of these modalities because it can be used to show that a putative authority is untrustworthy.<sup>129</sup>

## 1. Precedent

Precedential arguments posit that courts should decide cases in a manner consistent with the holdings of earlier cases.<sup>130</sup> These arguments thus treat earlier cases as authorities, requiring a later court to treat the fact that an earlier case held *X* as a reason to follow *X* in a similar case, whether or not the later courts agree with *X* on the merits.<sup>131</sup> Indeed, that is why the mere fact that an earlier case was wrongly decided cannot “by itself justify scrapping settled precedent.”<sup>132</sup> If it could, a later court would fail to treat the earlier case as an authority.

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eds., 2002); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935 (2008); Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 LEGAL THEORY 1, 26–27 (2000). *But see* P. Markwick, *Independent of Content*, 9 LEGAL THEORY 43, 43–44 (2003) (challenging the standard view).

129. The philosophical literature recognizes this as one potential use of genealogical critique. *See, e.g.*, GARY GUTTING, *FOUCAULT* 50 (2005) (noting that “[g]enealogical critique” is a promising argumentative strategy when it is “directed at efforts to support established authorities on the basis of their origin”); Matthieu Queloz, *How Genealogy Affects the Space of Reasons*, 197 SYNTHESE 2005, 2010 (2020) (explaining that genealogy can undermine “practices whose authority is itself a function of their formation” (emphasis omitted)).

130. For sources identifying precedential argument as a modality of constitutional interpretation, *see* BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 19, at 39; Fallon, *supra* note 19, at 1202; and McConnell, *supra* note 19, at 1763.

131. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989).

132. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (declining to overrule *Brulotte v. Thys Co.*, 379 U.S. 29 (1964)).

One reason for treating precedents as authorities is the belief that it would be an act of “intellectual hubris”<sup>133</sup> for a judge not to give precedent some measure of deference; after all, a judge will usually have no reason to believe she is more trustworthy than her predecessors. And genealogy can undermine the authority of precedent by showing that a doctrinal rule originated in a judicial decision that is untrustworthy.<sup>134</sup> Consider, for example, Justice Gorsuch’s concurring opinion in *United States v. Vaello Madero*.<sup>135</sup> In that case, the Court addressed whether the Fifth Amendment’s equal protection component requires Congress to provide certain public benefits to residents of Puerto Rico to the same extent as residents of the states.<sup>136</sup> According to the governing doctrinal framework, the Constitution fully applies in territories that Congress has “incorporated,” but only “fundamental” aspects of the Constitution apply in “unincorporated” territories, such as Puerto Rico.<sup>137</sup> The Court applied this framework in the course of holding that Congress may provide Supplemental Security Income to state residents without providing those benefits to residents of Puerto Rico.<sup>138</sup>

Justice Gorsuch’s opinion, however, noted that the governing doctrinal framework has an ugly pedigree originating in the *Insular Cases*. In one of those cases, *Downes v. Bidwell*, the Court concluded that the Constitution applies only in “contiguous territory inhabited . . . by people of the same race.”<sup>139</sup> And a concurring opinion observed that the United States had a right to acquire and exploit “an

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133. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 41 (2010); see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4 (2012) (noting that “epistemic humility” is one reason for adhering to the doctrine of stare decisis). There are, to be clear, other rationales for deferring to precedent. A judge, for example, could believe that treating precedents as authorities helps the legal system achieve rule-of-law values, such as consistency and stability. See Barzun, *Impeaching Precedent*, *supra* note 23, at 1669. Or judges may believe that following precedent is required by the phrase “judicial Power” in Article III, see JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 168 (2013), or that doing so is required by the original law of interpretation, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1120 (2017). The main text of this Article discusses the epistemic rationale for deferring to precedent because it is that rationale to which genealogy is most directly relevant.

134. See Barzun, *Genetic Fallacy*, *supra* note 23, at 106–07; Barzun, *Impeaching Precedent*, *supra* note 23, at 1639; see also Arulanantham, *supra* note 23, at 5 (arguing that judicial decisions that were motivated by racial animus should be stripped of their precedential force because they violate the Equal Protection Clause).

135. 596 U.S. 159, 180 (2022) (Gorsuch, J., concurring).

136. *Id.* at 596 (majority opinion).

137. See *Dorr v. United States*, 195 U.S. 138, 148–49 (1904); *Hawai’i v. Mankichi*, 190 U.S. 197, 215–18 (1903).

138. *Vaello Madero*, 596 U.S. at 166.

139. 182 U.S. 244, 282 (1901).

unknown island, peopled with an uncivilized race.”<sup>140</sup> Likewise, in *Dorr v. United States*, the Court remarked that recognizing a “fundamental” right to a jury trial would have the unintended consequence of guaranteeing that right to “savages.”<sup>141</sup> On account of these origins, Justice Gorsuch concluded that the *Insular Cases*’ doctrinal framework did not deserve the deference ordinarily afforded to precedent. That is because, in his words, those cases were based on “ugly racial stereotypes” and “the theories of social Darwinists,”<sup>142</sup> rather than a good-faith interpretation of the Constitution’s text, history, and structure. Justice Gorsuch therefore refused to follow the framework in deciding *Vaello Madero*.<sup>143</sup>

Many other cases involving the intersection of genealogy and judicial precedent are similar to *Vaello Madero*. They trace doctrinal rules to foundational decisions grounded in racial or religious prejudice.<sup>144</sup> In other cases, a Justice has attempted to undermine a doctrinal rule by showing that the precedent court was uninformed about the relevant facts or issues. According to Professor Melissa Murray, for example, Justice Thomas’s opinion in *Box* aims to show that the *Roe* Court “failed to fully appreciate the racial dynamics and underpinnings of abortion.”<sup>145</sup> In doing so, she argues, Justice Thomas sought to undermine *Roe*’s authority. After all, if one has reason to believe that an earlier court was unaware of some critical fact, then one has reason to doubt the trustworthiness of its judgment. What unites all these examples, however, is the genealogist’s goal of demonstrating that a doctrine’s foundation should not be trusted.<sup>146</sup>

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140. *Id.* at 306 (White, J., concurring).

141. 195 U.S. at 148.

142. *Vaello Madero*, 596 U.S. at 185 (Gorsuch, J., concurring).

143. For an argument that the *Insular Cases* should be overruled, see Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows To Be True: Why Stare Decisis Is Not an Obstacle to Overruling the Insular Cases*, 53 COLUM. HUM. RTS. L. REV. 721, 747–56 (2022); see also Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2460 (2022) (“Just as we cannot turn a blind eye to the racist premise driving *Plessy* . . . neither can we tolerate, let alone expiate, the racist premise of the *Insular Cases* . . .”).

144. See *Haaland v. Brackeen*, 599 U.S. 255, 327 (2023) (Gorsuch, J., concurring) (noting that *United States v. Kagama*, 118 U.S. 375 (1886), was based on the anti-Native “prejudices of the day”); *Gamble v. United States*, 587 U.S. 678, 756 (2019) (Gorsuch, J., dissenting) (refusing to follow the dual-sovereignty interpretation of the Double Jeopardy Clause because its original source, *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), “did violence to the Constitution in the name of protecting slavery and slaveowners”).

145. Murray, *supra* note 104, at 2030.

146. Justin Simard’s project identifying case law involving slaves bears some resemblance to the genealogical arguments discussed in the main text of this Article. See Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 79 (2020); *The Legal Profession Must Confront Its Role in Slavery*, CITING SLAVERY PROJECT, citing-slavery.org (last visited Oct. 17, 2024) [https://perma.cc/NDK3-JBQT]. While the mere fact that an earlier case involved slaves does not immediately demonstrate

Before proceeding, two caveats about the relationship between genealogy and precedential argument are in order. First, when genealogy is used to undermine the authority of precedent, it operates at the level of legal propositions, not at the level of cases. That is important because cases often stand for numerous propositions of law. The strict-scrutiny standard for race-based discrimination, for example, can be traced to the Court's decision in *Korematsu v. United States*,<sup>147</sup> which notoriously upheld the internment of Japanese Americans during the Second World War.<sup>148</sup> *Korematsu* is a loathsome decision premised on ugly stereotypes about Japanese Americans.<sup>149</sup> But that fact does not call into question the authority of the strict-scrutiny standard. That is because the racism manifest in *Korematsu* was not the basis for the Court's articulation of the strict-scrutiny test. Indeed, what is most troubling about the decision is the Court's failure to apply that standard faithfully.

Second, one must use caution in attributing a doctrinal rule to a single source, rather than multiple sources that may have different origins. A genealogical critique that subverts the constitutional reasoning of one case does not necessarily subvert every case that supports the same proposition. For example, the dual-sovereignty doctrine arguably rests not only on *Moore v. Illinois*, which Justice Gorsuch criticized in *Gamble v. United States*,<sup>150</sup> but also on subsequent cases that did not rely on *Moore*.<sup>151</sup> To the extent that those subsequent

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that the case was wrongly decided, it gives us reason to question whether we should treat the case as an authority. That is because it gives us reason not to trust the judgment of the precedent court. For similar reasons, *The Bluebook* now requires parenthetical indications for cases involving enslaved parties. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(d) (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). Scholars have debated the propriety of this change to the rules. Compare Will Baude & Stephen E. Sachs, *Citing Slavery in the Bluebook*, VOLOKH CONSPIRACY (Oct. 30, 2020), <https://reason.com/volokh/2020/10/30/citing-slavery-in-the-bluebook/> [<https://perma.cc/VF6K-FEJD>], and Josh Blackman, *Cancellation by Citation*, VOLOKH CONSPIRACY (Oct. 30, 2020), <https://reason.com/volokh/2020/10/30/cancellation-by-citation/> [<https://perma.cc/S65W-RNCA>], with Justin Simard, *Professor Simard Writes in on the Importance of Citing Slavery*, VOLOKH CONSPIRACY (Nov. 13, 2020), <https://reason.com/volokh/2020/11/13/professor-justin-simard-writes-in-on-the-importance-of-citing-slavery/> [<https://perma.cc/2BSL-EARF>], and David J.S. Ziff, *Citation, Slavery, and the Law as Choice: Thoughts on Bluebook Rule 10.7.1(d)*, 101 N.C. L. REV. F. 72 (2023).

147. 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”).

148. *Id.* at 222.

149. See Jerry Kang, *Denying Prejudice—Internment, Redress, Denial*, 51 UCLA L. REV. 933, 954 (2004); Robert Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1188 (2018).

150. See cases cited *supra* note 144.

151. Many cases supporting the dual-sovereignty doctrine rely on *United States v. Lanza*, 260 U.S. 377, 382–84 (1922), which relied on the authority of several cases preceding and succeeding *Moore*, including *Fox v. Ohio*, 46 U.S. 410, 435 (1847), and *Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439 (1915). For cases that rely on *Lanza*, rather than *Moore*, see

cases are not infected by the same pro-slavery bias as *Moore*, the dual-sovereignty doctrine will be less vulnerable to Justice Gorsuch's genealogical critique.

## 2. Tradition

"Traditions" in constitutional law are "longstanding or widespread practices."<sup>152</sup> Opening legislative sessions with prayer, for example, is arguably a U.S. tradition because state legislatures have long engaged in that practice.<sup>153</sup> Traditions play various roles in constitutional law.<sup>154</sup> As relevant here, traditions are sometimes treated as authoritative interpretations of constitutional provisions.<sup>155</sup> In *NLRB v. Noel Canning*, the Court held that the Recess Appointments Clause allows presidents to fill vacancies that precede Senate recesses in part because doing so was the political branches' longstanding practice.<sup>156</sup> Traditionalist arguments of this form treat longstanding practices as authorities.<sup>157</sup> In other words, they treat longstanding practices as reasons to decide cases in accordance with those practices, even if a judge believes that the practices do not reflect the best reading of the relevant constitutional provision.

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*Hebert v. Louisiana*, 272 U.S. 312, 314–16 (1926), *Screws v. United States*, 325 U.S. 91, 108 n.10 (1945), *Jerome v. United States*, 318 U.S. 101, 104–05 (1943), *Bartkus v. Illinois*, 359 U.S. 121, 132 n.19 (1959), and *Abbate v. United States*, 359 U.S. 187, 192–93 (1959).

152. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1482 (2023); see McConnell, *supra* note 19, at 1771–75; Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174; Barnett & Solum, *supra* note 53, at 442–44; Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023). In some legal scholarship, "tradition" refers only to the longstanding practices of past generations of Americans, whereas the term "historical practice" refers to the longstanding practices of American governments. See, e.g., Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 1. The main text of this Article combines the two concepts under the same heading because both make implicit assertions of authority, and genealogy can therefore be used to undermine both.

153. See *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014); *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

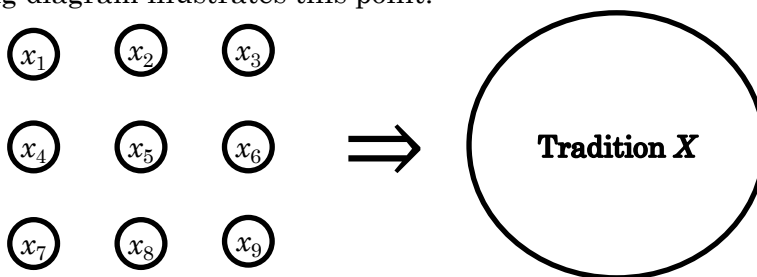
154. For example, a tradition can supply the meaning of a constitutional provision or provide evidence of a provision's original purpose. See Barnett & Solum, *supra* note 53, at 447–48.

155. See Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1128–29 (2020) (advocating for this use of tradition).

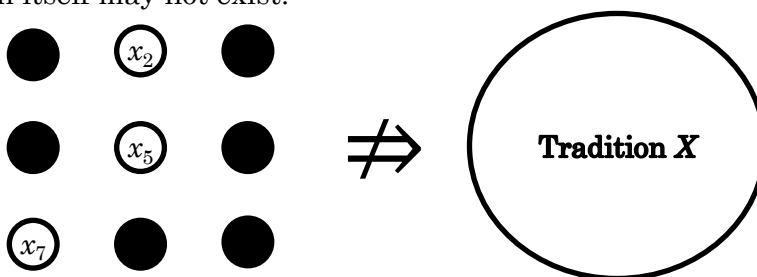
156. See 573 U.S. 513, 533 (2014) (explaining that the president has made "countless recess appointments during intra-session recesses" and that "the [p]resident has consistently and frequently interpreted the word 'recess' to apply to intra-session recesses"). On the role of historical practice in *Noel Canning*, see Bradley & Siegel, *supra* note 152.

157. See Felipe Jiménez, *Tradition in Constitutional Adjudication*, 35 YALE J. L. & HUMANS. (forthcoming 2024) (manuscript at 10), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4641821](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4641821) [<https://perma.cc/6DMT-CY85>] ("Within a tradition, the past has an authoritative presence."); see also Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 240 (1986) ("[L]aw is organized to preserve, maintain and draw systematically and constantly upon [traditions].").

As in the case of doctrinal rules, genealogical arguments can undermine putative traditions. To see why, one must first attend to what brings traditions into being. The existence of a tradition requires that there has been a longstanding pattern of consistent behavior. More formally, if *X* represents the type of behavior that characterizes a putative tradition, then the tradition exists only if there have been many tokens of *X*— $x_1$ ,  $x_2$ ,  $x_3$ , and so on—over a sufficient period.<sup>158</sup> The following diagram illustrates this point.



Genealogical investigation can undermine a putative tradition by showing that the historical events that constitute it sprang from impulses we now wish to reject. In doing so, a genealogy demonstrates that the relevant historical antecedents are not worthy of our respect and therefore should not contribute to the formation of a constitutional tradition. It is as if the reprehensibility of certain antecedents blots them out for purposes of establishing a tradition. And if a great many of the relevant antecedents are to be disregarded, then the putative tradition itself may not exist.



Recall, for example, the majority's reasoning in *Espinoza*. The Court observed that the putative tradition against providing state funds to religious schools had a "checkered" history.<sup>159</sup> That was because many of the state laws constituting the putative tradition were

158. The locus classicus of the type-token distinction is Charles Sanders Peirce, *Prolegomena to an Apology for Pragmaticism*, 16 *MONIST* 492 (1906). For more on the distinction, see Linda Wetzel, *Types and Tokens*, *STAN. ENCYC. OF PHIL.* (Apr. 28, 2006), <http://tinyurl.com/t2z6m6ss> [<https://perma.cc/2DH3-WZ27>].

159. *Espinoza v. Mont. Dep't. of Revenue*, 591 U.S. 464, 482 (2020).

patterned on the Blaine Amendment and evinced “pervasive hostility to the Catholic Church and to Catholics in general.”<sup>160</sup> The laws thus could not contribute to the formation of a “tradition that should inform our understanding of the Free Exercise Clause.”<sup>161</sup> Genealogy can thus subvert putative traditions by undermining the authority of the historical antecedents on which they are based.

In the coming years, the use of genealogy to undermine the authority of a putative tradition may become very significant in the Second Amendment context. The Supreme Court’s recent Second Amendment decisions have recognized “an individual right to keep and bear arms for self-defense,” which “presumptively protects” conduct covered by the Amendment’s “plain text.”<sup>162</sup> Under current law, the government can overcome that presumption only by demonstrating that “the restriction is consistent with [the] Nation’s historical tradition of firearm regulation.”<sup>163</sup> The doctrine thus looks to the country’s longstanding practices to determine whether modern firearm regulations are constitutional.<sup>164</sup> Potentially complicating the application of this test is the fact that many historical firearm regulations were “at least partially motivated by racism or reflected racist attitudes.”<sup>165</sup> As Patrick Charles has explained, “Laws restricting the access, ownership, and use of firearms by people of color, both free and enslaved, were commonplace” by the mid-eighteenth century and remained prevalent in the South even after the ratification of the Reconstruction Amendments.<sup>166</sup>

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160. *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 792, 828–29 (2000) (plurality opinion)).

161. *Id.*

162. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022).

163. *Id.*; *United States v. Rahimi*, 144 S. Ct. 1889, 1896 (2024) (internal quotation marks omitted).

164. See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 80–95 (2023) (explaining the operation of *Bruen*’s doctrinal test).

165. Winkler, *supra* note 32, at 537–38; see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 7 J. ON FIREARMS & PUB. POL’Y 75 (1995) (discussing the racist history of firearm regulation in the eighteenth and nineteenth centuries); Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to be Applied to the White Population*”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1318 (1995) (“Free blacks were subject to a variety of measures meant to limit black access to firearms through licensure or to eliminate such access through outright prohibitions on firearms ownership.”).

166. Patrick D. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343, 1345–46, 1351–52 (2022). There is a robust scholarly debate about the role racial animus played in historical firearm regulation. Compare *id.* at 1344 (arguing that the “historical narrative of race and firearms is becoming increasingly misappropriated and hyperbolized”), with Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 17 (1995) (“racism underlies [all] gun control laws.”). Some scholars have also raised concerns

If the “history and tradition” test does not permit judges to disregard historical antecedents on the basis of their present-day normative judgments, then governments will be permitted to invoke these antecedents to justify modern firearm regulations.<sup>167</sup> But if genealogy can be used to undermine specific historical antecedents, then many historical antecedents cannot be invoked for that purpose. Some courts and commentators have thus recently concluded that certain firearm regulations cannot be justified on traditionalist grounds because the relevant antecedents reflect an invidious past.<sup>168</sup> And several amici curiae advanced a similar argument in *United States v. Rahimi*, though the Court in that case ultimately declined the amici’s invitation to address issues of discriminatory taint.<sup>169</sup>

### 3. Ethos

In constitutional parlance, “ethos” refers to the “character . . . of the American polity” or to moral commitments that are inherent in the Constitution.<sup>170</sup> Ethical arguments maintain that constitutional disputes should be resolved in ways that “comport[ ] with the sort of

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that labeling firearm laws as racially motivated can occasionally fail to tell their “entire story” by overlooking other motivating factors like public safety. Winkler, *supra* note 32, at 542.

167. Indeed, some scholars have argued that laws denying previously convicted felons the right to possess firearms are constitutional on the ground that Founding Era laws disarmed people considered dangerous or “unvirtuous,” such as Black people, Native Americans, and enslaved persons. See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 281–83 (2020); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

168. See, e.g., Justin Aimonetti & Christian Talley, *Race, Ramos, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 223 (2021) (“[I]t is illegitimate to conclude that the modern [right to bear arms] is susceptible to copious restrictions because racist Southern authorities restricted Black citizens’ past exercise of that right.”); *United States v. Hicks*, 649 F. Supp. 3d 357, 365 (W.D. Tex. 2023) (declining to rely on historical laws “based on race, class, and religion”); see also *Young v. State*, 992 F.3d 765, 847 (9th Cir. 2021) (O’Scannlain, J., dissenting) (arguing that “one should be hesitant to assume too much about the constitutional validity of laws that sought to disarm inhabitants of [the] Western territories” and “suppress the ability of freedmen to own guns following the Civil War”); *McDonald v. City of Chicago*, 561 U.S. 742, 745 (2010) (observing that the Reconstruction Era South passed laws to systematically disarm Black citizens).

169. See Brief for Nat’l African-American Gun Ass’n, Inc. as Amicus Curiae in Support of Respondent at 21, *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (No. 22-915); Brief of Amici Curiae Professors of Second Amendment Law Center, and the Independence Institute in Support of Respondent and Affirmance at 7–8, *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (No. 22-915).

170. BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 94; see BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 19, at 13; David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 757–58, 822–25 (2001) (describing “ethos” as having to do with “character” and noting that the Court is “guided by principles that have served the nation well since the founding”).

people we are and the means we have chosen to solve political and customary constitutional problems.”<sup>171</sup>

Identifying the “metes and bounds” of ethical argument has long been a difficult problem for constitutional theorists.<sup>172</sup> But one common strategy for identifying the national ethos is to appeal to the authority of honored figures in American history.<sup>173</sup> Many judicial opinions, for instance, recite the views of members of the Constitutional Convention, even when their views are not probative of original intent or original meaning. In *McCulloch v. Maryland*, Chief Justice Marshall invoked the moral authority of George Washington, noting that the constitutional arguments in favor of the national bank had “convinced minds as pure and as intelligent as this country can boast.”<sup>174</sup> Recitations such as this, Professor Jamal Greene explains, are not made to demonstrate “reasonable views about the meaning of words” but are instead made because the Founders “carry authority in narratives of American identity.”<sup>175</sup> And arguments of this form are not limited to the founding generation. Many judicial opinions invoke the ethical authority of honored figures, such as Abraham Lincoln,<sup>176</sup> Frederick

171. BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 94–95; see Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167 (1987) (noting that a “constitution” can refer to “a characteristic way of life, the national character of a people, their ethos or fundamental nature as a people, a product of their particular history and social conditions”).

172. Greene, *supra* note 19, at 1443; see RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 187 (1998); Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 TEX. L. REV. 1707, 1716 (1994); J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1785 (1994); Walter Benn Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765, 770 (1982) (reviewing BOBBITT, CONSTITUTIONAL FATE, *supra* note 19) (“[O]ne doesn’t exactly know what the American ethos is.”); Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 671 (1984) (reviewing BOBBITT, CONSTITUTIONAL FATE, *supra* note 19) (characterizing ethical judgments as “highly subjective”); William W. Van Alstyne, *The Fate of Constitutional Ipse Dixits*, 33 J. LEGAL EDUC. 712, 715 (1983) (reviewing BOBBITT, CONSTITUTIONAL FATE, *supra* note 19) (claiming that the “technique of discovering constitutional ‘ethics’ just seems to be hopelessly arbitrary”).

173. See Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1697 (2012); see also Post, *supra* note 19, at 29 (maintaining that many originalist arguments are “neither more nor less than a characterization of the national ethos”); Richard Primus, Response, *The Functions of Ethical Originalism*, 88 TEX. L. REV. SEE ALSO 79, 80 (2009) (“[T]he deeper power of originalist argument sounds in the romance of national identity.”); Dorf, *supra* note 18, at 1770, 1800–05 (arguing that some originalist arguments, which he calls “heroic originalism,” appeal to honored authorities).

174. 17 U.S. (4 Wheat.) 316, 402 (1819).

175. Greene, *supra* note 173, at 1697.

176. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224–25 (1995) (quoting Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed., 1953)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 661 (1952) (Clark, J., concurring) (quoting Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges (Apr. 4, 1864) *reprinted in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN 66 (John George Nicolay & John Hay eds., 1894)).

Douglass,<sup>177</sup> and Susan B. Anthony.<sup>178</sup> And the same form of argument is often implicitly at work whenever a citation includes a gratuitous parenthetical indication of an opinion's author, such as "(Marshall, C.J.)" or "(Brandeis, J.)."

Ethical arguments rely on the authority of honored figures to identify the nation's character.<sup>179</sup> For that reason, genealogy can undermine them because genealogy can be used to show that a particular idea about the Constitution traces to someone whose opinions do not warrant our respect. For example, consider arguments appealing to the ethical authority of Justice John Marshall Harlan. Justice Harlan has been called "The Great Dissenter"<sup>180</sup> on account of his many influential and prescient dissents.<sup>181</sup> Those dissents have

177. See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 393 (2023) (Jackson, J., dissenting) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered at the Annual Meeting of the Massachusetts Anti-Slavery Society in Boston, Massachusetts* (Jan. 26, 1865), *reprinted in* 4 *THE FREDERICK DOUGLASS PAPERS* 68 (J. Blassingame & J. McKivigan eds., 1991)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 446–47 (1968) (Douglas, J., concurring) (quoting Frederick Douglass, *The Color Line*, 132 N. AM. REV. 567, 568 (1881), *reprinted in* 4 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 343–344 (Philip S. Foner ed., 1955)).

178. See *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting) (describing Susan B. Anthony's ideas of liberty and equality as "an irresistible force in motivating leaders").

179. See Balkin, *Uses of History*, *supra* note 19, at 672–73 (explaining why arguments from honored authority claim we should follow the views of honored figures).

180. PETER S. CANELLOS, *THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO* (2022).

181. See *The Civil Rights Cases*, 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting) ("The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination . . ."); *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom . . ."); *Berea College v. Kentucky*, 211 U.S. 45, 58–70 (1908) (Harlan, J., dissenting) ("Have we become so inoculated with prejudice of race than an American government, professedly based on the principles of freedom . . . can make distinctions between such citizens . . . simply because of their respective races?"); *Lochner v. New York*, 198 U.S. 45, 65–74 (1905) (Harlan, J., dissenting) ("[T]he state . . . may not unduly interfere with the right of the citizen . . . to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation" (internal quotation marks omitted)); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 652–54 (1895) (Harlan, J., dissenting) ("[T]he instrumentalities of the states . . . are not subjects of national taxation in any form or for any purpose, while the property of private corporations and of individuals is subject to taxation by the general government for national purposes."); *United States v. E.C. Knight*, 156 U.S. 1, 18–46 (1895) (Harlan, J., dissenting) ("The constitution . . . should not . . . be subjected to an interpretation so rigid, technical, and narrow that [preservation of a just government] cannot be accomplished."); *Hurtado v. California*, 110 U.S. 516, 538–58 (1884) (Harlan, J., dissenting) ("I cannot agree that the state may, consistently, with due process of law require a person to answer for a capital offense, except upon the presentment or indictment of a grand jury."); *Downes v. Bidwell*, 182 U.S. 244, 375–91 (1901) (Harlan, J., dissenting) ("The government of the union . . . is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit."); *Dorr v. United States*, 195 U.S. 138, 154–58 (1904) (Harlan, J., dissenting) ("In my opinion, guaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity . . ."); *Hawai'i v.*

largely been vindicated in the course of history, demonstrating what Eric Schepard calls Justice Harlan's "preternatural ability to articulate the ideals inherent in the Constitution before the nation fully recognized them."<sup>182</sup> No surprise, then, that numerous judicial opinions claim fidelity to Justice Harlan's ethical vision.<sup>183</sup>

Opinions that appeal to the moral authority of Justice Harlan, however, are vulnerable to the criticism that Justice Harlan—a former slave owner and opponent of the Reconstruction Amendments—was no saint.<sup>184</sup> Justice Harlan authored the Court's opinion upholding a Georgia school district's decision to provide a high school for white children but not one for Black children.<sup>185</sup> He joined the Court's opinions in *Chae Chan Ping v. United States*<sup>186</sup> and *Fong Yue Ting v. United States*,<sup>187</sup> which upheld the federal government's expressly anti-Chinese immigration policies.<sup>188</sup> And in a frequently suppressed passage of his *Plessy* dissent, Justice Harlan wrote that whites are the "dominant race in this country . . . in prestige, in achievements, in

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Mankichi, 190 U.S. 197, 227–49 (1903) (Harlan, J., dissenting) ("[N]either the [life, liberty, or property] of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States.").

182. Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, the "Color-Blind" Constitution and the Meaning of His Dissents in the Insular Cases for the War on Terror*, 48 AM. J. LEGAL HIST. 119, 119 (2006).

183. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting))); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268–69 (2022) (same); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) ("I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy* . . ."); *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) ("The destinies of the two races in this country are indissolubly linked together . . ." (quoting *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting))); *United States v. Vaello Madero*, 596 U.S. 159, 185 (2022) (Gorsuch, J., concurring) (quoting *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting)); *Dr. A. v. Hochul*, 142 S. Ct. 552, 559 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) ("Cases like this one may serve as cautionary tales for those who follow. But how many more reminders do we need that 'the Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis . . . may suggest?' " (quoting *Downes*, 182 U.S. at 384 (Harlan, J., dissenting))).

184. See Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1385 (2008) ("[T]he portrayal of Harlan as a legal prophet does not fully wash."); Janelle Bouie, Opinion, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. TIMES (July 7, 2023), <https://tinyurl.com/yx74en2x> [<https://perma.cc/W838-XB5F>] (arguing that Justice Harlan is more accurately described as a "sophisticated defender of white racial dominance" than he is an "anti-racist").

185. See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899).

186. See 130 U.S. 581 (1889).

187. See 149 U.S. 698 (1893).

188. See sources cited *supra* note 21 (explaining Congress's application of the Chinese Exclusion Act).

education, in wealth, and in power” and should “continue to be for all time.”<sup>189</sup>

As then-Professor Goodwin Liu has argued, coming to terms with Justice Harlan’s complex legacy need not necessarily “lessen our regard for” him.<sup>190</sup> Indeed, gaining a better understanding of Justice Harlan “as a man who lived and struggled with the assumptions and contradictions of his times” may allow us to “gain a fuller appreciation of why he deserves admiration.”<sup>191</sup> But seeing him as a man capable of both moral prescience and moral depravity suggests that we should not reflexively treat his vision of the American ethos as deserving of deference. Genealogizing his opinions is thus relevant to this mode of constitutional analysis.

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One final caveat about genealogical arguments that seek to undermine assertions of authority bears mention. Such arguments do not establish—and should not purport to establish—that a putative authority is incorrect on the merits. They merely negate the *deference* that an authority is otherwise owed.<sup>192</sup> It is possible, in other words, that an authority happens to be correct on the merits but for the wrong reasons. As the saying goes, even broken clocks are right twice per day. For example, even if Justice Gorsuch’s genealogical critique of the dual-sovereignty doctrine is sound, the doctrine may still reflect the best understanding of the constitutional structure. This distinguishes genealogical arguments that undermine assertions of authority from arguments that invoke the “anticanon”—that is, the set of cases that “all legitimate constitutional decisions must be prepared to refute.”<sup>193</sup> Like genealogy, arguments from the anticanon make normative judgments about the past. But the latter are typically meant to supply an *affirmative* reason to avoid repeating the past, whereas genealogical arguments that undermine authorities merely seek to *negate* deference to the past.

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189. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

190. Liu, *supra* note 184, at 1386.

191. *Id.*

192. See Guy Kahane, *Evolutionary Debunking Arguments*, 45 NOÛS 103, 108 (2011) (observing that genealogical arguments are “purely negative”); David Couzens Hoy, *Genealogy, Phenomenology, Critical Theory*, 2 J. PHIL. HIST. 276, 283 (2008) (making a similar observation).

193. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011); see Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 681–82 (2005) (defining the anticanon); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998) (same); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (same).

### B. Revealing Function

Genealogy can also be used to clarify the functions of contemporary laws, rules, and practices by uncovering the functions that their historical antecedents originally performed.<sup>194</sup> Justice Kavanaugh’s partial concurrence in *Ramos* argued that the original purpose of Louisiana’s nonunanimous-verdict rule shed light on its function today. The “whole point” of adopting that rule, he explained, was to affect the outcomes of cases “involving black defendants, victims, [and] jurors.”<sup>195</sup> It should therefore be “no surprise,” Justice Kavanaugh continued, that the rule continues to perform the same function today—to “silence the voices and negate the votes of black jurors.”<sup>196</sup> As this Section explains, this use of genealogy can advance conclusions relevant to several modalities of constitutional interpretation.

To be sure, this form of genealogy assumes that modern-day legal phenomena continue to perform the functions that their predecessors originally performed.<sup>197</sup> One may therefore wonder whether this form of genealogy is ever necessary. If the problem with a modern legal rule is how it affects Black people today, then why not investigate those effects directly, rather than investigating the law’s historical antecedents? The answer is that genealogy can sometimes allow one to perceive features of social reality that are hidden in plain sight. As the next Subsection explains, for example, prison abolitionists have “trace[d] the roots of today’s carceral state to the racial order established by slavery”<sup>198</sup> in part because they believe that identifying these roots can help one to see that aspects of the modern criminal justice system “continue[] to perpetuate black people’s subjugated

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194. See Edward Craig, *Genealogies and the State of Nature*, in BERNARD WILLIAMS: CONTEMPORARY PHILOSOPHY IN FOCUS 184 (Alan Thomas ed., 2007) (explaining that genealogies can ascribe functions to their objects); Damian Cueni & Matthieu Queloz, *Theorizing the Normative Significance of Critical Histories for International Law*, 24 J. HIST. INT’L L. 561, 578 (2022) (showing ways a critical history can be normatively significant in revealing functional continuities and discontinuities in a practice); Srinivasan, *Genealogy, Epistemology and Worldmaking*, *supra* note 7, at 141–42 (detecting this rhetorical strategy in the writings of numerous social and political theorists).

195. *Ramos v. Louisiana*, 590 U.S. 83, 127 (2020) (Kavanaugh, J., concurring in part).

196. *Id.*

197. See Nicholas Smyth, *The Function of Morality*, 174 PHIL. STUD. 1127, 1132–33 (2017) (arguing that trying to derive morality’s function from its evolutionary history requires assuming that relevant conditions persisted over time); Brian Epstein, *History and the Critique of Social Concepts*, 40 PHIL. SOC. SCI. 3, 5 (2010). If that assumption is false, then the argument will be unsuccessful. For example, while Maryland’s laws prohibiting commercial activities on Sundays originally functioned to reinforce Christian orthodoxy, the Court has rejected an Establishment Clause challenge to those laws on the ground that their function has secularized over time. See *Maryland v. McGowan*, 366 U.S. 420, 431–46 (1961).

198. Roberts, *supra* note 100, at 19.

status.”<sup>199</sup> Of course, this is not the only way to demonstrate the function of contemporary laws, rules, and practices. But it is one way. And in some instances, it may be a particularly persuasive way.

### 1. Text

Textual arguments maintain that disputes should be resolved in ways that closely align with the constitutional text.<sup>200</sup> And a genealogy that reveals its object’s function can demonstrate how the text applies to particular laws, rules, or practices. Consider, for example, whether the Thirteenth Amendment’s prohibition on “slavery” applies to modern institutions and practices that were unknown to the people who ratified the Amendment. Some cases have answered that question by attempting to identify the essential elements of the word “slavery.”<sup>201</sup> Others have answered it by reference to the restraints associated with the legal status of enslavement when the Thirteenth Amendment was ratified.<sup>202</sup> Both answers have resulted in narrow readings of the Amendment.

Genealogy, by contrast, offers an alternative way of reading the Thirteenth Amendment, which asks whether modern institutions and practices functionally replaced chattel slavery. Consider the Court’s 1968 decision in *Jones v. Alfred H. Mayer Co.*, which held that the Thirteenth Amendment empowers Congress to ban private racial discrimination in the sale and rental of housing.<sup>203</sup> Writing for the Court, Justice Stewart explained the historical relationship between slavery and private discrimination in real estate as follows:

Just as the Black Codes . . . were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when

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199. *Id.* at 20.

200. See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 19, at 5.

201. See *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (concluding that it was “too clear for argument” that the Thirteenth Amendment’s prohibition on slavery did not apply to a state statute requiring railroad passengers to be segregated according to race because slavery refers exclusively to “a state of bondage; the ownership of mankind as a chattel[;] . . . and the absence of a legal right to the disposal of his own person, property, and services”); *Hodges v. United States*, 203 U.S. 1, 16 (1906) (holding that the Thirteenth Amendment did not empower Congress to enact a criminal prohibition on conspiring to prevent laborers from exercising their right to make and enforce contracts because the Amendment merely denounces “a condition of enforced compulsory service of one to another”); *id.* at 17 (quoting Webster’s definition of “slavery”). For additional discussion of the linguistic focus of *Plessy* and *Hodges*, see James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 455–57 (2018).

202. See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (concluding that “slavery” encompasses compulsory service, restraint of movement, and other legal deprivations, such as a “disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities”).

203. 392 U.S. 409, 413 (1968).

racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.<sup>204</sup>

The reasoning in this passage is genealogical. Justice Stewart contends that the function of private race discrimination in white communities is to subordinate the descendants of slaves, just like the Black Codes before it, and just like the institution of chattel slavery before the Black Codes. And he posits that the Thirteenth Amendment reaches conduct that can be traced to, and that functionally replaced, chattel slavery. For that reason, Section 2 of the Amendment empowers Congress to proscribe the private discrimination at issue in that case.

Looking beyond the Supreme Court's cases, Professor Dorothy Roberts has genealogized aspects of the modern criminal justice system to show that it has "roots in racialized chattel slavery."<sup>205</sup> Among other things, she argues that modern police departments are the "descendants" of slave patrols,<sup>206</sup> that modern surveillance techniques functionally replaced Reconstruction Era vagrancy and anti-loitering laws,<sup>207</sup> that mass incarceration of Black men has functionally replaced the Slave and Black Codes,<sup>208</sup> and that capital punishment in the United States "has its roots in slavery" and "reinforce[s] the subordinated status of black people."<sup>209</sup> In each instance, Roberts views

204. *Id.* at 441–43.

205. Roberts, *supra* note 100, at 20.

206. *Id.* at 21. There is an ongoing debate about the accuracy of tracing modern police forces to slave patrols. Compare ALEX S. VITALE, *THE END OF POLICING* 45–46 (2017) (tracing the function of modern police to slave patrols), and Ben Brucato, *Policing Race and Racing Police: The Origins of U.S. Police in Slave Patrols*, 47 SOC. JUST. 115 (2020) (making a similar historical claim), with Dan McLaughlin, *No, Modern Policing Did Not Originate with Slavery*, NAT'L REV. (Apr. 21, 2021), <http://nationalreview.com/2021/04/no-modern-policing-did-not-originate-with-slavery> [<https://perma.cc/3MZC-6CXD>] (arguing modern policing is fundamentally different from slave patrols), Jonah Goldberg, *The Problem with Claiming that Policing Evolved from Slave Patrols*, AM. ENTER. INST. (June 19, 2020), <https://www.aei.org/op-eds/the-problem-with-claiming-that-policing-evolved-from-slave-patrols/> [<https://perma.cc/S72Y-HXUA>] (arguing the practice of policing precedes slave patrols), and Hannah E. Meyers, *No, US Policing Doesn't Trace Its Roots to Heinous Slave Patrols*, MANHATTAN INST. (May 17, 2021), <https://manhattan.institute/article/no-us-policing-doesnt-trace-its-roots-to-heinous-slave-patrols> [<https://perma.cc/9L48-Y4CH>] (arguing the use of constabularies to enforce the law in the United States and Great Britain developed separately from slavery).

207. See Roberts, *supra* note 100, at 17, 27–28 (citing Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1700, 1714 (2019)).

208. See *id.* at 29; see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004); Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 82, 85 (David Garland ed., 2001) (arguing that contemporary mass incarceration is part of a historical lineage of "peculiar institutions" that have served to define, confine, and control African Americans).

209. Roberts, *supra* note 100, at 38, 41; see Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE 100–101 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) ("With the end of slavery, whites turned toward alternative forms of racial subjugation, and one of them was the death penalty."); Stephen B.

the subordination of Black people as an unbroken thread connecting slavery first to Jim Crow and then to the modern prison-industrial complex. And that insight, she argues, supports the view that many aspects of the modern criminal justice system violate Section 1 of the Thirteenth Amendment and empower Congress to enact appropriate legislation under Section 2.<sup>210</sup> Here again, genealogy is used to argue that the constitutional text applies to modern laws, rules, and practices—in this case, it is used to argue that militaristic police practices in Black neighborhoods are relics of slavery that must be dismantled pursuant to the Thirteenth Amendment.

## 2. Consequences

Consequentialist arguments posit that constitutional disputes should be resolved in ways that will produce the best consequences.<sup>211</sup> It thus requires judges to attend to the “political and economic circumstances surrounding” their decisions.<sup>212</sup> Genealogy can advance conclusions relevant to this modality by illuminating the consequences of potential rulings. Recall, for example, Justice Alito’s thesis in *Espinoza* that no-aid provisions in state constitutions harm Catholic institutions today.<sup>213</sup> If that thesis is correct, then it is one consideration in favor of the Court’s holding that such provisions are unconstitutional.

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Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 676 (2015) (arguing that southern whites viewed “[t]he death penalty . . . as essential to maintaining control over the slaves”); Ta-Nehisi Coates, *The Inhumanity of the Death Penalty*, THE ATLANTIC (May 12, 2014), <https://www.theatlantic.com/politics/archive/2014/05/the-inhumanity-of-the-death-penalty/361991/> [<https://perma.cc/K8KS-E9ZS>] (arguing that the history of the death penalty “is utterly inseparable from white supremacy”).

210. See Roberts, *supra* note 100, at 116–17 (“To the extent that such practices perpetuate slavery in violation of the Thirteenth Amendment, Congress, state legislatures, and city assemblies, as well as courts, are empowered . . . [to enact reforms].”). The literature linking the modern criminal justice system to slavery is vast. For other examples, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 862 (2021); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 169 (2022); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1186 (2015); and Jamelia N. Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 607 (2021).

211. Bobbitt labeled this modality “prudential argument.” See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 19, at 13; see also Greene, *supra* note 19, at 1441 (using the label “consequentialist argument”). Other commentators have subsumed consequentialist argument within broader categories, such as “value arguments,” Fallon, *supra* note 19, at 1204, or the “normative approach,” McConnell, *supra* note 19, at 1777.

212. BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 61.

213. See *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 507 (2020) (Alito, J., concurring) (noting that the “discrimination in this case shows that the [no-aid] provision continues to have its originally intended effect”).

That is because it suggests that the Court's ruling will have the desirable consequence of ameliorating religious discrimination.<sup>214</sup> Similarly, in *Ramos*, Justices Gorsuch and Kavanaugh each sought to surface the “real-world consequences” of Louisiana's nonunanimous-verdict rule.<sup>215</sup> Even Justice Thomas—perhaps the current Justice least likely to be concerned with consequences—can be read as invoking consequentialist argument in attempting to reveal what he regards as the costs of the Court's decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—namely, that their laissez-faire approach to the regulation of abortion had the same consequences as overtly eugenicist policies.<sup>216</sup>

### 3. History

Professor Philip Bobbitt used the phrase “historical argument” to refer to an argument that relies on “the intentions of the framers and the ratifiers of the Constitution.”<sup>217</sup> What Bobbitt called “historical argument” we would thus call “originalism” today.<sup>218</sup> As noted, there are many versions of originalism.<sup>219</sup> But all versions posit that

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214. This argument, of course, is not necessarily dispositive of the overall valence of consequentialist considerations in that case. There may also be consequentialist considerations against the Court's ruling. *See id.* at 536–37 (Breyer, J., dissenting) (“The States have taken advantage of the ‘play in the joints’ between the Religion Clauses to craft programs of public aid to education that address their local needs” that in many cases include “scholarships to students at religious schools . . . Today's decision upends those arrangements without stopping to ask whether they might actually further the objectives of the Religion Clauses in some or even many cases”).

215. *Ramos v. Louisiana*, 590 U.S. 83, 124 (2020) (Kavanaugh, J., concurring in part); *see id.* at 99 n.44 (majority opinion) (observing that “if the Sixth Amendment calls on judges to assess the functional benefits of jury rules, as the *Apodaca* [v. Oregon, 406 U.S. 404 (1972),] plurality suggested,” then “that analysis” should not “ignore the very functions those rules were adopted to serve”); *see id.* at 99 (observing that *Apodaca*'s “breezy cost-benefit analysis” ignored the “racially discriminatory reasons that Louisiana and Oregon adopted their peculiar rules in the first place”).

216. *See* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 507 (2019) (Thomas, J., concurring):

[W]ith today's prenatal screening tests and other technologies, abortion can easily be used to eliminate children with unwanted characteristics. Indeed, the individualized nature of abortion gives it even more eugenic potential than birth control, which simply reduces the chance of conceiving *any* child. As petitioners and several *amicus curiae* briefs point out, moreover, abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics.

217. BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 12.

218. For other sources identifying originalism as a modality, *see* McConnell, *supra* note 19, at 1755–62 (describing originalism as a “methodology for constitutional interpretation”); Fallon, *supra* note 19, at 1198–99 (noting that “searches for intent” in constitutional adjudication divide into different types, including between “specific” or “concrete” and “general” or “abstract” intent); and Greene, *supra* note 19, at 1430 (characterizing “original-intent originalism” as “an ethical mode of historical argument”).

219. *See supra* notes 53–56 and accompanying text.

constitutional provisions should be interpreted in accordance with something fixed at the time of their ratification. Genealogy that reveals its object's function can advance conclusions relevant to this modality. But instead of advancing conclusions *within* originalism, it can be used to advance conclusions *about* originalism and originalism's proper place within constitutional discourse.

Calvin TerBeek and Professor Reva Siegel have each recently argued that originalism has “uncomfortable racial origins.”<sup>220</sup> Originalist rhetoric, to be sure, has been part of U.S. judicial culture since the Chief Justiceship of John Marshall and was a common theme in many nineteenth-century cases.<sup>221</sup> But in early U.S. jurisprudence, originalist claims were usually regarded as merely “one mode of constitutional argument among many.”<sup>222</sup> TerBeek and Siegel, however, attempt to trace the origin of the theory that originalism is analytically prior to other modes of constitutional interpretation.

According to the standard account,<sup>223</sup> originalist theory was developed in the 1970s in the foundational work of Professor Raoul Berger and then-Professor Robert Bork.<sup>224</sup> TerBeek and Siegel, by contrast, have argued that originalism emerged earlier as backlash against the Court's decision in *Brown v. Board of Education*.<sup>225</sup> TerBeek traces originalist theory to several mid-twentieth-century thought

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220. Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 832 (2021); see Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99, 109–120 (2023) (noting that “appeals to original ‘intent’ and framers’ ‘intent’ circulated widely in politics” after the Court's decision in *Brown v. Board of Education*).

221. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 14 (2009) (citing examples).

222. Siegel, *supra* note 220, at 111.

223. See Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 462 (2013); Randy Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9–10 (2018); JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 10, 23 (2005).

224. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (“Where constitutional materials do not clearly specify the value to be preferred . . . [t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights.”); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 9 (1977) (noting that what the Framers meant to accomplish and what words meant to them “must be the historical focus, not what we should like the words to mean in the light of current exigencies or changed ideals”).

225. See TerBeek, *supra* note 220, at 832 (arguing that “the modern GOP's constitutional ‘originalism’” grew directly out of resistance to *Brown*); Siegel, *supra* note 220, at 106 (arguing that “the *Dobbs* Court was *not* acting on the model of the Warren Court in *Brown*; it was employing a method rooted in the defense of segregation”); *id.* at 109 (arguing that originalism and *Dobbs*'s history-and-tradition method have “roots” in the “defense of segregation”).

leaders,<sup>226</sup> who “viewed *Brown* as an affront” to conservatism.<sup>227</sup> According to TerBeek, these thinkers eagerly seized on the idea of original intent as an “ostensibly non-racialized first constitutional principle to delegitimize *Brown*.”<sup>228</sup> Similarly, Siegel observes that the method of counting state laws at the time of a constitutional provision’s ratification was used by “[p]rominent lawyers and public officials arguing in courts and in politics at the time of *Brown*” in order “to demonstrate that segregation was immune from constitutional oversight.”<sup>229</sup> For example, John W. Davis filed a brief in one of the cases consolidated in *Brown* that focused on the Fourteenth Amendment’s original understanding, highlighting in particular “state practice during Reconstruction.”<sup>230</sup>

TerBeek avoids drawing normative conclusions from this history. Siegel, however, has argued that the history of originalism reveals the function that originalist methodology serves—to vindicate “the interpreters’ values and functions as a veiled form of conservative living constitutionalism.”<sup>231</sup> Put another way, she argues that the genealogy of originalist methodology provides evidence of the sorts of outcomes it is most likely to support—outcomes that are socially conservative and racially regressive. And, of course, those who find this argument persuasive will likely view many of the recent decisions by the Court’s originalist majority as confirmation.<sup>232</sup>

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226. See JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* 262–64, 268–72 (1957) (invoking the Framers’ “intent” and “understanding” in favor of a segregationist vision of the Constitution); JAMES JACKSON KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* 129 (1962) (“Only one procedure is known to the law . . . *It is to determine the intent of the framers.*”); BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 29 (1960) (arguing that the Fourteenth Amendment “was not intended to, and therefore it did not outlaw racially separate schools”); William F. Buckley, *Segregation and Democracy*, *NAT’L REV.*, Jan. 25, 1956, at 5 (arguing that *Brown* was “patently counter to the intent of the Constitution”); L. BRENT BOZELL, *THE WARREN REVOLUTION* 48 (1966) (“The States that ratified the Fourteenth Amendment, equally with the Congress that proposed it, had no intention of outlawing separate schools.”); WARREN JEFFERSON DAVIS, *LAW OF THE LAND* 47, 96–99, 141 (1962) (arguing that *Brown* “was a misconstruction of the intent of the Founders”).

227. TerBeek, *supra* note 220, at 821.

228. *Id.* at 822.

229. Siegel, *supra* note 220, at 111.

230. *Id.* at 114–15.

231. *Id.* at 108.

232. See, of course, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231–32, 237–56 (2022) (relying on originalist interpretation to overrule the constitutional right to an abortion); *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 232–46 (2023) (Thomas, J., concurring) (outlining an “originalist defense” to the Court’s decision to overrule race-conscious admissions policies); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 38–70 (2022) (employing extensive historical analysis to evaluate the constitutionality of gun restrictions); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022) (stating “this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings”) (internal quotation marks omitted). Those who find Siegel’s

Originalists, to be sure, are unlikely to be convinced. They may deny that TerBeek and Siegel have correctly identified the origin of originalist methodology.<sup>233</sup> Or they may deny that originalist methodology will tend to produce the consequences that the opponents of *Brown* thought it would.<sup>234</sup> Or they may argue that originalism must be followed because it promotes other constitutional values, such as popular sovereignty or legitimacy,<sup>235</sup> or that the primacy of originalist methodology follows from certain premises about what it means to have a written constitution,<sup>236</sup> or that originalism is the law.<sup>237</sup> But the broader point remains: Genealogical arguments can advance conclusions about the role that originalism should play in constitutional interpretation, and they are therefore relevant to constitutional law and discourse.

#### IV. HISTORICAL FACTFINDING AND JUDICIAL COMPETENCE

Genealogical arguments inevitably raise contestable issues of historical fact. The vignettes featured in this Article provide numerous examples: Was a current state constitutional provision based on an earlier provision, and was the earlier provision motivated by racism?<sup>238</sup>

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argument persuasive will also find confirmation in the (flawed) originalist reasoning in *Dred Scott*. See Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 46 (1993) (detailing the originalist interpretation at the heart of the analysis in the *Dred Scott* case); Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN INST. FOR JUST., (June 28, 2022), <https://tinyurl.com/564p3vd4> [<https://perma.cc/3NUW-A29U>] (“*Dred Scott* was the first major originalist ruling, claiming to find its defense of slavery and its assertion that even free Black people could not be citizens in the original intent of the founders.”).

233. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 50, at 786 (arguing that original methods for interpreting the Constitution were “broadly originalist” in nature).

234. See MCGINNIS & RAPPAPORT, *supra* note 133, at 2 (arguing that originalist methodology will produce desirable consequences); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) (same).

235. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143–53 (1990) (arguing that originalism advances democracy); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 3 (1999) (arguing that originalism enforces popular sovereignty); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (arguing that originalism constrains judicial discretion); Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 49, at 232–33 (arguing that originalism reconciles judicial review and democracy).

236. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 100–113 (2004) (arguing that “original-meaning originalism” follows from the nature of a commitment to a written constitutional text); Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*”: *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) (arguing that intentionalist methods of constitutional interpretation follow from conceptual truths about the right way to read legal documents); Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 539–40 (2013) (similar).

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

238. See *Ramos v. Louisiana*, 590 U.S. 83, 99 n.44 (2020) (examining the history of jury laws passed in Oregon and Louisiana).

Have anti-loitering laws traditionally subordinated Black people?<sup>239</sup> Was the purpose of a state constitution's no-aid provision to denigrate Catholics?<sup>240</sup> Have abortion-related practices in the United States served eugenicist ends?<sup>241</sup> Was a judicial precedent intended to justify the conquest and subjugation of Native Americans?<sup>242</sup>

The previous Part argued that these questions are, in theory, relevant to constitutional analysis. But which courts, in practice, should be responsible for answering them, and according to what rules and procedures?<sup>243</sup> The current practice is for appellate courts to determine the facts central to genealogical arguments in the first instance. But that allocation of institutional responsibility is problematic. Appellate courts cannot supplement the factual record, tailor the factfinding timeline to the demands of a particular case, or appoint experts. Because of these limitations, appellate factfinding will often result in inaccurate or incomplete information and flout the requirements of due process. This Part therefore proposes that the factual issues underlying genealogical arguments be determined by trial courts, which have a greater capacity for factfinding.<sup>244</sup> Put differently, this Part maintains that factfinding related to genealogical arguments should follow the normal rules and processes for determining other types of facts in adjudication.<sup>245</sup>

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239. See *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999) (plurality opinion) (analyzing the history of vagrancy laws).

240. See *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 498 (2020) (Alito, J., concurring) (discussing the historical context in which Montana's no-aid provision was adopted).

241. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493–95 (2019) (Thomas, J., concurring) (invoking the history of abortion and birth control).

242. See *Haaland v. Brackeen*, 599 U.S. 255, 325–28 (2023) (Gorsuch, J., concurring) (discussing *United States v. Kagama*, 118 U.S. 375 (1886)).

243. The question whether a particular kind of information is relevant to a decision is different from the question whether a particular decisionmaker should *use* that information to decide. Indeed, a decisionmaker's overall performance will sometimes be improved by limiting their discretion to consider certain types of information. See Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 562–64 (1983) (making this point about decisionmakers generally); see also Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1864 (1998) (“[I]t is not the case that more information always and necessarily produces more accurate decisionmaking than does less information.”).

244. Another plausible response would be to question whether courts should engage in genealogical analysis at all. That question is worth exploring in earnest. Assuming that courts will continue to use genealogy, however, it is also worth asking how that mode of argument can best be implemented. And this Article addresses that question.

245. In an article that has greatly influenced my thinking about these issues, Joseph Blocher and Brandon Garrett have advanced a similar proposal with regard to historical factfinding undergirding originalist inquiries. See Blocher & Garrett, *supra* note 53.

*A. Current Practice*

The U.S. legal system generally prefers that trial courts, rather than appellate courts, determine the facts relevant to litigation.<sup>246</sup> That preference is manifest in the jury-trial guarantees of the Sixth and Seventh Amendments.<sup>247</sup> It is manifest in due process rulings ensuring that litigants have access to transcripts or other essential records.<sup>248</sup> It is manifest in rules of evidence and procedure that specify how discovery is to be conducted and a factual record is to be developed.<sup>249</sup> And it is manifest in standards of review that make questions of fact reviewable only for clear error.<sup>250</sup>

In determining historical facts central to constitutional arguments, however, the Supreme Court has deviated from the legal system's preference for trial-court factfinding. And the historical questions central to genealogical arguments have been no exception. When genealogical arguments have emerged in recent cases, the Court has typically determined the relevant historical facts in the first instance, with little to no assistance from trial courts. In *Espinoza*, for example, the Montana state courts (trial and appellate) were briefed on the ostensible relationship between the current Montana Constitution and the anti-Catholic bigotry motivating the Montana Constitution of 1889.<sup>251</sup> Yet neither the trial court nor the Montana Supreme Court addressed that issue. As a consequence, Chief Justice Roberts's

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246. See *id.* at 733 (“In our legal system, lower courts have primary authority for fact-finding.”); Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 16 (2023) (“Developing [the factual] record is typically the occupation of the lower courts, involving lay jurors, trial court judges, and administrative factfinders.”).

247. See U.S. CONST. amends. VI, VII.

248. See Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 422 (2019); Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57, 61 (2015) (canvassing constitutional rules regulating the admission and use evidence); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996).

249. Blocher & Garrett, *Fact Stripping*, *supra* note 246, at 16.

250. See FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . .”); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).”).

251. See Plaintiffs’ Brief in Support of Their Motion for Summary Judgment at 15, *Espinoza v. Mont. Dep’t of Revenue*, (Mont. Dist. May 16, 2016) (No. 15-1152), 2016 WL 11608959 (noting a connection between Montana’s Constitution and the federal Blaine Amendment); Brief of Amicus Curiae of the Becket Fund for Religious Liberty in Support of Plaintiffs and Appellees at 15–17, *Espinoza v. Mont. Dep’t of Revenue*, (Mont. Jan. 19, 2018) (No. 17-0492), 2018 WL 798925 (connecting the Montana Constitution to the Blaine Amendment); Appellee’s Answer Brief at 25–27, *Espinoza v. Mont. Dep’t of Revenue*, (Mont. Jan. 19, 2018) (No. 17-0492), 2018 WL 7351707 (same); Brief of Appellant, *Espinoza v. Mont. Dep’t of Revenue*, (Mont. Feb. 12, 2018) (No. 17-0492), 2018 WL 949265 (arguing that Montana’s no-aid provision is not a “Blaine Amendment”).

majority opinion and Justice Alito's concurring opinion made determinations of historical fact without the help of a factual record, expert reports, trial-court factfinding, or a lower court opinion addressing the subject. And this is typical of the Court's approach to the factual predicates underlying genealogical arguments.

It bears noting that the historical facts underlying the Court's genealogical opinions are, in this respect, like other kinds of facts that the Court relies on to formulate and apply constitutional doctrine.<sup>252</sup> In many recent cases, the Court's constitutional decisionmaking has hinged on ostensible facts about traditional legal practices. The Court has thus ventured its own answers to historical questions, such as whether U.S. law has traditionally permitted laws "preventing individuals who threaten physical harm to others from misusing firearms",<sup>253</sup> whether states generally banned abortions at the time the Fourteenth Amendment was ratified,<sup>254</sup> and whether particular types of harm have been "traditionally recognized as providing a basis for a lawsuit in U.S. courts."<sup>255</sup> Further, the Court's factfinding has not been confined to questions of historical fact. As Professor Allison Larsen has explained,<sup>256</sup> the Court has taken an armchair approach to many empirical questions, such as whether a partial-birth abortion is ever medically necessary,<sup>257</sup> whether one can effectively discharge a locked gun in self-defense,<sup>258</sup> and whether Black children are stigmatized by segregated schools.<sup>259</sup>

While appellate factfinding of this sort deviates from the standard allocation of responsibility between trial and appellate courts, it does not violate existing rules and procedures. That is because the relevant facts are not what Professor Kenneth Culp Davis called "adjudicative facts"—that is, they are not "facts about the immediate parties—who did what, where, when, how, and with what motive or

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252. Numerous scholars have noted the importance of factfinding in the formulation of constitutional law. *See, e.g.*, Kenneth L. Karst, *Legislative Facts in Constitutional Law*, 1960 SUP. CT. REV. 75, 75; Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1187 (2013); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 178 (2018); Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249 (2023).

253. *United States v. Rahimi*, 144 S.Ct. 1889, 1896 (2024).

254. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 248 (2022).

255. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021).

256. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1255–56 (2012) (supplying these examples).

257. *See Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007).

258. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

259. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007).

intent.”<sup>260</sup> Instead, they are “legislative facts,” or “generalized statements about the world that help the court decide questions of law and policy.”<sup>261</sup> That distinction is important because the rules and procedures specifying how adjudicative facts are to be determined mostly do not apply to legislative facts.<sup>262</sup> Such facts need not be the subject of expert testimony.<sup>263</sup> Findings of legislative fact need not be supported by a record developed at trial.<sup>264</sup> Trial court findings of legislative fact need not be given deference on appeal.<sup>265</sup> And the Federal Rules of Evidence exempt legislative facts from restrictions on judicial notice.<sup>266</sup>

### *B. Proposal for Reform*

While appellate determination of the historical facts central to genealogical arguments does not violate existing rules and procedures, it is far from ideal because the nature of genealogical arguments tends to exacerbate the weaknesses of appellate courts and favor the strengths of trial courts. A better system, this Article maintains, would be for trial courts to determine those facts in the first instance and with

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260. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1986); see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 HARV. L. REV. 364, 365–66 (1942). For scholarship seeking to refine Davis’s initial categorization, see DAVID FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS, at xiii (2008); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 70 (2008); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146 (2011); and Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955, 957–62 (2024).

261. Larsen, *supra* note 256, at 1265–66; see KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 7.03 (3d ed. 1972).

262. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 44–45 (2011).

263. See FAIGMAN, *supra* note 260, at 97–98.

264. See Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 44 (1988).

265. See Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016) (“[A]ppellate courts generally grant clear error deference only to adjudicative facts.”).

266. See FED. R. EVID. 201(a) advisory committee’s note to 1972 proposed rules. With regard to legislative facts:

[T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present;

see also Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 153 (2008) (“The Federal Rules of Evidence and their state counterparts limit only judicial notice of adjudicative facts.”).

deference on appeal. This would allow more robust development of the factual record and consultation with historical experts.<sup>267</sup>

To see why appellate factfinding in this domain is troubling, it will be helpful to begin by reflecting on the diversity of evidence that genealogical arguments can require courts to evaluate. Consider some examples discussed earlier. To determine whether certain state constitutional provisions were ratified with discriminatory intent, the Court in *Ramos* and *Espinoza* reviewed nineteenth-century periodicals and other secondary sources related to the relevant legislative proceedings.<sup>268</sup> To determine whether anti-loitering laws traditionally subordinated Black people, the Court in *Morales* reviewed the text and purpose of numerous laws spanning four centuries of Anglo-American law.<sup>269</sup> To determine whether abortion-related practices in the United States served eugenicist ends, Justice Thomas reviewed the writings of early twentieth-century abortion advocates.<sup>270</sup> To determine whether a function of originalism is to produce socially conservative outcomes, TerBeek and Siegel synthesized the writings of numerous mid-twentieth-century conservative intellectuals.<sup>271</sup>

As these examples illustrate, genealogical arguments can require courts to review historical evidence that is highly diverse and idiosyncratic to each case. Those arguments can involve a wide variety of historical materials—from secondary sources reporting on legislative

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267. To be clear, this Article does not maintain that every proposition of fact asserted in an opinion needs to be vetted by a trial court. Some facts are asserted merely as background information and are not “load bearing” in the sense that they will affect the outcome of a case. See Blocher & Garrett, *supra* note 53, at 724 (noting the importance of having a reviewable record is “relatively minor if the evidence is merely background evidence cited as general support—something judges have long done when discussing constitutional interpretation. Such facts are not load-bearing, as it were”). The possibility of judicial error in determining those sorts of facts is not nearly as troubling as it is when factual assertions are used to adjudicate the rights of the parties and to determine the content of the law.

268. See *Ramos v. Louisiana*, 590 U.S. 83, 88 n.4 (2020) (discussing various nineteenth-century newspaper accounts of the push for nonunanimous juries (citing Frampton, *supra* note 9, at 1613–17)); *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 500 (2020) (Alito, J., concurring) (noting concerns over Catholic education (citing *Sectarian Education: Anti-public School Crusade. Aggressive Attitude of the Roman Catholic Clergy—The Terrors of the Church Threatened*, N.Y. TIMES, Aug. 24, 1873, at 8)).

269. See *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999) (plurality opinion) (discussing anti-loitering laws ranging from sixteenth-century England to twentieth-century United States).

270. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493–506 (2019) (Thomas, J., concurring) (citing Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV., Feb. 1919, at 11, 12; MARGARET SANGER, THE PIVOT OF CIVILIZATION 187, 189 (1922); MARGARET SANGER, WOMAN AND THE NEW RACE 5, 25 (1920); Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., Oct. 1921, at 5; ALAN F. GUTTMACHER, BABIES BY CHOICE OR BY CHANCE 186–88 (1959); GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 20 (1957)).

271. See TerBeek, *supra* note 220, at 821–31 (discussing sources cited in note 226); Siegel, *supra* note 220, at 109–26 (discussing sources cited in note 232).

proceedings, to primary materials from England and early America, to judicial opinions and internal court documents, to the popular writings of influential thought leaders. They can also pertain to a wide variety of legal sources—from state constitutions, to statutes, to judicial doctrines, to longstanding practices, to private conduct.<sup>272</sup> And they are not limited to a particular period (such as the Founding Era) but can involve materials from any time in Anglo-American legal history. These features of the evidence relevant to genealogical arguments favor the strengths of trial courts and exacerbate the weaknesses of appellate courts.

First, only trial courts can develop the factual record,<sup>273</sup> conduct evidentiary hearings,<sup>274</sup> and tailor the litigation timeline to the evidentiary demands of a particular case.<sup>275</sup> These are crucial differences because the evidence relevant to a genealogical argument will often not be directly and immediately accessible to the judges tasked with evaluating it. Judges, for instance, will not have at their fingertips information about the 1898 Louisiana constitutional convention, or anti-loitering laws in England and early America, or the writings of mid-twentieth-century conservative thought leaders. Moreover, even when the relevant information is technically accessible, resource constraints, docket pressures, and ethical limitations will often make a court ill equipped to perform the requisite research on its own.<sup>276</sup> For these reasons, judges depend on the parties to identify and present the relevant evidence. But when issues of genealogy arise for

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272. This distinguishes genealogical arguments from originalist arguments. While different originalist theories emphasize different features of the Constitution's history—original intent, original meaning, original law, among others—they are all at bottom about *the Constitution*. Genealogical arguments, by contrast, can be used to undermine a wide variety of sources of law.

273. See FED. R. APP. P. 10(a) (providing that the record on appeal includes the following items: (1) original papers and exhibits filed in district court, (2) transcript proceedings, and (3) a certified copy of docket entries).

274. See *About the U.S. Courts of Appeals*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> (last visited Oct. 17, 2024) [<https://perma.cc/9CTK-FYJL>] (“The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury.”).

275. See Blocher & Garrett, *supra* note 53, at 734:

[I]t is not always straightforward even to determine what types of historical evidence are relevant for constitutional interpretation, much less whether the record is adequate and what work must be done to assess it. It might take time to adequately review such questions, and lower courts have flexibility to schedule discovery and expert review in response to the complexity of a factual question.

276. Cf. Vermeule, *supra* note 243, at 1878 (“There are few problems that cannot be solved with sufficient effort, but effort is costly. . . . [C]ourts labor under systemic constraints that limit the amount of effort judges can invest.”); Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 759 (2000) (noting, in a different context, that judges labor under constraints of time, information, and expertise).

the first time on appeal, it is often too late for the parties to collect the relevant evidence, much less to enter it into the record. And that raises both accuracy and legitimacy concerns.

When it comes to accuracy, failing to give parties a full opportunity to present evidence in support of or in opposition to a genealogical critique creates the possibility that a court's decision will be based on inaccurate or incomplete information. To be sure, appellate courts occasionally receive briefs from the parties and their amici containing historical analyses and evidence relevant to the law's genealogy. But as other scholars have noted, amicus briefs often involve cherry-picked evidence and questionable sources.<sup>277</sup> And if a genealogical argument first enters a case in an appellate brief (or, worse, an opinion), then the opposing side may not have an opportunity to identify or present contrary evidence. Little wonder, then, that some of the Court's genealogical arguments have hinged on questionable historical claims.<sup>278</sup>

Failing to give parties an opportunity to present contrary evidence also raises serious concerns about the legitimacy of the courts' decisionmaking. As Professors Joseph Blocher and Brandon Garrett explain, just as it would be "highly problematic for fact-finding concerning the discoverability of an injury to occur for the first time on appeal in a tort case," so too is it "problematic for that same appellate judge to decide, for the first time, how long a statute of limitations should be by relying solely on a study or a historical record."<sup>279</sup> Factfinding should generally be done in accordance with our legal system's basic procedural guaranties of notice, an opportunity to be heard, and, in some cases, a jury trial.<sup>280</sup> Thus, if a case hinges on a particular factual assertion—say, whether the Montana Constitution of 1889 was motivated by anti-Catholic sentiment<sup>281</sup>—then the parties

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277. See Larsen, *supra* note 252, at 200 (noting that "advocates at the Court 'wrangle' the amicus experts they think would influence the justices and then 'whisper' to them to make sure they are saying what needs to be said" (quoting Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1919–26 (2016))); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1784–1800 (2014) (objecting to amicus expertise when amici cite no sources, sources that are not publicly available, sources created in anticipation of litigation, or authorities with minority views in their field); see also Gorod, *supra* note 262, at 36–37 ("[T]he Supreme Court rules place virtually no limit on who can file [an amicus] brief.").

278. See, e.g., Ziegler, *supra* note 93, at 200 (noting criticisms of Justice Thomas's historical analysis in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493–506 (2019) (Thomas, J., concurring)); Murray, *supra* note 104, at 2030 (arguing that Justice Thomas's concurrence in *Box* offers a "thin historical account").

279. Blocher & Garrett, *supra* note 53, at 726.

280. See *id.* at 723 (making a similar criticism of "appellate originalism").

281. See *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 497–508 (2020) (Alito, J. concurring) (concluding that Montana's no-aid provision was the result of anti-Catholic bigotry).

should have the right to submit evidence and briefing, to respond to their opponent's arguments, and to submit the issue to the appropriate trier of fact.

Second, judges are not accustomed to reviewing the sorts of historical evidence that are central to genealogical arguments. Judges are generalists, most of whom lack historiographical training and expertise. Consequently, they can be expected to commit basic mistakes, such as failing to place evidence in the appropriate context, reading sources anachronistically, failing to take reasonable steps to locate contrary evidence, overestimating the significance of salient or sensational evidence, and so forth. Indeed, judges' limited historiographical expertise may be one reason why many of the opinions discussed in Part II outsourced their historical analyses to secondary sources—often without even citing the underlying primary sources.<sup>282</sup>

Critics have also argued that originalism requires greater historical expertise than can reasonably be expected of judges.<sup>283</sup> Prominent originalists Professors William Baude and Stephen Sachs have responded that the most plausible versions of originalism require judges to review only a “refined subset” of the materials that would be relevant to a general historical inquiry.<sup>284</sup> In their view, it is therefore realistic to expect judges to review that refined subset in evaluating originalist arguments and to expect that, over time, judges will attain greater levels of expertise. But however successful that response may be as a defense of originalism, it cannot be repurposed to defend appellate factfinding on matters of genealogy. That is because the diversity of historical materials relevant to genealogical arguments cannot be reduced to a reasonably “refined subset,” and thus there can be no reasonable expectation that judges will eventually achieve a sufficient level of “genealogical” expertise.

Trial judges, to be sure, have no more expertise on historical questions than appellate judges. Indeed, one might think that historical “fact-finding is precisely the kind of fact-finding with regard to which

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282. See *id.* at 482; *id.* at 499–506 (Alito, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999) (plurality opinion); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 120–21 (1996) (Souter, J., dissenting) (same); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 495–96 (2019).

283. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 14–16 (2002); Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning* Foreword, 84 *FORDHAM L. REV.* 905, 912 (2015); Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 *CONST. COMMENT.* 271, 282 (2005).

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

lower courts don't have any kind of institutional advantage."<sup>285</sup> But, unlike appellate courts, trial courts can compensate for their lack of training by enlisting the help of professional historians as court-appointed experts.<sup>286</sup> And increasing the role of historical experts in constitutional litigation would be only a change of degree, not of kind. As Blocher and Garrett note, "[H]istorians have long played an important role in trial-level litigation in a range of legal contexts,"<sup>287</sup> including Native American treaty rights,<sup>288</sup> cases involving alleged historical sex discrimination,<sup>289</sup> and voting rights cases.<sup>290</sup>

Of course, appointing professional historians as experts will raise its own set of challenges. Judges will presumably have to serve a "gatekeeping" role related to the admission of historical evidence, as they do with other types of scientific and technical evidence.<sup>291</sup> And judges and historians will have to work through awkward tensions between the professional norms of historians and the nature of legal advocacy.<sup>292</sup> But there is no reason in the abstract to think that these difficulties cannot be overcome. And it seems much better to work through them than for judges to continue to rely solely on their own expertise aided by nothing other than sporadic party submissions and amicus briefs. This Article thus proposes that trial courts conduct

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285. Blocher & Garrett, *supra* note 53, at 735–36 (emphasis omitted) (making this point about historical factfinding central to originalist arguments).

286. *See id.* at 737 (noting this possibility as a way of improving the quality and accuracy of originalist arguments).

287. *Id.* at 739; see Jonathan D. Martin, Note, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1519 (2003) ("Historians are increasingly being called to testify as expert witnesses. They appear in cases adjudicating a vast array of matters . . .").

288. *See* Daniel A. Farber, *Adjudication of Things Past: Reflections on History on Evidence*, 49 HASTINGS L.J. 1009, 1012–13 (1998).

289. *See* Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629, 1630 (1988).

290. *See* Kritika Agarwal, *Historians as Expert Witnesses: Can Scholars Help Save the Voting Rights Act?*, PERSPS. ON HIST. (Feb. 1, 2017), <https://www.historians.org/perspectives-article/historians-as-expert-witnesses-can-scholars-help-save-the-voting-rights-act-february-2017/> [<https://perma.cc/F82N-K5PC>] (examining the "near-constant presence" and "significant impact" of historians in voting rights cases).

291. *See* *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589 (1993) (stating that judges are not "disabled from screening" scientific evidence and must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that *Daubert's* rule on a judge's "gatekeeping" obligation applies "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge"); *see also* Blocher & Garrett, *supra* note 53, at 740 (noting that these issues arise for the use of historians to supplement originalist arguments).

292. *See generally* Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 361 (2013) (arguing that lawyers have a "cynical view of the past that historians cannot quite abide" because they "view history as they do any other expertise hired for trial—as a tool to win").

factfinding on historical issues underlying genealogical arguments in the first instance with deference on appeal.<sup>293</sup>

### CONCLUSION

This Article has explored the promise and peril of genealogical argument in constitutional law. It has shown that genealogy is featured prominently in recent Supreme Court decisions. And while those arguments may at first glance seem irrelevant to constitutional analysis, this Article has argued that genealogy can be relevant to various modalities of constitutional interpretation. At the same time, the Article has suggested caution about the current allocation of institutional responsibility for evaluating genealogical arguments. If they are to continue to play a prominent role in constitutional analysis, the facts underlying those arguments should be subject to the same rules and procedures that govern other forms of judicial factfinding.

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293. The one exception to this proposal is for genealogical arguments that critique judicial doctrine. The institutional considerations described above do not so obviously favor trial-court factfinding in that context. That is for two reasons. First, the materials courts must review to evaluate genealogical arguments designed to undermine judicial doctrine are generally not inaccessible or beyond a judge's expertise. Indeed, the genealogical critiques canvassed in Subsection II.A.2 were all based on troubling ideologies contained in foundational judicial opinions. To evaluate those arguments, a reviewing court therefore only needs to read the cases and determine whether the doctrinal rule continues to rely on their foundation. That is a task any judge should be qualified to perform without the assistance of the parties or the expertise of historical experts. Second, allowing trial courts to evaluate the strength of a genealogical argument designed to undermine judicial precedent would threaten to undermine our legal system's commitment to vertical precedent.