CONSTITUTIONAL GENEALOGY

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Genealogy is a form of argument, often associated with critical theory, that seeks to discredit a social or cultural phenomenon by exposing its lowly origins. In a fascinating recent development, courts and commentators from across the ideological spectrum have begun using genealogy to advance claims about constitutional law. They've genealogized state constitutions, statutes, traditions, precedents, social practices, and even interpretive methodology. And those genealogies have involved topics as diverse as due process, abortion, criminal procedure, firearm regulation, Indian law, race discrimination, religious liberty, sovereign immunity, the application of constitutional rights in the U.S. territories, and constitutional originalism. Genealogy, in short, is quietly becoming a fixture of constitutional law and discourse. After documenting this development, this Article advances two theses about genealogy's emerging role in constitutional law.

First, genealogy is relevant to constitutional law when it's used either to undermine assertions of authority or to reveal the functions that its object serves. These uses of genealogy provide information relevant to several modalities of constitutional construction, including arguments from text, history, precedent, tradition, consequences, ethos, and restraint.

Second, while information about the ancestral origin of a law, rule, or practice is relevant to its constitutionality, judges should generally suppress that information in their decisionmaking for reasons related to the structure of adjudication, the competence of the judiciary, and the instability that genealogy will tend to engender in the legal system. Genealogy's proper role within constitutional law therefore lies outside the courts.

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INTRODUCTION

No one would confuse the current Supreme Court for a bunch of radical crits. Yet, in a fascinating recent development, the Court has taken a page straight from the crits' playbook in its constitutional decisionmaking.

Genealogy is a form of argument, often associated with critical theory, that seeks to explain the emergence of social or cultural phenomena.[1] It's often used to cast doubt on its object by exposing the lowliness of the object's ancestral origins.[2] Nietzsche, for example, attempted to undermine his contemporaries' beliefs about morality by showing that they were the products of slave resentment, the debtor-creditor relation, and the desire of the priestly caste to dominate.[3] Freud can be read as subverting certain religious beliefs by arguing that they originate in "man's need to make his helplessness tolerable."[4] And critical theorists of all stripes have used genealogy to impugn many other beliefs and practices—from concepts

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1 *See* BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 20 (2002).

2 *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 METAPHILOSOPHY 391, 398 (1990) ("[A] genealogy is an argument to discredit a belief or belief system by exposing its genesis."); Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 144-46 (D. F. Bouchard ed., 1977) (observing that genealogy identifies "the errors, the false appraisals, the faulty calculations that give birth to those things that continue to exist and to have value for us"). Genealogy can also be used to vindicate, rather than undermine, its object. But the recent emergence of genealogy in caselaw and legal scholarship has been exclusively critical in nature. This Article therefore focuses on the relevance of critical genealogy to constitutional law.

3 *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Carol Diethe, trans. 2007) (1887); *see also* Amia Srinivasan, *The Archimedean Urge*, 29 PHIL. PERSP. 325, 326 (2015) (offering this reading of Nietzsche).

4 SIGMUND FREUD, THE FUTURE OF AN ILLUSION 23 (James Strachey trans. & ed., 1989) (1927).

central to scientific discourse[5] to patriarchal[6] and imperialist[7] ideology implicit in Western social practices.

The Court has begun using this technique to advance conclusions about the substance of constitutional law. In its 2020 decision in *Ramos v. Louisiana*, for example, the Court held that a state constitutional provision allowing non-unanimous jury verdicts in criminal cases was unconstitutional.[8] The rule allowing non-unanimous verdicts was first adopted during an 1898 constitutional convention, the avowed purpose of which was "to establish the supremacy of the white race."[9] And while it was re-adopted in 1974 for different reasons and without any of the earlier signs of racism, three justices in *Ramos* concluded that the "legacy of racism" was relevant to their decision.[10] In their view, the bigotry manifest in Louisiana's nineteenth-century 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 roots in an insidious past.

Ramos is just one example of a broader trend in constitutional law.[11] As Part I explains, judges and commentators from across the ideological spectrum have

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5 *See, e.g.*, GASTON BACHELARD, LE RATIONALISME APPLIQUÉ (1966); 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 (1994).

6 *See, e.g.*, SIMONE DE BEAUVOIR, THE SECOND SEX (1949); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); JUDITH BUTLER, SENSE OF THE SUBJECT (2015).

7 *See, e.g.*, CHANDRA MOHANTY, FEMINISM WITHOUT BORDERS: COLONIZING THEORY, PRACTICING SOLIDARITY (2003); EDWARD W. SAID, ORIENTALISM (1978).

8 Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

9 Id. (quoting Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H. Hearsay ed. 1989)) (internal quotation marks omitted); *see also* 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).

10 Ramos, 140 S. Ct. at 1410 (Sotomayor, J., concurring in part); *see also* id. at 1401 n.44 (maj. opn.) (Gorsuch, J.); id. at 1417-18 (Kavanaugh, J., concurring in part).

11 This Article focuses on genealogy's relevance to constitutional law, rather than public law more generally. That's because the Supreme Court's recent use of genealogy has been concentrated in constitutional law and because an article about public law generally would be unmanageably long. Limiting the analysis to constitutional law, however, is to some extent artificially truncated. And some of the Article's conclusions may be extended *mutatis mutandis* to other areas of public law.

recently used genealogy in a wide range of contexts. They've used it to argue that provisions of written law are rooted in white supremacy and religious bigotry;[12] that longstanding traditions reflect animus toward particular groups;[13] that judicial precedents were the products of perverse ideologies;[14] that social practices are relics of Jim Crow or the eugenics movement;[15] and that constitutional originalism grew out of resistance to the judgment in *Brown v. Board of Education*.[16] Genealogical critiques, moreover, have implicated constitutional issues as diverse as due process, abortion, criminal procedure, firearm regulation, Indian law, race discrimination, religious liberty, sovereign immunity, the application of constitutional rights in the U.S. territories, and constitutional originalism.

What should we make of this development? Is information about the ancestral origin of a law, rule, or practice relevant to its constitutionality? And if so, should judges rely on that information in their constitutional decisionmaking? Or do the institutional limitations of the adjudicative process give judges sufficient reason to exclude such information? This Article attempts to answer these questions.[17]

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[12] *See infra* § I.B.1.

[13] *See infra* § I.B.2.

[14] *See infra* § I.B.3.

[15] *See infra* § I.B.4.

[16] *See infra* § I.B.5.

[17] In an important article, Professor Kerrel Murray analyzes the law's treatment of discriminatory policy "lineages." Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1192 (2021). He argues that contemporary policies are "tainted" when they "carry forward" the "functional operation" of an earlier, discriminatory policy implemented by the same institution. Id. at 1220-24. And he advocates a specialized decision rule under which the presence of discriminatory taint would trigger heightened judicial scrutiny even if the government evinced no discriminatory intent when enacting or implementing a successor policy. Id. at 1227-36. This Article agrees with Professor Murray that a policy's genealogy can be relevant to its constitutionality. Indeed, Murray's analysis is essential for understanding genealogy's role in undermining the presumption of constitutional fidelity that political institutions ordinarily receive. *See infra* notes 151–157 and accompanying text. The scope of this Article, however, is broader in important respects, and it reaches different conclusions on several key points. The Article shows that the phenomenon Murray identifies should affect not only our thinking about policy successors, but also our thinking about traditions, precedents, and practices. *See infra* Part I.B. Moreover, while Murray's focus is on the *substance* of a constitutional decision rule, this Article focuses on the *institutional* question whether courts are well equipped to make determinations about the existence of taint. *See infra* Part III.

Part II argues that information about the genealogy of a law, rule, or practice can be relevant to its constitutionality when it's used in at least two ways.[18] First, a troubling genealogy can undermine assertions of authority implicit in laws, precedents, traditions, and appeals to the national ethos.[19] A court, for example, could conclude that a doctrinal rule isn't authoritative because it originated in and ultimately depends on a case reflecting overt racial animus, rather than a good-faith reading of the Constitution.[20] Moreover, in undermining assertions of authority, information about the genealogy of a law, rule, or practice can advance conclusions relevant to several widely accepted "modalities"[21] of constitutional construction,

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[18] In attempting to demonstrate genealogy's relevance to constitutional law and discourse, this Article adds a new dimension to the broader academic debate about the proper role of history in constitutional law. For representative contributions to that debate, see 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); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997); and Cass R. Sunstein, *The Idea of a Usable Past*, 95 COLUM. L. REV. 601 (1995).

[19] *See infra* § II.A. In a pair of insightful articles, Professor Charles Barzun has also argued that genealogy can be used to undermine the authority of judicial precedents. *See* Charles L. Barzun, *The Genetic Fallacy and a Living Constitution*, 34 CONST. COMMENT. 101, 106-28 (2019); Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1639 (2013). This Article expands upon Barzun's claim, explaining that genealogy can also be used to undermine assertions of authority relevant implicit in arguments from tradition, judicial restraint, and national ethos. *See infra* §§ II.A.2–II.A.4.

[20] By suggesting an additional reason why legal officials may flout the dictates of precedent or tradition, this Article contributes to academic literatures on the force of those forms of legal authority. For scholarship addressing the force of precedent, see AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 234-41 (2012); Randy J. Kozel, *Special Justifications*, 33 CONST. COMMENT. 471 (2018); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); and Caleb E. Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001). For work addressing the force of tradition, see Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412 (2012); and Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. L. ISSUES (forthcoming 2023).

[21] The "modalities" are the recurrent categories of argument that are widely accepted as legitimate within constitutional law and discourse. *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 734-35 (2021). The term derives from the work of Professor Philip Bobbitt. *See* Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33

including arguments from precedent, tradition, judicial restraint, and national ethos.[22]

Second, genealogy can provide evidence of the function that a law, rule, or practice performs today by elucidating the function that it originally performed. A genealogy, for instance, may reveal the racist function of a 19th-century law as a way of suggesting that similar laws today serve the same ends. Here, too, information about the genealogy of a law, rule, or practice can advance conclusions relevant to several modalities of constitutional construction, including arguments from text, consequences, and originalism.

Despite genealogy's relevance to constitutional law and discourse, Part III maintains that judges should generally exclude genealogical arguments from their constitutional decisionmaking.[23] The Supreme Court's growing proclivity to invoke genealogy in its decisions should therefore be discouraged. The argument for that conclusion rests on an assessment of the potential costs and benefits of normalizing judicial recourse to genealogy in constitutional law.

Regarding costs, judicial recourse to genealogy will tend to unsettle otherwise-established components of the legal system by undermining laws, rules, and practices that are tainted by a history we now wish to renounce. But that description fits countless laws, rules, and practices in our legal system.[24] Normalizing judicial

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CONST. COMMENT. 145, 179 (2018) ("Since Bobbitt coined the term … 'modalities' has caught on as the standard way to describe the basic forms of argument in constitutional law.").

[22] Commentators have proposed various catalogs of the modalities. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 9 (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987); McConnell, supra note 20, at 1750-86; Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (Spring 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. 642, 652 (2013).

[23] It may initially seem rather strange to say that genealogy is relevant to constitutional law but should nonetheless be suppressed in judicial decisionmaking. But, as Part III explains, many legal rules suppress relevant information on the ground that decisionmakers will misuse the information with sufficient frequency that they will tend to reach better decisions overall by ignoring the information than they will by considering it. *See infra* notes 212-214 and accompanying text.

[24] *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) (observing that "many areas of the law have

recourse to genealogy therefore threatens to undermine the stability and clarity of the law.

Some, however, may view genealogy's destabilizing potential as a feature, rather than a bug. For genealogy's capacity to unsettle entrenched laws, rules, and practices is precisely what allows it to redress persistent forms of injustice. By exposing the ugly history of a statute, precedent, or tradition, for example, genealogy can undermine legal rules that continue to harm minorities and that wouldn't otherwise be vulnerable to judicial challenge. The affirmative case for genealogical argument is thus based on the belief that judges can—and will—use it to make the legal system more just overall or less subordinating to marginalized groups. And to the extent that achieving those goals causes a bit of disruption or upsets a few expectations, some may think genealogy's redeeming potential is well worth the cost.

It's far from clear, however, that judicial recourse to genealogy will ultimately make the legal system more just or less subordinating. That's because the historical evidence relevant to the genealogy of a law, rule, or practice is likely to be distortive, inflammatory, and burdensome when considered by judges laboring under constraints of time, information, and expertise.[25] In practice, that means that judges evaluating genealogical arguments will err frequently—sometimes by failing to eradicate discriminatory taint where it exists and sometimes by needlessly destabilizing an area of the law where it doesn't. Moreover, in many cases the benefits that genealogy promises can be obtained by more familiar modes of argument and sources of evidence, further diminishing the value that genealogy ostensibly adds to constitutional adjudication.

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historically been used to perpetuate racial discrimination"). For sources purporting to demonstrate the racist origins of a particular law, rule, or practice, see *infra* notes 220–222.

[25] This Article thus contributes to academic discussions about courts' capacity to answer certain kinds of questions, their ability to address certain kinds of problems, and their advantages vis-à-vis other decisionmaking institutions. 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); 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. (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).

I. GENEALOGY IN CONSTITUTIONAL LAW

In recent years, genealogy has become increasingly common in constitutional law and discourse. This Part documents that development. Section I.A provides a more robust definition of genealogy and distinguishes it from several other forms of argument that use historical evidence to advance conclusions about constitutional law. Section I.B then collects numerous examples of genealogical arguments advanced by judges and commentators from across the ideological spectrum, in a wide range of settings, and on a wide range of constitutional issues. The aim throughout is to demonstrate the existence of an emerging form of constitutional argument, rather than assess the success, vel non, of particular examples. Subsequent parts will provide analytic tools for making such assessments.

A. Defining Genealogy

As noted, genealogies are historical narratives that seek to cast doubt on their objects by revealing their shameful ancestral origins.[26] They involve three key claims. First, they posit that some current social phenomenon can be causally traced to a distinct historical phenomenon (or set of phenomena).[27] Second, genealogies posit that the historical phenomena to which their objects can be traced have an unflattering normative valence—for example, that the historical phenomenon was racist, capricious, unreliable, self-serving, etc.[28] Third, a genealogy concludes that the current phenomenon has the same normative valence as the historical phenomenon. With this account in hand, genealogy can be distinguished from three other forms of historical argument that one regularly encounters in constitutional law and discourse.

First, while both involve "origins," genealogical arguments are different from arguments about original public meaning—that is, the meaning that the public

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[26] *See supra* notes 1–2 and accompanying text.

[27] The relevant causal relationship will sometimes be rather straightforward, as in the case of a doctrinal rule that can be traced through a series of citations back to its source in an earlier judicial decision. But it can also be rather complicated, as in the case of a modern social practice that bears a strong resemblance to historical social practices. Any genealogical argument, however, will seek to trace its object to something distinct from the object itself.

[28] As noted, genealogy can also be used to vindicate its object by revealing that its ancestral origin was reliable, virtuous, etc. But this Article focuses on genealogies of the critical variety. *See supra* note 2.

ascribed to a provision of written law when it was ratified or enacted.[29] That's because arguments concerning original public meaning don't rely on normative judgments about the past. They don't rely on the premise that the original meaning of some law was good or bad in some way; they merely seek to show what the original meaning *was*.

Second, genealogical arguments are different from arguments about what lawmakers believed a law would accomplish or their reasons for enacting it. Here again, that's because arguments from original intent don't involve a normative judgment about the past; they merely seek to demonstrate what the original intent *was*. Moreover, arguments from original intent don't inherently seek to trace a current law, rule, or practice to a distinct historical phenomenon; rather, they seek to demonstrate what those who enacted or implemented the *current* law, rule, or practice intended (or what purpose they thought it would achieve).

In some cases, to be sure, the distinction between genealogical and original-intent arguments is blurry. Antidiscrimination doctrine makes a policy's "historical background" an "evidentiary source" for determining its intent or purpose.[30] In cases where little time has passed between a challenged action and its predecessor, an inquiry concerning the law's genealogy will thus overlap substantially with an inquiry into its intent or purpose.[31] Moreover, even in cases where a policy and its predecessor are distant in time, it's sometimes plausible to argue that the original policymaker's intent should be *imputed* to a subsequent policymaker, even if

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[29] *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 3-5 (2015); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269-70 (2017).

[30] *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (setting out a list of factors for determining whether a government action was taken with discriminatory intent in the equal protection context); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (following the *Arlington Heights* framework in the Free Exercise context).

[31] *See* Murray, *supra* note 17, at 1227 (noting that in circumstances where an action and its predecessor are proximate in time, "taint raises the likelihood that a facially neutral [later action] is *in fact* a bad faith attempt to launder an illegitimate [earlier action]"). By contrast, in cases where the relevant law was enacted many years after its predecessors, the intent or purpose behind the predecessor will have little to no probative value in a determination of intent. *See* id. at 1233 (noting that if "taint matters merely as evidence of specific proscribed intent," then "the mere passage of time would render it progressively irrelevant").

the imputation of intent rests on a legal fiction.[32] Despite the substantial overlap in some cases, analyses of original intent and genealogy are nonetheless conceptually distinct.

Third, genealogical arguments are different from arguments that seek to shed critical light on specific provisions of the Constitution by showing that they were motivated by slavery or some other evil. Professors Bruce Ackerman and Erik Jensen, for example, have each argued that the Direct Tax Clause[33] was intended to politically entrench slavery.[34] And Professors Carol Anderson and Carl Bogus have each argued that the Second Amendment had a similar purpose.[35] These criticisms share a family resemblance with genealogical arguments insofar as they rely on normative judgments about the past. The crucial difference, however, is that they merely seek to demonstrate the relevant constitutional provisions' original purposes, rather than tracing the provisions to distinct, historically antecedent phenomena.

B. Objects of Genealogical Inquiry

Having thus defined genealogical argument and distinguished it from several other forms of historical argument, this section canvasses a range of recent examples in caselaw and legal scholarship.

1. Positive Law

In several recent cases, the Supreme Court has considered the genealogy of provisions of positive law that stand in a successor-predecessor relationship with earlier laws enacted with discriminatory intent. In each instance, the argument has

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[32] Professor Eric Fish advances this kind of argument in his critical analysis of the federal crimes of unlawful entry and re-entry. *See* Eric Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022).

[33] U.S. CONST., art. I, § 9.

[34] *See* Erik M. Jensen, *Does 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).

[35] *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).

been that the current law is suspect due to its relationship to an earlier, constitutionally infirm enactment.

The Introduction already mentioned one example—*Ramos v. Louisiana*. As noted, three separate opinions in *Ramos* argued that the white supremacy manifest in Louisiana's 1898 constitutional convention was relevant to the constitutionality of a state constitutional provision ratified in 1974.[36] Writing for the majority, Justice Gorsuch argued that it was relevant because it revealed "the very functions" the rule was "adopted to serve."[37] Similarly, Justice Sotomayor's partial concurrence argued that the law's "legacy of racism" warranted the Court's attention because the state legislature had "never truly grappled with the laws' sordid history."[38] It was therefore unclear to her whether the provision ratified in 1974 law was "free of discriminatory taint."[39] Finally, Justice Kavanaugh concluded that the racist history of Louisiana's law could establish the kind of "special justification" needed to overrule an earlier decision upholding the constitutionality of non-unanimous criminal verdicts.[40]

A second example is Justice Alito's concurring opinion in *Espinoza v. Montana Department of Revenue*.[41] That case involved a Free-Exercise challenge to a Montana constitutional provision barring state-funded scholarships for children attending "sectarian" schools.[42] Although Justice Alito had criticized the *Ramos* majority's use of history, [43] his concurring opinion in *Espinoza* deployed

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[36] *See supra* notes 8-10 and accompanying text.

[37] Ramos, 140 S. Ct. at 1401 n.44.

[38] Id. at 1410 (Sotomayor, J., concurring in part).

[39] Id.

[40] Id. at 1417-18 (Kavanaugh, J., concurring in part) (concluding that the Court should overrule Apodaca v. Oregon, 406 U.S. 404 (1972)).

[41] Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring).

[42] Id. at 2252 (maj. opn.) (quoting MONT. CONST., art. X, § 6(1)).

[43] *See* Ramos, 140 S. Ct. at 1426 (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"). For additional discussion of Justice Alito's criticism of the majority in *Ramos*, see *infra* notes 124-127 and accompanying text.

genealogical reasoning expressly.[44] While the operative provision of Montana's constitution was ratified in the early 1970s,[45] Justice Alito provided a detailed account of its "origin" in the 1889 Montana Constitution.[46] That constitution, he argued, was the product of "virulent prejudice against immigrants, particularly Catholic immigrants."[47] And that history was relevant to the Free Exercise claim in *Espinoza* because the people of the state hadn't "'confront[ed]' the provision's 'tawdry past in reenacting it.'"[48] Montana's constitution was therefore tarnished by the bigotry of its 19th-century predecessor.

A final example is Professor Dorothy Roberts's argument that many aspects of modern criminal law and administration can be traced to "roots in racialized chattel slavery."[49] She argues, among other things, that modern police departments are the "descendants" of slave patrols;[50] that modern surveillance techniques functionally replace Reconstruction-era vagrancy and anti-loitering laws;[51] that mass incarceration of African Americans has functionally replaced the Slave and Black

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[44] *See* Espinoza, 140 S. Ct. at 2268 (Alito, J., concurring) ("*Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.").

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

[46] Id. at 2267.

[47] Id. at 2268.

[48] Id. (quoting Ramos, 140 S. C. at 1410 (Sotomayor, J., concurring in part)).

[49] *See* Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 20 (2019). For other scholarship linking the modern criminal justice system to slavery and Jim Crow, 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); and Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022).

[50] Roberts, *supra* note 49, at 21. There's an ongoing scholarly debate about the accuracy of tracing modern police forces to slave patrols. *Compare* ALEX S. VITALE, THE END OF POLICING 45-46 (2017); *and* Ben Brucato, *Policing Race and Racing Police: The Origins of U.S. Police in Slave Patrols*, 47 SOC. JUST. 115 (2020) *with* Dan McLaughlin, *No, Modern Policing Did Not Originate with Slavery*, NAT'L. REV. (Apr. 21, 2021), https://tinyurl.com/yw5zx7w6; Jonah Goldberg, *The Problem with Claiming that Policing Evolved from Slave Patrols*, AMERICAN ENTERPRISE INSTITUTE (June 19, 2020), https://tinyurl.com/yc2fej3t; *and* Hannah E. Meyers, *No, US Policing Doesn't Trace Its Roots to Heinous Slave Patrols*, MANHATTAN INST. (May 17, 2021), https://tinyurl.com/484pv83y.

[51] Roberts, *supra* note 49, at 21 (citing Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1700, 1714 (2019)).

Codes;[52] and that capital punishment "has its roots in slavery" and "reinforce[s] the subordinated status of black people."[53] In each of these examples, Roberts views 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 punishment system constitute "badges and incidents of slavery"[54] and thus either violate section 1 of the Thirteenth Amendment or empower Congress to enact appropriate legislation under section 2.[55]

2. Doctrinal Rules

The justices' genealogical inquiries have also aired the Court's own dirty laundry, exposing the stains of racism and xenophobia in its caselaw. Justice Gorsuch has been particularly enamored with this technique for re-evaluating the force of established doctrinal rules. Consider three recent examples.

In *Gamble v. United States*, a defendant had mounted a Double Jeopardy challenge to his federal conviction on the ground that he had previously been convicted for the same offense in state court.[56] The Court rejected that challenge under the "dual-sovereignty" doctrine, which allows the federal government to

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[52] 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 defined, confine, and control African Americans").

[53] Roberts, *supra* note 49, at 38, 41; *see also* 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. 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://tinyurl.com/bdz485sx (arguing that the history of the death penalty "is utterly inseparable from white supremacy").

[54] The phrase "badges and incidents of slavery" originates in *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

[55] Roberts, *supra* note 49, at 119.

[56] Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).

prosecute a defendant for the same conduct for which she was prosecuted in state court, and vice versa.[57] Justice Gorsuch, however, refused to follow that precedent. He maintained that the doctrine could be traced to its "first real roots"[58] in the Court's 1852 decision in *Moore v. Illinois*,[59] which had observed that the dual-sovereignty 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."[60] Seizing on this language in *Gamble*, Justice Gorsuch argued that *Moore* "did violence to the Constitution in the name of protecting slavery and slaveowners."[61] And that unseemly genealogy, he concluded, was one reason he needn't follow that precedent.[62]

In its 2022 decision in *United States v. Vaello Madero*, the Court addressed whether the equal-protection component of the Fifth Amendment requires Congress to provide certain public benefits to residents of Puerto Rico to the same extent as residents of the states.[63] *The Insular Cases* provide the established framework for analyzing that question. According to those cases, 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.[64] In *Vaello Madero*, Justice Gorsuch argued that *The Insular Cases* should be overruled because they were based on "ugly racial stereotypes" and "the theories of social Darwinists."[65] On account of the doctrine's origin in this perverse

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57 Id.

58 Id. at 2006 (Gorsuch, J., dissenting).

59 Moore v. Illinois, 14 How. 13 (1852).

60 Id. at 18.

61 Gamble, 139 S. Ct. at 2006 (Gorsuch, J., dissenting).

62 Id. at 2006-07.

63 United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022).

64 *See, e.g.*, Dorr v. United States, 195 U.S. 138, 148-49 (1904); Hawaii v. Mankichi, 190 U.S. 197, 215-18 (1903).

65 Vaello Madero, 142 S. Ct. at 1554 (Gorsuch, J., concurring). In one of *The Insular Cases*, for example, the Court concluded that the Constitution applies only in "contiguous territor[ies] inhabited ... by people of the same race." Downes v. Bidwell, 182 U.S. 244, 282 (1901). And a concurring opinion in that case observed that the United States had a right to acquire and exploit "an unknown island, peopled with an uncivilized race." Id. at 306 (White, J., concurring). Likewise, in *Dorr v. United States*,

ideology, he concluded that the governing doctrinal framework didn't deserve the deference ordinarily afforded to precedent. He therefore refused to follow it.[66]

Finally, in last term's decision in *Haaland v. Brackeen*, which rejected various challenges to the Indian Child Welfare Act,[67] Justice Gorsuch's concurring opinion criticized the doctrine that Congress has "plenary power" to enact legislation related to Native American tribes.[68] According to that doctrine, the Constitution imposes few constraints on the exercise of Congress's power in respect of the Tribes, and exercises of that power are significantly insulated from judicial review.[69] In *Brackeen*, Justice Gorsuch traced the doctrine to the Court's 1886 decision in *United States v. Kagama*,[70] which he argued had been distorted by "the prejudices of the day."[71] The plenary-power doctrine therefore wasn't authoritative.

While Justice Gorsuch's opinions provide particularly colorful examples, genealogical critiques of judicial precedent aren't unique to his jurisprudence. In several cases, Justice Thomas has suggested that some of the Court's Establishment Clause decisions are unworthy of respect because they were motivated by "anti-Catholic hostility."[72] Similarly, Justice Souter's dissent in *Seminole Tribe v.*

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the Court remarked that recognizing a "fundamental" right to a jury trial would have the unintended consequence of guaranteeing that right to "savages." Dorr v. United States, 195 U.S. 138, 148 (1904).

66 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).

67 Haaland v. Brackeen, 143 S. Ct. 1609, 1627-31 (2023).

68 Id. at 1657-58 (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).

69 *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).

70 *See* Brackeen, 143 S. Ct. at 1657 (Gorsuch, J., concurring) (discussing United States v. Kagama, 118 U.S. 375 (1886)).

71 Id. at 1658; *see also* Kagama, 118 U.S. at 384-85 (suggesting that the federal government has total power over "th[e] remnants of a race once powerful, now weak").

72 American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring in the judgment); *see* Espinoza, 140 U.S. at 2266 (Thomas, J., concurring); Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion); *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

Florida argued that a core aspect of the Court's Eleventh Amendment jurisprudence originated in *Hans v. Louisiana*,[73] which was decided as it was to prevent the Court from losing face.[74] The justices have had different reasons for questioning the authority of the Court's earlier decisions. Justice Gorsuch's concerns have been racism, ethnocentrism, and social Darwinism. Justice Thomas's beef was with religious bigotry. And Justice Souter complained about cowardice and self-interest. But in each case the basic form of argument is the same: A judicial doctrine traces to something shameful, insidious, or unreliable and, for that reason, doesn't deserve the respect ordinarily given to precedent.

3. Tradition

The justices have also used genealogy to debunk the authority of traditions.[75] In *City of Chicago v. Morales*, for example, 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 16th-century.[76] In a portion of his opinion joined by Justices Souter and Ginsburg, Justice Stevens didn't question the relevance or existence of that putative tradition, but he concluded the tradition had a troubling "pedigree"[77] and was therefore undeserving of respect. In particular, he noted that the tradition began with the 16th-century "Slavery acts"; that "many American vagrancy laws were patterned" on those laws; that vagrancy laws re-appeared "after the Civil War to keep former slaves in a state of quasi slavery"; and that these

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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'").

[73] Hans v. Louisiana, 134 U.S. 1 (1890).

[74] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 121 (1996) (Souter, J., dissenting). This example is discussed extensively in Barzun, *Impeaching Precedent*, *supra* note 17, at 1629-30, 1638-39, 1650-51.

[75] In constitutional parlance, "traditions" are "longstanding or widespread practices." Girgis, *supra* note 20, draft at 5; *see* McConnell, *supra* note 20, at 1771; Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174.

[76] *See* City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999) (plurality opn.). Justice Thomas's dissent endorsed that argument, concluding that Chicago's ordinance was supported by "[o]ur Nation's history, legal traditions, and practices." Id. at 102 (Thomas, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[77] Id. at 53 n.20 (plurality opn.).

"Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children."[78] The Court thus purported to expose the tradition's reprehensible origin and, in doing so, to show that deference to the tradition was unwarranted.

The same form of argument is evident in the majority opinion in *Espinoza*. As noted, that case involved a Free Exercise challenge to a Montana constitutional provision barring state-funded scholarships for children attending "sectarian" schools.[79] Montana defended its constitution by invoking "a tradition against state support for religious schools," which emerged when more than thirty states adopted such provisions in the late-19th century.[80] The Court in *Espinoza* concluded, however, that the putative tradition was unworthy of respect in part because of its "checkered" history.[81] In particular, the laws constituting the tradition were based on an 1870s proposed amendment to the U.S. Constitution ("the Blaine Amendment") that would have prohibited states from aiding "sectarian" schools. That proposed 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."[82] Moreover, many of the Amendment's state counterparts had a similarly "shameful pedigree."[83] For those reasons, the Court concluded, the "no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[84] Here again, a troubling genealogy stripped a putative tradition of its justificatory force.

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78 Id.; *see also* Dorothy E. Roberts, *Supreme Court Review, Foreword: 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).

79 *See supra* note 42 and accompanying text.

80 Espinoza, 140 S. Ct. at 2258.

81 Id. at 2259. In addition to the argument summarized in the main text, the Court also questioned the existence of the tradition. *See* id. at 2258-59 ("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)).

82 Id. (quoting Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (plurality opn.)).

83 Id. (internal quotation omitted).

84 Id.

Finally, in the coming years we are likely to witness genealogical arguments aimed at debunking putative traditions in the context of firearm regulations. The Supreme Court's recent decisions have recognized "an individual right to keep and bear arms for self-defense," which "presumptively protects" conduct covered by "the Second Amendment's plain text."[85] To defeat that presumption under the test recently announced in *Bruen*, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[86] The Court's test thus looks to the country's longstanding practices to determine whether modern firearm regulations are constitutional.[87]

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."[88] As Patrick Charles explains, "laws restricting the access, ownership, and use of firearms by people of color, both free and enslaved, were commonplace" by the mid-18th century, and they remained prevalent in the South even after the ratification of the Constitution, the Bill of Rights, and the Reconstruction Amendments. [89] For that reason, courts and commentators have recently concluded that some modern firearm regulations can't be justified on traditionalist grounds because the relevant antecedents reflect an insidious past.[90] And several

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85 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2125 (2022).

86 Bruen, 142 S. Ct. at 2126.

87 *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).

88 Winkler, *supra* note 24, at 537-38.

89 Patrick D. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343, 1345-46, 1351-52 (2022); *see also* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 333-48 (1991) (discussing the racist history of firearm regulation in the 18th and 19th 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.").

90 *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. … Otherwise, courts risk laundering past racist restrictions to validate modern burdens on constitutional rights."); United States v. Hicks, No. 21-CR-00060, 2023 WL 164170, at *7 (W.D. Tex. Jan. 9, 2023) (declining to rely on historical laws "based on race,

amici have advanced a similar argument in *United States v. Rahimi*—the Second Amendment case now pending before the U.S. Supreme Court.[91]

4. Social Practices

The justices haven't only genealogized sources of law—constitutions, legislation, traditions, precedents, and the like—but also various social practices to which the law is applied. Consider, for example, Justice Thomas's opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*[92] *Box* was a pre-*Dobbs*[93] case in which the Court was asked to determine whether an Indiana law barring certain trait-selective abortions was unconstitutional.[94] Although he concurred in the Court's decision to deny certiorari on that issue,[95] Justice Thomas wrote separately to explain his view that the Indiana law "promote[d] a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[96] In support of that claim, he traced the origins of modern trait-selective abortions to the eugenics movement.[97] He noted, for instance, that several of Planned Parenthood's leaders supported birth control and abortion for "eugenic reasons."[98] He then linked that history to the present, arguing that abortion is a

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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 .... suppress the ability of freedmen to own guns following the Civil War").

91 *See* Brief for National African American Gun Association, Inc. as Amicus Curiae Supporting Respondent, United States v. Rahimi (No. 22-915); Brief for Professors of Second Amendment Law, The Second Amendment Law Center, and the Independence Institute as Amici Curiae Supporting Respondent, United States v. Rahimi (No. 22-915); Brief for Professor Nicholas J. Johnson as Amicus Curiae Supporting Respondent, United States v. Rahimi (No. 22-915).

92 Box v. Planned Parenthood of Indiana and Kentucky, Inc., 139 S. Ct. 1780 (2019).

93 *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).

94 Id. at 1781.

95 Id. at 1784 (Thomas, J., concurring).

96 Id. at 1783.

97 Id. at 1787 ("From the beginning, birth control and abortion were promoted as means of effectuating eugenics.").

98 Id. at 1787 (discussing the views of Planned Parenthood President Alan Guttmacher); *see* id. at 1784 (noting that Planned Parenthood founder Margaret Sanger had argued that birth control was

"disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics" when it's paired with modern medical technologies.[99] For him, recognizing a constitutional right to a trait-selective abortion would therefore "constitutionalize the views of the 20th-century eugenics movement."[100] Here again, the argument's form is genealogical. Justice Thomas sought to impugn the conduct of today's abortion seekers and providers by connecting that conduct to an unseemly past.[101]

A second example is the Court's 2003 decision in *Virginia v. Black*.[102] The defendants in that case argued that a Virginia statute that criminalized cross burning violated the First Amendment because it targeted conduct based on its "distinctive message."[103] That argument was based in part on one of the Court's earlier decisions, which had held that a different statute criminalizing cross burning was unconstitutional.[104] In *Black*, however, the Court held that the Virginia statute was constitutional to the extent it criminalized "true threats."[105] To explain how burning a cross can constitute a threat, Justice O'Connor connected cross burning to

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"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))).

99 Id. at 1790.

100 Id. at 1792; *see also* Brief for African-American Organization et al. as Amici Curiae Supporting Petitioner, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) at 14-21 (arguing that proponents of liberal access to abortion have been motivated by a desire to suppress the size of the African-American population).

101 Both sides of the constitutional abortion debate have sought to characterize their opponents' position as a racist instrument of population control. In *Dobbs*, the American Historical Association filed an amicus brief arguing that mid-19th century bans on abortion were propagated for "ethnocentric" reasons. Brief for American Historical Ass'n & Organization of American Historians as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) at 21. In particular, the architect of those bans, Horatio Storer, warned that "foreign immigrants' large families were poised to overwhelm the white Protestant 'American' population" because white, Protestant women were more likely to seek abortions than Catholic immigrants. Id. at 22. The brief thus sought to undermine the legislative antecedents of the Mississippi law at issue in *Dobbs* by revealing their ethnocentric purpose.

102 Virginia v. Black, 538 U.S. 343 (2003).

103 Id. at 347 (quotation omitted).

104 *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992).

105 Black, 538 U.S. at 359-60 (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

the history of the Ku Klux Klan. The "genesis" of cross burning in the United States, she explained, was the 1905 publication of Thomas Dixon's book, *The Clansmen*, which depicted the Ku Klux Klan burning crosses to celebrate the execution of former slaves.[106] After that book's publication, the Klan began burning crosses as a "tool of intimidation and a threat of impending violence."[107] Justice O'Connor then provided numerous historical examples of the Klan using burning crosses to intimidate racial minorities, Catholics, and Jews.[108]

In both examples, genealogy was used to reveal the true character of a social practice, which would, in turn, affect the government's constitutional authority to regulate the practice. Justice Thomas hoped to establish the state's constitutional authority to regulate trait-selective abortions more forcefully by tying them to the history of eugenics. Similarly, Justice O'Connor attempted to demonstrate a state's authority to prohibit some forms of expressive conduct by showing that, in some circumstances, cross burning is unworthy of the level of constitutional protection ordinarily given to speech.[109]

5. Interpretive Practices

Genealogy can even be used to undermine an interpretive methodology, such as constitutional originalism. Professor Calvin TerBeek has recently argued that constitutional originalism has "uncomfortable racial origins."[110] According to the standard account, the theory of constitutional originalism was initially developed in the foundational work of then-Professor Robert Bork[111] and Professor Raoul

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106 Id. at 353.

107 Id. at 354.

108 *See* id. at 354-56.

109 *See* Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits*, 93 GEO. L.J. 575, 576 (2005) ("Justice O'Connor explained that in light of the historical meaning of cross burning, the practice can be proscribed in a manner consistent with the First Amendment.").

110 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).

111 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

Berger[112] in the 1970s.[113] Based on archival research, however, TerBeek maintains that originalism emerged in conservative intellectual circles well before the publication of Bork's and Berger's scholarship and "grew directly out of resistance to" *Brown v. Board of Education*.[114] In particular, TerBeek traces originalist theory to several mid-20th-century thought leaders,[115] who "viewed *Brown* as an affront" to conservatism.[116] According to TerBeek, these thinkers eagerly seized on the idea of original intent as an "ostensibly non-racialized first constitutional principle to delegitimize *Brown*."[117] While TerBeek refrains from drawing any normative conclusions about the role of originalist methodology in constitutional interpretation, it would be easy for critics of originalism to use his research in support of an argument that judges shouldn't use originalist methodology in constitutional adjudication.[118]

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112 *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

113 *See, e.g.*, 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).

114 TerBeek, *supra* note 110, at 832.

115 *See* JAMES KILPATRICK, THE SOVEREIGN STATES 262-63, 264, 268-69, 270-72 (1957) (invoking the framers' "intent" and "understanding" in favor a segregationist vision of the Constitution); JAMES 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 35-36 (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., at 4 (January 25, 1956) (arguing that *Brown* was "patently counter to the intent of the Constitution"); L. BRENT BOZELL, THE WARREN REVOLUTION 55-56 (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, THE CASE FOR THE SOUTH 47, 96-99, 141 (1962) (arguing that *Brown* "was a misconstruction of the intent of the Founders"); *see also* Alfred Avins, *Literacy Tests, the Fourteenth Amendment, and District of Columbia Voting: The Original Intent*, 4 WASH. UNIV. L.Q. 429, 462 (1965) ("[I]t was not the original intent of the framers of the fourteenth amendment to forbid English-language or other literacy tests."); Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966) (arguing that anti-miscegenation statutes were consistent with the original intent of the Fourteenth Amendment).

116 TerBeek, *supra* note 110, at 821.

117 Id. at 822.

118 Indeed, in a recently published essay citing TerBeek, Professor Reva Siegel argues that the "history-and-tradition method" that the Court deployed in *Dobbs* emerged from efforts to resist the judgment

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The foregoing demonstrates that genealogy is rapidly becoming a fixture of the Court's constitutional cases and legal scholarship. That invites an inquiry into genealogy's status within constitutional law and discourse. At first blush, genealogy's repeated appearances in the Court's opinions may suggest that genealogy has recently become, or is rapidly becoming, a distinct modality of constitutional construction.[119] If so, then genealogy should be added as a new item to lists of the modalities, alongside arguments from text, structure, precedent, and so forth. As the next Part explains, however, some judges and commentators believe that genealogical arguments are generally fallacious and, for that reason, should be categorically excluded from constitutional law. On this view, the mere fact that some judicial opinions have deployed genealogical arguments is no more telling than the fact that some judicial opinions engage in circular reasoning, affirm the consequent, or commit any number of other logical mistakes. The next Part will address these competing views. It will ultimately stake out a middle path, but one that is much closer to the former view than to the latter.

II. GENEALOGY'S RELEVANCE TO CONSTITUTIONAL LAW

In 1933, the distinguished philosopher of science Hans Reichenbach was dismissed from his post at the University of Berlin on account of his Jewish ancestry.[120] While in exile in Turkey, Reichenbach formulated a distinction aimed at countering the Nazis' psychotic obsession with genealogy.[121] In particular, he

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in *Brown*. *See generally* 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 (2023).

[119] Professor Charles Barzun, for one, has suggested that genealogy "may now be a legitimate modality." Charles Barzun, *The Constitution and Genealogy*, BALKINIZATION (July 6, 2020), https://tinyurl.com/3pxeffn2. It's unclear, however, whether Barzun meant that genealogy has become a legitimate way of advancing conclusions within constitutional law or that genealogy has become a distinct subject of argument in constitutional law, such as text, structure, history, precedent, and so forth. The main text agrees with the former claim but not with the latter. *See infra* notes 206–210 and accompanying text.

[120] *See* RONALD N. GIERE, SCIENCE WITHOUT LAWS 13 (1999). 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*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 23, 2021), https://plato.stanford.edu/entries/reichenbach/.

[121] *See* Amia Srinivasan, *Genealogy, Epistemology, and Worldmaking*, 119 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 127, 130 (2019) ("Reichenbach appears to have been motivated to draw this distinction … to counter the Nazis' condemnation of theories of 'Jewish origin'"); Queloz, *supra* note 2,

distinguished a theory's "context of discovery" from its "context of justification."[122] Whether a theory was of "Jewish origin," Reichenbach insisted, was simply irrelevant to whether it was correct. Writing in the same period, Morris Cohen and Ernest Nagel coined the term "genetic fallacy"[123] to refer to the mistake that Reichenbach had identified—the mistake of confusing an idea's epistemic standing with its origin.

In *Ramos*, Justice Alito raised much the same objection to the Court's genealogical reasoning as Reichenbach did to the Nazis' treatment of theories of "Jewish origin." The Court, recall, criticized Louisiana's non-unanimous-verdict rule on account of its white supremacist provenance.[124] But Justice Alito thought the law's ancestral origin had nothing to do with the Sixth Amendment question presented.[125] In his view, the majority had "contribut[ed] to the worst current trends"[126] by resorting to "ad hominem rhetoric," which "attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents."[127] Generalizing from Justice Alito's dissent, a skeptic may object to the use of genealogy in constitutional law on the ground that the ancestral origin of a law, rule, or practice is simply irrelevant to its constitutionality.

This Part addresses the validity of genealogical arguments and their relevance to constitutional law. It explains that genealogy can avoid the genetic fallacy when

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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 HANS REICHENBACH, EXPERIENCE AND PREDICTION: AN ANALYSIS OF THE FOUNDATIONS AND THE STRUCTURE OF KNOWLEDGE 6-7 (1938) (Phoenix Books ed. 1961).

123 *See* MORRIS R. COHEN & ERNEST NAGEL, INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 388 (1934).

124 *See supra* notes 8–10 and 36–40 and accompanying text.

125 *See* Ramos, 140 S. Ct. at 1426 (Alito, J., dissenting).

126 Id. at 1427.

127 Id. at 1426. Many logic texts characterize the genetic fallacy "as a form of *ad hominem* argument." Margaret A. Crouch, *A "Limited" Defense of the Genetic Fallacy*, 24 METAPHILOSOPHY 227, 230 (1997); *see* K.C. Klement, *When is Genetic Reasoning Not Fallacious?*, 16(4) ARGUMENTATION 383, 384 (2002) (noting that the genetic fallacy "is often subsumed under the ad Hominem fallacy because ad Hominem argumentation often involves scrutiny of the reasons or motives that may have caused a person to form a belief or advance an argument").

it's used either to undermine assertions of authority or to reveal the function of a law, rule, or practice. These uses of genealogy are also relevant to constitutional law because they can advance conclusions relevant to several widely accepted modalities of constitutional construction, including arguments from text, precedent, tradition, judicial restraint, ethos, consequences, and originalism. Although genealogy isn't a freestanding modality of constitutional construction, it's nonetheless an appropriate resource for advancing conclusions within and about the modalities.

A. Undermining Authority

The first way that genealogy can avoid the genetic fallacy is by undermining assertions of authority. To understand this point, it will be helpful to rehash the conventional wisdom about the nature of authority. An authority is something that provides a "content-independent" reason for action to the person to whom it's directed.[128] It provides, in other words, a reason that's unrelated to the nature of the action for which it's a reason. Clients, for instance, often treat their attorneys as authorities on legal matters. If a lawyer advises her client to accept a plea offer, the client will often treat that advice as a reason to accept the offer, even if the client doesn't fully comprehend the legal and strategic considerations driving the lawyer's advice. For the client, the force of that reason thus depends on its *source* (advice from a legal professional) rather than its *content*.

One reason for treating something (or someone) as an authority is the belief that the putative authority's judgment is likely to be sound. A putative authority's force can thus be undermined by discovering a reason to believe that the authority is untrustworthy. For instance, while a client would ordinarily trust her attorney's advice, she will have a reason to question that advice, if she learns that the lawyer has failed to disclose a significant conflict of interest. Genealogy can thus undermine assertions of authority because it can provide reasons to believe that ultimate

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[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, 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).

source of an authority is untrustworthy.[129] And this insight is relevant to constitutional law because assertions of authority are pervasive in constitutional law (as in law more generally). Indeed, genealogy's capacity to undermine assertions of authority allows it to advance conclusions relevant to at least four widely accepted modalities of constitutional construction.

1. Precedent

Precedential arguments maintain that courts should decide present and future cases according to rules used to decide earlier cases.[130] Such arguments make implicit assertions of authority because they require a court to treat the fact that an earlier case held *X* as a content-independent reason to hold *X* in similar cases—that is, as a reason to hold *X* regardless of the earlier case's rationale.[131] That's why the mere fact that an earlier case may have been wrongly decided can't "by itself justify scrapping settled precedent."[132] If it could, then a later court would fail to treat the earlier case as an authority. As in the case of deference to authority more generally, "epistemic humility" is one rationale for treating judicial precedents as authorities.[133] Since judges typically have no specific reason to believe that their judgment is superior to that of their predecessors, it would be an "act of

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[129] *See* GARY GUTTING, FOUCAULT 50 (2005) ("Genealogical critique will avoid the genetic fallacy as long as it is directed at efforts to support established authorities on the basis of their origin."); Matthieu Queloz, *How Genealogical 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 construction, see, for example, Fallon, *supra* note 22, at 1202; McConnell, *supra* note 20, at 1763; and BOBBITT, CONSTITUTIONAL FATE, *supra* note 22, at 39.

[131] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989). There are, of course, uses of precedent that don't purport to be binding under the doctrine of stare decisis. For instance, courts typically regard only an earlier case's holding, and not its dicta, as binding. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1552 (2020). The main text, however, focuses on precedential arguments that invoke binding precedent.

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

[133] Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4 (2012).

intellectual hubris"[134] not to give their predecessors' judgments some measure of deference.

The foregoing thus makes clear how genealogy is relevant to precedential argument. As Professor Charles Barzun has argued, genealogy can be used to show that the source of a doctrinal rule is unworthy of respect.[135] In *Brackeen*, for example, Justice Gorsuch maintained that the Court should abandon the plenary-power doctrine in part because its origin—*United States v. Kagama*—reflected "the prejudices of the day" rather than a good-faith reading of the Constitution's "text and original meaning."[136] And much the same can be said about his opinions in *Gamble*[137] and *Vaello Madero*,[138] about Justice Thomas's treatment of various Establishment Clause precedents in *American Legion*,[139] and about Justice Souter's discussion of *Hans* in *Seminole Tribe*.[140] In each instance, a justice sought to convince his reader that a doctrinal rule had a shameful origin and was therefore unworthy of deference in future cases.[141]

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[134] DAVID A. STRAUSS, THE LIVING CONSTITUTION 41 (2010); *see also* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 692 (1994) (advocating judicial doctrine that "allows the judge to tap into a cumulative wisdom that transcends his own rationality").

[135] *See* Barzun, *Genetic Fallacy*, *supra* note 19, at 106-07; Barzun, *Impeaching Precedent*, *supra* note 19, at 1639; *see also* Ahilan Arulanantham, *Reversing Racist Precedent*, 112 GEO. L.J. (forthcoming 2024) (draft at 5) (arguing that judicial decisions that were motivated by racial animus should be stripped of their precedential force because they violate equal protection).

[136] Haaland v. Brackeen, 143 S. Ct. 1609, 1658 (2023) (Gorsuch, J., concurring) (discussing United States v. Kagama, 118 U.S. 375 (1886)).

[137] *See* Gamble, 139 S. Ct. at 2006 (Gorsuch, J., dissenting).

[138] *See* Vaello Madero, 142 S. Ct. at 1554 (Gorsuch, J., concurring).

[139] *See* American Legion, 139 S. Ct. at 2097 n.3 (Thomas, J., concurring in the judgment).

[140] *See* Seminole Tribe, 517 U.S. at 121 (Souter, J., dissenting).

[141] Professor Melissa Murray suggests a slight variation on this rhetorical strategy. According to Murray, Justice Thomas's opinion in *Box* implies that the Court in *Roe* was ill-informed about an important set of facts relevant to abortion practices. In particular, Justice Thomas invoked the abortion movement's genealogy to show that "the *Roe* Court failed to fully appreciate the racial dynamics and underpinnings of abortion." Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2030 (2021). By suggesting that the *Roe* Court was unaware of the abortion movement's origin, Murray argues, Justice Thomas sought to undermine respect for *Roe* as an authoritative precedent. After all, if one has reason to think that an earlier court

Two caveats about this use of genealogy are worth briefly mentioning. First, while genealogy can undermine the epistemic rationale for treating an earlier case as an authority, it doesn't undermine other possible rationales. A judge, for example, could believe that she should treat precedents as authorities (even when they have insidious origins) because doing so helps the legal system achieve values associated with the rule of law, such as consistency and stability.[142] Second, doctrinal rules may be supported by multiple lines of cases that have different origins, rather than a chain of authority that grew out of a single case. The dual-sovereignty doctrine, for example, arguably rests not only on *Moore v. Illinois* (the 1852 decision that Justice Gorsuch criticized in *Gamble*[143]) but also on subsequent cases that didn't rely on *Moore*.[144] And a genealogy that subverts one chain of authority doesn't necessarily subvert all chains of authority.

2. Tradition

Arguments from tradition maintain that constitutional disputes should be decided in accordance with longstanding practices.[145] Traditionalist arguments make implicit assertions of authority because they treat the longstanding practices of various actors in our constitutional system as authoritative directives entitled to deference. In *Noel Canning*, for instance, the political branches' longstanding practice of allowing Presidents to unilaterally fill vacancies that precede a Senate

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was unaware of some critical fact, then one may have reason to doubt the trustworthiness of its judgment.

142 *See* Barzun, *Impeaching Precedent*, *supra* note 17, at 1669. For more on genealogy's relationship to rule-of-law values, see *infra* notes 223–229 and accompanying text.

143 *See supra* note 61 and accompanying text.

144 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 Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847), and Southern Ry. Co. v. R.R. Com. Indiana, 236 U.S. 439(1915). For cases that rely on *Lanza*, rather than *Moore*, see 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).

145 For sources identifying traditionalist argument as a modality of constitutional construction, see McConnell, *supra* note 20, at 1771-75; Balkin, *Uses of History*, *supra* note 22, at 660; and BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 22, at 18 (subsuming traditionalist argument under the heading of "doctrinal argument" but nonetheless recognizing it as a modality).

recess was treated as a reason to allow that practice to continue.[146] And the force of that reason derived from the mere fact that such a practice *existed*, not from the belief that the practice reflected the best understanding of the separation of powers.

As in the case of judicial precedent, one reason for treating traditions as authorities is the belief that they reflect "an accumulated fund of wisdom and experience" and that it would be "presumptuous" to believe that one could "replace this fund using [one's] own intellectual resources."[147] Genealogy can thus be used to undermine a tradition's authority by showing that it sprang from impulses we now wish to reject, rather than the collective wisdom of generations past. In *Espinoza*, for instance, the Court refused to treat a tradition against providing state funding to "sectarian" institutions as authoritative because it emerged from "pervasive hostility to the Catholic Church and to Catholics in general."[148] Similarly, in *Morales*, the Court refused to respect a tradition of anti-loitering laws because those laws grew out of slavery and reflected anti-black racism.[149]

3. Judicial Restraint

Arguments from judicial restraint posit that in some cases courts should defer to the constitutional judgments of other political institutions.[150] They thus make implicit assertions of authority because they require courts to treat the judgments of other institutions as content-independent reasons for deciding cases consistent with those judgments. Genealogies can advance conclusions relevant to this modality either be heightening or lowering the level of deference that another policymaker's judgments will receive.

In some cases, genealogy can be used to defeat the ordinary presumption that political institutions have been faithful to the Constitution and thus to show that a law is undeserving of the deference that similar laws or actions would receive. Professor Kerrel Murray, for example, has argued that policies with discriminatory

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146 *See* Noel Canning v. NLRB, 573 U.S. 513, 533 (2014).

147 Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1056 (1990).

148 Espinoza, 140 S. Ct. at 2259 (quoting Helms, 530 U.S. at 828-29 (plurality opinion)).

149 *See supra* notes 77-78 and accompanying text.

150 *See* McConnell, *supra* note 20, at 1746 (identifying judicial restraint as a distinct approach to constitutional construction).

genealogies should be subject to a searching form of judicial review in which the government bears the "burden of production" to demonstrate a discriminatory taint's "extirpation."[151] Under existing law, courts typically apply a rational-basis standard of review in cases where a challenged government action doesn't evince an intent to discriminate on a prohibited basis.[152] That highly deferential standard requires courts to uphold a challenged action so long as it is "rationally related to a legitimate [government] interest,"[153] whether real or imagined. Murray's proposed decision rule would thus diminish the deference (or heighten the scrutiny) that political institutions ordinarily receive.

Murray argues, for example, that federal statutory provisions that criminalize unlawful entry and re-entry into the United States should be subject to heightened scrutiny.[154] Those statutes were first enacted as part of the Undesirable Aliens Act of 1929, whose legislative history evinces overwhelming evidence of unlawful discriminatory intent.[155] Although Congress has re-enacted and amended those

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[151] Murray, *supra* note 17, at 1237.

[152] *See* Washington v. Davis, 426 U.S. 229, 339 (1976); Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979). Professor Murray argues that taint can "be understood as a uniquely justified exception to the normally obtaining decision rules in antidiscrimination cases," Murray, *supra* note 17, at 1234, but he also argues that his proposed decision rule is consistent with existing precedent, id. at 1234-35.

[153] *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam). In practice, courts virtually never hold laws unconstitutional when applying that test. There are exceptions, of course. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013); Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). But the infrequency of the exceptions demonstrates the extent to which rational-basis review is highly deferential to political institutions. For an insightful analysis of the rare cases in which rational-basis review has "bite," see Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015).

[154] 8 U.S.C. §§ 1325, 1326 (2020). Numerous defendants have recently challenged their convictions for these crimes on the ground that the statutes establishing those crimes are marred by a history of racial animus towards Latin American immigrants. *See, e.g.*, United States v. Hernandez-Lopez, 583 F. Supp. 3d 815 (S.D. Tex. 2022); United States v. Lucas-Hernandez, 2022 WL 1556161 (S.D. Cal. May 17, 2022); United States v. Maurico-Morales, 2022 WL 99996 (W.D. Okla. Jan. 10, 2022); United States v. Sifuentes-Felix, 2022 WL 293228 (D. Colo. Feb. 1, 2022).

[155] As Professor Eric Fish has explained, that Act's sponsors "sought to preserve the purity of the white race by preventing Latin American immigrants from settling permanently in the United States." Fish, *supra* note 32, at 1051. They "described Latin American immigrants as 'mongrelized,' 'peons,' 'degraded,' and 'mixed blood.'" Id. And they "held hearings where experts in eugenics testified about Latin Americans' undesirable racial characteristics. They gave speeches about the need to protect American blood from contamination." Id.

provisions several times since 1929,[156] their basic content has remained the same, and Congress hasn't explicitly stated non-discriminatory reasons for maintaining those provisions in their original form.[157] Accordingly, Professor Murray concludes that the laws suffer from discriminatory taint, which deprives Congress of the ordinary presumption of constitutional fidelity. As this example illustrates, genealogy can thus be used to undermine the law's ordinary assumption that the constitutional judgments of political institutions should be treated as authoritative (at least when they do not evince discriminatory intent).

In other cases, genealogy can be used to show that a law or action deserves deference that it ordinarily wouldn't receive. That's because genealogy can be used to undermine social practices that may otherwise fall within the ambit a protected constitutional right. In revealing the insidious origins of those practices, genealogy can be used to justify the government's authority to regulate them more forcefully. Recall, for example, the Court's decision in *Virginia v. Black*, which upheld a Virginia statute that criminalized cross burning with intent to threaten or intimidate.[158] While the Court had previously held that a city ordinance criminalizing cross burning was an unconstitutional content-based restriction on speech,[159] the Court's genealogy of cross burning in *Black* helped justify the conclusion that the Virginia statute could be upheld under the established exception for "true threats."[160] The Virginia legislature's decision to criminalize threatening uses of burning crosses was thus entitled to a measure of deference that regulations of expressive conduct ordinarily wouldn't receive.

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156 *See* id. at 1098.

157 *See* Rios-Montano, 2020 WL 7226441, at *5–6 (noting that the reenactments of the relevant statutory provisions have not addressed the risk of perpetuating the effects of earlier unlawful discrimination).

158 *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003).

159 *See* R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992).

160 Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam). *See* Black, 538 U.S. at 354 (noting that "the Klan used cross burnings as a tool of intimidation and a threat of impending violence").

4. Ethos

Ethical arguments maintain that constitutional disputes should be resolved in ways that are most congruent with the "character ... of the American polity."[161] Although many commentators perceive this form of argument in the Court's decisions, its "metes and bounds have long been obscure."[162] One common strategy for identifying the national ethos, however, is to appeal to the authority of national heroes and other honored figures.[163] Many judicial opinions, for example, recite the founders' views, even when their views aren't probative of original intent or original public meaning. These recitations, Professor Jamal Greene explains, aren't being used as "reasonable views about the meaning of words" but are used instead "because the drafters carry authority in narratives of American identity."[164] And this form of argument isn't limited to figures from the founding generation. Judicial opinions have invoked the ethical authority of honored figures throughout American history, such as Abraham Lincoln,[165] Frederick Douglass,[166] and Susan B. Anthony.[167] Ethical arguments of this form implicitly rely on the authority of honored figures to identify the nation's character. For that reason, genealogy can be used to undermine them.

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[161] BOBBITT, CONSTITUTIONAL FATE, *supra* note 22, at 93-119; *see* 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).

[162] Greene, *supra* note 22, at 1443.

[163] *See* Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1697 (2012); Balkin, *Uses of History*, *supra* note 22, at 652-53.

[164] Greene, *supra* note 163, at 1697.

[165] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 224-25 (1995) (quoting President Lincoln's First Inaugural Address on an issue of the separation of powers); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 (1952) (Clark, J., concurring in the judgment) (quoting Letter of April 4, 1864, to A. G. Hodges, *in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN (Nicolay and Hay ed. 1894), at 66).

[166] *See, e.g.*, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 393 (2023) (Jackson, J., dissenting) (quoting *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, *in* 4 THE FREDERICK DOUGLASS PAPERS 68 (J. Blassingame & J. McKivigan eds. 1991)); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 446 (1968) (Douglas, J., concurring) (quoting Frederick Douglass, *The Color Line*, THE NORTH AMERICAN REVIEW, June 1881, 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 343-344 (1955)).

[167] *See* Texas v. Johnson, 491 U.S. 397, 439 (1989) (Stevens. J., dissenting) (invoking Susan B. Anthony).

Consider, for example, arguments appealing to the ethical authority of Justice John Marshall Harlan. Harlan has been called "The Great Dissenter"[168] on account of his influential (and at times prescient) dissents in *The Civil Rights Cases*,[169] *Plessy v. Ferguson*,[170] and *Downes v. Bidwell*.[171] One frequently encounters briefs and judicial opinions claiming allegiance to Justice Harlan's ethical vision.[172]

Those claims are thus vulnerable to the objection that Justice Harlan was no moral visionary. According to a recent opinion in the *New York Times* by Jamelle Bouie, Justice Harlan is more accurately described as a "sophisticated defender of white racial dominance" than he is an "anti-racist."[173] That characterization of Harlan's relationship to race, Bouie argues, in supported by his status as a former slave owner, by his opposition to the Reconstruction Amendments as a young man, and by his jurisprudence.[174] In a case decided three years after he penned his memorable dissent in *Plessy*, for example, Justice Harlan voted to "uphold a system of school segregation that taxed Black families for the exclusive benefit of white ones)."[175] Moreover, in *Plessy itself*, Harlan wrote that the "white race" is the "dominant race in this country .... in prestige, in achievements, in education, in wealth, and in power."[176] And so "it will continue to be for all time," Harlan

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168 PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO (2021).

169 The Civil Rights Cases, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

170 Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

171 Downes v. Bidwell, 182 U.S. 244, 375-91 (1901) (Harlan, J., dissenting).

172 *See, e.g.*, Students for Fair Admissions, 600 U.S. at 230 (quoting Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting)); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (same); Parents Involved in City. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (same); McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (same); Vaello Madero, 142 S. Ct. 1539, 1555 (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) (same).

173 *See* Jamelle Bouie, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. TIMES (July 7, 2023), https://tinyurl.com/yx74en2x.

174 Id.

175 Id.

176 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

thought, so long as "it remains true to its great heritage and holds fast to the principles of constitutional liberty."[177] According to Bouie, Harlan's disagreement with the majority in *Plessy* is thus merely a "practical disagreement," rather than a moral one.[178] Unlike the majority, Harlan didn't "think it was necessary to segregate Americans by race in public places to maintain white racial supremacy."[179] Bouie therefore concludes that Harlan wasn't so much a "defender of equality" as much as he was "someone who thinks the Constitution can secure hierarchy and inequality without the assistance of state law."[180]

As Bouie acknowledges, many people will disagree with his characterization of Justice Harlan. But for present purposes, the crucial point is simply this: *If* Bouie's criticism of Harlan's moral outlook is balanced and historically accurate, then it undermines constitutional arguments that appeal to his ethical authority. It suggests that Harlan has no place on the Mount Olympus of America's constitutional heroes and therefore that he isn't to be trusted as a reliable source regarding the character of the nation.

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One final point about this use of genealogy bears emphasis. Arguments that seek to undermine assertions of authority typically don't establish that an authority is incorrect on the merits; they merely negate the deference that an authority is owed.[181] For example, even if Justice Gorsuch's genealogical debunking of the dual-sovereignty doctrine is sound, it's entirely consistent with the thesis that the doctrine nonetheless represents the best understanding of the constitutional structure. It's possible, in other words, that an authority has reached the right conclusion for the wrong reasons.

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177 Id.

178 Bouie, *supra* note 173.

179 Id.

180 Id.

181 *See* David Couzens Hoy, *Genealogy, Phenomenology, Critical Theory*, 2(3) J. PHIL. HIST. 276, 283 (2008) (observing that genealogy "does not tell us precisely what to do or where to go"); Guy Kahane, *Evolutionary Debunking Arguments*, 45 NOUS 103, 108 (2011) (observing that genealogical arguments are "purely negative").

B. Revealing Function

Many genealogies aim to uncover the functions that their objects originally performed as a means of elucidating the functions they continue to perform today.[182] Indeed, Professor Amia Srinivasan detects this rhetorical strategy both in Nietzsche's critique of modern moral concepts and in the critiques of numerous other social and political theorists.[183] It's also a common use of genealogy in constitutional law. Justice Kavanaugh's opinion in *Ramos*, for example, argued that the original function of Louisiana's non-unanimous-verdict rule shed light on its function today. The "whole point" of adopting that rule, he explained, was to "make a difference in practice … in cases involving black defendants, victims, and jurors."[184] It should therefore be "no surprise" that the rule continues to perform the same function—to "silence the voices and negate the votes of black jurors."[185] Similarly, Professor Dorothy Roberts argues that understanding the origin of America's criminal punishment system allows one to see that it functions today "to maintain forms of racial subordination that originated in the institution of slavery."[186]

Like genealogies that undermine assertions of authority, genealogy that are used to reveal function can also avoid the genetic fallacy. That fallacy, recall, involves drawing normative conclusions about a phenomenon from information about its "historical origin."[187] But functionalist genealogies don't draw normative conclusions about the present directly from information about the past. Instead, they use information about the historical function of a law, rule, or practice as evidence of its *present* function, from which they then draw normative conclusions.

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[182] *See* Edward Craig, *Genealogies and the State of Nature*, *in* BERNARD WILLIAMS 184 (Alan Thomas ed., 2007); Damian Cueni & Matthieu Queloz, *Theorizing the Normative Significance of Critical Histories of International Law*, 24 J. HIST. INT'L L. 561, 578 (2022).

[183] *See* Srinivasan, *supra* note 121, at 141-42 (discussing the work of Charles Mills, Uday Mehta, Edward Said, Chandra Mohanty, Simone de Beauvoir, bell hooks, Angela Davis, Catharine MacKinnon, Judith Butler, Quentin Skinner, and Samuel Moyn).

[184] Ramos, 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring in part).

[185] Id. at 1417, 1418.

[186] Roberts, *supra* note 49, at 4.

[187] C.L. HAMBLIN, FALLACIES 45 (2004); *see also* THE OXFORD DICTIONARY OF PHILOSOPHY (Simon Blackburn ed., 3d ed. 2016) (defining the genetic fallacy as the "mistake of inferring something about the nature of some topic from a proposition about its origins").

What's normatively problematic about the modern criminal punishment system, for example, isn't merely that it had a troubling genesis; it's that it continues to function to subordinate black people *today*.

To be sure, arguments of this form depend on the (often implicit) premise that their objects continue to perform the function that they originally performed.[188] And if that premise is false, then a genealogy that relies on it will be unsuccessful.[189] But the fact that functionalist genealogies fail when their objects' functions have evolved in significant ways doesn't mean that they're fallacious. Indeed, valid deductive arguments generally fail to establish their conclusions when one of their premises is false.

As in the case of genealogies that undermine assertions of authority, functionalist genealogies can advance conclusions relevant to at least three widely accepted modalities of constitutional construction.

1. Text

Textual arguments maintain that constitutional disputes should be resolved in ways that most closely align with the Constitution's text. Functionalist genealogies can be relevant to this modality because they can be used to demonstrate how the text applies to a law, rule, or practice. For example, that appears to be one of the goals of Professor Roberts's genealogy of the criminal punishment system. She seeks to demonstrate that quotidian features of that system, which may otherwise seem perfectly sensible, are in fact badges and incidents of chattel slavery that have never been eradicated. As a matter of constitutional law, she argues, it follows that the text of the Thirteenth Amendment applies to those features of the system. More specifically, those features either violate section 1's prohibition on "slavery"

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188 *See* Nicholas Smyth, *The Function of Morality*, 174 PHIL. STUD. 1127, 1132-33 (2017); Brian Epstein, *History and the Critique of Social Concepts*, 40(1) PHIL. SOC. SCI. 3, 5 (2010).

189 In McGowan v. Maryland, 366 U.S. 420 (1961), for example, the Court observed that while the original function of Maryland's laws prohibiting certain commercial activity on Sunday was to reinforce Christian orthodoxy, their function had secularized over time in such a way as to ameliorate any Establishment Clause concerns. Id. at 431-46 (examining the long history of Sunday Closing Laws, both in Maryland and Anglo-American law, and concluding that the "Sunday legislation" at issue had "undergone extensive changes" that had transformed the laws' "religious character" (id. at 431)). The Court thus rejected a constitutional challenge to those laws.

and "involuntary servitude" or empower Congress to enact "appropriate legislation" pursuant to section 2.[190]

2. Consequences

Consequentialist arguments posit that some constitutional disputes should be resolved in the way that will produce the best consequences.[191] A genealogy that reveals the function of a law, rule, or practice can be relevant to this modality because it can inform a judge's assessment of the potential costs and benefits of her decision. If it's true, for example, that the Montana constitution's no-aid provision harms Catholic institutions today,[192] then that's a consequentialist reason to believe that provision was justifiably held unconstitutional in *Espinoza*. Similarly, one can plausibly read Justice Thomas's opinion in *Box* as an attempt to demonstrate the consequences of a laissez-faire approach to the regulation of abortion: namely, that such an approach facilitates "the discriminatory preferences that undergird eugenics."[193]

To be sure, many formalists would recoil from the suggestion that judges should weigh consequences when deciding constitutional cases. A judge's commitment to "methodological stare decisis,"[194] however, can sometimes oblige her to consider the function of a law, rule, or practice, even if her own judicial philosophy

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190 U.S. CONST., amend. XIII.

191 Commentators have given this modality various names and have sometimes subsumed it under a larger category. *See* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 22, at 13 (discussing "prudential argument," which he defines as arguments that "seek to balance the costs and benefits of a particular rule"); Fallon, *supra* note 22, at 1204 (discussing "value arguments," which "appeal directly to moral, political, or social values or policies"); McConnell, *supra* note 20, at 1777 (discussing the "normative approach" to constitutional construction); Greene, *supra* note 22, at 1441 (discussing "consequentialist argument").

192 Espinoza, 140 S. Ct. at 2274 (Alito, J., concurring) (arguing that Montana's no-aid provision "continues to have its originally intended effect").

193 Box, 139 S. Ct. at 1790 (Thomas, J., concurring).

194 "Methodological stare decisis" refers to "the practice of giving precedential effect to judicial statements about methodology." Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010). A growing literature addresses the role and status of methodological rules that purport to bind judges. *See, e.g.*, Jonathan Remy Nash, *When is Legal Methodology Binding?*, 109 IOWA L. REV. (forthcoming 2023); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014).

ordinarily eschews such considerations. The Court's stare decisis doctrine, for example, requires a justice to consider whether an earlier case has engendered "significant negative jurisprudential or real-world consequences" before overruling it.[195] That's why Justice Kavanaugh, a self-professed formalist, argued in *Ramos* that the origins of Louisiana's non-unanimous-verdict rule could help one to perceive a negative "real-world consequence" of the Court's earlier decision upholding that rule.[196] Similarly, though Justice Gorsuch is widely regarded as a formalist,[197] he, too, read the Court's then-controlling opinion in *Apodaca* as compelling him to "assess the functional benefits of jury rules."[198]

3. Originalism

Originalist arguments maintain that constitutional disputes should be decided in accordance with either the original public meaning of the constitutional text or the original intentions of those who drafted or ratified the text.[199] Genealogy can also advance conclusions relevant to this modality. Rather than advancing premises *within* originalist arguments, however, genealogical critique may counsel either against using originalist argument altogether or in favor of weighing originalist conclusions less heavily in a pluralistic balancing of arguments.

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195 Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

196 Id. at 1417.

197 *See, e.g.*, Adam Liptak, *Kavanaugh and Gorsuch, Justices with Much in Common, Take Different Paths*, N.Y. TIMES, (May 12, 2019), https://tinyurl.com/2x59vs56; Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1090 (2022).

198 Ramos, 140 S. Ct. at 1401 n.44 (observing that "if the Sixth Amendment calls on judges to assess the function 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 1401 (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").

199 For sources identifying originalism as a modality, see, for example, McConnell, *supra* note 20, at 1755-62; and Fallon, *supra* note 22, at 1198-99 (referring to "arguments about the framers' intent"). Professor Philip Bobbitt's influential taxonomy labeled this modality "historical argument," but his definition of that modality aligns with what this Article calls "originalism." *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 22, at 12 (defining "historical argument" as arguments that "rely[] on the intentions of the framers and ratifiers of the Constitution").

While the arguments for originalism are various,[200] one set of arguments maintains that originalist methodology produces desirable consequences.[201] Functionalist genealogy can be used to advance the opposite claim: that originalist methodology produces undesirable consequences—the precise undesirable consequences that originalism was designed to produce. In particular, one can treat the claim that originalism emerged as a tactic for resisting the judgment in *Brown*[202] as evidence that originalist methodology performs the function of justifying politically conservative outcomes—in particular, conservative outcomes that are insensitive to the long history of marginalization of people of color. And those tempted by such an argument would likely regard recent decisions dictated by the Court's originalist majority as confirmation of originalism's undesirable function.[203]

Originalists, to be sure, could resist the conclusion of that argument by resisting its premises. They could deny, for example, that Professors TerBeek and Siegel

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200 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 143-53 (1999) (arguing that originalism advances democracy); 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); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999) (arguing that original-intent 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); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015) (arguing that "our current constitutional practices demonstrate a commitment" to "inclusive originalism"); 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 follows 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); Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223, 232-33 (Grant Huscroft & Bradley W. Miller eds., 2011) (arguing that originalism reconciles judicial review and democracy); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 875 (2015) (offering a conceptual defense of "original-law originalism").

201 *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

202 *See supra* notes 110–117 and accompanying text (describing the arguments of Professors Calvin TerBeek and Reva Siegel).

203 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242-43, 2246-57 (2022); Students for Fair Admissions, Inc. v. Harvard, 143 S. Ct. 2141, 2177-84 (2023).

have correctly identified the origin of originalist methodology.[204] Or they could deny that originalist methodology functions today as the mid-20th-century conservative thought leaders that TerBeek cites believed it would. But the broader point remains: Genealogical arguments can advance conclusions relevant to originalist arguments and, for that reason, they are relevant to constitutional law and discourse.

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This Part can now attempt to answer the question raised (but deferred) at the conclusion of Part I: What is the status of genealogy in constitutional law? Part I mentioned two possible answers. One is that the genealogy of a law, rule, or practice is simply irrelevant to its constitutionality. But, as the foregoing explained, that view overlooks the many ways that genealogy can advance conclusions relevant to widely accepted modalities of constitutional construction.[205]

The other view was that genealogy has become, or is becoming, a distinct modality, on par with arguments from text, structure, precedent, and so forth. That view, however, seems to misapprehend the modalities' defining characteristic. What makes a form of argument a "modality"—that is, a distinct subject of constitutional inquiry—is that it appeals to a distinct theory of constitutional justification.[206] Implicit in each modality, in other words, is a distinct theory about why someone should endorse a putative proposition of constitutional law. Structural arguments, for example, assume that an interpretation should be preferred if it leads government institutions established by the Constitution to perform their functions in harmony with one another.[207] Precedential arguments assume that

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[204] *See* John O. McGinnis & Michael B. Rappoport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 786 (2009) (arguing that original methods for interpreting the Constitution were "broadly originalist" in nature).

[205] The mere fact that some genealogical arguments avoid the genetic fallacy doesn't mean that those that do will necessarily be successful. Genealogical arguments may still commit any number of other errors that would render them unpersuasive. They must, for example, avoid basic historiographical mistakes, such as anachronism, oversimplification, and distortion of the historical record. *See* Balkin, *supra* note 22, at 665 (noting that this line of criticism is always possible for constitutional arguments that rely on historical claims). As Part III explains, there are serious concerns about judges' ability to avoid these and other mistakes when using genealogy in their decisionmaking.

[206] *See* Balkin, *Uses of History*, *supra* note 22, at 658; Greene, *supra* note 22, at 1421.

[207] The *locus classicus* of this style of argument is CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

interpretations adopted in earlier cases should be respected in the future. Consequentialist arguments assume that, at least in some cases, an interpretation should be preferred if it will produce the best consequences. And so forth. Genealogy, however, doesn't appeal to a distinct theory of constitutional justification and therefore isn't a freestanding modality.

Genealogy is more properly theorized as a resource for advancing conclusions within or about the modalities.[208] To use Professor Jamal Greene's terminology, genealogy is a "mode of persuasion" that judges, litigants, and commentators may use to convince their audiences of a modality's valence in particular cases.[209] It thus gains entry into constitutional law by "hitching" itself to the modalities.[210] Moreover, as this Part has illustrated, it's a rather ecumenical tool. There are, of course, many judges and theorists who would reject one or more of the modalities discussed above. Traditionalist, originalist, and consequentialist arguments, in particular, have many critics—often from different ends of the ideological spectrum. But one would be hard-pressed to find many constitutional lawyers who would reject *all* of genealogy's applications discussed in this Part.

III. EXCLUDING GENEALOGY FROM CONSTITUTIONAL ADJUDICATION

Should courts use information about the genealogy of a law, rule, or practice as a reason to rule in favor of one party over another in constitutional cases? In light of the Part II's conclusions, that question may initially seem rather strange. If genealogy provides information relevant to the constitutionality of some law, rule, or practice, then shouldn't courts consider it in deciding cases raising that issue?

The analytic question whether genealogy is relevant to constitutional law, however, is different from the institutional question whether courts should use it in their decisionmaking. That's because a court's overall performance will sometimes be "improved by restricting flexibility to use information" when there's a gap between the court's "competence and the difficulty of the decision problem to be

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[208] *Cf.* Balkin, *Uses of History*, *supra* note 22, at 652 (arguing that history is "a resource for making arguments within each modality," rather than "a distinct mode of argument").

[209] *See* Greene, *supra* note 22, at 1421-22 (characterizing "pathetic argument" as a "mode of persuasion" in constitutional law).

[210] Pozen & Samaha, *supra* note 21, at 773 (defining "modalization" as the rhetorical strategy of "hitching an … argument to a modality").

solved."[211] Indeed, concern about judges' capacity to use particular types of (concededly relevant) information support numerous legal rules restricting which types of evidence and arguments judges may consider in their decisionmaking. It's a reason, for example, why rules of evidence sometimes require the suppression of relevant evidence.[212] It's sometimes a reason for choosing rules over standards.[213] It's a reason why constitutional issues that elude judicially manageable standards are sometimes treated as non-justiciable political questions.[214] And it's a commonly cited reason for excluding other types of argument from constitutional adjudication.[215]

This Part maintains that courts should generally exclude genealogical argument from their constitutional decisionmaking. Put differently, the genealogy of a law, rule, or practice should generally not be one of a judge's grounds for ruling in favor of one party rather than another, or one of her reasons for holding *X* rather than *Y*. The argument for that conclusion is based on an assessment of genealogy's potential costs and benefits. On one hand, normalizing genealogical argument in constitutional law is likely to destabilize numerous areas of the law. That's a significant cost weighing against judicial recourse to genealogy. On the other hand, it's uncertain whether judicial recourse to genealogy will deliver the benefits that it promises because of constraints on judges' information, time, and expertise. Thus, while the benefits of judicial recourse to genealogy in constitutional

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211 Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 562, 564 (1983) (making this point about decisionmakers generally); *cf.* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 254 n.85 (asking "whether this decision procedure, when employed by these nine people with the amount of time spent on the cases as fixed, would produce better results over a run of cases [than would] employing a different procedure").

212 *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1888 (1998) (citing examples).

213 *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 150 (1991); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 38-39 (2000); Thomas W. Merrill, *The* Mead *Decision: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 820-21 (2002).

214 *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

215 *See, e.g.*, Scalia, *supra* note 200, at 863 (arguing that the Supreme Court lacks the institutional capacity to evaluate policy consequences).

decisionmaking are uncertain, the costs are likely to be substantial. Accordingly, judges should exclude genealogical argument from their constitutional decisionmaking.

Before proceeding, a brief caveat is in order. While this Part maintains that judges generally shouldn't rely on genealogical arguments in their constitutional decisionmaking, that doesn't mean that all historical evidence that would be relevant to the genealogy of a law, rule, or practice must be suppressed. That's for two reasons. First, such evidence might be used to support forms of argument other than genealogy. In determining whether the presidential proclamation at issue in *Trump v. Hawaii* was motivated by religious animus, for example, it was relevant that the proclamation's "historical background"[216] included two earlier proclamations that likely were infected with religious animus.[217] Just because that evidence shouldn't be used to support a genealogical argument doesn't mean that it may not be used to assess whether the proclamation was made with discriminatory intent. Second, such evidence might be relevant to purely rhetorical uses of genealogy in judicial opinions—that is, for uses of genealogy that don't seek to explain the rationale for the judgment.

A. Genealogy's Costs

Historical investigation into the origins of laws, rules, and practices will often bring to light "much that is false, crude, inhuman, absurd, [or] violent."[218] Indeed, many features of our legal system can be traced to conquest, slavery, racial animus, religious bigotry, and the like.[219] Foundational rules of property law grew out of

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[216] Village of Arlington Heights, 429 U.S. at 267.

[217] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

[218] Friedrich Nietzsche, *On the Uses and Disadvantages of History for Life*, *in* FRIEDRICH NIETZSCHE, UNTIMELY MEDITATIONS 95 (Cambridge 1983) (R.J. Hollingdale, trans.); *see also* 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").

[219] *See* Miller, *supra* note 24, at 295 ("[T]he history of all law in America is tainted with white supremacy."); Winkler, *supra* note 24, at 543 (observing that "many areas of the law have historically been used to perpetuate racial discrimination"); *see also* Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199 (2022) (making a similar claim about contract law); Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 79 (2020) ("In the twenty-first century, American judges and lawyers continue to cite case law developed in disputes involving enslaved people. These cases provide law for a wide variety of subject areas.").

the enslavement of African peoples and the conquest of Native Americans.[220] Private contracts, commercial practices, and zoning laws have been used to maintain racially segregated communities.[221] The hearsay rule originated as a means of insulating slaveholders from the threat of their slaves' petitions for freedom.[222] The list goes on and on. Normalizing judicial recourse to genealogy in constitutional cases would thus threaten to make a universal acid of history. And that would have several worrisome implications for the rule of law.

First, normalizing judicial recourse to genealogy would provide a powerful means of subverting established laws, rules, and practices, thus making the law less stable. If the Court were to endorse just the arguments canvassed in this Article, it would unsettle countless police practices;[223] immigration laws responsible for thousands of criminal convictions per year;[224] and judicial precedents foundational to the law of criminal procedure,[225] foreign affairs,[226] and the federal government's power over the U.S. territories[227] and vis-à-vis the Native American tribes.[228] Moreover, it's only a partial answer to note that not all genealogical

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220 *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, *The 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 and Jurisdictional Power* (draft).

221 *See* RICHARD ROTHSTEIN, THE COLOR OF LAW (2017); *see also* Deborah N. Archer, *"White Mens Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1260 (2020) (arguing that "the 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").

222 *See* David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering* Queen v. Hepburn, 2022 SUP. CT. REV. 413.

223 *See supra* notes 49–55 and accompanying text (discussing Professor Roberts' genealogy of the modern criminal punishment system).

224 *See* U.S. Immigr. and Customs Enf't., ICE Annual Report: Fiscal Year 2022, 8 (2022), https://tinyurl.com/p53udneb.

225 *See supra* notes 56–62 and accompanying text.

226 *See infra* note 243 and accompanying text.

227 *See supra* notes 63–66 and accompanying text.

228 *See supra* notes 67–71 and accompanying text.

arguments will succeed. For genealogy's destabilizing potential isn't limited to contexts in which a court ultimately concludes that a law, rule, or practice is in fact tainted by an insidious past. The mere *possibility* that judges and litigants may raise such concerns will itself have an unsettling effect on the relevant law, rule, or practice. The more that courts allow individual judicial precedents to be re-examined, for example, the more that they will undermine the settlement function of precedent in general.[229]

Second, normalizing judicial recourse to genealogy would make the content of the law depend on arcane historical facts, thus making the law less transparent. Before the Supreme Court's decision in *Ramos*, for example, a Louisiana trial judge would have concluded that the law in her state permits non-unanimous jury verdicts in felony cases. But she would have been wrong in part because, unbeknownst to her, the state constitutional convention that originally adopted Louisiana's non-unanimous-verdict rule was replete with white supremacy. Of course, she wouldn't have known that the records of a convention that adopted a since-abrogated constitution would be relevant to the verdict in the case she was presiding over. And yet they were. Further, as the next section explains, the law's opacity will likely be more detrimental to under-resourced parties than to well-resourced parties because parties with resources have a greater capacity to conduct historical research with low expected value. Attorneys for under-resourced parties, by contrast, must focus their resources on tasks with the highest probability of making a difference to their clients' cases.

Although it's possible to sketch the nature of these costs, their magnitude is unknowable. Ascertaining their magnitude would require, among other things, predictive and immeasurable information about the material costs that affected parties would incur as a result of opening a new pathway for unsettling established laws, rules, and practices. Moreover, even if it were possible to obtain that information, one would still need to measure the benefits of judicial recourse to genealogy to know whether the costs were acceptable. As the next section explains, however, the supposed benefits of genealogy are highly uncertain to materialize.

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[229] *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 60-70 (2017); *cf.* Larry Alexander & Frederick Schauer, *On Extra-Judicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (arguing that "settlement of contested issues is a crucial component of constitutionalism, that this goal can be achieved only by having an authoritative interpreter whose interpretations bind all others, and that the Supreme Court can best serve this role").

One therefore needn't suppose that the magnitude of the costs sketched in this section are particularly great to be concerned about judicial recourse to genealogy.

B. Genealogy's Uncertain Benefits

In theory, genealogy's primary benefit is the mirror image of its costs: By equipping courts to re-examine established laws, rules, and practices, genealogy may allow them to redress persistent forms of injustice. Professor Dorothy Roberts, for example, argues that her genealogy of the modern criminal punishment system supports an abolitionist vision of the Constitution—one that would unsettle contemporary police practices and at last "transform our society from a slavery-based one to a free one."[230] Similarly, genealogy can diminish the reasons for following a doctrinal rule first adopted for discriminatory reasons that continues to have discriminatory effects.[231] And by unveiling the discriminatory origin of a social practice, genealogy can provide the government with a stronger constitutional basis for regulating that practice.[232] Genealogy may therefore allow courts to "effectuate constitutional mandates" by preventing past unconstitutional conduct from "extend[ing] into the present."[233]

The case for genealogy in constitutional adjudication is thus based on the belief that it will make the legal system more just overall or at least less subordinating to historically marginalized groups. For two reasons, however, those benefits are less certain, and less likely to be substantial, than the costs of judicial recourse to genealogy. First, arguments in favor of genealogy often implicitly assume that courts will infallibly determine which contemporary policies, rules, and practices suffer from discriminatory taint. But real-world judges labor under constraints of information, time, and expertise that often lead them to err. And the historical evidence relevant to genealogical arguments will often exacerbate those limitations. Second, even when judicial recourse to genealogy would deliver some of its promised benefits, those benefits can often be obtained by other modes of

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230 Roberts, *supra* note 49, at 8.

231 As Professor Arulanantham has observed, doctrinal rules established for discriminatory reasons may persist for decades and continue to have a disparate impact on minorities, even if modern judges are unaware of, and don't intend, those effects. *See* Arulanantham, *supra* note 135, draft at 6.

232 See supra notes 158–160 and accompanying text.

233 Murray, *supra* note 17, at 1216.

argument and by other sources of evidence. In some cases, genealogy is therefore unnecessary to achieve the benefits it promises.

1. Judicial Error

The historical evidence relevant to genealogical arguments has several features that make it difficult for judges to reliably evaluate over the mine run of cases: It's diffuse, idiosyncratic to each case, and heterogenous across cases. One case may require a judge to pore over 19th-century periodicals related to state constitutional conventions.[234] Another case may require her to review the text and legislative history of numerous 19th-century state statutes regulating firearms.[235] Yet another may require her to synthesize the writings of early-20th century abortion advocates.[236] And so forth. In some cases, to be sure, the success of a genealogical critique may ultimately turn on only a handful of documents that a judge is accustomed to evaluating. But there will often be "no way of knowing in advance where something pertinent may be found"[237] and no guarantee that a judge will have experience evaluating the relevant materials once they're found.

These feature of the historical evidence relevant to genealogy interact with constraints on judges' information, time, and expertise in ways that will lead courts to regularly commit at least two types of error. First, courts may make decisions based on incomplete evidence. Due to the structure of our adversarial legal system, courts heavily depend on the parties to identify and present arguments and

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[234] *See, e.g.*, Ramos, 140 S. Ct. at 1394 (citing Frampton, *supra* note 9, at 1613-17 (discussing various nineteenth newspaper accounts of the push for non-unanimous juries)); Espinoza, 140 S. Ct. at 2269 (Alito, J., concurring) (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)).

[235] *Compare* Cottrol & Diamond, *supra* note 89, at 333-48 (arguing that many 19th-century firearm regulations were infected by anti-black racism) *with* Patrick, *supra* note 89, at 1345-46 (arguing that the historical record of racist firearm regulations is mixed).

[236] *See, e.g.*, Box, 139 S. Ct. at 1783-89 (citing Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV., at 12 (Feb. 1919); MARGARET SANGER, PIVOT OF CIVILIZATION 187, 189 (1922); MARGARET SANGER, WOMAN AND THE NEW RACE 25 (1920); Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., at 5 (Oct. 1921); A. GUTTMACHER, BABIES BY CHOICE OR BY CHANCE (1959); GLANVILLE WILLIAMS, SANCTITY OF LIFE AND THE CRIMINAL LAW (1957)).

[237] W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 408 (1992).

evidence relevant to their decisions. The parties, however, labor under their own resource constraints, forcing them to be selective about what materials they review and thus creating the possibility that they will fail to discover relevant evidence or formulate relevant arguments. And because courts generally lack the capacity to compensate for the parties' shortcomings, the parties' failure to locate a relevant source will often lead to errors in a court's decision.

Moreover, these errors will be unevenly distributed across parties and cases. Because historical research is often costly, well-resourced parties are more likely than under-resourced parties to uncover historical taint that will favor their litigation positions. One should therefore expect that courts will be more likely to find historical taint in cases where doing so will benefit well-resourced parties than in cases where finding taint will benefit under-resourced parties. And on the plausible assumption that the accumulation of assets tends to be negatively correlated with membership in a historically marginalized group, the likelihood of this type of error undermines the case for genealogy's anti-subordinating potential.

Second, judges with limited time and expertise may systematically over- and under-estimate the probative value of particular types of historical evidence. That may be due to judges' proclivity to commit basic historiographical mistakes, such as failing to place evidence in the appropriate context, reading sources anachronistically, failing to ensure that relevant contrary evidence hasn't been overlooked, overestimating the significance of particularly salient evidence, and so forth.[238] It may also be because evidence related to genealogical argument will tend to inflame judges' preconceptions.[239] As Professor David Strauss writes, "When historical materials are vague or confused, as they routinely will be, there is an overwhelming temptation for a judge to see in them what the judge wants to see in them."[240] Strauss's remark was aimed at constitutional originalism, but his point is even more powerful when aimed at genealogy. Indeed, the range and volume of

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[238] Judicial capacity to do historiographical work within the relevant time and resource constraints may be one reason why many of the opinions canvassed in Part I outsourced their historical analysis to secondary sources, often without even the mentioning the underlying primary sources. *See* Espinoza, 140 S. Ct. at 2259 (relying nearly exclusively on secondary sources); id. at 2269-73 (Alito, J., concurring) (same); Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality) (same); City of Chicago v. Morales, 527 U.S. 41, 54 n. 20 (1999) (same); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 120-21 (1996) (Souter, J., dissenting) (same); Box, 139 S. Ct. at 1784 (same); Virginia v. Black, 538 U.S. at 352-55 (same).

[239] *Cf.* Vermeule, *supra* note 212, at 1874 (making a similar point about legislative history).

[240] STRAUSS, *supra* note 134, at 20.

evidence potentially relevant to the genealogy of a law, rule, or practice will often leave a judge with more than ample confirmation of her preconceptions.[241]

In some cases involving judicial error, courts may fail to recognize the force of a genealogical critique. In others, they may erroneously conclude that an area of the law is tainted by a troubling history when it is not. In both situations, judges' propensity to err weakens the case for judicial recourse to genealogy.

Begin with cases in which a court fails to recognize the force of a genealogical critique. In those cases, the mere *possibility* of judicial recourse to genealogy will fail to deliver the benefits that it promises. Consider, for example, Justice Gorsuch's jurisprudence concerning the plenary-power doctrine. As noted, his opinion in *Brackeen* criticized the anti-Native American racism at the foundation of that doctrine.[242] But the plenary-power doctrine isn't limited to the federal government's power in respect of Native American tribes; it also underpins the Court's cases involving foreign affairs, where it has a similarly repulsive origin story.[243] The history of that branch of the doctrine was presented to the Court in

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241 Similar criticisms have also been made against constitutional originalism. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 14-16 (2002) (noting the difficulty of determining the historical meaning of constitutional provisions); FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 189 (2013) (noting that originalist reasoning often leads to outcomes that align with judges' ideological priors); Bruen, 142 S. Ct. at 2177 (Breyer, J., dissenting) (arguing that judges are ill equipped to "resolv[e] difficult historical questions"). Commentators who endorse those criticisms of originalism should accept this Article's criticism of genealogy *a fortiori*. But originalists who wish to reject those arguments needn't reject the argument here. The originalist inquiry is a "refined subset" of a broader "historical inquiry." *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810 (2019). Genealogy, by contrast, places virtually no limits on the type of historical evidence that a judge may be required to review.

242 *See supra* notes 67-243 and accompanying text.

243 In the foreign affairs context, the doctrine can be traced to the Court's 1889 decision in Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889). *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12-52 (1998). In a decision upholding a statute barring the return of Chinese laborers to the United States, the Court observed that Chinese people were unable "to assimilate with our people"; warned of an impending "Oriental invasion"; and concluded that the United States' "right to self-preservation" empowers Congress to exclude "classes of persons, whose presence is deemed injurious or a source of danger to the country." Chae Chan Ping, 130 U.S. at 595, 608; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 729-730 (1893) (upholding requirement that lawfully present Chinese citizens offer "at least one credible white witness" to remain in the country and noting Congress's belief that testimony from Chinese witnesses couldn't be credited because of "the loose notions entertained by the witnesses of the obligation of an oath").

Trump v. Hawaii,[244] yet Justice Gorsuch joined the portion of the Court's opinion invoking the doctrine in the course of upholding a Presidential Proclamation restricting the entry of nationals from several Muslim-majority countries.[245] The point, to be clear, isn't to take a cheap shot at Justice Gorsuch. The point is that even the Court's most enthusiastic genealogist sometimes fails to appreciate the significance of a genealogical critique. Thus, whatever genealogy's benefits may be in theory, those benefits won't materialize in practice when a court commits an error of this sort.

But if judges' propensity to erroneously conclude that a law isn't tainted are troubling, their propensity to commit the opposite error may be even more so. When courts erroneously conclude that an area of the law is tainted by a troubling history, they needlessly destabilize that area of law. And that should be worrisome for genealogy's advocates because destabilization won't invariably benefit a particular group of people or invariably lead to a legal system that aligns with a particular normative vision. Consider, for example, two dueling critiques concerning the issue of gun violence in black neighborhoods.

Consider, first, Professor Roberts's genealogy of the modern criminal punishment system, which leads her to the view that the militarized presence of the police in black neighborhoods is a relic of slavery and must be dismantled.[246] Suppose the Supreme Court endorsed her conclusion that many aspects of the modern criminal punishment system violate section 1 of the Thirteenth Amendment. Many prison abolitionists would think that would make the legal system more just and

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[244] In Trump v. Hawaii, 138 S. Ct. 2392 (2018), several amici argued that "the 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*." Brief of Amici Curiae Constitutional Law Scholars in Support of Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) at 18-19; see Korematsu Center Amicus, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) at 8 (arguing that the plenary-power doctrine is "infected with long-repudiated racial and nativist precepts").

[245] The Court's opinion cited several cases that relied on the Chinese exclusion cases. Trump v. Hawaii, 138 S. Ct. at 2415-23 (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); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)); *see also* Jennifer M. Chacón, *The Inside-Out Constitution:* Department of Commerce v. New York, 2019 SUP. CT. REV. 231, 246 (2020) ("[I]n immigration law, there is now a straight line from the Chinese Exclusion Case … to the Muslim Exclusion Case.").

[246] *See* Roberts, *supra* note 49, at 21.

less subordinating because they seek to create a world free of criminal-law institutions that have subjugated African Americans since slavery.[247]

But now consider Justin Aimonetti's and Christian Talley's argument that many contemporary firearm regulations can't be justified on traditionalist grounds because racial animus is pervasive in our nation's tradition of gun control.[248] When combined with the Court's recent decision in *Bruen*, the genealogy of our nation's tradition of gun regulation leads fairly quickly to the conclusion that many regulations covered by the plain text of the Second Amendment are unconstitutional.[249] Under plausible assumptions, if the Court were to endorse that argument, the number of guns in circulation would be greater because there would be fewer enforceable firearm regulations. That consequence may, in turn, persuade policymakers to increase the militarized presence of police in historically marginalized communities—a result that would horrify those inclined to celebrate Professor Roberts's genealogy of the modern criminal punishment system.

To be clear, the point isn't to express my own skepticism about the merits of either of these arguments or to suggest that a world in which either is endorsed would be more oppressive than a world in which either is rejected. Rather, the point is that judicial recourse to genealogy won't invariably destabilize the law in ways that align with a particular normative outlook. And the exercise performed above can be repeated for many other areas of the law. Genealogy has been used to argue both that the origins of affirmative action were antisemitic[250] and that the idea of "colorblindness" at the heart of the Court's recent skepticism of affirmative

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247 *See, e.g.*, ANGELA Y. DAVIS, ABOLITION DEMOCRACY 35-37 (2005); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 15-21 (2003); Rodríguez, *supra* note 49, at 1578.

248 *See supra* note 90 and accompanying text.

249 As noted, *Bruen* held that the Second Amendment "presumptively protects" conduct covered by "the Second Amendment's plain text" and that the government may defeat that presumption only by demonstrating that a "regulation is consistent with this Nation's historical tradition of firearm regulation." New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2125, 2126 (2022).

250 In *Students for Fair Admissions, Inc. v. Harvard*, the petitioners highlighted the anti-Jewish history of Harvard's holistic admissions process. *See* Brief for Petitioner, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S. Ct. 2141, 2174 (2023) (No. 20-1199) at 12 (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); *see also* id. at 13 ("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.").

action is racist.[251] It's been used to argue both that regulations of the labor market have racist origins[252] and that exclusions from federal labor law have such origins.[253] And its's been used to argue both that the notion of "substantive due process" that once protected the right to an abortion originated in *Dred Scott*[254] and that laws regulating abortion have racist origins.[255] The Court's current majority seems more likely to accept one set of these arguments, and I daresay that a hypothetical majority of the Court's liberal wing would be more likely to accept the other set.

What this suggests is that genealogy is merely a tool. It's neither inherently good nor inherently bad. And there's no guarantee it will be used for certain

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[251] Some advocates of race-consciousness in law 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 (2014-2015) (noting that a "white backlash movement intent on crushing black empowerment and preserving white dominance latched on to the concept of colorblindness as an ideological tool of retrenchment"). For judicial opinions invoking the notion of colorblindness, see Students for Fair Admissions, 143 S. Ct. at 2174 (tracing the notion of colorblindness to cherished decisions, such as in 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 Community Schools v. Seattle School District, 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."); and Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (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.").

[252] *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 (2009) (arguing that labor policies enacted during the progressive era and the New Deal were animated by xenophobia, racism, and sexism and that modern policies continue to reflect those origins).

[253] *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 (2011); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); Brenna R. McLaughlin, *#AirbnbWhileBlack: Repealing the Fair Housing Act's Mrs. Murphy Exemption to Combat Racism on Airbnb*, 2018 WIS. L. REV. 149; SARU JAYARAMAN, FORKED: A NEW STANDARD FOR AMERICAN DINING 33-35 (2016).

[254] *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*."); *see also* 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.").

[255] *See supra* note 101 and accompanying text.

purposes and not others. It won't inexorably lead to a world that is more just and less subordinating. The most that can be said is that it will tend to produce outcomes favored by the people who happen to be judges when cases arise. In some circumstances, that may help cleanse the legal system of the persistent stains of oppression. But in other circumstances, it may do the opposite.

2. Alternative Means

Further diminishing the potential value of judicial recourse to genealogy is the fact that some of its promised benefits can be obtained by alternative means.

First, some of the most compelling historical revelations mentioned in Part I can be used to support less exotic forms of constitutional argument. Consider, for example, the 19th- and early-20th-century judicial opinions evincing perverse ideologies about the moral rectitude of slavery and the "fitness" of certain races. In Justice Gorsuch's writings, those opinions have been used to support genealogical critiques of the foundations of modern doctrinal rules and frameworks. But the racism evident in those opinions could just as easily be referenced in support of the more familiar claim that those cases weren't "well reasoned."[256] After all, many of those opinions aren't just racist; they're stupid, having been based on demonstrably false premises about supposedly inherent differences between people of different races. Or consider policies that have discriminatory predecessors with which they are proximate in time. Genealogical critique is one way of subverting such policies. But they can also be subverted within *Arlington Heights*'s existing doctrinal framework by treating recent discriminatory predecessors as strong evidence of discriminatory intent.[257]

Second, the case outcomes that genealogical arguments support can often be sufficiently supported by other modes of argument. Indeed, genealogy is often invoked as a secondary or tertiary consideration in favor of a conclusion that's supported by other considerations. In *Ramos*, for example, the Court analyzed the problematic genealogy of Louisiana's non-unanimous-verdict rule only after concluding that the original meaning of the Sixth Amendment and the constitutional

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[256] Citizens United v. FEC, 558 U.S. 310, 363 (2010) (quoting Montejo v. Louisiana, 556 U.S. 778, 792-93 (2009))

[257] *See* Murray, *supra* note 17, at 1236 (noting that taint can serve as a trigger for imputing discriminatory intent).

structure required felony verdicts to be unanimous.[258] Similarly, in *Vaello Madero*, Justice Gorsuch argued that the holding of *The Insular Cases* should be overruled not just because it rested on racist stereotypes but also because it departed from the text, structure, and original understanding of the Constitution.[259] The secondariness of genealogical argument is perhaps one reason why it tends to have a certain preaching-to-the-converted quality—hardly ever convincing those who don't antecedently agree with the valence of a genealogical critique and entrenching the views of those who are already inclined to agree.

Third, the current function of a law, rule, or practice can often be investigated directly, without resorting to the sorts of historical evidence that are relevant to genealogy. One could, for example, try to determine whether Louisiana's non-unanimous-verdict rule harms African Americans without investigating that rule's origins. And one could confirm whether contemporary abortion practices carry out eugenicist goals without analyzing Margaret Sanger's writings. And one could determine whether cross burning threatens minorities without knowing anything about Thomas Dixon. In some cases, to be sure, a judge or litigant may lack reliable evidence of how a law, rule, or practice functions today and may not have the wherewithal to produce that evidence. In others, information about the genealogy of a law, rule, or practice may help readers to overcome biases that impede their ability to perceive its current function.[260] But the fact that functions may in some cases be investigated directly nonetheless diminishes the potential benefits of judicial recourse to genealogy.

CONCLUSION

[To follow.]

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[258] *See* Ramos, 140 S. Ct. at 1395-97.

[259] *See* Vaello Madero, 142 S. Ct. at 1554-55 (Gorsuch, J., concurring).

[260] This is one reason why prison abolitionists often "trace the roots of today's carceral state to the racial order established by slavery." Roberts, *supra* note 49, at 19. As Professor Roberts explains, recognizing that a host of modern criminal justice practices "originat[ed] in the enslavement of black people" can help one "to see how these practices emanated from a carceral system that continues to perpetuate black people's subjugated status." Id. at 20. Genealogy can thus elucidate the law's function in ways that are difficult for direct investigation to replicate.