BRENNAN CENTER FOR JUSTICE

Countering Originalism

A Guide for Litigators

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Brennan Center for Justice at New York University School of Law

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Introduction

Originalism is now a common feature of constitutional litigation. Throughout the federal courts — and, to a lesser extent, the state courts — judges are resolving major legal questions with reference to the "original public meaning" of constitutional provisions or related concepts of "history and tradition."

This turn in American jurisprudence now led by the Roberts Court has been widely and rightfully criticized for fostering an approach to judging at odds with established ways of making sense of the Constitution and for ignoring staple features of general legal reasoning such as precedent, purpose, morality, prudence, logic, and transparency. Critics have likewise noted that courts are using this approach to expand executive power in democracy-eroding ways, undermine long-standing rights and protections, and entrench inequality and marginalization. Given these problems, it's important to challenge attempts to remake legal reasoning to conform to originalism's demands.

And given the prevalence of originalist arguments in opinions and briefs, it's also important to contain and counter them when they appear in litigation. This guide is designed to help you do just that. It offers practical strategies and tactics for addressing originalist arguments that can persuade judges, take some of those originalist arguments off the table, and help win cases for your clients. This guide should help you spot originalist arguments, understand at a high level how they work, and respond to them effectively while maintaining a robust critique of originalism and its applications.

We've written this guide primarily for litigators. But litigators aren't the only ones who need to respond to originalist arguments. Judges, scholars, teachers, journalists, commentators, and others do too. Indeed, everyone is involved in the process of understanding and applying the Constitution; it's not just the province of the highest court or a matter confined to the courtroom. Throughout this guide, we talk about court filings and lawyering tactics. But many of our insights should also be useful for scholarly articles, judicial opinions, public writing, and debates.

At the core of the guide's approach is a basic idea: To address originalist arguments, attorneys don't have to discard their tried and true lawyering techniques and become historians. Historical research undoubtedly plays an important role in shaping responses to originalism in litigation, but it's just one tool in the lawyer's tool kit. Other tools — including precedent, logic, and critical reasoning — can be used to reduce the legal significance of your opponents' originalist claims without even engaging their historical merits. And, once you engage those merits, there are additional tactics that can help you more effectively work with historians and historical materials as well as avoid mistakes that can weaken your case.

This guide synthesizes holdings and useful commentary from judicial opinions, analysis from the scholarly literature, and tactics the Brennan Center for Justice has learned or developed in working with lawyers and historians on strategies for litigation in which originalism has been in play. It includes insights that are relevant for lawyering in both the federal and the state courts.

After a brief discussion of some of the ways originalism appears in litigation, this guide offers three sets of arguments that you can use to reduce the scope and legal significance of originalist propositions you encounter in your cases. It then provides practice pointers that can help you address the historical merits of originalist arguments. The guide closes with a sampling of approaches for recasting, in non-originalist forms, history's role in constitutional disputes. Along the way, you'll find copious citations to sources that can bolster your case filings and deepen your knowledge.

This guide aims to be thorough, but it does not claim to be comprehensive. The authors' principal experiences have been with federal appellate litigation on issues of structural constitutional law. We hope our observations will encourage practitioners in other areas of the law and other courts to bring more insights to bear in the coming years.

Additionally, this guide does not attempt to train you in substantive history or historical research methods. Our practice pointers should, however, help you identify problems with historical arguments you encounter and structure your consultations with historians.

Finally, this guide does not claim — and cannot responsibly claim — to offer advice that will work for every case and at every stage in the litigation life cycle. Your immediate obligation is to your clients. The choice of whether and how to deploy each of these tactics will depend on the needs of your case. In any given case, you should adopt only what will serve your clients' interests according to your own considered judgment. In that spirit, we encourage you to evaluate each of these arguments with the particulars of your case in mind.

Addressing the courts' originalist turn can be daunting. For your work and your thinking, it is crucial to take the long view. Originalism may be dominant now. But as a jurisprudential project it is just decades old, and only more recently has it become so consequential. It will not govern the law forever. Litigators have a key role to play in developing tools to challenge originalism's spread and advancing alternatives when opportunities arise.

Checklist for Practitioners

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Checklist for Practitioners

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I. Defining Originalism in Litigation

The exact contours of originalism as a philosophy of constitutional interpretation are the subject of fierce scholarly debate, both among originalists and between originalists and their critics.[1] In general, originalism rests on two major claims about the Constitution: first, that the written Constitution has a settled meaning we are bound by today; and, second, that the Constitution's meaning was settled by those who wrote it, ratified it, or were governed by it at the time of its enactment, or perhaps all three.

Accordingly, the theory goes, lawyers and judges are supposed to identify that settled meaning and follow it. The Supreme Court's originalist justices have also begun building out a jurisprudence based on "history and tradition," whose relationship to originalism is complex and debated. Given that these approaches both focus on history as a source of constitutional meaning and treat historical meaning as a constitutional command, many of our insights should be responsive to both.

The scholarly discourse surrounding these issues is important. But this guide focuses on originalism as lawyers have been putting it into use in litigation — or, in other words, originalism as a courtroom practice.

As a practice, originalism has some clear hallmarks. First and most obvious are appeals in briefs and judicial opinions to "original meaning," "original public meaning," "original intent," "the framers," and "history and tradition." These appeals may be supported with evidence or argument, or they may be offered with minimal accompanying detail.

Second is a frequent reliance on a few historical sources — or types of sources — to substantiate those concepts. For example, historical dictionaries or legal treatises may be cited to support claims about how words were popularly understood when a constitutional provision was enacted.[2] Or, when dealing with constitutional provisions enacted at the founding, reference may be made to the records of the Constitutional Convention and the Federalist Papers, as evidence of what the framers thought about the document they produced.[3] For the Reconstruction Amendments, the records of congressional debates perform a similar function.[4] Coterminous state constitutional provisions and state laws are frequently offered as evidence of what legislators thought they could — or could not — regulate consistent with their understanding of the Constitution at the relevant time.[5] And, in "history and tradition"–style analyses in particular, records from pre-founding British history — including cases and common law treatises such as Blackstone — are also popular for explaining concepts that purportedly carried over into early American legal thinking.[6]

Other types of historical sources may appear alongside these staples, as they did in *New York State Rifle & Pistol Association v. Bruen* and in *Dobbs v. Jackson Women's Health Organization*.[7] That underscores a third hallmark of originalist argumentation in litigation: a general lack of express criteria for including or excluding particular sources, assessing the evidentiary value of the sources that are included (both generally and vis-à-vis sources that are excluded), and mediating conflicts in the historical evidence. In these circumstances, the sources on which originalist arguments rest can appear arbitrarily assembled, at best.

Fourth, these sources are often presented without context or narrative. The argument is frequently advanced through the prose equivalent of strings of quotations or lists of legal citations. The lawyering or judging involved, in turn, is less like historical analysis as historians would practice it and more like surface-level readings of old words or old sources, with little context to arbitrate among competing potential interpretations.

II. Arguments for Responding to Originalism in Litigation

A wide variety of arguments can be deployed against the originalist assertions in your opponents' briefs. To bring some order to those arguments and help you identify the right ones to use in your case, consider this three-part typology: arguments that rely on judicial doctrine; arguments that focus on the problems with originalism as a method, its applications, or the conclusions it has allowed or encouraged courts to draw; and arguments that rely on alternative historical frameworks that the courts — including the Supreme Court — have previously accepted or at least acknowledged.

There are conceptual links among many of these arguments, and in some instances, certain arguments may become redundant or collapse into each other. Nevertheless, we lay them out in the detailed manner that follows to help you ensure that you're making all the arguments that are available to you.

CATEGORY 1

Argue on Doctrine

Your first set of potential responses will draw on judicial precedent to make doctrinal points about originalism's applicability — or lack thereof — to the case at bar.

1. "Originalism isn't the standard in this area of law."

(A) "Supreme Court case law doesn't require originalism."

Your opponents may argue that the Supreme Court has established originalism or "history and tradition" as the binding standard for constitutional interpretation generally. To support this claim, they may cite major decisions such as *Bruen*, *Dobbs*, or *Students for Fair Admissions v. President and Fellows of Harvard College*.[8]

When countering arguments like this, you should urge the court to construe the holdings of those cases narrowly, limited to the subject matters and constitutional provisions they expressly address.[9] Federal courts have already rejected litigants' originalist reasoning on this ground.[10] Then, explain these cases' inapplicability to the case at bar and remind the court that originalism is not the standard in the area of law at issue.

(B) "Binding precedent requires a different, non-originalist test."

Sometimes, binding precedent may require a different, non-originalist test for the constitutional issue in your case. You should thoroughly research the relevant case law and cite any non-originalist precedent that would bar the court from applying an originalist test to your issue because the proper analysis has already been decided.[11]

If you're litigating in the federal circuit courts, you can pair this kind of citation with citations to the relevant circuit's prior precedent rules, which are otherwise known as prior-panel-precedent or law-of-the-circuit rules. As litigators are likely well familiar, these rules require subsequent panels within a federal judicial circuit to follow the precedent of the first panel to address an issue.[12] They also typically provide that the prior decision controls unless a directly on-point and inconsistent U.S. Supreme Court ruling would require modifying it or the en banc circuit court has overruled it.[13] Many state courts have analogous rules.[14]

Courts have described these rules as constituting "one of the sturdiest building blocks on which the federal judicial system rests" and emphasized that "exceptions . . . are narrowly circumscribed and their incidence is hen's-teeth-rare."[15] These rules, coupled with relevant non-originalist precedent, can help build a strong argument that courts may not use an originalist test — even if the court disagrees with the prior rulings.

2. "Our opponents have made no effort to fit their argument within existing doctrine."

Litigants often use originalist arguments to justify completely overturning judicial precedent in a particular area of law.[16] Sometimes, however, litigants try to use originalist arguments in a less aggressive way, asking the court to insert a new rule based on original meaning into existing doctrine without reconciling that rule with the doctrine. In other words, instead of trying to tear down the whole doctrinal house, they ask the court to add a new room — or renovate an existing one — in a different architectural style, without regard for how it would look or function.

The Supreme Court faulted litigants who tried this in *Haaland v. Brackeen*, a case involving complex points of federal Indian law. Writing for a seven-justice majority

that included all but Justices Clarence Thomas and Samuel Alito, Justice Amy Coney Barrett noted that the petitioners "virtually ignore" the Court's precedents, fail to take them "on their own terms," and then "turn to criticizing [this Court's] precedent as inconsistent with the Constitution's original meaning." Justice Barrett criticized them for this approach, noting that they "offer no account of how their argument fits within the landscape of our case law."[17] Rather, they "frame their arguments as if the slate were clean" when "[m]ore than two centuries in, it is anything but."[18] Justice Barrett further instructed that the petitioners needed to "offer a theory for rationalizing" precedent, even if they wanted to create an exception to it, as "that would at least give us something to work with."[19] *Brackeen* draws on lines of scholarship in which originalists from Justice Antonin Scalia to Justice Barrett have tried to reconcile the principles of stare decisis with the often disruptive effects of originalist argument.[20]

Brackeen suggests that litigants must at least try to square their originalist approach with existing doctrine. So, whenever litigants attempt to go straight to originalist argument, it's important to argue that the burden is on them to engage with the doctrine and reconcile their arguments to it.

Additional Arguments for State Courts

Litigators may have a few additional arguments they can make in state courts, some of which hinge on doctrines that provide judges with rationales for maintaining independence from the federal courts. Keep in mind that, under principles of judicial federalism, the U.S. Constitution is a floor, not a ceiling, for rights, and state law can provide additional or more expansive protections.[21]

>> "The state court shouldn't lockstep with the federal courts."

In state courts, anti-lockstepping arguments are often available. Under this approach, you would argue that a state court should not follow — or lockstep with — the federal courts in using originalism to interpret analogous state constitutional provisions. Anti-lockstepping arguments can be compelling to state judges because they speak directly to the significance of their respective states' jurisprudence, constitutional history, and canons of construction.

Your briefing strategy on this front should have two major steps. First, you should argue that departure from the originalist federal precedent is warranted, applying the relevant departure standards, if any, established by your state court. These standards may include policy considerations that aren't compatible with originalist methods. Critically, however, even if the court chooses not to lockstep, it might not automatically reject an originalist analysis. Indeed, some courts may apply their own originalist interpretations of their state constitutions.[22] So, as a second step in this briefing strategy, you should present a constitutional analysis using arguments laid out elsewhere in this guide to persuade the court to take a non-originalist approach to your case.

To build an argument against lockstepping, you should first determine whether your state has departure rules and, if so, put them into play.[23] These rules govern which factors a court should consider when determining whether to deviate from federal precedent in cases specifically involving state constitutional issues.[24] Some state courts have departure rules for particular issue areas.[25] Others do not have clearly articulated rules but do have a history of declining to lockstep and of reading their own constitutional provisions more broadly and protectively than their federal counterparts.[26] Some states have also recently expressed an openness to revising precedents that engaged in unreasoned lockstepping.[27]

Several helpful arguments may be available at this stage:

- You may be able to encourage the court to break with originalism to the extent that the method has produced rights-restrictive federal rulings. For example, New York courts are more likely to engage in an independent state-law analysis when there has been a change in U.S. Supreme Court precedent that "dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright."[28]

- You may be able to point to the court's express recognition that a state constitutional provision confers greater protection than the analogous federal provision. For example, a Montana trial court recently struck down a law "limit[ing] the definitions of sex into binary categories" as unconstitutional under the state's privacy and equal protection guarantees, both of which are broader than their federal counterparts.[29] You could cite similar cases in a given issue area to argue that the court is bound to follow a broader state tradition over a federal approach.

- Even if such citations are not available, you may be able to appeal to the state's unique constitutional history or culture to justify a departure. For example, in a recent case upholding a state statute regulating firearms, a

Hawaii Supreme Court justice invoked the state's "spirit of Aloha" to depart from *Bruen* even though the statute's language closely mirrors the one the U.S. Supreme Court struck down.[30] And, in the wake of *Dobbs*, litigants and courts in some western states have invoked "the early adoption of women's suffrage and constitutional sex equality provisions," as well as the equal role frontier women played in society, to justify rights-protective rulings.[31] The Utah Supreme Court, for instance, appeared receptive to such arguments in affirming a preliminary injunction against a sweeping abortion ban in the state.[32]

- Finally, you may be able to persuade the court that the comparative newness of state constitutional provisions counsels against following federal precedents on older federal analogues. Many state constitutions or state constitutional provisions are relatively new, and most are newer than the federal constitution.[33] For instance, Montana's current constitution was not ratified until 1972. And new provisions are added regularly via amendments. New York, for example, passed its Equal Rights Amendment in 2024. This dynamic complicates state courts' attempts to tether their constitutions to jurisprudence regarding substantially older federal constitutional provisions.[34]

To sum up: To build a strong anti-lockstepping argument against an originalist federal ruling, you should research your state's departure rules, precedent that speaks to or demonstrates the state's long-standing tradition of departing from federal precedent, and any precedential or persuasive statements about the state's unique decision rules or constitutional culture that warrant a different conclusion or interpretive approach.

>> "Primacy requires the state court to take a non-originalist approach to this issue."

Some states also have primacy requirements, which commit courts ruling on cases involving claims under both federal and state constitutional provisions to decide the state claims first. Primacy requirements are often accompanied by commitments to decide state constitutional questions primarily using state precedent, turning to federal precedent only to the extent that the court finds it persuasive.[35] Primacy approaches increase the likelihood that a state court will center questions of state constitutional law in deciding the outcome of a case and independently analyze state constitutional provisions to reach its decision.[36] Courts that accept primacy and anti-lockstepping arguments may look to the distinct ways they have traditionally interpreted their states' constitutions.

If you are litigating in a primacy jurisdiction, you may be able to combine primacy and anti-lockstepping arguments to argue that the state court should take a different, non-originalist approach to an issue even when federal courts have applied originalism to it. And, as we've noted, state constitutions may also offer greater protections than the federal constitution does.

>> "Originalism is not the state court's approach to state constitutional interpretation."

You may be able to combine primacy or anti-lockstepping arguments with a third, related argument: Originalism is not the accepted or universal approach to constitutional interpretation in that state.

Your opponents may try to argue that originalism is the settled approach to constitutional interpretation, in that state or generally, and therefore should be used to resolve every constitutional question by default.[37] They may use such arguments to apply originalism to issues for which binding originalist precedent does not yet exist. They may try to argue that even under a primacy or anti-lockstepping model, the state's specific history and tradition call for originalism. Or they may try to justify overturning non-originalist precedent under that line of reasoning.

You can respond to such arguments by citing case law that interprets the state's constitution using non-originalist methodology or makes affirmative statements about the need or justification for applying a non-originalist approach, particularly for the subject area at issue. Some judges have challenged the notion that originalism is the standard for constitutional interpretation in their states, pointing, for instance, to long-standing, non-originalist precedent.[38] Judges have also stressed that the use of originalism in one case does not bind a court to use originalism in every case.[39] You can quote directly from such opinions to strengthen your brief.

CATEGORY 2

Argue on Method, Applications, and Conclusions

The second category of arguments takes aim at originalism's problems as a method, its applications, and the substance of the conclusions that it has produced.

1. "Originalism is a flawed method."

You can argue against originalism as a flawed method of constitutional interpretation, either in general or as specific courts have applied it. Many such arguments have been thoroughly developed in the case law and literature. In what follows, we offer high-level overviews of some of the most common critiques advanced by judges, historians, and legal scholars. But we encourage you to consult the sources cited in the extensive endnotes to this subsection, which both lay out these critiques in greater detail and point you to additional sources.

You should, of course, consider strategic questions about mobilizing these kinds of arguments in your case. Frontal critiques of originalism as a method may be most persuasive in courts or issue areas where originalism is not already the settled approach. That said, do not dismiss this family of critiques out of hand even when you're litigating in originalist courts or before originalist judges. They can be useful in several ways.

First, many frontal critiques of originalism can be restyled as critiques of originalism as your opponents are applying it in your case. For example, "Our opponents' argument would require us to adopt outdated social mores about the relationship between husbands and wives" is an as-applied version of the critique of originalist analyses' frequent tendency to lock in outdated social mores. These as-applied critiques may be persuasive to particular judges on particular issues, even those who generally consider themselves originalist. As we go, we will point you to other sections of this guide where you can find discussions of as-applied versions of some of these frontal critiques.

Second, it may be useful for you — or your amici — to seed these frontal critiques in briefs to help sympathetic judges frame their dissents. Powerful dissents are critical to shaping the public's reception of decisions and, in turn, building the popular understanding necessary both to constrain courts in the future and to advance the case for court reforms.

Finally, for similar reasons, these frontal critiques likely will be helpful for your communications outside the courts.

(A) "Originalism risks locking us into outdated and unacceptable values."

Originalism requires judges to tether their interpretations of the Constitution to understandings at the time the document was drafted or ratified. In keeping with that requirement, one scholar has explained, the Supreme Court "frequently relies [on] moments in which women and people of color were expressly excluded from political participation and deliberation."[40] Precisely because of that dynamic of exclusion, the understandings of those early constitutional moments often reflect outdated views and values that deny the agency and humanity of large parts of the contemporary population. Making those understandings our law, in turn, entrenches the inequality and marginalization of past eras[41] and reverts us to social, political, and legal arrangements that we long ago rejected as abhorrent.[42] Indeed, as one state supreme court justice explained, "[I]f originalism is taken to its logical conclusion, it would result in the radical rejection of long-settled constitutional principles. . . . *Brown v. Board of Education*, same sex marriage, virtually all rights of women and racial minorities, and any number of other fundamental rights are difficult, if not impossible, to justify on originalist grounds."[43]

Judges and scholars have noted related problems. Originalism's focus on original meaning as the substance and limit of judicial decision-making prevents judges from making reasoned decisions suitable for the present day, putting us under the dead hand of the past.[44] Similarly, by interpreting the Constitution to have a rigid meaning fixed deep in the past by constitutional conventions or electorates that excluded women and people of color, originalism grants privileged legal status to the thoughts and values of groups that do not represent the contemporary American public — a democratically illegitimate outcome.[45]

For as-applied versions of this critique, see "The originalist answer is reprehensible," p. 12.

(B) "Originalist methodology is often selective, results-oriented, and unprincipled."

One advertised benefit of originalism is that it is more "objective" than other ways of interpreting the Constitution. According to this account, originalism allows courts to do away with judge-made rules in favor of the Constitution's original meaning. But as judges and scholars alike have pointed out, any method of constitutional interpretation requires choices about which evidence and rationales to prioritize, and why, and originalism is no exception.[46] Constructing a historical account of the Constitution's meaning requires judges to choose which evidence, sources, or speakers to elevate and which to downgrade or ignore. And because the courts have offered no principled criteria to govern those choices, originalism allows judges to cherry-pick sources that

support their predetermined or values-driven conclusions.[47] In this way, originalism can enable judges to conceal their subjective judgments behind a veneer of objectivity.[48]

For guidance relevant to constructing as-applied versions of this critique, see Practice Pointers, p. 16.

(C) "Originalism has been destabilizing constitutional law."

Several characteristics of originalist analyses and originalist opinions have led judges and others to warn about the threats they pose to the stability and credibility of constitutional law. First, as multiple Supreme Court justices and other jurists have explained, the historical standards set out in the Supreme Court's originalist opinions are often confusing and unworkable, leaving lower courts without coherent and consistent means for resolving cases.[49] When this happens, Justice Ketanji Brown Jackson has reminded us, "the Rule of Law suffers. That ideal — key to our democracy — thrives on legal standards that foster stability, facilitate consistency, and promote predictability."[50]

Meanwhile, because originalism places overriding significance on the original meaning of the Constitution, it licenses judges to ignore or overturn decades-old precedent and thus "renders stare decisis irrelevant," in the words of one state court justice.[51] Indeed, as another justice explained, originalism allows a court "to impose its view of the meaning of a constitutional provision, as if the slate has been entirely blank, not merely purporting to supersede precedent . . . but to erase it."[52] When courts undermine stare decisis, Justice Stephen Breyer has cautioned, they undermine the "stability that allows people to order their lives under the law."[53] And, by freeing judges to ignore precedent, a state supreme court justice warns, originalism erodes "public confidence in the impartiality of judicial review."[54]

Finally, originalism undermines the very tradition of judging itself. Historically, judges have applied a wide range of modalities to resolve constitutional questions including prudence, ethics, and doctrine, as well as history.[55] As one scholar has noted, however, originalism is "jurispathic."[56] It doesn't tolerate other approaches to constitutional interpretation.[57] Instead, it tries to limit judging to the search for a false certainty in history.

For as-applied versions of this critique, see "Binding precedent requires a different, non-originalist test," p. 7.

(D) "Originalism is encouraging flawed history."

Historians have widely and repeatedly criticized originalism as "largely antithetical to accepted historical methodology."[58] For example, historians have faulted originalist briefs and arguments for attempting to analyze historical sources — or portions of sources — without accounting for the context that historians widely recognize is required to understand those materials.[59] Additionally, originalism focuses judges' attention on concepts that are often anachronistic or difficult or impossible to substantiate historically — such as original public meaning. For further discussion of problems with original public meaning, see below. For a discussion of anachronism, see p. 18.

Judges themselves have noted the difficulties with translating history into law. For one thing, judges and lawyers are trained differently from how historians are trained. As Justice Breyer explained, "Judges understand well how to weigh a law's objectives (its 'ends') against the methods used to achieve those objectives (its 'means'). . . . Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems."[60] Compounding this difficulty, attorneys and judges lack the resources, time, and experience necessary to apply proper historical methods, even if they were to receive instruction in them.[61]

These methodological or interdisciplinary problems with lawyers' originalism have serious substantive implications, with historians and judges repeatedly criticizing the method for generating wrong historical conclusions.[62]

For guidance relevant to constructing as-applied versions of this critique, see Practice Pointers, p. 16.

(E) "Originalism rests on the false assumption that a single original meaning exists in every case."

Judges, historians, and legal scholars have long warned that there may be no singular original public meaning on any given issue. This is just as true for the founding era as it is for other eras.[63] For example, the delegates to the Constitutional Convention didn't have a single shared perspective on the whole Constitution's meaning, let alone all its words, phrases, and clauses.[64] The same holds for the Constitution's ratifiers and the people they represented. Even if you could reconstruct all those perspectives through historical research — which would be extremely difficult — it would be impossible to synthesize them into a single meaning.[65] As this line of criticism runs, originalism therefore cannot provide conclusive answers for most constitutional questions.

For an as-applied version of this critique, see Embrace indeterminacy, p. 18.

(F) "Originalism contravenes the framers' creation of a dynamic constitution."

Historians and legal scholars have long challenged the notion that the framers generally envisioned that the Constitution's meaning would be static. Scholars have argued, for example, that the framers wrote an open-ended constitution that was meant to evolve to meet circumstances that they themselves didn't and couldn't imagine.[66] They have explained that the framers left questions open for later generations to explore or answer.[67]

And the framers understood that the Constitution's text could not contain all such answers.[68] Historians have likewise argued that "Congress built future interpretation and implementation" into the Reconstruction Amendments.[69] State constitutions are much the same.[70]

(G) "Originalism has been focusing on too narrow a range of historical perspectives."

Critics have frequently noted that originalist analyses have privileged the perspectives of a narrow range of historical actors, especially judges, lawyers, and legislators. And those actors were predominantly white, male, and affluent. Likewise, these analyses have frequently focused on a narrow range of historical sources (mainly cases and statutes) to determine what the Constitution meant in the past. However, as these critics emphasize, the Constitution was constantly being made and reshaped by many kinds of actors — from administrators to common people. Consequently, to assess what the Constitution meant, how it was formed, and how it evolved, it is important to consider a much broader array of voices and sources.[71] That, in turn, requires a healthy appreciation for historical context, which we delve into in greater depth in the Practice Pointers section of this guide, p. 16.

(H) "Originalist analysis limited to the founding era neglects the significance of subsequent constitutional amendments."

Scholars, litigators, and jurists have argued in depth that courts should treat at least certain amendments to the Constitution as significantly remaking the document. According to this line of thinking, "the Constitution" is not simply the original Constitution of 1787, but the whole Constitution as amended over time. Amendments, in turn, are not simply additive to the Constitution's substance but transformative, changing the way we should read at least some of the provisions that predate them.[72] By extension and for example, any originalist analysis of provisions of the Bill of Rights that limits its frame of historical reference to the founding era misunderstands the extent to which subsequent amendments have changed the content of those rights.

Justice Jackson has been a strong proponent of a version of this view, emphasizing that the Reconstruction Amendments and related contemporaneous legislation "transformed our Constitution and society."[73] This perspective draws on influential historical arguments that Reconstruction represented a "second founding," whereby the recast Constitution "greatly enhanced the power of the federal government" and generated "a new . . . relationship between individual Americans and the national state," in turn "creating the world's first biracial democracy."[74] The Reconstruction Amendments accomplished this second founding by, among other things, incorporating the Constitution's guarantees against the states, ending slavery, and articulating universalistic concepts of citizenship and legal equality that countered exclusionary elements of the original Constitution and the political configuration that produced it.

And because, as some scholars have noted, the 14th Amendment "represents a commitment to a series of principles," it challenges originalist attempts to treat history as a set of narrow, definitive rules.[75]

For one as-applied approach to this critique, see "Our opponents focus on the wrong constitutional moment," p. 14.

2. "The originalist answer can't be the answer."

(A) "The originalist answer is reprehensible."

You may encounter originalist arguments that are similar to, or related to, arguments historically made to support ideas that we now consider morally or ethically reprehensible. You can respond with a "negative precedent" argument that draws out those similarities.[76]

Justice Ruth Bader Ginsburg used this approach in her majority opinion in *United States v. Virginia*, arguing that Virginia's attempts to defend the exclusion of women from military education were an outgrowth of archaic scientific and pedagogical theories of the 19th century.[77] As she noted, "The notion that admission of women would downgrade [the Virginia Military Institute's] stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies]' once routinely used to deny rights or opportunities."[78] By drawing this connection, Justice Ginsburg delegitimized the arguments of those seeking to deny women an equal education.

Justice Sonia Sotomayor likewise used this approach in her dissent to *Students for Fair Admissions*, in which the majority ruled that the limited use of race to further racial diversity was a constitutionally invalid consideration in the college admissions process. In addition to casting the majority's arguments as contrary to the Court's canonical precedent *Brown v. Board of Education*, Justice Sotomayor connected them to the infamous and reviled case of *Plessy v. Ferguson*, which upheld the constitutionality of racial segregation under the doctrine of "separate but equal."[79]

Negative precedent arguments can also be used to address originalism as a method — as distinct from the specific historical arguments your opponents are putting forward. For example, courts, like the *Dred Scott* Court, and legislators, like the authors of the Southern Manifesto, deployed originalist-like arguments to roll back rights and entrench caste systems.[80] And, taken on its own terms, originalism is difficult to reconcile with some

of the Court's most time-honored decisions.[81] It is because originalism, practiced consistently, would have such disruptive and intolerable effects that even Justice Scalia confessed his use of originalism was "faint-hearted."[82]

(B) "The originalist answer has untenable ramifications (as a matter of structure, policy, etc.)."

Sometimes, originalist arguments lead to interpretations of the law that are obviously untenable because they would produce negative policy consequences, undermine the structure of government, or generate other, similar bad outcomes. You can call your opponents out when this is the case.

Litigation on presidents' power to remove the heads of federal agencies reveals that even the Supreme Court's originalist justices might balk, on policy grounds, when confronted with originalist arguments that have significant negative ramifications. Indeed, those ramifications may be more important to these justices than the weakness of the historical bases for the originalist arguments. Ruling at a preliminary stage in one such case, the justices seemed to take an aggressive position on the president's removal power, but they still refused to recognize an unfettered power to remove the chair of the Federal Reserve.[83] Their historical justification for distinguishing between the Federal Reserve and other agencies seemed specious. Commenters have surmised that the justices created a carve-out for the Fed at that stage in the litigation because they feared that a full-blown application of an originalist legal interpretation would destabilize the markets.[84]

Many scholars have noted that any methodology that could lead to intolerable consequences must not be worth following. For originalism, as one scholar has explained, those consequences could extend to invalidating critical precedents involving "the use of paper money as legal tender, the use of the federal commerce power to establish the welfare state and federal civil rights laws, and the federal administrative state."[85] Other harms have already come to pass, like undermining key privacy and reproductive rights precedents.[86]

3. "Originalism shouldn't be the standard in this area of law."

Litigants may ask judges to turn to originalism even in areas where courts haven't previously done so. You can assert the problems with that move as a doctrinal matter (see our discussion of reconciling originalism with precedent, p. 7). You also may be able to argue that, in certain areas of the law, judges have already expressed an unwillingness to use originalist approaches because the historical record in those areas is silent, unclear, or unhelpful.

Consider Chief Justice Earl Warren's famous statement in *Brown v. Board of Education* that the historical sources were "[a]t best . . . inconclusive."[87] "[W]e cannot turn the clock back to 1868," he said, looking for other grounds on which to decide the case.[88]

Even some self-proclaimed originalist justices have rejected originalist arguments where the historical record is ambiguous or silent. This is perhaps most notable in First Amendment cases.[89] For example, in her concurrence in *Fulton v. City of Philadelphia*, Justice Barrett voiced a preference for textual and structural analysis of the Free Exercise Clause after finding "the historical record more silent than supportive on the question" at issue.[90] Likewise, in her concurrence in *Vidal v. Elster*, Justice Barrett argued that treating history as authoritative can be misguided where there is an "absence of founding-era evidence."[91] When such evidence doesn't exist — and often, even when it does exist — courts "must inevitably articulate principles to resolve individual cases" in "applying broadly worded text like the Free Speech Clause."[92] They can't substitute history for their judgment.

4. "Our opponents are drawing flawed conclusions from silence."

Your opponents may argue that anything not expressly provided at the time the relevant constitutional provisions were written or ratified is unconstitutional today. As the argument runs, if something wasn't regulated or protected at that time, it cannot be now. This style of argument has been particularly common in Second Amendment cases, in which opponents of gun control contend that courts must invalidate contemporary laws that do not closely match historical ones.

This "argument from silence" has several vulnerabilities.[93] First, as Justice Barrett has explained, it wrongly assumes "that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority."[94] Second, it wrongly assumes that the reasons legislators declined to regulate something or protect something were necessarily related to their concerns about the legality of doing so.[95] The legislators of the time might just as well have thought that doing so was unnecessary, impractical, or politically insupportable. They simply might not have thought of it, because of a failure of creativity or forethought. Or they might have refused to legislate in the interests of communities of people they did not value or outright discriminated against.[96]

These objections to the "argument from silence" could potentially be substantiated with historical research. But they primarily reflect logic.

State Court–Specific Critiques of Originalism as a Method

Additional arguments against originalism as a method may be available to litigators in state courts.

>> "Originalism proceeds from the false assumption that the judges of this court are insulated from democratic accountability."
Advocates of originalism often stress the need for judges to defer to the original meaning of the Constitution, so as not to "overrule democratically adopted legislation based on . . . their idiosyncratic view of what the federal Constitution requires."[97] This stance ostensibly reflects unique features of the federal courts: Federal judges, with lifetime appointments, can't directly be held democratically accountable and can potentially remain in office for decades. But 38 states use elections as part of their system for selecting high court judges. Most have some form of reappointment process. And with just one exception, all state supreme courts impose some form of term limit or retirement age on their judges. These processes, in turn, arguably serve as accountability checks on the state judiciaries.

>> "The relative ease of amending this state's constitutional provisions cuts against the use of originalism here."
Proponents of originalism frequently defend the methodology based on the premise that originalism constrains judges from making policy-driven decisions. Even if one were to stipulate that originalism restrains judges more than other methods, there's less of a need to constrain state court judges, since state constitutions can be amended far more easily than the federal constitution when the public disagrees with court rulings on constitutional matters.[98]

>> "Originalist evidence doesn't exist for these questions of state constitutional law."
Scholars and judges have observed that historical sources required to support originalist claims in state constitutional interpretation can be scarce, deficient, or unreliable.[99] You may be able to point to these kinds of problems to argue that originalism is a particularly inappropriate method of constitutional interpretation for your state or the issue at hand.

CATEGORY 3

Argue Using a Potentially More Favorable Historical Framework

The final category of arguments accepts the originalist premise that history is relevant to figuring out legal meaning but tries to reinterpret that history using a framework different from the ones set forth in *Dobbs* and *Bruen*. These represent, essentially, defensive uses of history — moves you make when your opponents have already put history into play in their briefs. Some of these frameworks may also be useful for affirmatively deploying history in non-originalist ways. These affirmative possibilities are discussed in part IV.

1. "The principles underlying historical laws do not support our opponents' position."

Following originalist opinions like *Bruen*, litigants may challenge a contemporary law on the ground that it does not have a close enough analogue in founding-era laws. You can counter that the Supreme Court does not require such narrow analogies. In *United States v. Rahimi*, Chief Justice Roberts, in an opinion joined by all the justices save Thomas, noted that for a contemporary law to comport with the Second Amendment, "it need not be a 'dead ringer' or a 'historical twin'" to a similar law on the books in the founding era.[100] Instead, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[101]

This approach requires interpreting *Rahimi* as loosening *Bruen*. It does not require litigants to identify direct founding-era analogues for contemporary laws. Instead, it allows them to shift the inquiry to a higher level of generality, looking at whether current laws were passed for reasons similar to those for laws extant in the founding era and whether they burden a right in similar ways.[102]

Under *Rahimi*, scholars have observed, litigants can win or lose their cases on the basis of decisions judges make about the right level of generality or the most appropriate analogies.[103] You may be able to shape these considerations to your advantage. Your argument can frame, with appropriate precision or generality, the relevant principles underlying historical laws and practices.

2. "Our opponents focus on the wrong constitutional moment."

In litigation involving individual-rights challenges to state laws, your opponents may insist that the court restrict any historical analysis to the founding era. In this situation, however, you may be able to productively counter that Reconstruction is the relevant period. This has emerged

as a common feature of individual-rights litigation in areas of the law where the Supreme Court has already issued controlling originalist decisions.[104]

The Court's recent Second Amendment decisions, both written by originalist justices, have left open the question of "whether courts should primarily rely on the prevailing understanding of an individual right . . . in 1868" — when the 14th Amendment was ratified and the Bill of Rights was incorporated against the states — or "when the Bill of Rights was adopted in 1791."[105] Originalist justices writing on their own have opined in favor of 1868.[106] And conservative scholars have too.[107] One scholar has called this perspective "ascendant among originalists."[108] Shifting the time frame forward could bring into play historical practices that are more closely aligned with contemporary ones. It also requires courts to grapple with constitutional texts and principles expressly oriented toward broad-based, universalistic guarantees of equality and citizenship that can counter exclusionary values of the founding era and that traditionally have been critical to more equitable configurations of American law — whether those be important Supreme Court decisions guaranteeing individual rights or federal legislation doing the same.

3. "History did not end in 1787, and our whole experience as a nation supports our position."

Your opponents may argue that only history immediately surrounding the ratification of a particular constitutional provision is relevant when determining its meaning. But the Supreme Court has said on many occasions that the whole sweep of American history may also be relevant, especially on issues relating to the separation of powers.[109]

Reference to the long arc of constitutional practice has a deep pedigree, but Justice Breyer perhaps most forcefully articulated it for the majority in *National Labor Relations Board v. Noel Canning*. There, Justice Breyer wrote that the Constitution should be interpreted "in light of its text, purposes, and our whole experience as a Nation" and informed by "the actual practice of Government."[110] Under this approach, "'[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President."[111] He invoked James Madison, who had written that ambiguities in constitutional text could be clarified through a "regular course of practice" by the various branches of government.[112] *Noel Canning*'s approach is grounded in the theory that an enduring and uncontested practice of a particular branch of government reflects the acquiescence of other branches to it, and that acquiescence in turn reflects a deeper, shared assumption that the practice is constitutional.[113] The Supreme Court has repeatedly cited this approach since then.[114]

You can counter your opponents' focus on a narrow slice of history like the founding era or Reconstruction by encouraging the court to look at how certain constitutional actors — say, Congress or the executive — have understood their powers over time, and how their practice has built out the meaning of constitutional text.[115] Much of the history of the respective branches of government, or offices within those branches, is in the public record. Secondary sources and government publications — such as Congressional Research Service reports — may be sufficient to support this kind of argument.[116]

III. Practice Pointers

After exhausting the tactics laid out in the sections above, you may still need to engage the merits of your opponents' historical arguments. This section offers pointers for doing so. Some require minimal historical work on your part and are simply methods for quickly spotting flaws in your opponents' filings. Others require some engagement with historical material. In certain instances, you may be able to identify and analyze this material yourself. However, in many cases, a consulting historian will likely be a surer guide. These tips can help you more effectively structure your consultations. They can also help you avoid critical errors — both substantive and strategic — that are widespread in litigation involving originalist claims.

A theme unites many of these suggestions: the importance of historical context. Among other things, historical context can elucidate the meaning of texts by clarifying the motivations of the actors who produced them, the ways people used language and ideas, and the ultimate import of their statements and actions. Historical context can refer to many things, including the political, cultural, or religious concepts in currency at a particular time; the dominant modes of economic relations; the practices governing behavior both within and between social groups; and the methods that people used to disseminate information.

Accounting for context is much easier said than done. Indeed, historians are rigorously trained for years to do precisely this. That said, many of these pointers help concretize what it would mean for litigators to make use of context. And they underscore some major contributions that historians can make in forming responses to the historical underpinnings of originalist arguments.

A second, related theme runs throughout these recommendations: Responding to originalist arguments with history does not necessarily mean replacing one account of a constitutional provision's original meaning with another, rival account. Often, bringing context to bear on originalist arguments reveals that there is no one true answer.[117] And when history does not provide an answer, courts must look to nonhistorical considerations to reach the right ruling.[118] Several of the following pointers illustrate ways to put that insight into action and shine a light on its potentially powerful implications for your cases.

1. Approach your opponents' historical assertions skeptically.

As a general matter, it is critical to approach your opponents' historical arguments skeptically. Simply questioning whether an argument is true — or whether the source on which it is based is reliable — can potentially open up many lines of attack, even against the most confidently asserted characterizations of the historical record.

Take, for example, the case of the Pinckney Plan and the so-called independent state legislature theory.[119] Litigants relied on the document to make an originalist argument that the Elections Clause grants state legislators unfettered authority over the rules for federal elections held in their states.[120] They went so far as to cite the plan in the opening pages of their topside brief before the Supreme Court, as if it were dispositive of the issue. But historians have long known that the Pinckney Plan is a fraud.[121] Charles Pinckney claimed it represented a plan he had submitted to the Constitutional Convention in 1787. In fact, he submitted it in 1818, when the federal government was belatedly collecting the convention's records. As historians now know, Pinckney authored the document after the Constitution was enacted, likely to bolster the claim that he was the originator of many of the Constitution's key features.[122]

In sum: Don't trust, and always verify.

2. Leverage existing critiques of your opponents' sources.

It is often possible to track down the historical scholarship litigants draw on for their filings and find critiques of it that could be fruitful for your briefs. Simple searches in scholarly databases may be all that you need: Look for the articles your opponents use and then identify subsequent articles that cite them.

For example, recent lawsuits endorsing the president's broad power to remove federal officers are built on, among other things, originalist writings on the so-called Decision of 1789, the debate on presidential removal held in the first Congress.[123] In those writings, scholars contended that the first Congress settled the question in favor of unfettered presidential removal power. But more recent work by historians directly challenges this claim, noting critical missing facts, important errors of historical interpretation, and significant disagreements about the scope of executive power.[124]

As this example suggests, you should cross-check your opponents' historical arguments against secondary liter-

ature as a means of unearthing both their sources and potential counterarguments for your response.

3. Read in whole the primary sources your opponents cite.

Your opponents may introduce a historical argument by quoting a particular source and then saying that the quote stands for a certain principle or position they are advancing. But, just as you would read an entire case to confirm that a precedent is being fairly represented, you should read the entire document to ensure that it is not being misleadingly quoted.

For example, in *Trump v. United States*, President Trump's lawyers pointed to Federalist 69, written by Alexander Hamilton, in support of their argument that a former president has to be impeached before he can be criminally prosecuted.[125] They relied extensively on Hamilton's statement that the "President of the United States would be liable to be impeached" and "would afterwards be liable to prosecution and punishment in the ordinary course of law."[126] But reading that quote in the context of the whole of Federalist 69 makes clear that Hamilton was not advocating that impeachment precede prosecution. Instead, he was explaining the many ways in which presidents, unlike kings, could be held accountable. Hamilton further said that the president was like the state governors who could be prosecuted after their terms ended.[127]

In short, whenever your opponent cites a historical source, you should read it in full before addressing it in your briefs.[128] Ideally, your reading would be informed by substantial additional historical context to ensure that it is the correct one, or at least the most plausible.

4. Insist on direct evidence.

Your opponents may make historical assertions without any supporting evidence. Or they may supply their own interpretation of the historical record without clearly indicating where the record ends and their gloss on it begins. When this happens, insist that they provide direct evidence for their statements.

Consider, for example, the federal government's historical defense of President Trump's executive order purporting to end birthright citizenship for certain children. On its face, the 14th Amendment guarantees birthright citizenship to those "subject to the jurisdiction" of the United States.[129] The federal government's lawyers claimed that this language limited the guarantee to people subject to the "political jurisdiction" of the United States.[130] As the government's argument further ran, because those people subject to President Trump's order are subject only to the "regulatory jurisdiction" of the United States, they are not covered by the amendment's guarantee.

But this gloss on the text of the 14th Amendment lacks any basis in history. The government cites no historical sources to support its political/regulatory distinction.[131] And a review of relevant sources from the time of the 14th Amendment's enactment reveals no such distinction.

In short, do not allow your opponents to make historical arguments without evidentiary backup. Call on them to provide direct citations.

5. Don't give equal credence to all historical speakers.

Litigators do not always heed the dictum that history is written by the victors. You may notice them presenting old ideas as historical statements of the law or as dominant ways of thinking in an earlier time even though those ideas are best thought of as being on the losing side of historical debates (or irrelevant to them). It is important to flag sources representing the views of the losing side as a way of undermining their testimonial value.

Perhaps the most obvious recent example of this approach is litigants and judges giving historical content to the Constitution's provisions by referring to the writings of the Anti-Federalists, who opposed the Constitution's adoption.[132] Some Supreme Court justices have cited those thinkers and writers to narrow the reach of certain interpretations that the Federalists put forward or to defend expansive readings of certain rights guarantees against the government — much as the Anti-Federalists hoped for.[133] One justice went so far as to characterize an Anti-Federalist source as "highly influential" even though, as one scholar notes, "most historians would dispute this claim" and "would point out the obvious fact that" it "was composed by the Anti-Federalist minority of a single state."[134]

6. Work with the weight of history.

Historical arguments in litigation often take the form of competing citations, with one side countering the other side's quotations from historical sources with its own quotations from other sources. Or both sides may tussle over the meaning of the same material, with each side claiming a quotation supports its own argument. These scenarios reflect problems historians understand well: Historical materials are often susceptible to competing interpretations, and it is often possible to find some piece of evidence for every — or nearly every — proposition. In these situations, you must explain why your evidence should be weighed more heavily than your opponents', or why it should be interpreted in the way you argue it should. Failing to do so may concede significant ground to your opponents, freeing them to press claims on judges who will not otherwise have a means of arbitrating the dispute.

Providing historical context for your sources is critical to avoiding this trap. You can begin by searching for

evidence of dominant ideologies, gestalt ways of thinking, widely shared values, common actions, and so on. This evidence will often come from secondary literature that synthesizes a significant amount of primary source material and situates it in time with additional narrative and analysis. This kind of evidence can help you establish that your opponents' quotations represent outlier opinions, or that their evidence is best read differently from the way they urge. Think of this like burden-shifting in civil litigation: Your goal is to increase the weight of the evidence on your side, forcing your opponents to make a more robust showing to prove their point. You may also be able to argue that litigants making originalist arguments bear an extra burden of persuasion, especially if they are seeking to alter the status quo.[135]

The brief from founding-era scholars in *Trump v. United States* demonstrates this technique.[136] In that case, Trump's historical argument in support of presidential immunity for allegedly criminal conduct committed while in office hinged on a context-free reading of the Vesting and Impeachment Judgment Clauses, along with a few similarly context-free quotations from the Federalist Papers. Before engaging with those historical materials, the scholars' brief devoted nearly 13 pages to narrative historical context.[137] These sections presented founding-era Americans as suspicious of executive power, monarchs, and royal governors and supportive of establishing safeguards against presidents wielding monarchical prerogatives. That context made it difficult to read the Constitution as granting presidents the sort of kinglike powers that the petitioner claimed. The scholars brought that context to bear throughout the second half of the brief when addressing the petitioner's close reading of textual historical evidence, as a way of bolstering different readings of it or, alternatively, discounting its relevance. Although the Court ultimately ruled in favor of the petitioner, the majority generally sidestepped his context-free historical arguments to do so. That dynamic made the problems with the Court's ruling more apparent and thus riper for the public critique it swiftly received.

7. Embrace indeterminacy.

Originalist arguments assume that a constitutional provision has an "original public meaning." In responding to these arguments, lawyers often take that premise for granted and search for an alternative original public meaning that bolsters their side. However, as we have noted at several junctures throughout this guide, a single original public meaning often does not exist.[138]

In such cases, you can counter your opponents' originalist argument not with an originalist argument of your own but instead with an argument that the court must adopt some other way to decide the case. As noted above, even originalist Supreme Court justices have rejected historical arguments where the record is silent, ambiguous, or unhelpful.[139]

A version of this approach can be seen in a brief filed by Professor Jane Manners in *Boyle v. Trump*, a case involving the attempted removal of a member of the Consumer Product Safety Commission.[140] The brief uses the absence of discussion of presidential removal at the Constitutional Convention and ratification debates to direct the court to a longer history of law governing the removal of officers that predates the founding and extends into the 20th century.

8. Play with probability.

You can also challenge your opponents' assertion that a clear original public meaning exists by questioning its probability. As with the preceding tactic, this approach does not require positing an alternative original public meaning. Instead, it marshals historical evidence to suggest that — regardless of whether an original public meaning exists — your opponents' argument cannot be correct.

Historians of the founding era applied a version of this approach in their brief for *Moore v. Harper*, the independent state legislature theory case. This brief helped direct the Court to the correct answer in this highly charged case. There, the historians discredited the petitioners' claim about the Elections Clause — that state legislatures "are unconstrained by substantive limits imposed by the state's constitution and may act independently of any other branch of the state's government" when making rules for federal elections — as "historically implausible in view of the framers' general fear of unchecked power and their specific distrust of state legislatures."[141] The brief went on to recount that history to "show how emphatically Petitioners' claim would have been rejected" had it ever been presented "in 1787–88."[142] While the historians subsequently endorsed the respondents' alternative interpretation of the Elections Clause, this probability-focused approach does not require that.

9. Call out anachronism.

You should call out anachronisms in your opponents' arguments, as doing so can both neutralize the substance of their arguments and undermine their credibility with the court.

Keeping several insights front of mind can heighten your sensitivity to anachronism. First, the meanings of words can, and often do, change over time.[143] Second, the meaning of a historical statement is often not obvious when read in a vacuum. It follows that you should always work to understand historical words and statements in their native context. It is not sufficient to closely read a historical text the way you would a contemporary one and assume the

words' meaning. Nor is it enough to consult historical dictionaries. Taking history seriously requires attempting to think the way people actually thought at the time and acknowledging the difficulty of doing so; it is like translating from a foreign language.[144] Secondary historical literature can, again, be helpful with reconstructing context. The rich literature criticizing Justice Scalia's majority opinion in *District of Columbia v. Heller* — including Justice Breyer's clinical dissent — demonstrates in detail how to address this kind of anachronism.[145]

Relatedly, as mentioned in our discussion of the importance of direct evidence (p. 17), your opponents may try to impose present-day concepts on the past, despite those concepts having no basis in history. Consider the nondelegation doctrine in administrative law, the idea that the framers barred Congress from delegating discretionary authority to the executive.[146] Scholars have shown that the founders never embraced the formalist notion of separation of powers that underlies the doctrine and that early Congresses delegated substantial discretionary authority to the executive branch.[147] This scholarship demonstrates anachronism by showing the absence of the nondelegation concept in the historical record and explaining how things worked in actual practice.

IV. Alternative Approaches to History in Litigation

The preceding discussion focused principally on defensive moves you can make when your opponents have already put originalist frameworks into play. Sometimes it may make strategic sense to affirmatively introduce historical evidence on your side. History has long been integral to constitutional reasoning in a variety of forms.[148] In thinking through your case, consider methods for deploying history outside the framework of originalism — that is, in ways that are not concerned with the "original meaning" of the constitutional provisions at issue.

A broad survey of non-originalist uses of history is beyond the scope of this guide. Those alternative approaches will be the subject of future publications. Nevertheless, there are a few approaches that are already somewhat common in litigation, if less prominent than originalism. (You may recognize some of them from earlier in the guide.) These approaches might not resolve all the problems associated with incorporating history into litigation, but they do give lawyers and judges ways to talk about history that could encourage better decision-making. And they may provide seeds for more conversations among lawyers, judges, and scholars about the proper relationship between law and history.

1. Use a "historical gloss" approach.

You can introduce historical evidence about how certain constitutional actors — such as the courts, Congress, or the president — have acted over the full sweep of American history. This doctrinally well-established approach, often referred to as "historical gloss," emphasizes "our whole experience as a Nation" and "the actual practice of government."[149] As it runs, what actors have done for long periods is presumptively constitutional. Just as you might oppose an originalist reading of the Constitution by showing how it contravenes years of historical practice (p. 15), you can affirmatively point to years of historical practice to defend a non-originalist reading of the Constitution.[150] An argument following this approach would explain the constitutionality or unconstitutionality of a law, executive order, or judicial practice by placing it within, or outside, a long-running tradition of government action or inaction. Practices that are constitutional would be part of a multi-century tradition or, at least, aligned with the weight of historical evidence. This approach, strictly construed, is often more helpful in cases involving structural constitutional questions — for example, about the extent of executive or congressional power — than in cases involving constitutional rights. For examples of briefs employing this approach, see endnote 115.

2. Treat history as a record of trial and error.

You can treat history as a record of trial and error to help judges reach better decisions in the present day. While originalism focuses on history as a source of meaning, this approach focuses on history as a source of prudence, or, as Judge Richard Posner has described it, a "database" of what has worked and what has not.[151] It is informed by pragmatist legal thought, which famously suggests that the law is the product of experience and not logic — and that history is the record of that experience.[152] An argument following this kind of approach would use historical experience to shed light on the potential consequences of certain legal rules or rulings, helping the court decide whether it should make or avoid similar decisions.[153]

3. Employ a "negative precedent" approach.

You can look to the long sweep of national history as a record of the value choices prior generations made about the law and use the method of negative precedent (p. 12) to proactively tie your opponents' arguments to certain repugnant values from the past that we have since rejected. History, under this approach, does not simply reveal the meaning of the law but considers what the law represents when understood in its historical context (e.g., Jim Crow laws representing white supremacy). This use of history helps to taint the other side's arguments, making them appear no longer viable in the present day, either because they would lead to negative consequences or because they would lead to an interpretation of the law that is morally backward.[154] An argument following this approach would compare the arguments your opponents might make with repugnant or embarrassing episodes from history, or with ideas that might have been widely accepted at the time but are now contrary to well-established constitutional principles. For examples of briefs employing this approach, see endnote 76.

4. Introduce nontraditional sources for context.

A final approach, unlike the others discussed here, can focus on original meanings. But it engages with questions about meaning using historical sources that are nontraditional for contemporary constitutional jurisprudence. As we've noted, originalist arguments often put significant weight on just a few sources or types of sources — such as the records of the Constitutional Convention, the Federalist Papers, the Reconstruction-era Congresses, and dictionaries. This choice privileges certain voices — especially judges, lawmakers, and lawyers — over others. You can provide additional context by surfacing sources that typically have been absent from legal discussions and the litigation record.[155] Such sources could reveal unconventional interpretations of the law that are more accurate. Or they could complicate attempts to claim that a constitutional text had a settled meaning in the past by showing how constitutional meaning was disputed. An argument following such an approach would introduce a broad array of sources — from state court decisions to movement histories — to contextualize the constitutional provision at issue.[156]

Conclusion

This guide has laid out a broad array of tools litigators can use to reduce the significance of their opponents' originalist arguments to their cases, reframe those arguments, neutralize misused historical evidence, avoid costly missteps, and engage with history more productively.

Making some of these arguments will be challenging at times, especially in courts already inclined toward originalist analysis, or in cases in which originalist rulings are already on the books. But taking these approaches seriously and implementing them in your litigation strategies may do more than just help you win cases; they can help integrate your cases into the much larger project of changing American law's relationship with history for the better.

That project is a long-term, cooperative one that will require contributions from litigators, legal scholars, historians, commentators, and others. A large coalition will be necessary to accomplish all the things that need to be done: addressing flawed history in court filings to head off some damaging originalist rulings before they come to pass; exposing the problems with the rulings that come to pass nonetheless; using those problems to build the warrant for change; nurturing alternative ways to think about history's role in law; showing how those new ways can be put into practice; reframing conversations for the bar, the academy, and the public; and more. We hope that this guide will help you navigate this challenging present and start building a better future.

Endnotes

1 For a leading analysis of the dominant strains of originalism in legal scholarship and their historical problems, see generally Jonathan Gienapp, Against Constitutional Originalism: A Historical Critique (2024).

2 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 581–88, 605–09 (2008); Brief for Petitioners at 26–27, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 3017303, at *26–27.

3 *See, e.g.*, Seila Law v. CFPB, 591 U.S. 197, 223–25 (2020); CFPB v. CFSA, 601 U.S. 416, 431 (2024); Brief for the Appellants at 30–33, Trump v. New York, 592 U.S. 125 (2020) (No. 20-366), 2020 WL 6487939, at *30–33; Brief of Petitioner President Donald J. Trump at 17–18, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), 2024 WL 1234260, at *17–18.

4 *See, e.g.*, Brief for Appellants at 19–20, 26, Washington v. Trump, 145 F.4th 1013 (9th Cir. 2025) (No. 25-807), 2025 WL 2313011, at *19–20, *25–26.

5 *See, e.g.*, Brief for Petitioners at 25–30, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271), 2022 WL 4084287, at *25–30.

6 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 242–45 (2022); Brief for Petitioners at 4–6, 29–31, *Bruen*, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 3017303, at *4–6, *29–31.

7 *See, e.g.*, *Dobbs*, 597 U.S. at 254; *Bruen*, 597 U.S. at 50–70.

8 597 U.S. 1 (2022); 597 U.S. 215 (2022); and 600 U.S. 181 (2023).

9 For examples of this argument addressing each of these major cases, see United States v. Price, 656 F. Supp. 3d 772, 774–77 (N.D. Ill. 2023) (*Bruen*); United States v. Kilgore, No. 1:21-CR-00277 JLT SKO, 2023 WL 2505012, at *2–4 (E.D. Cal. Mar. 14, 2023) (same); United States v. Gallagher, 680 F. Supp. 3d 886, 905–07 (M.D. Tenn. 2023) (*Dobbs*); Gilmore v. Washington County Memorial Hospital, No. 4:22 CV 1008 JMB, 2023 WL 4120888, at *4 (E.D. Mo. June 22, 2023) (same); and Dzibela v. BlackRock Inc., No. 23-02093 (RK) (JBD), 2024 WL 4349813, at *6 n.4 (D.N.J. Sep. 30, 2024) (*Students for Fair Admissions*).

10 *See, e.g.*, Hecox v. Little, 104 F.4th 1061, 1076 n.9 (9th Cir. 2024) (rejecting the argument that *Dobbs* and *Bruen* necessitated an originalist reading of "male" in an Idaho statute categorically banning transgender girls' participation in sports); Berutti v. Bumb, No. 2:22-CV-4661, 2023 WL 5020542, at *9 n.80 (D.N.J. Aug. 4, 2023) (rejecting plaintiff's reliance on *Dobbs* and *Bruen* because "[a]lthough both of those decisions implicate history and tradition into the constitutional analysis, they do so for rights that predated the constitution *and were included in it*, unlike the right to audience").

11 *See, e.g.*, United States v. Valdivias, No. 20-20054-02-DDC, 2024 WL 3936469, at *2–3 (D. Kan. Aug. 26, 2024) (denying a defendant's request "to invalidate all Sixth Amendment jurisprudence that fails to address the Constitution's original meaning").

12 *See, e.g.*, Rodney v. Garrett, 116 F.4th 947, 955 (9th Cir. 2024); United States v. Thomas-Mathews, 81 F.4th 530, 540 n.3 (6th Cir. 2023); United States v. Williams, 80 F.4th 85, 90 (1st Cir. 2023); United States v. Baker, 49 F.4th 1348, 1358 (10th Cir. 2022); United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022); United States v. Segura, 747 F.3d 323, 328 (5th Cir. 2014).

13 *See, e.g.*, *Thomas-Mathews*, 81 F.4th at 540 n.3; *Peguero*, 34 F.4th at 158; United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009); Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007).

14 *See, e.g.*, State v. Jones, 598 S.E.2d 125, 133–34 (N.C. 2004); State v. Washington, 114 So.3d 182, 188–89 (Fla. Dist. Ct. App. 2012).

15 United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018) (internal quotation marks omitted).

16 *See, e.g.*, Brief for Petitioners at 14–15, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 3145936, at *14–15.

17 Haaland v. Brackeen, 599 U.S. 255, 278–79 (2023).

18 *Id.* at 279–80.

19 *Id.* at 279.

20 *See, e.g.*, Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017).

21 *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

22 *See generally* Hon. R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 Ohio St. L.J. (forthcoming 2025) (arguing for an originalist approach to the Ohio Constitution), http://dx.doi.org/10.2139/ssrn.4986929.

23 *See generally* David Schultz, *When Do State Courts Depart from Federal Precedents?*, State Ct. Rep. (June 30, 2023), https://statecourtreport.org/our-work/analysis-opinion/when-do-state-courts-depart-federal-precedents [https://perma.cc/AL3C-35MK].

24 *E.g.*, Minnesota has one of "the clearest departure rule[s] in the country," as does Washington State. *See id.*; *see also* Kahn v. Griffin, 701 N.W.2d 815, 828–29 (Minn. 2005); State v. Gunwall, 720 P.2d 808, 812–13 (Wash. 1986).

25 *See, e.g.*, People v. Weaver, 909 N.E.2d 1195, 1202 (N.Y. 2009) (laying out departure rule relating to privacy and search and seizure).

26 *See, e.g.,* State v. Melvin, 258 A.3d 1075, 1090–91 (N.J. 2021) (declaring that the federal Constitution provides the "floor" for the protection of individual rights but that New Jersey's constitution can provide additional protections); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003) ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

27 *See, e.g.*, State *ex rel.* Cincinnati Enquirer v. Bloom, 251 N.E.3d 79, 89 (Ohio 2024).

28 People v. Scott, 593 N.E.2d 1328, 1342 (N.Y. 1992).

29 Edwards v. Montana, No. DV-23-1026, at 4, 19, 26, 31 (Mont. Dist. Ct. Feb. 18, 2025), https://statecourtreport.org/sites/default/files/2025-03/missoula_county_district_court-order.pdf [https://perma.cc/Y5RU-JNKX].

30 State v. Wilson, 543 P.3d 440, 459 (Haw. 2024).

31 Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. Am. Const. Hist. 171, 232 (2024); *see also, e.g.*, *id.* at 232–33 (collecting sources); Brief of League of Women Voters of Utah & Fifty Business Leaders at 4, Planned Parenthood Ass'n of Utah v. State, 554 P.3d 998 (Utah 2024), 2023 WL 5670723, at *4 ("The concept of women's equality and autonomy in founding-era Utah was deeper, richer, and broader than it was among contemporaries in other American states."); Johnson v. Wyoming, No. 18732, slip op. at 18 (Wyo. 9th Jud. Dist. Aug. 10, 2022) (acknowledging precedent that has "emphasized that 'women in Wyoming are men's equals before the law'"), https://statecourtreport.org/sites/default/files/fastcase/additionalPdfs/processed/District%20Court%20-Order%20Granting%20Preliminary%20Injunction%20-08.10.2022.pdf [https://perma.cc/Z2WX-U52W].

32 *See* Planned Parenthood Ass'n of Utah v. State, 554 P.3d 998 (Utah 2024).

33 State Democracy Research Initiative, 50 CONSTITUTIONS, https://50constitutions.org/ (last visited Nov. 10, 2025).

34 *See, e.g.*, Hilo Bay Marina, LLC v. State, 575 P.3d 568, 595 (Haw. 2025).

35 *See, e.g.*, State v. Fleming, 239 A.3d 648, 654 n.9 (Me. 2020); Young v. Red Clay Consol. Sch. Dist., 122 A.3d 784, 812 (Del. Ch. 2015).

36 *Cf.* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 170–171 (2d ed. 2023) (explaining that "[f]ollowing this primacy approach would, most likely, lead state courts to be clearer about whether they intend their decisions to rest on adequate and independent state grounds").

37 *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (arguing that our current constitutional law is originalism and courts ought to follow this legal convention).

38 *See, e.g.*, Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1215 (Idaho 2023) (Zahn, J., dissenting); Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 990 N.W.2d 122, 152–53 (Wis. 2023) (Dallet, J., concurring); Planned Parenthood of the Heartland, Inc. v. Reynolds *ex rel.* State, 975 N.W.2d 710, 792–93 (Iowa 2022) (Appel, J., dissenting).

39 *See, e.g.*, *Wis. Just. Initiative*, 990 N.W.2d at 151 (Dallet, J., concurring).

40 Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOU. L. REV. 799, 800 (2023).

41 *See, e.g.*, United States v. Rahimi, 602 U.S. 680, 706 (2024) (Sotomayor, J., concurring) ("History has a role to play in Second Amendment analysis, but a rigid adherence to history (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy."); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 373 (2022) (Breyer, J., dissenting) ("Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."); Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 981 (Pa. 2024) (Wecht, J., concurring) (explaining that "generally speaking, relying upon particular points in history during which women expressly were precluded from political participation effectively enshrines and perpetuates the legal subjugation of women"); *Planned Parenthood Great Nw.*, 522 P.3d at 1235 (Stegner, J., dissenting) (explaining that the majority decision "once again relegate[s]" women "to their traditional (and outdated) roles").

42 *See* Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 411 (2023) (Jackson, J., dissenting) ("It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome."); *Wis. Just. Initiative*, 990 N.W.2d at 158 (Dallet, J., concurring) ("[E]ven if the original public meaning of many provisions of the Wisconsin Constitution were discoverable, applying it would lead to intolerable results."); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1162 (2012) ("The only kind of originalism that is reasonably determinate leads to conclusions that practically no one accepts."); William J. Brennan, Jr., *Foreword: Neither Victims nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 5 (1994) ("Anyone defending the narrow historical approach . . . must also be prepared to defend the contemporary use of pillorying, branding, and cropping and nailing of the ears, all of which were practiced in this country during colonial times.").

43 State v. Hoyle, 987 N.W.2d 732, 762 (Wis. 2023) (Dallet, J., dissenting).

44 *See, e.g.*, *Students for Fair Admissions*, 600 U.S. at 410–11 (Jackson, J., dissenting) ("Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances" and "obstruct[s] our collective progress"); *Rahimi*, 602 U.S. at 706 (Sotomayor, J., concurring) ("*Bruen*'s myopic focus on history and tradition . . . fails to give full consideration to the real and present stakes of the problems facing our society today."); State v. Wilson, 543 P.3d 440, 454 (Haw. 2024) ("As the world turns, it makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution."); Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 752 (Va. 2023) (Mann, J., concurring in part and dissenting in part) ("Virginia's interests cannot be cabined to what our Founders believed to be peace and good order — as times change, so do a state's compelling interests.").

45 *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV 1127, 1134 (2023) [hereinafter Siegel, *Memory Games*].

46 *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 324 (2024) (Barrett, J., concurring in part) ("Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test."); Owens v. Stirling, 904 S.E.2d 580, 610 (S.C. 2024) (Hill, J., concurring) ("[W]hen the framers left us with vague terms, they intentionally left interpretation of those terms to the only true power courts have in our republic: our judgment. . . . We should recognize this reality, and appreciate that judging is not capable of being done by a 'mere machine.'" (internal citations omitted)); United States v. Butts, 637 F. Supp. 3d 1134, 1136 n.2 (D. Mont. 2022) (explaining "the impossibility of ascertaining facts without interpretation since facts themselves must first be picked out from the chaos of happenings and then fitted into a 'story' that is told from only one perspective which may have nothing to do with what originally occurred"); *see also* State v. Weber, 168 N.E.3d 468, 481 (Ohio 2020) ("Nothing about the dissenting opinion reflects a principled approach to deciding this case."); ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 71 (2023) ("This desire for value-neutral judging is an impossible quest."); Siegel, *Memory Games*, *supra* note 45, at 1183 ("[A]t present the standard is standardless. . . . [*Dobbs*] offers no criteria for choosing which laws constitute relevant history and tradition in the next case, allowing the decision-maker to do as the *Dobbs* Court did in this case — to look out over a crowd and pick friends.").

47 *Vidal*, 602 U.S. at 327–28 (Sotomayor, J., concurring) (describing "the Court's history-and-tradition inquiry . . . as the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends"); *see, e.g.*, *Wilson*, 543 P.3d at 453–54; *Wis. Just. Initiative*, 990 N.W.2d at 156 (Dallet, J., concurring); State v. Wright, 961 N.W.2d 396, 428 (Iowa 2021) (Appel, J., concurring); Gregory Ablavsky, *Why We Should Stop Saying "The Founders,"* 173 U. PA. L. REV. 2013, 2021 (2025) (arguing that the "vagueness of the category of 'Founders' facilitates a form of what lawyers usually deride as cherry-picking, but of a particularly difficult and unresolvable variety").

48 *See, e.g.*, People v. Stovall, 987 N.W.2d 85, 98 (Mich. 2022) (McCormack, C.J., concurring) ("[A]dherence to original meaning does not offer more objectivity than other methods of interpretation. It allows rather for disguised policy choices about how to interpret text . . ."); *Hoyle*, 987 N.W.2d at 762 (Dallet, J., dissenting) (originalism "allows its adherents to hide their lack of constraints behind a false patina of objectivity"); Mayeri, *supra* note 31, at 179 (describing how the *Dobbs* majority "falsely claims neutrality and freedom from value-driven choices" despite being "inherently value-driven").

49 *See Rahimi*, 602 U.S. at 743 (Jackson, J., concurring) (noting that "[s]cholars report that lower courts applying *Bruen*'s approach

have been unable to produce 'consistent, principled results,' and, in fact, they 'have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them'" (internal citations omitted)); District of Columbia v. Heller, 554 U.S. 570, 718 (2008) (Breyer, J., dissenting) (asserting that the majority ruling "will leave the Nation without clear standards for resolving" the lawsuits it will invite); *Wilson*, 543 P.3d at 453 (explaining that the Supreme Court, "by turning the test into history and nothing else," has "dismantle[d] workable methods to interpret firearms laws").

50 *Rahimi*, 602 U.S. at 746 (Jackson, J., concurring).

51 *Stovall*, 987 N.W.2d at 99 (McCormack, C.J., concurring).

52 State v. Sistersong Women of Color Reprod. Just. Collective, 894 S.E.2d 1, 21 (Ga. 2023) (Ellington, J., dissenting); *see also, e.g.*, United States v. Johnson, 921 F.3d 991, 1002 (11th Cir. 2019) (asserting that the court "cannot use originalism as a makeweight" to override binding Supreme Court precedent); *Stovall*, 987 N.W.2d at 99 (McCormack, J., concurring) ("When the Court has for 50 years approached new iterations of a question governed by broad constitutional text with a specific analysis, it is immodest indeed to pitch that away because now, in 2022, one can determine somehow that the ouija board has spoken and the 1963 ratifiers meant something else by that broad language.").

53 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 388 (2022) (Breyer, J., dissenting); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 103 (2022) (Breyer, J., dissenting) (observing that the Court does "not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade").

54 *Sistersong*, 894 S.E.2d at 21 (Ellington, J., dissenting).

55 *See, e.g.*, Philip Bobbitt, Constitutional Interpretation 11–22 (1991) (describing the modalities of constitutional interpretation).

56 Jamal Greene, *Fourteenth Amendment Originalism*, 71 Md. L. Rev. 978, 1003 (2012) [hereinafter Greene, *Fourteenth Amendment Originalism*].

57 Karen Tani, *Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 Harv. L. Rev. 1, 46 (2024).

58 Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 Fordham L. Rev. 721, 722 (2013) [hereinafter Cornell, *Meaning and Understanding*]; *see also* Saul Cornell, *Reading the Constitution, 1787-91: History, Originalism, and Constitutional Meaning*, 37 Law & Hist. Rev. 821, 824 (2019).

59 *See, e.g.*, Kate Masur & Gregory Downs, *Designed to Ameliorate the Condition of People of Color: The Reconstruction Republicans and the Question of Affirmative Action*, 2 J. Am. Const. Hist. 625, 662 (2024) (addressing "non-historians who make sweeping claims about history while disregarding historians' work and while ignoring basic methods of historical analysis, often by extracting quotes from their context"); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or the Poverty of Public Meaning Originalism*, 48 San Diego L. Rev. 575, 591 (2011) [hereinafter Rakove, *Joe the Ploughman*] ("Any attempt to define *constitution* independently of the political discussions and developments that took place after 1765 — on the basis, say, of previously conventional British usage — would necessarily be defective.").

60 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 107 (2022) (Breyer, J., dissenting).

61 *See, e.g.*, *Bruen*, 597 U.S. at 111 (Breyer, J., dissenting) (explaining that the Court's "near-exclusive reliance on history will pose a number of practical problems," especially for lower courts); United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) ("This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess."); State v. Wilson, 543 P.3d 440, 453 (Haw. 2024).

62 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 916 (2010) (Breyer, J., dissenting) ("If history, and history alone, is what matters, why would the Court not now reconsider *Heller* in light of these more recently published historical views?"); Mayeri, *supra* note 31, at 175 ("The [*Dobbs*] majority cherry-picks sources of original meaning and historical evidence, rejecting the considered opinions of nearly every professional historian who has studied and published on abortion law and practice in early America."); Jennifer Tucker, *Gundamentalism*, 6 Mod. Am. Hist. 78, 81 (2023) ("There is great irony in the fact that the Supreme Court, while stressing the importance of 'history' — produced a narrative about the past [in *Bruen*] that rests on such thin empirical ground.").

63 *See, e.g.*, *Bullock*, 2022 WL 16649175, at *1 ("[H]istorical consensus . . . is elusive."); Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 990 N.W.2d 122, 157 (Wis. 2023) (Dallet, J., concurring) ("[W]hat originalism requires judges to identify — a single, objective original public meaning — is something we cannot know."); State v. Wright, 961 N.W.2d 396, 427 (Iowa 2021) (Appel, J., concurring) ("History is not granular, and it rarely points only in one direction."); Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution xxiv–xxv (2019) (discussing problems with assessing the "original intent" and "original meaning" of the Reconstruction Amendments); Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 Iowa L. Rev. 971, 975 (2024) ("The historical context of the founding era, which supplements and enriches the semantic meaning of the text, is profoundly ambiguous."); *cf. Bruen*, 597 U.S. at 112 (2022) (Breyer, J., dissenting) ("[E]ven under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions.").

64 Ablavsky, *supra* note 47, at 2021 ("[T]he Founders were not . . . a monolith, but hotly disagreed on almost everything.").

65 *See* Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 Fordham L. Rev. 969, 974 (2015) (detailing the problems associated with clarifying constitutional meaning by reference to the intentions or actions of the ratifiers or the framers); Martin Flaherty, *Foreword*, 84 Fordham L. Rev. 905, 911 (2015) (explaining that "there is every reason to believe that the range of possible meanings literate members of the public had would have been broader, with idiosyncratic views at the margins"); *see also* Rakove, *Joe the Ploughman, supra* note 59, at 586 (explaining the historical problems with attempting to access meaning through reference to an "imaginary disinterested original reader of the Constitution").

66 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 374 (Breyer, J., dissenting) ("The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning."); Obergefell v. Hodges, 576 U.S. 644, 664 (2015) ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."); Williams v. Sec'y Pa. Dep't of Corr., 117 F. 4th 503, 536–37 (3d Cir. 2024) ("[T]he Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (internal quotation marks omitted)).

67 *See* Jack M. Balkin, Living Originalism 27 (2011) ("[C]onstitutional framers and ratifiers very often use open-ended language that deliberately delegates questions of application to future interpreters."); Farah Peterson, *Expounding the Constitution*, 130 Yale L.J. 2, 79–80 (2020) ("At least some of those who voted to ratify the Constitution did so anyway because they trusted that the principles applicable to public laws would provide courts the flexibility to resolve ambiguities and adapt as new circumstances

arose. . . . [T]hese Founders had confidence in the Constitution's durability not because they assumed that future generations would or could derive a fixed and timeless meaning from its words, but because they expected that judges would interpolate the text to govern the 'unforeseen.'").

68 *See generally* GIENAPP, *supra* note 1.

69 FONER, *supra* note 63, at xxv.

70 *See, e.g.*, Kligler v. Att'y Gen., 198 N.E.3d 1229, 1251–52 (Mass. 2022); Hilo Bay Marina, LLC v. State, 575 P.3d 568, 600–01 (Haw. 2025) (Eddins, J., concurring); State v. Wright, 961 N.W.2d 396, 421 (Iowa 2021) (Appel, J., concurring); Order at *22, Planned Parenthood of Mich. v. Att'y Gen., No. 22-000044-MM (Mich. Ct. Cl. Sept. 7, 2022).

71 *See, e.g.*, JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 15–16 (2014) [hereinafter BALKIN, MEMORY AND AUTHORITY] (explaining that adoption history overlooks "most American history," including the "history and experience of groups shut out of formal constitution-making" and "the history of social mobilizations, political movements, and institutional innovations that have dramatically changed America but have not led to the ratification of a new constitutional amendment"); Laura Edwards, *Weapons and the Peace*, DUKE CTR FIREARMS L. (July 25, 2023), https://firearmslaw.duke.edu/2023/07/weapons-and-the-peace [https://perma.cc/9WXP-Z624]; Brief for Amici Curiae Professors of History & Law in Support of Petitioner at 3, United States v. Rahimi, 602 U.S. 680 (2023) (No. 22-915), 2023 WL 5489062, at *3 ("Evaluating how firearms and domestic violence were regulated in 1791 requires a deep understanding of the common law and contemporary local customs, since the relevant evidence is not always found exclusively in statutes and other forms of positive law. 'Most judges in colonial America, particularly local, received no formal training and relied on legal manuals and practical experience to learn the law.'" (quoting HOLLY BREWER, BIRTH OF CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 369 (2005))).

72 *See generally* JAMES E. RYAN, LAYING CLAIM TO THE CONSTITUTION: THE PROMISE OF NEW TEXTUALISM (Const. Accountability Ctr. 2021 ed.), https://www.theusconstitution.org/wp-content/uploads/2021/09/The-2021-Edition-of-Laying-Claim-to-the-Constitution.pdf [https://perma.cc/U2SE-EPDL] (explaining this jurisprudential approach and collecting sources).

73 Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 387 (2023) (Jackson, J. dissenting).

74 FONER, *supra* note 63, at xx.

75 Greene, *Fourteenth Amendment Originalism, supra* note 56, at 1002.

76 For a full explanation of the approach, see Deborah A. Widiss, *Re-Viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia*,* 108 YALE L.J. 237 (1998). For additional examples of the use of negative precedent in briefs, see Brief of Amici Curiae the Ass'n on American Indian Affairs et al. in Support of Respondent at 15–27, Oklahoma Statewide Charter School Board. v. Drummond, 605 U.S. 165 (2025) (Nos. 24-394, 24-396), 2025 WL 1083038, at *15–27; Brief of Professors William P. Quigley et al. as Amici Curiae in Support of Respondents at 14–31, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175), 2024 WL 1537661, at *14–31; Brief of Japanese American Citizens League & Other Asian American & Pacific Islander Organizations as Amici Curiae in Support of Petitioners-Appellants, W.M.M. v. Trump, 154 F.4th 207 (5th Cir. 2025) (No. 25-10534); Brief of Historians Martha S. Jones & Kate Masur as Amici Curiae in Support of Appellees & Affirmance at 17, Doe v. Trump, Nos. 25-1169, 25-1170 (1st Cir. May 28, 2025), 2025 WL 1568072, at *17; Brief for Amici Curiae American Historical Ass'n & Organization of American Historians in Support of Respondents at 18–26, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 4341742, at *18–26; and Plaintiffs-Appellees' Response Brief at 45–46, State v. Zurawski, 690 S.W.3d 644 (Tex. 2024) (No. 23-0629), 2023 WL 7105779, at *45–46.

77 United States v. Virginia, 518 U.S. 515, 534–547 (1996). For a similar example of a state court using this approach, see Hodes & Nauser MDs, P.A. v. Schmidt, 440 P.3d 461, 491 (Kan. 2019) ("In essence, the history of women's rights contemporaneous to the Wyandotte Convention reflects a paternalistic attitude and — despite what the Constitution said — a practical lack of recognition that women, as individuals distinct from men, possessed natural rights. We no longer live in a world of separate spheres for men and women.").

78 *United States v. Virginia*, 518 U.S. at 542–543 (internal citation omitted).

79 Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 326–331 (2023) (Sotomayor, J., dissenting). The Court's anti-canonical decisions are particularly ripe for these comparisons, given their widely acknowledged status as illegitimate. For more on anti-canonical decisions, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

80 *See* Christopher Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 46–48 (1993); 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. FORUM 99, 117–118 (2023).

81 *See, e.g.*, Earl Maltz, *Failed Quest: The Unsuccessful Effort to Reconcile* Brown *with Originalist Theory*, 4 AM. J. L. & EQUALITY 77 (2024); Lamont v. Woods, 948 F.2d 825, 839 (2d Cir. 1991).

82 Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 864 (1989).

83 Trump v. Wilcox, 145 S. Ct. 1415 (2025).

84 Timothy Noah, *The Supreme Court Wants to Crush Regulation — but Not the Fed*, THE NEW REPUBLIC (May 28, 2025), https://newrepublic.com/article/195765/supreme-court-trump-federal-reserve [https://perma.cc/ES6G-ZDHX].

85 Jamal Greene, *Selling Originalism*, 97 GEO. L. J. 657, 669 (2009).

86 *Id.* at 668–69.

87 Brown v. Board of Education, 347 U.S. 483, 489 (1954).

88 *Id.* at 492.

89 *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 247–48, 251–54 (2023).

90 Fulton v. City of Philadelphia, 593 U.S. 522, 543 (Barrett, J., concurring).

91 Vidal v. Elster, 602 U.S. 286, 312 (2024) (Barrett, J., concurring in part).

92 *Id.* at 324.

93 *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 111 (2023).

94 United States v. Rahimi, 602 U.S. 680, 739–40 (2024) (Barrett, J., concurring).

95 *See* District of Columbia v. Heller, 554 U.S. 570, 718 (2008) (Breyer, J., dissenting) (detailing "innumerable policy-related reasons why a legislature might not act on a particular matter, despite having the power to do so"); Charles, *supra* note 93, at 112–15.

96 Charles, *supra* note 93, at 112–15.

97 Hon. Dan Friedman, *Miles to Go: A Response to Dr. Nicholas Cole's Speech at the Third Annual Robert F. Williams Lecture on State Constitutional Law*, 76 RUTGERS U. L. REV. 895, 990 n.70 (2024).

98 *See id.*

99 *See, e.g.*, Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1172–81, 1193 (2022); Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 990 N.W.2d 122, 154–55

(Wis. 2023) (Dallet, J., concurring); Friedman, *supra* note 97, at 896–900.

100 United States. v. Rahimi, 602 U.S. 680, 692 (2024) (quoting New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30 (2022)).

101 *Id.*; *see also id.* at 740 (Barrett, J., concurring) ("Historical regulations reveal a principle, not a mold.").

102 *Id.* at 692.

103 *See, e.g.*, Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J. L. & PUB. POL'Y 563, 566 (2024) (noting, and criticizing, the malleability of historical analogies, since "[c]hanging the level of generality at which judges characterize the past can be outcome-determinative"). For a pre-*Rahimi* discussion of analogy, see Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023).

104 *See, e.g.*, Brief of Appointed Amici Curiae Eric Ruben & Gregg Costa at 11–12, Ziegenfuss v. Martin, No. 4:24-cv-01049-P (N.D. Tex. Sept. 12, 2025), Dkt. No. 57 (addressing the proper time frame for assessing a Second Amendment challenge).

105 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 37 (2022) (Thomas, J.); *see also Rahimi*, 602 U.S. at 692 n.1 (Roberts, C.J.).

106 *See, e.g.*, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 212–13 (2021) (Thomas, J., dissenting); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

107 *See, e.g.*, Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 115–16 (2008).

108 Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 HOFSTRA L. REV. 1, 23 (2022).

109 *See, e.g.*, Chiafalo v. Washington, 591 U.S. 578, 592–93 (2020); NLRB v. Noel Canning, 573 U.S. 513 (2014); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 601–11 (1952) (Frankfurter, J., concurring); The Pocket Veto Case, 279 U.S. 655, 688–90 (1929); M'Culloch v. Maryland, 4 Wheat. 316, 401 (1819); *see also* CFPB v. CFSA, 601 U.S. 416, 445 (2024) (Kagan, J., concurring) ("The way our Government has actually worked, over our entire experience, thus provides another reason to uphold Congress's decision about how to fund the CFPB."); *id*. at 442.

110 *Noel Canning*, 573 U.S. at 557 (cleaned up).

111 *Id.* at 524 (alteration in original) (quoting The Pocket Veto Case, 279 U.S. at 689).

112 *Id.* at 525 (citing Letter to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)).

113 *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017).

114 *See e.g.*, *CFPB*, 601 U.S. at 442 (Kagan, J., concurring); *Chiafalo*, 591 U.S. at 592–93.

115 For examples of this approach — or similar approaches — used in briefs, see Brief of Amici Curiae Historians Gautham Rao et al. in Support of Respondents, Relentless, Inc. v. Dep't of Com., 603 U.S. 369 (2024) (No. 22-1219), 2023 WL 9004934; Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties and Tribal Defendants at 2, 19–26, Haaland v. Brackeen, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3648346, at *2, *19–26; and Brief of Amici Curiae American Historical Ass'n & Organization of American Historians in Support of Federal & Tribal Parties at 7–11, *Haaland*, 599 U.S. 255 (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3924325, at *7–11.

116 Secondary literature of this sort can help convince a court that a particular practice is well known enough that it has been accepted by other branches of the government and the public.

117 *See* Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES GESTAE 1, 7 (2015) (noting that "[t]he Founding Era was not characterized by consensus, but rather was defined by profound conflicts over the meaning of the Constitution's terms, constitutional interpretive methods, and constitutional aspirations").

118 *Cf.* Cornell, *Meaning and Understanding*, *supra* note 58, at 755 ("Deciding which, if any, of these different historically grounded interpretations ought to guide us when interpreting the Constitution today is not a question that history can answer. These choices are inescapably philosophical or political decisions.").

119 *See* Ethan Herenstein & Brian Palmer, *Fraudulent Document Cited in Supreme Court Bid to Torch Election Law*, POLITICO (Sept. 15, 2022), https://www.politico.com/news/magazine/2022/09/15/fraudulent-document-supreme-court-bid-election-law-00056810 [https://perma.cc/688G-PF7V].

120 Brief for Petitioners at 15, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271), 2022 WL 4084287, at *15.

121 *See, e.g.*, Brief for Amici Curiae Scholars of the Founding Era in Support of Respondents at 20–24, *Moore*, 600 U.S. 1 (No. 21-1271), 2022 WL 16552942, at *20–24.

122 *Id.*

123 For an example of such scholarship, see Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006). For examples of judicial opinions making use of such scholarship, see Seila Law LLC v. CFPB, 591 U.S. 197, 241–42 (2020) (Thomas, J., concurring in part) and Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477, 492 (2010).

124 *See, e.g.*, Jed Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

125 Brief of Petitioner President Donald J. Trump at 17–18, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), 2024 WL 1234260, at *17–18.

126 THE FEDERALIST NO. 69, at 193–94 (Alexander Hamilton) (Michael A. Genovese ed., 2009).

127 *Id.*; *see also* Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent at 23–24, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), 2024 WL 1586752, at *23–24.

128 For another example of the value of reading sources in their entirety — and the dangers of partial accounts — see Siegel, *Memory Games*, *supra* note 45, at 1189 n.236.

129 U.S. CONST. amend. XIV, § 1.

130 Brief for Appellants at 10–13, Doe v. Trump, Nos. 25-1169, 25-1170 (1st Cir. Apr. 21, 2025), 2025 WL 1222482, at *10–13.

131 *Id.*

132 *See generally* Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067 (2012).

133 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 598–99 (2008); Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., concurring).

134 Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 629 (2008).

135 *Cf.* Christine Kexel Chabot, *Rejecting the Unitary Executive*,

2025 UTAH L. REV. 1001 (forthcoming 2025), https://dx.doi.org/10.2139/ssrn.4968775 (using a framework derived from science for examining the truth or falsity of empirical claims to argue that originalists bear the burden of dealing with all potential historical counterevidence to their constitutional interpretations).

136 *See* Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent at 5–18, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), 2024 WL 1586752, at *5–18.

137 *Id.*

138 *See* Richard Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1432 (2021) ("Beyond minimal meanings, there is no single historical fact of the matter about what disputed constitutional provisions more determinately meant and, thus, no determinate original public meaning.").

139 *E.g.*, Vidal v. Elster, 602 U.S. 286, 312 (2024) (Barrett, J., concurring); Fulton v. City of Philadelphia, 593 U.S. 522, 543 (2021) (Barrett, J., concurring).

140 Brief of Amicus Curiae Professor Jane Manners in Support of Plaintiffs-Appellees, Boyle v. Trump, No. 25-1687 (4th Cir. Aug 29, 2025).

141 Brief for Amici Curiae Scholars of the Founding Era in Support of Respondents at 4, 6, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271), 2022 WL 16552942, at *4, *6.

142 *Id.* at 7.

143 *See* Rakove, *Joe the Ploughman, supra* note 59, at 588.

144 *See* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 935–936, 940–944 (2015); *see also* Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 48–49 (1969).

145 *See* District of Columbia v. Heller, 554 U.S. 570, 681–723 (2008) (Breyer, J., dissenting); Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss*," 56 UCLA L. REV. 1095 (2009); MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014).

146 *See* Gundy v. United States, 588 U.S. 128, 149–79 (2019) (Gorsuch, J., dissenting).

147 *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1970s*, 130 YALE L.J. 1288 (2021).

148 *See* BALKIN, MEMORY AND AUTHORITY, *supra* note 71, at 1–14.

149 NLRB v. Noel Canning, 573 U.S. 513, 557 (2014) (cleaned up); *see also* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

150 The Supreme Court has adopted such an approach in separation of powers cases. *See, e.g.*, *Noel Canning*, 573 U.S. at 525 ("The longstanding practice of the government can inform this Court's determination of what the law is in a separation-of-powers case." (internal citations and quotations omitted)).

151 Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 589 (2000).

152 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

153 *See e.g.*, Doe v. Trump, --- F.4th ---, 2025 WL 2814730, at *35 (1st Cir. Oct. 3, 2025) (noting the "lessons of history"). For examples of briefs using this approach, see Brief of Historians of the Civil Rights Era William H. Chafe et al. as Amici Curiae Supporting Respondents, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2882695; and Brief of Japanese American Citizens League & Other Asian American & Pacific Islander Organizations as Amici Curiae in Support of Petitioners-Appellants, W.M.M. v. Trump, 154 F.4th 207 (5th Cir. 2025) (No. 25-10534).

154 *See* Widiss, *supra* note 76, at 238.

155 *See, e.g.*, Mayeri, *supra* note 31, at 195–227; Reva B. Siegel, *Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1012, 1023–25 (2025).

156 For an example of a brief employing elements of this approach, see Brief of Historians Martha S. Jones & Kate Masur as Amici Curiae in Support of Appellees & Affirmance at 5–16, Doe v. Trump, Nos. 25-1169, 25-1170 (1st Cir. May 28, 2025), 2025 WL 1568072, at *5–16. *See also* Planned Parenthood Ass'n of Utah v. Utah, 554 P.3d 998, 1031–33, 1040 (2024).

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