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# The Genetic Fallacy and a Living Constitution

Charles L. Barzun

# THE GENETIC FALLACY AND A LIVING CONSTITUTION

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Should the historical origins of some principle or practice affect how we think about it today? Under one standard view, the answer is "no"; to think otherwise is to commit a fallacy—the *genetic* fallacy.[1] But in legal argument, origins often seem to matter a great deal. This Essay takes up the question of whether, or under what conditions, it is right for them to do so.

To motivate the inquiry, consider a recent example of such an argument. This past spring the Supreme Court, in a *per curiam* opinion, declined to consider the issue of whether the Constitution barred Indiana from prohibiting "sex-, race-, or disability-selective abortions by abortion providers."[2] Such denials of writs of certiorari tend not to receive much attention,

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1. I use the term here in the ordinary sense that describes an inference from premises about the origins of some claim, practice, or theory to conclusions about its nature or truth. *See* Kevin C. Klement, *When is Genetic Reasoning Not Fallacious*, 16 ARGUMENTATION 383, 384 (2002) (explaining that the term "genetic fallacy" is often used in a general way to refer to the fallacy of "confusing something's origins with its nature, whether or not that something is a belief or theory"). *See also* Logically Fallacious, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/99/Genetic-Fallacy (last visited Nov. 3, 2019) (characterizing the genetic fallacy as "basing the truth claim of an argument on the origin of its claims or premises"). The term also has been used in a more technical, though related, sense to refer to various forms of reasoning in the philosophy of science. *See, e.g.*, Norwood Russell Hanson, *The Genetic Fallacy Revisited*, 4 AM. PHIL. Q. 101 (1967) (surveying various formulations of the alleged fallacy); T. A. Goudge, *The Genetic Fallacy*, 13 SYNTHESE 41 (1961) (canvassing different formulations); MORRIS COHEN & ERNEST NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 382 (1936).

2. Box v. Planned Parenthood of Indiana & Kentucky, Inc., No. 18-483, slip op. at 1 (U.S. May. 28, 2019).

but Justice Clarence Thomas wrote a lengthy concurrence that made news. Thomas suggested that Indiana might have a "compelling interest" in "preventing abortion from becoming a tool of modern-day eugenics."[3] As evidence, he pointed to the way in which the history of abortion was at times wrapped up with the eugenics movement. For instance, Margaret Sanger, the founder of respondent's parent organization, Planned Parenthood, advocated the use of birth control in order to reduce "ever increasing, unceasingly spawning class of human beings who never should have been born at all,"[4] and a later president of Planned Parenthood, Alan Guttmacher, specifically "endorsed the use of abortion for eugenic reasons."[5] Justice Thomas went on to show the way in which the eugenics movement was embraced by the Nazis and more generally reflected an ideology of white supremacy.[6]

The response to Thomas's opinion was swift and fierce. Some insisted that he got the history wrong,[7] others observed that Sanger herself had *opposed* abortion,[8] and still others argued that linking the Indiana law to eugenics required too capacious a definition of what "eugenics" includes.[9] But for my purposes the relevant criticism leveled was an objection to the *form* of Thomas's argument. It amounted, according to both an historian and a legal scholar, to a charge of "guilt by association."[10] Justice Thomas was effectively arguing, Professor Michael Dorf

3. *Id*. at 2.

4. *Id*. at 3 (Thomas, J., concurring).

5. *Id*.

6. *Id*. at 6–8.

7. Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 29, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/

8. Eli Rosenberg, *Clarence Thomas tried to link abortion to eugenics. Seven historians told The Post he's wrong*, WASHINGTON POST (May 30, 2019, 8:50 PM), https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/?utm_term=.0ac541c5d02d. Thomas acknowledged as much in his opinion. Box, *supra* note 2, at 9.

9. Michael C. Dorf, *Clarence Thomas's Misplaced Anti-Eugenics Concurrence in the Indiana Abortion Case*, THE TAKE CARE BLOG (May 30, 2019), https://takecareblog.com/blog/clarence-thomas-s-misplaced-anti-eugenics-concurrence-in-the-indiana-abortion-case.

10. Alexandra Minna Stern, *Clarence Thomas's Inaccurate Linking Abortion to Eugenics is as Inaccurate as it is Dangerous*, NEWSWEEK (May 31, 2019) (arguing that "Thomas has thrown down the guilt-by-association gauntlet and cleaved open new space in the language and culture wars of reproductive rights"); Dorf, *id*. ("[Thomas's] argument really does appear to be one of guilt by association.").

concluded, "that because some people once favored a legal right to abortion for a bad reason, it should be banned today."[11]

Put differently, these scholars accused Thomas of committing the *genetic fallacy*.[12] That term (ironically, given the context here) has nothing directly to do with genetics in the biological sense. Instead, it describes the process of using facts about the origins of some belief or practice to support an inference (positive *or* negative) about the truth of the belief or of the claims that the practice embodies. So, the reasoning goes, the fact that some people supported abortion for ("bad") eugenicist reasons is irrelevant to whether today ("good") non-eugenicist reasons exist to support the availability of abortion.

What is striking about this critique is that such "genetic" arguments have a long tradition in the disciplines of both history and law. Take history first. Anytime an historian offers an account of the history of some practice or rule as an effort to "debunk" its current status or prominence, they are committing the "genetic fallacy." Charles Beard famously argued that the Framers were motivated primarily by their class and financial interests.[13] To the extent that his work was understood to challenge the sanctity with which the constitutional structure was regarded in his day, such reasoning depends on the genetic fallacy.[14] Similarly, a generation of critical legal historians sought to undermine current legal regimes by arguing that the doctrines that comprise them

11. Dorf, *supra* note 9.

12. Ross Douthat, *Clarence Thomas's Dangerous Idea*, N.Y. TIMES (June 1, 2019), https://www.nytimes.com/2019/06/01/opinion/sunday/clarence-thomas-abortion.html (observing that one response among pro-choice progressives to Thomas's opinion was to argue that Thomas was guilty of the genetic fallacy).

13. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

14. For a recent neo-Beardian interpretation of the Founding, *see* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016). Professor Klarman makes clear that he thinks his account poses a challenge to theories of constitutional interpretation that privilege the Framers' views. *See id*. at 631 (observing that "those who wish to sanctify the Constitution are often using it to defend some particular interest that, in their own day, cannot in fact be adequately justified on its own merits").

originally developed to serve narrow, class interests.[15] They, too, commit the alleged fallacy.[16]

Such arguments are probably even more common in broader political and cultural debates in which history is deployed in order to attack current policies or programs. Suggestions are legion, in both popular and "elite" publications, that learning of the sinister origins of some policy should make us suspicious of that policy today.[17] The *New York Times's* recent 1619 Project has garnered considerable attention and controversy precisely because it indicts everything from arguments for states' rights to domestic sugar production to modern-day corporate culture by tracing the history of such policies and practices back to slavery.[18]

And those are just the debunking efforts. Arguments that look to historical origins to *support* a present practice (or, to use Simon Blackburn's felicitous term, "bunking" accounts) are far more common in legal argument.[19] Consider how often lawyers (and even normal people, too) quote one of the Founders on some

15. *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860 (1977). *See also* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 75 (1984) ("The great contribution of this [type of legal history] has been to put social structure, class, and power—whose very existence much liberal legal writing seems so astonishingly to deny—back into our accounts of law."); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1021 (1981) ("Perhaps more disturbing is the possibility that the critic, searching like the legal scholar for pattern and regularity in legal materials, will uncover a pattern, but not one that the scholar would wish to find. The critic might, for example, attempt to explain legal texts as determined, in an important sense, by some contextual variable such as the politics of a dominant class or temporarily dominant political coalition . . . .").

16. The classic example of this form of historical debunking argument, which are sometimes called "genealogies" for this reason is FRIEDRICH NIETZSCHE, 10 THE WORKS OF FRIEDRICH NIETZSCHE: A GENEALOGY OF MORALS 35 (Alexander Tille ed., William A. Hausemann trans., 1897) (arguing that the dominant Judeo-Christian morality of Nietzsche's day was the product of a "slave-revolt in morality" fueled by the resentment which the weak felt toward the powerful).

17. *See, e.g.*, Chris Ford, *The Racist Origins of Private School Vouchers*, THE CENTER FOR AMERICAN PROGRESS (July 12, 2017, 11:59 PM), https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/); Alyssa Pagano, *The Racist Origins of Marijuana Prohibition*, BUSINESS INSIDER (March 2, 2018, 9:57 AM) , https://www.businessinsider.com/racist-origins-marijuana-prohibition-legalization-2018-2).

18. The 1619 Project, N.Y. TIMES, Aug. 18, 2019 magazine, at 40, 55, 72.

19. Simon Blackburn, *Pragmatism in Philosophy: The Hidden Alternative*, 41 PHIL. EXCH. 1, 4 (2011) (observing that what he calls "pragmatist" explanations "may be offered in an unmasking, debunking spirit, as in Nietzsche or Foucault. We think some particular way, they say, only because we are flawed: weak, or slavish, or corrupt, or chained by distorting social and economic forces. But pragmatist explanations may also be offered in a perfectly friendly, perhaps even 'bunking' spirit.").

topic precisely in order to suggest that some broad principle (e.g., the separation of powers) or some particular legal mechanism (e.g., impeachment) demands our special regard today.[20] These suggestions, too, trade on the genetic fallacy, though in the opposite direction. It is "esteem by association."

But the question is, however pervasive such arguments may be, are they *rational*? That is, is the genetic fallacy really a *fallacy*? This Essay offers a partial answer to that question. It is partial because it temporarily brackets the question of whether such arguments are, as a general matter, rational for all-things-considered normative evaluation of some practice.[21] My own view is that it is *not* a fallacy. People often seem to care about *history*—both of their own beliefs and of the social, political, or the economic practices they approve or disapprove of, join, oppose, or ignore—and I think they are right to do so. I'll say a bit more about why that is in the Conclusion, but the bulk of this Essay focuses on the narrower question of whether such historical explanations are relevant to the sorts of arguments that lawyers and judges make in the context of adjudication. In other words, it takes stock of the role of genetic inferences in the context of *legal* reasoning.

My answer to that question is that under at least three models of legal reasoning, such explanations *are* properly relevant, in theory, to the legal analysis (i.e., the charge of fallacious reasoning is misplaced). These three models are: *reasoning from authority*,

20. Of course, sometimes reference to the Founders is made on the ground that their views are evidence of the law at the time, which is what binds current judges (unless the law has been duly changed). *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) (endorsing a view they call "original-law originalism," which serves as the "criterion for the rest of our constitutional law, 'including of the validity of other methods of interpretation or decision.'") (*quoting* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015)). Even so, it may be that part of the reason we look to the Founders' law is that we treat them with a certain reverence. *See* SCOTT SHAPIRO, LEGALITY 351 (2011) ("The reverence in which the 'Founding Fathers' are held . . . and the veneration with which the text is treated all bespeak a belief that the authority of the Constitution stems from its special provenance.").

21. There is a vast philosophical literature on this and related questions. For a few recent examples, see Katia Vavova, *Irrelevant Influences*, 96 PHIL. & PHENOM. RESEARCH 134 (2018); David Plunkett, *Conceptual History, Conceptual Ethics, and the Aims of Inquiry: A Framework for Thinking about the Relevance the History/Genealogy of Concepts to Normative Inquiry*, 3 ERGO 27 (2016); Roger White, *You Just Believe that Because* . . . , 24 PHIL. PERSPECTIVES 573 (2010). For some older entries, *see* Margaret A. Crouch, *A "Limited" Defense of the Genetic Fallacy*, 24 METAPHILOSOPHY 227 (1993); Hanson, *supra* note 1; Goudge, *supra* note 1.

*reasoning for the sake of integrity*, and a third form of reasoning that I call, following the philosopher Charles Taylor, *ad hominem reasoning*.[22] Under each of these ways of drawing inferences about and from legal materials, the question of how those materials came into existence matters for assessing their present-day legal status.

Because this third, "ad hominem," form of reasoning is the least familiar, and because I have discussed the first two models at greater length elsewhere,[23] I devote the most attention to identifying and explaining this third model. What I hope to show is that ad hominem argumentation best fits the traditional idea that the common law "works itself pure" over time and, relatedly, that it best explains the appeal of a "Living Constitution," whose meaning evolves over time.[24] I explain what I mean by both terms and support my claim about the latter by showing how one of the most famous and controversial Supreme Court cases of the last few decades, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, exemplifies this model of reasoning.

## I. REASONING FROM AUTHORITY

Reasoning from authority is the model of reasoning that is both the most commonly used in legal argument and the model under which historical explanations are the most obviously relevant. As traditionally formulated, to treat some source as authoritative entails treating the mere fact that the source stated a proposition or issued a directive as itself a reason to believe that proposition (in the case of theoretical authority) or follow that

22. *See* Charles Taylor, *Explanation and Practical Reasoning*, in CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS (1995). What are typically known as "Ad hominem arguments," i.e., those directed at the person making an argument rather than the argument itself, are also considered fallacious. But Taylor gives this term a technical meaning which is distinct from, though related, to that more conventional understanding. *See infra* note 23, Part III. A.

23. *See* Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013).

24. The phrase may be traced back to Lord Mansfield. *See Omychund v. Barker*, 26 ENG. REP. 15, 23 (Ch. 1744) (Mansfield, L.J.) ("[T]he common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament."). But it was made more famous in this country by Lon Fuller's invocation of it. LON L. FULLER, LAW IN QUEST OF ITSELF 140 (1940) (concluding his book with the observation that the common-law judge "is playing his part in the eternal process by which the common law works itself pure and adapts itself to the needs of a new day"). On living constitutionalism, see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (offering a theory of constitutional interpretation based on the common law method of adjudication).

directive (in the case of practical authority).[25] In this way, authorities provide people with "content-independent" reasons for belief or action.[26] In such circumstances, whether deference to an authority's judgment is justified in any particular case will depend in part on how and why the authority is issuing the directive or stating the proposition.

A simple example illustrates the point. Most of us treat medical doctors who attend to us as authorities with respect to our physical health. So if your doctor recommends a course of treatment, you generally count that as a reason—even if not always a conclusive reason—to pursue that course of treatment. But you do so on the assumption that the best explanation for the doctor's recommendation is that she genuinely believes it to be the best course of treatment, based on her knowledge and experience. If you have reason to think that the reasoning supporting that recommendation was biased or distorted in some way—perhaps because she stands to benefit financially or in some other way from your use of the treatment—then you will likely be less inclined to follow her recommendation. Those are precisely the situations in which one seeks a second opinion (from another authority).

Something similar occurs in law. Such traditional sources of law as judicial opinions, statutes, and constitutions are treated as legal "authorities" because judges and other officials treat the directives they contain as providing them with sufficient reasons to render decisions consistent with those directives.[27] Here, too,

25. *See* Scott J. Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 382, 400 (Jules Coleman & Scott Shapiro eds., 2002) (observing, in the context of epistemic or "theoretical" authority, that such authorities are legitimate when "their directives are also conclusive reasons to believe that their content is justified").

26. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 62 (2009) (explaining that for directives to be treated as "authoritative" means that their force derives "not from their soundness but from their status, and philosophers of law refer to this feature of authority as content-independence.").

27. *Id*. This point is limited to situations where courts treat such sources as genuinely authoritative, rather than as merely "persuasive" authority, such as a court decision from another jurisdiction or the constitution of another country. In such cases, presumably the court is only endorsing the force of the reasoning the source reflects or embodies, rather than treating its existence as itself a reason to follow it. For that reason, as Professor Schauer has pointed out, the term "persuasive authority" seems be nearly a contradiction in terms. *See id*. at 69 (explaining that "if the court citing such material is genuinely

the explanation of how a source became such an authority matters. If a bill did not receive a majority of votes in support of it, or an administrative order was not properly authorized by the executive, then courts will no longer treat it as authoritative. This concern with the "pedigree" of a rule is well recognized by legal scholars and is associated with the tradition of legal positivism.[28]

It will immediately be objected that what is going on here is very different than what is going on in the doctor case. There the explanation for why the doctor gave the recommendation she did mattered for the purposes of determining its truth. We worry that bias may have led to an inaccurate evaluation of what curing your ailment requires. But in the case of legal sources, we do not care about the explanation of how the directive came to be because we have concerns about its truth or accuracy. Rather, we care about the process because it is simply what *makes* law by converting some rule into a legally valid one. In philosophical jargon, the relation between the historical explanation and the proffered authority is *metaphysical*, rather than *epistemic*. In that way, it differs fundamentally from the doctor case.

There are a few things to say about this objection. First, it seems unlikely to fit all the instances of deference to legal authorities. When courts defer to past court decisions, for instance, they may sometimes do so on the ground that the past decision is likely to be rightly decided, not because it was duly authorized by the relevant criteria of legal validity.[29] Admittedly, this explanation for the practice of stare decisis is not the most popular one these days. But its plausibility is increased

persuaded, then it is misleading to think of the sources as authoritative at all, for persuasion and authority are fundamentally opposed notions.").

28. Whether that's a fair characterization of legal positivism is controversial. *Compare* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17 (1967) (ascribing to legal positivism the view that the "law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power" and that such rules "can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed") (emphasis in original) *with* H.L.A. HART, THE CONCEPT OF LAW 264 (3d ed.) (2011) (arguing that Dworkin's belief that "a rule of recognition can only provide pedigree criteria" is mistaken).

29. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 43 (1961) (ascribing to the jurist John W. Salmond the view that past cases are presumed to be correct); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L. J. 503, 512 (2000) ("Precedent means that prior decisions are taken as correct, or correct unless shown otherwise to some requisite degree.").

considerably if part of the value of stare decisis is that it conserves judicial resources by allowing judges to avoid rethinking every issue they confront.[30]

If judges do defer to past decisions for this reason, then the historical explanation of how or why it came to be decided in the way that it did does seem relevant to assessing its value as an authority in a way analogous to our concern with the explanation for the doctor's recommendation to her patient. It is interesting, then, that judges seem only to care about explanations in one direction: they frequently look to the reasons a past court offered in support of its decision as an explanation of that decision, but they rarely (though not never) offer explanations purporting to show that the past court was corrupted or biased in some way in order to show that the past court's decision ought *not* be trusted. They offer bunking accounts of precedents, in other words, but not *de*bunking ones. I have explained and criticized that asymmetry elsewhere, but I put that issue aside for now.[31]

The second point is that in many cases where courts do look to a proffered source's pedigree as an explanation for its authoritativeness it often does so for reasons of political morality. Statutes are the best example here. The reason why we demand that a bill receive majority support in the legislature before it becomes law is that we think that process ensures a certain democratic legitimacy. This situation still differs from the doctor case, for we are not looking to the historical explanation in order to help us evaluate the "accuracy" or "truth" of the content of the bill. The historical explanation of the source matters for moral, rather than epistemic reasons. Still, the structure of reasoning is the same. In both cases, the historical process serves to validate (morally or epistemically) the rules that are produced as outputs of that process; and in both cases, there's an underlying rationale

30. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (Yale 1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."); *See also*, Schauer, *Thinking*, *supra* note 26, at 43 (observing that "stare decisis brings the advantages of cognitive and decisional efficiency").

31. Barzun, *Impeaching*, *supra* note 23, at 1625 (offering Justice Souter's dissent in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), as a rare example of a judge reasoning in the way described in the text and providing an explanation and defense of that sort of reasoning).

for the process that provides a criterion for determining whether or not the process has worked well in any particular case.

An example may help here. Take the "absurdity" doctrine of statutory interpretation. In theory, ratification of a text through the proper procedures—in the case of federal legislation, Article I's requirements of bicameralism and presentment—is both necessary and sufficient to convert that text into law. Period. But even most textualists—who emphasize the significance of those procedures in delimiting the interpreter's task—carve out an exception for clerical errors that would, if read literally, have an "absurd" result. In so doing, they implicitly acknowledge the importance of capturing something like legislative "intent."[32] In other words, because the rationale for requiring the procedures in the first place is to facilitate democratic lawmaking, deviations from those procedures are sometimes allowed when doing so seems consistent with that same underlying democratic rationale.

Finally, though, it must be acknowledged that the objection is successful under one rationale for treating the directives of some source as authoritative. Sometimes judges treat legal sources as authorities simply because other judges do so as well.[33] Philosophers dub such rules *conventional* rules, the benefits of which lie in their capacity to facilitate coordination among different people and institutions.[34] If all legal sources were treated as authoritative *only* for this reason, then arguments that look to the origins of some source would indeed commit a "fallacy" because nothing about how the source came to be would matter for the purpose of deciding the issue. To see why, consider the paradigmatic conventional rule: the rule instructing us to drive on the right side of the road. That other drivers drive on the right side today provides you with a reason to do so as well, never mind how that practice developed or why those who first initiated it did so. Under this rationale, all that matters is that the source is treated

32. *See* Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?": Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 978–79 (2004) (arguing that such textualists as Justice Scalia and Professor Manning cannot justify the use of the absurdity doctrine on the basis of what Alexander and Prakash call "Intention Free Textualism").

33. Famously, H.L.A. Hart argued that the ultimate rule of recognition of a legal system was a conventional rule. *See* HART, *supra* note 28, at 256; Leslie Green, Introduction, *id*. at xxii.

34. *See* Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982).

as law by others tasked with enforcing it today. It seems unlikely, though, that all law is founded upon this rationale.[35]

## II. REASONING FOR THE SAKE OF INTEGRITY

Another rationale sometimes offered for the law's concern with history is one that sounds in the political virtue of integrity.[36] When we praise a person for her integrity we typically mean that she has stuck to her principles over time rather than shifting her views according to what suits her interests or popular fashions at the moment.[37] Perhaps the law aims for a certain degree of consistency, both across different areas of law and over time, for a similar reason: the law should be a forum of principle, rather than politics.[38]

Reasoning for the sake of integrity, unlike reasoning from authority, is not entirely content-independent because having integrity demands some minimum threshold of moral adequacy.[39]

35. Green, *supra* note 33 ("It is not plausible to think that the only reason officials conform to a rule of recognition (or other fundamental rules) is that others do so.").

36. *See* RONALD DWORKIN, LAW'S EMPIRE 165–66 (1986) (describing and endorsing an ideal of "integrity" that "requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some"); Gerald J. Postema, *On the Moral Presence of Our Past*, 36 MCGILL L.J. 1153, 1177 (1991) ("Integrity in a community takes the form of an ideal of equality, not the formal or abstract equality of treating like cases alike, but substantive equality, equality among members in recognition of their co-membership.").

37. The many eulogies praising John McCain's "integrity" after the late Senator's death seem to have something like this idea in mind. *See, e.g.*, Leonard Pitts, Jr., *John McCain: A Man of Integrity and Honor*, BALTIMORE SUN (Aug. 30, 2018, 6:00 AM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0830-pitts-mccain-20180829-story.html ("Most of us can only imagine the difficulty of balancing politics and integrity. McCain likely managed it as well as anyone ever could."); Michael Bloomberg, *John McCain: American Hero*, BLOOMBERG (Aug. 25, 2018), https://www.bloomberg.com/view/articles/2018-08-26/michael-bloomberg-s-tribute-to-john-mccain-american-hero (observing that McCain "never sacrificed his integrity or honor . . . for the sake of personal or political gain").

38. Dworkin, s*upra* note 36*,* at 172 (cited in note 86) (explaining that his theory of law as integrity "assumes that the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals"); Postema, *supra* note 35, at 1176 ("If we, in and through the communities we constitute, are to deliberate and act purposively and responsibly in time, we must be able to see our common actions as fitting into meaningful patterns and practices through time.").

39. Scott Hershovitz, *Integrity and Stare Decisis*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 114 (Scott Hershovitz, ed., 2006) (observing that one acts with integrity when one's "actions as a whole reflect a commitment to a coherent and defensible moral view").

A Nazi cannot have integrity. That means that when deciding whether a past rule should govern a present case, a judge must to some degree consider the moral quality of the rule. Thus, the historical explanation of how a given source came to be treated as law does not figure in the analysis in quite the same way as when courts look to the pedigree of a source or defer to one on epistemic grounds.

Nevertheless, even here, historical explanations do, or should, matter.[40] The reason is straightforward: for a person to have integrity with respect to some domain of action or belief she must make her decisions, or form her beliefs, on the basis of general principles that apply outside the immediate context of decision. That is why "being principled" is synonymous with having integrity. Since the process by which a person reaches her conclusion matters for the sake of integrity (i.e., it must be based on principles), an explanation for her decision that does not involve the application of those principles would undermine that decision from the perspective of integrity. And the same, it seems, would be true of law.

An example demonstrates the point. In the landmark case of *Dillon v. Legg*, the Supreme Court of California faced the question of whether a plaintiff could recover for the emotional harm she suffered from witnessing the defendant's car run into, and kill, her daughter, as she was crossing the street.[41] The defendant had argued that the defendant owed the plaintiff no duty to avoid such harm because the plaintiff failed to show that she was in the "zone of danger" at the time of the accident, as the law required at the time. In responding to this argument, the court observed that "the history of the concept of duty discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards."[42] The implication of the reasoning was that, had the concept of duty indeed been an "old and deep-rooted doctrine," then it may have carried more normative weight. But since it was merely a "legal device of the latter half of the nineteenth century," used primarily for reasons of judicial policy, it demanded little fidelity from the court today.

40. I have made this argument in the context of stare decisis elsewhere. Barzun, *Impeaching*, *supra* note 23, at 1652–54.

41. Dillon v. Legg, 68 CAL. 2D 728 (1968).

42. *Id*. at 734.

Because the doctrine did not flow from principle, it did not command the court's adherence.[43] Thus, how and why the rule came into existence mattered for the purpose of determining its continuing vitality.

## III. AD HOMINEM ARGUMENTATION

The last model of legal reasoning that makes historical explanations relevant to legal argument is the least well-known but the most interesting. Indeed, it has not, as far as I know, been recognized as a distinct model of *legal* reasoning.[44] The burden of this Part is thus twofold: first, to explain and identify what this model of practical reasoning entails generally; second, to show how it can be seen as a distinct model of *legal* reasoning. My ultimate claim—that historical explanations are relevant to the analysis under this model of reasoning—will be established in the course of meeting this twofold burden. For as will become clear, it is a form of reasoning in which historical explanations figure centrally.

### A. AD HOMINEM ARGUMENTS AS A FORM OF PRACTICAL REASONING

The third model of practical and legal reasoning I call "ad hominem" reasoning. The term comes from Charles Taylor, who is the first philosopher (as far as I know) to have identified it as a distinct form of reasoning worthy of its own name. Born in 1931, Taylor is an eminent Canadian political and moral philosopher whose work broadly falls within the "hermeneutic" tradition of philosophy, which sees knowledge as fundamentally dependent on human meaning and interpretation. Taylor's philosophical influences are diverse and include Hegel, Wittgenstein, Hans-George Gadamer, and Maurice Merleau-Ponty.

Taylor explores the role of ad hominem arguments in an essay entitled *Explanation and Practical Reason*.[45] In this Section, I summarize his analysis of ad hominem reasoning in that essay in some detail because it will lay the foundation for my analysis of it in the legal context.

43. Note that one could also see this as reasoning from authority, where the oldness and deep-rootedness counted in favor of its correctness.

44. As I explain in the text, Charles Taylor has identified and defended ad hominem argumentation as a legitimate form of practical reasoning more generally.

45. Taylor, *Explanation*, *supra* note 22.

Taylor uses the term "ad hominem" because this form of reasoning involves arguing for a particular view by comparing it directly to another person's view or theory, rather than by showing that the theory beats all comers.[46] His goal is to offer ad hominem argumentation as an alternative to what he calls the "apodeictic" or deductive model of reasoning, which requires the application of general criteria to specific cases.[47] More specifically, he is chiefly concerned with responding to a form of moral relativism that denies the possibility of adjudicating cross-cultural value conflicts on the ground that people in different cultures disagree about first principles, making rational resolution of conflicts over controversial practices impossible.

Against this view, Taylor argues that if you look at the arguments people actually make on behalf of what we take to be immoral practices, they usually do not so much reject fundamental moral principles as they do try to explain why those principles do not apply in a particular case. For instance, even Nazis would often pay lip service to the intrinsic value of human life, Taylor suggests, but they argued that the targets of their persecution and murder were, for one reason or another, not fully human or that they posed a unique threat to the community.[48] In other words, defenders of immoral practices often recognize the moral principles with which their conduct conflicts, but they try to rationalize their behavior through some sort of "special plea."[49]

If that description of moral disagreement is accurate, then, according to Taylor, arguing with someone may begin from shared premises even if that person is from another culture with seemingly radically different moral practices. One assumes that one's opponent understands what is good and right but that she has fallen into moral error—error which results "from confusion, unclarity, or an unwillingness to face some of what he cannot lucidly repudiate."[50] And the goal of arguing with them is to "show up the special pleas."[51]

46. *Id*. at 54.

47. *Id*. at 36. Lawyers would call the apodeictic model of reasoning a "syllogism." When such criteria are found in a positive legal source, such as a statute or court decision, the deductive or apodeictic model of reasoning fits what I called reasoning by authority. When those criteria are moral principles, they better fit reasoning for the sake of integrity.

48. *Id*. at 35.

49. *Id*. at 36.

50. *Id*.

51. *Id*.

Because, under this view, persuading a person to change her moral view is really an effort to increase her own self-understanding, the appropriate form of reasoning is not the deductive, apodeictic sort. Instead, it requires ad hominem argumentation, which accepts for the sake of argument what one's opponent already believes and compares it against one's own views. The central task of such an argument is to show why moving from your opponent's views to your own results in what Taylor calls a "gain in understanding" or an "epistemic gain."[52] That is, the purpose is to show your opponent why she can improve her epistemic position by adopting your view.

Taylor's point, of course, is not that, as an empirical matter, one could (or should even try to) persuade actual Nazis to abandon their barbaric views through the use of ad hominem argumentation. The point is instead one about the structure of reasoning: deep moral disagreement does not necessarily reduce to a situation of dueling, incompatible first premises because ad hominem arguments reject the apodeictic model's demand for "criteria."[53] Rather than asking whether one moral view satisfies some independent criterion better than does another view, they look to the process by which one view came to replace an earlier one in order to determine whether an epistemic gain has been achieved.[54] If that transition occurred through an error-reducing process, then we have reason to trust that subsequent view, at least relative to what it replaced.

Taylor offers a few examples to show what he has in mind. Imagine you walk into a classroom and see a pink elephant. You literally can't believe your eyes. So you rub your eyes, shake your head, and then look more carefully. It's still there. Now you believe that there really is a pink elephant in the room, no matter how surprising that is. So you seek out explanations, e.g., that someone has played a practical joke.[55] You are more confident in your belief that there is a pink elephant in the room because you

52. *Id*. at 42, 59. Taylor credits this focus on transitions that count as epistemic gains to Alasdair MacIntyre, *Epistemological Crises, Dramatic Narrative, and the Philosophy of Science*, 60 MONIST 453 (1977).

53. The version of ad hominem argumentation discussed in the text is the third of three versions Taylor describes. Taylor considers it the most radical of the three because it rejects more wholeheartedly than the other two the apodeictic model of reasoning. *Id*. at 42–43.

54. *Id.* at 51.

55. *Id*. at 52.

have taken error-reducing measures, namely ensuring that you're not dreaming, that your eyes are working, and that you're giving sufficient cognitive attention to the matter. Such an "ameliorating transition" gives you increased confidence in your new belief.[56]

So far, so good. But Taylor's second and third examples are a bit trickier. He first takes the case of Joe, who is unsure whether he loves Anne or not because he also resents her, and he thinks the two emotions are incompatible. Later he realizes that the two emotions are distinct and *not* incompatible and so concludes that he does love her. According to Taylor, Joe is confident in this second judgment "because he knows that he passed from one to the other via the clarification of a confusion, i.e., a move which in its very nature is error-reducing."[57]

Taylor then offers the case of Pete, who is a child who used to act horribly at home. He always felt himself somehow cheated and treated his younger siblings poorly. Eventually, though, after several sessions with a social worker his parents hired, he comes to recognize that he felt entitled to certain things because he was the oldest. Now he rejects any such principle and so repudiates his earlier behavior. According to Taylor, Pete has undergone moral change and is "confident that this change represents moral growth, because it came about, through dissipating a confused, largely unconsciously held belief, one which couldn't survive his recognizing its real nature."[58]

Taylor recognizes that each of these examples involved changes made by a single person about his own beliefs, but he insists that the same thing occurs in arguments and dialogues between individuals. Indeed, Taylor concludes that this form of argument is "the commonest form of practical reasoning in our lives."[59] It involves proposing to our interlocutors "transitions mediated by such error-reducing moves, by the identification of contradiction, the dissipation of confusion, or by rescuing from (usually motivated) neglect a consideration whose significance they cannot contest."[60] That is, *A* seeks to show why *B* can make an epistemic gain by coming around to *A*'s view of the matter.

56. *Id*.
57. *Id*. at 16.
58. *Id*.
59. *Id*. at 53.
60. *Id*.

In short, according to Taylor, ad hominem argumentation involves an effort to persuade someone of something by showing them that they are not seeing the matter clearly or that their moral judgment has been in some way corrupted. In that way, historical explanations as to why a person has come to hold a particular view are critical. There is, however, a further step in this reasoning process that Taylor either ignores or does not bring out with sufficient clarity. To see what that step is, let us take a closer look at his three examples.

There is a crucial difference between the first example (pink elephant) and the latter two. In the first example, we conclude that we have achieved an epistemic gain because we have independent reasons for thinking that the measures taken were error-reducing. We rub our eyes, for instance, because we have done that on other occasions and noticed that it has corrected misperceptions. In the latter two examples, however, there is no comparable independent basis for concluding that the transition described—Joe's coming to conclude he really does love Anne, Pete's coming to see his earlier behavior as unjustified—were error-reducing, thereby justifying the conclusion that the change marked an "epistemic gain." Instead, the judgment that the earlier view resulted from a (motivated) "neglected consideration" or was "confused" seems entirely based on the firmness of Joe's and Pete's current convictions that their subsequent views on the matter at hand are the correct ones. And yet it is precisely the validity of those convictions that the process is meant to affirm. Thus, the argument seems to collapse into circularity.

Imagine, for instance, a transition whereby Pete comes to conclude that his younger siblings have been manipulated by his father in ways designed to humiliate and belittle him. The effect is to reinforce and deepen his sense of indignation at having been wronged rather than to alleviate it. Could Pete not just as well conclude, from his later vantage point, that he had neglected a relevant consideration, namely his father's nefarious role in his conflicts with his siblings? If so, on what basis could we justify treating the transition Taylor describes as an epistemic gain and the one I have described as an epistemic *loss*?

The answer, which I think is implicit in Taylor's argument in that essay (and more explicit elsewhere[61], begins with the recognition that there is no general criterion by which we can judge one transition to be a gain and another not. Instead, we must look to the particular facts of the case and try to assess whether the transition counts as a gain by reflecting on *both* (a) the force of one's convictions about the matter at hand and (b) the plausibility of alternative explanations of how one came to that belief *other than having come to see the force of those moral truths after having neglected them earlier*.

Consider again the story of Pete. In Taylor's version, in order for Pete to know whether he should act on the basis of his new moral view—that he is not entitled to more than his siblings simply by virtue of being the first born—he must compare it against other possible explanations of how he came to adopt this new view, such as, for instance, that he has been duped by the social worker his parents hired into giving up his claim to what is rightfully his. And the same is true of my twist on the story in which Pete ends up blaming his father for his plight. He must compare the force of his newfound conviction about his father's manipulative role (by looking to any evidence of such a manipulation that may exist) against alternative explanations as to why he has developed this view—such as, for instance, that he already resented his father for other reasons, which clouded his judgment.

If we generalize from the case of evaluating one's own conduct, beliefs, or attitudes to the case of evaluating an entire social or political practice, a similar reasoning applies. Following Taylor, we might say that the "best account" one can give of such a practice is one that compares the best justification the practice can offer on its own terms to possible explanations of its dominance or acceptance *other than an explanation that looks to its intrinsic appeal or truth*.[62]

61. I think Taylor has in mind something like what I argue in the text in CHARLES TAYLOR, SOURCES OF THE SELF 57 (1989) ("What better measure of reality do we have in human affairs than those terms which on critical reflection and after correction of the errors we can detect make the best sense of our lives? 'Making the best sense' here includes not only offering the best, most realistic orientation about the good but also allowing us best to understand and *make sense of the actions and feelings of ourselves and others*.") (emphasis added).

62. Professor Klement seems to have in mind something similar when he describes what he calls "self-referential abductive arguments." *See* Klement, *supra* note 1, at 390

The method is analogous to, but importantly different from, the method of "reflective equilibrium" made famous by John Rawls.[63] Under that approach to moral reasoning one compares one's considered judgments about particular cases with the fundamental principles to which one is committed, allowing each type of consideration to influence the other.[64] The ad hominem form of reasoning described here, however, compares one's settled moral convictions about some practice (whether arrived at by reflective equilibrium or some other process) against rival *explanations* of how that practice may have developed—other than as a result of its truth or intrinsic appeal. The reason it looks to explanations is that the goal is not to identify and refine the proper criteria for moral evaluation (as in the case of reflective equilibrium), but rather to assess whether the adoption of that practice marked an epistemic gain or loss over what it revised or replaced. If so, then that fact counts in favor of the practice. In this way, the historical explanation of a practice is relevant to an assessment of its present value.

Another way to put the point is that, under this view, the justification for a practice *is* a sort of explanation.[65] Since it requires evaluating practices by looking to the transitions which led to it, to say that a practice embodies a certain value or

(explaining that such arguments "begin only with the presence of a certain belief held by some person or some group of people, and proceed to argue that the very belief in question must be true simply because the best explanation as to why that belief exists entails that the belief is true or probably true."). Professor Klement goes on to observe that, in his view, such arguments "have been unduly neglected by philosophers and logicians, and that they are more common, and more important, than one might think." *Id*. In my view, the same is true of *legal* philosophers and theorists.

63. JOHN RAWLS, A THEORY OF JUSTICE 48–53 (1971).

64. *Id*. at 48–53; Norman Daniels, *Reflective Equilibrium*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), https://plato.stanford.edu/entries/reflective-equilibrium/ ("The method of reflective equilibrium consists in working back and forth among our considered judgments (some say our 'intuitions,' though Rawls (1971), the namer of the method, avoided the term 'intuitions' in this context) about particular instances or cases, the principles or rules that we believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them.").

65. It is interesting, in this regard to notice the etymological connection between the words "cause" and "because." *See* Selim Berker, *The Unity of Grounding*, 127 MIND 729, 733 (2018) ("It takes real work to remind ourselves that 'virtue' is part of 'in virtue of' and that 'cause' is part of 'because'."). *Cf.* Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1869) (observing that Bacon "uses the word cause in the broad signification which it has in the writings of Aristotle and his commentators the schoolmen, that is, as nearly synonymous with the word reason").

expresses important truths is implicitly to make a claim about the epistemic quality of the transition that led to its current incarnation. Specifically, it entails making a claim that the truth value of the propositions embodied in the practice is at least partly what explains its current acceptance. If we did not think that the truth played any such role—if, for instance, we thought the practice could be entirely explained as the result of social or economic forces unrelated to the truth value of its constituent claims—we would have no reason to think that an epistemic gain took place at all.

### B. AD HOMINEM ARGUMENTATION AS A MODEL OF LEGAL REASONING

Does ad hominem reasoning serve as a model of reasoning in law and legal argument? I think it does. For starters, it is worth observing that at a very general level, the ad hominem method of reasoning is concerned with *process* in a sense familiar to lawyers. The legal system is riddled with procedures that are designed to reduce errors and whose outcomes we often assume (or at least hope) produce epistemic gains. Everything from the rules governing discovery and the admissibility of evidence to the adversarial structure of trial and appellate argument can be seen as efforts to generate "epistemic gains" in our understanding of which alleged rights violations are entitled to repair and which are not. That courts are constantly forced to resolve factual and legal issues by making essentially *comparative* judgments in the way ad hominem argument entails only reinforces the point.

But the harder question is whether the particular sort of reasoning Taylor describes plays a role in legal argument and analysis. In support of the claim that it does I offer two distinct (but related) pieces of evidence. The first involves showing that ad hominem reasoning captures better than does its rival models of reasoning (discussed above) one traditional, if controversial, justification for common-law decisionmaking, namely the idea that the common law "works itself pure" over time. The second piece of evidence is the fact that in one famous and important case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court engaged explicitly in ad hominem reasoning, albeit not under that label.

i. The common law as a series of epistemic gains

The suggestion that the common law "works itself pure" over time expresses the idea that by developing doctrines through a process of deciding particular, concrete cases, common-law judges feel their way to better and better rules—at least better in the sense of better suited to the demands of the time. It is a process of evolution, even if only a partially conscious one.[66]

This justification does not fit any of the other models we have considered particularly well. It does not presume that past decisions are necessarily right and for that reason command courts' obedience, as reasoning from authority would require. To the contrary, it suggests that the common law's virtue as a source of law lies precisely in the fact that its doctrines *change* and improve over time. But nor does the notion of "integrity" quite capture it. The process is one of improving, refining, and adapting, not one that demands fidelity to fixed principles. Finally, for much the same reason, this understanding does not see past decisions as conclusively binding present courts purely as a matter of convention. After all, the whole point is that the rules *change*, whereas conventions are valuable insofar as they prevent change and reduce uncertainty.

The ad hominem model of reasoning, by contrast, captures well the idea that the law "works itself pure." It explains, for instance, why common-law courts look first to the rules and rationales offered by previous courts but nevertheless consider themselves free to revise those rules and to find new bases for distinguishing past cases.[67] Like the epistemic rational for

66. Or perhaps an entirely unconscious one. Another explanation for the same phenomenon, understood in economic terms, is the thesis that the common law develops efficient rules because inefficient rules are more likely to be litigated. The literature here is vast, but for classic statements, see George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) and *Paul H. Rubin, Why is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977). *But see* Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 Geo. L.J. 583 (1992) (criticizing the efficiency hypothesis on the ground that the cases judges decide are subject to selection bias). Even though this explanation does not in any way depend on judges having an intuitive sense of which rules are efficient or not, as long as it asserts that the process is one that produces good rules (in this case, defined in terms of efficiency), such an explanation could perform the same function in ad hominem argumentation as the more traditional rationale for the common-law method. The reason is that the explanation purports to track the truth (of what is a good rule) in an analogous way.

67. Schauer, *Thinking*, *supra* note 26, at 105–06 (arguing that the image of the common law conveyed by Mansfield and Fuller's formulation has "no real-world instantiations," but acknowledging that "although the image of an entirely judge-made

reasoning by authority, it treats the truth-value of the doctrines (i.e., their moral fitness for resolving the issue at hand) as the driving factor in explaining how they came to be treated as legal authorities. But like the integrity model, it asks judges to engage substantively with the reasoning of those cases, not just to defer to them for reasons of coordination or democratic legitimacy.[68] That is why they feel free to refine and alter those doctrines when the facts with which they are presented seem to demand it.[69]

In short, under this view, the common law is itself a series of "epistemic gains," in Taylor's sense. The role envisioned for the common-law judge is in some ways analogous to that of a natural scientist. Like the scientist, the judge must make her own fresh judgments about what the right outcome in the particular case is while at the same time considering the vast amount of background material already produced by others working in the field (i.e., past judges). Insofar as she relies on those background materials, she does so because she trusts the process that she assumes has produced them. In this way, the ad hominem nature of her reasoning is *implicit* in how she uses and interprets past decisions.

To all of this one may be inclined to make the following sort of objection: what is described above hardly qualifies as a "justification" for the common law at all; it is an obscuring myth, and a harmful one at that. Far from feeling their way towards better and better rules in a process of moral or social improvement, common-law courts have instead been simply entrenching—and then discarding whenever it suits them—"the assumptions of a dominant class," as Holmes put it.[70] This is essentially Morton Horwitz's claim in *The Transformation of American Law*, and, as noted above, a whole generation of critical legal theorists and historians made comparable points about different areas of the law.[71] Whereas an earlier generation had

common law is a caricature, it captures important features of adjudication in common-law countries," such as the judge's ability to refine and reinterpret past cases and even statutes).

68. *Cf.* Hershovitz, *supra* note 39, at 116 ("There is good reason to think of stare decisis as a broader practice than simply following precedent . . . Overruling and distinguishing are as much ways of engaging with the past as following is.").

69. *See* Schauer, *Thinking*, *supra* note 26, at 118–19 (questioning whether common-law rules even qualify as "law" given how easily judges may revise prior rules when their application entails what the judge considers suboptimal implications or consequences).

70. Oliver Wendell Holmes, *The Path of the Law*, 1 BOS. L. SCHOOL MAG. 10 (1897).

71. *See* HORWITZ, *supra* note 15 (arguing that in the nineteenth century common-law judges refashioned tort and contract doctrines in order to subsidize burgeoning

seen law in general, and the common law especially, as a process of development and progress, they saw mainly the work of *ideology*.[72] In their view, the ideas and ideals associated with legal practice and liberal political theory—individual rights, the "rule of law," notions of judicial impartiality and the like—were really instruments by which powerful interests oppressed weaker segments of society. These interests have mischaracterized the current political structure as a "neutral" one in order to legitimate their own power, rather than seeing it for what it is—the product of a naked struggle for power.[73]

Maybe so. But that's just the point. This critique does not undermine the role historical explanation plays in ad hominem argumentation; quite the opposite, it is yet another example of it. For the logic of the CLS critique is just the inverse of the working-itself-pure idea: the best historical explanation for the current regime is one that looks mainly to power struggles as the driving causal forces. Since there is no reason to think that such power struggles track the truth in any meaningful way, we have no reason to trust, and perhaps a reason to *dis*trust the outcome of that process. In other words, the historical evidence suggests that we have suffered an "epistemic loss."

In this way, critical historians share common methodological assumptions with their targets: both assume that historical explanations matter for evaluating current practice. Specifically, it matters to both whether or not the truth value of the ideas

industries, such as railroads, and thus served the interests of the commercial classes who profited from the growth of such industries). For discussions of other studies in a similar vein, *see* Gordon, *Legal Histories*, *supra* note 15, at 67–68; Gordon, *Historicism in Legal Scholarship*, *supra* note 16.

72. For examples of the "earlier generation," *see* FULLER, LAW IN QUEST OF ITSELF, *supra* note 24, at 140; Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 930 (1951) ("Law as it *is* is a continuous process of becoming."). For an interpretation of the Hart and Sacks teaching materials along these lines, see Charles Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013). For the ideological interpretation of legal practice, *see* Gordon, *Critical Histories*, *supra* note 15, at 96 n. 92 (suggesting that "the permanent importance of [*Transformation of American Law*] to scholarship lies in its subtlety and richness as a history of legal ideology"); Gordon, *Historicism in Legal Scholarship*, *supra* note 16, at 1054 (observing that "a novel genre of legal history that treats legal doctrine as ideology, a way of structuring social experience that seems to be a functional response to social needs but is in fact a way of making the existing order seem natural and necessary").

73. *See* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 181 (1976) ("The state, a supposedly neutral overseer of social conflict, is forever caught up in the antagonism of private interests and made the tool of one faction or another.").

constituting that practice figure in the best explanation of its current acceptance. What they typically *dis*agree about is what, as an historical matter, the best explanations of those practices in fact are.

*ii. Casey*'s joint opinion

The ad hominem reasoning by common-law judges under the "working itself pure" interpretation of the common law is, as I say, largely implicit in how the common-law judge treats her legal materials. There is, however, at least one case in which the Supreme Court engaged explicitly in the sort of reasoning Taylor describes. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Casey*, of course, is not your typical Supreme Court decision. Not only was it of great practical importance because it decided the fate of *Roe*'s right to abortion, it was highly unusual—and unusually candid—in the reasoning it employed to support its decision to uphold *Roe*.

At issue in *Casey* were various provisions of a Pennsylvania statute governing the procurement of abortions.[74] Many thought that the Court, having replaced several Justices with Republican appointees in the years since *Roe v. Wade* (1973), would take the opportunity to overturn that landmark decision.[75] But the Court did not do so, and the decision's "joint opinion," authored by Justices O'Connor, Souter, and Kennedy, discussed at great length why *Roe*—or, more precisely, its "essential holding"—should be upheld as a matter of stare decisis.[76] After applying its traditional stare-decisis analysis, the Court went on to compare *Roe* to both *Lochner v. New York* and *Plessy v. Ferguson*.[77] The idea was that these now-overruled decisions were of a "comparable dimension" to *Roe* because in those cases, too, the political stakes seemed so high. The question the Court put to itself was whether *Roe* was like *Lochner* and *Plessy* in some relevant sense, thereby justifying its overruling.

What the Court concluded was that *Roe* was *not* like these other cases. Why not? In those cases, the Court explained, there had been a fundamental change in the Court's understandings of

74. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
75. Roe v. Wade, 410 U.S. 113 (1973).
76. *Casey*, 505 U.S. at 844–69. *See id*. at 846.
77. *Id*. at 861–63.

the facts in question. In *Lochner* and its progeny, which protected a "right to contract" under the Fourteenth Amendment's Due Process Clause, for instance, the Court had operated under the assumption that "an unregulated market economy could satisfy minimum levels of human welfare."[78] But the Great Depression had proven that assumption mistaken, thereby vindicating the Court's decision to abandon the *Lochner* line of cases in *West Coast Hotel*.[79] Similarly, in *Plessy*, which held racial segregation in public accommodations to be constitutional (if they were "separate but equal"), the Court had stated that insofar as segregation imposed a "badge of inferiority" on black Americans, that was true only because "the colored race chooses to put that construction upon it."[80] But by 1954 when the Court took up the issue again in *Brown*, that was no longer a plausible view of the social meaning of segregation.[81] The Court (and society's) understanding of the facts of segregation had fundamentally changed. Thus, the Court concluded, the Court's decision to overrule *Plessy* was "not only justified, but required."[82]

*Roe*, however, was a different story. In the roughly two decades since *Roe* there had been no comparable shift in understanding of the relevant facts in question. The morality and legality of abortion was controversial in 1973, and it remained so in 1992. No events or social changes had occurred since 1973 which changed the "factual underpinnings of *Roe*'s central holding [ ] or our understanding of it" in a way comparable to what had occurred in the years between *Lochner* and *West Coast Hotel* and between *Plessy* and *Brown*.[83] Therefore, the Court concluded, were the Court to overturn *Roe*, it would be perceived (and justifiably so) not as a ruling of principle but instead as simply a result of the changing composition of the Court.[84]

It is not hard to see how this analysis displays ad hominem model of reasoning. The Court was effectively saying that there had been "epistemic gains" in the relevant domains between *Lochner* and *West Coast Hotel* and between *Plessy* and *Brown*,

78. *Id*. at 862.
79. *Id*.
80. *Id*. (citing *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).
81. The Court also noted, citing Justice Harlan's dissent, that the view may not even have been plausible in 1896 when Plessy was decided. *Id*.
82. *Id*. at 863.
83. *Id*. at 864.
84. *Id*.

but that there had not been any such gain with respect to abortion since *Roe*. Rather than apply general criteria to these earlier decisions as the apodeictic model requires (and as Chief Justice Rehnquist, in dissent, did[85]), the Court reasoned by means of historical explanation: since the Court's change in doctrine between those earlier cases could be best explained as the consequence of increased social and economic awareness of societal facts (and hence moral progress), the Court's confidence that change of a constitutional dimension had taken place was warranted. But since one did *not* see such an increase in awareness of societal facts (or "epistemic gains") with respect to abortion since 1973, no such confidence was warranted here. Hence, *Roe* should not be overruled.

In this way, *Casey* is unusual among Supreme Court opinions in the explicitness with which it describes the sort of reasoning necessary to make sense of "living constitutionalism" as a theory of constitutional interpretation. By that term, I mean to describe the view that the meaning of the Constitution changes over time.[86] Of course, the Court often *practices* living constitutionalism in the sense that it reinterprets or overturns previous cases.[87] But in *Casey*, the Court trained its sights on different time periods in our history and openly asked what it would take for the Court to validate the changes experienced during those periods as genuine *growth* or improvement, constitutionally speaking. The answer offered—that there must have been a change in the facts or an "understanding of the facts"—may be hard to apply (like many other broad constitutional principles and standards). But the

85. *See id*. at 961 (Rehnquist, C.J., dissenting) ("When the Court finally recognized its error in *West Coast Hotel*, it did not engage in the post hoc rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his Lochner dissent, that '[t]he Constitution does not speak of freedom of contract.'").

86. *See* Strauss, *supra* note 24, at 2 ("A "living constitution" is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."); Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019). ("Living constitutionalists contend that constitutional law can and should evolve in response to changing circumstances and values.").

87. *See, e.g*., 539 U.S. 558, 572 (2003) (in overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), observing that recent legal developments eliminating sodomy laws "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

point is that the Court seemed to recognize that taking seriously the *living* part of "living constitutionalism" requires that constitutional justification depend, at least in part, on historical *explanation*.[88]

Now there are a variety of questions and objections one might raise about this argument and my interpretation of it. The most obvious objection would be to deny that the argument was doing any real work. It was just a post hoc rationalization for what was essentially a political decision. But that charge could be leveled against almost any Supreme Court decision. My own view is that the argument discussed here genuinely reflects Justice Souter's judicial philosophy in a way that is consistent with how he decided other cases, but I have defended that claim elsewhere and so put it aside here.[89]

Let me instead focus on just two other objections. The first goes to the particular historical explanations offered by the Court, and it asks whether they are the most plausible ones. How do we know the change really did involve an epistemic gain? Were there not lots of factors, having nothing to do with improved understanding of the consequences of an unregulated market economy or the meaning of segregation, that could explain *West Coast Hotel* and *Brown*, respectively?

This objection is of the same sort as the critical historians' critique to the effect that the common law does not "work itself pure" but instead entrenches powerful interests. The proper response in both cases is to say, "maybe so, but that is the right question to ask." *Casey* shows how historical explanation can be relevant to answering a legal question, not that it necessarily got the explanation right. This objection nicely focuses our attention on the sorts of considerations that we would want to know in order to best answer the historical questions.

For one thing, we might want to know the actual motivations of the Courts deciding the cases. Were the Justices in *Lochner* baldly trying to serve the interests of the commercial class to which they belonged? If so, then those facts add further support to the Court's analysis because they suggest that the *Lochner*

88. It is thus striking that Strauss's book on the subject does not even mention *Casey*.
89. *See* Charles Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655 (2018).

Court was even more confused and more beset by a "motivated neglect" of relevant considerations than originally thought.[90]

But such self-interested or improper motivations are neither necessary nor sufficient to render a court's judgment suspect. That is because it is not the sincerity of the reasons but the extent to which they are likely to track the truth that matters. So, for instance, the *Lochner* majority may have genuinely believed that the due process clause protected the rights of contract and property in the way it claimed, but if that genuine belief merely reflected the fact that those justices were deeply in the grip of a laissez-faire, even Social Darwinist, ideology at the time, then that would give reason to doubt the decision's correctness as a constitutional matter.

At the same time, even selfish or unprincipled motivations might align the court with genuine constitutional requirements. Imagine, for example, that the *Brown* Court in 1954 didn't care a whip about the black students suffering under Jim Crow and thought the *Plessy* Court had more or less gotten the constitutional question right. Yet they were deeply concerned with the nation's standing in the Cold War, and they feared that the Russians could use effectively the conditions in the south for Anti-American propaganda throughout the world, buoying the communist cause.[91] Even if that's true, it suggests that the consequence of this concern would be a felt need to make the Court stand up for what are, arguably, the nation's highest ideals of freedom and equality. Thus, all the more reason to think that a decision based on such motivations—even if unprincipled—yielded epistemic gain.

In short, under this model of legal reasoning, the historical explanations of past decisions relied upon—whether those explanations look to psychological, political, sociological, economic, intellectual considerations—are relevant to a court deciding a present legal issue to which those previous cases speak. Nothing is off the table, and the question we would want to ask about any of them is whether we have reason to think that such

90. *Cf.*, Taylor, *Explanation*, *supra* note 22, at 53 (describing ad hominem reasoning as a method by which one attempts to produce error-reducing transitions by, among other things, "rescuing from (usually motivated) neglect a consideration whose significance they cannot contest").

91. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2002).

forces would yield epistemic gains about what our constitutional principles require. Historical explanation becomes central to the practical task at hand.

But also central to the task is reflection on constitutional principles. For just as in the cases of Joe and Pete, discussed above, part of our judgment about whether a gain has occurred is going to depend on our prior confidence that the practice at issue (in this case, the doctrinal developments set in motion by *Brown* and *West Coast Hotel*) are in fact rightly decided in the way assumed. The more confident we are in our legal and moral convictions that the case in question was rightly decided, the more likely we are to find plausible the truth-tracking explanations of it. In this way, the process of reasoning is a holistic one.

The difference between *Lochner* and *Plessy* here illustrates the point. Whereas virtually no one today would defend *Plessy*'s separate-but-equal regime, *Lochner* continues to have its defenders.[92] Those defenders today offer genealogical historical accounts intended to undermine the Court's abandonment of the right to contract by showing that it was the result of unprincipled political behavior.[93] On the model of reasoning presented here, such accounts are not necessarily ends-driven, improperly motivated "law-office" history; they are the product of ad hominem practical reasoning. Since the convictions of *Lochner*'s defenders make them doubt that any epistemic gain was achieved by abandoning the doctrine, they reasonably look to alternative explanations as to why that road was taken.

The second objection challenges the ad hominem model itself by denying its rationality. If there are no general criteria by which one can assess whether a given explanation is the correct one, then it seems as if the answers to these questions are fundamentally indeterminate. Furthermore, if the process of reasoning requires, as I have suggested, a judge to compare the proffered justifications for practices to the proffered explanations of them,

92. *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2012); RICHARD A. EPSTEIN, HOW THE PROGRESSIVES REWROTE THE CONSTITUTION (2006).

93. *See, e.g.*, RANDY BARNETT: RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 125 (2013) (characterizing the famous "Brandeis Brief" as part of an attack on the "Republican Constitution" and observing that Brandeis was "driven more by his progressive ends than by any principled concern for 'realist' judicial decisionmaking").

so that she has to render judgment about them in some kind of brute, intuitive way, then it hardly qualifies as "reasoning" at all.[94]

This is a deep objection, and I cannot adequately respond to it here. But let me close by offering two reasons to resist it. The first is a "companions in guilt" sort of argument: the same skeptical worries of indeterminacy plague virtually all other theories of moral and legal reasoning, too. There may not be any determinate answers as to what the "original understanding" of the fourteenth amendment was or what "equality" demands as a moral matter or what the best interpretation of the case law on some disputed issue is. But courts and scholars continue to debate such questions and typically feel capable of distinguishing between better and worse answers. The same may be true here as well.

But the second and more important response begins by observing, as Taylor does, that ad hominem reasoning is pervasive in our daily lives. It comes so naturally because we live in a world rife with both moral complexity *and* factual uncertainty—especially with respect to the motivations of others and our own. We are constantly trying to figure out whether we are seeing things clearly—and, if not, why not—and we do so by comparing factual propositions with moral ones: Was I right to break up with *A*? (moral) Or were the reasons I gave just rationalizations? (factual) If so, what was the *real* explanation of my decision? (factual) Is my friend right that I should turn down a lucrative job offer on ethical grounds (moral), or is she just jealous of the high salary (factual)? Am I in denial about my child's aggressive behavior (factual), or was I right to complain to the principal about the teacher's treatment of her (moral)? Each of these questions require us to compare different moral perspectives or positions, whether hypothetical or real, and then to try to discern whether a shift from one position to another would be an epistemic gain or loss.

If ad hominem reasoning does play a central role in everyday practical reasoning, then it begins to look a lot like other standard forms of legal reasoning that have been criticized as irrational (or at best, non-rational) yet have a firm foundation in common sense. Reasoning by authority, the first model considered, in some

94. Taylor himself raises these concerns in his essay. *See* Taylor, *Explanation*, *supra* note 22, at 52–53.

contexts might be considered irrational.[95] Analogical reasoning is another feature of legal argument whose status as genuine reasoning has been called into question.[96] Yet we pervasively rely on both authorities and analogies when managing our own affairs or evaluating the work of those tasked with managing the affairs of others, or of our nation's. And at least in part for just that reason, such patterns of inference are widely accepted as valid forms of judicial reasoning.

## CONCLUSION

This last point raises the broader question of whether the genetic fallacy is fallacious in practical reasoning generally—an issue I bracketed at the outset. As I indicated then, in my view, it is not a fallacy. It seems to me that we commonly and properly care about where certain ideas, beliefs, and practices come from, even if what we learn is not alone sufficient to upset our settled convictions about them.[97] I will close this essay not so much by offering a full philosophical defense of this view, which is a task too large to take on here. Instead, I will merely try to motivate its appeal by tracing out some of its implications.

To do so, let's return to where we began, with Justice Thomas's concurrence. Now there is a sense in which his critics are plainly right: the fact that past presidents of Planned Parenthood or anyone else thought abortion should be promoted

95. *See* COHEN AND NAGEL, *supra* note 1, at 193 (distinguishing between valid and invalid uses of authority). *See also* LOGICALLY FALLACIOUS, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/21/Appeal-to-Authority (last visted Nov. 3, 2019) (characterizing "appeal to authority" as the insistence that "a claim is true simply because a valid authority or expert on the issue said it was true, without any other supporting evidence offered").

96. On the significance and rationality of analogical reasoning, *compare* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005) (defending analogical reasoning as both valid and pervasive in the law) *with* Richard A. Posner, *Book Review: Reasoning by Analogy*, 91 CORN. L. REV. 761, 765 (2006) (reviewing Weinreb's book and arguing that analogical reasoning is not reasoning, properly understood, and that it belongs "not to legal thought, but to legal rhetoric"). *See also*, *supra* note 26, at 98.

97. *Cf.* Plunkett, *supra* note 21, at 59 ("If my arguments in this paper are on the right track, then philosophers engaged in normative inquiry shouldn't dismiss facts about the emergence of and past use of concepts as epistemically irrelevant in virtue of their being historical facts of this sort."); Vavova, *supra* note 32, at 138 (in defending the potential undermining power of the discovery of irrelevant influences on one's belief formation, asserting that "[l]earning that I was hypnotized to believe that Portland is the capital of Maine should cast doubt on that belief just as reading an outdated atlas that says it's Augusta should").

for eugenicist reasons does not itself tell us anything about the moral or policy considerations on which one might think its legality today should depend. A deontological or rights theorist would want to know the moral status of a fetus (perhaps at different stages of growth) and whether the legality of abortion is required by the best theory of sex equality or of individual liberty. A consequentialist would want to know what effects banning abortion would have on women, children, and society more generally, and she'd want to compare those effects with those produced by a regime in which abortion is permitted. None of these considerations seem to depend on who first began practicing or advocating for abortion, when they did so, or why.

But if the assumptions that provide the critical content for the evaluations people actually make—one's brute intuitions about the moral status of fetuses or one's judgments about which "effects" count in the cost-benefit analysis and for how much—if such assumptions, for any given analysis, are *at least in part* a product of the society and culture in which we live (and how could they not be, really?), then either one of two things is true: either we can discriminate between better and worse explanations (epistemically speaking) for why a moral position came to be held, or why a practice came to be accepted, or we cannot do so. On the individual level, we can either distinguish brainwashing from genuine learning, or we cannot do so; on the societal level, we can either distinguish political change effected under conditions of genuine free expression and democratic processes from one brought about through repression and coercion, or we cannot do so.

If the first of these alternatives is true, so that we can, at least *in theory*, make such discriminations, then the genetic fallacy is not a fallacy. The reason is that it would always be possible to show that the input into a person's moral evaluation or cost-benefit analysis has been corrupted in some way. As software developers say, "garbage in, garbage out." If your understanding of the moral status of the fetus has been distorted through ideological indoctrination, then the outcome of an analysis in which that understanding figures ought not be trusted. It is akin to showing a chemist that her sample under study has been contaminated.

I think this is the best way of understanding Justice Thomas's argument. He was essentially trying to show that support for

abortion grew out of a way of thinking about human life that was corrupted from the start. Even if abortion advocates today do not endorse the eugenicist ideas of the past, the relatively low moral status their policies implicitly ascribe to human fetuses is best explained as the product of a toxic ideology that is willing to sacrifice weak and vulnerable individuals for the sake of social "progress," however understood. Garbage in, garbage out.

If that reconstruction sounds charitable, I in no way mean to suggest that it's right. Rather, part of my point is just that it ill becomes *progressives* to cry "genetic fallacy" (or "guilt by association"). For one of the core claims of radical and progressive social movements going back at least to Karl Marx has been the insistence that we ought not accept current arrangements (especially those related to race, class, or sex) because those arrangements are products of repressive and coercive practices rather than the expression of a genuinely free and enlightened popular will.[98] In other words, they argue that we have reason to doubt that our political structures are really the product of "epistemic gains." So, for instance, abortion supporters can point to the way in which the pro-life movement may have developed in the nineteenth century as a means to stifle women's increasing freedom and political power.[99]

I do mean to suggest, however, that what's sauce for the goose is sauce for the gander. Any theory that sees progress at work in human history would be vacuous if it understood such progress to follow necessarily from the advancing of time. Yet if progress cannot be so guaranteed, then it always remains an open

98. *Cf.* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY 88 (1981) (explaining that the task of "Ideology-critique" as elaborated by Critical Theorists, is to show people that the "world-picture" necessary to maintain the legitimacy of current institutions is "false consciousness," which the critique accomplishes "by showing them that it is reflectively unacceptable to them, i.e., by showing them that they could have acquired it only under conditions of coercion").

99. Jennfier L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, Organization of American Historians, https://tah.oah.org/november-2016/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/ (last visited Nov. 3, 2019) ("[T]he fetus was merely a stand-in for a broader cultural project. Here, the movement tapped into concerns over women's increasing education, autonomy, and the extension of rights, as it reasserted women's connection to and limitation by their own reproductive anatomy.").

question whether there has been a wrong turn, with respect to certain issues, at some previous point.[100]

Which brings us back to the second of the alternatives posed above. Under this view, it is *not* possible, in fact or in theory, to distinguish between better and worse explanations of our current social and legal practices. We only believe what we believe and do what we do as a result of causal processes that are either impossible to discern or entirely arbitrary from an epistemic or moral point of view, or both. It is contingency all the way down.

If that's true, then the genetic fallacy is indeed a fallacy, and the suggestion that the common law "works itself pure" is indeed a myth. But so, too, are historical critiques that trace current practices back to sources of oppression, whether along the lines of race, class, sex, or anything else. What is more, the logic and appeal of a "living" constitution becomes somewhat of a mystery.

100. An alternative view to the one expressed here is the view that assertions of moral progress are nothing more than moral judgments, so that historical explanations properly play no role whatsoever. But this view amounts to a *skeptical* account of progress insofar as the concept itself does no work in one's overall reasoning. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 87 (2011) ("[W]e are entitled to no more confidence in our judgment of progress when we can offer [various historical] explanations [of progress] than when we can say only that earlier generations did not "see" some moral truth that we do. In either case we are relying finally on our conviction and on the moral case that we believe supports it."). For an older defense of a similar view, *see* R. G. Collingwood, *A Philosophy of Progress*, 1 THE REALIST 77 (1929) ("The question whether, on the whole, history shows a progress can be answered, as we now see, by asking another question. Have you the courage of your convictions? If you have, if you regard the things which you are doing as things worth doing, then the course of history which has led to the doing of them is justified by its results, and its movement is a movement forward.").