

JURISPRUDENCE — PROPERTY — FOURTH CIRCUIT GRANTS OWNERSHIP BASED ON PRESUMPTION FROM POSSESSION. — *Elam v. Early*, 138 F.4th 804 (4th Cir. 2025).

Courts often consult entrenched, preratification sources such as Blackstone’s *Commentaries*¹ and *The Digest of Justinian*² when rendering decisions in common law actions.³ These authorities can help guide courts in cases where a state’s common law may not form sufficient precedent.⁴ Recently, in *Elam v. Early*,⁵ the Fourth Circuit resolved a dispute over personal property at summary judgment by applying Virginia’s common law presumption that possession implies legitimate title.⁶ Adding historical gravitas to the presumption, the majority cited the conceptually similar Roman maxim of *uti possidetis*, translated to “as you possess,”⁷ to trace the presumption’s historical roots and further support its application.⁸ The Fourth Circuit’s partial reliance on Roman law gestures toward a “general law” of property stemming from timeless, universal principles. This implication, whether intentional or not, is in tension with the *Erie*⁹ doctrine because federal courts must demonstrate fidelity to state law in diversity cases.¹⁰ When courts do cite Roman precedent that overlaps with state law, they should clarify that this reference provides normative, rather than positive, support.¹¹ Framing Roman law as normative support clarifies that it is merely a source of principles and policies that strengthens a state rule, as opposed to the canonical “formulation of a rule.”¹²

This case concerned a familial dispute over artwork. In 1943, painter Norman Rockwell depicted “visitors in the West Wing waiting” to meet with President Franklin D. Roosevelt, entitling the four-piece

¹ See, e.g., *State v. Lancaster*, 895 S.E.2d 337, 343 (N.C. 2023) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *149–50, in common law weapons crime case).

² See, e.g., *Specialty Risk Servs. v. Royal Indem. Co.*, 164 P.3d 300, 303 (Or. Ct. App. 2007) (invoking Justinian in unjust enrichment case).

³ See generally Samuel J. Astorino, *Roman Law in American Law: Twentieth Century Cases of the Supreme Court*, 40 DUQ. L. REV. 627 (2002) (documenting influence of Roman law on Supreme Court case law).

⁴ See *id.* at 652.

⁵ 138 F.4th 804 (4th Cir. 2025).

⁶ *Id.* at 808.

⁷ *Id.* at 813 (quoting Eric Descheemaeker, *The Consequences of Possession* 21 (Univ. of Edinburgh Sch. of L., Working Paper No. 2013/31, 2013)); accord *id.* at 820 (Richardson, J., dissenting).

⁸ *Id.* at 813–14 (majority opinion).

⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁰ *Id.* at 78.

¹¹ See LEWIS D. SARGENTICH, LIBERAL LEGALITY 8 (2018) (“Reasoning based on principles and policies is practical moral argument; reasoning based on established legal rules is not.”). But see FRANCISCO J. URBINA, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661, 1701 n.189 (2024) (“[L]egal reasons are normative reasons . . .”).

¹² Gerald J. Postema, *Philosophy of the Common Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 596 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., paperback ed. 2004).

collection *So You Want to See the President*.¹³ Later that year, Rockwell gifted the collection to Stephen Early, President Roosevelt's Press Secretary.¹⁴ Early ("Grandfather Early") and his wife, Helen Early ("Grandmother Early"), "had three children — Stephen T. Early, Jr., Thomas A. Early, and Helen Early Elam."¹⁵ Stephen Jr. had one daughter, and Thomas had three children.¹⁶ "Helen [Elam] had two children — Dru Anne Elam and William Elam[] III."¹⁷ William III ("Elam") was the plaintiff in this case.¹⁸

Elam argued that while Grandfather Early was still alive, he gifted the illustrations to his youngest daughter (Elam's mother), Helen Elam, in 1949.¹⁹ Members from "[t]he two other branches of the family"²⁰ — the wife of Stephen Jr. and the children of Thomas — disagreed, claiming that insufficient evidence existed to support "an *inter vivos* gift."²¹

Grandfather Early died intestate in 1951.²² His possessions were divided among "Grandmother Early and their three children."²³ While the "accounting of [his] estate" had "meticulous[ly]" catalogued his personal effects,²⁴ the Rockwell illustrations, despite their significant value,²⁵ were not listed.²⁶ After Grandfather Early's death, Grandmother Early possessed the Rockwells "until at least 1960."²⁷ "The parties disagree[d]" on who possessed them between 1960²⁸ and 1969, but at a minimum agreed that Helen lived with the drawings from 1969 to 1978.²⁹ In 1978, concerned after a break-in attempt, Helen loaned the Rockwells to the White House.³⁰ Before doing so, she consulted with her eldest brother, Stephen Jr.³¹ Later that year, Grandmother Early died.³² Her "three children — Stephen Jr., Thomas, and Helen — each signed acknowledgments" that "they received a one-third share" of her

¹³ *Elam*, 138 F.4th at 808.

¹⁴ *Id.*

¹⁵ *Id.* at 809. Stephen Jr., Thomas, and Helen are now deceased. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* For a visual family tree, see *id.* at 810.

¹⁸ *Id.* at 812.

¹⁹ *Id.* at 810.

²⁰ *Id.*

²¹ *Id.* at 817 (emphasis added).

²² *Id.* at 810.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 811.

²⁶ *Id.* at 810.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 811.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

personal effects.³³ But yet again the Rockwell illustrations went unmentioned.³⁴

Helen passed away in 2009.³⁵ In her will, she bequeathed two of the four illustrations to her son, Elam, and two to her daughter, Dru Anne.³⁶ “Dru Anne disclaimed her ownership in the” drawings, so Elam received Helen’s interest in all four drawings, though they remained on loan to the White House.³⁷ According to Elam’s uncle, Thomas, one day in 2017, Thomas noticed the illustrations “in the background of [a televised] interview with President Trump.”³⁸ Although Thomas died in 2020, his sons and the widow of Stephen Jr. informed Elam in 2021 that they believed they had “an ownership interest in” the drawings.³⁹

In response, Elam went on the offensive. First, at his request, the White House returned the illustrations to him in early 2022.⁴⁰ Second, Elam sued two of his cousins in state court, “seeking a declaratory judgment that he” had sole ownership of the Rockwell illustrations.⁴¹ He obtained a default judgment against one cousin.⁴² Then, in 2023, Elam brought suit in the U.S. District Court for the Eastern District of Virginia against the remaining cousins and his aunt, seeking the same declaratory judgment.⁴³ Those relatives countersued, asking the court “to quiet title” and to issue “a declaratory judgment that” Elam could own no more than a one-third interest in the illustrations.⁴⁴ They also brought “conversion, detinue, breach of bailment, and civil conspiracy” claims.⁴⁵ Both parties “filed cross-motions for summary judgment.”⁴⁶

Judge Nachmanoff granted summary judgment to Elam and denied the defendants’ motion.⁴⁷ The court applied Virginia common law, which presumes a possessor owns property unless another party can “produce evidence of superior title”⁴⁸ because “individuals generally own the personal property that they possess.”⁴⁹ Judge Nachmanoff then found that Helen Elam likely “had . . . possession of the [i]llustrations from 1960 [to] 1978” and almost certainly possessed them from 1972 to

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 811–12.

³⁹ *Id.* at 812.

⁴⁰ See *Elam v. Early*, No. 23-cv-00229, 2023 WL 7164918, at *4 (E.D. Va. Oct. 31, 2023).

⁴¹ Joint Stipulation of Facts ¶ 13, *Elam*, No. 23-cv-00229.

⁴² *Id.* ¶ 14.

⁴³ Complaint at 1, *Elam*, No. 23-cv-00229.

⁴⁴ *Elam*, 2023 WL 7164918, at *4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *1.

⁴⁸ *Id.* at *6 (quoting *Maine v. Adams*, 672 S.E.2d 862, 867 (Va. 2009)).

⁴⁹ *Id.*; see also *id.* (“Possession is nine-tenths of the law.” (quoting *Willcox v. Stroup*, 467 F.3d 409, 412 (4th Cir. 2006))).

1978.⁵⁰ This finding shifted the onus to the Earlyls to prove “superior title.”⁵¹ The defendants failed to meet their burden, the court found, because they merely pointed to the “absence of record evidence proving an *inter vivos* gift” to Elam.⁵² In other words, they failed to provide *affirmative* proof of their own superior title.⁵³ The court rejected an alternative theory that Elam stole the illustrations because the defendants produced no evidence “even plausibly suggestive of theft.”⁵⁴ The district court then concluded that the rest of the common law actions were invalid: Conversion was “time-barred,”⁵⁵ detinue failed for lack of a right “to immediate possession,”⁵⁶ and breach of bailment failed for lack of a bailment agreement.⁵⁷ Because the defendants’ civil conspiracy claim was parasitic on these earlier claims, it, too, was rejected, and “the [c]ourt grant[ed] summary judgment to” Elam on all counts.⁵⁸ The Earlyls appealed,⁵⁹ arguing that the district court should have “assess[ed] the validity of the . . . gift” prior to applying the common law presumption of ownership.⁶⁰

The Fourth Circuit affirmed.⁶¹ Writing for a divided panel, Judge Quattlebaum⁶² held that under Virginia law, “possession . . . creates a [rebuttable] presumption of ownership.”⁶³ And, because “Helen had undisputed sole physical control over the Rockwells” for six years, the court concluded that she presumptively had legitimate title.⁶⁴ Judge Quattlebaum traced this presumption’s origins to Roman law.⁶⁵ Responding to a critique from the dissent, the majority insisted that its exegesis on Roman law merely “show[ed] the historical pedigree of the presumption that Virginia law maintains to this day.”⁶⁶ The majority clarified that it did not reference Roman law “to replicate [its] precise procedures” in Virginia, stating that the court’s holding “does not depend on . . . an ancient equivalent of Rule 56” of the Federal Rules of Civil Procedure.⁶⁷

⁵⁰ *Id.* at *7.

⁵¹ *Id.* at *8 (quoting *Adams*, 672 S.E.2d at 867).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at *9; *accord id.* at *8.

⁵⁵ *Id.* at *11.

⁵⁶ *Id.* at *12.

⁵⁷ *Id.* at *13.

⁵⁸ *Id.*

⁵⁹ *Elam*, 138 F.4th at 812.

⁶⁰ *Id.* at 813.

⁶¹ *Id.* at 808.

⁶² Judge Quattlebaum was joined by Judge Harris.

⁶³ *Elam*, 138 F.4th at 813.

⁶⁴ *Id.* at 816.

⁶⁵ *Id.* at 813.

⁶⁶ *Id.* n.7.

⁶⁷ *Id.*

The court then referenced both Virginia and Fourth Circuit cases that applied the presumption to resolve property disputes.⁶⁸ Judge Quattlebaum stated that the presumption “promotes stability”⁶⁹ and “relieves a court from having to preside over ‘a historical goose chase.’”⁷⁰ Accordingly, he rejected the Earlys’ argument that the court must first determine whether Grandfather Early’s *inter vivos* gift to his daughter Helen was valid under D.C. law before applying the presumption.⁷¹

Having established a presumption of valid title for Elam, the court turned to the Earlys’ rebuttal.⁷² It found that intestacy laws as applied to the case were not sufficient evidence of superior title since the record showed no evidence that the drawings were part of either Grandmother or Grandfather Early’s estate when they died.⁷³ Elam again triumphed over his cousins.⁷⁴

Judge Richardson dissented,⁷⁵ arguing that the presumption of superior title is appropriate at trial but not at summary judgment.⁷⁶ He accepted the relevance of Roman law⁷⁷ but contended that “the Romans applied the presumption only before a factfinder.”⁷⁸ He argued that the presumption of superior title stemming from possession was applied at the *rei vindicatio* proceeding, an ancient analog to a bench trial, and not at a stage prior to factfinding.⁷⁹ Judge Richardson explained that the *interdictum* of *uti possidetis*, somewhat like a preliminary injunction, merely “preserve[d] the status quo”⁸⁰ of possession until formal proceedings could occur.⁸¹ He pointed to evidence supporting a “genuine dispute of material fact,”⁸² such as Helen’s choice to “consult[] her brother” on whether to loan the illustrations to the White House, and Grandmother Early’s retention of the illustrations *even after* Grandfather Early’s alleged *inter vivos* gift in 1949.⁸³ In light of the conflicting record, he would have vacated and remanded for a jury trial.⁸⁴

The Fourth Circuit correctly held that possession creates a rebuttable presumption of valid title. The relativity-of-title doctrine is well

⁶⁸ *Id.* at 814 (discussing, inter alia, *Willcox v. Stroup*, 467 F.3d 409 (4th Cir. 2006); *Maine v. Adams*, 672 S.E.2d 862 (Va. 2009)).

⁶⁹ *Id.* (quoting *Willcox*, 467 F.3d at 413).

⁷⁰ *Id.* (quoting *Adams*, 672 S.E.2d at 867).

⁷¹ *Id.* at 815.

⁷² *Id.* at 816.

⁷³ *Id.* at 817–18.

⁷⁴ *See id.* at 818.

⁷⁵ *Id.* at 819 (Richardson, J., dissenting).

⁷⁶ *Id.* at 820.

⁷⁷ *Id.* (“If the majority wishes to fight on Roman soil, I have no objection.”).

⁷⁸ *Id.*

⁷⁹ *See id.* (citing, inter alia, *Descheemaeker*, *supra* note 7, at 19).

⁸⁰ *Descheemaeker*, *supra* note 7, at 19.

⁸¹ *Elam*, 138 F.4th at 820 (Richardson, J., dissenting).

⁸² *Id.* at 819.

⁸³ *Id.* at 821.

⁸⁴ *Id.* at 819.

established in Virginia law.⁸⁵ The court's exploration of the past, however, appears to derive the presumption's authority from ancient principles beyond the reach of any specific jurisdiction or timeframe.⁸⁶ *Erie* announced the principle that "[t]here is no federal general common law."⁸⁷ Yet the *Elam* court's demonstration of a state law's "historical pedigree"⁸⁸ gestured toward a general law of property. It traced the genealogy of Virginia's common law presumption, suggesting that the legal rule endures across a range of jurisdictions.⁸⁹ Instead, a normative framing of Roman law would have diminished the chance of contravening *Erie*.

By tracing the archaic lineage of the presumption of ownership from possession,⁹⁰ the court indicated that this presumption transcends any particular jurisdiction. The majority located the presumption's origins in classical Roman law, which empowered a praetor to issue an *interdictum* to prevent a challenger from forcefully displacing a possessor from their property.⁹¹ Judge Quattlebaum appeared to characterize this presumption as unbroken across time and space, tracing its expansion to chattels under Justinian;⁹² through the conflation of possession and ownership in medieval common law;⁹³ and its survival in "[e]arly American law."⁹⁴ Finally, the court asserted that "th[is] presumption gathered no dust in Virginia," framing current state law as inheriting the mantle of Roman tradition.⁹⁵ Though the court cited several Virginia cases that applied the presumption,⁹⁶ its emphasis on the practice's continued application went beyond merely "ornament[ing] the discourse"⁹⁷ and seemed to suggest Roman law's importance to its decision.⁹⁸ Instead of

⁸⁵ See *Maine v. Adams*, 672 S.E.2d 862, 867 (Va. 2009).

⁸⁶ Professor Caleb Nelson defines general law similarly. See Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) (defining "general law" as "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions").

⁸⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁸⁸ *Elam*, 138 F.4th at 813 n.7.

⁸⁹ See *id.* at 813–14; Nelson, *supra* note 86, at 525.

⁹⁰ *Elam*, 138 F.4th at 813–14.

⁹¹ See *id.* at 813 (quoting Descheemaeker, *supra* note 7, at 21).

⁹² *Id.* (quoting Descheemaeker, *supra* note 7, at 20).

⁹³ *Id.* at 813–14 (quoting Frederick Pollock, *Part I: Introduction*, in *AN ESSAY ON POSSESSION IN THE COMMON LAW* 1, 5 (Oxford, Clarendon Press 1888)).

⁹⁴ *Id.* at 814 ("American law continued this tradition.").

⁹⁵ *Id.*

⁹⁶ See *id.* at 813 (discussing, inter alia, *Willcox v. Stroup*, 467 F.3d 409 (4th Cir. 2006); *Maine v. Adams*, 672 S.E.2d 862 (Va. 2009)).

⁹⁷ O.W. Holmes, Just., Supreme Jud. Ct. of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 475 (1897).

⁹⁸ The court denied that its historical analysis would "lend an air of legitimacy" to its decision, *Elam*, 138 F.4th at 813 n.7 (quoting *id.* at 820 (Richardson, J., dissenting)), but it is unclear why the court would ever spill ink on reasoning not intended to persuade.

contesting the majority's use of legal history, the dissent embraced the persuasiveness of Roman law and responded in kind.⁹⁹

The court might have justified its citation to Roman precedent as coherent with Virginia's tradition of borrowing from Roman law.¹⁰⁰ Virginia's intestacy statute, for example, was based largely on the Roman model.¹⁰¹ However, "as the nineteenth century progressed, the body of Virginia case law accumulated," and Virginia courts eventually found it "unnecessary . . . to argue from the civil law of Imperial Rome."¹⁰² Indeed, the Virginia Supreme Court has not cited the Roman maxim of *uti possidetis* since 1797.¹⁰³

Before *Erie*, federal courts regularly referenced general law, a body of unwritten law outside statute or state common law.¹⁰⁴ This approach was exemplified by the Supreme Court decision *Swift v. Tyson*.¹⁰⁵ Since developing a universal law is no longer the overt goal of federal courts, *Elam* appears to have struck a compromise between *Erie* and *Swift*: The court may rely on general law if state law accords with it. The court's contention is that legal practice concerning the presumption has been fairly uniform from the Roman Republic up to the present, including current Virginia law.¹⁰⁶ Yet squarely relying on ancient precedent, without more, is inconsistent with *Erie* doctrine.¹⁰⁷ Unelaborated overture to a principle's "historical pedigree" is, at best, harmless error; at worst, it risks contravening *Erie*'s command because it may treat Roman and medieval authorities as authoritative precursors to state law. The court appealed to Roman law as a formulation of an established rule, not just a source of well-reasoned arguments.¹⁰⁸

Moreover, the application of Roman precedent when it is consistent with state law assumes that the court's historical investigation accurately excavated a rule substantially similar to Virginia's presumption. Yet this use of history raises two additional problems. First, it faces the classical challenge of extrapolating from historical analogs at the

⁹⁹ See *id.* at 820 & n.1 (Richardson, J., dissenting) (citing, inter alia, Richard A. Epstein, *The Natural Law Origins of Private and Public Law*, 17 N.Y.U. J.L. & LIBERTY 205, 205 (2024)).

¹⁰⁰ See W. Hamilton Bryson, *The Use of Roman Law in Virginia Courts*, 28 AM. J. LEGAL HIST. 135, 136 (1984).

¹⁰¹ *Id.* at 139.

¹⁰² *Id.* at 146.

¹⁰³ See *Innis v. Roane*, 8 Va. (4 Call) 379, 389 (1797).

¹⁰⁴ See Jack Goldsmith, *Erie and Contemporary Federal Courts Doctrine*, 46 HARV. J.L. & PUB. POL'Y 727, 732 & n.17 (2023).

¹⁰⁵ 41 U.S. (16 Pet.) 1, 19 (1842) ("Non erit alia lex Romæ, alia Athenis . . . una eademque lex obtenebit."). The quote reads: "There shall not be one law of Rome, another of Athens . . . one and the same law shall prevail."

¹⁰⁶ See *Elam*, 138 F.4th at 813–14.

¹⁰⁷ See Astorino, *supra* note 3, at 643–44 (noting that Justice Holmes "question[ed] the value of . . . Roman law" due to its emphasis on "general principles," *id.* at 644).

¹⁰⁸ Cf. Postema, *supra* note 12, at 596–97 (contending that "[c]lassical common law" cited cases for argument quality, not "discrete rules of law," *id.* at 596).

appropriate level of generality.¹⁰⁹ In *Elam*, the majority and the dissent disagreed on how tailored a historical parallel must be.¹¹⁰ The majority argued that it was a sufficient parallel to observe Roman praetors as similarly favoring actual possessors in property disputes.¹¹¹ The dissent countered that Romans delayed the question of ownership until *rei vindicatio*, a later proceeding resembling trial, where the presumption was applied.¹¹² Here, the majority is probably correct that it need not “pull[] out an ancient equivalent of Rule 56,”¹¹³ but the challenge remains. Second, in seeking an analog to Virginia law, the court’s sweeping historical discussion inevitably flattened nuances between jurisdictions. Generally speaking, unlike civil law, medieval English and early American common law did not inherit Roman property law.¹¹⁴

Given the *Elam* court’s citation to Roman law, it should have characterized its reference as a policy-based justification that buttressed its state law holding. First, the court might have leveraged history as evidence that the Virginia common law’s presumption has *empirically* been correct. The presumption is not determinative — yet centuries of decisions that concur in its allocation of ownership, from *The Digest of Justinian* to present-day authorities, might serve as evidence from one long natural experiment that a possessor usually has valid title.¹¹⁵ The court approached such an analysis when it stated that “our tradition . . . has decided that overinclusion is preferable to the insecurity of a world where the law does not assume that people own the property they possess.”¹¹⁶ Yet it missed an opportunity to further argue that history gave *observational evidence* that overinclusion under the presumption was tolerably low.

Second, the court might have argued that the presumption’s pedigree demonstrates that it is a structural aspect of property, integral to a legal system “managing uses [of things] at positive information cost.”¹¹⁷ This

¹⁰⁹ See Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. & PUB. POL’Y 563, 566–67 (2024).

¹¹⁰ *Elam*, 138 F.4th at 813 n.7.

¹¹¹ *Id.* at 813.

¹¹² *Id.* at 820 (Richardson, J., dissenting).

¹¹³ *Id.* at 813 n.7 (majority opinion); see also Epstein, *supra* note 99, at 295 (“[P]rocedural variation . . . is of no consequence under natural law theory.”).

¹¹⁴ See Eric Descheemaeker, *The Consequences of Possession*, in THE CONSEQUENCES OF POSSESSION 1, 13 (Eric Descheemaeker ed., 2014) (“[T]he English ‘law of property’ . . . is distinctively un-Roman.”).

¹¹⁵ Cf. Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1849–50 (2015) (“Burkeanism values past practice in part because such practice is believed to reflect a collective wisdom generated . . . over time.” (citing, inter alia, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), reprinted in REFLECTIONS ON THE REVOLUTION IN FRANCE AND THE RIGHTS OF MAN 15 (Doubleday & Co. 1961))).

¹¹⁶ *Elam*, 138 F.4th at 815.

¹¹⁷ Yun-chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses*, 92 S. CAL. L. REV. 785, 808 (2019). The authors use “information costs” to describe the difficulty potential purchasers face in verifying valid title. *Id.* at 797.

role for ancient precedent recalls courts' reliance on foreign law to illustrate that the "world community" has converged on a common view.¹¹⁸ Just as biologists observe that multiple unrelated species of crustaceans independently evolved a "crab-like" body — a form of convergent evolution labeled "carcinization"¹¹⁹ — property systems tend to align on common features. This mode of policy-based reasoning would have better set *Elam* within *Erie*'s bounds, because it would have demonstrated that the court had good practical reasons for adopting a rule beyond merely importing rules from other jurisdictions and time periods.¹²⁰ Nevertheless, even this normative usage could encounter the two identified problems associated with an unadorned appeal to the presumption's "historical pedigree." Hence, any recourse to Roman law should be exercised cautiously.

Because *Erie* remains prevailing doctrine, courts usually decline to establish new federal common law rules.¹²¹ In *Elam*, the Fourth Circuit could have simply cited to Virginia law. Instead, it reinforced state law with ancient Roman law. This unqualified citation to historical lineage as authoritative support contravenes *Erie* and the prevailing maxim that "property rights . . . are creatures of state law."¹²² It also raises dual difficulties for judges: selecting the right level of generality and ensuring historical accuracy. Should a future federal court reference Roman law, it ought to cast this citation as normative support rather than additional legal authority. Such a framing would enhance the opinion's persuasiveness and steer clear of a potential *Erie* issue.

¹¹⁸ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹¹⁹ Gerhard Scholtz, *Evolution of Crabs — History and Deconstruction of a Prime Example of Convergence*, 83 CONTRIBUTIONS TO ZOOLOGY 87, 89 (2014).

¹²⁰ Cf. STUART BANNER, *THE DECLINE OF NATURAL LAW* 237 (2021) ("But the use of a broad policy-based mode of reasoning is not the same as reliance on natural law.").

¹²¹ See Goldsmith, *supra* note 104, at 735.

¹²² *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021).