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### Originalism's Implementation Problem

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# ORIGINALISM'S IMPLEMENTATION PROBLEM

Michael L. Smith\* and Alexander S. Hiland\*\*

## INTRODUCTION

Originalism has received a great deal of recent, mainstream attention. President Donald Trump's nomination of three justices to the Supreme Court amplified discussions of their judicial philosophies during and following their confirmation proceedings.<sup>1</sup> Supporters of these nominations highlighted the nominees' originalist credentials, arguing that originalism was the dominant approach to constitutional interpretation.<sup>2</sup>

In the academic sphere, volumes of articles and books set forth originalist theories and methodology. Its academic proponents also refer to it as the dominant form of constitutional interpretation—often asserting that opponents of originalism have

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<sup>1</sup> See Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution "Doesn't Change Over Time"*, NPR (Oct. 13, 2020, 10:08 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [<https://perma.cc/AS6W-5Y EJ>] (characterizing now-Justice Amy Coney Barrett as an originalist and detailing her explanation of what "originalism" means); Lawrence B. Solum, *Judge Barrett Is an Originalist. Should We Be Afraid?*, L.A. TIMES (Oct. 14, 2020, 1:31 PM), <https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative> [<https://perma.cc/5DVX-V8E4>]; Sol Wachtler, *Brett Kavanaugh Is an Originalist*, N.Y. L.J. (Sept. 20, 2018, 11:57 AM), <https://www.law.com/newyorklawjournal/2018/09/20/brett-kavanaugh-is-an-originalist/> [<https://perma.cc/DQ4L-8A47>] (describing Justice Kavanaugh as an originalist). Emily Bazelon & Eric Posner, *Who Is Brett Kavanaugh?*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html> [<https://perma.cc/ZQJ7-5G3T>] (arguing that Justice Kavanaugh is not an originalist); Kyle Peterson, *The Weekend Interview with Neil Gorsuch: The High Court's Rocky Mountain Originalist*, WALL ST. J. (Sept. 7, 2019), <https://www.wsj.com/articles/the-high-courts-rocky-mountain-originalist-11567792378> [<https://perma.cc/6UKZ-TAVE>] (noting Justice Neil Gorsuch's new book and detailing an interview with him regarding originalism).

<sup>2</sup> *Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 115th Cong. 3–5 (2017) (statement of Lawrence B. Solum) [hereinafter *Justice Gorsuch Nomination Hearing*], <https://www.judiciary.senate.gov/imo/media/doc/03-23-17%20Solum%20Testimony.pdf> [<https://perma.cc/9W62-LC9T>] (describing originalism as being in the "mainstream" of American jurisprudence).

failed to enunciate a coherent alternative theory.<sup>3</sup> Some argue that originalism (at least, an inclusive version of the theory) is our constitutional law, and that this in itself is a reason to follow originalism, as judges are bound to follow the law.<sup>4</sup>

Early originalists focused on determining the meaning of the Constitution by determining the original intentions of the founders.<sup>5</sup> Today, though, most originalists take the approach that the meaning of the Constitution is determined by the original public meaning of its provisions at the time of its enactment.<sup>6</sup> This latter approach to originalism, sometimes referred to as “new originalism,” or “original public meaning originalism,” is now the dominant version of the theory.<sup>7</sup> This Article focuses primarily on original public meaning originalism, particularly in Parts III and onward. There, we will typically use the term “originalism” interchangeably with “original public meaning originalism,” unless otherwise noted.

Academic originalists have written a great deal explaining their theories of originalism—including why originalism is justified and what originalist methodology involves.<sup>8</sup> This theorizing invites other academics to join in on the discussion, resulting in further nuances and alternate varieties of originalism, as well as critiques of various originalist theories.<sup>9</sup> As originalists respond to criticism and refine their theories, a virtual subdiscipline of constitutional law has spun into existence. Articles and books proliferate. Academics sacrifice forests of trees to the cause of explaining, criticizing, and defending originalism.

Despite the vast body of theoretical work produced by originalist scholars, this literature fails to address how practicing judges and attorneys should apply originalist theories. All too often, academic originalists appear to write for an audience of

<sup>3</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989) (claiming that it is “hard to discern any emerging consensus” among non-originalists as to what an alternate approach other than originalism might be). Even critics of originalist theories recognize the prominence of the theory. See, e.g., S.L. Whitesell, Comment, *The Church of Originalism*, 16 U. PA. J. CONST. L. 1531, 1554 (2014) (noting originalism’s “ascendant” status as early as 1997); Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401, 403 (2021) (describing originalism as a “juggernaut”).

<sup>4</sup> See generally William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352–53 (2015).

<sup>5</sup> E.g., Whitesell, *supra* note 3, at 1531–32 (discussing the key differences between “Old” and “New Originalists”).

<sup>6</sup> *Id.* at 1532.

<sup>7</sup> See generally *id.* (describing “New Originalism’s” rise in popularity).

<sup>8</sup> See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1248–50 (2019) [hereinafter Solum, *Living Constitutionalism*] (laying out foundational characteristics of originalists and making the case for originalism by identifying two “foundational distinctions” and eight “elements” of the case for the theory—with all but one of the distinctions and elements being defined by a citation to at least one of the author’s prior articles).

<sup>9</sup> See Whitesell, *supra* note 3, at 1552–53.

other originalist scholars. This results in lengthy, technical, and heavily theoretical discussions. The question of how courts and judges are to apply these increasingly technical and theoretical originalist methods is left by the wayside. All too often, judges and attorneys cherry-pick from this body of scholarship to create a veneer of academic legitimacy for their own goal-oriented arguments.

We do not seek to bridge this gap in the originalist literature or to cast aspersions on the reasons for its uptake in legal practice. Instead, we argue that originalism is difficult, if not impossible, to implement—at least in cases where a theory of interpretation matters. By demonstrating that originalism is more of an academic phenomenon than a guide for legal practice, we cast serious doubt on judicial and political treatment of originalism which tends to frame originalism as a method, if not *the* method, that judges should employ when interpreting the Constitution.

Determining the original public meaning of constitutional provisions is a complex undertaking that is prone to goal-oriented findings even if its adherents believe they are engaging in cautious, prudent analysis. Attorneys are unlikely to have the time or expertise necessary to engage in the methodical, balanced research necessary to achieve accurate results. Additionally, they are ethically obligated to make the strongest argument in favor of their clients and will likely tailor their investigation and presentation of original public meaning in a manner that supports their clients' desired outcomes. Indeed, to the extent that an originalist method leads to a single answer in a case, half of the attorneys involved in that case are ethically enjoined from relying on the method if an alternate interpretive approach will support their client's case. Courts face the options of deciding cases based on the skewed submissions of counsel, or undertaking their own independent research in the face of significant time and resource constraints. The latter option carries the risk of courts rendering decisions based on facts and arguments that are not before them—resulting in unchecked, unreviewable decision-making, the very thing that early iterations of originalism sought to avoid.<sup>10</sup>

While originalists occasionally acknowledge that their methodology may be difficult for judges and attorneys to implement, they give short shrift to this concern.<sup>11</sup> In the rare instances where originalists address the implementation challenges at all, they typically do so as an afterthought—relegating discussion of practicalities to a few under-analyzed pages or paragraphs at the end of their articles or books.<sup>12</sup> This unaddressed shortcoming lends originalism the appearance of an academically accepted truth rather than a contested issue that is impractical for legal application.

For those originalists who pay at least some attention to implementation issues, they often propose that judges and attorneys rely on the work of originalist scholars

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<sup>10</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 464–67 (2d ed. 1997).

<sup>11</sup> For multiple examples, see *infra* notes 49–63 and accompanying text.

<sup>12</sup> See *infra* notes 39–51 and accompanying text.

to determine the original public meaning of the Constitution.<sup>13</sup> These originalists acknowledge that accurate determinations of original public meaning require a great deal of time, and that scholars—unlike attorneys and judges who have impending case deadlines—may devote months or even years to their projects.<sup>14</sup> Additionally, scholars do not face the same ethical obligations of zealous advocacy as practitioners, meaning that their research is less likely to be guided by the desire to achieve particular outcomes.<sup>15</sup>

This proposed solution fails. The sheer amount of scholarship and the lack of meaningful barriers to preventing the publication of shoddy originalist research leave courts and attorneys to parse through a glut of contradictory scholarship. Additionally, advocacy by academics—motivated by their own political views as well as their desire to attain wider readership and a higher likelihood of publication—is likely to result in goal-oriented, argumentative analysis that is little better than that submitted by counsel.<sup>16</sup>

What's more, reliance on academic originalist scholarship undermines the normative reasons for accepting originalism in the first place. Originalists point to several reasons for accepting their theory—arguing that originalism can help judges reach a verifiable determination of the Constitution's meaning,<sup>17</sup> that originalism may constrain judges from deciding cases based on their personal or political preferences,<sup>18</sup> and that originalism is consistent with democratic ideals as it rests on the original public meaning of provisions adopted by superdemocratic majorities.<sup>19</sup> Reliance on originalist academic research to determine the original public meaning of the Constitution undermines these goals of stability, predictability, and democracy.

Should courts take originalists seriously and truly rely on academic literature in divining the original meaning of the Constitution, their rulings on the meaning of constitutional provisions become subject to developments in the academic originalist literature—a field whose volatility will only increase as specialized experts continue to enter legal academia and as technological developments (particularly in the field of corpus linguistics) change the landscape of how historic research is conducted. Additionally, reliance on originalist scholarship renders courts' interpretation of the Constitution even less democratic, because rather than determine the original public meaning of the Constitution, courts instead rely on what law professors claim that

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<sup>13</sup> See Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYUL REV. 1621, 1672–75 (2017) [hereinafter Solum, *Triangulating Public Meaning*].

<sup>14</sup> *Id.* at 1675.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at 1672–75.

<sup>17</sup> See Whitesell, *supra* note 3, at 1546.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1549.

meaning is. The inevitable focus on authors' and publications' pedigrees as proxies for selecting higher quality scholarship undermines democracy even further by determining original public meaning based only on the output of prestigious professors publishing in the most elite publications.

We do not propose solutions for implementing originalism. Indeed, we have little hope that originalists will succeed in solving the problem of implementation should they finally decide to devote the necessary time and effort to confront this issue. We hope that this Article will prompt originalists to at least attempt to take the practice—not just the theory—of originalism seriously. Should originalists fail to rise to this challenge, academic originalism will remain little more than an abstract, theoretical exercise that is fatally disconnected from the practice of law. In such a case, originalism's supporters, including judges and politicians, will need to acknowledge that originalism in practice lacks the rigor and nuance of originalism as theorized.

### I. A BRIEF BACKGROUND ON ORIGINALISM AND ITS EVOLUTION

This section provides a brief background on originalism, its evolution, and a summary of the current state of the theory. The goal of this section is to identify originalism's key underpinnings that the remainder of this Article will address—not to provide a complete history and survey of originalism and all of its nuances.<sup>20</sup>

Modern originalism developed largely as a reaction to perceived revisions of the Constitution by the Supreme Court—particularly the Warren Court.<sup>21</sup> In *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Raoul Berger criticized the Supreme Court's "continuing revision of the Constitution under the guise of interpretation."<sup>22</sup> In an argument that foreshadowed the development of the

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<sup>20</sup> For a more thorough background of originalism and its variations, see, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 458–69 (2013) [hereinafter Solum, *Constitutional Construction*] (describing the origins of originalist theory and some of its present variations); Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1134–48 (2003). For briefer, more approachable outlines to originalism and its varieties, see Lawrence B. Solum, *Legal Theory Lexicon: Originalism*, *LEGAL THEORY BLOG* (Aug. 11, 2019), <https://lsolum.typepad.com/legaltheory/2019/08/legal-theory-lexicon-originalism.html> [<https://perma.cc/M7U8-8X28>]; Lawrence B. Solum, *Legal Theory Lexicon: The New Originalism*, *LEGAL THEORY BLOG* (July 26, 2020), <https://lsolum.typepad.com/legaltheory/2020/07/legal-theory-lexicon-the-new-originalism.html> [<https://perma.cc/N45J-ARR7>].

<sup>21</sup> See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 554–55 (2006) (describing how "originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had 'almost nothing to do with the Constitution' and was merely an effort to enact 'the political agenda of the American left'" (quoting Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 *TEX. L. REV.* 789, 789 (1987)).

<sup>22</sup> BERGER, *supra* note 10, at 3.

originalist interpretation, Berger argued that the Court's role should be narrower, limited to "polic[ing] the boundaries drawn in the Constitution," and that the "'original intention' of the Framers" was "binding on the Court."<sup>23</sup> Berger also set forth an early statement of the role of academic originalist discussion in the political context, arguing that such scholarship serves to "heighten public awareness that the Court has been overleaping its bounds."<sup>24</sup>

In a speech before the American Bar Association in 1985—eight years after Berger's *Government by Judiciary* was first published, then—Attorney General Edwin Meese warned against "a drift back to the radical egalitarianism and expansive civil libertarianism of the Warren Court," arguing that this would "be a threat to the notion of limited but energetic government."<sup>25</sup> Rather than "judg[ing] policies in light of principles" and "remold[ing] principles in light of policies," Meese urged "a jurisprudence seriously aimed at the explication of original intention."<sup>26</sup> Fore-shadowing future developments in originalist theory, Meese vowed that his office would "endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."<sup>27</sup>

Berger, Meese, and other early originalist writers urged that interpretation of the Constitution be guided by the original intentions of the Constitution's framers.<sup>28</sup> This early, "original intentions" approach to originalism came under fire as critics noted the difficulty or impossibility of attempting to derive a coherent original intent from a group of people with distinct, and often opposing, ideologies and political goals.<sup>29</sup> Indeed, the term "originalism," itself likely originated in an article written by a critic of original intentions originalism, Paul Brest.<sup>30</sup> The original intentions approach to originalism is uncommon today, although it still has some supporters.<sup>31</sup>

<sup>23</sup> *Id.* at 3–4.

<sup>24</sup> *Id.* at 464.

<sup>25</sup> Edwin Meese III, Speech Before the American Bar Association, at 6 (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [<https://perma.cc/W4XM-YQV5>].

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* at 6–7; BERGER, *supra* note 10, at 466–67.

<sup>29</sup> *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229–30 (1980).

<sup>30</sup> *Id.* at 204 ("By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.").

<sup>31</sup> *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228–29 (1988); *see generally* Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Whitesell, *supra* note 3, at 1550 (noting that while there was a "discernable trend" from original intent originalism to original public meaning originalism, the "shift . . . was not a clean break.") (alteration in original) (quoting Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 251 (2009)).

Most originalists assume that “originalism” generally refers to original public meaning originalism, and will accuse critics who attack original intentions originalism of targeting the wrong theory.<sup>32</sup>

Today, though, most originalists adopt a version of Justice Antonin Scalia’s notion that legal minds should pursue the original meaning of the text.<sup>33</sup> Many also take the view that originalism is meant to guide constitutional interpretation rather than attack existing doctrines believed to be “products of judicial excesses.”<sup>34</sup> Proponents of original public meaning originalism note that it shares some features with older originalist approaches—including the propositions that “the textual meaning of a written constitution is fixed at the time its language is enacted” and that “this fixed meaning should remain the same until it is properly changed.”<sup>35</sup> Lawrence Solum refers to the proposition that constitutional meaning is fixed at the time of its origin as the “Fixation Thesis,” and identifies it as a “core idea” shared by various “members of the originalist family.”<sup>36</sup> Another shared idea of modern originalist theories is what Solum labels the “Constraint Principle,” the notion that “constitutional construction should be constrained by the original meaning of the constitutional text.”<sup>37</sup>

There are many subtheories of originalism that are worthy fodder for unique lines of criticism. Our critique, though, functions on a higher level by challenging the feasibility judges and lawyers engaging in the rigorous methodology required to interpret the Constitution’s original meaning—a necessary step for nearly all theories of originalism. We address a variety of methods that purportedly help judges, attorneys, and academics ascertain the original meaning of the Constitution, including reliance on constitutional record, immersion in constitutional law, and corpus linguistics. We conclude that such methods cannot be effectively employed to determine the original meaning of the Constitution and that these methods lend themselves toward partisan and goal-oriented interpretations of the text, tending toward a capricious and deleterious application of the law.

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<sup>32</sup> See, e.g., Christopher Scalia, *Get Ready for a Flood of Falsehoods About Originalism*, WALL ST. J. (Oct. 11, 2020, 4:06 PM), <https://www.wsj.com/articles/get-ready-for-a-flood-of-falsehoods-about-originalism-11602446778> [<https://perma.cc/G3QG-SRFQ>] (criticizing characterizations of originalism as seeking the original intentions of the founders).

<sup>33</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 8–9 (2013); see also Antonin Scalia, Judge, U.S. Court of Appeals for the D.C. Circuit, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 104–06 (U.S. Dep’t of Just. ed., 1987).

<sup>34</sup> See Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 545 (2013). Berman and Toh refer to this as “new originalism,” distinct from “New Originalism,” which they apply to a particular subset of modern originalist theory. *Id.* at 553–54.

<sup>35</sup> Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660–61 (2009).

<sup>36</sup> Solum, *Constitutional Construction*, *supra* note 20, at 459.

<sup>37</sup> *Id.* at 460.



Suggestions that courts or attorneys fall back on academic research or corpus linguistics to determine original public meaning are unworkable. There exists an overabundance of literature on original public meaning, meaning that courts will be confronted with conflicting citations to various interpretations curated by the advocates appearing before them. Tools like corpus linguistics tend to reflect the biases of the persons who crafted those tools and the biases of their users rather than an objective presentation of original public meaning. We conclude that the implementation problem facing originalism is both immutable and insurmountable. Originalists must make a serious effort to address the implementation problem, or admit that their theories are unlikely to be applied in the manner originalists hope and expect.

## II. THE PROBLEM OF IMPLEMENTING ORIGINALIST THEORY

Most theories of modern originalism require the determination of the original public meaning of provisions in the Constitution. Originalists fail to address how this determination should be made in practice, preferring to make assertions at a theoretical level. Assuming the issue is even addressed at all, it is often discussed briefly and at the last minute, with originalists waiting until the final chapter of a book or the last several pages of an article to address how their theories may be applied.<sup>38</sup>

For example, in their book, *Originalism and the Good Constitution*, John McGinnis and Michael Rappaport spend the bulk of the text explaining their “Original Methods Originalism” and why the theory’s basis in supermajoritarian constitutional provisions and amendments is an ideal approach to interpretation.<sup>39</sup> How the theory is to be implemented is reserved for the last ten or so pages of the book, with most of the discussion centering on scholarly treatment of originalism and originalist methodology rather than on how attorneys and judges may put the book’s theories into practice.<sup>40</sup>

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<sup>38</sup> See Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 331–32 (2019) (recognizing, in the final section of an article, that it is a “caveat worth noting” that judges are not corpus linguists and may not readily have the capacity to engage in this particular method of originalist analysis); see also Solum, *Triangulating Public Meaning*, *supra* note 13, at 1674–75 (acknowledging that judges’ and justices’ law clerks and attorneys are unlikely to have the time or objectivity to engage in balanced historical analysis, and suggesting that legal scholars may do deeper research, and that results reached by academics and practitioners may be compared and contrasted); ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 100–02 (2017) (confronting objections that lawyers cannot engage in historical research by asserting that they can because judges tasks of determining credibility and applying facts of events in the past are similar, and that historians also make mistakes).

<sup>39</sup> MCGINNIS & RAPPAPORT, *supra* note 33, at 11–15 (introducing the core theses that take up the bulk of the book).

<sup>40</sup> *Id.* at 197–207 (addressing, in the final ten pages of a 200-plus page book, how “a culture of originalism” may be implemented—with much of the discussion reserved for how originalism would change theorizing and research in the legal academy).

Another example: Justice Thomas Lee and James Phillips, in their article, *Data Driven Originalism*, propose that corpus linguistics methodology be combined with improved technological search tools to determine the original communicative content of constitutional terms and provisions.<sup>41</sup> For about 70 pages, the authors describe and give examples of their approach, which involves developing coding methods for various potential meanings of constitutional provisions, examining trends in words appearing next to each other, looking over clusters of words, and having research assistants review examples of target terms appearing in original sources.<sup>42</sup> In the last part of the article before the Conclusion, the authors consider the objection that judges do not have the capability to engage in this sort of analysis.<sup>43</sup> The authors devote about two pages to this issue, and acknowledge that it's a concern for their method.<sup>44</sup> They respond with little more than one paragraph asserting that, despite practical challenges, judges should use the most effective tools available.<sup>45</sup> The paragraph contains four footnotes, two of which cite to another law review article coauthored by Justice Lee, and two of which cite to a concurring opinion authored by Justice Lee.<sup>46</sup>

Finally, take Lawrence Solum's article, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record* where he describes three separate originalist methods: corpus linguistics, immersion, and studying the constitutional record.<sup>47</sup> Solum goes through the intricacies of each approach, and suggests that constitutional text may be "translated" by applying all of the methods in tandem.<sup>48</sup> Towards the end of the article, Solum addresses concerns over shoddy historic analysis and whether law clerks or practitioners have the resources to engage in detailed studying of the constitutional record.<sup>49</sup> Solum admits that law clerks and lawyers likely cannot undertake research of sufficient breadth, depth, and balance.<sup>50</sup> He suggests that legal scholars may be able to undertake more extensive research against which lawyers and clerks may check their results.<sup>51</sup>

These examples illustrate a pattern of paying short shrift to the difficulties of implementing originalism. It is unclear why so little attention is paid to this issue, as academic originalism is presumably written with an eye to its use or application

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<sup>41</sup> Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019).

<sup>42</sup> *See id.* at 261–330.

<sup>43</sup> *See id.* at 331–32.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* at 332 n.204–07.

<sup>47</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1624.

<sup>48</sup> *See id.* at 1678.

<sup>49</sup> *Id.* at 1673–74. This is only one of the three approaches that Solum would ideally see applied in tandem—the other two involve an intensive “immersion” in the language of the time of the founding and employing corpus linguistics methodology to analyze trends in the use of language at the time of the founding.

<sup>50</sup> *Id.* at 1674–75.

<sup>51</sup> *Id.* at 1675.

at the judicial level.<sup>52</sup> Failing to present theories that can be applied by attorneys and judges is one likely reason why academic discussions of originalism are divorced from discussions of originalism in the political and judicial spheres.<sup>53</sup>

Originalism must account for this failure if it is to be of any use. This next section details the implementation problems that originalist theories tend to minimize. Using Solum's triangulation method as a framework, it examines the three originalist methods that Solum advocates and outlines the serious problems with implementing each of them—concluding that these methods are unlikely to be of any practical use to attorneys and courts.

### A. *Corpus Linguistics*

“Corpus linguistics is the study of language through systemic analysis of data derived from large databases of naturally occurring language . . . .”<sup>54</sup> The corpus linguistics method requires that interpreters review “a large number of naturally occurring uses of [a] phrase in a database or corpus of language.”<sup>55</sup> To do so, an interpreter reviews examples of the phrase's use drawn from databases called “corpora,” (or “corpus,” in the singular) which are collections of newspapers, books, articles, essays, or other similar documents.<sup>56</sup>

For originalist analysis, the interpreter should draw from a corpus that contains documents from the particular time period during which a constitutional provision or amendment was ratified.<sup>57</sup> For the original public meaning of the Constitution and its amendments at the time of their initial enactment, the corpus of choice is the Corpus of Founding-Era American English (COFEA), developed by the Brigham Young University J. Reuben Clark Law School.<sup>58</sup> That corpus is “designed to represent general written American English from the founding era of the United States of America (i.e., 1765–1799).”<sup>59</sup> It consists of 119,801 documents from various sources, with the largest three being Evans Early American Imprints, Founders Online, and HeinOnline.<sup>60</sup>

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<sup>52</sup> See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 867–68 (1991) (describing how normative legal thought “demands and desires” to be enacted in the “social realm”).

<sup>53</sup> See Solum, *Living Constitutionalism*, *supra* note 8, at 1289–91 (recognizing differences in how originalism is treated in academic discourse compared with how it is described in popular discourse and how it is implemented in judicial opinions).

<sup>54</sup> Lee & Phillips, *supra* note 38, at 289.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 290.

<sup>57</sup> *Id.* at 293; see also Solum, *Living Constitutionalism*, *supra* note 8, at 1644–45.

<sup>58</sup> Lee & Phillips, *supra* note 38, at 293.

<sup>59</sup> *Corpus of Founding Era American English (COFEA)*, BYU LAW & CORPUS LINGUISTICS (Oct. 11, 2019) [hereinafter *COFEA*], <https://lcl.byu.edu/projects/cofea/> [<https://perma.cc/L5E4-K4QF>].

<sup>60</sup> *Id.* Only 277 documents, but a total of 32,237,273 words are from these sources.

Evans Bibliography of Early American Imprints consists of texts of books, pamphlets, and periodical publications printed in the United States from 1639 to 1820—COFEA gained access to approximately a third of these works and selected the 2,645 documents from the 1760–1799 time frame, which contain 62,660,171 words.<sup>61</sup> Founders Online consists of papers (personal records, letters, and diaries) from six individual founders: George Washington, John Adams, Alexander Hamilton, Benjamin Franklin, Thomas Jefferson, and James Madison.<sup>62</sup> The largest pool of documents by far in COFEA is from this source—with 115,408 documents originating from Founders Online (although this set of documents totals up to 37,057,114 words—far less than that from Evans Early American Imprints).<sup>63</sup> COFEA also contains documents from HeinOnline, which include “mostly session laws, executive department reports, and legal treatises.”<sup>64</sup> Only 277 documents originate from HeinOnline, but they contain 32,237,273 words.<sup>65</sup>

Corpus linguistics analysis consists of analyzing instances of word or phrase use to analyze the frequency of word usage do derive “the more common sense of a given term in a given linguistic context.”<sup>66</sup> Investigators review a number of “concordance lines,” of text from a corpus—which are sentences or paragraphs in which the searched-for term appears—and develop coding methods for classifying the results.<sup>67</sup> Investigators may also review common “collocates,” or instances where words are “commonly used in association with another.”<sup>68</sup> Common collocates may provide clues regarding how people in a particular time, or people writing in a certain context, used a particular term or phrase.

Corpus linguistics analysis involves developing a mechanism to classify or “code” search results as indicating a particular meaning.<sup>69</sup> How precisely this is to be done remains unclear—Lee and Phillips suggest drawing “on principles and practices from survey and content analysis methodologies.”<sup>70</sup> Solum devotes even less discussion to coding in the context of using corpus linguistics—instead presenting a search for collocates of the phrase “science of” with an aim at determining the scope of the term, “science” in the early nineteenth century.<sup>71</sup> Solum does so, and notes that frequent collocates included “words like *government, politics, art, law, religion, and theology,*”

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<sup>61</sup> *Id.* As of April 25, 2021, the number of titles in COFEA’s downloadable list of current titles included 2,931 titles, suggesting that the list of titles from this source has been on the rise.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* As of April 25, 2021, however, COFEA’s downloadable title list for this source contained only ninety-five titles.

<sup>66</sup> Lee & Phillips, *supra* note 38, at 290–91.

<sup>67</sup> *Id.* at 291.

<sup>68</sup> *Id.* at 291–92.

<sup>69</sup> *Id.* at 291.

<sup>70</sup> *Id.*

<sup>71</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1645–47.

which he took to suggest that historic uses of “science” corresponded to a definition of mastery of any branch of learning rather than the narrower STEM fields commonly associated with science today.<sup>72</sup> Presumably, those terms that Solum identifies in his list of collocates correspond to the broader “mastery” definition of science, but Solum does not make this explicit—and the coding he employs remains undisclosed.

This lack of disclosure indicates an initial problem with sorting and classifying search results based on undisclosed coding methods. Addressing how this phenomenon relates to race in the wider context of search algorithms and related technology, Ruha Benjamin describes this as the “anti-Black Box” which “encode[s] inequity to the race-neutral laws and policies that serve as powerful tools for White supremacy.”<sup>73</sup> Benjamin argues that efforts to remain neutral in applying technologies like coding and search systems tend to reproduce pre-existing inequities.<sup>74</sup> This argument is part of a burgeoning field of research that calls into question the presumptive neutrality of how codes and algorithms are written, and this concern applies to the more basic “coding” methods used in originalist analysis—even the simple example that Solum uses as an illustration, which appears to rely on present-day assumptions to formulate how results should be coded.<sup>75</sup> Originalist methods or “coding” classification risk being coded to produce the best meaning for particular desired outcomes rather than a better approximation of “truth”—and a failure to make coding methodologies and underlying assumptions transparent exacerbates this risk.<sup>76</sup>

Proponents of corpus linguistics contend that it will make originalist analysis “more empirical,” noting that judges and justices already engage in similar, less-formal analysis.<sup>77</sup> Lee and Mouritsen suggest that corpus linguistics analysis will allow judges to test hypotheses about phrases’ meanings “through rigorous experimentation with observable and quantifiable data,” and that the results of these conclusions “will be replicable and falsifiable.”<sup>78</sup> Unfortunately, corpus linguistics presents a number of practical challenges, lends itself to corruption by the adversarial process of litigation, and risks undermining the adversarial process should judges take charge and conduct their own corpus linguistics analysis.

### 1. The Cumbersome Realities of Corpus Linguistics

The corpus linguistics method of determining original meaning is a time-intensive undertaking that requires most judges and attorneys to act beyond the scope

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<sup>72</sup> *Id.* at 1645–47.

<sup>73</sup> RUHA BENJAMIN, RACE AFTER TECHNOLOGY 35 (2019).

<sup>74</sup> *Id.*

<sup>75</sup> See generally SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018).

<sup>76</sup> *Id.*

<sup>77</sup> See James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 20, 26–28 (2016).

<sup>78</sup> Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 829 (2018).

of their expertise. This problem is often overlooked by proponents of corpus linguistics, who either make conclusory assertions about the ease of the method, or who focus solely on corpus linguistics' use in the academic sphere.<sup>79</sup>

While judges and attorneys may be used to electronic databases like Westlaw and LexisNexis, interpreting and sifting through the results of corpus linguistics searches is a different ball game, as these search results do not result in a series of cases or statutes that attorneys and judges are accustomed to reading. Instead, judges and attorneys are confronted with lists of collocates and series of historic document excerpts. The task is further complicated by the need to account for variations in spelling—which were particularly widespread during the founding era. For a search of a corpus linguistics database to pull a complete picture of how a term or phrase was employed during a certain time period, judges and attorneys must craft searches that account for variations on how that term was spelled in order to ensure the results are sufficiently representative.

Additionally, quality corpus linguistics analysis takes time. A search for a term or phrase used in the Constitution or a constitutional amendment may result in hundreds, if not thousands, of instances where that term is used.<sup>80</sup> When that happens, judges and attorneys are faced with the task of parsing through these voluminous results—a task that can eat up expensive time for attorneys, and time that could be spent on other cases for judges and their clerks.

There may be ways to narrow down results, but these methods also present risks. Judges and attorneys can narrow their search results by only examining those with collocates that are deemed relevant. For example, someone may want to examine the use of the term “unusual,” to see if this sheds any light on the Eighth Amendment’s prohibition on “cruel and unusual punishment.” A COFEA search for “unusual” results in quite a few hits,<sup>81</sup> so it may be tempting to look at common collocates to see if the results can be narrowed. The vast majority of collocates include simple prepositions or conjunctions (e.g., the, of, and, to),<sup>82</sup> which an interpreter may find unhelpful at first glance. But there are some promising hits on the collocate list, such as “cruel,” “punishments,” “imposed,” “inflicted,” and “manner,” all of which have

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<sup>79</sup> See *id.* at 872 n.323 (claiming that originalist methodology reflects how attorneys can parse historical materials and present them to the court, and citing one of the coauthors' concurring opinions as the sole support for the claim that “this ‘isn't rocket science’”) (quoting *State v. Rasabout*, 356 P.3d 1258, 1286 (Utah 2015) (Lee, J., concurring)); see also Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1212 (2017) (advocating for the use of computer-assisted research techniques by originalist scholars).

<sup>80</sup> See Donald L. Drakeman, *Is Corpus Linguistics Better Than Flipping a Coin?*, 109 GEO. L.J. ONLINE 81, 90 (2020).

<sup>81</sup> *COFEA*, *supra* note 59. As of May 1, 2021, a COFEA search for “unusual” resulted in 1,629 results. *Id.*

<sup>82</sup> *Id.*

far more manageable hit numbers below 50.<sup>83</sup> To save time, a judge or attorney may be tempted to narrow their review to these results. But doing so risks introducing bias to the search. Remember, the whole point of using corpus linguistics methodology is to determine the general public use of “unusual” at the time of the founding—not only instances where that term was used in the context of punishment.<sup>84</sup> Original documents describing other unusual phenomena, such as “circumstances,” “bodies,” and “appearance” may be useful, and excluding results based on the investigator’s subjective determination of “relevance” may generate skewed or misleading results.

Yet another problem with this method is that advocates of corpus linguistics are, at best, vague when describing how those engaging in corpus linguistics analysis should reach interpretive conclusions. Take, for example, a situation where a search suggests that there are multiple original meanings of a particular term, although one meaning was used with more frequency than the other. Assume that one meaning of a term is found to have been used eighty percent of the time, and the other meaning was used twenty percent of the time.<sup>85</sup> Judges and attorneys may be tempted to conclude that the meaning that is used more frequently is the original public meaning—as it was the meaning that is most consistent with “ordinary use.” The normative reasons for making this determination are unclear, however. A term may indeed have multiple meanings. Indeed, a term with multiple meanings may have been strategically chosen so that different members of its audience may have taken it to mean different things—particularly in the context of the Constitution, where the audience was divided and a consensus was desirable.<sup>86</sup> And a focus on frequency may ignore potentially relevant characteristics of each result—such as the size of the audience for each result.<sup>87</sup>

Without clearly prescribed methods for translating corpus linguistics search results into actionable bases for decisions, judges and attorneys will have difficulty implementing this method in practice where a conclusive interpretation is required. Lee and Mouritsen sidestep the question, acknowledging that corpus linguistics may

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<sup>83</sup> *Id.*

<sup>84</sup> See Drakeman, *supra* note 80, at 90 (noting the problem of bias in search results and using the example of narrowing search results for “establishment” to results that include collocates with “religion”).

<sup>85</sup> This hypothetical assumes that the analysis revealed only two meanings and that there are no instances of indeterminate meanings.

<sup>86</sup> See Leah Ceccarelli, *Polysemy: Multiple Meanings in Rhetorical Criticism*, 84 Q. J. SPEECH 395, 404–06 (1998) (describing “strategic ambiguity,” and how such ambiguity may be employed to elicit favorable responses from opposing factions within a speaker’s audience); see also Alexander Hiland, *Polysemic Argument: Mitt Romney in the 2012 Primary Debates*, in *DISTURBING ARGUMENT: NCA/AFA CONFERENCE ON ARGUMENTATION* 168–73 (Catherine Palczewski, 1st ed. 2014) [hereinafter Hiland, *Polysemic Argument*].

<sup>87</sup> Drakeman, *supra* note 80, at 96–97 (noting that it is unclear whether a private letter with an audience of one should be given less weight than a newspaper article that was available to a wide audience).

help determine whether a given sense of a term is more factually common, but insisting that the implications of these findings are only to be determined after answering the separate question of what “ordinary meaning” means.<sup>88</sup> At times, Lee and Mouritsen leave open the question of what theory of “ordinary meaning” should be employed when addressing critiques that corpus linguistics analysis may exclude meanings of terms that are not as commonly used.<sup>89</sup> Elsewhere, they explicitly denounce the notion that the most common senses of a word or phrase are the “ordinary meanings” of those phrases—denouncing such an approach as “arbitrary.”<sup>90</sup> But in other writings they state that the most common use of a word or phrase at least “might” be a method of determining the public meaning of historic texts.<sup>91</sup>

Neal Goldfarb argues that frequency of use is an important fact to consider when determining ordinary meaning.<sup>92</sup> Goldfarb argues that a long line of authorities support this claim and cites a number of cases in support of this proposition.<sup>93</sup> Some of the authorities that Goldfarb cites, however, do not clearly state that frequency of use is a factor, or the method, of determining the ordinary meaning of a term—emphasizing instead the importance of context, or using broad references to the “ordinary” meaning of terms without referencing frequency of usage.<sup>94</sup> Other authorities

<sup>88</sup> Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 334–35 (2021).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 341–42.

<sup>91</sup> Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 78, at 826.

<sup>92</sup> See Neal Goldfarb, *The Use of Corpus Linguistics in Legal Interpretation*, 7 ANNU. REV. LINGUIST. 473, 475–76 (2021) [hereinafter Goldfarb, *Use of Corpus Linguistics*] (surveying scholarship arguing that “relative frequencies of the various meanings that a given word can convey” should be a “factor[] relevant to determining ordinary meaning”); see also Neal Goldfarb, *Corpus Linguistics: Empiricism and Frequency*, LAWNLINGUISTICS (Mar. 22, 2018) [hereinafter Goldfarb, *Empiricism and Frequency*], <https://lawlinguistics.com/2018/03/22/corpus-linguistics-empiricism-and-frequency/> (“It seems to me that under any reasonable approach to determining a word’s usual and most known meaning, the frequency with which the word’s various senses are believed to appear will inevitably be a factor.”).

<sup>93</sup> Goldfarb, *Use of Corpus Linguistics*, *supra* note 92, at 475–76.

<sup>94</sup> See *id.* at 476; *Littlefield v. Littlefield*, 28 Me. 180, 183, 185–86 (1848) (stating that the meaning of words is to be “ascertained by popular usage” rather than “arbitrary judicial edicts” and that, when interpreting a deed, a word in the deed is to be understood “in the sense in which it was ordinarily used, and understood at that place, whether it accorded with strict legal accuracy or not”). This phrasing does not describe a methodology for determining popular usage by measuring the frequency of word usage. Additionally, this example is of dubious relevance to questions of constitutional interpretation because it interprets a deed, rather than the Constitution or a statute. Moreover, in the opinion itself, the court notes that where there are multiple potential meanings, the context of their use should be the focal point for determining meaning—an approach that the court then applies. See, e.g., *Lumbra v. United States*, 290 U.S. 551, 561 (1934) (“Unless by construction these words are given a meaning far different from that they are ordinarily used and understood to convey, the evidence must be held not sufficient to support a verdict for petitioner.”); *Wis. Cent. Ltd. v.*



that Goldfarb cites refer to the “common” usage of words, but these authorities’ frequent use of “common” in conjunction with the phrase “ordinary,” suggests that the courts may be using “common” or “common and ordinary” as a synonym for “ordinary,” rather than a means of defining “ordinary.”<sup>95</sup> Alternatively, those opinions that describe the “common, ordinary,” or “common and ordinary” meaning of words suggest that “common” is a concept that is distinct from “ordinary”—which undermines the conclusion that the two terms are synonymous. The conflation of the terms “common” and “ordinary,” as well as their combined permutations are themselves illustrations of problems with corpus linguistics methodology. The polysemic nature of terms creates sufficient overlap that makes the act of distinguishing them or treating them as synonyms an intervention into the text that predetermines the outcomes of the analysis, introducing an avenue for the motives and interests of the judges and attorneys using corpus linguistics to make their way into the results.

Moreover, even if frequency of use is an important factor in determining the ordinary meaning of a term or phrase, Goldfarb acknowledges the importance of context in determining meaning.<sup>96</sup> The importance of context complicates the use of frequency analysis in at least three ways.<sup>97</sup> First, even if one definition of a word or phrase was used more frequently than an alternative definition at the time of the founding, the less-common meaning may have still played a role in the enactment of the constitutional provision—particularly in light of the consensus required to meet the supermajority requirements of constitutional and amendment ratification and enactment.<sup>98</sup> This context suggests that frequency analysis may be less warranted when determining the meaning of a constitutional provision. Second, the importance of context, recognized both by Goldfarb and the sources he cites, require a more nuanced and thorough approach to corpus linguistics analysis.<sup>99</sup> Simple

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United States, 138 S. Ct. 2067, 2072 (2018) (asserting that a definition of a term that is used occasionally is not the ordinary meaning of a term, but going on to argue that the context of the case does not support the alternate meaning urged by the dissent).

<sup>95</sup> See Goldfarb, *Empiricism and Frequency*, *supra* note 92; see, e.g., *Yarbro v. Comm’r*, 737 F.2d 479, 483 (5th Cir. 1984) (“The term ‘exchange,’ in its most common, ordinary meaning implies an act of giving one thing in return for another thing regarded as an equivalent.”); see, e.g., *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105, 106–08 (N.D. Ill. 1994) (“Such an interpretation comports well with the statute’s purposes in addition to following the most common and ordinary meaning of its language.”).

<sup>96</sup> See Goldfarb, *Use of Corpus Linguistics*, *supra* note 92, at 476 (“Here, we are concerned not with how a word or phrase is most frequently used overall but, rather, with how it is most frequently used (i.e., what meaning it is most frequently used to convey) when it appears in contexts similar to that in the legal provision at issue.”).

<sup>97</sup> See Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 94 S. CAL. L. REV. POSTSCRIPT 13, 14, 20–21 (2020–21).

<sup>98</sup> See Ceccarelli, *supra* note 86, at 404–06 (describing “strategic ambiguity,” and how such ambiguity may be employed to elicit favorable responses from opposing factions within a speaker’s audience); see also Hiland, *Polysemic Argument*, *supra* note 86, at 168–73.

<sup>99</sup> Goldfarb, *Empiricism and Frequency*, *supra* note 92.

frequency analysis and review of collocates or contexts in a sentence may not be enough; reviewers may need to examine a larger portion of the document in order to obtain the context necessary to determine meaning. Third, even where the scope of corpus linguistics could be expanded to include contextual analysis of documents, it would create a second order problem of determining what criteria would be used to include or exclude contextual clues to appropriately determine if the document contributes to contextual understanding of original public meaning.<sup>100</sup> All of this presents even more of a challenge for time-pressured judges and attorneys.

Rejecting a simplistic frequency rule will likely lead to more accurate, nuanced results. But this leaves judges and attorneys in a lurch, as they must determine a particular meaning to apply in the case at hand. Lee and Mouritsen suggest that corpus linguistics is not meant to supplant a judge's "experience, training, or professional judgment" and that the method serves as a "check against the judge's linguistic intuition."<sup>101</sup> This may not be enough for constitutional interpretation, though, as determining the public meaning of terms from the perspective of readers in the 1700s or 1800s requires a complete revamping of one's modern linguistic intuitions—not a mere "check." Additionally, if corpus linguistics ultimately serves as little more than a supplement to alternate interpretive methods, it is unclear why it is worth judges' and attorneys' time to engage in such intensive investigations.

## 2. The Danger of Adversarial Corruption of Corpus Linguistics Results

So far, we have addressed general difficulties that attorneys and judges will face in implementing corpus linguistics that arise from the nature of corpus linguistics analysis and the method's under-theorization. But more problems arise when corpus linguistics is implemented by attorneys advocating for a particular interpretation of a constitutional provision or amendment. Attorneys will likely frame the results of their analysis to advocate for a certain reading and they will likely interpret vague results in a manner that supports their client. Additionally, attorneys may employ algorithms that skew their findings in a particular direction. All of this undermines the objective, replicable appeal that proponents of corpus linguistics rely on when advocating the method.

### *a. Argumentative Advocacy and Corpus Linguistics*

In cases that involve voluminous results, attorneys may decide to engage in targeted searches for documents that better support their positions. Corpus tools like COFEA allow users to generate randomized lists of concordance lines, and those who advocate the method use random sampling to demonstrate how corpus linguistics

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<sup>100</sup> Slocum & Gries, *supra* note 97, at 14–15.

<sup>101</sup> Lee & Mouritsen, *The Corpus and the Critics*, *supra* note 88, at 345.

may be employed.<sup>102</sup> But it is unlikely that attorneys will constrain themselves to this approach—particularly if the random results don’t come out in their favor.

As discussed earlier, search results may be narrowed by limiting results to particular collocates. Attorneys whose arguments aren’t supported by randomized concordance lines may turn to targeted collocate searches to tailor the results to conform to a particular interpretation. Alternatively, attorneys who are disappointed with the results of randomized sampling may increase their sample size, cherry-pick as many supportive documents that they can find, and present all of these sources to the court as independent authorities.

These skewed approaches to corpus linguistics may be rightfully flagged by the opposing parties, and courts that are well-versed in corpus linguistics methodology and appropriate sampling practices may give the results of such analysis less weight. But there is still a risk that courts may consider, and even be convinced by, this goal-oriented analysis. Additionally, even if sampling suggests that a proposed interpretation of a term or provision is not common, presenting examples of less-common uses still places that alternate interpretation before the court. It is a bell that is difficult to unring, and it may be enough to convince a court (particularly a court that wants to reach a particular result) to take up the proposed interpretation anyway—especially if the court engages in selective citation and eschews corpus linguistics methodology in its ruling.<sup>103</sup>

Even if courts’ and attorneys’ methods are balanced and randomized, the results of these searches may be spun by skillful advocates. This is particularly likely in hotly contested constitutional cases, which often involve underdetermined provisions and broadly worded provisions. In these cases, corpus linguistics may transform a debate over the original public meaning of a particular constitutional provision into a debate over the original public meaning of documents authored at or around the time the provision at issue was written.<sup>104</sup> While attorneys and judges deal

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<sup>102</sup> See, e.g., Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 78, at 841 (using a sample of one hundred randomized concordance lines to analyze the meaning of the term “vehicle”).

<sup>103</sup> There is a wealth of literature on how judges that purport to be originalist may engage in selective citation or application of originalist methods to reach particular results. See Rebecca Piller, *History in the Making: Why Courts Are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187, 197–200 (2015) (arguing that originalists may rely on selective citations to historic sources and goal-oriented readings of these sources to arrive at preferred conclusions); ERIC J. SEGALL, ORIGINALISM AS FAITH 123–24 (2018) (arguing that Supreme Court Justices have used originalism in a selective manner to support particular outcomes); CATHERINE L. LANGFORD, SCALIA V. SCALIA: OPPORTUNISTIC TEXTUALISM IN CONSTITUTIONAL INTERPRETATION 81 (2017) (noting that Justice Scalia referred to the intent of the founders in his opinions on the Establishment Clause of the First Amendment, despite claiming elsewhere that judges should seek to understand the original meaning of the text rather than the founders’ intent).

<sup>104</sup> See Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435,

routinely deal with similar arguments over the applicability of cited cases, corpus linguistics and the numerous historical sources it may bring to bear can escalate disputes over several cited authorities into disputes over dozens, or even hundreds, of historic documents. Those who advocate for more rigorous historic analysis in opinions may welcome this development, but the judges who must decide the cases before them may be overwhelmed by the numerous, competing historical documents and arguments and interpretation of counsel.

*b. Advocacy by Algorithm and Corpus Linguistics*

Another complication that will likely arise when parties engage in dueling corpus linguistics analyses will be the use of algorithms. So far, there has been little discussion of algorithms and how they may be used to parse through corpora. Most originalist academics who discuss the method do not (yet) appear to employ algorithms that purport to arrange results by relevance, and instead display random samples of results.<sup>105</sup> Much of the coding, grouping, and relevance determinations appear to be up to the interpreter.<sup>106</sup> A rigorous user of corpus linguistics analysis would ideally make their searches, search results, concordance line sets, coding, and classification of the various results, available for anyone to see. In practice, attorneys and the court could criticize various results by disputing particular coding determinations and arguing that certain results support alternate meanings.

Should the method of corpus linguistics catch on, though, attorneys and other advocates may turn to algorithms to assist in performing targeted searches of results. An algorithm may search a corpora database and classify results based on those that are “most relevant,” by, for example, excluding search results that involve senses of terms that are deemed to be clearly irrelevant for any party to the litigation.<sup>107</sup> Machine learning may also be employed to fine tune search algorithms, with sample searches of particular terms or phrases and the coding of particular results being used to “train” an algorithm to better locate “relevant” results through predictive coding.<sup>108</sup>

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455–56 (2018) (noting that the analysis of empirical corpus data requires judges to make decisions—including normative decisions over particular interpretations and the relevance of results).

<sup>105</sup> See, e.g., Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 78, at 841.

<sup>106</sup> See Solum, *Triangulating Public Meaning*, *supra* note 13, at 1645–47.

<sup>107</sup> See Marc van Opijnen & Cristiana Santos, *On the Concept of Relevance in Legal Information Retrieval*, 25 A.I. L. 65, 72–73 (2017) (describing the development of algorithmic relevancy techniques).

<sup>108</sup> This is a technique that is gaining traction in complex litigation that involves extensive document review. See Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, JOLT DIGEST (Jan. 3, 2018), <https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> [<https://perma.cc/6ZJQ-FSE2>] (“[W]hen lawyers using AI-powered software for document review flag certain documents as relevant, the AI learns what type of documents it’s supposed to be looking for. Hence, it can more accurately identify other relevant documents. This is called ‘predictive coding.’”); Robert Keeling et al.,

For example, a corpus linguistics analysis conducted in a Second Amendment dispute over what it means “to bear” arms will likely generate search results that include uses of the phrase, “to bear” that do not relate to firearms, such as “to bear fruit,” or a person being “unable to bear further stress.”<sup>109</sup> Machine learning and predictive coding may be used to fine-tune an algorithm that will better generate “relevant” results. Taking this a step further, an advocate may also want to focus on producing “helpful relevant” results—i.e., those results that support the sense that best fit the argument the attorney is trying to make. Returning to the “bear arms,” example, an attorney for a party hoping to show that “bearing arms,” means doing so in a military, rather than individual, context may develop an algorithm that prioritizes as “relevant” those results that involve documents describing bearing arms in a military context.

This latter example reveals how adversarial use of corpus linguistics may end up corrupting the features that make corpus linguistics an appealing method to originalist scholars. Replicating results and checking coding decisions may be rendered impossible once the search has been run through an algorithm.<sup>110</sup> The results are also far from objective, as the attorneys running the analysis may set up an algorithm to achieve a set of skewed results.

But these concerns are not limited to the second example of attorneys trying to find “helpful relevant” results. They also apply to instances where algorithms are developed to reduce or exclude results that are “clearly irrelevant.” While the difference between “bearing a child” and “bearing arms” may seem clear, developing an exclusion of the former sense may end up removing relevant results—such as instances in which a person’s carrying or holding of a child is described with the

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*Using Machine Learning on Legal Matters: Paying Attention to the Data Behind the Curtain*, 11 HASTINGS SCI. & TECH. L.J. 9, 10-1 (2020) (describing machine learning and predictive coding and how this technology may be applied to litigation). Algorithmic relevance rankings are also employed in databases that lawyers and legal scholars use to conduct legal research. See generally Susan Nevelow Mart et al., *Inside the Black Box of Search Algorithms: A Behind-the-Scenes Look at the Algorithms That Rank Results in Bloomberg Law, Fastcase, Lexis Advance, and Westlaw*, 24 AALL SPECTRUM 10, 11–15 (2019).

<sup>109</sup> See Josh Jones, Comment, *The “Weaponization” of Corpus Linguistics: Testing Heller’s Linguistic Claims*, 34 BYU J. PUB. L. 135, 159 (2020) (excluding as “irrelevant,” these senses of the term, “bear” in a corpus linguistics analysis of the phrase, “bear arms”); see also Neal Goldfarb, *A (Mostly Corpus-Based) Linguistic Reexamination of D.C. v. Heller and the Second Amendment*, GEO. L. CTR. 1, 3–10, 18–23 (Feb. 26, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3481474](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481474) [<https://perma.cc/NR4W-7Z3F>] (excluding similar senses of “bear” and “arms” in a corpus linguistics analysis—including “bear arms” references to bearing a coat of arms, “bear” in the sense of childbirth, and “arms” in the sense of body parts).

<sup>110</sup> See Alyssa M. Carlson, *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, 103 IOWA L. REV. 303, 315–16 (2017) (noting, in the context of risk-assessment algorithms, that for-profit companies claim that these algorithms are proprietary tools and do not publicly disclose them). Technological barriers of parsing out the algorithm aside, replicating results is all the more unlikely if the firm or third party hosting the corpus takes the position that its algorithms are proprietary.

phrase “bearing.”<sup>111</sup> Using algorithms to parse results presents an avenue for an investigator’s biases or modern linguistic intuitions to create skewed results that are not representative of original use of terms.

All of this belies a fundamental problem in the context of algorithmic learning. Early studies into the nature of algorithmic bias<sup>112</sup> demonstrate that rather than promoting consensus, algorithms tend to increase fragmentation by solidifying the boundaries of existing competing beliefs.<sup>113</sup> In other words, left to its own devices, an algorithm would produce a single meaning, but only after identifying a list of possible meanings that are preferred in clusters, then selecting the largest cluster, excluding a number of other potentially very popular definitions. From the standpoint of a legal practitioner, what they receive is either a list that is comparable to what can be found in any dictionary or a deceptively simplistic definition that is deemed appropriate only by virtue of excluding vast swathes of public discourse. All of this is made more likely by virtue of algorithms and how they function—meaning that these problems may arise even if advocates or researchers think they are employing algorithms in an unbiased manner. The neutrality of corpus linguistics results is thrown into greater doubt by vendors who may operate with a profit motive in mind with the goal of producing lists of results that fit with the goals and desires of users rather than with the actual historic usages of terms.<sup>114</sup>

### 3. Interference with the Adversarial System

While adversarial use of corpus linguistics analysis presents a host of problems, judicial use of the technique raises separate concerns. In particular, urging courts to conduct their own corpus linguistics analysis runs afoul of the norm that judges should not engage in independent factual or scientific research in reaching their conclusions.

Because civil and criminal proceedings in the United States are adversarial, courts typically avoid conducting research into facts or issues beyond the scope of the record or the parties’ briefs. The corpus linguistics method, however, requires that courts engage in intensive independent corpus linguistics research when interpreting the Constitution—either to verify the arguments by counsel, or to ensure that accurate results are reached if counsel fail to use this methodology.<sup>115</sup> This creates the risk of

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<sup>111</sup> For a modern example of this, see Elspeth Young, *Bearing a Child in Her Arms* (painting), [https://www.alyoung.com/art/work-virgin\\_and\\_child.html](https://www.alyoung.com/art/work-virgin_and_child.html) [<https://perma.cc/2N6G-48GX>].

<sup>112</sup> The generally accepted term for the tendencies of algorithms to reproduce existing inequities. See, e.g., Nicole Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS INST. (May 22, 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/> [<https://perma.cc/3LEX-5ASN>].

<sup>113</sup> Aina Sirbu et al., *Algorithmic Bias Amplifies Opinion Fragmentation and Polarization: A Bounded Confidence Model*, PLOS ONE (Mar. 5, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0213246> [<https://perma.cc/V76W-KP5P>].

<sup>114</sup> See SHOSHANNA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 122–25 (2019).

<sup>115</sup> See Slocum & Gries, *supra* note 97, at 20–21.

courts veering beyond the arguments of counsel and issuing unreviewable conclusions on the meaning of terms.

This criticism should not be a surprise for advocates of corpus linguistics. Indeed, the Utah Supreme Court has raised this precise concern against Justice Thomas Lee—a coauthor of most of the sources cited in this section.<sup>116</sup>

In *State v. Rasabout*, the Utah Supreme Court addressed whether Rasabout, who had fired a gun twelve times into a house occupied by a rival gang member, could be prosecuted for twelve separate felony counts for unlawful discharge of a firearm.<sup>117</sup> The court concluded that each shot could give rise to a separate count, finding that the statute’s term “discharge” meant each individual shot, and noting that each individual shot carried an independent harm.<sup>118</sup>

In a lengthy concurring opinion, Justice Lee agreed with the majority’s conclusion that the term “discharged” applied to “each discrete shot” expelled from a gun,” but argued that the majority was wrong to resort to a dictionary to resolve the debate over the term’s definition.<sup>119</sup> Instead, Justice Lee relied on the Corpus of Contemporary American Usage (COCA), “to analyze the meaning of *discharge* of a *firearm*” and concluded that the 81 instances where “discharge” appeared within five words of “*firearm, firearms, gun, and weapon*” indicated that “discharge” was “overwhelmingly” used in the “single shot sense.”<sup>120</sup>

Did they though? Justice Lee specifies that:

- Twelve of the 81 hits “*clearly linked discharge to a single bullet.*”<sup>121</sup>
- Sixteen of the hits described accidental discharges, which Lee characterized as instances of the term being used in the single-shot sense because “it seems highly unlikely if not impossible that an accidental trigger-pull could result in a release of all of the bullets in a gun’s magazine.”<sup>122</sup>
- “Fifteen other hits *were a bit more ambiguous*; but on closer examination, the *discharge* in question *seemed to imply a single shot* (based on the nature of the weapon, the circumstance of the discharge, or description of the resulting damage).”<sup>123</sup>

<sup>116</sup> See *State v. Rasabout*, 356 P.3d 1258, 1264–66 (Utah 2015).

<sup>117</sup> *Id.* at 1261.

<sup>118</sup> *Id.* at 1263–64 (analyzing Utah Code section 76-10-508).

<sup>119</sup> *Id.* at 1271 (Lee, J., concurring).

<sup>120</sup> *Id.* at 1281–82.

<sup>121</sup> *Id.* at 1282 (emphasis added).

<sup>122</sup> *Id.* at 1282. Lee never specifies the types of guns that are addressed in these instances, making it unclear if the stories referred to a single-shot rifle, a semiautomatic weapon, or a machine gun—the last of which could certainly result in multiple bullets being fired as a result of a single trigger pull.

<sup>123</sup> *Id.* (emphasis added).

- One hit was irrelevant, as the discharge referred to a patient being discharged from a hospital.<sup>124</sup>
- One instance *did* involve the word “discharge” being used to describe the release of multiple bullets.<sup>125</sup>
- For the thirty-six other instances, Justice Lee concluded “that there was insufficient detail to indicate whether the *discharge* at issue had reference to a single shot or to the emptying of the magazine.”<sup>126</sup>

Justice Lee concluded that this analysis indicated that “*discharge* of a weapon is used overwhelmingly in the single shot sense.”<sup>127</sup> What made certain conclusions “clear” or how he was able to work out that some “ambiguous” results ultimately “implied” this conclusion was not explained further.<sup>128</sup>

The majority took issue with Justice Lee’s approach, noting that Justice Lee conducted the corpus linguistics research *sua sponte*, that Rasabout had no opportunity to respond or present a different perspective, and that this violated “the very notion of our adversary system.”<sup>129</sup> The majority noted that linguistics is a scientific field, and argued that it was “entirely inappropriate for this court to conduct the independent scientific research that serves as the basis for Justice Lee’s approach.”<sup>130</sup> The majority also warned of the burdens that corpus linguistics research would place on the courts and litigants.<sup>131</sup> And the majority criticized Justice Lee’s distinguishing between the categories of his search results, questioning how Justice Lee was able to parse through the majority of results that were not “clear.”<sup>132</sup>

Some of the majority’s critique addresses corpus linguistics in general.<sup>133</sup> While corpus linguistics may give attorneys and judges a broad set of examples, the approach may backfire and exponentially increase the complexity of the judge’s task by multiplying one underdetermined phrase into an analysis of dozens of similar underdetermined phrases. Skepticism of analysis that purports to distill “ambiguous” examples into concrete, conclusive examples of a particular meaning is therefore warranted. These are problems that the corpus linguistics method must grapple with, and a full discussion of this criticism and potential responses is beyond the scope of this Article.

What is within the scope of this Article, though, are the majority’s concerns that judicial corpus linguistics analysis—particularly instances where that analysis is done

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.*

<sup>128</sup> *Id.* at 1282.

<sup>129</sup> *Id.* at 1264–65.

<sup>130</sup> *Id.* at 1265.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1266.

<sup>133</sup> *Id.* at 1265.



at the court's own initiative—creates a risk of bad law.<sup>134</sup> The majority noted that its judicial resources were already spread thin, and that requiring judges to engage in corpus linguistics research in every case involving disputed statutory terms was unfeasible.<sup>135</sup> If coding and classification of results is performed by only one person, this creates a risk of skewed classifications that are not balanced out by multiple sets of eyes.<sup>136</sup>

Moreover, a court performing corpus linguistics analysis on its own initiative could result in this research being done poorly, as it would involve unchecked, and potentially irreversible determinations. In cases like *Rasabout* that interpret Utah state law,<sup>137</sup> if the Utah Supreme Court ends up getting its corpus linguistics analysis wrong, that incorrect interpretation can't be appealed. It doesn't matter if the method can be reviewed, replicated, and disproven—the decision has been made by the highest judicial authority in the state.

The *Rasabout* majority's concern over independent corpus linguistics analysis undermining the adversarial system should carry particular weight for some originalists who present originalism as a means of preventing judges from imposing their own views onto the case.<sup>138</sup> The unchecked and unreviewable use of new and quickly changing linguistics research technology by judges who may be barely familiar with corpus linguistics methodology is contrary to this goal of judicial constraint and predictability.<sup>139</sup>

### B. Studying the Constitutional Record

Solum's triangulation approach to originalism includes the method of “studying the constitutional record,” which is closest to how originalist analysis occurs in legal argument and judicial opinions.<sup>140</sup> There are at least five “components” of the method of studying the historical record:

1. Precursor provisions and proposals—studying precursors to the Constitution like the Articles of Confederation and state constitutions, as well as similar precursors to the Bill of Rights.<sup>141</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See Jones, *supra* note 109, at 173 (noting as a caveat to the author's own results that his analysis was the product of the author's own intuition and biases and that coding decisions should ideally be reviewed by multiple people and be subject to quality control).

<sup>137</sup> See generally *Rasabout*, 356 P.3d.

<sup>138</sup> *Id.* at 1285.

<sup>139</sup> Some critics have suggested that the various shortcomings in each step of corpus linguistics methodology may render the method no more reliable than flipping a coin—if not worse. See generally Drakeman, *supra* note 80.

<sup>140</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1654.

<sup>141</sup> *Id.* at 1655.

2. The drafting history—examining the records of the Philadelphia Convention.<sup>142</sup>
3. The ratification debates—examining records of states' ratifying conventions and public debates over ratification, including the Federalist Papers and Antifederalist writing.<sup>143</sup>
4. Early historical practice—studying how certain provisions were implemented following the ratification of the Constitution (or amendments).<sup>144</sup>
5. Early judicial decisions—reviewing early judicial decisions interpreting provisions of the Constitution and its amendments.<sup>145</sup>

This is a lot of material for courts and attorneys to digest. Judges in particular may find this task daunting, as they must balance time spent on constitutional cases with other cases on their dockets. Attorneys also must balance the demands of their various clients and cases and, with the possible exception of some highly specialized practitioners, cannot devote all of their time to historic research.

Moreover, Solum notes that investigating the constitutional records involves numerous caveats.<sup>146</sup> The records of the Philadelphia Convention are largely limited to the notes of James Madison, who revised them in the years following the establishment of the government and the evolution of his own views.<sup>147</sup> The ratification debates may not give an accurate perspective of the original meaning of the text because proponents and critics of provisions may have characterized the text in motivated (and potentially misleading) ways.<sup>148</sup> A similar problem arises with early historical practice—particularly practices that were the subjects of dispute or controversy, as statements regarding the propriety of these practices may have included vague, loaded, or polysemic language in the pursuit of certain political ends.<sup>149</sup>

The caveats continue. Solum distinguishes between the “communicative content” and the “legal content” of constitutional provisions, arguing that the original meaning of particular provisions is distinct from how those provisions were initially implemented.<sup>150</sup> While such “legal content” of provisions “can provide evidence of public meaning”—it just doesn't constitute the original meaning.<sup>151</sup>

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<sup>142</sup> *Id.* at 1655–56.

<sup>143</sup> *Id.* at 1657.

<sup>144</sup> *Id.* at 1658–61.

<sup>145</sup> *Id.* at 1661–63.

<sup>146</sup> *Id.* at 1663–66.

<sup>147</sup> See generally MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015).

<sup>148</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1657–58.

<sup>149</sup> *Id.* at 1658–60.

<sup>150</sup> *Id.* at 1663–64.

<sup>151</sup> *Id.* at 1664.

Similarly Solum warns against relying too much on the original “expected applications” of constitutional provisions.<sup>152</sup> Solum argues that even if an expected application is based on “a true belief about the public meaning of the constitutional text” it “could nonetheless be a misleading guide to recovering the communicative content of the text if that expectation was based on a false belief about the facts.”<sup>153</sup> Other scholars of originalism also warn against framing original meaning using early applications of those provisions.<sup>154</sup> Still others argue that “while the original meaning may not be defined by the expected applications, these applications will often be some of the best evidence of what that meaning is.”<sup>155</sup> All of this complicates the task of deriving an original meaning of the Constitution’s text from sources in the historic record.

### 1. The Unrealistic Expectation That Courts and Attorneys Will Conduct a Rigorous, Objective Investigation of the Constitutional Record

Judges and lawyers aren’t historians by trade, so the task of reading through debate transcripts, dueling essays, and other written materials forces them out of their wheelhouse. Even for Justices on the Supreme Court, who enjoy assistance of highly qualified clerks and who are tasked with performing the highest-level review of constitutional provisions, high quality historical analysis is often too much to ask.<sup>156</sup> For judges in lower courts, the task of taking on extensive historic research to address a small subset of their cases is an unrealistic demand.<sup>157</sup>

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See WURMAN, *supra* note 38, at 39–40 (arguing that the “sense” of constitutional provisions—which Wurman describes as a “function” applied to particular circumstances—are distinct from the “referents” of those functions—that is, the facts and circumstances before the courts applying those provisions); see also Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 560 (2006) (advancing the theory that “the *sense* of a constitutional expression is fixed at the time of the framing, but the *reference* is not, because it depends on the facts about the world, which can change”).

<sup>155</sup> John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378 (2007).

<sup>156</sup> See Lorianne Updike Toler, *Law Office Originalism 20–21* (Mar. 2, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3659611](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659611) [<https://perma.cc/H9SE-W3GM>] (noting Supreme Court Justices’ persistent failures to cite historical sources, and that—in the few instances they do include citations—they tend to cite to secondary sources rather than primary sources); see also *Alejandro-Gallegos v. Holder*, 598 Fed. App’x 604, 605 (10th Cir. 2015) (“In our adversarial system, neutral and busy courts rely on lawyers to develop and present in an intelligible format the facts and law to support their arguments.”).

<sup>157</sup> See Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 912–13 (2015) (suggesting that courts, attorneys, and even law professors have demands on their time that are not typical of professional historians, and that this may result in shoddy historical research).

Originalists may suggest that, given the constraints on judges' time, attorneys will do most of the work for the courts by researching, drafting, and presenting originalist briefing and argument to courts.<sup>158</sup> Attorneys may take the time to analyze the constitutional record and determine the original public meaning of constitutional provisions. Briefing, perhaps with supplemental expert reports and amicus submissions, will provide the necessary insight for the courts to reach decisions.

The problem is that counsel will likely conduct their research with their clients' interests in mind, rather than with the goal of objective historic analysis, and their briefing and arguments will reflect this advocacy. Attorneys, after, all, are ethically obligated to zealously represent their clients.<sup>159</sup> Amici will likely be of little help as well, as many of them will likely consist of interest groups founded to pursue particular policy goals.<sup>160</sup> Courts are then left with the unsavory options of adopting one of the parties' arguments and analysis—analysis that the court likely knows was reached through selective sourcing and motivated reasoning—or checking the sources and research performed by all parties, a task that may take even more time than conducting an independent search for original public meaning.

And as for the notion that courts should search for original public meaning themselves, this approach raises its own problems. We have already noted that busy courts—particularly lower courts—will not have the time to engage in thorough historic inquiries. But a further issue with this proposal is that courts may end up straying beyond the arguments and sources relied upon by counsel and come up with their own conclusions. Recall that one of the motivations behind originalism is to constrain judges from deciding cases based on their political or policy preferences.<sup>161</sup> Originalism

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<sup>158</sup> See, e.g., Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 58–63 (2019) (recognizing a lack of originalist briefing at the lower court level and proposing that courts request originalist briefing or issue standing orders requiring originalist briefing); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 778, 787 (2022).

<sup>159</sup> See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 1983) (requiring a lawyer to “act with commitment and dedication to the interests of the client and with zeal in advocacy on the client’s behalf”).

<sup>160</sup> See Piller, *supra* note 103, at 189–90 (highlighting the danger of partisan bias in non-attorney experts and describing selective reliance on amicus briefs).

<sup>161</sup> See *Justice Gorsuch Nomination Hearing*, *supra* note 2, at 1–2 (noting that under originalism “the United States Supreme Court should consider itself bound by the original public meaning of the constitutional text” and that originalist judges “do not believe that they have the power to impose their own values on the nation by invoking the idea of a ‘living constitution’”); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578 (2011) (“Originalism is often described and justified as a means of preventing modern courts from imposing their moral preferences on cases.”). As academic originalism has morphed into a multifaceted set of distinct and often conflicting theories suggesting varying levels of restraint, some originalists now claim that limiting judicial discretion is no longer a goal of originalism. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013)

gives the judges the chance to substitute one lack of constraint with another by letting them engage in historic analysis without regard to the arguments and authorities of counsel. In a legal environment where judges come under fire for conducting simple internet searches, it's unlikely to expect parties and the public to accept courts undertaking unconstrained, expansive historic research on their own initiative.<sup>162</sup>

These concerns address the first four categories of documents Solum identifies in the “constitutional record.” But perhaps there's some hope with the fifth set of documents—early case law applying constitutional provisions.

## 2. Early Case Law and Originalist Treatment of Early Applications

Judges and attorneys are used to relying on prior cases and making arguments applying courts' holdings and analysis in those cases to subsequent patterns of fact. This isn't specific to cases involving questions of constitutional law—this is how legal reasoning works in nearly all cases.<sup>163</sup> While analyzing precursors to the Constitution, ratification-era debates, drafting histories, and early historical practices may be beyond the knowledge and research abilities of judges and attorneys, analyzing early cases to determine original public meaning may not be.<sup>164</sup>

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(“Limiting judicial discretion has rarely been offered as a compelling justification for the adoption of originalism in the recent literature.”); *see also* Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714–15 (2011) (arguing that “Originalism has sold its soul to gain respect and adherents” by sacrificing its original promise of judicial constraint). This conflict between how constraint as a normative justification for originalism operates in the political sphere as opposed to the academic sphere is one example of how originalist discussions in academic theory differ from originalism in practice—a subject we plan to address in future research.

<sup>162</sup> *See* Frederick Schauer, *The Decline of “The Record”: A Comment on Posner*, 51 DUQ. L. REV. 51, 54 (2013) (“For a judge to go outside of the record in the search for additional facts, or for an advocate to encourage a judge to do so, has long been a cardinal taboo of American appellate practice.”); *see also* James M. Beck, *Pitfalls of Judges, Lawyers, and Experts Citing Wikipedia*, DRUG & DEVICE L. (Jan. 23, 2017), <https://www.druganddevicelawblog.com/2017/01/pitfalls-of-judges-lawyers-and-experts-citing-wikipedia.html> [<https://perma.cc/M3B6-QY5M>] (surveying instances of judges and special masters citing to Wikipedia, and noting blowback resulting from such instances, including reversals); Colter Paulson, *Judge Posner Goes Where No Judge Has Gone Before—Internet Sources as Evidence*, NAT'L L. REV. (Aug. 21, 2015), <https://www.natlawreview.com/article/judge-posner-goes-where-no-judge-has-gone-internet-sources-evidence> [<https://perma.cc/5X9E-DJ3U>] (describing Judge Richard Posner's use of internet sources in the case, *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015), and noting the “traditional rule . . . that facts not in the record cannot be raised in a brief”).

<sup>163</sup> *See generally* Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STAN. ENCYCLOPEDIA PHIL. (June 20, 2006), <https://plato.stanford.edu/entries/legal-reas-prec/#:~:text=Precedent%20involves%20an%20earlier%20decision,similar%20to%20the%20earlier%20one> [<https://perma.cc/EV6L-PMW9>].

<sup>164</sup> Although originalist analysis of certain provisions affected by the development of

But this is where additional caveats by originalists further complicate the process of interpretation. Originalists caution against over-reliance on early decisions and applications of constitutional provisions, noting that while these may be evidence of original public meaning, these cases do not constitute that original public meaning.<sup>165</sup> Indeed, some versions of originalism suggest that, in cases of broadly worded constitutional provisions, reliance on precedent is not relevant to discerning the original meaning at all—it is, instead, part of constitutional “construction”—the application of constitutional provisions to particular cases.<sup>166</sup> All of this introduces further uncertainty and complication for time-pressured judges and attorneys.

The caution against defining prior meaning by reference to original or early applications of provisions is further muddled if judges and courts try to delve into how originalists decide whether an early decision should be used for interpretive guidance. Originalists tend to caution against reliance on early applications in determining original public meaning because those early applications may have been based on mistakes of fact that have since been corrected.<sup>167</sup> Deciding where an early decision relied on a mistake of fact or an outdated political view, though, isn't an easy task—even for originalists who are setting forth this guidance in the first place.

Lawrence Solum, for example, cites the case of *Bradwell v. Illinois*<sup>168</sup> as a case that exemplifies an early application of a constitutional provision using mistaken factual views.<sup>169</sup> Solum notes that the Court's decision to uphold Myra Bradwell's exclusion from the Illinois bar on the basis of her gender, “could have been understood as consistent with the [Fourteenth Amendment's Privileges Or Immunities] Clause by Justices who believe that women were intellectually incapable of functioning as competent lawyers.”<sup>170</sup> He claims that an opposite result would have been required if the Court had true beliefs about women's intellectual capabilities.<sup>171</sup> Because fixed original public meaning can give rise to different outcomes given changing beliefs about facts, modern day interpreters should not use the Court's ruling that women may be barred from the practice of law to support an interpretation of the original meaning of the Privileges or Immunities clause.<sup>172</sup>

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technology and relevant social structures may certainly complicate this analysis. See ERIC J. SEGALL, ORIGINALISM AS FAITH 153–54 (2018) (noting the difficulty of taking an originalist approach to the Fourth Amendment's prohibition of unreasonable searches and seizures in light of changing technology and the nature of modern police forces that did not exist at the time of the founding).

<sup>165</sup> See Solum, *Triangulating Public Meaning*, *supra* note 13, at 1664; WURMAN, *supra* note 38, at 39–40; see also Green, *supra* note 154, at 560.

<sup>166</sup> See JACK M. BALKIN, LIVING ORIGINALISM 101 (2011).

<sup>167</sup> See Green, *supra* note 154, at 560.

<sup>168</sup> 83 U.S. 130 (1873).

<sup>169</sup> See Solum, *Living Constitutionalism*, *supra* note 8, at 1268–69; see also Solum, *Triangulating Public Meaning*, *supra* note 13, at 1664–66.

<sup>170</sup> Solum, *Living Constitutionalism*, *supra* note 8, at 1268–69.

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* at 1268.

But it is not at all apparent that the *Bradwell* opinion reflects a set of mistaken factual views, as opposed to a set of outdated and sexist moral and political beliefs. Solum appears to draw his conclusion that the Court had mistaken factual views about women’s capabilities from the concurring opinion of Justice Bradley, who indeed asserted that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>173</sup> This could be viewed as an instance of a mistaken factual belief about women’s intellectual capacities. But much of Justice Bradley’s discussion involves not factual, but moral, political, and religious reasoning, including remarks such as:

- “Man is, or should be, woman’s protector and defender.”<sup>174</sup>
- “The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”<sup>175</sup>
- “The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>176</sup>

These are not mistakes of fact—they are political opinions regarding women’s proper role in society and the family. Accordingly, it is not so clear that the *Bradwell* Court’s reasoning (again, as reflected in Justice Bradley’s concurring opinion) was based on a mistake of fact rather than an outdated set of beliefs about gender roles.<sup>177</sup> If changing political views are enough to invalidate a prior application of a constitutional provision, it is unclear how originalism is different from the “living constitutionalism” that originalists oppose.<sup>178</sup> Originalists’ failure to clearly distinguish between which early opinions are based on mistakes of fact and which are based on changing social norms makes it all the more difficult for courts and attorneys to determine which early opinions should be avoided as evidence of original public meaning.

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<sup>173</sup> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 141–42.

<sup>178</sup> Eric Segall raises this point as well in response to Solum’s reliance on *Bradwell*. See Eric J. Segall, *The Concession that Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33, 40–41 (2020) (“The proper role for women in our society, however, could just as easily be labelled by judges a values question, and what really changed was, thankfully, society’s values. But any theory of constitutional interpretation that allows judges to apply the original meaning of the constitutional text differently today than when ratified because the public’s values changed sounds a lot more like Living Constitutionalism than Originalism.”).

To the extent that originalists cannot provide a coherent explanation of why original applications should be disregarded and when those applications should be avoided, this uncertainty at the theoretical level makes implementation all but impossible. If originalists are unable to make this distinction clear in their academic writing—free from the pressure of needing to render a decision in a timely fashion—it is fantasy to assume that courts and attorneys will somehow be able to succeed where scholars have failed.

### C. *Immersion*

Another originalist method that Solum advocates is “immersion,” which he describes as “requir[ing] the investigators to immerse themselves in the texts from the relevant period in order to ‘train up’ their linguistic intuitions.”<sup>179</sup> A broader description of the approach, which Solum disclaims to be “tentative” and a “proposal for discussion at a preliminary stage” is:

The originalist method of immersion in the language of the period consists in the researcher reading a wide variety of sources from the relevant period. To count as immersive, the reading must draw on sources that are representative of language use of the relevant period. Such sources are not limited to writings directly relevant to the Constitution, but should include sources such as diaries, newspapers, broadsheets, novels, and letters. Immersion requires a substantial period, months and years, not days and weeks.<sup>180</sup>

Beyond this, Solum does not describe the method of immersion by identifying steps that practitioners, judges, or even scholars should take.<sup>181</sup> Solum claims to describe the method in greater detail—particularly when distinguishing his immersion technique from approaches used by historians.<sup>182</sup> But, as will be addressed shortly, Solum’s discussion is less a description of his method and more a description of the method’s goals.<sup>183</sup> Other originalist scholars have not described the immersion technique.<sup>184</sup>

Critics of originalism, however, note that immersion is necessary, and that proponents of originalism fail to respect the technique.<sup>185</sup> Jonathan Gienapp, for instance, notes:

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<sup>179</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1649.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1652–53.

<sup>183</sup> *Id.* at 1653–54.

<sup>184</sup> *Id.* at 1681.

<sup>185</sup> See Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AM. HIST. (Mar. 20, 2017), <http://www.processhistory.org/originalism-history/> [<https://perma.cc/J5E5-VX2F>].



Words and concepts that appear in historical sources often bear a superficial similarity to our own, but grasping what they actually meant in their original historical context requires first reconstructing the foreign conceptual world from which they issued. Keyword searches can never disclose this world (in fact, such searches presuppose that this world is immediately accessible and virtually identical to our own). But, as all historians know, bringing this world into focus requires a much deeper level of immersion. . . . In the case of the American Constitution, it requires knowing how to think and reason as Founding-era Americans did, knowing how to see the world as an original constitutional reader would have. . . . It requires, in short, behaving like a historian.<sup>186</sup>

Originalist scholars do not seem to have taken this advice to heart. While this may be inadvertent, the persistent lack of engagement between historians' academic literature and originalists' literature suggests that there may be a deeper disagreement at play.<sup>187</sup> In any event, Solum's minimal description of immersion will have to suffice for now.

### 1. Courts and Attorneys Lack the Time for the Extensive Undertaking of Historic Immersion

The first criticism of the method of immersion is that judges and their clerks cannot readily engage in this method.<sup>188</sup> Solum admits elsewhere that contemporary judges, lawyers, and even legal scholars are not immersed in the relevant "linguistic culture of late eighteenth-century American English."<sup>189</sup> He also acknowledges that judges and their clerks lack the time to engage in proper immersion, because of time limits on law clerks' terms and the time they typically have to prepare bench memos concerning particular cases.<sup>190</sup> Judges and clerks do not have "months and years" to immerse themselves in a broad sampling of texts from the Founding Era (or the

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<sup>186</sup> *Id.* (internal footnotes omitted).

<sup>187</sup> See Logan Everett Sawyer III, *Method and Dialogue in History and Originalism*, 37 L. & HIST. REV. 847, 859–60 (2019).

<sup>188</sup> See, e.g., David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 970 (2008) ("Especially in dealing with highly controversial issues, ascertaining the original understandings will routinely require a thorough immersion not just in the context of the specific debate but in the culture of the time. It is a lot to expect a busy judge to do that competently, and it will be all too easy to seize on any evidence that supports the view of the Constitution that the interpreter himself prefers.").

<sup>189</sup> Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 284 (2017).

<sup>190</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1674–75.

Reconstruction Era, should a case involve a Fourteenth Amendment question or a constitutional amendment as incorporated against a state).

Attorneys face similar time constraints. Many attorneys litigate a variety of cases, and—with the possible exception of highly specialized counsel who work almost entirely in constitutional litigation—cannot devote enough time to the extensive project of immersion in the historical record without doing a disservice to the rest of their clients. Beyond time constraints, attorneys face a further obstacle: for the most part, someone needs to pay for the time that attorneys spend on their cases. Certain clients with restrictive billing practices may limit research time in connection with particular matters as a manner of course.<sup>191</sup>

The process of immersion is so involved that Solum himself states that he is not certain if any legal scholars have achieved this method, noting that “it may well be the case that we do not yet know what enrichments would emerge from immersive study of the text.”<sup>192</sup> He acknowledges that whether immersion will result in “true linguistic competence is a difficult empirical question.”<sup>193</sup> If no one has managed to achieve sufficient immersion before—not even in the legal academic sphere—it is a fantasy to suggest that attorneys or judges will do so successfully.

Additionally, it is unclear how successful immersion can ever be validated. There is no way of knowing whether a deviation from past conclusions is a result of evaluating the historic record incorrectly because of mistaken immersion, or an instance of immersion identifying a mistake in the historic record. Additionally, if Solum cannot identify scholars who have successfully accomplished the method of immersion, it is unclear who will evaluate judicial efforts at immersion, and how they will go about doing so.

## 2. The Danger of Goal-Oriented Immersion

A further problem with immersion is that it tends toward goal-oriented methodology. Solum falls into this habit when he repeatedly defines the immersion method by referring to the method's goals.<sup>194</sup> For example, he attempts to distinguish originalist

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<sup>191</sup> One of the authors, in earlier years, practiced almost exclusively in insurance defense and can attest that time limits on research were required by most insurance carriers' billing practice requirements. See also Ronald J. Clark, *Avoiding the Minefields—The Ethical Dilemmas Posed by the Attack on the Tripartite Relationship, Auto Liability and Coverage*, BULLIVANT HOUSER BAILEY PC 165, 167 (Nov. 2005), <http://www.bullivant.com/files/DRI-Avoiding-the-Minefields-The-Ethical-Dilemmas-Posed-by-the-Attack-on-the-Tripartite-Relationship.pdf> [<https://perma.cc/Y6YE-Q54V>] (noting that Alabama's State Bar Disciplinary Commission issued an opinion indicating that an insurance company's "Litigation Management Guidebook" requirement that attorneys seek approval before conducting research for more than three hours conflicted with attorneys' independence of professional judgment, and noting a similar opinion issued by the Rhode Island Supreme Court Ethics Advisory Panel).

<sup>192</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1652.

<sup>193</sup> Solum, *Originalist Methodology*, *supra* note 189, at 284.

<sup>194</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1653–54.

immersion from techniques employed by historians by emphasizing that originalist immersion “aims to recover the communicative context of the constitutional text,” while historical immersion typically has the goals of “construction of narratives that illuminate causal connections and the discovery of the motives and aim of historical actors.”<sup>195</sup> It is unclear how this distinction reveals any differences between originalists’ and historians’ *methodologies*, as the only difference that Solum emphasizes is the *end goal* of each methodology.<sup>196</sup>

The confusion continues as Solum attempts to address accusations of “law office history” that are often leveled against originalist attempts at historic analysis.<sup>197</sup> Solum claims that the originalist method of immersion “has a specific structure,” which “flows from the target at which the method is aimed—recovery of the original public meaning of the constitutional text.”<sup>198</sup> Again Solum distinguishes this method from historians’ methods, which “can aim at any number of goals,” and again Solum equates a description of methodology with a mere reiteration of the method’s aims.<sup>199</sup>

Solum’s response to historians’ immersive methods reveals additional problems with the approach: it is impossible to know when immersion has been achieved, and it is likely that the investigator’s biases will color the direction that immersive investigation takes and the determination that immersion has been sufficiently conducted. For example, Solum differentiates originalist immersion from historians’ immersion.<sup>200</sup> Historians, Solum suggests, will tend to recreate the “life worlds” of particular groups like working-class women, slaves, or recent immigrants.<sup>201</sup> Solum asserts that “[i]mmersion in the life world of recent German immigrants in the late eighteenth century is obviously a poor way to recover the communicative competence of speakers of American English during that same period.”<sup>202</sup> This glosses over the fact that these recent immigrants were nevertheless members of the American public at the time, and that their linguistic idiosyncrasies were part of (and likely contributed to) the original public meaning of words and phrases at the time of the founding. Solum’s same critique could apply to other neglected groups who should not be ignored, such as enslaved persons, as well as the linguistic tendencies of the Native Nations—some of which had representatives present in Philadelphia during

<sup>195</sup> *Id.* at 1652–53.

<sup>196</sup> *See id.* at 1652.

<sup>197</sup> For examples of such criticism, see Saul Cornell, *Heller, New Originalism, and Law Office History: Meet the New Boss, Same as the Old Boss*, 56 UCLA L. REV. 1095, 1111–12 (2009) (noting examples of scholars and judges using nineteenth-century texts as a means to understand texts from the Founding Era, and describing how such a method ignores profound changes that occurred in the interim); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 1110–11* (1997).

<sup>198</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1674.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

the Constitutional Convention, and all of which would be affected by the outcome of the Constitution's ratification.<sup>203</sup> Indeed, it may be the case that some of those idiosyncrasies support an alternate reading of a particular constitutional term or phrase—one that may not be uncovered by an immersive method focused only on sources or language thought to be relevant by a modern interpreter.

Solum's goal-oriented formulation of immersion exemplifies the danger that originalist interpreters will narrow their immersive process to focus on one targeted provision and incorporate their goal of parsing the legal meaning of that phrase into their investigation. Doing so may result in a disregard of "context, contingency, and subtext," and a failure to approach the text with a complete historical understanding.<sup>204</sup> The assumption that immersion in particular persons' or demographics' circumstances and language is "obviously" a poor manner of recovering the communicative competence of speakers of the time assumes that some generalized interpretation exists and may be discovered. But such an assumption is not at all obvious, potentially untrue, and risks excluding relevant understandings of constitutional terminology from the conclusions of constitutional immersion.<sup>205</sup>

### III. THE MISGUIDED SOLUTION OF OUTSOURCING ORIGINALIST ANALYSIS TO ACADEMIA

Of the few scholars who recognize originalism's implementation problems, a consistent suggestion they offer is that legal scholars do the bulk of the research, with the assumption that judges and lawyers will be guided by this work.<sup>206</sup> The thinking goes that once we finally get to a point where academic scholarship has fleshed out the original meaning of constitutional terms and be in a world where judges and justices can consistently apply originalist methods.<sup>207</sup>

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<sup>203</sup> See Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 *FORDHAM L. REV.* 1707 (2021).

<sup>204</sup> See Stephen Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 *BYU J. PUB. L.* 283, 299 (2014) (criticizing originalists' failure to approach history to gain a contextual understanding of historic texts and statements).

<sup>205</sup> For an extensive discussion about why relying on an oversimplified "reasonable person's" reading of the Constitution at the time of the founding is a misguided approach, see generally *id.*

<sup>206</sup> See Solum, *Triangulating Public Meaning*, *supra* note 13, at 1675, 1681 (noting that while law clerks, judges, and attorneys have time constraints and may discount evidence that does not favor the chosen conclusion, legal scholars can undertake expensive research); MCGINNIS & RAPPAPORT, *supra* note 33, at 198 ("[I]n a world dominated by originalism, academics would work to create the knowledge that would improve the performance of originalist judges and reinforce their inclination to be consistently originalist.").

<sup>207</sup> MCGINNIS & RAPPAPORT, *supra* note 33, at 198; see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 116–17 (rev. ed. 2014) (arguing that original public meaning of various terms can be discerned and claiming that recent

This is not a solution. Leaving the bulk of originalist analysis to academics fails to address the difficulties of implementation discussed above. But entrusting originalist interpretation to legal academics makes a bad situation worse and undermines several key normative motivations for adopting originalism in the first place, including the arguments that originalism is consistent with democratic ideals and that originalism lends some measure of constraint and predictability to constitutional law.

One may initially object to originalists' suggestion that scholarship will guide courts and practitioners by arguing that it is unrealistic to assume that practicing lawyers and judges will turn to academic legal scholarship. The Supreme Court's citation of academic legal articles has been on the decline for over fifty years.<sup>208</sup> This decline is not limited to the Supreme Court—as citation rates have dropped generally across federal courts as well.<sup>209</sup> Critics argue that academic legal writing is disconnected from the work of practicing attorneys and judges—often accusing law review articles of being overly theoretical.<sup>210</sup> Academic discussions of originalism

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scholarship (much of which was authored by Barnett himself) now sheds light on the original meaning of various constitutional amendments).

<sup>208</sup> See Louis J. Sirico Jr., *The Citing of Law Reviews By the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1011–13 (2000) (noting a “steady decline” in the number of Supreme Court citations to legal periodicals in comparing the periods of 1971–73, 1981–83 and 1996–98, even when the decreasing number of Supreme Court merit opinions is taken into account); Brent Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404, 406 (2012) (noting a decline in frequency of Supreme Court citations to law review articles in comparing citation rates in the 1970s and 1980s with the time period of 2001 to 2011, and finding that only 37.1% of Supreme Court opinions cited to law review articles).

<sup>209</sup> See Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES (Mar. 19, 2007), <https://www.nytimes.com/2007/03/19/us/19bar.html> [<https://perma.cc/CP3P-4VJM>] (noting that federal courts' citations to the Harvard Law Review dropped by over fifty percent from the 1970s to the 1990s). *But see* Eugene Volokh, *Are Law Reviews Useful to Courts?*, VOLOKH CONSPIRACY (Sept. 1, 2020, 4:30 PM), <https://reason.com/volokh/2020/09/01/are-law-reviews-useful-to-courts/> [<https://perma.cc/3TJL-EBFS>] (performing a “quick search” for case citations to sources containing “L. Rev.” or “L.J.” for the year 2019 and finding 3,724 cases, and concluding that this suggests that judges “do find law reviews useful at least sometimes”). For a more nuanced and in-depth discussion of federal court of appeals' citation rates, see David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1363 (2011) (recognizing that there was an increase in the proportion of opinions citing legal scholarship from the 1950s to the 1980s, followed by a decline and leveling-out of this proportion into the 1990s and 2000s).

<sup>210</sup> See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation With Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 115–21 (2010); *see also* RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 42–45 (2016) (arguing that “academic law [is] becoming esoteric” and that its unapproachability and impracticality make of little use to judges).

may well fall into this universe of overly theoretical work, especially if we are to accept Lawrence Solum's suggestion that a rigorous articulation of the theory of originalism and justification for the theory require reference to at least ten separate articles, not counting aspects of the theory that will be discussed in future work.<sup>211</sup>

Despite all of this, the remainder of this section accepts originalists' assumptions that courts and practitioners will read and rely upon the writings of originalist legal scholars. Even so, originalism is still impossible to implement and ends up undermining the goals of stability, predictability, and democracy. Indeed, reliance on the output of legal academia, including its publication motivations and hierarchical underpinnings, injects further unpredictability and opacity into the interpretive process.

### *A. The Problems of Selecting Scholarship and Academic Advocacy*

While originalists suggest that courts and attorneys may rely on academic originalist research in implementing originalist methodology, they have little to say about how practitioners should go about identifying and selecting scholarship to use.<sup>212</sup> Originalism is the subject of a significant body of academic legal writing, with multiple subtheories and variations.<sup>213</sup> Indeed, it has developed into a subdiscipline of constitutional law, with conferences,<sup>214</sup> symposia,<sup>215</sup> and institutes<sup>216</sup> devoted to the theory. A Westlaw search of law reviews and law journals for "Originalism OR originalist" results in 4,029 results.<sup>217</sup> Narrowing the search by hot-button constitutional

<sup>211</sup> See Solum, *Living Constitutionalism*, *supra* note 8, at 1249–50 (describing various elements of the foundation of originalism and the case for originalism as a constitutional theory, and citing Solum's published and unpublished scholarship elaborating on each element).

<sup>212</sup> See *id.* at 1254.

<sup>213</sup> See D.A. Jeremy Telman, *Originalism: A Thing Worth Doing*, 42 OHIO N.U. L. REV. 529, 549 (2016); see also Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401, 403 (2021) (describing originalism as a "juggernaut" and stating that it "pervades our constitutional discourse, and it has become a fort and font of constitutional legitimacy").

<sup>214</sup> See *13th Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference*, UNIV. SAN DIEGO SCH. L., <https://www.sandiego.edu/events/law/detail.php?focus=81108> [<https://perma.cc/ST3P-FZTX>] (last visited Apr. 26, 2022).

<sup>215</sup> See *2021 Originalism Symposium*, THE FEDERALIST SOC'Y AT THE UNIV. OF VA. SCH. OF L., <https://fedsocatuvalaw.org/2021-originalism-symposium/> [<https://perma.cc/3PQW-9B73>] (last visited Apr. 26, 2022).

<sup>216</sup> *Columbus School of Law Receives \$4.25 Million Gift*, CATH. UNIV. AM. (Apr. 26, 2021), <https://communications.catholic.edu/news/2021/04/law-originalism-gift.html> [<https://perma.cc/UX2T-QKX6>] (describing a \$4.25 million donation to the Catholic University of America Columbus School of law "to establish The Project for Constitutional Originalism and the Catholic Intellectual Tradition").

<sup>217</sup> Based on a Westlaw Classic search of secondary sources, narrowed to law reviews and journals, for "originalism OR originalist," completed on May 3, 2021.

topics is of little help, as adding “AND ‘second amendment’” results in 551 results, and adding “AND abortion” results in 539 results.<sup>218</sup>

This shouldn’t be a surprise. There are hundreds of law journals in the United States.<sup>219</sup> Many thousands of pages of academic legal scholarship are published every year.<sup>220</sup> Originalism, with its evolving theories and political relevance, is an appealing topic to editors of law reviews and law journals. As a result, a glut of originalist scholarship on nearly all constitutional provisions and amendments that are likely to be the subject of litigation exists—much of which involves competing conclusions by various scholars.<sup>221</sup>

The sheer number of law journals, combined with their editorial practices, increases the probability that insufficiently rigorous work will be published. Many law journals are edited by law students, who lack the training—both legal and historical—to ensure that detailed historical analysis accompanying originalist scholarship are adequately supported.<sup>222</sup> Highly ranked journals may find themselves overwhelmed with submissions, meaning that they can be selective in who and what they choose to publish. But journals with lower rankings, as well as specialty journals, may find themselves strapped for submissions. Those articles they accept may soon be lost, as authors use acceptances by lower-ranked journals to expedite their review and acceptance by higher-ranked journals.<sup>223</sup> This may force editors to accept less rigorous scholarship simply to ensure that they can fill a year’s volume.

On top of this, most editors of law journals are law students. Their lack of expertise in the field of originalism, inability to confirm whether claims about history are properly sourced or supported, and—like judges—their need to divide time and effort among all of the articles being published in the overall volume make it more likely that dubious claims will slip past their editorial scrutiny.<sup>224</sup> Editors may also be influenced by factors beyond the quality of legal scholarship—including a motivation to

<sup>218</sup> Both additional searches run as of May 3, 2021 and also narrowed to law reviews and journals.

<sup>219</sup> Newton, *supra* note 210, at 114.

<sup>220</sup> *Id.*

<sup>221</sup> See Telman, *supra* note 213, at 546–47 n.112–27 (surveying originalist literature on numerous constitutional provisions and amendments).

<sup>222</sup> See Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 *FORDHAM L. REV.* 905, 912–13 (2015) (arguing that submissions to student-edited rather than peer-reviewed journals results in there being “very little to filter shoddy historical work”).

<sup>223</sup> See *Top Law Review Submission Tips for Authors: 2021 Edition*, SCHOLASTICA (Jan. 27, 2021), <https://blog.scholasticahq.com/post/law-review-article-submission-tips-for-authors/#:~:text=Know%20when%20to%20expedite%20and%20how&text=First%2C%20for%20a%20quick%20overview,to%20that%20offer%20is%20due> [https://perma.cc/8RNU-2J6K] (noting that expedite requests can help authors “push your article higher up the submissions pile at some law reviews”).

<sup>224</sup> See Blackman, *supra* note 158, at 58–59 (describing law students’ minimal exposure to originalism).

publish articles with dramatic conclusions or findings contrary to established conclusions with the expectation that this may prompt discussion and draw attention to the journal, or at least increase citations as a result of criticism of the article. Once a poorly researched, unsupported originalist article makes its way into publication, there is little to stop judges or attorneys from relying on it, as the identification of contrary scholarship and the recognition of the better claim is likely too much to expect from practitioners lacking independent historical expertise.

Additionally, it is overly optimistic to assume that law professors will be free of the advocacy that is to be expected of attorneys. To be sure, scholars, unlike parties' attorneys, are not ethically obligated to zealously represent a particular side's position.<sup>225</sup> But law professors have political views as well, and these views may skew the results of their research in a particular direction.<sup>226</sup> And while law professors with historical training, or those who work with historians, may be better situated to undertake serious historic analysis, they may also be subject to similar biases and goal-oriented investigations.<sup>227</sup> These biases may be difficult to spot when the resulting research is presented as complex historic analyses.

The risk of bias influencing the results of academic research increases when legal academics are faced with the unfamiliar task of performing historic research or immersion into a certain time period. The biases, habits, and experiences of law professors may end up causing professors to select sources that support their conclusions even if those professors honestly believe that they are being objective. Academics' biases are particularly likely to influence the legal system when legal scholars file or sign amicus briefs before a court—which present the court with collections of goal-oriented academic citations tied together by arguments in favor of a particular result.

Originalists themselves have all but admitted that selective use of scholarship may help pursue particular policy goals. One of us has already noted one example of this in the work by sitting Justice Alito while working in the Office of Legal Counsel during the Reagan Administration.<sup>228</sup> In one of the memos that Alito

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<sup>225</sup> See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 1983) (requiring a lawyer to “act with commitment and dedication to the interests of the client and with zeal in advocacy on the client’s behalf”).

<sup>226</sup> See Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277, 279, 288–91 (2015) (finding that the ideology of tenured professors, as measured by contributions to candidates to political office, is correlated at a statistically significant level with “the ideological valence” of those professors’ research).

<sup>227</sup> This is, after all, what originalists claim. See Randy E. Barnett, *Challenging the Priesthood of Professional Historians*, VOLOKH CONSPIRACY (Mar. 28, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/> [<https://perma.cc/2TQG-YWWY>] (responding to a history professor’s critiques of originalist methods by arguing, in part, that historians often approach their work with a “presentist ideological agenda”); see also WURMAN, *supra* note 38, at 100–02.

<sup>228</sup> See ALEXANDER S. HILAND, *PRESIDENTIAL POWER, RHETORIC, AND THE TERROR WARS: THE SOVEREIGN PRESIDENCY* 44 (2019).



authored supporting the use of signing statements as a tool for expanding the power of the president (and limiting the importance of legislative history for how courts approach legal questions) he explicitly argued for a combination of selective litigation, publication in law reviews, and opinion writing by the White House Office of Legal Counsel to legitimize the use of Presidential Signing Statements.<sup>229</sup> Though anecdotal, this example illustrates the extent to which treating originalism as an academic endeavor isolated or insulated from political interests and career motivations understates the extent to which originalism is an ends-oriented practice that judges begin long before they take the bench that could linger in their thinking.

The glut of legal scholarship, lack of meaningful barriers to publication, and risk of author bias means that judges and attorneys will be able to pick and choose scholarship that supports a particular conclusion in a case. The same problems with the methods of studying the constitutional record and corpus linguistics therefore arise once again, only with attorneys and judges selecting particular articles rather than historic sources to fit a particular conclusion.<sup>230</sup>

A few law professors may end up performing the diligent, immersive, unbiased historical research that good faith originalist scholars hope will guide attorneys and the courts. But this scholarship will likely be lost in the noise of other published articles and overwhelmed as attorneys pick and choose sources that support their goals. To the extent that the conclusions of those good faith efforts run counter to the political and cultural interests that animate the interest in originalism, they may be excluded in favor of more amenable scholarship. It is therefore unrealistic to expect that reliance on academic research will result in quality originalist analysis by courts and attorneys.

### *B. The Anti-Democratic Implications of Relying on Academic Originalist Research*

One of the normative considerations underlying originalism is that originalist methodology is more democratic than alternative approaches. Originalists argue that living constitutionalists are unconstrained by any interpretive theory and are more likely to decide constitutional questions based on their political preferences.<sup>231</sup>

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<sup>229</sup> Memo from Samuel A. Alito, Jr. to Litigation Strategy Working Group, U.S. Department of Justice, Office of Legal Counsel (Feb. 5, 1986), <https://www.archives.gov/files/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> [<https://perma.cc/JA2K-FDSL>].

<sup>230</sup> See Toler, *supra* note 156, at 20, 38 (noting that the Supreme Court, when citing to sources in discussing history, tends to cite secondary sources far more often than primary sources and that only a small fraction of those secondary sources were historical secondary sources rather than legal secondary sources).

<sup>231</sup> See Scalia, *supra* note 3, at 854; *Justice Gorsuch Nomination Hearing*, *supra* note 2, at 4 (“I am not a conservative or libertarian but I do believe in originalism. Why is that? It

Originalists claim that originalism is more consistent with democratic value because it constrains judges to implementing the original meaning of a Constitution or Amendment adopted by a supermajority.<sup>232</sup>

Leaving it to legal academics to do the heavy lifting of originalist analysis undermines the democratic values that originalism supposedly promotes. Originalists urge that judges rely upon academic analysis of constitutional provisions and amendments to discern the original public meaning of these provisions.<sup>233</sup> But this just makes it more likely that judges will make decisions based on what law professors say the original public meaning is, which results in the substitution of judges' political inclinations with those of the academics the judges cite.

Originalists may argue that this claim is overblown and that judges can take efforts to select high-quality, extensively researched, rigorous scholarship. But this simply undermines democracy in a different way, as original public meaning will not be determined by what legal academics in general claim, but only by what is advanced by high-profile legal scholars who manage to publish in the most prestigious law journals.

### 1. Substituting the Preferences of Courts with Those of Professors

By relying on legal academic research to determine the original meaning of constitutional provisions, judges will most likely end up substituting their own biases for those of the scholars upon whom they choose to rely. There is no guarantee that legal academics will engage in objective historic analysis in determining the original public meaning of provisions. Indeed, in many cases, legal scholars' political views will likely guide their analysis, the sources they choose, and lead them to preferred conclusions.<sup>234</sup>

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is because I am convinced that giving judges the power to override the Constitution and impose their own vision of constitutional law is dangerous for everyone.”)

<sup>232</sup> Scalia, *supra* note 3, at 862, 864 (arguing that “originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system,” and noting that elections rather than constitutional guarantees ensure that current values are reflected in the governance of a democratic society); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 154–55 (1999) (arguing that popular sovereignty “dictates the adoption of an originalist method of interpretation” as originalism enforces “the terms of the known sovereign will” and thereby “protects a space for a renewed exercise of popular constitutional deliberation”); *see also* ROBERT BORK, *THE TEMPTING OF AMERICA* 178 (1990) (“[T]o oppose original understanding and judicial nominees who insist upon it [is] profoundly antidemocratic.”). Whether the supermajorities that adopted the original Constitution or earlier amendments are truly representative is a question that originalists must address, but it is beyond the scope of this Article.

<sup>233</sup> *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 *CONST. COMMENT.* 451 (2018) [hereinafter Solum, *Originalist Theory and Precedent*].

<sup>234</sup> *See* Chilton & Posner, *supra* note 226, at 288–91.

Law professors are, for the most part, not historians, and will choose what sources they prefer, or at minimum have pre-existing familiarity with, to discern original meaning. This step of source selection introduces an opportunity for biases or preferred outcomes to influence the research process—either on a conscious or unconscious level. Resorting to, or checking analysis, with corpus linguistics methodology does not guarantee that such goal-oriented analysis will be avoided, as advocates of corpus linguistics themselves may prefer certain sources or types of documents over others—even if the ostensible goal of originalism is to uncover a public meaning of a term or phrase.<sup>235</sup>

Publication incentives may also undermine academic objectivity. To make their findings appear more relevant to the busy student editors who are flooded with article submissions, authors may be tempted to skew their research in support of a particular conclusion or exaggerate their findings. Doing so may draw the attention of law journal editors at the initial stage of review where the publication determination is made. It may also cause editors to think that the paper is more likely to be cited by courts or in other work due to its purported relevant and groundbreaking findings—which in turn will increase the prestige and ranking of the journal.<sup>236</sup> All of this makes it more likely that scholarship will be published that does not accurately reflect the original public meaning of the Constitution—which, in turn, undermines the democratic value of applying originalist methods.

## 2. The Elitism of Attempted Quality Control

Realizing the dangers of academic advocacy and poor-quality research, judges and attorneys may endeavor to seek out the highest quality originalist scholarship they can find.<sup>237</sup> Given their time constraints and lack of independent historical expertise, judges and attorneys will likely rely on simple metrics to determine what scholarship is most reliable rather than a review and survey of the literature. An article's author and place of publication are two of the most readily available pieces of information that busy judges and attorneys can identify in narrowing down what scholarship they should review. By limiting their review of scholarship to only those

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<sup>235</sup> See Strang, *supra* note 79, at 1218–19 (arguing against claims that subcommunities may not be represented in corpora by emphasizing that there should be a focus on how communities interpreted the Constitution's text rather than on terms or phrases as used within such subcommunities).

<sup>236</sup> See *Ranking Methodology*, WASH. & LEE SCH. L., <https://managementtools4.wlu.edu/LawJournals/Default3.aspx> [<https://perma.cc/8TMD-U5WR>] (last visited Apr. 26, 2022) (noting that Washington & Lee's law journal ranking system relies upon searches of cases and articles to determine how many citations there are to particular journals).

<sup>237</sup> This, of course, assumes that judges and attorneys will not simply seek out whatever scholarship that happens to support their own inclinations—an exceedingly generous and unrealistic assumption.

articles published by the most well-renowned scholars in the most highly ranked law journals, courts and attorneys can ensure that the originalist analysis they rely upon is most likely to reveal the original public meaning of whatever provisions are at issue.

This attempt at quality control, however, has profoundly undemocratic impacts when implemented. If courts and attorneys limit themselves to only the most elite authors and scholarship, their interpretation of the Constitution becomes based on whatever the most elite law professors say it is and on what the most elite law reviews decide to publish.

By relying only on what is written and published by those in the most elite academic circles, courts and attorneys risk a small, elite set of inputs which risks the biases and preferences of these elite sources coloring the outcomes and analysis of constitutional provisions.<sup>238</sup> A similar outcome occurs if courts limit citations to peer-reviewed scholarship, as much of this content is behind paywalls that require expensive subscriptions that are often only paid by academic institutions and libraries. Citing to these sources (assuming that courts can even get access to them in the first place) further removes judicial reasoning from the democratic process by making it prohibitively expensive for members of the general public to delve into the sources and citations bolstering courts' conclusions.

Law professors and the editors of law journals are not elected representatives, and there is little holding them accountable for the scholarship that they write. Indeed, originalist scholarship on politically charged amendments or constitutional provisions tends to give rise to separate, self-supporting camps of academics in support of opposing interpretations of constitutional provisions. While each camp of academics criticizes those in the other camp, academics within each camp cite and elaborate on the conclusions of their like-minded colleagues, giving the appearance of well-supported scholarship in favor of diametrically opposed interpretations of original meaning.<sup>239</sup> If legal academics can produce research that they know will

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<sup>238</sup> See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1566–67 (noting Supreme Court law clerks' inclination to give close attention to amicus briefs filed by academics—particularly prominent academics—and arguing that Justices may be influenced by the contents of such briefs); see also Eric Segall, *Supremely Elite: The Lack of Diversity on our Nation's Highest Court*, A.B.A. (Dec. 31, 2015), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2015--vol-41-/vol-41-no-1-lurking-in-the-shadows-the-supreme-court/supremely-elite-the-lack-of-diversity-on-our-nations-highest-co/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015--vol-41-/vol-41-no-1-lurking-in-the-shadows-the-supreme-court/supremely-elite-the-lack-of-diversity-on-our-nations-highest-co/) [<https://perma.cc/6FQM-XYRU>] (arguing that the Supreme Court is a “cloistered, secretive, elite, and intellectually and socially removed institution” and that this results in a failure to perceive the impact of the Court's decisions on the public at large and fosters siding with “big-moneyed interests or governmental defendants against everyday folks”).

<sup>239</sup> Debates over the original public meaning of the Second Amendment—particularly whether the Second Amendment protects an individual right to keep and bear arms—are a ready example of this. See Telman, *supra* note 213, at 548 (noting that the majority and dissenting opinions in *District of Columbia v. Heller* relied on identical interpretive methods,

likely be published somewhere, and will find a certain level of support and citations within a group of like-minded academics, there is little to check low-quality, results-oriented originalist scholarship. Reliance on academic originalist research therefore puts constitutional interpretation through an undemocratic, unchecked, and often biased black box, and in doing so abandons the democratic reasons for accepting originalism as an interpretive theory in the first place.

*C. Relying on Legal Academic Research Risks Instability and Uncertainty in Judicial Decisions*

As noted above, originalists often juxtapose their theory with the alternative of “living constitutionalism” to claim that originalism prevents judges from imposing their own moral and political views in making their decisions.<sup>240</sup> One of the claimed benefits is that this approach constrains judges to render decisions based on the original public meaning of constitutional provisions is that this approach makes things more consistent and predictable.<sup>241</sup> If judges are deciding cases on the basis

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but arrived at the opposite conclusions regarding the meaning of the Second Amendment). For scholarship supporting the individual right, see generally, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009) (arguing that the original meaning of the Second Amendment supports an individual right to keep and bear arms for self-defense, but criticizing Justice Scalia’s methodology used to reach this conclusion in *Heller*); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004). For scholarship in the opposing camp, see, e.g., Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008) (criticizing Randy Barnett’s praise for Justice Scalia’s opinion in *District of Columbia v. Heller*, arguing that the historical methodology in the opinion was lacking, and criticizing Barnett for failing to realize that “most historians are militantly anti-originalist”); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 350–52 (arguing that the longstanding view that the Second Amendment did not protect the right to keep or bear arms in a capacity unconnected with service in a militia was challenged by “a phalanx of gun rights advocates, single-topic academics, and contrarian and clever constitutional theorists” and criticizing Justice Scalia’s majority opinion in *Heller* as “objectively untenable” from “the standpoint of an academically trained historian”); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 280–82 (2008); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI. KENT L. REV. 103, 161–65 (2000). Academics are also divided over originalism and its implications for the nondelegation doctrine. Sachs, *supra* note 158, at 801, n.160.

<sup>240</sup> See Lund, *supra* note 239, at 1345.

<sup>241</sup> See Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 286–87 (1988) (arguing that original intentions originalism is “about as stable and objective as human beings can contrive”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 641 (1999) (noting that the fact that the constitution is in writing assures that those “provisions will be respected over time—an assurance that an unwritten constitution or a written constitution that can be

of fixed original public meanings rather than policy preference, this should lead to a stable, consistent, and predictable set of outcomes.

### 1. Originalism and Precedent: An Ongoing Debate

A common critique of originalism is that originalism undermines predictability and stability in the legal system by requiring the reversal of precedent that originalists deem inconsistent with the original public meaning of the Constitution.<sup>242</sup> Such an approach is contrary to the principle of *stare decisis*—that past precedent should be followed in similar cases in the future. Requiring the reversal of precedent creates the risk of upheaval and instability—particularly if the precedent at issue has been in place for a long time, if the non-originalist interpretations in prior opinions have given rise to a substantial body of case law and practices, or if the government or public has grown to rely on the precedent and its implications.

Originalists have various responses to this critique. Some falter in the face of precedent, characterizing *stare decisis* as an exception to originalist practice.<sup>243</sup> Others try to find workarounds, with some arguing that originalists should follow non-originalist precedents where such precedent has longstanding support by the legislative branch,<sup>244</sup> where such precedents would be enacted through constitutional amendment were they overturned,<sup>245</sup> or where overturning non-originalist precedent would result in “enormous costs.”<sup>246</sup> Others try to minimize the problem, arguing that leaving non-originalist precedents in place is not the same as accepting the decisional theories of those decisions, that precedent applying non-originalist methods may be acceptable if it reaches the same results, or that originalists may use the “avoidance canon” to avoid overturning incorrect precedent.<sup>247</sup> Others work to portray precedents that may be characterized as non-originalist as consistent with

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freely modified by legislative practice or judicial opinion cannot provide”); *see also* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 38 (2009) (noting that stability and predictability are two of several values that originalists cite in support of originalism).

<sup>242</sup> *See* Berman, *Originalism Is Bunk*, *supra* note 241, at 78.

<sup>243</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–40 (Amy Gutmann ed., 1997).

<sup>244</sup> *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1475 (2007).

<sup>245</sup> *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 837–38 (2009) (using *Brown v. Board of Education* as an example).

<sup>246</sup> *See id.* at 836–37 (using Supreme Court cases upholding Social Security and the government’s ability to tender paper money as examples of cases, which if overturned, would result in chaos).

<sup>247</sup> *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1939–41 (2017). *But see* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013) (“I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”).

original public meaning.<sup>248</sup> Others bite the bullet, arguing that non-originalist precedent should be overturned in almost all cases.<sup>249</sup>

A complete discussion of originalism's implications for non-originalist precedent, the instability and unpredictability that originalism raises, and originalists' varied defenses against this issue is beyond the scope of this Article. We will, however, raise a few points questioning these attempts at defense.

First, the originalist arguments regarding upholding well-established precedents, or precedents upon which society, or a substantial subset of society has come to rely, introduce opportunities for judges to make decisions on normative or political considerations independent of original public meaning. Originalists argue that their theory is not motivated by political goals—indeed, originalism, if properly applied, can result in both conservative or liberal outcomes.<sup>250</sup> But determinations as to whether a precedent has been around for a sufficient period of time or whether people have come to rely on the precedent present opportunities for political reasoning to influence the decision of whether to overturn a non-originalist precedent or whether to selectively apply originalism.<sup>251</sup> Should originalism require the overturning of a precedent that a judge favors, the judge may determine that it is not appropriate to overturn that precedent, citing reliance on the precedent or emphasizing other similar opinions to support the claim that the precedent is well-established. As a result, judges may selectively apply originalism to reach their preferred policy outcomes.

Second, several of the defenses appear to be attempts by originalists to avoid or minimize the problem by suggesting how originalists may avoid conflicts between originalist methodology and non-originalist precedent.<sup>252</sup> Now-Justice Amy Coney Barrett's responses in particular exemplify this tactic, as she suggests that originalism's conflict with non-originalist precedent is not a significant concern because these conflicts can be sidestepped through the canon of non-avoidance and the notion that not addressing a non-originalist precedent does not concede the reasoning

<sup>248</sup> See generally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that *Brown v. Board of Education* is consistent with the original public meaning of the Fourteenth Amendment).

<sup>249</sup> See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59, 266 (2005) (arguing that originalism provides a normative argument to reject precedent where precedent conflicts with original meaning, although suggesting that “properly tailored” claims that citizens have relied on non-originalist precedent may warrant upholding those precedents—listing Social Security as one such example); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 20–21 (2007) (arguing that courts are very rarely obligated to overturn non-originalist precedent, and that non-originalist precedents should only be left in place if judges in the prior case “honestly applied sound methodologies”).

<sup>250</sup> See Solum, *Originalist Theory and Precedent*, *supra* note 233, at 250–59.

<sup>251</sup> Originalists recognize this concern. See Barnett, *supra* note 249, at 266 (acknowledging that reliance interests may warrant refusal to overturn a non-originalist precedent, but noting that arguments about reliance interests are often spearheaded by interest groups and are overblown).

<sup>252</sup> See Barrett, *Originalism and Stare Decisis*, *supra* note 247, at 266.

of that precedent.<sup>253</sup> One response to this defense is that these tactics are invalid attempts to avoid the hypothetical, and that they fail to address the cases where originalists must truly reckon with non-originalist precedent. Another response—one that is more relevant to the implementation problems this Article raises—is that these attempts to minimize the apparent conflict between originalism and non-originalist precedent admit the problem with a thorough originalist approach by conceding that originalism should not be applied in cases where it might undo non-originalist precedent. If that is the case, then originalism will only make a difference in cases of first impression, as a strong commitment to avoiding overturning precedent will leave non-originalist precedent standing and may not even warrant the application of originalist methodology if a prior opinion's non-originalist methodology reaches an acceptable result.

## 2. Exacerbating Uncertainty Through Reliance on the Academic Literature

Whatever the outcome of the debate over precedent may yield, originalists' grappling with precedent and *stare decisis* in implementing their theories demonstrates that the need for stability and predictability in a theory is an important consideration. Unfortunately for originalists, their proposal that courts and attorneys rely on academic originalist research makes it even more likely that prior precedents will be undermined. Indeed, precedents that are ostensibly originalist may need to be abandoned if later developments in academic research reveal that the scholarship on which the prior court relied was mistaken or incomplete.

The realities of legal scholarship make this a probable outcome. Legal academics may uncover historic sources that have not yet been applied in the literature, and this may change the landscape of how certain constitutional provisions or amendments are interpreted. This may become more likely as interdisciplinary specialization in legal academia becomes more widespread and more scholarly writers begin to have master's or doctoral degrees in history or related disciplines.<sup>254</sup>

Moreover, should corpus linguistics analysis continue to be a significant part of originalist methodology, it has the potential to amplify the unpredictability of academic originalist scholarship. Corpus linguistics analysis in originalist academia and debates is a fast-evolving component of the field. As more scholars begin to rely on this methodology, the landscape of originalist scholarship will likely change—injecting

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<sup>253</sup> See *id.* at 1939–41.

<sup>254</sup> See Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 507, 540 (2016) (noting a sharp increase in the hiring of law professors with doctoral degrees and predicting that more than half of the faculty members of law schools will have PhDs by 2028); cf. Stephen G. Breyer, *The Uneasy Case for Copyright: A Look Back Across Four Decades*, 79 GEO. WASH. L. REV. 1635, 1635 (2011) (in which Justice Breyer reminisces that the reason he had authored a particular law review was because he wanted tenure and that “[t]hose were the days when you just had to write one article” to get tenure at Harvard Law School).



further instability into the opinions that ultimately rely on this scholarship in reaching their originalist conclusions.

Scholarship on the Second Amendment is an example of such disruption. Corpus linguistics may undermine the Court's opinion in *District of Columbia v. Heller*,<sup>255</sup> a precedent that some originalists hail as one of the most prominent examples of originalism in practice.<sup>256</sup> While Justice Scalia, in his majority opinion, cited a number of historic sources, he did not engage in corpus linguistics analysis in reaching his conclusion that the Second Amendment protects an individual right to keep and bear arms.<sup>257</sup> Subsequent corpus linguistics research suggests that, as a result, Justice Scalia's conclusion that the Second Amendment protected an individual right to keep and bear arms—rather than a collective right—was mistaken.<sup>258</sup> Academics have signed onto amicus briefs that channel corpus linguistics research into legal arguments before the Supreme Court in cases regarding the scope of the right to carry firearms, urging the Court to reevaluate *Heller*'s findings in light of this new evidence.<sup>259</sup> All of this demonstrates how further originalist research using corpus linguistics analysis may destabilize prior precedents—even those precedents which are generally recognized as examples of originalist reasoning.

Corpus linguistics analysis further exacerbates uncertainty as a result of technological advances and as the databases (or “corpora”) from which searches draw continue to expand. The corpora that include founding-era sources (as well as reconstruction-era sources) are still under development and will likely continue to develop as further collections of documents are added. With each additional document, each corpus becomes more representative, yet this creates a chance that the results of identical searches of a single corpus may produce different results at different periods of time. Expansion of corpora is necessary—at least for any originalist

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<sup>255</sup> 554 U.S. 570 (2008).

<sup>256</sup> See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412–13 (2013); see also Randy E. Barnett, *Scalia Restored Right to Bear Arms: Randy Barnett*, USA TODAY (Feb. 17, 2016, 7:00 AM), <https://www.usatoday.com/story/opinion/2016/02/17/randy-barnett-antonin-scalia-new-originalism-heller-second-amendment-column/80450446/> [<https://perma.cc/E5LW-PCJK>] (describing Justice Scalia's opinion as “sweeping and masterful”).

<sup>257</sup> See generally *Heller*, 554 U.S. 570.

<sup>258</sup> See Kyra Babcock Woods, Note, *Corpus Linguistics and Gun Control: Why Heller Is Wrong*, 2019 BYU L. REV. 1401, 1414–23 (2020) (analyzing corpus linguistics data regarding the phrases, “bear arms,” “keep arms,” and “the right of the people” and concluding that the results supported Justice Stevens's dissent that these terms were typically used in a militia-only context, rather than in the context of describing an individual right).

<sup>259</sup> See, e.g., Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 17–27, *N.Y. State Rifle & Pistol Assoc., Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 3824697 (relying on corpus linguistics analysis not available during prior Supreme Court rulings on the scope of the Second Amendment and arguing that the Second Amendment does not protect an individual right to carry firearms).

who wants corpus linguistics analysis to result in findings that are truly reflective of the founding-era public—as the founding-era database, COFEA, currently lacks documents and language of nonelite people.<sup>260</sup> Additionally, if scholars begin to apply algorithms to their searches in trying to bolster their preferred conclusions or make the process of researching more efficient, this could further destabilize scholarship by producing a whole new set of results upon which courts may rely.

If courts were to follow through with the suggestion that they be guided by academic originalist literature, constitutional law in America would find itself not just governed by whatever academic theories are in vogue, but potentially changing with each generational update of the major corpus linguistics databases. Predictability and stability would vanish, replaced by an originalist doctrine that evolves as databases of founding-era speech become more thorough. Such a reality would place legal academics at the helm in guiding the constitutional law that affects hundreds of millions of people. This may be appealing to scholars, but those millions affected may not be as enthusiastic about such an outcome.

#### *D. Potential Responses*

While most academic originalists tend to avoid discussion of how originalist theory may be implemented, Stephen Sachs addresses the issue in some detail in his article, *Originalism: Standard and Procedure*.<sup>261</sup> Rather than treating originalism as a procedure for courts and attorneys to follow, Sachs argues that originalism should be treated as a standard by which decisions and actions should be measured.<sup>262</sup> Indeed, Sachs argues that demanding that originalism provide guidance for courts and attorneys is a “category error,” and an obstacle that originalists need not address at all.<sup>263</sup>

For a response that is a little less theoretical, in confronting objections that originalism may undermine stare decisis and upend precedent, Lawrence Solum proposes a deferential approach to prior decisions that attempt to apply originalist methods in good faith.<sup>264</sup> While Solum’s response is limited to the issue of precedent rather than the varied implementation problems we address in this Article, the point may be adapted to apply to our critique.<sup>265</sup> Accordingly, we address this potential counter-argument, along with Sachs’ argument, below.

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<sup>260</sup> See Drakeman, *supra* note 80, at 86–87 (noting that COFEA is skewed toward elite speech patterns in light of the documents it contains, and emphasizing that it may not even completely represent elite speech patterns); see also Matthew Jennejohn et al., *Hidden Bias in Empirical Textualism*, 109 GEO. L. J. 767 (2021). For a thorough account of originalism’s need to take into account more diverse viewpoints, see generally Christina Mulligan, *Diverse Originalism*, 21 J. CONST. L. 379 (2018).

<sup>261</sup> See generally Sachs, *supra* note 158.

<sup>262</sup> See generally *id.*

<sup>263</sup> *Id.* at 787.

<sup>264</sup> See Solum, *Originalist Theory and Precedent*, *supra* note 233, at 466.

<sup>265</sup> See *id.* at 466.

## 1. Treating Originalism As a Standard, Rather Than a Procedure

Sachs starts off his article by acknowledging up front that critics of originalism argue that judges and attorneys are bad at performing history and that originalism is therefore not effective at offering answers to these actors.<sup>266</sup> To address this, Sachs draws from the discipline of philosophy and argues that originalism should be treated as a standard for correct decisions rather than as a procedure for reaching those correct decisions.<sup>267</sup> For example, the ethical theory that one should act in a manner that maximizes positive outcomes may be difficult to implement—as consequences of actions may be unpredictable and complex, particularly in the long term.<sup>268</sup> But the lack of a clear procedure for acting does not mean that one should not strive to maximize positive consequences, or that this standard may still be used to determine whether a particular action was ethical or unethical.<sup>269</sup> Sachs argues that originalism, which he appears to define as the notion that “our law is the Founders’ law, as lawfully changed,” should be treated as a standard, rather than a procedure.<sup>270</sup> Even if the method of determining the historic meaning of the Constitution is hard to do, “the standard is the standard.”<sup>271</sup>

Sachs acknowledges that this distinction “might not persuade those who find originalism too theoretical already,” but contends that scholars must go where the arguments lead them and that the truth may not end up being simple.<sup>272</sup> His instincts are correct. While this argument may preserve originalism on some theoretical level, it is more of a dodge than a response to the problems of implementing originalism—primarily because it does not confront the objection that the standard of originalism itself necessarily leads to implementation problems. In cases where the text does not give a readily determinable answer—the cases where the choice of methodology is of highest importance—figuring out the original public meaning, or figuring out the “Founders’ law,” involves difficulties that render the theory useless in practice. Even evaluating decisions after the fact is a muddle because the historic investigation necessary to state whether the originalist standard is met is too complicated for commentators and academics to undertake.<sup>273</sup>

While Sachs’ approach is likely too nuanced to gain a substantial following in the political or judicial sphere—at least in the near future, his own article demonstrates how treating originalism as a standard would likely give rise to poor implementation

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<sup>266</sup> Sachs, *supra* note 158, at 779–80.

<sup>267</sup> *Id.* at 779, 787.

<sup>268</sup> *Id.* at 778, 788.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 790.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 787.

<sup>273</sup> Competing evaluations over whether the Supreme Court’s opinion in *District of Columbia v. Heller* was correct are but one example of this. Compare Barnett, *supra* note 256, at 412–13, with Cornell, *supra* note 239, at 626, and Woods, *supra* note 258, at 1414–23.

practices.<sup>274</sup> For example, Sachs confronts a recent study by Lorianne Updike Toler in which she concludes that Supreme Court Justices tend to employ poor historical methodology when deriving the original meaning of the Constitution.<sup>275</sup> Sachs takes issue with criticizing Justices for failing to cite enough historic sources—arguing that citation practices do not indicate that the Justices failed to consider those sources in rendering their opinions, and that judicial opinions need not justify the conclusions they reach to the extent as scholarly treatments of similar subjects.<sup>276</sup> Sachs goes on to argue that it is wrong to suspect Justices to “delve as deeply into the records as scholars would,” suggesting that it is enough that Justices read the briefs filed to the Court, so long as those brief writers have read the scholars.<sup>277</sup> This, Sachs concludes, is not consistent with “ideal research methods,” but should be instead judged by “whether it’s good enough for government work.”<sup>278</sup>

These revealing claims (relegated to the subsection just before the article’s conclusion) bring Sachs’ theoretical article squarely into the universe of scholarship that this Article critiques. Even if originalism is meant to be a standard, rather than a procedural guide, for judges and attorneys, it necessarily requires a determination of the original public meaning of the constitutional text in order for the standard to have any bearing on reality. Our Article demonstrates that, in cases where the text is vague or under determinative (read: the cases where applying an originalist standard will be of any importance whatsoever), that determination cannot be made. Originalism as a standard necessarily leads to this outcome.

Moreover, as addressed at length above, Sachs’ suggestion that attorneys read the scholarship and include that in their briefs is no solution at all.<sup>279</sup> And, as Sachs’ own arguments demonstrate, treating originalism as a standard rather than a procedure invites courts to issue unjustified, shoddily researched opinions with the excuse that courts need not be as thorough as scholars.<sup>280</sup> We are not convinced, as it is courts—not scholars—whose determinations have a direct impact on the parties before them, along with a broader impact on others in similar situations. If treating originalism as a standard justifies outcomes where courts throw up their hands and say their decision is “good enough for government work,” it is a standard that should not be used in the first place.

## 2. Deference to Prior Originalist Decisions

One potential way to avoid unpredictability that may be caused by changing academic findings on original meaning may be to avoid overruling precedent in which

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<sup>274</sup> See generally Sachs, *supra* note 158.

<sup>275</sup> See *id.* at 827, citing and discussing Toler, *supra* note 156.

<sup>276</sup> See *id.* at 781, 828–29.

<sup>277</sup> See *id.* at 828–29.

<sup>278</sup> See *id.* at 828.

<sup>279</sup> *Supra* Section III.B.1.

<sup>280</sup> See Sachs, *supra* note 158, at 829.

the prior court applies originalist methodology. Lawrence Solum suggests that such decisions may be subject to a heightened level of deference.<sup>281</sup> If a court at the same level of authority reached a prior opinion that may have been mistaken about the original public meaning of a constitutional provision, but made a “good faith attempt to determine the original meaning of the constitutional text,” that precedent may be preserved until “clear and convincing evidence [has] produced a substantial consensus that there had been an error.”<sup>282</sup> Gary Lawson appears to advocate a similar approach by suggesting that precedents in which the prior court had “carefully and honestly applied sound methodologies” may be entitled to some weight.<sup>283</sup>

This solution is flawed. The numerous qualifications required to rely on prior, potentially erroneous precedent make this approach difficult to operationalize and invite goal-oriented discretion. Courts confronting precedents that they determine may have applied incorrect (or potentially incorrect) interpretations of originalist public meaning must make an array of determinations, including whether the prior court applied appropriate methodology “honestly” or in “good faith.” The undefined nature of this test means that court may treat the precedent with genuine deference (applying, for example, an approach similar to abuse of discretion), or that they may determine that the analysis, sources, or both upon which the prior opinion was based are so unreliable that the method is undeserving of respect.

A similar issue arises with Solum’s suggestion that courts apply a “clear and convincing evidence” standard—a burden of proof that falls between the lesser “preponderance of the evidence” (or “more likely than not”) standard, and the more demanding “beyond all reasonable doubt” standard commonly employed in criminal prosecutions.<sup>284</sup> While this is a standard that is applied to particular questions of fact in certain types of cases, it is out of place in the originalist context of interpreting law. How precisely a standard of proof used to evaluate evidentiary sufficiency in legal proceedings is to apply at the legal interpretive level is a question that originalists have not yet answered—and a question that will likely cause headaches and confusion if it is to be implemented.

Beyond this, originalists’ appeal to deference does not bode well for their theory. One would think, for all the ink that has been spilled in support of originalism, its virtues, and its variations, that this is a theory worth implementing. But urging deference in the face of precedent limits the practical impact of the theory. This response (like the originalist responses to the problem of precedent addressed above) addresses a problem of implementation not by suggesting how originalism may be

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<sup>281</sup> Solum, *Originalist Theory and Precedent*, *supra* note 233, at 466.

<sup>282</sup> *Id.*

<sup>283</sup> Lawson, *supra* note 249, at 19.

<sup>284</sup> See C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1328–29 (1982) (describing the results of a survey of 170 federal judges’ interpretation of the probability required to meet the “clear and convincing” burden of proof that found that both the median and average percentage was 75%).

practically implemented in certain situations, but by suggesting how originalism's implementation can be curtailed to avoid unpleasant or disruptive results.

If this is the approach that originalists want to take, the theory is in trouble. This Article demonstrates the myriad of implementation problems that originalism faces. These problems arise for multiple originalist methodologies: studying the constitutional record, immersion, and corpus linguistics. If originalists' response to these implementation problems is to place limitations on when originalism may be applied, then we may never see courts apply these theories.

#### CONCLUSION: DEALING WITH ORIGINALISM'S IMPLEMENTATION PROBLEM

If we were writing an article on how originalism can be improved or saved from its shortcomings, this would be the all-too-short part of the paper where we make underdeveloped suggestions on how originalism may be salvaged. But that is not our goal. Our purpose is to demonstrate that the theories expounded in academic originalist circles are largely, if not entirely, impossible to implement. These theories may have numerous components and variations, they may generate numerous articles and responses, and they may create a self-sustaining subdiscipline of self-referential scholarship on fixation, constraint, construction, and whatever other layers originalists think should be added to the analysis. But in the end, none of this matters if courts cannot implement these complex, unworkable theories.

Originalists may object to this. They may tell us that it takes a theory to beat a theory—overlooking the failure of originalism to constitute itself as a functional theory.<sup>285</sup> They may claim that originalism is a—if not the—dominant theory of constitutional interpretation now, and that it is not simply enough to criticize it—one must offer up a compelling theory to take its place.

There are several responses to this. First, we can assert that such an alternate theory is beyond the scope of this Article.<sup>286</sup> Our purpose here is to demonstrate how academic discussions of originalism are incomplete because the theories propounded cannot be implemented. We have done that.

Second, we can point to what may well be a preferable alternate theory: rather than being bound by the original public meaning of the Constitution or its amendments, courts should be bound by present public meaning. Such an alternate theory

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<sup>285</sup> See Scalia, *supra* note 3, at 855 (“It is not enough to demonstrate that the other fellow’s candidate (originalism) is no good; one must also agree upon another candidate to replace him.”).

<sup>286</sup> Solum, *Triangulating Public Meaning*, *supra* note 13, at 1629, 1632 n.18, 1641 n.42, 1652, 1673 (stating that “an originalist account of constitutional construction,” “[a] full account of the relationship between history and originalism,” “[a] full telling of the law-office history debate,” the “difficult” question of “how public meaning originalism should handle cases of ‘public-meaning versus technical meaning ambiguity,’” and “discussion of the relevant history” of the narrow scope of “freedom of the press” are all beyond the scope of the article).

has been suggested occasionally in the context of originalist theorizing.<sup>287</sup> In the context of this Article's criticism, the present public meaning approach seems appealing—it avoids the need for the complicated and goal-oriented method of studying the constitutional record and the undefined, unworkable method of immersion. It likely leads to much more thorough and representative corpus linguistics analysis, as the internet enables the construction of corpora that are magnitudes more extensive and representative than those available for founding-era language. And it better prevents scholars, advocates, and courts from reaching politically motivated conclusions by modernizing the basis for interpretation—allowing the general public to check or speak out against mistakes, rather than letting courts hide behind a curtain of selective historic citations. As for concerns about linguistic drift, this can be minimized by reading the text of the Constitution as a whole with an eye to relevant context thereby avoiding absurd results that originalists flag.<sup>288</sup>

Third, originalists' claim that it takes an alternate theory to overcome originalism is unconvincing if originalism is a theory that cannot be implemented. Volumes have been written on originalism. The theory has evolved over the decades. It is now a multifaceted entity that operates under its own momentum. As a result, academic originalists have let their theory get away from them, and where it has gone raises increasingly urgent questions of whether originalism is truly intended to interpret law or to serve specific political interests. The normative arguments for and against originalism, common threads between competing theories, and the permissible extent of constitutional construction all neglect to consider how any of these theories

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<sup>287</sup> See Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3911956](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911956); Michael L. Smith, *The Present Public Meaning Approach to Constitutional Interpretation*, 89 TENN. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4106823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106823); Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269 (2013). For an example of a similar approach to statutory interpretation, see generally Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103 (2012).

<sup>288</sup> Solum references Article IV of the Constitution, which guarantees every state a republican form of government and provides that the United States shall protect states against invasion and, on application of the legislature or executive, against “domestic violence.” See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 16–18 (2015) (citing U.S. CONST. art. IV, § 4, cl. 4). Solum argues that changes in language would suggest that the Constitution provides for protection against familial or intimate partner violence—which Solum dismisses as a “linguistic mistake” in light of the original public meaning. *Id.* at 16–18. This is not much of a problem for the present public meaning theory, though, as the context of “domestic violence” in the Constitution indicates that it is referring to civil conflict arising within a state—particularly as the state is the object of protection, a point that Michael Dorf notes in *The Undead Constitution*, 125 HARV. L. REV. 2011, 2044 (2011) (book review). Solum addresses Dorf's comment and does not dispute it—instead arguing that it does not fit the theory that meaning is fixed at the time of utterance. But Solum does not address the larger point that concerns of linguistic drift are overblown as they may be mitigated by reading constitutional terms in context.

are to ultimately be implemented by attorneys and courts. By failing to establish an implementable theory, originalists are not in a position to demand that critics propose an alternative theory of their own.

While originalism has given rise to a great deal of theorizing, its proponents have failed to demonstrate that originalism can be feasibly implemented by judges, attorneys, and the general public. As a result, originalism is fatally disconnected from the practice and rule of law. Its proponents must either solve this problem or acknowledge this disconnect and begin to grapple in earnest with the political significance of a theory that is being used to advance specific political interests. Until then, originalist literature will remain of little practical significance—continuing to serve as a political stalking horse, strategically deployed in political discourse to justify the pursuit of political agendas and, in practice, resulting in little more than selective citation and application by courts and attorneys hoping to reach a particular result.