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THE PAST AS A COLONIALIST RESOURCE

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ABSTRACT

Originalism's critics have failed to block its rise. For many jurists and legal scholars, the question is no longer whether to espouse originalism but how to espouse it. This Article argues that critics have ceded too much ground by focusing on discrediting originalism as either bad history or shoddy linguistics. To disrupt the cycle of endless "methodological" refinements and effectively address originalism's continued popularity, critics must do two things: identify a better disciplinary analogue for originalist interpretation and advance an argument that moves beyond methods.

Anthropology can assist with both tasks. Both anthropological analysis and originalist interpretation are premised on the goal of cultural translation—that is, on rendering holistic worldviews from another time-place intelligible to the translator's own context. Likewise, both anthropology and originalism often rely on a particular interpretive device—the Reasonable Man (or Reader)—to achieve their translational goals. This Article is the first to recognize the true goal of originalism as applied cultural translation*.*

But analogizing to anthropology also reveals that originalism's greatest weakness is political *and* ethical *rather than methodological. Pressing cultural translation into the service of state power is an inextricably colonialist endeavor: it does violence to those against*

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whom translational insights are applied by taming and supplanting their worldviews based on racialized and gendered disparities of power. Nineteenth- and twentieth-century colonizing powers often literally used anthropological research to buttress their authority over colonized peoples. Today, originalist jurisprudence intentionally reinforces the political oppression of historically marginalized groups within the United States by magnifying the views of their historical oppressors. But whereas anthropology can exist independent of its use by political powers, originalism is inseparable from statecraft. By drawing on lessons learned in anthropology, this Article demonstrates that originalist analysis—however *methodologically sound—is problematic because it uses the past as a colonialist resource.*

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INTRODUCTION

Originalism, to its critics' dismay, is enjoying extremely good health. After making its formal debut in 1981[1] and experiencing a series of transformations in the 1990s,[2] Originalism and its most famous champion—the late Justice Scalia[3]—spent a few decades assembling a formidable cast of supporters. Before the end of its first decade, scholarly literature on originalism had already become "so voluminous" that a "tourist guide" was deemed necessary.[4] By the time originalism was in its thirties, then future-Justice Kagan famously remarked that "we are all originalists."[5] Now that originalism is formally part of the over-forty crowd, it has an enviable majority on the Supreme Court, countless adherents on the federal bench,[6] and

1. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 13 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter Solum, *What Is Originalism?*].

2. Most scholars agree that originalism elicited particularly severe criticism during the 1980s that spurred a shift away from "original intent" and toward public meaning originalism. *See, e.g.*, Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 62 (2006); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 612 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004). Two of the most influential 1980s critiques were Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980) and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For arguments critiquing the shift from intent to public meaning, 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), and Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 715 (2011).

3. *See, e.g.*, Solum, *What Is Originalism?*, *supra* note 1, at 22–23; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1139 (2003).

4. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085 (1989)

5. *Hearing on the Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solic. Gen., Dep't of Just.).

6. The Trump administration is widely recognized as having reshaped the federal judiciary through a slew of appointments. President Trump "appointed more than 200 judges to the federal bench, including nearly as many powerful federal appeals court judges in four years as Barack Obama appointed in eight." John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges [https://perma.cc/S4KR-97MQ]. Thanks to this wave of appointments, as of January 13, 2021, over one-quarter of active federal judges were Trump appointees. *Id.* Notably, President Trump "strengthened Republican-appointee majorities on four [appellate] courts, and achieved thin Republican-appointee majorities on three others." Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS (Jan. 28, 2020), https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-reali

high-profile victories to its credit.[7] The Supreme Court's October 2021 term has been called "the most originalist in American history."[8] To be sure, none of these developments have occurred unopposed.[9] But for many judges and justices, as well as for a wide swath of the legal academy, the question is no longer *whether* to espouse originalism but *how* to espouse it.[10] More than ever before, criticizing originalism seems like a well-intentioned but futile endeavor.[11]

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ties [https://perma.cc/6LUM-KSJ7].

7. *See generally, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (applying an originalist understanding to the Second Amendment); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (same to the Fourteenth Amendment's Due Process Clause); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (same to the First Amendment's Establishment Clause). Although it concerned statutory rather than constitutional analysis, the Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), is also sometimes considered part of this group. Mark Tushnet, Bostock *and Originalism*, YALE UNIV. PRESS (July 15, 2020), https://yalebooks.yale.edu/2020/07/15/bostock-and-originalism [https://perma.cc/8DD3-PBX8] (noting that *Bostock* presents "serious questions about some prominent arguments for textualism in statutory interpretation and, by implication, originalism in constitutional interpretation").

8. Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken over the Supreme Court*, ABA J. (Sept. 6, 2022), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/F8JH-JB2W]. *See generally* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022) (offering a wholesale critique of originalism in the aftermath of its most recent victories).

9. Literature that is critical of originalism is almost as vast as originalist scholarship itself. For key works, see *infra* Parts II.A, II.B. Because this Article is a critique of originalism—and, to a degree, a critique of originalism's critics—I do not engage with the schools of constitutional theory that have emerged in opposition to originalism. Most prominent among these is living constitutionalism (associated with David Strauss) and living or framework originalism (associated with Jack Balkin). For explanations of these schools, see generally DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); JACK M. BALKIN, LIVING ORIGINALISM (2014).

10. *See, e.g.*, William Haun, *Tradition-based Originalism and the Supreme Court*, AM. ENTER. INST. (Mar. 21, 2022), https://www.aei.org/articles/tradition-based-originalism-and-the-supreme-court [https://perma.cc/4S5Z-SWQV] ("While the broad ground has been claimed, originalists are now engaged in an intense debate over how to apply originalism and textualism in practice."). For a sampling of articles reflecting this perspective—or themselves sampling other articles reflecting this perspective—across two decades, see generally, for example, Barnett, *supra* note 2; William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

11. Social science–minded readers will no doubt note the highly instrumentalist sense in which I am using "critique"—namely, to mean "challenging to upend or improve" rather than, for instance, "proposing alternative practicable ways" after the manner of Frankfurt School Critical Theory. *See, e.g.*, Claudio Corradetti, *The Frankfurt School and Critical Theory*, INTERNET ENCYC. PHIL., https://iep.utm.edu/critical-theory-frankfurt-school [https://perma.cc/NE3U-Q2N6] (arguing that "traditional theory is evaluated by considering its practical implications . . . . Critical Theory, instead, characterizes itself as a method contrary to the 'fetishization' of knowledge, one which considers knowledge as something rather functional to ideology critique and social emancipation"); *Critique: Verb*, OXFORD ENGLISH DICTIONARY (2023), https://www.oed.com/dictionary/critique_v [https://perma.cc/2855-SPX4] (defining critique as meaning "[t]o examine and evaluate the central or fundamental aspects of (a theory, discipline,

I argue that critics have ceded too much ground by focusing on discrediting originalism as either bad history or shoddy linguistics.[12] Through the 1990s and early 2000s, originalism's critics excoriated its reliance on "law office history"[13]—a species of substandard, end-driven, pseudohistorical analysis that would be dismissed out of hand by professionally trained historians.[14] More recently, originalism's opponents have responded to the rise of "legal corpus linguistics"[15] by arguing that this method's large-scale, empirical analysis of naturally

system, etc.), typically to see if they are well-grounded or to assess their proper scope"); *Critique*, MERRIAM-WEBSTER (2024), https://www.merriam-webster.com/dictionary/critique [https://perma.cc/7VL2-5PXH] ("*Criticism* is most often used broadly to refer to the act of negatively criticizing someone or something . . . or a remark or comment that expresses disapproval . . . , while *critique* is a more formal word for a carefully expressed judgment, opinion, or evaluation of both the good and bad qualities of something."). Given the thing-in-the-world quality of constitutional law and originalist approaches to it, this instrumentalist agenda is, in the end, precisely what I'm after.

12. As I often note, the objections articulated by historically and linguistically minded critics are fair and devastating, inasmuch as they make clear why originalism does not satisfy the standards of historical or linguistic analysis. By arguing that a nonmethodological approach may be better positioned to challenge originalism's dominance, I do not mean to undermine the validity of these earlier efforts.

13. The term "law office history" has become a popular (and pejorative) shorthand. Its earliest use may be in Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 132 (1965). Other prominent critics of public meaning originalism who use the term include Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 970 (2015) [hereinafter Rakove, *Tone Deaf*]; Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss*,*"* 56 UCLA L. REV. 1095, 1098 (2009); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389 (2003); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 107 (1997); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995).

14. On the argument from history, see *infra* Part II.A.

15. Legal corpus linguistics scholarship has exploded in recent years. Much of the earliest and most influential work has been produced by attorney Stephen C. Mouritsen and Thomas R. Lee, a former justice on the Utah Supreme Court, either writing alone, in collaboration with one another, or with other coauthors. *See, e.g.*, Stephen C. Mouritsen, Note, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1919 (advocating "a corpus-based approach to resolving questions of lexical ambiguity"); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 833 (2018) (elaborating further on legal corpus analysis) [hereinafter Lee & Mouritsen, *Judging Original Meaning*]; Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 262 (2019) (explaining "typical tools of a corpus—concordance lines, collocation, clusters (or n-grams), and frequency data"); Thomas R. Lee & Stephen C. Mouritsen; *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 279 (2021) [hereinafter Lee & Mouritsen, *The Corpus and the Critics*] (responding to recent criticisms of corpus linguistics methodology). For more legal corpus scholarship, see *infra* Part I.A.

occurring speech acts wrongly assumes that language can be understood out of context.[16]

Such "methodological" criticisms, while fair, have not proven to be successful. As demonstrated by recent decisions like *Dobbs v. Jackson Women's Health Organization*[17] and by an ever-expanding body of scholarship, methodological criticisms simply generate methodological adjustments without addressing originalism's foundational principle.[18] Originalism is premised on the idea that courts should imagine worldviews from another time-place and use those insights to inform decision-making today.[19] I argue that this is best understood as a type of *applied cultural translation*. Originalism is not, as prominent originalists have stated, "a theory of anyone-in-particular's understanding."[20] Consequently, it cannot be measured against the standards of accuracy and disinterestedness that inform professional historical scholarship. Nor can it be beholden to considerations of context and perspective that are appropriately

16. *See, e.g.*, Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397, 1399 (2021); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 725, 735 (2020); Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1419 (2018); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1029 (2017); John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50, 54 (2019); *infra* Part II.B.

17. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

18. *See infra* note 157 and accompanying text (representing originalism as a theory that is "working itself pure"). A different type of response, offering a new theory of constitutional interpretation, has also emerged. This Article complements such efforts inasmuch as it offers a new and compelling critique of originalism. *See, e.g.*, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (offering an alternative theory of constitutional interpretation grounded in classical law traditions).

19. Originalists have long indicated, albeit not explicitly stated, that this is their goal. *See, e.g.*, Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1621 (2018) [hereinafter Solum, *Triangulating Public Meaning*] (calling "immersion" one of three paradigmatic originalist techniques, and explaining that it "requires researchers to immerse themselves in the linguistic and conceptual world of the authors and readers of the constitutional provision being studied"); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 n.51 (2002) ("[T]he proper object of originalist inquiry is something a bit more hypothetical, such as the understanding that the general public would have had if all relevant information and arguments had been brought to its attention . . . ."). Even skeptics of public meaning originalism have gestured toward the worldview-defining nature of originalist analysis. *See, e.g.*, Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584 (2011) [hereinafter Rakove, *Joe the Ploughman*] (complaining that public meaning originalism asks decisionmakers "to imagine this reader—and imagine seems to be operatively correct here"); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMM. 71, 78 (2016) (observing that "'original public meaning' . . . is a theoretical construction").

20. Kesavan & Paulsen, *supra* note 3, at 1132.

centered in linguistic scholarship. But originalism *can* be appropriately—and productively—compared to the anthropological study of culture.[21]

Anthropological analysis and originalist interpretation share a common goal. Both are fundamentally concerned with translating holistic worldviews from another time-place[22]—that is, with imagining how a collection of persons might *think* about, *feel* about, or *experience* something.[23] While identifiable individuals or historically situated speech are a part of this translational exercise and figure in its outcome, they are not the real focus of this inherently broad analysis.[24] Anthropology and originalism also have an interpretive tool in common: a fictional figure known as the Reasonable Man[25] or Reasonable Reader[26] through whom anthropologists and originalists

21. Anthropologists have long defined their discipline as the study of culture, albeit somewhat begrudgingly. *See, e.g.*, MATTHEW ENGELKE, HOW TO THINK LIKE AN ANTHROPOLOGIST 25 (2018) ("Culture is the most significant concept in anthropology."); CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 5 (1973) (developing a theory of anthropology as "an interpretive [science]" centered on the study of culture); Akhil Gupta & James Ferguson, *Culture, Power, Place: Ethnography at the End of an Era*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 1, 1 (Akhil Gupta & James Ferguson eds., 1997) (observing that "the theoretical thread linking twentieth-century American cultural anthropology through its various moods and manifestations has been the concept of culture").

22. CLAUDE LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 16 (1963) (arguing that whether a sense of "*otherness*" between scholar and subject "is due to remoteness in time . . . or to remoteness in space, or even to cultural heterogeneity, is of secondary importance").

23. For a once-widely accepted and still influential view of cultural translation as anthropological endeavor, see, for example, D.F. POCOCK, SOCIAL ANTHROPOLOGY 88 (1961) ("[T]he work of the social anthropologist may be regarded as a highly complex act of translation in which author and translator collaborate."). *See also* JOHN COMAROFF & JEAN COMAROFF, ETHNOGRAPHY AND THE HISTORICAL IMAGINATION 12 (1992) (describing ethnography as, ideally, being concerned with "understand[ing] the *making* of collective worlds").

24. Anthropologist Eduardo Viveiros de Castro's explanation of his interests is instructive:

> What interests me . . . is neither local knowledge and its more or less accurate representations of reality . . . nor indigenous cognition, its mental categories, and how representative they are of the species' capacities . . . . My objects are indigenous *concepts*, the worlds they constitute (worlds that thus express *them*), the virtual background from which they emerge and which they presuppose.

Eduardo Viveiros de Castro, *The Relative Native*, HAU: J. ETHNOGRAPHIC THEORY, Winter 2013, at 473, 485 (Julia Sauma & Martin Holbraad trans.); *see also, e.g.*, Talal Asad, *The Concept of Cultural Translation in British Social Anthropology*, *in* WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 141, 160 (James Clifford & George E. Marcus eds., 1986) ("According to many social anthropologists, the object of ethnographic translation is not the historically situated speech (that is the task of the folklorist or the linguist), but 'culture' . . . .").

25. *See infra* Part III.B. In the interests of readability and fidelity to the anthropological texts discussing "reasonableness," I have not used the gender-neutral term Reasonable Person.

26. *See infra* Part I.B.

can translate those alternate worldviews.[27] Like anthropologists (but unlike historians and linguists) originalists are primarily interested in what "a Reader" or "the Reader" *would think* of a particular word or concept. Less central to both endeavors is what Joe Reader *actually thought* of a word or concept.

Other scholars have previously analogized constitutional interpretation to translation, but they have not identified the object of translation as *culture*—even when that is clearly what they mean.[28] Similarly, other scholars have sought to explain and evaluate originalism's reliance on the Reasonable Reader.[29] But they have measured the Reader using imperfect disciplinary analogues and therefore, predictably, they have found him wanting as an interpretive device.[30] By clarifying the true goal (translation) and the object (culture) of originalist analysis, the analogy to anthropology makes the strongest possible methodological case for originalism.[31]

But looking to anthropology achieves far more than identifying a better disciplinary comparator: it reveals originalism's true weakness

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27. On the Reasonable Man as a fictional person, see Simon Stern, *The Legal Imagination in Historical Perspective*, *in* VIRTUE, EMOTION AND IMAGINATION IN LAW AND LEGAL REASONING 222 (Amalia Amaya & Maksymilian Del Mar eds., 2019) (calling the Reasonable Man "an imaginative device"); William Twining, *Preface*, *in* LEGAL FICTIONS IN THEORY AND PRACTICE v (Maksymilian Del Mar & William Twining eds., 2015) (calling "mythical characters" including "'the reasonable man' . . . devices for resolving intellectual puzzles"). Readers should note that I am eliding differences within anthropology about the relationship between time and space in the process of cultural translation; there are some who view what they do as immanently synchronic and others who argue that "no ethnography can ever hope to penetrate beyond the surface planes of everyday life . . . unless it is informed by the historical imagination." COMAROFF & COMAROFF, *supra* note 23, at xi.

28. *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1266 (1993) ("'Language' is more than words people use; it is their ideals, their hopes, their prejudices, their enlightenments—in short, it is their world."); Ian C. Bartrum, *Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism*, 10 WASH. U. JURIS. REV. 29, 32–33 (2017) ("[T]he semantic meaning of language transposed into an alien communicative culture can arise only out of analysis, construction, and contextualization—or, as this process is often called in other contexts, *translation.*"); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 140 (2011) ("[A]n originalist somehow has to adapt or translate the original understandings or original meanings to our world.").

29. *See infra* notes 79–93.

30. *See infra* notes 79–93 and accompanying text.

31. While critical race theory or critical legal studies might have also informed a critique of originalism that is similar to the one I ultimately advance in this Article, anthropology is nonetheless essential to my argument. First, the analogy to anthropology ensures that my critique is leveled against the strongest possible understanding of what originalism entails, one that better coheres with *originalists'* understandings of originalism. Second, anthropology's particular disciplinary history allows me to show why applied cultural translation is politically and ethically problematic.

in a way that goes beyond existing methodological criticisms. Anthropology's disciplinary experiences reveal that cultural translation, when it is pressed into the service of state power, becomes an inextricably colonialist endeavor: "a practice of domination" involving "the subjugation of one people to another."[32] That is because applied cultural translation is premised on the intentional *weaponization of worldviews*.

Sometimes, the knowledge gained through cultural translation is weaponized against the very people whose thoughts, practices, and beliefs are under study. British colonial officials, for instance, wrote grammars, codified laws, mapped terrains, and classified indigenous communities out of a sense that "[e]very accumulation of knowledge . . . [regarding] people over whom we exercise dominion founded on the right of conquest, is useful to the state . . . ."[33] At other times, however, the subjects and objects of applied cultural translation are different. Originalist analysis, for its part, furthers the oppression of historically marginalized groups within the United States by intentionally magnifying the worldview of historically dominant groups.[34] As *Dobbs* suggests, applied cultural translation in the originalist mode involves treating some present-day individuals harshly *because* they were treated harshly according to an earlier worldview. Regardless of any such subject/object differences—that is, whether it happens across geographical space or across time (or both)—pressing cultural translation into the service of the state *intentionally reifies*

32. Margaret Kohn & Kavita Reddy, *Colonialism*, STAN. ENCYC. OF PHIL. ARCHIVE (Aug. 29, 2017), https://plato.stanford.edu/archives/sum2022/entries/colonialism [https://perma.cc/M6FX-LA69]. Note that, unlike Kohn & Reddy, I do not reserve "colonialism" for what is often called "settler colonialism": situations in which "[l]arge numbers of settlers claim land and become the majority." Nancy Shoemaker, *A Typology of Colonialism*, PERSPS. ON HIST. (Oct. 1, 2015), https://www.historians.org/research-and-publications/perspectives-on-history/1381ctober-2015/a-typology-of-colonialism [https://perma.cc/HY6N-975F].

33. *See infra* note 246.

34. Thus, it does not matter that "[o]riginalism has the interpretive tools to be sufficiently flexible in the face of changed societal conditions" because, under any level of flexibility, the purpose of originalist analysis is to magnify and reinscribe particular viewpoints. *Cf.* Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 930 (2009). This is also why originalist methodologies, though they may not feel as problematic in contexts other than the United States, likely raise similar concerns, in part because historical contexts are never as uncomplicated as they appear from outside. *See, e.g.*, Arvind Elangovan, *Constitutionalism as Discipline: Benegal Shiva Rao and the Forgotten Histories of the Indian Constitution*, 41 S. ASIA: J.S. ASIAN STUD. 605, 606 (2018) (questioning "the dominant paradigm of writing on the Indian Constitution," according to which "the Constitution is a revolutionary document that sought to usher in radical social transformation").

inequality: it tames and supplants worldviews based on disparities of power that are inescapably racialized and gendered.

Anthropologists have long understood this and have consequently developed a strong disciplinary convention against using anthropological research in the service of state power.[35] Critics of originalism are also beginning to gesture toward the way in which originalist analysis reifies inequality.[36] Nevertheless, the analogy to anthropology makes the political nature of their criticism, as well as its profound, irresolvable nature, explicit: whereas anthropology can exist independent of its use by political powers, originalism is inseparable from statecraft. Critics who wish to counter originalism's rising prominence should draw on the lessons learned by anthropology to demonstrate that originalist analysis—*however* methodologically sound—is problematic because it uses the past as a colonialist resource.[37]

This Article proceeds in four parts. Part I establishes "public meaning originalism" as the dominant strand of originalist thought today and describes its key features. I focus on the role of the Reader as an interpretive device used to determine original public meaning. Part II explains prominent arguments against public meaning originalism that sound in history and linguistics and shows how originalists have countered or evaded these criticisms. Part III introduces anthropology as the study of culture and traces the importance of the Reasonable Man, focusing on anthropological studies of law. This Part also compares the goals and methods of anthropology with those of originalism to show how both are concerned with the task of cultural translation. Finally, Part IV reveals anthropological complicity with colonialist statecraft (as well as

35. *See infra* notes 273–82.

36. Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1194, 1996 (2023) (critiquing *Dobbs* for the way it "restricts and threatens rights that enable equal participation of members of historically marginalized groups" and because the decision "locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies"). In a related vein, see Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (seeking to "redirect scholarship away from the methodological principles of originalism as a jurisprudence and toward the social forms of originalism as a political practice").

37. This phrase borrows from the title of a widely read anthropology article that—appropriately enough—concerns the scope of history's vulnerability to ideological manipulation. Arjun Appadurai, *The Past as a Scarce Resource*, 16 MAN 201 (1981). For more on Appadurai's argument, see *infra* notes 238–39 and accompanying text.

ongoing efforts to cease and disavow such complicity) before showing how originalism entails meaningfully similar yet inescapable entanglements.[38] As this Article shows, originalist analysis is not problematic because of how it is done, but *because* it is done.

I. PUBLIC MEANING ORIGINALISM AND THE REASONABLE READER

Originalism, in the words of two of its most prominent exponents, is "a family of contemporary theories"[39] connected by a shared focus on "memory and erasure"[40] rather than a single and internally consistent whole. Like many "isms," originalism has passed through distinct phases, each characterized by a particular iteration of an underlying perspective.[41] One of these iterations—original public meaning originalism—has risen above the others,[42] and it is for this dominant school of originalist thought that the Reader matters most.

A. The Rise of Public Meaning Originalism

Initially, originalism emphasized authorial intent—in other words, the Constitution means what a particular group of individuals associated with its *production* intended it to mean.[43] Who exactly

38. Others have also made substantive critiques of originalism. Some of these have taken the form of the "dead hand" critique that was an early counterargument to originalism. For an overview of the dead hand debates, see generally Andrew Coan, *The Dead Hand Revisited*, 70 EMORY L.J. ONLINE 1 (2020). Others have also made substantive critiques on democratic grounds, albeit in passing. *See, e.g.*, Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 318–24 (2021) ("Originalists thus echo populism's anti-institutional bent to solve the problem of pluralism and obviate the need to justify our law.").

39. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017) [hereinafter Solum, *Originalist Methodology*]; Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1958 (2021) [hereinafter Solum, *The Public Meaning Thesis*].

40. JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 5 (2024).

41. Perhaps the most widely accepted definition of originalism describes it as having two elements: the fixation thesis (the idea that "the communicative content of the constitutional text is fixed at the time each provision is framed and ratified") and the constraint principle (the idea that "constitutional practice should be constrained by that communicative content of the text"). Solum, *Originalist Methodology*, *supra* note 39, at 269; *see also* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013). On comparable periodization in other contexts, see, for example, Pamela L. Caughie, *Introduction: Theorizing the 'First Wave' Globally*, 95 FEMINIST REV. 5 (2010) (describing the first, second, and third waves of feminism).

42. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1936 [hereinafter Solum, *Originalism and the Unwritten Constitution*].

43. Kay, *supra* note 2, at 247.

counted as an "author" was a point of some internal disagreement,[44] one that many originalists avoided by speaking generally of authorial intent.[45] Intent-based originalism, however, invited "withering criticisms,"[46] and eventually many originalists came to emphasize the Constitution's *audience* over its authors.[47] These "public meaning" originalists (sometimes also called new originalists[48]) argued that the key to understanding the constitutional text was to identify what it would have meant for its intended audience, the public at large.[49] Again, there was some debate over who counted as a member of "the public,"[50] but public meaning originalism has generally drawn this

44. In particular, scholars have vacillated over whether the Constitution's framers or its ratifiers comprise its "authors." *See* Kesavan & Paulsen, *supra* note 3, at 1114; Rakove, *Joe the Ploughman*, *supra* note 19, at 580–81; Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004).

45. Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013) (arguing that "[t]he meaning of a legal norm is just its authorially intended meaning" but not specifying who counts as an author).

46. Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 609 (2008).

47. To be sure, intent-based originalism has not disappeared. *See, e.g.*, Zachary B. Pohlman, *Revisiting the Fried Chicken Recipe*, 98 NOTRE DAME L. REV. REFLECTION 76, 87 (2022) (arguing that "the meaning of the Constitution is its authorially intended meaning" in the course of discussing and disagreeing with Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997)).

48. Whittington, *supra* note 2, at 603–09 (discussing the "new originalism"); Solum, *Originalism and the Unwritten Constitution*, *supra* note 42, at 1943 (noting that public meaning Originalism is sometimes called "the new originalism"); Colby, *supra* note 2, at 720–21 (contrasting "New Originalism" focused on public meaning with "Old Originalism" emphasizing intent); Strang, *supra* note 34, at 930. *But see generally* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459 (2016) (saying that new originalism is a subset of public meaning originalism).

49. Kesavan & Paulsen, *supra* note 3, at 1118 (defining "original meaning" as "the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted"); Solum, *The Public Meaning Thesis*, *supra* note 39, at 1957 ("The Public Meaning Thesis is the claim that the original meaning of the constitutional text is best understood as its *public meaning*: roughly, the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified.").

50. For a range of views on the proper scope of the "public" see, for example, Solum, *The Public Meaning Thesis*, *supra* note 39, at 1975 (stating that "the members of the public in the United States who were able to read English or to understand English if it were read to them"); *id.* at 1982 (referencing "the citizens of the United States"); Balkin, *supra* note 19, at 73–77 (discussing the implications of significant German- and Dutch-speaking populations existing in New York and Pennsylvania at the time of ratification); Strang, *supra* note 34, at 971 (arguing for a particular interpretive norm because "it is the norm that a reasonable Framer or Ratifier would claim"); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1499 (2012) ("What matters . . . is the public understanding of the Constitution's maxims at the time of ratification, rather than the Framers' private understandings of those terms."); Lawson

circle broadly: those who read the Constitution, those who read about the Constitution, and those who heard and participated in discussions about the Constitution are all widely accepted as being part of the Constitution's audience—or its "readers."[51]

The importance of this imagined audience to public meaning originalism (as well as the importance of its singular form, the Reader) has been widely acknowledged by originalist scholars. Professor Keith Whittington has stated that "[t]he critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification."[52] Professor Randy Barnett has argued that "'original meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[53] And in an article wholly devoted to analyzing "public meaning," Professor Lawrence Solum identifies "four possible readerships of the constitutional text" before going on to support the fourth of these options, namely, "members of the public in the United States who were able to read English or to understand English if it were read to them."[54] More recently, "positivist" originalists have claimed to circumvent the debilitating focus on a historical Reader.[55] But they have done so simply by asserting that what *seems* like an interpretive historical exercise—judging what counted as law at a given time, on a given issue, for a given set of people—actually isn't one.[56]

& Seidman, *supra* note 2, at 79 (favoring a hypothetical reasonable person trained in the law); as well as Blakely v. Washington, 542 U.S. 296, 313 (2004) ("There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: . . . the common-law ideal of limited state power . . . .").

51. Solum, *Originalist Methodology*, *supra* note 39, at 275–76; Lawson, *supra* note 19, at 349 n.89 (referencing "a fully-informed public audience in possession of all relevant facts and arguments").

52. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999).

53. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92 (2004).

54. Solum, *The Public Meaning Thesis*, *supra* note 39, at 1975–80.

55. For examples of such positivist scholarship, see generally Baude, *supra* note 10; William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019). For criticism of the "positivist turn," see generally Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017).

56. *See, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) (arguing that "[t]his 'law of interpretation' determines what a particular instrument 'means' in our legal system"). Baude and Sachs, who are among the most influential proponents of the positivist turn in originalism, contend that "[t]he crucial question for legal

The Reader is more subtly referenced in originalist jurisprudence but is nonetheless conceptually central. For instance, in *District of Columbia v. Heller*,[57] Justice Scalia declared that "[i]n interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood . . . [and] its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[58] The Reader is undoubtedly the focal point of this analysis despite the absence of any explicit reference to him. Similarly, the majority in *United States v. Jones*[59] wrote that "our task, *at a minimum,* is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment."[60] Again, because meaning must exist for someone,[61] the *Jones* majority was relying on the idea of a constitutional audience—and Reader—even if it did not explicitly say so. Even the Court's landmark 2022 decision in *Dobbs*, which nowhere discussed the original meaning of the relevant constitutional provisions, has been defended on the grounds that its "history and traditions" analysis seeks to "conclusively establish that abortion is not protected by any provision of the Fourteenth Amendment as originally understood."[62] Understanding and meaning, again, must exist for someone—and that "someone" is the general public of the ratification era whose "normal and ordinary"[63] or "original"[64] understanding of key terms is being prioritized by the Court. Thus, whether implicitly in jurisprudence or explicitly in

interpreters isn't 'what do these words mean,' but something broader: What law did this instrument make?" *Id.* at 1083. This approach, they argue, "focuses attention on these preexisting rules — rules of law, and not of language — that determine the legal effect of written instruments." *Id.* at 1084.

57. District of Columbia v. Heller, 554 U.S. 570 (2008).

58. *Id.* at 576 (second alteration in original) (citing United States v. Sprague, 282 U.S. 716, 731 (1931)).

59. United States v. Jones, 565 U.S. 400 (2012).

60. *Id.* at 406 n.3.

61. *See, e.g.*, Solum, *The Public Meaning Thesis*, *supra* note 39, at 1974 (noting that "[c]ommunication is usually directed at some intended audience").

62. J. Joel Alicea, *An Originalist Victory*, CITY-JOURNAL 7 (June 24, 2022), https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists [https://perma.cc/YE6G-SJQQ]. Perhaps just as revealingly, many of *Dobbs*'s critics have evaluated the decision using the same methodological frameworks traditionally used to discredit public meaning originalism, particularly the accuracy of its historical analysis. *See generally, e.g.*, Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091 (2023) (correcting the historical analysis reflected in the *Dobbs* majority opinion).

63. *Heller*, 554 U.S. at 576 (citing *Sprague*, 282 U.S. at 731).

64. *Jones*, 565 U.S. at 406 n.3.

scholarship, the public—and its singular form, the "reasonabl[e]" and "well-informed reader"[65]—is at the core of what it is to engage in originalist analysis today.

The centrality of the Reader has persisted even as originalism has shifted its disciplinary orientation from history to linguistics, but it is now less explicitly acknowledged. Beginning in the late 2010s, originalist scholars became interested in applying the methodologies of corpus linguistics analysis to the task of constitutional interpretation.[66] This "legal corpus linguistics"[67] involves searching large collections ("corpora") of founding-era language to determine the ordinary public meaning of words in order to guide judicial decision-making.[68] Several of the main collections used for legal corpus linguistics analysis are housed at Brigham Young University, including the Corpus of Contemporary American English ("COCA"), the News on the Web Corpus ("NOW"), the Corpus of Historical American English ("COHA"), and the Corpus of Founding Era American English

65. Perhaps fittingly, the exact phrasing can vary without making the similarity of meaning any less clear. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) (referencing "a well-informed reader"); Kesavan & Paulsen, *supra* note 3, at 1132 (highlighting "a hypothetical, objective, reasonably well-informed reader"); BARNETT, *supra* note 53, at 92 (mentioning a "reasonable listener").

66. For examples of originalist scholarship that draws on legal corpus linguistics, see *supra* note 15. *See also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 443 (2018); James C. Phillips & Jesse Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies To Improve Corpus Design and Analysis*, 2017 BYU L. REV. 1589, 1592; Friedemann Vogel, Hanjo Hamann & Isabelle Gauer, *Computer-Assisted Legal Linguistics: Corpus Analysis as a New Tool for Legal Studies*, 43 LAW & SOC. INQUIRY 1340, 1341 (2018).

67. I borrow the term "legal corpus linguistics" from Bernstein, *supra* note 16, at 1400 (distinguishing between "corpus linguistics in linguistics" and "*legal* corpus linguistics," and calling the latter a "thinner version" of the former).

68. *In re Adoption of Baby E.Z.*, 266 P.3d 702 (Utah 2011), is an example of the use of legal corpus linguistics. *In re Baby E.Z.* involved a biological father who sought to intervene in the adoption of his daughter. *Id.* at 704. The biological father, Wyatt, argued that the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A (2006), removed jurisdiction over the adoption proceeding from the district court and required enforcement of a Virginia court order that had awarded him custody. *Id.* at 706. The court agreed with Wyatt as to the PKPA's applicability, but ultimately ruled that Wyatt had forfeited his claims under the statute by not raising the issue before appeal. *Id.* at 714. Judge Lee, writing in concurrence, used legal corpus linguistics to

> articulate an alternative ground for [the court's] holding that Wyatt may not rely on the PKPA to challenge the district court's jurisdiction over the adoption of Baby E.Z.: the Act has no application to adoption proceedings, but extends only to modifiable 'custody or visitation determination[s]' such as those made in a divorce context.

Id. at 715 (Lee, J., concurring in part and concurring in the judgment).

("COFEA").[69] The collections differ in geographic and temporal scope, but they share an emphasis on accumulating diverse types of actual language use—including anything ranging from blogs and movie subtitles (COCA) to web-based newspapers and magazines (NOW) to fiction and nonfiction books (COHA) to letters, sermons, diaries, and legal cases (COFEA).[70] They also share an emphasis on sheer volume, often encompassing billions of words, and are electronically searchable.[71]

It is easy to see why legal corpus linguistics would appeal to originalist scholars. Before the rise of corpus-based analysis, the task of determining the original public meaning of a word or phrase involved identifying and manually searching relevant historical documents like dictionaries and letters.[72] This work was often painfully slow and—as originalists themselves increasingly acknowledged[73]—it was easy to criticize using the standards of professional historical analysis. Legal corpus linguistics not only promised to speed up the identification of public meaning through the use of digital corpora, it also offered a renewed sense of intellectual legitimacy in a world where "[q]uantification is seductive."[74] Writing in the *Yale Law Journal* in 2016, coauthors James C. Phillips, Daniel M. Ortner, and Thomas R. Lee declared that this new approach should be compelling to any

69. Bernstein, *supra* note 16, at 1413–15 (identifying and describing these corpora).

70. *Id.*

71. *Id.*

72. *See, e.g.*, James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J.F. 21, 23 (2016) (discussing "contemporaneous dictionaries" but calling them an "imperfect tool"); District of Columbia v. Heller, 554 U.S. 570, 581–86 (2008) (citing, among other things, contemporaneous general dictionaries, legal dictionaries, a thesaurus, state constitutions, compilations of state trials and legislative enactments, collections of individual scholars' writings, and legal treatises).

73. Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J.F. 57, 58 (2016). See also the critiques of historically informed originalism discussed in Part II.A.

74. SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING 1 (2016). Not surprisingly, legal corpus linguistics is already generating its own, even more heavily quantified, responses. *See, e.g.*, Jonathan H. Choi, *Measuring Clarity in Legal Text*, 91 U. CHI. L. REV. 1, 5, 7 (2024) (arguing that corpus linguists focus on the wrong problem when trying to resolve textual unclarity, and "develop[ing] novel computational techniques to understand word meaning and quantify clarity" in order to "underscore the importance of non-textual evidence in legal interpretation, contrary to interpreters who rely on text alone"). Although Choi uses computational methods to critique corpus linguistics, this is broadly reminiscent of the pattern of refinement that marked historically informed public meaning originalism.

originalists interested in "mov[ing] beyond the subjective nature of the humanities to the more objective realm of social science."[75] By bringing numbers to originalism, legal corpus linguistics tapped into a fetishization of empiricism and data that has long existed within U.S. academic culture,[76] and that has been particularly influential within U.S. *legal* academia[77] ever since the rise of law & economics.[78]

But even if a corpus linguistics approach trades in handsearching and history for corpora and linguistics, it is no less reliant on the idea of the Reader. After all, the logic behind searching vast collections of actual language use is *precisely* to identify the meaning that an ordinary person would have ascribed to specific words. All that has changed with the shift from history to linguistics is the source of information and the manner of searching it—and, perhaps, the degree of confidence enjoyed, however justifiably, by the analyst. The conceptual importance of the Reader to originalism remains firmly in place.

B. The "Reasonable" and "Well-Informed Reader" of Originalist Thought

Over the years, originalist scholars, as well as their critics, have openly speculated about the Reader's probable biography. What kind of person would he be? (As the discussion below shows, the Reader is quite likely a *he*.[79]) What kind of environment would he inhabit? These

75. Phillips, Ortner & Lee, *supra* note 72, at 23.

76. Lisa Gitelman & Virginia Jackson, *Introduction*, *in* "RAW DATA" IS AN OXYMORON 1, 2 (Lisa Gitelman ed., 2013) (critiquing the "unnoticed assumption that data are transparent, that information is self-evident, the fundamental stuff of truth itself").

77. Whether academic law is too entranced with positivistic, quantitative science is a longstanding debate that has generated an extensive literature. Of late, that literature has focused on comparing a handful of movements centered on the empirical study of law—law and society, law and economics, and empirical legal studies—as well as on the question of which movement has most impacted the legal academy. *See, e.g.*, Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713; Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 563 (2010); Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies*," 71 LAW & CONTEMP. PROBS., no. 2, Spring 2008, at 17, 31. On the appeal of positivistic empirical work (which they call "scientism") within even the law and society tradition, see Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97, 141 (1988).

78. Some corpus originalists have made the comparison with law & economics explicit. *See, e.g.*, Phillips & Egbert, *supra* note 66, at 1590.

79. Again, I will refer to the "Reasonable Reader" (of originalism) using male pronouns and to the "Reasonable Man" of anthropology. Although these terms depart from contemporary usage, they reflect clues regarding the Reader's identity. *See infra* notes 83–85 and the language of the anthropological example I draw on in notes 208–215.

exchanges reflected a recognition that the kind of person the Reader is necessarily impacts his likely understanding of constitutional language.[80] By cross-referencing and compiling these clues, which appear in both scholarship and jurisprudence, we can see that the Reader is not a wholly empty figure even if he also lacks the full-fledged characteristics of a human person.[81]

At a minimum, the Reader is white; most likely, the Reader is also male. The racialized and gendered nature of the Reader is inescapably implied by some of the more specific terms used by originalist scholars and judges to reference the Constitution's intended audience. For instance, in addition to being a member of the "public," the Reader is often described as a "citizen."[82] In the 1780s, this category would have excluded many nonwhite persons but included all white women.[83] Conversely, the Reader is also sometimes described as a "voter."[84] During the same period, this category would have excluded (in most contexts) all nonwhite persons *and* all white women *and* many white men.[85] Strikingly, public meaning originalists have rarely

80. *See, e.g.*, Rakove, *Joe the Ploughman*, *supra* note 19, at 584 (imagining what the Reader had on his "shelves to discover what literary resources he had ready to hand").

81. What may be less obvious is that these qualities of the Reader are not merely a reflection of some demographic truth but reflect an ideological process that constitutes, or *interpellates*, the Reader as a subject to be engaged with. Interpellation refers to the process of "creating" subjects in the course of recognizing—or "hailing"—them. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 127, 174–75 (Ben Brewster trans., 1971).

82. District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) ("Normal meaning . . . excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.").

83. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 252 (2005) (stating that "[f]rom the beginning, federal courts acting under [the language of Article III] decided suits brought by and against women" and that "the same held true for Article IV" before going on to note that "[f]ree blacks were also plainly encompassed by Articles III and IV as originally understood").

84. *Heller*, 554 U.S. at 576 ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))). Obviously, the parameters of these groups shifted during the nineteenth century after the Reconstruction Amendments were passed.

85. AMAR, *supra* note 83, at 351, 419 (noting that it was not until 1870 that Black men were guaranteed "the 'political' right to vote and kindred 'political' rights to hold office and serve on juries"—and that it was not until "August 1920[that] some ten million women . . . became the full political equals of men thanks to the ratification of the Nineteenth Amendment"). Amar also notes that during the election of ratification-convention delegates, "New York temporarily set aside its usual property qualifications and, for the first time in its history, invited *all free adult male citizens* to vote." *Id.* at 7 (emphasis added); *see also* Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 58 (2013) (acknowledging that, during

acknowledged that the Reader *has* a race and most likely has a gender even though they have explicitly opined on many of the Reader's less foundational attributes (discussed below).[86] But even if considerations of race and gender are relatively invisible within originalist scholarship and jurisprudence, they are nevertheless baked into originalism itself.

In addition to race and sex, the Reader also has specific language skills because he is a fluent speaker of eighteenth-century American English.[87] In fact, he may have even more *particularized* language skills than that because he is occasionally believed to understand how constitutional "terms were used in a newspaper article published . . . two decades [before ratification], and in a British parliamentary debate in 1780."[88] It may even be the case that the Reader is comfortable reading constitutional prose in German or Dutch, as were many individuals in the culturally influential states of Pennsylvania and New York.[89] Finally, all of these clues about language and literacy have, in turn, led some of originalism's historically minded critics to imagine the Reader's probable reading habits. Those reading habits might have included anything from, on the low end, "the popular press"[90] or "a Bible and Foxe's *Book of Martyrs*,"[91] to some "classic texts of Anglo-American law,"[92] especially Blackstone's *Commentaries*.[93]

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ratification votes, "[m]ost adults could not vote; women were excluded, and most blacks were held in slavery").

86. This may be because a theory centered on a generalized concept like the "public" permits discussion that is deracinated and gender neutral, whereas other varieties of originalism—especially intent-based originalism—center the personal qualities of identifiable human beings or groups of human beings. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 629 (2008) [hereinafter Cornell, *Originalism on Trial*].

87. *See, e.g.*, Solum, *The Public Meaning Thesis*, *supra* note 39, at 1975; Kesavan & Paulsen, *supra* note 3, at 1118; Balkin, *supra* note 19, at 72; Lawson & Seidman, *supra* note 2, at 55.

88. Tushnet, *supra* note 46, at 612 (discussing *Heller*). This expansive type of language comprehension also necessarily has implications for the Reader's age.

89. *See* Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding-Era Translations of the U.S. Constitution*, 31 CONST. COMMENT. 1, 1 (2016) (examining eighteenth-century German and Dutch translations of the Constitution).

90. Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 300 (2011) [hereinafter Cornell, *The People's Constitution*].

91. Rakove, *Joe the Ploughman*, *supra* note 19, at 584.

92. Cornell, *The People's Constitution*, *supra* note 90, at 300.

93. *See generally* John V. Orth, *Blackstone*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 359 (Markus D. Dubber & Christopher Tomlins eds., 2018) (describing the *Commentaries*' prominence in the colonies); Rakove, *Joe the Ploughman*, *supra* note 19, at 585 (describing the *Commentaries*' success in print).

Despite all these details—civic status, race, sex, language, and literacy levels—it is important to recognize that the Reader of public meaning originalism remains resolutely indeterminate. In other words, even with these speculative attributes, the Reader does not have the fully fledged identity and complexity of a human person. For instance, we know next to nothing about his socioeconomic class, occupation (or occupational status), family networks, religious identity, or political preferences.

It is also important to note that the indeterminate nature of the Reader holds true for both historical and linguistic approaches to public meaning originalism, although for different reasons. On the historical side, the characteristics attributed to the Reader are not specific enough to allow a historian to select some sources over others as accurate and relevant indicia of the Reader's understanding. For instance, two fluent speakers of eighteenth-century American English might be otherwise dissimilar from one another along axes like age, education, and reading habits. How could a historian (or a judge) decide which written materials to draw on to access *both* of their likely understandings of constitutional terms?

The linguistics approach seems to address this worry through sheer volume: by including as many sources as possible, it hopes to account for both the Reader who only accesses the popular press *and* the Reader who enjoys Blackstone's *Commentaries*.[94] But the corpora used for this analysis reflect actual language use by actual human authors—discrete persons possessing all the specificity that the Reader lacks—who are, nonetheless, individually unknown or unknowable. The COFEA, for instance, "tells us that it contains 'documents from ordinary people of the day' but does not give . . . demographic information"[95] regarding the people whose language use it preserves. How could a COFEA user establish the representativeness of the speech that they are describing as ordinary and public?

Ultimately, however, none of this matters. Public meaning originalists have been exceptionally clear that the indeterminacy of the Reader is *intentional* rather than accidental or unavoidable. Coauthors Vasan Kesavan and Professor Michael Stokes Paulsen state that

94. *See, e.g.*, Tobia, *supra* note 16, at 795 (noting that "[i]t is tempting to think that any acceptable use must be found *somewhere* in a large corpus").

95. Bernstein, *supra* note 16, at 1414. Depersonalization, of course, is meant to achieve here what it is often meant to achieve in scholarly analysis: impart a sense of objectivity. *See, e.g.*, Kesavan & Paulsen, *supra* note 3, at 1131–32 (asserting that originalism "is a theory of the hypothetically 'objective' and the *fixed* meaning of words and phrases in a legal text").

originalism is not "a theory of anyone-in-particular's understanding."[96] Similarly, Professors Lawson and Seidman note that "the touchstone is not the specific thoughts in the heads of any particular historical people."[97] And in a related vein, Professor Solum has argued that the idea of "public accessibility" that is so important to public meaning originalism "does not require that each and every member of the public read and understand the constitutional text."[98] Put differently, it does not matter that originalists—whether they use a historical approach or rely on corpus linguistics—cannot point to a particular human being whose views they are prioritizing when interpreting the Constitution, because that is not what originalists have set out to do. Indeed, as I argue later on, an indeterminate understanding of the Reader makes sense in light of what originalists really *are* trying to do: applied cultural translation.[99] But the absence of specificity has nonetheless inspired vociferous methodological critiques of public meaning originalism.

II. METHODOLOGICAL CRITICISMS OF ORIGINALISM

Both in its earlier historical phase and in its current linguistic phase, public meaning originalism has looked outside law to develop methods for its preferred mode of analysis. Unsurprisingly, then, critical responses to originalism have also sounded in history and linguistics and they have largely attacked originalism on methodological grounds. Historians[100] have articulated variations of an argument that boils down to "cherry-picking,"[101] while linguists' responses can be roughly described as "context matters."[102] Neither line of critique is exclusively the province of either disciplinary response: historians also clamor for context and linguists also allege

96. Kesavan & Paulsen, *supra* note 3, at 1132.

97. Lawson & Seidman, *supra* note 2, at 48.

98. Solum, *Triangulating Public Meaning*, *supra* note 19, at 1630.

99. *See infra* Parts II.C, III.C.

100. I am using the terms "historian" and "linguist" as a shorthand for the kind of critique being articulated rather than as a reflection of the individual critic's credentialing or institutional affiliation. Thus, I categorize the lawyer-anthropologist Anya Bernstein as a "linguist" for the purposes of this Article even though Bernstein's doctoral training emphasized linguistic anthropology and even though she also holds a J.D. and is housed in a law school. Jeanne Leblanc, *UConn Law Welcomes Distinguished New Faculty Members*, UCONN TODAY (Sept. 15, 2022), https://today.uconn.edu/2022/09/uconn-law-welcomes-distinguished-new-faculty-members [https://perma.cc/58NJ-GK57].

101. *See infra* Part II.A.

102. *See infra* Part II.B.

misleading selectivity.[103] At the same time, *both* lines of critique are centrally concerned with the Reader—although, just as in the theory they criticize, that centrality usually goes unacknowledged. But because arguments from history and linguistics have targeted originalist methodology, and because they misunderstand the role of the Reader within that methodology, they have made little headway in countering originalism writ large.[104]

A. Originalism as Bad History: "No Cherry-picking!"

Historically grounded criticisms of originalism are varied and plentiful,[105] but they tend to focus on how the indeterminacy of the "public" behind public meaning originalism impacts source selection. This type of argument typically begins by noting that the members of this public—the Readers—are fictional persons rather than real human beings.[106] But, the argument goes on, historical analysis demands the selection of real sources which can then be interpreted to identify original public meaning.[107] That source selection, in turn, demands some justificatory framework that is at least partly centered on the type of person whose perspectives or understandings are the focus of analysis.[108] History-minded critics argue that because the Reader is

103. For a historian lamenting the lack of context, see Rakove, *Joe the Ploughman*, *supra* note 19, at 583. For a linguist implicitly alleging "cherry-picking," see Tobia, *supra* note 16, at 796–97.

104. To be sure, as I have commented elsewhere, the current landscape of legal academia is also heavily shaped by a well-funded political movement. *See* Deepa Das Acevedo, *Sweet Old-Fashioned Notions: Legal Engagement with Anthropological Scholarship*, 73 ALA. L. REV. 719, 721 n.3 (2022) (noting donor influence with respect to the rise of law and economics).

105. Nevertheless, as Professor Rakove notes, "The number of historians"—most likely referring to Ph.D.-credentialed scholars—"who are actively concerned with originalism is quite small." Rakove, *Tone Deaf*, *supra* note 13, at 970.

106. *See, e.g.*, Rakove, *Joe the Ploughman*, *supra* note 19, at 584; Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 735 (2013) [hereinafter Cornell, *Meaning and Understanding*].

107. *See, e.g.*, Rakove, *Tone Deaf*, *supra* note 13, at 972 (noting the need "to identify and then to weigh the evidentiary value of the primary sources that one can bring to bear to solve some problem about historical action"); Cornell, *Meaning and Understanding*, *supra* note 106, at 741 ("Given that there were a small number of English dictionaries to consult from this era, one might have expected Justice Scalia to look at them all with some care" before crafting the majority opinion in *Heller*, but "[o]ne text he obviously did not consult was Nathan Bailey's *Universal Etymological English Dictionary*, which actually uses the phrase 'bear arms.'"); Strauss, *supra* note 28, at 139 (noting that a historian wanting to "analyze how people in an earlier era talked about a constitutional issue . . . would examine public statements, public records, and the like").

108. *See supra* note 107.

fictional and chronically indeterminate, all of his attributes—and therefore any justifications for selecting or excluding specific sources—are left to the discretion of the person doing the analysis. Consequently, the analyst is able to cherry-pick sources that will produce the interpretive result they favor.[109]

For instance, Professor Jack Rakove writes that a "reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind."[110] Professor Mark Redish and coauthor Matthew Arnould forthrightly state that "[o]riginal meaning possesses neither a clear methodology for deciding which historical materials may be used to determine meaning nor rules for analysis once an appropriate historiography has been gathered."[111] And Professor Saul Cornell colorfully argues that originalism "is . . . little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft."[112] In fact, given the profusion of scholarship on originalism over the past four decades, as well as the historical inflections of much scholarship that has been *critical* of originalism during the same period, any sampling of arguments from history will itself be vulnerable to the critique of cherry-picking!

Critics offer a range of explanations as to *why* originalists engage in this kind of substandard historical analysis, sometimes even offering several explanations within the confines of a single article. Take the following example. In an article published in the *Columbia Law Review*, Professor Martin Flaherty argues that the work of "constitutional 'professionals'" (among whom he includes lawyers, judges, and especially legal academics) "at times fall[s] below even the standards of undergraduate history writing"—a criticism that "obtains most strongly for originalists."[113] Later on in the same article, Professor Flaherty indicates that legal scholars' uses of history may be *intentionally* problematic rather than accidentally so: "legal scholars . . . notoriously pick and choose facts and incidents . . . that serve their

109. *See, e.g.*, Kelly, *supra* note 13, at 126 (calling the historical analyses in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), and in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895), "very bad history indeed" because, in both instances, the Court "carefully selected . . . materials designed to prove the thesis at hand").

110. Rakove, *Joe the Ploughman*, *supra* note 19, at 586.

111. Redish & Arnould, *supra* note 50, at 1499.

112. Cornell, *Originalism on Trial*, *supra* note 86, at 626.

113. Flaherty, *supra* note 13, at 524, 526.

purposes."[114] But just one sentence later, Professor Flaherty observes that "historical procedure dictates genuine concern for facts, sources, and context" and goes on to admit that "[a]biding by just these standards is hard and time-consuming work, often too hard and time-consuming to meet the imperatives of legal scholarship."[115]

These are three very different explanations for the inadequacy of originalist historical analysis (indeed, for the inadequacy of *legal* historical analysis, broadly speaking), yet they are all common among historically minded critics.[116] Professor Flaherty's first explanation gestures toward legal scholars having inadequate skills or training (the personal capacity thesis); his second states that legal scholars engage in motivated reasoning when they "do history" (the personal intent thesis); and his third explanation points to a scarcity of time and labor as an understandable if nonetheless regrettable reason why legal scholars do history poorly (the structural capacity thesis). All three explanations are regularly proposed by historically minded critics seeking to account for originalism's continued popularity, and all of them attack originalism on the grounds that it is bad history.[117]

I do not take issue with the substance of the cherry-picking critique: it is fair *from a historical perspective*. Likewise, the explanations of originalism's historical shortcomings often nicely balance their cynicism regarding originalists' motivations with generosity.[118] But the argument from history suffers from two flaws that are common to all methodological criticisms of originalism. First, it is

114. *Id.* at 554.

115. *Id.*

116. *See, e.g.*, William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 642 (articulating a version of the Personal Capacity Thesis); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987) (same); Kelly, *supra* note 13, at 126 (articulating a version of the Personal Intent Thesis); Cornell, *Meaning and Understanding*, *supra* note 106, at 742 (same); Strauss, *supra* note 28, at 139–40 (same); Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 961 (2015) (articulating a version of the Structural Capacity Thesis).

117. In addition to the sources already cited, see Tang, *supra* note 62, at 1127 (showing that "the number of states that permitted abortion before quickening . . . was much larger than the *Dobbs* majority asserted") and Siegel, *supra* note 36, at 1135 (arguing that the *Dobbs* majority "performs its history-and-traditions analysis with the energies of movement-identified judges achieving a goal").

118. Again, Professor Flaherty's range of explanations is exemplary of this trend in the scholarship. *See supra* notes 113–15 and accompanying text.

purely methodological;[119] it criticizes the "how" of originalism rather than the "why." Consequently, the responses it invites are themselves methodological and imply that the real issue is how to pursue originalist analysis rather than whether to pursue it at all.[120] Indeed, the rise of public meaning originalism is widely understood to be a response to methodological critiques of intent-based originalism.[121] Likewise, the rise of legal corpus linguistics can be viewed as a methodological response to critiques advanced during the historical phase of public meaning originalism.[122] Put differently, methodological critiques may be reasonable—and they may even be necessary—but by themselves they do little more than push for a more refined originalism.

However, the argument from history also has a second and more serious flaw—namely, that it misunderstands what originalists are trying to do in the first place. Cherry-picking is a valid critique if and only if originalists are interested in accurately assessing what constitutional terms mean for identifiable human beings. The critique contends, essentially, that the sources on which such assessments are based are inadequate to the task. But originalism, as originalists keep saying, is not about assessing the meaning of constitutional terms for identifiable human beings. It is not about documenting "anyone-in-particular's understanding"[123] and then repeating that process until something that can be more credibly characterized as *public* meaning emerges. By faulting originalists for not properly doing something that they never set out to do, the historical critique starts from a persuasive deficit. And in this respect, it is not at all different from the critiques more recently emanating from linguistics.

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119. To be sure, some hypotheses regarding *why* originalists engage in cherry-picking—such as the personal intent thesis—touch on motive.

120. Historian critics themselves acknowledge this pattern. *See* Martin S. Flaherty, *Foreword: Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 912 (2015) ("[T]he story has largely consisted of originalists advancing claims, historians responding with skepticism, and originalists countering with modified approaches.").

121. *See* Redish & Arnould, *supra* note 50, at 1498.

122. *See* Solan, *supra* note 73, at 58; Calvin TerBeek, *Response to Garnett, Sachs, and Green on Originalism's Intellectual History*, FAC. LOUNGE (May 28, 2017, 4:07 PM), https://www.thefacultylounge.org/2017/05/response-to-garnett-sachs-and-green.html [https://perma.cc/B6BD-HTD9] ("After years of being buffeted by academic historians, the linguistic turn was developed by Solum in order to avoid these critiques . . . .").

123. Kesavan & Paulsen, *supra* note 3, at 1132.

B. Originalism as Bad (Corpus) Linguistics: "Context Matters!"

Language-based criticisms of originalism are not quite as plentiful as their historically informed counterparts, but they have been multiplying rapidly with the rise of legal corpus linguistics. Like the arguments from history, linguistic critiques emphasize the indeterminacy of the Reader, but their connection to the Reader may be less immediately apparent. Essentially, linguistic critiques argue that dictionaries are used and corpora are structured so as to preclude knowledge of crucial contextual details without which language analysis is inadequate, if not outright misleading.[124] This type of missing context leads critics to say that legal corpus linguistics offers a false sense of security regarding the representativeness of the original public meanings it claims to unearth.

Examples of the argument from linguistics are not hard to find. Professor Kevin Tobia, for example, emphasizes the context in which speech occurs when he notes that "ordinary meaning sometimes diverges from ordinary use: people's understanding of language is not always reflected in recorded speech and writing, especially their understanding concerning nonprototypical category membership."[125] His objections convey the sense, common among linguistic critics, that even *ideally conducted* corpus analysis cannot credibly identify original public meaning because corpora by themselves cannot adequately account for context. Meanwhile, Professors Stefan Gries and Brian Slocum, who are more ambivalent about legal corpus linguistics, nonetheless state that "[a]ny theory of interpretation should recognize that the linguistic meaning of a legal text is not limited to the semantic meaning of its language but rather includes the pragmatic processes necessary to identify the meaning of the legislative utterances."[126] They go on to say that, at least in the statutory context, "corpus analysis that cannot account for the full context . . . cannot by itself provide

124. *See* Bernstein, *supra* note 16, at 1414–15 (arguing that corpora "are sometimes a bit cavalier" in contextualizing the data that they contain and that many contain material that is "planned, edited, and broadcast . . . for particular purposes . . . [or] focus[es] on a few specific, predetermined topics"); BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 215 (2015) (noting the inherent problems in "adopting a dictionary definition without properly considering the contribution that context makes to meaning").

125. Tobia, *supra* note 16, at 805.

126. Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1425.

conclusive meanings to legal texts."[127] Other critics have also noted the importance of context and speaker in arguing against originalism.[128]

Linguistically minded critics also speculate as to *why* originalists engage in faulty language analysis and their explanations largely track historians' views with respect to faulty historical analysis. Linguistic critics appeal to the personal capacity thesis when they argue that practitioners of legal corpus analysis tend to misinterpret their own results out of a lack of familiarity with existing scholarship and methods.[129] They note, for example, that corpus originalists tend to assume or strongly imply that a word's original meaning is likely its *prototypical* meaning which, in turn, is often presumed to be the word's *most common* meaning.[130] Consequently, corpus originalists view the number of times a word appears in a corpus ("frequency" analysis[131]) or alongside another word in the corpus ("collocation" analysis[132]) as indicative of the word's original meaning. But in linguistics scholarship, "frequency has been shown to be not as good a measure of 'commonness' . . . as [advocates of legal corpus linguistics] presuppose" and linguistics scholarship has also demonstrated that "collocate analysis . . . is fairly useless."[133] Furthermore, "[a] better approach to

127. Gries & Slocum, *supra* note 126, at 1470. For similar arguments that also limit themselves to the use of corpus analysis in statutory interpretation, see generally Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401 (2019) (analyzing how corpus linguistics is used for statutory interpretation) and Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979 (2017) (stating that the type of context is important for statutory interpretation).

128. *See, e.g.*, Neil H. Buchanan and Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 625–30 (2021) (drawing on Stanley Fish's deconstructionist work in literary theory to explain why originalism and textualism "are highly dubious"). Interestingly, although Fish's work on "interpretive communities" seemingly provides a ready-made structure for critiquing originalism, it is not often cited by linguistic critics. *See generally, e.g.*, Bernstein, *supra* note 16; Bernstein & Staszewski, *supra* note 38; Tobia, *supra* note 16.

129. *See infra* note 133.

130. *See infra* notes 131–34.

131. Bernstein, *supra* note 16, at 1406–08; Tobia, *supra* note 16, at 791 (discussing frequency analysis).

132. Bernstein, *supra* note 16, at 1407–11; Tobia, *supra* note 16, at 746–47 (discussing collocation).

133. Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 94 S. CAL. L. REV. POSTSCRIPT 13, 25, 29 (2020). Gries and Slocum observe that "[a]ll that collocates do is reveal general semantic relatedness"—not, as legal corpus linguists intend, the prototypical meaning of a word. *Id.* at 29. Words that are rarely associated with a target term and must therefore be specifically mentioned in order to indicate a nonprototypical usage will tend to have a high collocation frequency—for instance, *electric* with *vehicle*, because the prototypical meaning of *vehicle* is "a four-wheeled car with an internal combustion engine." *Id.* At the same time, some

prototypicality"—one that is admittedly "quantitatively more demanding"—"has existed for quite some time."[134] Beyond this unfamiliarity with theory and scholarship, linguistically minded critics note that "[j]udges and lawyers do not currently receive . . . training" on "methods specifically designed to identify and describe the meaning of expressions and how to experimentally and statistically counter cognitive biases."[135]

In a twist on the personal intent thesis, linguistic critics argue that originalists are so blinded by their fetishization of objectivity that they do not see their own involvement in producing the outcomes they want.[136] That involvement comes in many forms and at several stages in the analytic process: when determining which word or word bundle should be the object of interpretation,[137] when determining which method of interpretation to use (such as dictionaries versus corpus linguistics[138]), and when determining the optimal source (*which* dictionary, *which* corpus[139]). In other words, according to most linguistically minded critics, it is not merely that originalists

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words that are highly associated with the target term may also have a high collocation frequency simply because of contextual usage patterns—for instance, *motor* with *vehicle*, because (as Gries and Slocum put it) "one apparently often talks about motors when talking about vehicles even though having a motor is the (overridable) default of vehicles." *Id.* Conversely, other words that are highly associated may have low collocation frequency with the target term because of inverse usage patterns—*tire* and *wheel/steering wheel* do not appear in the top fifty collocates for *vehicle*. And finally, contrasting or antonymic words may have high collocation frequencies with target terms: Gries and Slocum note that "even the most advanced approaches to collocation . . . return *meat* as one of the words most similar distributionally to *vegetarian*." *Id.*

134. Slocum & Gries, *supra* note 133, at 28.

135. Gries & Slocum, *supra* note 126, at 1470.

136. *See, e.g.*, Bernstein, *supra* note 16, at 1418–20 (discussing the unacknowledged shift "from word ('time') to lexical bundle ('full time')" in an amicus brief filed in *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019)). And yet, it is not precisely that corpus originalists are unaware of their role in constructing and interpreting data—it is that they believe that role to be less problematic than with earlier methods of originalist analysis. *See, e.g.*, Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. REV. 156, 203–04 (2011) (acknowledging that "[t]here are human beings at both ends of the corpus" but adding that "a corpus analysis brings these subconscious assumptions about language and meaning out in the open" and thus may be less "vulnerable to context effects").

137. Bernstein, *supra* note 16, at 1418–20. *See* Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 569 (2017) (arguing that "judicial opinions select text to interpret and . . . situate that text within contexts they create" and that "these two conceptual moments—selecting and situating—are the constitutive forces of interpretation").

138. *See generally* Tobia, *supra* note 16 (using an experimental study to identify differences resulting from the choice between dictionaries and corpus analysis).

139. Zoldan, *supra* note 127, at 419.

intentionally engage in partial or prejudiced analysis. It is that they are so hungry for objectivity that they mislead themselves into believing they have achieved it.[140]

Finally, critics of new corpus-based approaches to originalism are deeply cognizant of the structural capacity constraints that exist for this approach, in addition to any skills limitations that may apply to individual analysts. Corpus analysis is often promoted as being easier and quicker than other ways of identifying original meaning.[141] At the same time, there is some mixed messaging regarding the time and labor it truly demands.[142] On the one hand, corpus advocates contend that the method "makes modest and simple demands of a jurist, requiring an effort and expertise similar to that required by other search engines."[143] Yet proponents also concede that legal "corpus linguistics is not 'plug and play' analysis"[144] and caution against simply searching for terms online to deduce aspects of their meaning, as Judge Posner did in *United States v. Costello*.[145] Consequently, corpus advocates

140. Bernstein's exact phrasing more carefully walks the line between attributing intentional action and assuming unintentional action than I have done here. She argues that while originalists claim to be *figuring out* what the law means, they are actually *deciding* what the law *should* mean. Whether or not they *intend* to say one thing while doing another remains an open question. Personal Communication from Anya Bernstein to author (Dec. 15, 2022) (on file with author).

141. For assertions that corpus analysis is easy, see, for example, Mouritsen, *supra* note 136, at 204; Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 15, at 868; Lee & Phillips, *supra* note 15, at 332.

142. For acknowledgements that corpus analysis can be technically demanding, see Lee & Mouritsen, *The Corpus and the Critics*, *supra* note 15, at 345 ("Our contention is not that corpus linguistics will provide push-button answers . . . ."); Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 15, at 866 ("[C]orpus linguistics is not 'plug and play' analysis."); Lee & Phillips, *supra* note 15, at 331–32 ("[I]t may be unrealistic to expect [judges] to acquire the expertise and proficiency needed . . . .").

143. Case Note, *Statutory Interpretation — Interpretive Tools — Utah Supreme Court Debates Judicial Use of Corpus Linguistics* — State v. Rasabout*, 356 P.3d 1258 (Utah 2015)*, 129 HARV. L. REV. 1468, 1474 (2016).

144. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 15, at 866.

145. United States v. Costello, 666 F.3d 1040 (7th Cir. 2012). Costello involved a U.S. citizen who was accused, in pertinent part, of "harboring" an alien (her boyfriend) who was known to be in the United States illegally, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). *Id.* at 1044. In the course of considering whether the defendant had "harbored" an illegal alien by allowing her boyfriend to live with her, Judge Posner conducted a Google search of various terms that included the word harboring, ranging from "harboring a fugitive" to "harboring victims" to "harboring guests." *Id.* at 1044–45. In part relying on those search results, Judge Posner argued that "'harboring' as the word is actually used has a connotation—which 'sheltering,' and a fortiori 'giving a person a place to stay' does not—of deliberately safeguarding members of a specified group from the authorities." *Id.* at 1045. The Seventh Circuit ultimately reversed the lower court's ruling against the defendant, concluding that "[o]ur rejection of equating harboring to providing a place to stay compels the acquittal of the defendant." *Id.* at 1050.

recommend the careful construction of search terms (at a time when there are no defined best practices[146]), the performance of "lemmatized searches"[147] designed to capture all forms of a given word, as well as the manual review of potentially thousands of lines of outputs in order to parse usage, competing meanings, and semantic range.[148] Perhaps not surprisingly, they have at least occasionally declared that their method should be "something of a last resort."[149] Even less surprisingly, linguistically minded critics have been alert to these structural capacity challenges.[150]

It is indisputable that legal corpus linguistics determines original meaning by evaluating language without regard to speech or speaker context. Linguistic explanations of corpus-based originalism's shortcomings fairly identify capacity constraints that corpus advocates themselves sometimes recognize. However, linguistic critics also recognize an objectivity fetish[151] that corpus advocates understandably cannot see. But as with the argument from history, the linguistics critique suffers from two serious flaws. First, once again, by emphasizing methodology, this approach criticizes the "how" of originalism instead of the "why." Linguistically informed criticisms of corpus analysis have yet to give way to a wholly new method of identifying original public meaning in the way that history-based criticisms gave way to corpus analysis. Nevertheless, their most obvious effect thus far has been—as corpus advocates themselves state—to "help refine the methodology[,] . . . situate it more carefully within existing theories and practices of interpretation, and either refute or credit the major critiques that have been identified."[152]

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146. *See* Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 15, at 868.

147. *Id.* at 831.

148. Mouritsen, *supra* note 136, at 203.

149. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 15, at 872 (quoting United States v. Rasabout, 356 P.3d 1258, 1286 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment)).

150. Bernstein, *supra* note 16, at 1448 (noting that "[a]cademic papers in corpus linguistics routinely spend most of their time explaining, justifying, and hedging about methodological and interpretive choices"); *see* Gries & Slocum, *supra* note 126, at 1471 ("Just as legal practitioners defer to expert witnesses when it comes to such things as fingerprinting and analyzing genetic information, legal practitioners could similarly defer to experts who can testify about language meaning.").

151. IAN BUCHANAN, *Commodity Fetishism*, *in* A DICTIONARY OF CRITICAL THEORY (2d ed. 2018), *reprinted in* OXFORD REFERENCE (2023) (tracing the concept of the fetish to "anthropology, where it refers to a sacred or symbolic object that according to its worshippers has supernatural power").

152. Lee & Mouritsen, *The Corpus and the Critics*, *supra* note 15, at 279.

More problematically, however, the argument from linguistics misunderstands what originalists are trying to do. This confusion is even more understandable than the similar confusion reflected in historical critiques because, at this time, corpus originalists *themselves* seem to misunderstand what they are able to do. Essentially, it cannot be that corpus originalists believe they are unearthing the original public meaning of constitutional terms. (Let's set aside for now whether they can believe similar things about the ordinary meaning of statutory terms—although at least one critic has argued that corpus analysis is *more* problematic in the statutory law context.[153]) If we grant that "[l]awyers are crafty, ingenious creatures"[154] capable of mastering "new tools, technologies, and methodologies,"[155] then corpus originalists cannot sincerely think that frequency searches using untested parameters applied to corpora of speech acts by unspecified and likely unrepresentative speakers without vetted post hoc review of the results tells us anything worth knowing about original public meaning. After all, the proponents of legal corpus linguistics are at least as intelligent as the lawyers and judges they task with implementing their methods.

But, once again, this does not matter. Instead of trying to understand what a particular word means in a *linguistic* sense—a sense in which the word must always be understood in context, incorporating insights about its author and its communicative circumstances—corpus originalists are trying to grasp at something broader. Surprisingly, some of originalism's linguistically oriented critics seem to appreciate this: Professors Gries and Slocum write that, rather than "the general meaning of a word (or even a sentence)," what courts really seek is "something broader and more along the lines of what a reasonable person would take the author to be conveying by the chosen language in the given communicative context."[156] Rather than trying to shoehorn this goal into a type of inquiry that is not-quite-history and not-quite-linguistics, both originalists and their critics would do well to acknowledge what public meaning originalism is *really* after: the intentionally and inescapably holistic goal of cultural translation.

153. *See* Zoldan, *supra* note 127, at 406.

154. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 15, at 872.

155. *Id*.

156. Gries & Slocum, *supra* note 126, at 1426.

C. A New Disciplinary Analogue

Methodological arguments from history and linguistics have provided important critiques of public meaning originalism. The argument from history has emphasized cherry-picking, while the argument from linguistics has focused on the decontextualized nature of originalist analysis. Both critiques are valid from their respective disciplinary perspectives. It would be unacceptable (and quite simply *difficult*) to study history or language as originalists have done.

But methodological critiques simply invite methodological refinements without ever seriously troubling the foundational premise of originalist analysis—they merely contribute to the process of originalism "working itself pure."[157] The argument from history was largely answered by the rise of legal corpus linguistics. There is little reason to think that the argument from linguistics will achieve anything except further technical adjustments or a new phase in originalist analysis that is informed by yet another cognate discipline. Additionally, methodological criticisms suffer the disadvantage of criticizing originalists for something they do not even think they are trying to do. This problem is readily apparent with respect to historically informed critiques because originalists have consistently maintained that they are not interested in determining the thoughts, words, reading material, or other biographical details of identifiable human beings. The Reader, they argue, is a much more generalized figure. The mismatch is admittedly harder to see in the case of linguistic critiques because, at this time, corpus originalists *do* often present themselves as interpreting discrete, contextually defined speech acts. But as this Article and many others have shown, that view is simply not supportable—even if corpus originalists mistakenly think otherwise.

What neither originalists nor their critics appear to have realized is that a better disciplinary analogue exists. Originalism is premised on the idea that courts should identify worldviews from another time-place and then use those insights to inform decision-making today.

157. The frequency with which originalists themselves acknowledge this is striking, even though it has not yet led critics of originalism away from their focus on methodological critique. *See, e.g.*, Lee & Mouritsen, *The Corpus and the Critics*, *supra* note 15, at 279 ("[T]he opportunity to respond to our critics will help refine the methodology that we advocate . . . ."). For a description of originalism as a theory that is "working itself pure," see Will Baude & Eric Posner, *Originalism: A Debate*, UNIV. OF CHI. L. SCH., (July 15, 2015), https://www.law.uchicago.edu/news/originalism-debate [https://perma.cc/82F9-PJ66] (stating that "while originalism is 'working itself pure,' it seems like one of the most viable competitors in current constitutional theory") and Kesavan & Paulsen, *supra* note 3, at 1114.

Originalist analysis is thus better thought of as applied cultural translation in the mode of anthropology than as a species of history or linguistics. Importantly, originalists' focus on *specific* words in *legal* texts does not change the overall nature of their inquiry because, as Professors Gries and Slocum have observed, originalists are interested in "something broader . . . along the lines of what a reasonable person would take the author to be conveying."[158] That "something broader" is the kind of holistic cultural translation that lies at the heart of anthropological analysis.

Previous scholarship has analogized constitutional interpretation to translation[159] and even, on occasion, to anthropology.[160] But the object of translation has never been accurately identified, and the idea of translation was wrongly extended to all schools of constitutional interpretation[161] when it specially—if not exclusively—applies to originalism. This Article is the first to identify the object of such translational efforts as *culture*, and to argue that originalism is peculiarly committed to *applied cultural translation*. It is also the first to draw on anthropology's disciplinary history to show the problems with pressing cultural translation, even when it is methodologically sound, into the service of state power through use of originalism.

III. ANTHROPOLOGY AND THE REASONABLE MAN

Anthropology is a relatively young discipline: it emerged in Europe in the mid–nineteenth century and had no dedicated university department in the United States until 1902.[162] In part because of this newness, anthropological analysis is likely to be less familiar to legal scholars than the perspectives of other, more established fields like

158. *See supra* note 156 and accompanying text.

159. *See supra* note 28 and accompanying text.

160. Saul Cornell, "*To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 FORDHAM L. REV. 915, 916 (2015) (advocating "a form of historically grounded 'constitutional ethnography'"); Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES GESTAE 1, 8 (2015) (arguing that, in contrast to originalists (who favor "thin description"), "most historians, ethnographers, and anthropologists prefer approaches to context that favor thick description"); *see also* LAWRENCE LESSIG, FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE CONSTITUTION 5 (2019) (asking readers to not "approach this story from the Left or the Right; approach it as an enlightened anthropologist would").

161. *See supra* note 28 and accompanying text.

162. *Beginnings: The Boasian Legacy at Columbia*, COLUM. UNIV. DEP'T OF ANTHROPOLOGY, https://anthropology.columbia.edu/content/beginnings-boasian-legacy-columbia [https://perma.cc/6FUX-DSKA].

history and economics.[163] At the same time, anthropology and law have had an undeniable tradition of cross-pollination. Many proto-anthropologists of the nineteenth century were interested—or actually trained—in law, including Henry Maine, Johann Jakob Bachofen, John McLellan, and Lewis Henry Morgan.[164] Indeed, Professors John Conley and William O'Barr, both anthropologists of law (and one a trained lawyer) contend that "[n]o discipline had a greater influence on the birth and growth of anthropology than law."[165]

Anthropology's influence on law has been admittedly smaller and mostly unknown to contemporary legal scholars,[166] but it has nevertheless emerged at key moments. For instance, at the height of the legal realist movement, Karl Llewellyn and E.A. Hoebel published *The Cheyenne Way*,[167] a hallmark in legal anthropology thanks to its

163. Consider the following sampling of history and economics departments and their dates of establishment: JOHN H. SELKREG, LANDMARKS OF TOMPKINS COUNTY, NEW YORK 424–25 (1894) (noting that "political science and history" was one of several original and "special[ized]" departments established at Cornell University's 1868 founding); *Timeline – 1848 Studying History*, UNIV. OF WIS. DEP'T OF HIST., https://history.wisc.edu/department-information/the-history-of-the-history-department/timeline-1848-studying-history [https://perma.cc/994T-RPN3] (noting that Wisconsin appointed a "professor of history" in 1866–67); Zorina Khan, *Who Was the First U.S. Economics Professor? Samuel Newman, of Bowdoin College*, BOWDOIN COLL. (Sept. 17, 2022), https://research.bowdoin.edu/zorina-khan/life-on-the-margin/who-was-the-first-economics-professor [https://perma.cc/H5BB-TV4K] (asserting that the first professorship of economics in the United States was established at Bowdoin in 1824); *History*, HARV. UNIV. DEP'T OF ECON., https://economics.harvard.edu/history [https://perma.cc/LG7V-3JKB] (noting that "economics was studied as political economy in the 1800s," that "Professor Charles Franklin Dunbar received Harvard's first endowed professorship in political economy" in 1871, and that "Dunbar established the Quarterly Journal of Economics in 1886, which was the first scholarly journal of economics in the English-speaking world").

164. MARK GOODALE, ANTHROPOLOGY AND LAW: A CRITICAL INTRODUCTION 9–11 (2017) (discussing these four scholars as "proto-anthropologists"); *see also* Laura Nader, *The Anthropological Study of Law*, 67 AM. ANTHROPOLOGIST 3, 3 (1965) (naming the same four and adding Robert Redfield).

165. John M. Conley & William M. O'Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41, 42 (1993).

166. Deepa Das Acevedo, *What's Law Got To Do with It? Anthropological Engagement with Legal Scholarship*, 48 LAW & SOC. INQUIRY 1, 3–5 (2023) [hereinafter Das Acevedo, *What's Law Got To Do with It?*]; Conley & O'Barr, *supra* note 165, at 44 ("[E]arly anthropology has exerted little influence on legal scholarship."); John Comaroff, *"Does Anthropology Matter to Law?": Reflections, Inflections, Deflections*, 2 J. LEGAL ANTHROPOLOGY 72, 72 (2018) ("[A]nthropology, broadly conceived, has comparatively little impact on the core of *any* of the other social sciences, law demonstrably among them."); Lawrence Rosen, *Reconciling Anthropology and Law*, 2 J. LEGAL ANTHROPOLOGY 105, 105–06 (2018) ("[L]awyers are . . . troubled by either anthropology's relativistic urge or its inability to speak to the ultimate questions of the law (e.g. guilt or innocence, liability or no liability).").

167. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

novel use of the case method in a context without formal law or courts. Few legal scholars have read *The Cheyenne Way*, but many will have read, analyzed, and debated something that Llewellyn drafted while preparing the book and thinking through its emphasis on "law in action": Article 2 of the Uniform Commercial Code.[168] One commentator has argued that the Cheyenne people, and "what Llewellyn perceived to be their way of life, are arguably more crucial in the genesis of modern sales law than are the . . . legal realists" with whom Llewellyn is more widely associated.[169] Another commentator declares that, "by shaping Karl Llewellyn's approach to the drafting of the Uniform Commercial Code, the Cheyenne research exerted more influence on the content of American law than almost any other social science research project."[170]

Anthropology arguably exerted even more influence on law via its role in the transformation of American conceptions of race. Between World War I and II, anthropology—particularly the anthropologist Franz Boas—"cast doubt on the utility of 'race' as a scientific concept."[171] At a time when the academy and society viewed racial identity as biological and racial hierarchy as inescapable, Boas "directed the anthropology of race away from theories of evolution and guided it to a consensus that African Americans, Native Americans, and other people of color were not racially inferior and possessed unique and historically specific cultures."[172] Boas's work achieved signal legal salience because of his relationship with W.E.B. Du Bois and, through Du Bois, his connection to an entire network of scholars,

168. David R. Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 BUFF. L. REV. 1457, 1459 (1999).

169. *Id.*

170. John M. Conley & William M. O'Barr, Review, *A Classic in Spite of Itself: "The Cheyenne Way" and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179, 180–81 (2004).

171. JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 41 (2001); *see also* Gili Kliger, *The Critical Bite of Cultural Relativism*, BOS. REV. (Oct. 10, 2019) (reviewing CHARLES KING, GODS OF THE UPPER AIR: HOW A CIRCLE OF RENEGADE ANTHROPOLOGISTS REINVENTED RACE, SEX, AND GENDER IN THE TWENTIETH CENTURY (2019)), https://www.bostonreview.net/articles/gili-kliger-be-not-afraid-find-them-wanting [https://perma.cc/X5MQ-L4HT] (Boas "challenged prevailing conceptions of racial and social hierarchy" by arguing that "differences observed across human groups—from the physical to the cognitive and social—were often the result of their distinctive cultural environments, rather than inherited biological traits").

172. Lee D. Baker, *Columbia University's Franz Boas: He Led the Undoing of Scientific Racism*, 1998–1999 J. BLACKS HIGHER EDUC. 89, 94.

activists, and lawyers working to advance civil rights.[173] Via this indirect—but indisputable—path, Boas's anthropological understanding of race as a cultural construct influenced the social science foundation of arguments in *Brown v. Board of Education*.[174]

For all these reasons, anthropology and law are not strangers to one another, even if they have grown apart in recent decades. Nor is it surprising that anthropologists are particularly well suited to understanding what originalists are after, given law's early influence on anthropology. Despite differences in their objects of study and analytic methods, anthropology and originalism share a fundamental interest in the goal of cultural translation. This Part introduces anthropology as the study of culture, traces the importance of the Reasonable Man in anthropological studies of law, and compares the goals and methods of anthropology with those of originalism to show their shared focus on the task of cultural translation.

A. Anthropology as Cultural Translation

"Anthropology," in the words of one of its most famous exponents, "is a science whose progress is marked less by a perfection of consensus than by a refinement of debate."[175] Unsurprisingly, then, none of what follows is universally accepted by anthropologists themselves—but none of it is likely to be deemed wholly inaccurate by them, either. As it is generally practiced today, anthropology is characterized by a shared object of study, a foundational premise, a research method, and an analytic purpose.[176]

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173. *Id.* at 94–95.

174. Brown v. Bd. of Educ., 347 U.S. 483 (1954); LEE D. BAKER, FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE, 1896–1954, at 5–6 (1998) ("[M]embers of the New Negro Movement used Boasian ideas about culture to promote cultural achievement and . . . members of the NAACP Legal Defense and Education Fund (LDEF) used Boasian theories on race to underpin arguments for school desegregation that culminated with *Brown*.").

175. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 29 (1973).

176. In phrasing matters this way, I am quite obviously leaving archaeologists and physical or biological anthropologists—who, in North America, are included among the four fields of anthropology—out of the conversation. Nevertheless, analogizing to sociocultural anthropology best provides the kind of fruitful insights about originalism with which this Article is concerned. Moreover, sociocultural anthropology's dominance is widely acknowledged. See, for example, the hiring trends described in Robert J. Speakman, Carla S. Hadden, Matthew H. Colvin, Justin Cramb, K.C. Jones, Travis W. Jones, Isabelle Lulewicz, Katharine G. Napora, Katherine L. Reinberger, Brandon T. Ritchison, Alexandra R. Edwards & Victor D. Thompson, *Market Share and Recent Hiring Trends in Anthropology Faculty Positions*, 13 PLoS ONE 1, 13 (2018)

1. *The Study of Culture.* "Culture" is both the most frequently used and frequently contested term in anthropology.[177] It is simultaneously the discipline's raison d'être—much like fish are to ichthyology or rocks to geology—and its bête noire, given the difficulty of defining what culture means. Anthropology's internal critics, for instance, have pointed out that "if you postulate Culture as a major cause of human phenomena, you create an epistemological problem" because "Culture is human phenomena; human phenomena, generalized, are Culture."[178] Nevertheless, conceptual tangles like this have not prevented anthropologists from identifying culture as their object of study or from trying to articulate its meaning. At their most poetic, they have defined culture as the "webs of significance"[179] that human beings both spin and are suspended in; more prosaically, they have described culture as "a way of seeing things, a way of thinking[,] . . . a way of making sense."[180] Most importantly, however, anthropologists do not consider culture to be a static, unitary, universally shared "thing." It is, rather, that which makes argumentation possible.

2. *Cultural Plurality.* If culture is anthropology's object of study, cultural *plurality*—the idea that there are many ways of being human—is its foundational premise. Importantly, this is a descriptive assertion rather than a normative one. Anthropologists are not arguing that all ways of being human are equally meritorious so much as stating, based on observation, that the human experience *is* inherently plural.[181] Whether it emerges from the armchair "anthropology" of Michel de Montaigne[182] or the Papuan beachside observations of Bronislaw Malinowski,[183] the idea that the human experience is inherently plural

(comparing academic hiring patterns for Ph.D. anthropology graduates in "Archeology," "Biological [Anthropology]," and "Sociocultural [Anthropology]" between 1985 and 2014).

177. ENGELKE, *supra* note 21, at 28.

178. John W. Bennett, *Classic Anthropology*, 100 AM. ANTHROPOLOGIST 951, 952 (1998) (emphasis omitted).

179. GEERTZ, *supra* note 175, at 5.

180. ENGELKE, *supra* note 21, at 27.

181. Clifford Geertz, *Distinguished Lecture: Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 264 (1984).

182. *See generally* Norris Brock Johnson, *Cannibals and Culture: The Anthropology of Michel De Montaigne*, 18 DIALECTICAL ANTHROPOLOGY 153 (1993) (discussing Montaigne's importance to anthropology because of his contributions to the development of cultural relativism in European thought).

183. *See generally* BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF

comes from somebody's having seen someone else do, say, or think things differently. As a result, anthropologists argue that human divergence on a wide and potentially infinite range of issues—what counts as food (crickets or fattened goose livers[184]), who represents an ideal mate (your father's sister's son or a blood stranger[185]), and whether peccaries, a kind of pig, are people[186]—all of this variation is the product of cultural difference rather than ontological necessity.

3. *Cultivated Attentiveness.* The foundational assertion that there are multiple ways to be human leads quite naturally to a defining analytic method: cultivated attentiveness.[187] An anthropologist is committed to and "is capable of *attending* to things that her interlocutors might attend to differently (ignore, naturalize, fetishize, valorize, take for granted, etc.)."[188] This kind of anthropological attentiveness depends on a profound, continuous, and self-conscious commitment to remembering that there are multiple ways of doing things, and that neither "common sense" nor "informed understanding" are universal. That is why attentiveness *can* be cultivated in the first place, why there are different *ways* of being attentive, and why some people are better than others at cultivating certain kinds of attentiveness.[189] Not for nothing is anthropology

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MELANESIAN NEW GUINEA (1922) (chronicling Malinowski's seminal ethnographic study of the Trobriand people).

184. ENGELKE, *supra* note 21, at 25–27.

185. Melford E. Spiro, *Causes, Functions, and Cross-Cousin Marriage: An Essay in Anthropological Explanation*, 94 J. ROYAL. ANTHROPOLOGICAL INST. GR. BRIT. & N. IR. 30, 30 (1964) (using cross-cousin marriage to discuss contrasting approaches to the study of social structure and compliance with social norms).

186. Viveiros de Castro, *supra* note 24, at 492 (noting that "[i]n American ethnography one often comes across the idea that, for Amerindians, animals are human" and using the specific example of peccaries after the author's graduate student "asked me whether I believed that the peccaries are humans, like the Amerindians say they are").

187. Kaushik Sunder Rajan wrote of this method that:

> the fundamental problem of fieldwork is not technical . . . how to interview or transcribe or code, how to do surveys, how to do participant observation, how to get access, what questions to ask and so on . . . . Instead, the fundamental problem of fieldwork involves the cultivation of attentiveness. . . . What makes good ethnography work . . . is the fact that the ethnographer is capable of attending to things that her interlocutors might attend to differently . . . .

Kaushik Sunder Rajan, *ANTH 42000: Anthropological Fieldwork Methods* 1 (2015) (emphasis omitted) (on file with author).

188. *Id.*

189. *Id.*; *see also* Clifford Geertz, *On the Nature of Anthropological Understanding*, 63 AM. SCI. 47, 53 (1975) ("[A]ccounts of other peoples' subjectivities can be built up without recourse to pretensions to more-than-normal capacities for ego-effacement and fellow-feeling.").

frequently considered the most humanistic of the social sciences: like a good novelist, anthropologists are constantly on the lookout for the quirky material of everyday life that seems unremarkable to those who experience it and fascinating to those who read about it.[190]

Admittedly, both anthropologists and non-anthropologists often suggest that *ethnographic fieldwork* is the discipline's hallmark research method.[191] And indeed, ethnography—the feet-on-the-ground, professionalized "hanging out" more formally known as "participant-observation"[192]—is what gives anthropology its slightly exotic (and quixotic) reputation. It is also central to the professionalization processes within contemporary academic anthropology that require initiates to undergo long periods of dedicated fieldwork.[193] But ethnography is not unique to anthropology: it is also practiced by qualitative sociologists and, to varying degrees, by social historians, political scientists, and academics from a host of other disciplines.[194] And conversely, anthropological analysis is not dependent on time spent among strangers in far-off places.[195] Indeed,

190. Anthropology is often described as "the most scientific of the humanities, the most humanist of the sciences." This phrase is often attributed to Eric Wolf, but Wolf himself quoted it without attribution. ERIC WOLF, ANTHROPOLOGY 88 (1964).

191. *See, e.g.*, ENGELKE, *supra* note 21, at 14.

192. For a fairly conventional definition of the relationship between ethnography and participant-observation, see ROBERT L. WELSCH & LUIS A. VIVANCO, CULTURAL ANTHROPOLOGY: ASKING QUESTIONS ABOUT HUMANITY 63 (2018) (defining participant-observation as "[t]he standard research method used by cultural anthropologists that requires the researcher to live in the community he or she is studying to observe and participate in day-to-day activities"—and calling it "a systematic research strategy that is, in some respects, a matter of just hanging out"). Even vociferous critics of the anthropology-ethnography-participant-observation nexus are likely to admit that "participant observation is key to the practice of anthropology" even if they also insist that "participant observation and ethnography are not the same." Tim Ingold, *Anthropology Contra Ethnography*, HAU: J. ETHNOGRAPHIC THEORY, Spring 2017, at 21, 23 [hereinafter Ingold, *Anthropology Contra Ethnography*]. Tim Ingold, for instance, elaborates that "[t]he very idea of 'ethnographic fieldwork' perpetuates the notion that what you are doing in the field is gathering material on people and their lives" while "observation is a way of participating attentively" and "is not a technique of data gathering but an ontological commitment." *Id.*

193. Das Acevedo, *What's Law Got To Do with It?*, *supra* note 166, at 10.

194. Magdalena Kazubowski-Houston & Virginie Magnat, *Introduction to Special Issue: The Transdisciplinary Travels of Ethnography*, 18 CULTURAL STUD. ↔ CRITICAL METHODOLOGIES 379, 381 (2018) (describing and discussing the "'ethnographic turn' in the humanities and social sciences, especially in the fields of cultural, communication, and performance studies, but also in sociology, education, health studies, business, social work, the study of sport and physical culture, and theology, among others").

195. Tim Ingold has written extensively and insightfully on the need to disaggregate ethnography from anthropology. *See, e.g.*, Ingold, *Anthropology Contra Ethnography*, *supra* note 192, at 21 (arguing against the characterization of ethnography "as the be-all and end-all of the

the fieldwork that anthropologists perform may not always mirror traditional ethnographic activities like face-to-face conversations, participation in protests, and "walk-alongs"[196] in which the researcher accompanies an interlocutor who is going about their daily activities. Indeed, some anthropologists who study online cultures spend the vast majority of their time sitting in front of a computer.[197] Others blend the traditional "participant-observation" of ethnography with documentary analysis.[198] For all these reasons, I argue that cultivated attentiveness, not ethnography, is anthropology's true defining method.[199]

4. *Cultural Translation.* *Why* do anthropologists cultivate attentiveness toward the multiplicity of human experience? In other words, what is the animating impulse behind anthropological study? It is, as the introduction stated, *cultural translation*: the process of translating concepts developed according to one worldview to make them intelligible to individuals operating from within another worldview.[200] Most of the phrases with which anthropologists explain

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discipline of anthropology"); *see also* Tim Ingold, *That's Enough About Ethnography!*, HAU: J. ETHNOGRAPHIC THEORY, Summer 2014, at 383, 384 [hereinafter Ingold, *That's Enough About Ethnography!*] (arguing that it "narrow[s] ethnography down so that to those who ask . . . what it means, we can respond with precision and conviction"). For a critique of the perceived requirement that anthropologists work among strangers, see Kirin Narayan, *How Native Is the "Native" Anthropologist?*, 95 AM. ANTHROPOLOGIST 671, 671 (1993) (arguing "against the fixity of a distinction between 'native' and 'non-native' anthropologists").

196. Jo Lee & Tim Ingold, *Fieldwork on Foot: Perceiving, Routing, Socializing*, *in* LOCATING THE FIELD: SPACE, PLACE AND CONTEXT IN ANTHROPOLOGY 67, 67 (Simon Coleman & Peter Collins eds., 2006) (discussing "walk[ing] *with*" as a key ethnographic practice).

197. *See* E. GABRIELLA COLEMAN, CODING FREEDOM: THE ETHICS AND AESTHETICS OF HACKING 4–7 (2013) (describing the challenges faced by the author in conducting fieldwork among hackers and the professional skepticism that greeted her declared intention to do so).

198. *See* Sally Engle Merry, *Ethnography in the Archives*, *in* PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS 128, 137–38 (June Starr & Mark Goodale eds., 2002) (describing an ethnographic approach to archival documents); ANNELISE RILES, THE NETWORK INSIDE OUT 2 (2001) (using "the production of funding proposals, the collection of data, [and] the drafting of documents" among other things, to study "the character and aesthetics of information"); COMAROFF & COMAROFF, *supra* note 23, at 33 (describing their "historical ethnography" as attentive to "the 'textual traces' of the period, traces found in newspapers and official publications as well as in novels, tracts, popular songs, even in drawings and children's games").

199. *But see* Ingold, *That's Enough About Ethnography!*, *supra* note 195, at 389 (calling participant-observation "a practice . . . that calls upon the novice anthropologist to *attend*: to what others are doing or saying and to what is going on around and about; to follow along where others go and to do their bidding, whatever this might entail and wherever it might take you").

200. Even anthropologists who feel that anthropology should not be concerned with cultural translation acknowledge the influence of this view of the discipline. *See, e.g.*, Asad, *The Concept*

themselves to others—"mak[ing] the familiar strange and the strange familiar,"[201] and "making the world safe for differences"[202]—reveal how central translation is to the discipline. And it remains true that anthropologists are invested in making sense of other worlds, or parts of other worlds, for the edification, delight, discomfiture, and occasional improvement of their own. To aid themselves in this process of sense-making, and whether they do so explicitly or implicitly, anthropologists mobilize an interpretive device—the Reasonable Man—in ways that are very reminiscent of public meaning originalism.

B. The "Reasonable Man" in Anthropological Analysis

Ethnographic data gather detailed information about a circumscribed set of topics or persons. An ethnographer may examine court dockets, attend church, join the church choir, volunteer at a county historical society, and participate in afternoon craft circles all in an effort to learn how the members of a close-knit, highly religious community approach dispute resolution.[203] Similarly, an ethnographer interested in mediation programs may observe mediation sessions, observe court proceedings for disputes that do not settle in mediation, analyze program and court records, and interview mediation participants.[204] As these examples suggest, ethnography is time-consuming work that produces extremely granular data points:

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of Cultural Translation in British Social Anthropology, *supra* note 24, at 163 ("[T]he process of 'cultural translation' is inevitably enmeshed in conditions of power—professional, national, international.").

201. *See generally* Robert Myers, *The Familiar Strange and the Strange Familiar in Anthropology and Beyond*, 18 GEN. ANTHROPOLOGY 1 (2011) (offering a brief genealogy of this phrase).

202. This quotation is usually attributed to Ruth Benedict, although Benedict never explicitly ascribed this purpose to *Anthropology*. Ryan Wheeler, *Ruth Benedict and the Purpose of Anthropology*, THE PEABODY INST. OF ARCHAEOLOGY (Jan. 14, 2017), https://peabody.andover.edu/2017/01/14/ruth-benedict-and-the-purpose-of-anthropology [https://perma.cc/E9GK-UA7Z]. Still, the early pages of Benedict's well-known book, *The Chrysanthemum and the Sword*, suggest that this is precisely what she meant to say about anthropologists, or at least about social scientists. RUTH BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE 14–15 (1947) ("Some day no doubt we shall recognize that it is the job of the social scientist to do this for the nations of the contemporary world . . . . Their goal is a world made safe for differences . . . .").

203. CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN 9–12 (1986).

204. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 17–18 (1990).

transcripts of conversations, observation notes, photos, pamphlets, and other paraphernalia collected from the field site.[205]

But despite the granularity of ethnographic data, anthropological insight is pitched broadly. Anthropologists are not "walking tape recorders" who just document and reproduce whatever they encounter during their fieldwork.[206] Simple reproduction would provide no new insight because it involves no interpretation and offers no synthesis. Instead, anthropologists seek patterns of thought, behavior, and relationships that can illuminate and translate what they encounter—this kind of sense-making is the essence of cultural translation. To get from the nitty-gritty of ethnographic fieldwork to the cultural translation motivating anthropology writ large, anthropologists have often relied, explicitly or implicitly, on an interpretive aid known as the "Reasonable Man."[207]

The most explicit and well-known anthropological use of the Reasonable Man comes from the work of Professor Max Gluckman, a twentieth-century South African legal anthropologist.[208] Gluckman studied the Barotse[209] of Northern Rhodesia (now Zambia) while he was an officer of the British government–funded Rhodes-Livingstone

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205. *See* Jean E. Jackson, "*I Am a Fieldnote": Fieldnotes as a Symbol of Professional Identity*, *in* FIELDNOTES: THE MAKINGS OF ANTHROPOLOGY 6–7 (Roger Sanjeck ed., 1990) (discussing the range of materials anthropologists collect and generate during fieldwork).

206. Diana E. Forsythe, *"It's Just a Matter of Common Sense": Ethnography as Invisible Work*, 8 COMPUTER SUPPORTED COOP. WORK 127, 141 (1999) ("[C]onsistent with the view of ethnography as something that anyone can do and of fieldworkers themselves as 'walking tape recorders,' people from science and medicine tend to focus on (quantitative) data analysis while viewing ethnographic data as simply grist for the statistical mill.").

207. Readers should note that Gluckman's approach represents a very old and often critiqued iteration of the discipline, and few anthropologists today would view themselves as implicitly or explicitly drawing on the "Reasonable Man" mode of analysis. For an introduction to some of these critiques, see generally CULTURE AND SOCIETY (Laura Nader ed., 1969). However, my goals in introducing the parallel are to make clear the broader similarity between anthropological and originalist analysis—and, secondarily, to make a normative (and critical) statement about what contemporary anthropology still entails, whether or not its practitioners choose to acknowledge it.

208. JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 101, fig.8.1 (2008) (giving a brief synopsis of Gluckman's life).

209. Social science scholarship uses the names "Barotse" and "Lozi" interchangeably to refer to the same community. *Compare* MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORHTERN RHODESIA 1 (2d ed. 1967) [hereinafter GLUCKMAN, JUDICIAL PROCESS] (using "Lozi"), *with* Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, *in* Law in CULTURE AND SOCIETY 349, 355 (Laura Nader ed., 1969) [hereinafter Gluckman, *Tribal Law*] (using "Barotse"). I will exclusively use Barotse to refer to Gluckman's interlocutors and their legal practices.

Institute.[210] In his most famous monograph, *The Judicial Process Among the Barotse of Northern Rhodesia*, Gluckman devoted an entire chapter to the assertion that his Barotse interlocutors used an interpretive tool that, then as now, would be exceptionally familiar to any student of the common law: the Reasonable Man.[211] Specifically, Gluckman argued that the Barotse used the Reasonable Man in much the same way that English or American common law judges use him—as a means of imagining how an idealized yet stereotypical representative of a dominant culture would (and should) respond under certain circumstances:

> The [Barotse] distinguish between different kinds of evidence . . . and attach different degrees of cogency to these and different degrees of credibility to various witnesses . . . . [T]heir chief weapon in attacking evidence is to catch persons in departures from usages and norms. . . . The norms can be fulfilled in varying degrees, and therefore the judges require a standard by which to assess fulfilment. This standard is 'the reasonable and customary man and what he would have done'.[212]

Gluckman relied on case studies to illustrate Barotse use of the Reasonable Man. For instance, the *Case of the Violent Councillor* focused on a village counselor (*induna*) who had become physically involved in a fight between his children and another villager. The judges hearing the case determined that the counselor "did not behave as a reasonable man would do when arbitrating in a fight" and, far more troublingly, that "his whole behaviour was not that of a reasonable induna."[213] Instead of requiring his children and the villager to sit down and talk so that he and the other villagers could weigh their arguments, the counselor intervened physically. Instead of helping the villager by pulling away his own daughter and two sons (who were reportedly the aggressors), the counselor seized the man by his wrist so forcefully that the wrist became swollen.[214] The counselor's own version of events was implausible because no reasonable man, let alone a reasonable *induna*, would behave as he said he did. Ultimately, the judges chose to only issue a fine, but they "took considerable trouble to bring home to [the

210. DONOVAN, *supra* note 208, at 101, fig.8.1.
211. GLUCKMAN, JUDICIAL PROCESS, *supra* note 209, at 82–162.
212. *Id.* at 82–83.
213. *Id.* at 87.
214. *Id.* at 85–86.

counselor] the enormity of his offence and their disbelief in his innocence[.]"[215]

The "Barotse Reasonable Man" clearly resembles (although it does not quite replicate[216]) the identically named standard used in common law tort, contract, and criminal cases—and, as with the common law standard, it was situational in nature.[217] This made it "'[l]aw'[] in the lawyer's sense": it was part of the conceptual framework used by members of Barotse society to resolve disputes among themselves.[218] To Gluckman, however, the Reasonable Man was more than just a standard that Barotse judges relied on to resolve cases like the *Violent Councillor*. It was also, and perhaps more importantly, a way to *translate* Barotse jurisprudence for his largely Euro-American audience. The Reasonable Man allowed Gluckman to render Barotse thought intelligible to colleagues and students back home, and to convey how his Barotse interlocutors approached dispute resolution in a way that transcended what any one of them said or did. This meant the Reasonable Man also belonged to the "'law' of comparative jurists," or the conceptual framework that scholars like him used to talk across societies.[219] Anthropologists have long differentiated between these two types of conceptual frameworks—between *folk* concepts and *analytic* concepts[220]—but the Reasonable Man, by virtue of its dual status, made the binary especially clear.

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215. *Id.* at 91.

216. Gluckman, *Tribal Law*, *supra* note 209, at 370–71 ("[W]here modern Western law is specialized in defining types of rights and duties, Barotse law is developed in definitions of social positions and types of property. . . . [R]easonableness in modern Western law, therefore, applies to rights and duties; in Barotse law it applies to social positions in relation to property.").

217. Thus, the analytic measure in *Violent Councillor* is more aptly called a "Reasonable *Induna*" rather than the "Reasonable Man." The counselor's positionality determined the appropriate zone of argument.

218. GLUCKMAN, JUDICIAL PROCESS, *supra* note 209, at 91; PAUL BOHANNAN, JUSTICE AND JUDGMENT AMONG THE TIV 5 (Waveland Press 1989) (1957) [hereinafter BOHANNAN, JUSTICE AND JUDGMENT].

219. BOHANNAN, JUSTICE AND JUDGMENT, *supra* note 218, at 5.

220. The distinction between folk (internal, emic) concepts and analytical (external, etic) concepts is an old one in anthropology. *See, e.g.*, PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 549 (1988) ("In what became popular anthropological jargon, the dominant approach was 'etic,' centering on what was particular, concrete, measurable . . . as opposed to 'emic' orientations, attempting holistic understanding . . . ."). One of the most well-known formulations of the distinction comes from the anthropologist Paul Bohannan. BOHANNAN, JUSTICE AND JUDGMENT, *supra* note 218, at 5 ("A folk system is a systematization of ethnographic fact for purposes of action . . . . An analytical system, on the other hand, is a systematization of ethnographic fact (including the folk system) for purposes of analysis."). Later on, Bohannan revised his understanding of a folk system: "a folk

In the years since Gluckman's Barotse research, anthropologists have moved away from explicitly translating between their host communities and their home communities, and they have grown particularly averse to using English terms to translate native concepts or practices.[221] This is largely for the good, inasmuch as it helps minimize the dominance of Euro-American epistemes and avoids the kind of coin-collecting empiricism of earlier anthropology. But the underlying impulse to relate a "them" to an "us" has not disappeared from anthropology because it *cannot*: it is "impossible to describe, let alone analyze, without at least implicit comparison."[222] And even though anthropologists now rarely (if ever) openly use the Reasonable Man as an analytic concept, they continue to engage in exactly the kind of abstraction and interpretation that the Reasonable Man represents. A study of "four different types of nonstate dispute adjudication forums"[223] is not merely a transcript of the cases heard there: it is "an ethnography of Islamic legal expertise"[224] and argues that "the very plurality of forums, each with its own traditions of divorce adjudication, together makes Indian secularism."[225] Similarly, a book critiquing the influence of quantitative "indicators"[226] in international governance and development efforts rests on "six years of . . .

system is what an ethnographer thinks and says that allows him to interact successfully with the people he is studying." Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, *in* LAW IN CULTURE AND SOCIETY 401, 406 (Laura Nader ed., 1969); *see also* Ira Bashkow, *A Neo-Boasian Conception of Cultural Boundaries*, 106 AM. ANTHROPOLOGIST 443, 447 (2004) (discussing folk and analytic concepts in the context of "cultural boundaries"); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM 37, 58–59 (2002) (discussing "the advantages and disadvantages of an analytical concept of law that would be useful for cross-cultural and historical comparisons").

221. This shift is in large part because, by most accounts, Paul Bohannan won the debate over literal and conceptual translation. *See, e.g.*, DONOVAN, *supra* note 208, at 112 (arguing that Bohannan's "perspective has become the disciplinary standard"); Conley & O'Barr, *supra* note 165, at 50–51 ("Bohannan has been persistent and, within the discourse of legal anthropology, stands for the effort to present the culture from the point of view of its participants."). On the significance of the Gluckman-Bohannan debate itself, see GOODALE, *supra* note 164, at 15 (calling it "one of the most important debates in the history of the anthropology of law"); Anthony Good, *Folk Models and the Law*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 423, 425 (2015) ("[F]undamental issues were raised by this debate . . . ."); Conley & O'Barr, *supra* note 165, at 54–55 (critiquing how "Western ethnographers have shaped the ways in which generations of educated people in the West have seen and understood the rest of the world").

222. Gluckman, *Tribal Law*, *supra* note 209, at 361.

223. KATHERINE LEMONS, DIVORCING TRADITIONS: ISLAMIC MARRIAGE LAW AND THE MAKING OF INDIAN SECULARISM 6 (2019).

224. *Id.* at 6.

225. *Id.* at 193.

226. MERRY, *supra* note 74, at 11–12.

workshops, discussions . . . interviews . . . and formal and informal meetings"[227]—but it is far more than a journalistic reporting of what was said in each of those contexts. Notwithstanding the rich ethnographic detail in such works, their aim is not to tell the unique story of any individual, event, or case. It is, on the contrary, to engage in the far more holistic—and valuable—task of translating worldviews from another time-place.

C. Originalism as Cultural Translation

Neither anthropologists nor originalists are likely to enjoy the analogy I have drawn between them. Anthropologists who view their discipline as being more scientific than humanistic will bristle at being analogized to individuals who, in their eyes, are engaged in unempirical, rigidly formalistic analysis. Originalists, meanwhile, will object to being lumped in with a discipline that can have no pretensions to generating statistically significant conclusions. Many in each camp will undoubtedly take issue with the political preferences commonly imputed to the other.[228]

But none of this ultimately detracts from this Article's assertion that originalism is best understood as a kind of cultural translation. Unlike some historians, originalists are not interested in accurately assessing what constitutional terms might have meant for identifiable human beings. And unlike some linguists, originalists are not trying to uncover "the general meaning of a [constitutional] word" or how parties to an eighteenth-century conversation understood their exchange—although, admittedly, originalists themselves appear to be somewhat confused on this point. Rather than either of these goals, which historians and linguists justifiably characterize as unattainable using originalist methods, originalism is after an *anthropologically*

227. *Id.* at 8.

228. RACHEL ADLER, NICHOLAS CARTER, MARK COLLARD, RAYMOND HAMES, MARK HOROWITZ, MICHAEL JINDRA, ROBERT LYNCH, JOSEPH MANSON, JOE NALVEN, DAVID PUTS, KATHLEEN RICHARDSON, RAYMOND SCUPIN, NEIL THIN, SUSAN TRENCHER & WILLIAM YAWORSKY, LETTER OF CONCERN: ANTHROPOLOGY (Apr. 2022) (on file with author) (arguing that "[a]nthropologists often view themselves not only as advocates for the marginalized, but also as observers who are uniquely capable of unmasking oppression"); Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate over Originalism*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html [https://perma.cc/4WFH-AR9W] (quoting Justice Alito as saying that "originalism has often been thought, correctly or incorrectly, to be associated with conservatism").

inflected end: conveying how a collection of persons from another time-place might think about, feel about, or experience something.[229]

Now, originalists may worry that the analogy to anthropology will simply affirm existing methodological criticisms of their approach instead of rebutting them. That is, perhaps comparing originalism to anthropology will not help counter the accusations of acontextual, cherry-picking analysis—perhaps, instead, all it will do is lead critics to believe that anthropology is as faulty as originalism! This concern would not be unwarranted. Qualitative disciplines like anthropology have not fared well in U.S. legal academia, particularly since the rise of law & economics.[230] It would not at all be surprising if legal academics now used to demanding regression analyses and replicability found it easy to dismiss an entire discipline that does not offer similarly structured insights. It would be even less surprising if they found it easier to do so than to accept that a contentious theory might be methodologically acceptable when judged by that discipline's standards.

But the analogy to anthropology not only explains what originalism really entails—cultural translation—it also clarifies why originalist *methods* are not wholly unreasonable. To see why, consider the following two insights from the intersection of anthropology and law. These examples draw on very different styles of anthropological analysis (participant-observation versus ethnohistory) and focus on different study populations (prosecutors in the United States versus temple administrators in India). But they both help underscore why originalist methods are better analogized to anthropology than to other disciplines.

First, anthropological research shows that originalist reliance on the Reader is not as strange as it might initially appear to be. On the contrary, fictive persons are useful interpretive devices in other areas of law besides constitutional analysis. Using "a half decade of on-the-ground, in-the-office ethnographic research" among assistant U.S. attorneys, Professor Anna Offit, a lawyer-anthropologist, shows "how prosecutors imagine—or invent—the jurors whose perspectives,

229. *See supra* Part II.C.

230. On anthropology's minimal influence in academic law, see *supra* note 166. For a comparison of legal anthropology and law & economics within the U.S. legal academy, see generally Riaz Tejani, *The Life of Transplants: Why Law and Economics Has "Succeeded" Where Legal Anthropology Has Not*, 73 ALA. L. REV. 733 (2022) (investigating why law and economics has been more successful than legal anthropology in being absorbed into law).

opinions, and biases shape their approaches to trial strategy."[231] Her point is not that prosecutors' use of the Imagined Juror is unproblematic; in fact, she notes that prosecutors rarely interrogate their own assumptions about how racial and socioeconomic disparities factor into juror worldviews and that "when prosecutors imagined prospective jurors of color or those who were poor, such jurors assumed flattened and generalized attributes."[232] But she also notes that the Imagined Juror provides crucial rhetorical and interpretive assistance to prosecutors as they try to "navigate . . . office hierarchies," identify "alternative interpretations of their cases," "develop a reflexive capacity," and talk about "evolving community mores."[233] The *particular* benefits of using fictive persons as interpretive aids will vary across contexts, but their value for the kind of holistic analysis originalists and anthropologists (and, it seems, prosecutors) are interested in remains constant.[234]

Second, anthropological research suggests that the past is no more open to infinite manipulation than the present. The historian's worry about originalist cherry-picking is like the legal scholar's worry regarding ethnography, in that both impute distortion effects to the qualitative nature of particular research methods rather than to the suboptimal execution of those methods.[235] This assumption is certainly

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231. ANNA OFFIT, THE IMAGINED JUROR: HOW HYPOTHETICAL JURIES INFLUENCE FEDERAL PROSECUTORS 2, 9 (2022).

232. *Id.* at 8.

233. *Id.* at 2.

234. MAKSYMILIAN DEL MAR, ARTEFACTS OF LEGAL INQUIRY: THE VALUE OF IMAGINATION IN ADJUDICATION 353–54 (2021) (calling the Reasonable Person one of "the law's explicitly-named social persons" and explaining that "[s]ocial persons draw us into social landscapes, and thereby enable a specific construction and evaluation of the parties"). Simultaneously, Saul Cornell, a prominent critic of originalism (and friend of anthropology) highlights both the usefulness and dangers of fictive persons in literary theory. Cornell, *Meaning and Understanding*, *supra* note 106, at 735 ("Once literary critics began investigating actual readers and comparing their responses to the ideal readers . . . it soon became apparent that many of their critical assumptions about reading practices were simply false.").

235. For a legal criticism of ethnographic research along these lines, see generally STEVEN LUBET, INTERROGATING ETHNOGRAPHY: WHY EVIDENCE MATTERS (2018). For criticisms of Lubet from an anthropological perspective, see, e.g., Dvora Yanow, *Trying Lubet's Ethnography: On Methodology, Writing, and Ethics*, 9 POLS., GRPS., & IDENTITIES 858 (2021) (critiquing Lubet's scope of analysis and—ironically—the evidentiary basis for his analysis); Elizabeth Mertz, *Mertz on Studying Social Science Ethics*, NEW LEGAL REALISM CONVERSATIONS (July 30, 2015), https://newlegalrealism.wordpress.com/2015/07/30/where-do-we-look-in-studying-social-science-ethics [https://perma.cc/LM6F-PQX6] (noting that Lubet's assertion that "'the field of ethnography ethics is seriously undertheorized,'" lacked "any citation to the voluminous literature involved, let alone any consultation with the many scholarly experts in this area").

misplaced with respect to the ethnographic study of the present: ethnographic methods are no more vulnerable to design-choice bias than are quantitative methods.[236] But, as historians should well know, the distortion concern is also misplaced with respect to the study of the *past*.[237] That is because the past is not "a limitless and plastic symbolic resource, infinitely susceptible to the whims of contemporary interest and the distortions of contemporary ideology."[238] On the contrary, "there is a definable *cultural* framework with which such debates concerning meaning must take place."[239] In a study of disputes over the management of a South Indian Hindu temple, Professor Arjun Appadurai shows how competing factions were obliged to conform their interpretations of the past to a normative framework or else fail at establishing the dominance of their own preferred interpretation. The number and nature of norms making up a relevant cultural framework will, of course, be situationally specific; what matters is that they constrain claims on the past—even claims made via an imagined Reader.[240]

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236. COMAROFF & COMAROFF, *supra* note 23, at 9 ("[T]he 'problem' of anthropological knowledge is only a more tangible instance of something common to all modernist epistemologies . . . . [E]thnography personifies . . . the inescapable dialectic of fact and value."). Regarding bias in economic analyses, see, for example, NOVICK, *supra* note 220, at 546–48 (stating that during the "epistemological revolution which began in the 1960s[,] . . . [e]conomics, despite a few dissidents, remained firmly committed to the positivist program of generating objective laws of economic behavior, based on its reification of *homo oeconomicus*"); GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 19 (2016) ("[Professional economists] have, too often, been described . . . as having an axe to grind, usually an ideological one."). Regarding bias or incompleteness in quantitative analysis more broadly, see, for example, MERRY, *supra* note 74, at 5 (noting that "[s]tatistical knowledge is often viewed as nonpolitical by its creators and users," and adding that "[i]t flies under the radar of social and political analysis as a form of power").

237. Appadurai, *supra* note 37, at 201.

238. *Id.*

239. *Id.* at 203.

240. Of course, constraints may not always be respected, as many critics argue about the Supreme Court's decision in *Dobbs*:

> [W]hen the Fourteenth Amendment was ratified, the actual number of states that banned abortion at all stages in pregnancy was not 28 of 37, as the *Dobbs* majority asserts, but as few as 16. . . . [I]n light of this evidence, the public could not have understood the Amendment's protections to extend to unborn fetuses.

Tang, *supra* note 62, at 1099–1100. And, arguably, the Court has not emerged unscathed after *Dobbs*. Josh Gerstein, *Fighting for Trust: The Painful Journey of the Supreme Court After* Dobbs, POLITICO (June 25, 2023, 7:00 AM), https://www.politico.com/news/2023/06/25/supreme-court-dobbs-00102730 [https://perma.cc/M74G-CCNJ] ("A long string of polls has shown record-low levels of public trust in the court . . . . [S]ome of the justices themselves have aired concerns about damage to the institution. . . . Sotomayor and Kagan broke ranks with public remarks . . . casting doubts on the court's very legitimacy.").

Thus far, I have made two arguments. First, I have suggested that originalism is best understood as a kind of anthropological endeavor rather than a historical or even a linguistic one. That is because originalists are more interested in the holistic task of translating worldviews than in simply recreating the ideas or communicative exchanges of identifiable people—put differently, originalists (like anthropologists) are interested in cultural translation. Second, I have argued that, understood for its proper goals, originalism is not necessarily methodologically flawed. To be sure, there will be better and worse instances of originalist analysis, just as there are better and worse instances of anthropological, historical, and linguistic analysis. As Professor Appadurai notes, there are limits within which all claims on the past must operate, and claims that are less successful at observing these limits will need to be "reformulated, refined, sometimes expanded."[241] Still, neither the motivation for making the claim (a kind of cultural translation) nor the method of doing so (the Reader) are *intrinsically* flawed.

If methodological criticisms are inapt because they misunderstand the goal of originalist analysis, they are also inept for much the same reason. Nevertheless, there is another criticism that proves fatal to originalism—namely, that applied cultural translation is an inextricably colonialist and therefore politically and ethically fraught endeavor. This insight is the subject of the Article's final Part, and it also emerges from a comparison with anthropology. However, unlike the methodological arguments made so far, which have emphasized similarities between anthropology and originalism, the next section demonstrates the nature and severity of their differences.

IV. CULTURAL TRANSLATION IN THE SERVICE OF STATE POWER

If originalism is like anthropology by virtue of their shared interest in cultural translation, it is also different because of its explicit orientation toward governance.[242] That difference is crucial. It marks

241. Appadurai, *supra* note 37, at 206.

242. To be sure, there are other meaningful differences between anthropology and originalism. One obvious example consists of the obligations that anthropologists owe to their interlocutors—those whom they work with and among, and whose worldviews the anthropologist is interested in translating. *See, e.g.*, BRONISLAW MALINOWSKI, THE DYNAMICS OF CULTURE CHANGE: AN INQUIRY INTO RACE RELATIONS IN AFRICA 3 (1945); HORTENSE POWDERMAKER, STRANGER AND FRIEND: THE WAY OF AN ANTHROPOLOGIST 286 (1966) ("Essential to participant observation is the need for communication between the investigator and the people being studied . . . . There is no reciprocal personal communication between the

the boundary between inquiry that *may* have politically devastating consequences, and inquiry that inherently—indeed intentionally—has such consequences. For much of their discipline's history, anthropologists have been inescapably guilty of visiting such consequences upon the populations they studied by virtue of their discipline's connection to colonial rule. However, whereas anthropology can exist independent of its use by political powers and has increasingly fought to do so, originalism is inseparable from statecraft.

A. The Handmaiden of Colonialism

Anthropology grew up in the thick of colonial politics.[243] Indeed, the discipline was *essential to* the entrenchment and everyday operations of colonial rule.[244] Eighteenth- and nineteenth-century

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physicist and atoms, molecules, or electrons, nor does he become part of the situation studied."). The originalist's "interlocutors," by contrast, are long since dead. But this difference does not undermine the analogy to anthropology, for two reasons. First, scholars in disciplines centered on nonliving interlocutors nonetheless understand themselves as having obligations to those interlocutors. *See, e.g.*, SOC'Y AM. ARCHAEOLOGY, STATEMENT CONCERNING THE TREATMENT OF HUMAN REMAINS (Apr. 14, 2021), https://documents.saa.org/container/docs/default-source/doc-careerpractice/statement-concerning-the-treatment-of-human-remains.pdf [https://perma.cc/QV8V-3GEG] (noting that "[w]orking with human remains is a privilege, not a right," and that "[h]uman remains are deserving of the dignity and respect afforded to living people"); NOVICK, *supra* note 220, at 595 (discussing the "reality rule"—namely, that "the historian should tell 'the most likely story that can be sustained by the relevant existing evidence'" (citations omitted)). Secondly, even if living interlocutors impose greater or more variegated obligations on researchers, this difference does not obviate the similarity between anthropological and originalist *goals*.

243. Talal Asad wrote of anthropology's history that:

> It is not a matter of dispute that social anthropology emerged as a distinctive discipline at the beginning of the colonial era, that it became a flourishing academic profession towards its close, or that throughout this period its efforts were devoted to a description and analysis . . . of non-European societies dominated by European power.

Talal Asad, *Introduction*, *in* ANTHROPOLOGY AND THE COLONIAL ENCOUNTER 9, 14–15 (Talal Asad ed., 1973).

244. Kathleen Gough, *Anthropology and Imperialism*, MONTHLY REV., April 1968, at 12, 12 ("Anthropology is a child of Western imperialism."); GOODALE, *supra* note 164, at 55 ("[T]he twentieth-century anthropology of law was closely associated with colonialism" because "it was the knowledge about local legal systems and practices that arguably proved most useful to the form of governance known as 'indirect rule.'"); Poornima L. Paidipaty, Tribal Nation: Politics and the Making of Anthropology in India, 1874–1967, at 5 (2010) (Ph.D. dissertation, Columbia University) (on file with author) ("Indian anthropology . . . had started as an administrative science in the nineteenth century, [and] moved more firmly into the academy" by the 1950s.); UNIV. OF PA. DEPT. OF ANTHROPOLOGY, Statement on Anthropology, Colonialism, and Racism, https://anthropology.sas.upenn.edu/news/2021/04/28/statement-anthropology-colonialism-and-racism [https://perma.cc/K47C-22NS] ("Anthropology began as a colonial science, the product of

colonial officials were often quasi-anthropologists who undertook extended residencies, engaged in immersive language study, collected indigenous written sources, and carefully documented everything from local religious rituals to legal practices.[245] In other words, colonial officials engaged in paradigmatic forms of participant-observation, and they did so in large part because knowing native populations was a necessary precursor to governing them.

For instance, Warren Hastings—the first governor of Bengal as well as the first governor-general of India—wrote in 1784 that:

> Every accumulation of knowledge and especially such as is obtained by social communication with people over whom we exercise dominion founded on the right of conquest, is useful to the state . . . it attracts and conciliates distant affections; it lessens the weight of the chain by which the natives are held in subjection; and it imprints on the hearts of our countrymen the sense of obligation and benevolence.[246]

Hastings, it is worth noting, largely *admired* Indian traditions, and his interest in them was intellectual as well as instrumental.[247] His successors in the colonial government of India, who were less appreciative of local cultures, continued to use and develop their knowledge for explicitly strategic reasons.[248] They collected and

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a settler colonialism uniquely focused on the study of the languages, history, culture, and biology of non-European peoples seen as 'primitive,' or 'ancient' all around the world.").

245. Consider the example of J.H. Driberg, who was an anthropologist (eventually joining the faculty of anthropology at the University of Cambridge) as well as a member of the British Civil Services in Uganda and Sudan. J. H. Driberg, *Anthropology in Colonial Administration*, 20 ECONOMICA 155, 157 (1927) (explaining why, in the author's view, "the importance of anthropological work" to the colonial administration "is difficult to overestimate" because "[t]he results of scientific anthropological research enable the government to formulate a policy which has a reasonable chance of success with the minimum of friction").

246. BERNARD S. COHN, *The Command of Language and the Language of Command*, *in* COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA 16, 45 (1996).

247. Hastings "had been a staunch opponent of the imposition of English common law on the people of India, and one of the most enthusiastic patrons in the East India Company of indigenous learning, particularly in the field of law." MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY, 1774–1950, at 16 (2010). Of course, Hastings' politics were complicated: "even as [he] encouraged the systematization of India's legal traditions . . . he also asserted that these very traditions allowed for the exercise of arbitrary and exceptional power by the sovereign . . . ." *Id.*

248. Thomas Babington Macaulay and William Bentinck are the most widely known examples. ROBERT E. SULLIVAN, MACAULAY: THE TRAGEDY OF POWER 6, 121 (2009) (noting that Macaulay "came to loathe the subcontinent and to disdain its people" and that "[t]he Indians to whom he would speak became almost invisible to him unless they were repugnant or amusing"). Bentinck is considered to have had less overt antipathy for Indian cultures, and instead

translated indigenous texts,[249] created dictionaries for local languages,[250] sought to differentiate between "tribes" and "castes" as well as to document their respective characteristics,[251] mapped the physical terrain, and undertook vast archaeological studies[252]—projects that have been aptly described as the "cultural technologies of rule."[253] Moreover, although British activities in India were especially extensive and have inspired a correspondingly rich scholarly discussion, British India was not unique within the colonized world for being subjected to such knowledge extraction. On the contrary, colonial powers across Africa, Asia, Australia, and the Americas also sought to understand indigenous worldviews for the sake of political power. For decades now, the idea that "European colonial conquest was dependent not just upon superior military, political, and economic power, but also upon the power of knowledge"[254] has been a mainstay of scholarship in history and anthropology. And few disciplines have received as much criticism—whether internal or external—for their imbrication with colonial rule as has anthropology.

That criticism is justifiable because, even after colonial officials ceased being quasi-anthropologists, anthropology remained intertwined with colonial power. The first generation of academic anthropologists emerged just as colonial regimes began to falter during

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to have been motivated by pragmatic concerns like the preservation and augmentation of British authority. *See id.* at 124 ("Bentinck's objectives were those of a practical administrator . . . [including] to train a cadre of Indian civil servants who would do the same work as Britons . . . ."); Nancy G. Cassels, *Bentinck: Humanitarian and Imperialist–The Abolition of Suttee*, 5 J. BRIT. STUD. 77, 87 (1965) ("[T]here is no indication among Bentinck's papers that he either resented or challenged the habit among his subordinates of maligning certain native characteristics . . . .").

249. COHN, *supra* note 246, at 61 (1996) ("Hastings encouraged a group of younger servants of the East India Company to study the 'classical' languages of India . . . as part of a scholarly and pragmatic project . . . .").

250. *See, e.g.*, J.H. DRIBERG, THE LANGO: A NILOTIC TRIBE OF UGANDA 270–442 (1923) (containing a Lango grammar and Lango-English dictionary). *See generally* HENRY THOMAS COLEBROOKE, A GRAMMAR OF THE SANSCRIT LANGUAGE (1804) (studying Sanskrit).

251. Paidipaty, *supra* note 244, at 5 ("The idea of tribe as a social category distinct from caste owes much to colonial anthropology. The administration of tribes, starting in the colonial period, was built on a scaffolding of concepts borrowed (or least legitimated) by anthropology.").

252. Trautmann & Sinopoli, *In the Beginning Was the Word: Excavating the Relations Between History and Archaeology in South Asia*, 45 J. ECON. & SOC. HIST. ORIENT 492, 492–93 (2002) (arguing that "[t]he study of the historic past, through material evidence and texts, was an integral component of colonial practice in India under British rule").

253. NICHOLAS DIRKS, CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA 9 (2001).

254. Phillip B. Wagoner, *Precolonial Intellectuals and the Production of Colonial Knowledge*, 45 COMP. STUD. SOC'Y & HIST. 783, 783 (2003).

the early decades of the twentieth century. This new generation of professional anthropologists often worked among colonized peoples, and they sometimes did so at the behest (and even on the payroll) of colonial governments.[255] For instance, Part III.B noted that Max Gluckman completed a significant portion of his fieldwork on the Barotse while working for the Rhodes-Livingston Institute, which was funded by the British government.[256] Similarly, E.E. Evans-Pritchard, whose works are still staples of anthropology education today, selected a new field site and conducted much of his research in response to funding that was made available by the British administration in Sudan.[257] To be sure, neither Gluckman nor Evans-Pritchard—nor most other anthropologists of this period—worked *intentionally* as the agents of a colonial government.[258] But it remains the case that "the basic reality which made pre-war social anthropology a feasible and effective enterprise was the power relationship between dominating (European) and dominated (non-European) cultures."[259]

Anthropology in the United States has not been immune to entanglements with government action, either.[260] During the First and Second World Wars, American anthropologists served as spies,[261]

255. See the example of J. H. Driberg, *supra* notes 245 and 250.

256. *See supra* note 210.

257. Douglas H. Johnson, *Evans-Pritchard, the Nuer, and the Sudan Political Service*, 81 AFR. AFFS. 231, 242 (1982) ("Evans-Pritchard advocated a more active seeking of advice on the part of colonial governments; his cautioning anthropologists against volunteering advice on their own was a tactical matter.").

258. Wendy James, *The Anthropologist as Reluctant Imperialist*, *in* ANTHROPOLOGY AND THE COLONIAL ENCOUNTER 41, 42 (Talal Asad ed., 1973) (observing that although "the anthropologist can often appear as a critic of colonial policy . . . he was usually at odds with the various administrators, missionaries, and other local Europeans he had dealings with" and consequently "[h]e cannot often be seen unambiguously as a willing agent of colonialism"); *see also infra* note 274.

259. Asad, *supra* note 243, at 17.

260. I do not mean to suggest that there merely *happens* to be a parallel between the uses of anthropology in the United States and by erstwhile European colonial powers: there is likely a great deal of joint or shared causation rooted in the United States' global political ambitions, its emulation of the very metropole-periphery politics that characterized its colonial period, and the history of slavery that links North America and Europe.

261. James N. Hill, *The Committee on Ethics: Past, Present, and Future*, *in* HANDBOOK ON ETHICAL ISSUES IN ANTHROPOLOGY (Am. Anthropological. Assoc. Special Publ'n No. 23) (Joan Cassell & Sue-Ellen Jacobs eds.), https://americananthro.org/learn-teach/handbook-on-ethical-issues-in-anthropology/chapter-2 [https://perma.cc/85L7-EUDG] ("Franz Boas was censured, stripped of his membership in the Association's governing Council, and threatened with expulsion from the AAA (because of his publication in *The Nation* of a statement alleging that he had proof that some anthropologists were acting as spies for the U.S. government in foreign countries).").

developed government projects,[262] and worked for the U.S. government's Office of Strategic Services.[263] During the Vietnam War and the Cold War period, anthropologists were involved in clandestine research efforts in Chile and Thailand,[264] and they conducted military-funded research expeditions in Micronesia.[265] After the September 11 attacks, the U.S. Army renewed its interest in recruiting anthropologists for military purposes through the Human Terrain Systems ("HTS") program that ran until 2014, which has been dubbed "the most expensive social science program in history."[266] And, significantly, the *targets* of anthropologically informed governance have not always been outside the United States: U.S. anthropology has long contributed to the conceptualization, study, and control of indigenous American populations via the Bureau of Indian Affairs and the Department of the Interior.[267] Indigenous Americans were, in the

262. Carleton Mabee, *Margaret Mead and Behavioral Scientists in World War II*, 23 J. HIST. BEHAV. SCI. 3, 4 (1987) (discussing Margaret Mead's role in developing the United States' food rationing system).

263. David Price, *Lessons from Second World War Anthropology: Peripheral, Persuasive and Ignored Contributions*, 18 ANTHROPOLOGY TODAY 14, 17 (2002) (stating that "[d]ozens of anthropologists worked for the Office of Strategic Services" doing "a variety of tasks").

264. *See* Hill, *supra* note 261 (discussing Project Camelot and the Thailand work).

265. Glenn Peterson, *Politics in Postwar Micronesia*, *in* AMERICAN ANTHROPOLOGY IN MICRONESIA: AN ASSESSMENT 145, 154 (Robert C. Kiste & Mac Marshal eds., 1999) ("In supervising Harvard's Yap project, for instance, Douglas L. Oliver felt it necessary to remind David M. Schneider and his colleagues, midway through their work, that the navy funding made their own dissertation projects 'secondary' to the studies of social organization and depopulation they were obligated to provide." (citations omitted)).

266. Roberto J. González, *Ethnographic Intelligence: The Human Terrain System and Its Enduring Legacy*, *in* RECONFIGURING INTERVENTION: COMPLEXITY, RESILIENCE AND THE 'LOCAL TURN' IN COUNTERINSURGENT WARFARE 51, 51 (Louise Wiuff Moe & Markus-Michael Müller eds., 2017) (observing that the HTS program cost more than $725 million). The HTS concept and program was developed by Montgomery McFate, a cultural anthropologist, and Andrea Jackson, then director of research at a security contractor named the Lincoln Group. *Id.* at 53–54. Its goals, as envisioned by the Department of Defense, were to help "win the 'will and legitimacy' fights" (perhaps through propaganda), to "surface the insurgent IED networks" (presumably for targeting), and to serve "as an element of combat power" (that is, as a weapon). *Id.* at 55.

267. David H. Price, *How the CIA and Pentagon Harnessed Anthropological Research During the Second World War and Cold War with Little Critical Notice*, 67 J. ANTHROPOLOGICAL RSCH. 333, 333 (2011) (regarding the Department of the Interior's efforts respecting Native Americans); *id.* at 334 ("Philleo Nash [(an anthropologist)] worked for a special White House program that tracked and suppressed African American racial and labor uprisings across the country . . . .").

words of one anthropologist, "both the first natives and the ultimate foreigners."[268]

As this history makes clear, anthropology has an extensive record of deploying cultural translation in the service of state power. Sometimes, this was done directly and intentionally. Colonial officials deploying anthropological methods used their knowledge of native cultures to further subjugate them, while some state-funded anthropologists undertook research that was explicitly meant to support intelligence missions. At other times, anthropologists have been passively complicit in the weaponization of their own research.[269] Scholars like Gluckman and Evans-Pritchard did not actively try to support the colonial regimes that funded their research; nevertheless, their research was sufficiently valued by those regimes to merit extended funding.[270]

In almost all these instances, anthropological insight served to entrench the interests and perspectives of white peoples at the expense of nonwhite peoples.[271] Knowledge of indigenous culture—ritual, religion, economic relations, and law, among many other things—was used to further entrench white colonizing authority over colonized subjects. The ability to decide what counted as authentic indigenous culture, and what was therefore worth studying and preserving, *itself*

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268. John Borneman, *American Anthropology as Foreign Policy*, 97 AM. ANTHROPOLOGIST 663, 667 (1995) ("Indians were both the first natives and the ultimate foreigners . . . . American anthropology and American foreign policy employed the conceptual apparatus created in Indian policy as part of a global strategy in dealing with foreignness outside the territorial boundaries of the United States.").

269. *See, e.g.*, Price, *supra* note 267, at 334 ("Ruth Benedict, and a half dozen other anthropologists designed Japanese surrender leaflets, monitored Japanese media, and wrote cultural analysis that informed the postwar occupation." (citation omitted)).

270. Ruth Benedict's most famous monograph, *The Chrysanthemum and the Sword: Patterns of Japanese Culture*, "was commissioned by the government as a sort of manual for the occupying forces of Japan after 1945." Monique Scheer, Christian Marchetti & Reinhard Johler, *"A Time Like No Other": The Impact of the Great War on European Anthropology*, *in* DOING ANTHROPOLOGY IN WARTIME AND WAR ZONES: WORLD WAR I AND THE CULTURAL SCIENCES IN EUROPE 9, 12 (Reinhard Johler, Christian Marchetti & Monique Scheer eds., 2010).

271. Diane Lewis, *Anthropology and Colonialism*, 14 CURRENT ANTHROPOLOGY 581, 582–83 (1973) ("Whether he played the role of detached observer (theoretical anthropologist) or that of liaison . . . (applied anthropologist) . . . [i]t was as impossible for [the anthropologist] as for other Europeans to remain in a colony without participating in the power and privileges of the dominant group."); Gough, *supra* note 244, at 13 ("In spite of some belief in value-free social science, anthropologists in those days seem to have commonly played roles characteristic of white liberals in other spheres of our society . . . . Applied anthropology came into being as a kind of social work and community development effort for non-white peoples . . . ."). To be sure, colonizers were not only white—Japan is the archetypal example—but anthropology's imbrication with colonialism overwhelmingly took place in the context of European colonialism.

served to reflect and reinscribe colonial authority over colonized research subjects.[272] Put simply, a discipline dedicated to translating holistic worldviews—to understanding how a collection of persons might think about, feel about, or experience things—has frequently been guilty of using its insights to entrench a political project with inescapable racial overtones. To say all this is to articulate a *political* and *ethical* criticism of anthropology rather than a *methodological* one.

Just as importantly, however, anthropology has long fought to disavow and dismantle its relationship with any form of statecraft.[273] As early as 1945, the anthropologist credited with articulating the tenets and purpose of ethnographic fieldwork observed that "[t]here is a moral obligation to every calling" and that "[t]he duty of the anthropologist is to be a fair and true interpreter of the Native."[274] Many of the discipline's most famous practitioners (including many anthropologists who were at times funded by the state) used their research to *critique* political institutions and practices.[275] Franz Boas used a congressional mandate to study the effects of immigration on U.S. society to argue against prevailing notions of inherent racial inequality.[276] Ruth Benedict's study of Zuñi culture led her to critique contemporary U.S. norms of sexuality.[277] And Max Gluckman's championship of African self-determination led to his permanent exile

272. *See, e.g.*, Marc Galanter, *The Displacement of Traditional Law in Modern India*, 24 J. SOC. ISSUES 65, 65 (1968) (tracing "the process by which the modern system, introduced by the British, transformed and supplanted the indigenous legal systems"); LATA MANI, CONTENTIOUS TRADITIONS: THE DEBATE ON SATI IN COLONIAL INDIA 24 (1998) (discussing the colonial regulation and eventual prohibition of *sati*, or widow immolation); Deepa Das Acevedo, *Changing the Subject of* Sati, 43 POL. & LEGAL ANTHROPOLOGY REV. 37, 39 (2020) (noting how Regulation XVII "justified itself by stating that sati was 'nowhere enjoined by the religion of the Hindus'").

273. *See generally* JOAN VINCENT, ANTHROPOLOGY AND POLITICS: VISIONS, TRADITIONS, AND TRENDS 2 (1990) (arguing that "it is historically inaccurate to regard the discipline simply as a form of colonial ideology" because early anthropologists often harshly critiqued European domination, early ethnographic studies funded by the British Association were conducted "at home" on English and Irish communities, and early professional anthropologists often came from non-establishment backgrounds).

274. MALINOWSKI, *supra* note 242, at 3 (1945); *see also* Thomas Weaver, *Malinowski as Applied Anthropologist*, *in* THE DYNAMICS OF APPLIED ANTHROPOLOGY IN THE TWENTIETH CENTURY: THE MALINOWSKI AWARD PAPERS 14, 26 (Thomas Weaver ed., 2002) ("Malinowski felt it was the duty of anthropology to chronicle contemporary events that occurred in conjunction with Westernization . . . [and he] appealed to the moral obligation of every scientist and especially the anthropologist" to be "advocates for native rights.").

275. *See, e.g.*, Kliger, *supra* note 171.

276. *Id.*

277. *Id*.

from his former field sites in Barotseland and Zululand in South Africa.[278]

More recently, anthropologists have been heavily involved in efforts to decolonize pedagogical and research practices.[279] The discipline's major conferences have called on anthropologists to "avoid retreating to a high moralizing stance"[280] and to ask themselves how "the dual histories of settler colonialism and slavery continue to influence anthropological thought and practices."[281] And, over the years, anthropologists have authored countless books and articles exposing their discipline's relationship with colonialism in order to counter misperceptions of it as a neutral, benign science—and, effectively, to warn against future involvement with state power.

Anthropologists will be the first to admit that their discipline's involvement in perpetuating political and epistemological oppression is not comfortably a thing of the past.[282] They are equally likely to note that the task of acknowledging and addressing prior harms is incomplete. But what matters as much as the fact of anthropology's complicity in furthering colonialist power structures is the fact, equally unarguable, that such complicity is not inherent to the discipline. Anthropologists *need not* pursue their research as agents of the state or in the service of its authority. Anthropological insights *need not* create or perpetuate power disparities between white and nonwhite peoples. Cultural translation, as undertaken by anthropologists, is not inextricably aligned with the taming and supplanting of alternate worldviews based on racialized and gendered disparities of power. None of this can be said about originalism.

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278. Elizabeth Colson, *Obituary*, ROYAL ANTHROPOLOGICAL INST. (1975), https://therai.org.uk/archives-and-manuscripts/obituaries/max-gluckman [https://perma.cc/2YNF-757B].

279. JOHN GLEDHILL, POWER AND ITS DISGUISES: ANTHROPOLOGICAL PERSPECTIVES ON POLITICS 3–4 (2d. ed. 2000) ("[I]t remains necessary to strive for the decolonization of anthropology today" because of the problematic "historical legacies of Western domination, the continuing global hegemony of the Northern powers, and contemporary manifestations of racial and neo-colonial domination in the social and political life of metropolitan countries."); *see also* Ryan Cecil Jobson, *The Case for Letting Anthropology Burn: Sociocultural Anthropology in 2019*, 122 AM. ANTHROPOLOGIST 259 (2020).

280. AM. ETHNOLOGICAL SOC'Y, ASS'N FOR POL. & LEGAL ANTHROPOLOGY, AND COUNCIL ON ANTHROPOLOGY & EDUC., CALL FOR PAPERS: INDETERMINACY, SPRING CONFERENCE (2023) (on file with author).

281. EXEC. PROGRAMMING COMM., AM. ANTHROPOLOGICAL ASS'N, 2020 AAA ANNUAL MEETING THEME: TRUTH AND RESPONSIBILITY (2020) (on file with author).

282. Das Acevedo, *What's Law Got To Do with It?*, *supra* note 166, at 13 (discussing Jobson's widely circulated essay that made a "[c]ase for [l]etting [a]nthropology [b]urn").

B. The Past as a Colonialist Resource[283]

Because it is a theory of adjudication, there can be no separating originalism from governance. What matters, then, is whether the *kind* of governance that originalism compels should be countenanced. Drawing on ample scholarship regarding the profoundly racist and sexist origins and original meaning of the Constitution, I argue that it should not. This is not because originalist analysis necessitates any particular outcome with respect to substantive constitutional issues. It is because originalist analysis intentionally and inescapably magnifies the worldview of historically dominant groups. That is, even when undertaken in accordance with and measured by its own standards—*even when absolved of all methodological criticisms*—originalism furthers an unacceptably antidemocratic politics. To see why, consider the extensive literature on how profound racial and gender inequalities pervade not only the Constitution itself but the worldview of anyone imaginable as the Reasonable Reader.

Originalists have generally argued that the "Constitution is color-blind," meaning that it reflects a worldview that race should not play a role in assigning rights or assessing individuals.[284] The term itself comes from Justice Harlan's dissent in *Plessy v. Ferguson*,[285] in which Justice Harlan declared that "[t]here is no caste here," before adding that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens."[286] Color-blindness can have an intuitive appeal in the United States given the overwhelming influence here of Lockean liberalism, and claims that the Constitution is color-blind are by no means limited to originalism.[287] Classically liberal values like individuality and formal equality cohere with the idea of *not* differentiating between persons on the basis of race, except in extreme

283. This phrase takes after the title of Arjun Appadurai's article, *The Past as a Scarce Resource.* Appadurai, *supra* note 37, at 201.

284. *See, e.g.*, Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 116 (2013) (defining "the colorblindness approach" as the view that "the original meaning incorporates a strict standard of review of all racial distinctions" and arguing, from an originalist perspective, "that strong evidence of a colorblindness approach does in fact exist").

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

286. *Id.*

287. On Locke's influence, see Merle Curti, *The Great Mr. Locke: America's Philosopher, 1783–1861*, 11 HUNTINGTON LIB. BULL. 107, 107 (1937) ("Political thought both before and during American Revolution was profoundly affected by the *Two Treatises on Civil Government*.").

circumstances.[288] Even the origins of the term—an opinion objecting to legislatively enacted segregation—seemingly reinforces the notion that color-blindness has progressive, almost emancipatory overtones.[289] Put simply, color-blindness agrees with many Americans' notions of what America should be[290] (and, depending on who you ask, with their ideas about what America *already is*[291]).

But as an extensive and interdisciplinary body of scholarship has shown, the Constitution is *not* color-blind.[292] This is not simply because the Framers declined to accept language that would have expressly prohibited race-based analysis.[293] It is also because the Framers "countenanced laws that explicitly differentiated people on a racial basis."[294] And it is additionally because subsequent interpretations of the Constitution that proceed from an assumption of color-blindness

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288. Rappaport, *supra* note 284, at 116.

289. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV., 99, 99 ("For decades, colorblindness was the great slogan of the civil rights movement.") [hereinafter Strauss, *The Myth of Colorblindness*]. *But see* Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 5 (2013) (quoting "what the Justice stated immediately before his allusion to colorblindness" and suggesting that, in context, "[w]hat Harlan seems to be saying is that to remain ascendant, the dominant race need not resort to ruses like equal but separate, precisely because it is dominant and will continue to be for all time, if it observes the principles of constitutional liberty").

290. For assertions that color-blindness is basked into our constitutional fabric, and thus part of what the United States should aspire to, see, for example, CASS R. SUNSTEIN, RADICALS IN ROBES 138 (2005); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431–32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

291. Kennedy, *supra* note 289, at 2–3 (describing a variant of the "colorblind immediatist," who "views affirmative action as having been useful as a needed expedient in the late 1960s and early 1970s, but [believes] . . . that whatever the proper status of affirmative action in the past, currently it should play no role in American life").

292. *See infra* notes 293–95.

293. Theodore R. Johnson, *How Conservatives Turned the "Color-Blind Constitution" Against Racial Progress*, ATLANTIC (Nov. 19, 2019) (noting that "[c]olor-blind constitutionalism reached its high point in *Brown v. Board of Education* (1954)" when "Thurgood Marshall, who argued the case . . . professed, '[t]hat the Constitution is color blind is our dedicated belief'"). *But see* Strauss, *The Myth of Colorblindness*, *supra* note 289, at 100 ("The prohibition against discrimination established by Brown is not rooted in colorblindness at all.").

294. Kennedy, *supra* note 289, at 4. In one of the major cases of the October 2022 term, the Supreme Court held that Harvard University and the University of North Carolina at Chapel Hill violated the Equal Protection Clause of the Fourteenth Amendment when they considered race as part of their admissions processes. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 230 (2023). Although Chief Justice Roberts' majority opinion referenced the concept of a color-blind Constitution, *id.* at 210 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 416 (1978) (Stevens, J., concurring in part and dissenting in part)), Justice Thomas wrote a concurrence "to offer an originalist defense of the colorblind Constitution." *Students for Fair Admissions*, 600 U.S. at 232 (Thomas, J., concurring).

have effectively "foster[ed] white racial domination."[295] In other words, there is good reason to think that *any* interpretation of the Constitution builds off a foundation that is so inescapably flawed that, as Professors Ryan D. Doerfler and Samuel Moyn wrote in a recent opinion piece, *The Constitution Is Broken and Should Not Be Reclaimed*.[296] Absent such drastic action, however, the question becomes one of optimal interpretive approaches under suboptimal conditions. More specifically, in light of originalism's unarguable dominance, the question becomes whether or not originalist analysis can fix—or, at least, avoid exacerbating—what is constitutionally broken. It cannot.

Originalism is uniquely incapable of responding to this longstanding but increasingly urgent sense of constitutional brokenness. It cannot mitigate the troubling text and context of the Constitution itself, and it certainly cannot break well-established patterns of interpreting that text in a way that would avoid further entrenching its original inequalities. That is because originalism, by virtue of seeking and translating anything that might be considered original public meaning, is expressly *designed to magnify* those inequalities. When undertaken as its proponents intend, with an eye to translating founding-era worldviews, originalist analysis "legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."[297] Put differently, originalism's reliance on the Reader, whether through historical or linguistic means, is problematic *because* it is done, not merely because of *how* it is done.

Moreover, the Reader-centric analytic approach of public meaning originalism does not entrench only *racial* inequalities: it has a similar effect with respect to sex and gender, too. Consider, once again, the Supreme Court's 2022 decision in *Dobbs*. Justice Alito's opinion

295. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 1 (1991). This claim reflects, among other things, the fact that color-blind constitutionalism has, at least since the 1980s, been overwhelmingly mobilized by opponents of voting protections and affirmative action policies that would facilitate fuller participation in civic and political life by historically marginalized groups. Kennedy, *supra* note 289, at 5 ("The Harlan declaration becomes an oft-used rhetorical weapon only later, when it was deployed against affirmative action policies.").

296. Ryan D. Doerfler & Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES, Aug. 19, 2022, at 2 ("It's difficult to find a constitutional basis for abortion or labor unions in a document written by largely affluent men more than two centuries ago.").

297. Gotanda, *supra* note 295, at 2–3.

has been widely criticized as unoriginalist[298] (including by influential originalist scholars[299]), but the "history and traditions" analysis that he used instead suffers the same shortcomings as the approach he seemingly failed to emulate. As Professor Reva B. Siegel notes, "*Dobbs* locates constitutional authority in imagined communities of the past—entrenching norms, traditions, and modes of life associated with old status hierarchies."[300] Even as it looks to a period other than the founding era, *Dobbs* grounds itself—how could it not?—in perceptions of gender roles "at a time when law so regularly enforced these gender-role divisions that the Supreme Court itself authorized states to bar women from voting and to deny women the right to practice law."[301]

Admittedly, as Professor Siegel also notes, Justice Alito's opinion does not acknowledge just *how* committed he is to translating those alternate worldviews about gender equality.[302] In fact, the *Dobbs* majority sets up a false dichotomy by asking whether mid-nineteenth-century lawmakers were "motivated by 'hostility to Catholics and women' *or* by 'a sincere belief that abortion kills a human being'"[303]—

298. Commentary by legal scholars that describes *Dobbs* as non-originalist has appeared in a wide array of both scholarly and public venues. *See, e.g.*, Siegel, *supra* note 36, at 1171; Steven G. Calabresi, Letter to the Editor, *The True Originalist Answer to* Roe v. Wade, WALL ST. J. (May 8, 2022, 12:38 PM), https://www.wsj.com/articles/the-true-originalist-answer-to-roe-v-wade-11652027903 [https://perma.cc/BW4Y-5RUU]; David Weisberg, *Is* Dobbs *an Instance of Originalism? Yes and No.*, ORIGINALISM BLOG (Aug. 10, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/is-dobbs-an-instance-of-originalism-yes-and-nodavid-weisberg.html [https://perma.cc/4GH3-CSEL]; Noah Feldman, *Supreme Court "Originalists" Are Flying a False Flag*, BLOOMBERG (July 17, 2022, 8:00 A.M.), https://www.bloomberg.com/opinion/articles/2022-07-17/supreme-court-s-conservative-originalists-are-flying-a-false-flag [https://perma.cc/CB5T-NCTP].

299. Lawrence Solum (@lsolum), X (May 6, 2022, 7:16 AM), https://twitter.com/lsolum/status/1522550847745531904 [https://perma.cc/C787-EFKJ] ("Judge Alito's draft opinion in *Dobbs* is not an originalist opinion.").

300. Siegel, *supra* note 36, at 1128.

301. *Id.* at 1186; *see also* Deborah Dinner, *Originalism and the Misogynist Distortion of History in* Dobbs, LAW & HIST. REV.: DOCKET, https://lawandhistoryreview.org/article/dr-deborah-dinner-originalism-and-the-misogynist-distortion-of-history-in-dobbs [https://perma.cc/C8FE-ELAP] (arguing that Justice Alito's analysis "begs the question why the Court should deprive pregnant people of bodily autonomy based on the views of men who held political power in 1868" because "[d]oing so flouts evolution in constitutional meaning and fixes constitutional interpretation at a time when women lacked the franchise, full control over their earnings and marital property, the capacity to sue their husbands for marital rape, and equal rights to labor market participation and economic citizenship").

302. Siegel, *supra* note 36, at 1185 ("Justice Alito refused to deal with the historical record in which the laws gathered in the appendix are rooted.").

303. *Id.* (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 254 (2022)).

as if it were impossible to be simultaneously motivated by both. But the fact that Justice Alito's opinion does not acknowledge the holistic worldviews it enshrined into law matters even less than the ways in which his opinion departed from the purest forms of originalism. In the end, the opinion captured—more or less accurately, if not at all openly—how a Reasonable Reader from another time-place might have responded to the prospect of a woman's bodily autonomy. Therein lies the problem.

CONCLUSION

This Article began by critiquing originalism's critics, most of whom have discredited originalist analysis for being bad history or shoddy linguistics. These arguments, though valid, have had limited impact because—as originalists have been saying for some time—their theory is not concerned with the opinions, experiences, or communicative exchanges of identifiable human beings. I showed that, instead, originalism is more properly analogized to anthropology because of its interest in a task best described as "cultural translation." Both public meaning originalism and anthropology are committed to rendering holistic worldviews from another time-place intelligible to the translator's own context. The similarities between originalism and anthropology become especially clear through a comparison of the Reasonable Reader of originalist analysis and the Reasonable Man of anthropology.

Because critics misunderstand the purpose of originalist analysis, they start from a persuasive deficit even though their arguments are otherwise compelling. Additionally, because critics articulate objections that are *methodological* in nature, they invite responses that are also limited to methodology. For both these reasons, arguments from history and linguistics have primarily impacted originalism by contributing to its process of "working itself pure": they cannot definitively counter originalism's rise.

The analogy to anthropology both provides a more accurate understanding of what originalists are after *and* offers a more robust objection to originalism itself. Anthropology's disciplinary history is replete with examples of cultural translation being pressed into the service of state power, either because colonial officials were themselves quasi-anthropologists or because many early professional anthropologists were funded by colonizing states that viewed their research as administratively useful. In the case of anthropology,

applied cultural translation literally and synchronously promoted colonial power by entrenching the interests and perspectives of white peoples at the expense of nonwhite peoples. Importantly, this criticism is a political and ethical objection rather than a merely methodological one.

A similar objection applies to originalism. Originalist analysis, taken on its face, seeks to imagine the likely perspective of a reasonable eighteenth-century Reader. This person, as even originalists have suggested, is definitely white and likely male. The goal of originalist interpretation *when done well by originalist lights*—and regardless of whether it is historical or linguistic in approach—is to prioritize the Reader's perspective over those of any contemporary individuals. This is a more figurative and asynchronous type of colonial authority, but it replicates the problematic power dynamics of anthropology's disciplinary experience.

Even when originalist analysis is done poorly, as some originalists have complained regarding *Dobbs*, it seeks to magnify a worldview that is fundamentally antithetical to contemporary expectations of racial and gender equality. Put simply, as *Dobbs* made clear, originalism *done well* necessitates that repression and oppression in the past justifies repression and oppression in the present *because* of its commitment to applied cultural translation. And unlike anthropology, originalism cannot resist applying cultural translation in the service of state power because originalist translation is inherently an act of governance. In other words, originalist analysis—however methodologically sound it may be—is problematic because it uses the past as a colonialist resource.