

ORIGINALISM'S SELECTION PROBLEM

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INTRODUCTION

Originalism is called a “family” of theories.¹ If that’s true, they all suffer from a congenital malady: the problem of selection. This vulnerability afflicts every branch of the family, whether we speak of original intentions originalism, original public meaning originalism, original methods originalism, or original law originalism—any originalism that descends from Attorney General Ed Meese’s legendary speech before the American Bar Association in 1985.² To the extent originalism of any variety purports to make descriptive, falsifiable claims about language, history, tradition, practice, or law, all of them must confront problems common to any empirical project—what data to collect, how to code that data, over what time period and how long to collect data, and what conclusions to draw from that data.

This Essay examines the problem of selection with any originalist theory and what it means for constitutional adjudication. Part I surveys the major branches of originalism, explains how each share a commitment to the pursuit of objective, knowable, falsifiable fact, and then use that fact as a fixed point to constrain discretion. Part II discusses how each of these theories are vulnerable to methodological challenges familiar to all empirical projects. Part III explores the implications of these methodological challenges for originalism in particular and for constitutional doctrine and theory more generally.

I. THE ORIGINALIST FAMILY TREE

Originalism as a theory of legal interpretation begins with Ed Meese’s famous speech before the District of Columbia chapter of the American Bar Association on

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¹ Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1253 (2019).

² Professor Balkin’s “framework originalism” or “living originalism” was initially rejected as originalist by other professed originalists. Cf. Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177, 178–79, 184 (2010) (documenting why Professor Balkin has not been accepted into the originalist family by other originalists); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1166 (2012) (“[T]o the extent Balkin’s approach calls for constitutional construction, it is not originalist; it is living constitutionalist.”). In this Essay, I’m not going to take sides in this family squabble.

July 9, 1985, where he said, “A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.”³

Since this speech, originalism has flourished in the academy and on the bench.⁴ It has also, over time, become more sophisticated, more difficult to apply, and easier to manipulate.⁵ The rest of this Part briefly surveys that prodigious genealogy.

Before explaining how the various branches differ, I follow Professor Lawrence Solum’s explanation of how they are the same. As a comprehensive theory of constitutional interpretation,⁶ all branches of originalism share both the “fixation thesis” and the “constraint principle.”⁷ The fixation thesis stipulates that some objectively ascertainable, disprovable fact about the Constitution’s text, tradition, history, custom, practice, or law becomes “fixed” in some temporal proximity to a particular constitutional provision’s enactment or ratification.⁸ The constraint principle argues

³ See Edwin Meese III, Att’y Gen., U.S. Dep’t of Just., Speech to the American Bar Association 7 (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [<https://perma.cc/M8ML-TANR>].

⁴ The public by contrast are still stuck in a kind of un-originalism, in which the intentions of George Washington, James Madison, Alexander Hamilton, and Thomas Jefferson are invoked with the reverence of Biblical figures.

⁵ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (“The very changes that make the New Originalism theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree.”); Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL’Y 257, 269 (2022) (“[L]ower court judges—including those committed to originalism as an abstract theory of constitutional obligation—are likely to face a range of practical questions about how to integrate such abstract commitments into their own practical obligations to adjudicate the concrete disputes that are brought before them.”). For a general critique of the life cycles of prescriptive theories, including originalism, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1821 (2016) (“As [prescriptive legal theories] develop over time, . . . [they] become not only increasingly complicated but also increasingly *compromised*, by their own normative lights.”).

⁶ For purposes of this point, I subscribe to Jack Balkin’s distinction between originalism as a theory of constitutional method and originalism as a mode of constitutional argument. See JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 62–63 (2024).

⁷ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6 (2015) (“Contemporary originalism is a family of constitutional theories, united by two core ideas, fixation and constraint.”). But cf. JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 19 (2024) (describing these twin concepts as “mistaken”).

⁸ Solum focused his initial discussion of the “fixation” thesis on the text of the Constitution. *Id.* at 7 (“Despite their differences, these originalist theories agree that the communicative content of the constitutional text was fixed at the time each provision was framed and ratified.”). However, as originalism has become more expansive, the object of the fixation thesis has grown correspondingly broader and more difficult to, well, fix. As discussed in the balance of this section, some originalists understand law to become fixed. See Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142 (2016) (“Insofar

that judicial discretion in any given case is limited by whatever set of objective facts about the Constitution have been fixed.⁹

What different varieties of originalism count as “fixed” is the topic of the first part of this Essay. The empirical weakness shared by all varieties of originalism is the subject of the second half.

A. *Original Intentions Originalism*

The *pater familias* of originalism is original intentions originalism. Original intentions originalism—sometimes referred to as “originalism 1.0”—began as a method of interpreting the Constitution according to the intentions of some defined group of people: the Framers, the Founders, or the ratifiers of the Constitution.¹⁰

Originalists of this variety consult notes from the record of the ratification, *The Federalist*, letters written by James Madison, Alexander Hamilton, or Thomas Jefferson,¹¹ reports from the state constitutional conventions, and other written evidence, and try to discern what this individual's or group's intentions were concerning provisions of the Constitution. In the most optimistic version, this is an empirical exercise, and therefore subject to falsification.¹²

as the original law of the Constitution resolves legal questions within its domain, a legal convention requiring adherence to that meaning until lawfully changed suffices to make the law fixed and enduring.”). Others argue that tradition becomes fixed. See Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 42 (2023) (“The preservation of our legal practices was an aim or objective of our predecessors, as it is one of ours.”). Text is a sufficient, but no longer necessary component of the fixation thesis to many originalists. See generally Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115 (2022).

⁹ Cf. Solum, *supra* note 7, at 8 (“Originalists also agree on the Constraint Principle—the notion that the communicative content of the Constitution should constrain constitutional practice, including decisions by courts and the actions of officials such as the president and institutions such as Congress.”). I leave aside a distinction between “restraint” and “constraint” that Professor Colby outlined. Colby, *supra* note 5, at 751 (“[O]riginalism . . . no longer emphasizes judicial *restraint*—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial *constraint*—in the sense of promising to narrow the discretion of judges.”).

¹⁰ Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45, 48 (2006) (“A jurisprudence of originalism presumes that we can know in some meaningful way the intentions of the Founders or of the framers of the Constitution.” (emphasis omitted)).

¹¹ *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 7 (1966) (“Because of his active interest and influence in the early development of the patent system, Jefferson's views on the general nature of the limited patent monopoly under the Constitution . . . are worthy of note.”).

¹² To paraphrase Justice Antonin Scalia: intentions, linguistic usage, legal methods, and law are facts to be discovered rather than convictions to be demonstrated. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in the judgment and dissenting in part) (“Texts and traditions are facts to study, not convictions to demonstrate about.”), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Unfortunately, there wasn't a lot of rigor to this method, at least initially, and often the reasoning resembled less an application of constitutional method than an exercise in hagiography¹³ or divination.¹⁴ Consider the recurrent references to Thomas Jefferson in early opinions and scholarship that purport to apply original intentions. Thomas Jefferson wasn't at the Constitutional Convention in 1787 (he was serving in France as a diplomat) and didn't leave for America until late September 1789, shortly before the Bill of Rights was submitted to the states for ratification.

Jefferson's personal intentions about the meaning of the Constitution of 1787 (or the Amendments of 1789 for that matter) are no more relevant to its meaning, from an original intentions perspective, than are the intentions of Louis XVI or Sally Hemings.¹⁵ If we stipulate that original intentions originalism confines its factual investigation to the intentions of the people who either drafted the Constitution, approved the Constitution, ratified the Constitution, or all three, even then, there are serious methodological challenges to this kind of inquiry.

First, it is not at all clear that the Founders would have wanted the Constitution to be interpreted according to their intentions, as Professor H. Jefferson Powell has capably demonstrated.¹⁶ Second, any individual Framers' intentions may be unknowable.¹⁷ Even if knowable, they could be mutable. For example, the Framers James Madison was contemptuous of a national bank and certain the Constitution did not authorize its creation; as President, he came to conclude that it was constitutional.¹⁸ Third, the evidence one uses to determine original intentions may be unreliable or

¹³ Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 4 (2014) (discussing the "two centuries of hagiography for the Founders and worship of the [Constitution] that they produced").

¹⁴ Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 504 (2008) ("Given that the Framers' intent on almost any concrete case is going to be nonexistent, intentionalist inquiries amount to a process of channeling the framers.").

¹⁵ The only way Thomas Jefferson's intentions could be relevant is if they were known and acted upon by some group of people who drafted or adopted the Constitution and its Amendments. But then the question of intention becomes a question of *those* person's intentions regarding *another* person's intentions. See Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 AKRON L. REV. 623, 624 (2007) ("Undergirding Jefferson's reputation as one of the chief architects of the Establishment Clause has been a constant, if sometimes unarticulated assumption, that Jefferson's views on church and state were well known and widely accepted by those involved in the adoption of the Establishment Clause.").

¹⁶ See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

¹⁷ Frank S. Ravitch, *Interpreting Scripture/Interpreting Law*, 2009 MICH. ST. L. REV. 377, 380 ("[R]eliance on original intent may simply mask judicial predispositions because the intent of the framers may be unknowable or divided.").

¹⁸ Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 287 (1997) (explaining that although Madison asserted that his personal opinion had not changed, as president he "expressly disclaimed the view, so tenaciously advocated by himself twenty-three years earlier, that the Bank was unconstitutional").

contradictory.¹⁹ Madison's notes of the Constitutional Convention, as Professor Sarah Mary Bilder has uncovered, were intentionally revised over time to make his positions more publicly palatable.²⁰

Then there is the question of the set of intentions from which to derive original intent. Fifty-five men were involved in drafting the 1787 Constitution, but only thirty-nine of them signed it. Whose intentions matter?²¹ Once you attempt to find the intentions of not just the Philadelphia Convention-goers but the men who attended state ratifying conventions; the problem of isolating the "intention" of any group concerning a given provision becomes incalculable.²²

Finally, original intentions originalism generated huge interpretive difficulties, given the Constitution is a trans-generational document. Justice Samuel Alito's sardonic question in *Brown v. Entertainment Merchants Ass'n* (where he asked what James Madison thought of video games) was an acknowledgment of this difficulty.²³

These challenges were all well-understood public choice problems in areas like political science and statutory interpretation;²⁴ it's just that the problems were magnified by the stakes of constitutional law. Enter "originalism 2.0": original public meaning originalism.

B. Original Public Meaning Originalism

Original public meaning originalism was born to rescue originalism from the theoretical and practical problems that hobbled original intentions originalism.²⁵ This type of originalism rejected the notion that any individual's or group's intentions

¹⁹ BALKIN, *supra* note 6, at 164 ("The *Federalist* and Madison's notes are not entirely reliable sources of original meaning, original intention, or original understanding.").

²⁰ See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 4–5, 15 (2015).

²¹ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–16 (1980).

²² Barnett, *supra* note 14, at 504 (recognizing that searching for the intentions of those who ratified the Constitution on behalf of the people "only magnifies the practical difficulties in determining original intent").

²³ Transcript of Oral Argument at 17, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (No. 08-1448).

²⁴ Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. . . . It is not only impossible to reason from one statute to another but also impossible to reason from one or more sections of a statute to a problem not resolved.").

²⁵ See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 616 (2008) ("The old originalism succumbed to a series of criticisms—about the difficulty of aggregating individual intentions, about the inevitable incompleteness of the historical record—whose combined effect was to undermine its claim that only it offered an interpretive approach that avoided judicial subjectivity, judgment, and choice.").

mattered.²⁶ Instead, original public meaning focused on the text alone: how an ordinary English speaker would have understood the words at the time the words were ratified.²⁷ As such, the practice “is objective insofar as it looks to the public meaning conveyed by the words used in the Constitution, rather than to the subjective intentions of its framers or ratifiers.”²⁸

Public meaning originalism has steadily become more sophisticated. Whereas early adopters of original public meaning consulted notoriously unreliable sources like dictionaries written by Samuel Johnson and his contemporaries,²⁹ subsequent generations have employed corpus linguistics and big data techniques to scan vast databases of digitized documents in an attempt to identify how words and phrases were most often used. By mining resources with these formidable computational tools, mavens of this approach trust they can determine as a matter of historical linguistic fact how individuals in the relevant generation most often used terms found in the Constitution.³⁰

C. Original Methods Originalism

Original methods originalism (“originalism 3.0”)³¹ developed as a way to sever the legal part of original public meaning from the linguistic part. Public meaning

²⁶ Perry Dane, *The Nagging in Our Ears and Original Public Meaning*, 106 MARQ. L. REV. 767, 781 (2023) (“[Original public meaning] rejects intentionalism’s reliance on the private meaning that the original authors might have thought they were memorializing in those texts and looks instead to either the shared, public interpretation of the readers of those texts or the public meaning more generally attached at the time to the words, phrases, and concepts enacted by those texts.”).

²⁷ Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (“‘[O]riginal meaning’ refers to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted.”).

²⁸ *Id.*

²⁹ 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, 298 (2011) (“Early dictionaries, including the first American dictionaries, were not compiled according to the rules of modern lexicography. These texts were idiosyncratic products of their authors, who often had ideological and political agendas.”).

³⁰ Lee J. Strang, *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1184–85 (2017) (“[O]riginalists’ conceptual move toward original meaning originalism, when coupled with the adoption of CART [computer-assisted research technologies and techniques], will increase originalism’s methodological rigor.”).

³¹ Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821, 823 (2019) (“Originalism appears to be morphing yet again: version 3.0 is still somewhat inchoate, but its champions have turned away from an emphasis on linguistic meaning, stressing instead legal meaning.”).

originalism was initially insensitive to the fact that certain terms and phrases of the Constitution, like “Letters of Marque and Reprisal,”³² are technical terms. It does little good to scan vast databases of ordinary usage for this phrase, because it’s not a phrase commonly used among the vast majority of English speakers.³³

The progenitors of this original methods approach are Professors John McGinnis and Michael Rappaport, and their contribution to the family was to argue that the entire Constitution is a legal document, not a recipe or a letter.³⁴ Therefore, they argue, legal documents must be interpreted using legal methods. And, since originalism looks for something fixed in the Constitution, the methods that most lawyers in the founding era would employ to interpret legal documents is the historical fact that constrains what methods can be used to interpret the Constitution today.³⁵

D. Original Law Originalism

Professors Stephen Sachs and Will Baude contributed significantly to originalism by—among other things—arguing that originalism is less a theory of intentions, language, or methods, and more a “theory of legal change.”³⁶ The law of the relevant era remains the law until legally changed.

³² U.S. CONST. art. I, § 8, cl. 11. Professor Larry Solum has attempted to harmonize the two approaches. See Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1632 (“[A] farmer in Massachusetts who read the proposed Constitution of the United States might realize that ‘Letters of Marque and Reprisal’ was a technical term and consult an expert (an admiralty lawyer or sea captain) about its meaning.”).

³³ James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21, 29 (2016) (“[G]eneral corpora are not appropriate for examining legal terms of art.”).

³⁴ John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758 (2009) (“The Constitution is a formal, legal document and therefore interpreters of the Constitution must follow the original interpretive rules applicable to a document of this type.”).

³⁵ *Id.* at 751 (“Under this approach, the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it.”); Solum, *supra* note 1, at 1251 (“‘Original Methods Originalism’ maintains that the original meaning of the text is fixed by the original methods of constitutional interpretation and construction.”); see also BALKIN, *supra* note 6, at 124 (discussing that “if adoption-era lawyers disagreed about what interpretive methods to use and also disagreed about how to apply those methods . . . McGinnis and Rappaport argue that lawyers . . . can decide which interpretation was better supported,” even if that support is simply fifty-one percent to forty-nine percent).

³⁶ Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 819 (2015) (“Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them.”); see also GIENAPP, *supra* note 7, at 231 (recognizing this move as a “significant step forward”).

An important innovation of original law originalism is its effect of severing originalism from textualism. Original intentions, original public meaning, and original methods originalism are all deeply concerned with interpreting the text of the Constitution. But, as Professor Sachs has ably argued, one can have originalism without textualism.³⁷ “The crucial question for legal interpreters,” Sachs and Baude write, “isn’t ‘what do these words mean,’ but something broader: What law did this instrument make?”³⁸ The law that any given instrument, like a constitution, may make can involve both written and unwritten rules, defaults, and assumptions. In this model of original law, “[l]anguage will of course be an input to the process, but law begins and ends the inquiry.”³⁹

Original law originalists have been chief articulators of the “positive” turn in constitutional theory.⁴⁰ The positive turn in originalism is both a jurisprudential and an empirical statement. Jurisprudentially, original law originalism follows the positivists like H.L.A. Hart to argue that constitutional law—and originalism itself—is an “is” not an “ought.” It is a social practice that can be analyzed sociologically. Empirically, the positive turn presumes that this “is” of original law can be demonstrated with data and, hence, like the objective component of any originalist project, is subject to falsification.

This next section explains how, while each branch of originalism has developed its own set of principles and techniques, all share a trait—that some kind of empirical, replicable, falsifiable set of data points can be discovered in order to begin the interpretive enterprise. It is this trait that makes each form of originalism susceptible to problems common to all empirical projects: the problem of selection.

II. ORIGINALISM IS A THEORY OF COUNTING

Originalism is, at root, a theory of counting. Original intent counts evidence of intentions. Original public meaning counts evidence of usage. Original public methods count evidence of methods. Original law counts evidence of law. The various family members may count different things, but all versions of originalism count

³⁷ Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017) (“Originalism is not about the text.”).

³⁸ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017).

³⁹ *Id.*

⁴⁰ Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1325 (2017) (“The core idea of the positive turn is that debates about how to properly interpret statutes and the Constitution ought to be settled neither by analyzing concepts of meaning, interpretation, or authority nor by engaging in normative debates sounding in political or moral philosophy” but instead “look to the same source lawyers and judges do to resolve legal disagreements: the law.”).

something—that's what makes originalist claims about the Constitution empirical and falsifiable, and that is originalism's chief appeal.

The statement, ordinary "speakers of English in 1791 most often used the phrase 'bear arms' to mean" "carry weapons" is a claim of historical linguistic fact that can be disproven with data.⁴¹ "[P]eople should have rights to bear arms for individual self-defense" is not an empirical claim;⁴² it's an ethical assertion to be disputed along other margins.⁴³ Originalism has always held out the promise that some statement about law, methods, linguistics, or intentions can be disproven, in a way that a normative prescription cannot.⁴⁴

Originalist theory is also epistemically optimistic.⁴⁵ It operates on the faith that, given sufficient time and expertise, some set of facts about law, language, method, or intentions can be observed, counted, aggregated, and assembled into a rough distribution. Then, a vaguely statistical assertion about the "most," the "median," the "average," the "ordinary," the "common," or the "conventional" that characterizes a feature of this distribution that becomes fixed as a legal matter. It is incumbent upon judges to respect that fixation. For thick theories of originalism, counting is constraining.

But, once you start counting, as empiricists tell us, you are presented with four questions: what to count, how to count, when to count, and what conclusions to draw from counting.

A. What to Count

An initial challenge of any originalist method is the choice of what to count. As discussed above, one can decide to count intentions, or linguistic usage, or methods,

⁴¹ Darrell A.H. Miller, *Owning Heller*, 30 U. FLA. J.L. & PUB. POL'Y 153, 157 (2020).

⁴² I've used a version of this example elsewhere, see *id.*

⁴³ The disputation could be consequentialist or deontological, and of course could be supported by data. But they are not epistemic disagreements. The point is that these normative statements are not falsifiable in any empirical sense. See Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1962 n.49 (2005) (defending a place in constitutional law for "normative legal theory that is not falsifiable").

⁴⁴ William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1458 (2019) ("[T]o claim that . . . our original law actually permits or requires [a particular methodology] is to make an empirical and falsifiable claim, one that has to be supported by historical evidence and not only by modern policy preferences."); Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 76 ("A chief selling point of originalism has always been that history is an objective and falsifiable metric that can constrain judicial decision-making.").

⁴⁵ Frederick Mark Gedicks, *The "Fixation Thesis" and Other Falsehoods*, 72 FLA. L. REV. 219, 222 (2020) ("Public-meaning originalism claims that the original public meaning of the Constitution is *epistemologically* discoverable.").

or law. Given limited resources, the decision to count one or the other is itself a choice suffused with discretion. Choosing public understanding prioritizes the legal importance of language; choosing the Framers' intentions prioritizes the legal significance of a past generation's motivations.⁴⁶

Selecting what to count could be just a matter of convenience, but originalist methods presume a theoretical justification for counting what they count. Original intentions originalists, for instance, presuppose that the meaning of constitutional law is fixed by the intentions of some group of people in the past, and that should control interpretive discretion. Original public meaning originalists deny that intention controls and instead posit that the public meaning of the words to an ordinary speaker of English control. The justification for what to count cannot be bootstrapped by originalism; it is based on a meta-theory about why you're counting what you're counting in the first place.

But my interest is not so much about what originalists choose to count, but the reliability of the data points they *do* count, assuming the choice can be justified in some fashion. For instance, lawyers and scholars, including the present author, cite William Blackstone's *Commentaries* as an authority on the practices of the common law in England.⁴⁷ Blackstone himself said that the unwritten common law he described was the unwritten practices and customs both of the nation and in particular areas of England from time immemorial.⁴⁸ To an original methods originalist, for example, legal texts are to be interpreted according to the majority practices of lawyers. But Blackstone was not a sociologist; indeed, there was no such discipline until the latter nineteenth century. Blackstone's *Commentaries* are therefore scant evidence of the practices of English common law as a matter of historical fact.⁴⁹

This presents a problem for theories of original methods originalism.⁵⁰ To the degree Blackstone is offered for definitive evidence of agreed-upon original methods

⁴⁶ BALKIN, *supra* note 6, at 139–41 (discussing how lawyers have a presentist object to using history, rather than to understand some historical fact on its own terms).

⁴⁷ Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1566 (2009) (noting that by the late eighteenth century, Blackstone's *Commentaries* were "being cited as an authoritative statement of the law in the newspapers and pamphlets, the courts, the House of Commons, the House of Lords, Scotland, and the colonies").

⁴⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *17.

⁴⁹ Daniel R. Coquillette, *Past the Pillars of Hercules: Francis Bacon and the Science of Rulemaking*, 46 U. MICH. J.L. REFORM 549, 581 (2013) ("[L]egal scholars such as E.P. Thompson, Douglas Hay of the Warwick School, and Duncan Kennedy have demonstrated that Blackstone's *Commentaries* did not accurately represent the actual practice of law or the operation of eighteenth-century courts."); Patrick O. Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663, 741 n.295 (1983) ("Blackstone undertook what he conceived to be a scientific ordering of the substance and structure of legal institutions; Blackstone did not purport to write a general sociology.").

⁵⁰ JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 134–35 (2013) (citing Blackstone as evidence of original methods).

among lawyers, his synthesis of what lawyers actually did in England is not credible.⁵¹ Hence, any statement of historical fact that begins: “As Blackstone demonstrated . . .”⁵² must be viewed either with skepticism or for what it is: an imperfect, provisional, small *n* tool for establishing a matter of historical truth.⁵³

For an original law originalist, the decision to count cases relies upon the assumption that case law represents a good proxy for identifying original law and that the sample of cases is likely to be representative of law during the relevant time period. But as Andrew Willinger has noted, reported cases are not reliable evidence of what the actual “law” at the time is, even if we considered cases the right thing to count to determine original law.⁵⁴

Reported cases, especially during the early period of American history, suffered an acute form of publication bias. Publication of the proceedings of cases was a hit-or-miss affair, governed more by the idiosyncrasies or pecuniary ambition of individual reporters rather than any desire to assemble a comprehensive resource for contemporary lawyers, much less future ones.⁵⁵ Moreover, many cases have been lost to history, “because the nascent reporting system did not deem them worthy of preservation, was not aware of them, or because the decisions were never written down in the first place.”⁵⁶ Finally, the sources of reported cases may extend beyond reporters to publications like newspapers or other non-legal sources.⁵⁷

Similarly, if one is searching for data on linguistic usage as a public meaning originalist, dictionaries (as mentioned before) were notoriously unreliable. Resort

⁵¹ A number of scholars, even some contemporaries, criticized Blackstone as offering a simplified and pristine version of the way in which law was actually practiced. *See* Kadens, *supra* note 47, at 1564 (“[T]he law as presented in the *Commentaries*, while perhaps technically correct in the abstract, was too inanimate to be accurate when applied to particular instances.”). Blackstone as an authority on the actual content of “original law” is scarcely more reliable.

⁵² *Cf. Ex parte Tabor*, 840 So. 2d 115, 127 (Ala. 2002) (Moore, C.J., concurring in part and dissenting in part) (“[A] careful reading of Blackstone’s *Commentaries* shows that a parent was not required to provide education throughout the entire period of minority—certainly not a college education.”).

⁵³ Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 158 (2015) (reviewing MCGINNIS & RAPPAPORT, *supra* note 50) (“Although McGinnis and Rapport cite examples of historical figures who followed some common law rules . . . they do not undertake a fine-grained, time-specific analysis of the common law in the United States in 1787. Had they done so, they likely would have noticed the rules were undergoing both challenge and change, to a degree fatal to any claim that the rules were so widely known and accepted that we can presume they were baked into the constitutional text.”).

⁵⁴ Andrew Willinger, *Missing Pieces: Gaps in the Record of Early American Decisional Law*, 73 DUKE L.J. ONLINE 209, 229 (2024).

⁵⁵ *Id.* at 216.

⁵⁶ *Id.*

⁵⁷ *Id.* at 219.

to a larger dataset—like a corpus of documents from the eighteenth century—is going to skew toward the educated and elite.⁵⁸ An assessment of the linguistic practices of ordinary speakers of English looks much different when the literacy level is ninety-two percent compared to seventy-five percent.⁵⁹ Further, given historical racial discrimination in education, those numbers are racially skewed, erasing from consideration linguistic usage by a significant portion of the U.S. population.⁶⁰

B. How to Count

Even if one can settle on a justification for what to count: how do you count? How to count is a question of coding. Assume you wanted to identify the original public meaning of the term “he” in Article II.⁶¹ Specifically, you want to find out whether the most common usage of the word “he” was gender-specific or gender-neutral. Assume also that you want to use data beyond usage internal to the Constitution itself or beyond the intentions of the Framers.⁶² How should one code the word “he” used in a non-legal document? How should one code an instance of the use of the word “he” that does not have a clear gendered referent? Is this evidence of a gendered usage or not?

One can, of course, use records of the Convention or other kinds of aids to decide whether the “he” in Article II fixed the gender of the President.⁶³ One can also attempt to confine the data set of usage to legal documents, or usage among

⁵⁸ See Michael L. Smith & Alexander S. Hiland, *Originalism’s Implementation Problem*, 30 WM. & MARY BILL RTS. J. 1063, 1110–11 (2022) (“Expansion of corpora is necessary—at least for any originalist who wants corpus linguistics analysis to result in findings that are truly reflective of the founding-era public—as the founding-era database, COFEA, currently lacks documents and language of nonelite people.”).

⁵⁹ F.W. Grubb, *Growth of Literacy in Colonial America: Longitudinal Patterns, Economic Models, and the Direction of Future Research*, 14 SOC. SCI. HIST. 451, 453–55 (1990).

⁶⁰ In 1870, 20% of the U.S. population 14 years or older could not read or write in any language. *National Assessment of Adult Literacy (NAAL): 120 Years of Literacy*, NAT’L CTR. EDUC. STAT., https://nces.ed.gov/naal/lit_history.asp [<https://perma.cc/7NYT-M669>] (last visited Nov. 27, 2024). For Black Americans, that number was 80%. *Id.*

⁶¹ U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years.”).

⁶² See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 827 (2018) (“The public-meaning construct seems to dictate a speech community consisting of a broad cross-section of the public.”); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 292 (1987) (noting that “[o]ver and over, Article II uses the words ‘he’ and ‘his’ to refer to the President” while not using gendered terms in Article I or III).

⁶³ See generally Robert Natelson, *A Woman as President? The Gender-Neutral Constitution*, WASH. POST: VOLOKH CONSPIRACY (Oct. 28, 2015, 10:56 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/28/a-woman-as-president-the-gender-neutral-constitution/> [<https://perma.cc/9C8F-8DHU>] (comparing the use of the word “he” with other contemporary sources such as the records of the convention and state constitutional law).

citizens speaking of constitutions,⁶⁴ but that is to go outside the four corners of the presumed empirical exercise in public meaning originalism, which is to determine how an *ordinary* speaker of English understood the word “he.”⁶⁵

Other forms of originalism suffer from the same kind of coding challenge. Does a regulation concerning firearms in hospitals “count” as a regulation on guns in hospitals, or does it count as a regulation on guns in places dedicated to helping the infirm? Is a regulation without a criminal penalty or a regulation that was infrequently or partially enforced evidence of original law?⁶⁶

If we narrow the question to one of intentions, then we have the selection issues that crippled the theoretical coherence of original intentions originalism. How do you code the conflicting intentions of just one person, much less the conflicting intentions of a group?

C. *When to Count*

Originalism's selection problem also presents two temporal issues. The first issue is over what period to look for data, especially when the borders of that time period are indistinct—when does the “Founding” or “Reconstruction” begin and end? The second issue is distinct in that it isn't about the historical duration from which to find data; it's the duration of time to look for data. That is a methodological choice directed to the persons counting. When does the counter stop incorporating data into the dataset, assuming one settles on the precise temporal boundaries of the “Founding” or “Reconstruction.”

Most forms of originalism state that the time period for counting data is that period roughly contemporaneous with enactment of the relevant constitutional provision. That has been a chief premise of the “fixation” thesis—but stopping one's counting at the year 1791, or 1801, or 1868, or counting only between two of these time periods has enormous consequences for both the sources available to count and the data points that may be counted. Attempts to extend the boundaries of this enterprise by concepts like liquidation,⁶⁷ gloss,⁶⁸ or tradition⁶⁹ simply raise further

⁶⁴ See Lee & Mouritsen, *supra* note 62, at 827.

⁶⁵ See Smith & Hiland, *supra* note 58, at 1076 (using the example of the Eighth Amendment's prohibition on “cruel and unusual punishment”: “[T]he whole point of using corpus linguistics methodology is to determine the general public use of ‘unusual’ at the time of the founding—not only instances where that term was used in the context of punishment”).

⁶⁶ See generally Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J.L. & PUB. POL'Y 223 (2016).

⁶⁷ See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 47 (2019) (noting that constitutional liquidation “is not quite an alternative, but rather an adjunct, to more complete methods of constitutional interpretation”).

⁶⁸ See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 257 (2017) (“[P]ractices might be invoked as an appeal to ‘historical gloss’—a claim that the practice informs the content of constitutional law.”).

⁶⁹ See generally Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023).

questions about the reasons for setting the new temporal scope and potentially complicate the data inputs that this broader scope of time includes.⁷⁰

The second issue is not about the boundaries from which to find data but how long you actually update the dataset. Originalism in particular, but the common law system more generally, is an inductive enterprise, so when and whether to stop counting can be quite important. The record of linguistic usage in 2008, when the Court decided *District of Columbia v. Heller*, is far less complete than that which exists in 2024.⁷¹ Scans of digitized newspapers in the twenty-first century may contain records of adjudications or the enactment of municipal laws not available in any published reporter or compilation of statutes a decade ago. Adding this information plainly changes the dataset from which to identify original law.⁷²

Granted, the constraints on when the counter stops counting are set by imperatives outside the method itself. No researcher has an infinite amount of time to count. The demands of adjudication simply magnify the problem. Briefs need filing; cases need deciding. Our system of precedent means that judgements can and must be made on a partial or schematic factual record with limited opportunity to correct or improve the factual predicates for the decision.⁷³ But that simply raises the question, addressed later, about what needs to be sacrificed given a choice between originalist methods, expediency, and accuracy.

D. What Conclusions to Draw from Counting

Finally, there's the question about the conclusion to draw from the counting exercise. The fact there may be a widespread phenomenon, whether that is intentions, or linguistic usage, or law, does not itself say much about what inference to draw from the phenomenon.⁷⁴ As Professor Balkin notes, the assumption that

⁷⁰ Justice Kavanaugh suggests all these terms are part of the same dataset of “post-ratification history.” See *United States v. Rahimi*, 602 U.S. 680, 725 (2024) (Kavanaugh, J., concurring) (“[T]he Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text.”).

⁷¹ See Miller, *supra* note 41, at 160 (“Whereas a decade ago the linguistic briefing on the meaning of ‘bear arms’ was confined to a sample of just 115 sources, today, through big data sets of historical materials . . . historical and linguistic researchers can comb through billions of words to find these terms.”).

⁷² See Willinger, *supra* note 54, at 212–13.

⁷³ But cf. Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 283 (1999) (“The Supreme Court has expressed agreement with the proposition that changes in underlying facts alter the status of the legal conclusions that rely on those facts.”).

⁷⁴ See BALKIN, *supra* note 6, at 145 (“A lot depends on who has the burden of proof in the face of uncertainty and what kinds of inferences we are willing to make from an incomplete historical record.”).

historical practices, for instance, are evidence of constitutional norms is risky: “[S]ome of these practices might be violations of the Constitution, mistakes, or exceptional cases.”⁷⁵ The same could be said about other kinds of data points used in originalism.

For instance, as Professor Kevin Tobia has argued, original public meaning originalism that relies on analysis of corpora may fall into the nonappearance or uncommon use fallacies or the comparative use fallacy.⁷⁶ The nonappearance and uncommon use fallacies are the erroneous inferences that the lack of, or infrequent appearance of, a particular term in a linguistic dataset means that use of the term is not part of ordinary meaning.⁷⁷ Tobia’s example would be the erroneous conclusion that airplanes are not commonly understood to be vehicles because of the absence or infrequent appearance of the word airplane in conjunction with the word vehicle in a dataset.⁷⁸ The comparative use fallacy falls into the trap that as between two different usages, the more common usage is exclusive of another, more capacious understanding. Again, Tobia uses the example of an airplane: “Just because it is more common to use ‘vehicle’ to refer to cars than to airplanes does not mean it is clear that the ordinary meaning of ‘vehicle’ in any legal text is [limited to cars and trucks].”⁷⁹

Original law originalism can fall into a similar type fallacious reasoning from nonappearance. Consider how Justice Scalia in *Burnham v. Superior Court* inferred from the lack of reported cases the conclusion that a regulation addressing in-person service complied with the due process clause: “Although research has not revealed a case deciding the issue in every State’s courts, that appears to be because the issue was so well settled that it went unlitigated.”⁸⁰

⁷⁵ BALKIN, *supra* note 6, at 142; *see also Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring) (“[C]ourts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind.”).

⁷⁶ *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 796–97 (2020) (“These three fallacies—the Nonappearance Fallacy, the Uncommon Use Fallacy, and the Comparative Use Fallacy—each present an individual challenge to common interpretive arguments grounded in legal corpus linguistics data. But we should also note that these three arguments together threaten much of the current usefulness of legal corpus linguistics. If legal corpus linguistics cannot reliably account for omitted or rare uses (from ordinary meaning) or determine which of two possible senses is more credible, then the method loses much of its promise as a solution to questions of ordinary meaning.”).

⁷⁷ *See* Kevin Tobia, *The Corpus and the Courts*, 2021 U. CHI. L. REV. ONLINE 1, 11 (“Just because a use is unattested in a corpus does not support that the use is outside of the ‘ordinary meaning’ of a text containing that term.”).

⁷⁸ *Id.*

⁷⁹ Tobia, *supra* note 76, at 796.

⁸⁰ *Burnham v. Superior Ct.*, 495 U.S. 604, 613 (1990) (“The law is so clear on this point that there are few decisions on it.” (quoting R. LEFLAR, *AMERICAN CONFLICTS LAW* § 24, at 43 (1968))).

Compare that to how Justice Thomas uses the lack of enacted legislation in *Bruen* as evidence of the unconstitutionality of modern firearm regulation.⁸¹ As Thomas argues, a “straightforward” application of a “historical understanding” means that “when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”⁸² As Andrew Koppelman has piquantly put it, to infer solely from the lack of regulation the constitutional inability to regulate is not just fallacious—“It is crazy.”⁸³ “At any given time,” he observes, “an infinite number of laws are not enacted. . . . Just as the number of nonenacted laws is infinite, so is the number of reasons why the legislature decides not to enact them, starting with the obvious possibility that no one thought of it.”⁸⁴

Granted, originalist methods are not alone in risking unwarranted conclusions from lack of evidence.⁸⁵ But other areas of law, including other constitutional methodologies, contain institutional guardrails, norms, and defaults that attempt to minimize the effects of such epistemic challenges. Norms and defaults that originalism, as currently practiced, seems less content to apply.

III. IMPLICATIONS TO ORIGINALISM AND CONSTITUTIONAL METHODOLOGY

The implications of the selection problem for originalism and constitutional methodology are extensive⁸⁶ and range from the manageable to the crippling. I offer

⁸¹ See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 111 (2023) (“[F]or the absence of evidence (of regulations) to serve as evidence of absence (of regulatory authority), the Court must make assumptions about historical lawmaking that do not seem justified.”).

⁸² See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26 (2022). *But see* *United States v. Rahimi*, 602 U.S. 680, 739–40 (2024) (Barrett, J., concurring) (observing it to be a fallacious assumption that “founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority”).

⁸³ See Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami’s Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 187, 192 (2024); *see also* Girgis, *supra* note 69, at 1514 (“[W]hile states have never banned ice cream, that doesn’t make ice cream consumption a constitutional right.”).

⁸⁴ Koppelman, *supra* note 83, at 192.

⁸⁵ Common law constitutionalism, for example, to the extent it relies on case law, party presentation, and analogs from prior cases, presents a similar type of epistemic challenge. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879–91 (1996) (outlining the common law method of deciding constitutional cases); *cf.* Oren Bar-Gillet et al., *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 12 n.13 (2017) (“[S]election effects are relevant for a normative assessment of the common-law evolutionary process and of the rules that it produces.”); Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1665 (2020) (“In a common law system, . . . selection effects on litigation . . . limit the range of available opinions from which later judges might draw their analogies.”).

⁸⁶ Indeed, the entire positivist conception of law as social practice raises many of these

the following (potentially incompatible) implications as points to ponder rather than as reflective of any conviction about originalism's ability to overcome them.

I also acknowledge that selection effect challenges are not unique to originalism.⁸⁷ Whether originalism, all else equal, is a superior method of constitutional interpretation despite these selection problems is outside the scope of this Essay, as is the broader question of the right criteria with which to judge the superiority of any given method.⁸⁸

A. Implication 1: Originalism Can Be Less Second Best

Justice Antonin Scalia was known to quip that originalists didn't need to outrun the bear, they just needed to outrun non-originalists.⁸⁹ Of course, he was speaking during a period when originalists more or less agreed on the nature of the "bear"—judicial discretion in the face of the counter-majoritarian difficulty.⁹⁰ Assuming that judicial constraint is still a worthy object of constitutional theory, and assuming it

same empirical and epistemic problems. See Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC'Y 149, 153 (2003) ("[W]hat determines the existence and content of the rule of recognition in any legal system is that, as a matter of empirical fact, the people who function as officials in the system accept the rule as regulating their behavior *qua* officials and conform to those requirements in their official behavior."); W. Bradley Wendel, *Professionalism As Interpretation*, 99 NW. U. L. REV. 1167, 1206 (2005) ("One can ascertain the existence and content of a rule of recognition by reading cases, doing legal sociology, or employing some other method appropriate to discovering facts about a community's practices.").

⁸⁷ See D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. 795, 797 (2019) (discussing selection effects as one concern in common law adjudication).

⁸⁸ A number of scholars have attempted to articulate a theory of what makes one kind of method better than another. See, e.g., Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 125–26 (2017). Constraint in the face of the counter-majoritarian difficulty has been one. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). Utilitarianism has been another. See MCGINNIS & RAPPAPORT, *supra* note 50, at 1698. So has integrity, oath-keeping, and fidelity. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 184–95, 225–32 (1983); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 308 (2016); James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1354 (1997). I focus here on constraint, acknowledging that is not the only criteria for judging the relative value of a method.

⁸⁹ Recent Publications, *Frank B. Cross, The Failed Promise of Originalism*, 127 HARV. L. REV. 1075, 1075 (2014) ("Justice Scalia is fond of quipping to nonoriginalists that he does not need to 'outrun the bear; I just have to outrun you'—meaning that while originalism may not be perfect, it is better at constraining judicial discretion and maintaining the legitimacy of the Court than other interpretive methods.").

⁹⁰ Colby, *supra* note 5, at 751; see also Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing A "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1509 (2012) ("[O]riginalism grew out of an understandable desire to cabin the interpretive discretion of unrepresentative, unaccountable judges" imposing their policy preferences "under the guise of 'interpreting' the counter-majoritarian Constitution.").

remains a shared commitment among the originalist family,⁹¹ originalism as a second best solution could be made less second best.

Courts are not geared to overcome the methodological problems identified here but perhaps can be retooled to do so. Broadening the dataset to include points relevant to the specific factual inquiry is a place to start. For example, accepting evidence of the intentions or understandings of those not writing polemics in limited circulation newspapers would provide greater confidence that one is accurately assessing intentions or understanding of the relevant enactors.⁹² Expanding the *n* of evidence of “original law” beyond reported cases to other indicia of juris-generative social practice would make a finding of original “law” more robust.⁹³

Operationally, factual presentations about customs, practice, tradition, and law would need to become more routine, as they are in other domains, like customary international law.⁹⁴ Relatedly, expert reports, special masters, amicus briefs, and

⁹¹ Now that conservatives hold supermajority power at the Supreme Court, there is far less agreement among originalists about the nature (or even the existence) of the “bear.” The turn to “judicial engagement” and “constitutional restoration” are emblematic of this turn. *See generally, e.g.*, Clark Neily, *Judicial Engagement Means No More Make-Believe Judging*, 19 GEO. MASON L. REV. 1053 (2012); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 969 (2018). Correspondingly, liberals by and large have now discovered the virtues of constraint. *See* Richard M. Re, Keynote Address at the National Conference of Constitutional Law Scholars: The One Big Question (Feb. 26, 2024), <https://ssrn.com/abstract=4739469> [<https://perma.cc/EMB4-EUB4>]; Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 215 (2019) (“Over the course of a little more than a century, American liberals (or, in an earlier period, progressives) and conservatives have switched positions on judicial review, judicial restraint, and the role of the federal courts—not once, but twice.”).

⁹² *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 84 (2010) (noting *The Federalist* had a “limited circulation outside New York” and within the state as well); Annette Gordon-Reed, *Writing About the Past That Made Us: Scholars, Civic Culture, and the American Present and Future*, 131 YALE L.J. 948, 957 (2021) (reviewing AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840* (2021)) (“[L]imiting the story of early America to the lives and actions of the men—and they were almost all men—who held official power leaves far too much out of the story.”). For more on diversifying the sources from which to practice originalism, see James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 678 (2016); Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 380 (2018).

⁹³ *See generally* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 805 (2006) (discussing possibility that persons other than judicial officials can make “law” in the social sense).

⁹⁴ *See* Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT’L & COMP. L. 205, 205 (1996) (“Although customary international law is used by United States courts in the same manner as any other law, its content and applicability are often proved by expert testimony rather than by means of citation and argumentation by counsel.”). *See generally* Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 669 (2024).

more reliance on norms within other domains of expertise, like statistics, history or linguistics, can supply what lawyers themselves cannot.⁹⁵ This reliance is different than the crutch of party presentation (discussed more below). It means obliging courts that apply an originalist approach to be far more attuned to empirical methods and to engage in far more rigorous gatekeeping of empirical data than judges are currently trained to perform.⁹⁶

B. Implication 2: Originalism Cannot Save Law from the Social Sciences

The more originalism rests on objective metrics produced by linguists, historians, sociologists, or statisticians, the more it will be susceptible to the critiques, norms, and methods of those disciplines, and the less confidence we can have in a generalist lawyer's ability to distinguish between meritorious and meretricious data. In this way, originalism simply reintroduces the critique that originalism was designed to counter: the charge that law cannot be meaningfully separated from psychology, political science, history, economics, or any one of several other academic disciplines.⁹⁷

Attempts to lean upon the thin reed of party presentation is not an escape from this dilemma; instead, it will force judges into a set of potentially problematic

⁹⁵ See Miller & Blocher, *supra* note 44, at 79; William Baude et al., *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 37 (2017). But see BALKIN, *supra* note 6, at 208 (expressing skepticism that there is a technical solution to the empirical problems associated with thick originalism).

⁹⁶ See Eric M. Larsson, *Qualifying Historians as Expert Witness*, in 130 AM. JUR. PROOF OF FACTS 3D 89, § 16 (July 2024) ("Apart from the academic debate, the practical consideration in qualifying a historian as an expert witness with respect to methodology is for the expert to be able to describe in detail the method he or she used to investigate the matter at hand and to reach the conclusions rendered, to the court's satisfaction."); cf. Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation*, 70 DRAKE L. REV. 387, 409 (2022) ("If corpus linguistics is indeed scientific and a method for discovering objective truths, then it should be subject to the same constraints as other fields that claim empirical validity, using expert testimony in conformance with the rules of evidence and with the courts acting as gatekeepers."); Amanda L. Tyler et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1908 (2012) ("I am not going to say there ought to be a *Daubert* test for historian amicus briefs. But some historians are better, and more disinterested, than others." (remarks of Judge Jeffrey S. Sutton)).

⁹⁷ See Robert J. Delahunty, *Originalism and Legitimacy: A Reply to Professor Powell*, 7 U. ST. THOMAS L.J. 281, 282 (2010) ("Originalism was offered by exponents like Raoul Berger and Robert Bork as a jurisprudential alternative to legal realism."); Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 700 (2021) ("A . . . feature of originalism is its hope that emphasizing constitutional formalities might escape from the dynamics of legal realism and politics.").

maneuvers. The judge may anchor a decision on uncertain, partial, and potentially inaccurate premises offered by parties whose primary object is advocacy rather than identifying historical or linguistic fact. The judge may discount such gilded facts and rely upon non-originalist modalities like prudence, or Thomist natural law theory, or representation reinforcement to make a decision. Or the judge may become far more inquisitorial in the adjudicative process to ensure the empirics are reliable.⁹⁸ In any case, the judicial discretion that originalism was meant to defang will return—and the only question will be, when it does, will it come dressed as a sheep or as a wolf.⁹⁹

C. Implication 3: Everything Is Contingent and Up for Bayesian Updating

The prior discussion assumes originalism as a comprehensive theory of constitutional law is worth saving. If it is worth saving, it will likely require a better theory of stare decisis.¹⁰⁰ Decisions grounded on erroneous historical premises about intentions, linguistics, methods, or law may have to be revisited when new data becomes available.¹⁰¹

Of course, non-originalist decisions could be justified on some grounds that are not, in fact, originalist. But that justification will require trimming down the thick theories of originalism that many advocates and judges advance, so that originalism as practiced looks incomplete, rhetorical, or skeletal.

D. Implication 4: Originalism Is Incomplete, an Argumentative Trope, or a Form of Political Signaling

It's possible, of course, that originalism—at least as a thick theory of interpretation—is not worth saving. The selection difficulties could be so crippling that

⁹⁸ This last option, at least at the appellate level, may be near impossible. See Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 273 (2023) (“[I]t is a virtual practical impossibility that the Supreme Court could conduct serious originalist inquiries in all of the cases on its docket.”); see also Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 614 (1992) (observing if courts became more aggressive in obtaining information for judgment, “they would cease to be courts” and function more like administrative agencies).

⁹⁹ Cf. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing But this wolf comes as a wolf.”).

¹⁰⁰ See William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 333; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 83 (2001).

¹⁰¹ Cf. *Gamble v. United States*, 587 U.S. 678, 726 (2019) (Thomas, J., concurring) (“Our judicial duty to interpret the law requires adherence to the original meaning of the text. For that reason, we should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous.”).

originalism's claim to have devised a method that is equally empirical, rigorous, comprehensive, and compulsory is the legal equivalent of having devised a perpetual motion machine—it's a fun thought experiment, but it is incapable of doing any real work.

If that is so, an obvious consequence is that originalism is not actually a comprehensive theory of constitutional law.¹⁰² It's incomplete¹⁰³ and must be supplemented with other kinds of decision-making tools. Or it's not a theory at all, so much as an argumentative trope¹⁰⁴ or a form of political signaling.¹⁰⁵ In any case, it cannot bear the weight of normative consequences that are heaped upon it, nor absolve its practitioners from the choices they must make.

This does not necessarily mean that originalism is worthless or meritless. Nor does it suggest that there is no value in constraint, whether imposed by originalist methods or otherwise. It just means that originalists must abandon their faith that originalism has all the answers.¹⁰⁶ As a form of legal argument, originalism functions no better or worse than the multiple modalities of constitutional argument that various theorists have articulated over time.

E. Implication 5: Jack Balkin Is Right—The Only Intellectually Plausible Form of Originalism Is Framework Originalism

The last implication follows from the prior. Maybe Jack Balkin is right. The best account of constitutional law is an extremely thin conception of interpretation and

¹⁰² The most damning evidence for this proposition is that originalism of the thick variety is almost never applied in state supreme courts, which seems particular for a mode of constitutional reasoning that should be generalizable to all forms of constitutionalism. See BALKIN, *supra* note 6, at 73–74.

¹⁰³ See Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313 (1996) (discussing “soft” versus “hard” originalism, and the “incompleteness” of soft originalism).

¹⁰⁴ BALKIN, *supra* note 6, at 169–74.

¹⁰⁵ Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 556–57 (2006) (“The political practice of originalism thus reflected (and continues to reflect) conservative commitments that are not determined by objective and disinterested historical research into the circumstances of the Constitution's ratification.”); see Henry Redman, *Kelly, With a Pro-Business Record, Runs on Originalism*, WIS. EXAM'R (Feb. 15, 2023, 7:00 AM), <https://wisconsinexaminer.com/2023/02/15/kelly-with-a-pro-business-record-runs-on-originalism/> [<https://perma.cc/PX7D-8VL3>] (discussing judicial candidate Daniel Kelley's campaign for Wisconsin Supreme Court on a platform of originalism).

¹⁰⁶ See Fallon, *supra* note 98, at 244–45 (discussing the practice of “[s]elective originalism” wherein originalist judges will “rest their decisions on prior judicial precedents based partly on their policy-based preferences without regard to whether those precedents” comport with originalism, are binding as horizontal stare decisis, or whether the originalist material is raised by the parties).

an enormous range of inputs for construction.¹⁰⁷ And if that's the case, outside a very narrow set of incontestable brute facts (the number two as used in the Constitution is in base ten), we are not arguing over some actual or falsifiable matter of language, history, custom, tradition or law;¹⁰⁸ we are contesting some kind of remembered past.¹⁰⁹ Originalism is an argumentative mode, a modality, not a comprehensive theory of interpretation. It's (nearly all) construction all the time. As Professor Balkin argues, the only originalism that works both in theory and practice is framework originalism.¹¹⁰

CONCLUSION

Originalism has a selection problem. This Essay has outlined how it afflicts every branch of the originalist family. The more originalism relies on matters of linguistic or historical fact, the more the selection problem manifests. The more sophisticated the technological toolkit used to discover, aggregate, and analyze facts about intentions, language, methods, or law, the more acute the vulnerability will become.¹¹¹

One can sympathize with the originalist of the late 1980s, attempting to discern original intentions from a few letters in the National Archives and a well-thumbed copy of *The Federalist Papers*. Originalists of the twenty-first century, with instant access to billions of digitized documents, optical character recognition, automated translators, and artificial intelligence cannot claim they were born too early. Preserving in legal amber confident statements about the past from small *n* samples will no longer do.¹¹² Originalism must evolve to survive.

¹⁰⁷ See generally BALKIN, *supra* note 6, at 120–48.

¹⁰⁸ See Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1472 (2021) (“The fact of a constitutional provision’s original public meaning that goes beyond its necessary or historically noncontroversial meaning is not an empirical fact in the same sense as facts about the natural world.”); Gedicks, *supra* note 45, at 224 (2020) (“The meaning of any text from the past is also shaped by the demands of the interpreter in the present—textual meaning is mutually constituted by past *and* present.”).

¹⁰⁹ See generally BALKIN, *supra* note 6, at 179–209.

¹¹⁰ See generally *id.* at 97–119.

¹¹¹ Cf. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 262 (2019) (“Big data . . . [has] the potential to bring greater rigor and transparency to the practice of originalism.”).

¹¹² Cf. *United States v. Rahimi*, 602 U.S. 680, 691 (2024) (“[S]ome courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber.”).