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Equivocal Originalism

Gary S. Lawson
Boston Univeristy School of Law

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GARY LAWSON*

ABSTRACT

"Originalism" is a term shrouded in ambiguity and ripe for equivocation. A recent article by Stephen Sachs in the Harvard Law Review *tries to clarify the discussion by distinguishing between originalism as a decision standard, or a set of criteria for ascertaining the truth conditions for propositions, and a decision procedure, or a mechanism for ascertaining whether those truth conditions are satisfied in any given context. That is a helpful distinction, but it still leaves much room for multiple and confusing uses of the term originalism. Jumping off from comments on Professor Sachs's article by Mitchell Berman and Judge Andrew Oldham, I suggest that a more basic distinction between originalism as a positive theory of interpretation, or the ascertainment of communicative meaning, and originalism as a normative theory of action, or a prescription for decision-making, is crucial to clear and productive discussion of originalism. Once one keeps focus on those two distinct enterprises, one sees the contours of distinct research agendas that may be difficult to fit together. Originalism-as-interpretation and originalism-as-adjudication ask very different questions and may well call for application of different skill sets, decision procedures, evidence sets, and standards of proof. The problems in linking those enterprises (and never mind the problems of executing either enterprise) may explain why originalist scholarship has not been as useful to originalist judges as jurists like Judge Oldham would like.*

INTRODUCTION

The label "originalism" often generates strong reactions. Scholars have called it everything from "Bunk"[1] to "Our Law."[2] Whole books have been written attacking originalism[3] or defending it.[4] Jurists have derided it as "arrogance cloaked as humility,"[5] celebrated it as showing "respect for the separation of powers"[6] and as reinforcing "rule-of-law values,"[7] and offered it as the least bad choice among a host of poor options.[8] As a practical matter, a plurality, and possibly a majority, of current United States Supreme Court Justices self-identify as originalists,[9] and a substantial number of lower federal court (not to mention state court) judges surely do the same. As a result, regardless of anyone's views on the merits or demerits of originalism, any lawyer who does not know how to make a persuasive originalist argument, in addition to persuasive arguments grounded in other modalities, probably has no business arguing a constitutional case in court, and law schools that do not teach their students how to make persuasive originalist arguments, alongside other kinds of

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* Philip S. Beck Professor, Boston University School of Law.

1. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 1 (2009).

2. *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015) (arguing that "a version of originalism is indeed our law").

3. *See, e.g.*, JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 1 (2015) (arguing against an inclusive interpretation of originalism); ERIC J. SEGALL, ORIGINALISM AS FAITH 4 (2018) (arguing that judges use originalism as a justification to reach politically desirable results).

4. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013) (arguing that the Supreme Court should adhere to the original meaning of the Constitution because it was enacted by supermajorities, which have special value in democracy).

5. Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium (Oct. 12, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 58 (Steven G. Calabresi ed., 2007).

6. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 (2019).

7. *Id.* at 125.

8. *See* Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (arguing that "originalism seems . . . more compatible with the nature and purpose of a Constitution in a democratic system [than alternatives]"); *cf.* GORSUCH, *supra* note 6, at 110–11 ("If I cannot convince you that originalism is the *proper* interpretive theory for our Constitution, I hope to convince you (to borrow from Churchill) that originalism is the worst form of constitutional interpretation, except for all the others.").

9. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1423–24 (2021) (noting self-descriptions from Justices Barrett, Gorsuch, Thomas, and Alito). Justice Kavanaugh may also self-identify as an originalist. *See* Will Baude, *The Best Parts of the Kavanaugh Hearing*, REASON: VOLOKH CONSPIRACY (Sept. 5, 2018, 5:02 PM), https://reason.com/volokh/2018/09/05/the-best-parts-of-the-kavanaugh-hearing/ [https://perma.cc/FXE6-6BDV] (noting a self-description from Justice Kavanaugh).

arguments, are probably committing something resembling educational malpractice. Love it or hate it, originalism is a legal presence that is difficult to ignore.

All of which prompts the question put forward by the eminent theorist Douglas Adams regarding the ultimate question "Of Life, the Universe, and Everything": "Yes . . . but what actually *is* it?"[10] When people talk about originalism, about what are they talking? Are they all talking about the same thing? Is any particular person talking about the same thing at different times—or even in different parts of the same argument or discussion? *Originalism* is a term shrouded in ambiguity, and arguments—pro, con, or neutral—using the term are prime candidates for the fallacy of equivocation, in which words shift meaning from one part of an argument to another. If there is going to be intelligent and productive conversation about originalism, it is important that everyone in the conversation either talk about the same thing or at least be aware that others might be talking about something quite different and take account of those possible differences.

My goal in this Essay is not to put forward a definitive account of originalism that must be employed by all persons in all contexts. People are entitled to use words however they wish, so long as the meaning is clear enough to make communication possible.[11] My more modest, but I think important, goal is simply to point out some ways in which multi-variant and shifting uses of the term *originalism* can prevent productive exchanges of ideas. I come neither to praise nor bury originalism, nor even to define it, but to clarify the nature of conversations about it—whatever "it" turns out to be in any given context.

One big step towards clarification of discussions about originalism comes from a recent article by Stephen Sachs that emphasizes the difference between viewing originalism as a standard, or a set of criteria for ascertaining the truth conditions for propositions, and a decision procedure, or a mechanism for ascertaining whether the truth conditions prescribed by a

10. DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 179, 181 (Pocket Books 1981) (1979).

11. Frankly, people are also entitled to use terms in a way that makes communication difficult or impossible if that is really what they want to do. I am assuming, perhaps falsely, that clarity of expression and communication is a value widely held among academics. This Essay is addressed only to those about whom that assumption is true.

standard are satisfied in any given context.[12] As a standard, originalism can be quite vague ("figure out the original public meaning of the text"), providing little guidance about how to go about determining whether one has satisfied, or could ever satisfy, the standard in any concrete instance. But perhaps a vague standard is nonetheless the correct one; there is no a priori reason to suppose that reality will always be kind enough to prescribe correct standards that are easy to implement. Decision procedures, Professor Sachs reminds us, are quite different entities than standards.[13] Standards can be correct as standards even if there is no really good set of decision procedures available to determine whether one has or has not satisfied the standards. Consequently, arguments about the workability of originalist decision procedures may not say much about the validity of originalist standards, and vice versa.

Professor Sachs is onto something important here, and his valuable work points out several ways in which failure to distinguish originalism-as-standard from originalism-as-decision-procedure can lead to people talking past each other.[14] This is a vital part of the picture of framing a useful discussion of originalism. But it is only part of the picture.

In this brief Essay, I spring off from two published comments on Professor Sachs's article: one by an eminent legal scholar, Professor Mitchell Berman,[15] and one by an eminent federal court of appeals judge, the Honorable Andrew Oldham.[16] Using these insightful works as foils, I aim to highlight an even broader way in which originalism can, and often does, have multiple meanings and how failure to focus on those multiple meanings can impoverish conversation. In essence, Professor Sachs has pointed to the broad distinction between originalism as a descriptive enterprise and originalism as a normative enterprise.[17] They are

12. *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 787 (2022) (arguing that originalism should be understood as a standard and not as a decision-making procedure).

13. *See id.* at 778–81 (describing distinctions between standards and decision procedures).

14. *Id.* at 778.

15. Mitchell N. Berman, Response, *Keeping Our Distinctions Straight: A Response to* Originalism: Standard and Procedure, 135 HARV. L. REV. F. 133 (2022).

16. Andrew S. Oldham, Response, *On Inkblots and Truffles*, 135 HARV. L. REV. F. 154 (2022).

17. *See* Sachs, *supra* note 12, at 798 (describing adding normative defenses of originalism to "current practice").

distinct enterprises.[18] Any given person can pursue or critique one of those enterprises without engaging at all with the other. Arguments for and against originalism-as-description might or might not be persuasive, or even relevant, for or against originalism-as-prescription. Propositions regarding the former are simply in a different domain of knowledge from propositions regarding the latter. One can embrace both the descriptive and normative projects, reject both projects, or mix and match them in any fashion that one wishes. The key is to be clear at each step of one's discussion exactly which project one is embracing or rejecting.

Part I of this Essay lays out more fully the distinction between the descriptive and normative originalist enterprises, showing how careful attention to the distinction between them helps clarify discussion of originalism, with specific reference to Professor Berman's essay. I hope to show that the distinction between originalism as a descriptive, interpretative enterprise and originalism as a normative, adjudicative enterprise is the basic distinction that one needs to draw in order to have productive conversations about originalism.

Part II explores the truth conditions for originalist claims, jumping off from Judge Oldham's pleas for more scholarly work that provides decision procedures that can yield "determinate or 'thick' original meanings."[19] It turns out that Judge Oldham is asking for more than he may realize. In order to prescribe a decision procedure for ascertaining original meaning, it may make a big difference whether one is doing so as part of an interpretative or adjudicative enterprise. Judge Oldham, of course, is most interested in the latter. As it happens, however, there are complexities in translating communicative meaning into adjudicative decision procedures that originalists have only begun to recognize, much less explore. Some of those complexities are epistemological and some are normative or jurisprudential. My

18. As I have said on multiple occasions. *See, e.g.*, Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2155–56 (2017) [hereinafter Lawson, *Justice Scalia*] (explaining the difference between interpretation and adjudication); Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1312–13 (2013) [hereinafter Lawson, *Originalism Without Obligation*] (noting the main differences between originalism-as-adjudication and originalism-as-interpretation); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. REV. 1823, 1823 (1997) [hereinafter Lawson, *On Reading Recipes*] (noting that modern constitutional theory fails to distinguish between theories of interpretation and theories of adjudication).

19. Oldham, *supra* note 16, at 156.

hope here is not to solve any of these problems of the ages but simply to get more people to recognize them and to set forth the contours for research agendas for the various distinctive originalist enterprises.

Thus, my aim is not to offer a thoroughgoing analysis of the pros and cons of originalism, either as a tool for ascertaining communicative meaning or as a normative basis for decision-making. I just want to help make discussion more productive—or at least to highlight some reasons that might make it unproductive. To borrow and adapt some words from a wise theorist, I seek "not to resolve substantive disagreements that divide originalists from their opponents [or from each other] but to facilitate their resolution by making crisper what's in dispute."[20]

I

A good starting point for exploring the different ways in which originalism can be employed is the definition of originalism put forward by Larry Solum, one of the legal academy's most careful and subtle theorists. Professor Solum identifies originalism as "a family of constitutional theories, almost all of which endorse two ideas: (1) the meaning of the constitutional text is fixed at the time each provision is framed and ratified and (2) that fixed meaning ought to constrain constitutional practice."[21] He calls the first idea the "fixation thesis"[22] and the second the "constraint principle."[23] While, as Professor Solum acknowledges, there are a few theorists (and probably no jurists) who describe themselves as

20. Berman, *supra* note 15, at 151.

21. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1958 (2021).

22. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

23. *Id.* The constraint principle is a stronger claim than the "contribution thesis" that was part of Professor Solum's earlier attempts at a definition of originalism. *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 953–54 (2009) (defining the contribution thesis). The contribution thesis claims only that original meaning should make some substantial contribution to constitutional decisionmaking. *See id.* at 953 ("[T]he linguistic meaning of constitutional text must provide *some* of the content of the corresponding doctrines of constitutional law." (emphasis added)). The constraint principle goes further to say that "[c]onstitutional doctrine and practice taken as a whole should be (a) consistent with, (b) fully expressive of, and (c) fairly traceable to the communicative content of the constitutional text." E-mail from Lawrence B. Solum, William L. Matheson & Robert M. Morgenthau Distinguished Professor of L. and Douglas D. Drysdale Rsch. Professor of L., Univ. of Virginia Sch. of L., to author (Feb. 22, 2023) (on file with author).

originalists who do not necessarily endorse both theses,[24] as an empirical matter he seems right that most self-described originalists subscribe to some version of both theses. For example, one originalist of some note, Justice Neil Gorsuch, frames his approach in much the terms that Professor Solum identifies, describing the "core" of originalism as the twin claims "that the Constitution's meaning was fixed at its ratification and the judge's job is to discern and apply that meaning to the people's cases and controversies."[25] That formulation translates naturally into the fixation thesis and the constraint principle.

While there are non-random reasons for the observed linkage between the fixation thesis and the constraint principle, they are very different theses. There are observable linkages as a matter of actual social practice, but those linkages are neither inevitable nor logically entailed.

The fixation thesis is a claim about the ascertainment of meaning. Within that sphere, it is a very limited claim, because it addresses only the point in time to which one must look in order to accurately ascertain the meaning of a text.[26] It does not tell you what to look for at that particular point in time. As a result, it provides one piece of a process for ascertaining textual meaning. It is an important piece, to be sure, but it does not itself specify a complete theory of interpretation. It is like telling someone to go look in the kitchen but not telling them what to look for once they get there.

Of course, Professor Solum, as do many other originalists, has a distinct view about what to look for once you are in the kitchen. He defends at length the proposition that federal constitutional meaning—not necessarily all meanings of all documents, but as a

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24. Professor Solum identifies Stephen Sachs as an originalist who does not accept the fixation thesis. *See* Solum, *supra* note 21, at 1958 n.5 (noting that Professor Sachs rejects the "theory that originalism is tied to text and the original intent behind such text"). In my scholarly capacity, I neither endorse nor reject the constraint principle (or the weaker contribution thesis). *See* Lawson, *Originalism Without Obligation*, *supra* note 18, at 1309 (noting that the arguments typically made in favor of obedience to the Constitution are generally unpersuasive).

25. GORSUCH, *supra* note 6, at 110.

26. More precisely, it tells you the point in time to look for meaning, whether that meaning is textual, social, or otherwise grounded. *See* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157–58 (2017) (noting that the fixation thesis anchors the meaning of a constitutional provision to the time when it is framed and ratified). Because my discussion in this brief Essay is focused on federal constitutional interpretation, i.e., the interpretation of a specific text, I pass over this point. A full treatment of interpretation could not pass it over so easily.

contingent matter the meaning of the United States Constitution—is best ascertained by reference to the text's public meaning.[27] In theory, one could separate that commitment about the content of meaning from the abstract fixation thesis. One could believe, for example, that meaning is indeed public meaning but that it is best ascertained not when the text is first produced in a public fashion but instead at a present moment, and perhaps even at an infinite succession of moments, so that one must always speak of meaning M1 at time T1, meaning M2 at time T2, and so forth, rather than speaking of a unitary meaning for a text that is fixed at the time of its issuance.[28] One could also believe, with the fixation thesis, that meaning is fixed at the time of public issuance but hold that the content of meaning at that point is determined by something other than public meaning, such as the private meaning held by some actor or actors, a semantic meaning divorced of pragmatic enrichment, an ideal meaning (as determined possibly by the dominant normative theory of the time of the text's issuance), a social meaning discernible only through a study of actual practices, and so forth.

But however one slices, dices, and defines those various claims, they are all claims about the ascertainment of meaning. They are in that sense positive or descriptive claims about certain facts regarding human communication. In the specific case of the federal Constitution, they are claims about certain facts regarding a particular human communication in written form.

Several profound things follow from this seemingly banal observation about the descriptive character of the fixation thesis. Most importantly, the truth conditions, both what Professor Sachs

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27. *See* Solum, *supra* note 21, at 1957–58 (defending the original public meaning interpretation of the Constitution).

28. *See, e.g.*, Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 828 (2022) (arguing that textualism can be used to interpret the public meaning of language now instead of at a fixed point in the past). One will have no rational choice but to believe such a thing if a certain form of hermeneutics is correct and there is, ontologically, no such thing as meaning divorced from the standpoint of a particular interpreter. *See* Frederick Mark Gedicks, *The "Fixation Thesis" and Other Falsehoods*, 72 FLA. L. REV. 219, 224 (2020) (contending that "[p]hilosophical hermeneutics rejects the assumption that the original public meaning of the Constitution exists in the past unaffected by the present. . . . [T]here isn't any 'there' in the past to yield objective answers to questions about constitutional meaning"). As is clear from the rest of this Essay, I think this view is flatly wrong, but to engage with it fully would be part of a larger project of laying out the content of an originalist methodology, which is the work of a book (which I hope to produce in the not-too-remotely-distant future). This Essay is about clarification, not about the ontology or epistemology of originalism. In this Essay, I assume that there is in principle such a thing as original meaning, Gedicks and others to the contrary notwithstanding.

calls standards (criteria for truth) and decision procedures (methods for ascertaining satisfaction of those criteria), for claims about communicative meaning are within the domains of certain very specific fields of knowledge. To make claims about communicative meaning, one must first have a theory of language that explains how psycholinguistic symbols represent concepts. One must also have a theory of epistemology that explains how the concepts represented by those psycholinguistic symbols have meaning, i.e., that explains the connection between concepts and the things and relations in the world to which the concepts refer. Finally, one needs a theory of communication that explains how the content of concepts, and therefore worldly content to which the concepts refer, is conveyed from one mind to another via language, keeping clear that the minds on the sending and receiving ends of the communication can in principle belong to the same person at different points in time (as when a person's present self seeks to communicate with a future self). There are plenty of other domains of knowledge, such as chemistry, nephrology, zoology, French literature, and moral theory, that do not seem in general to bring much to bear on this particular enterprise, though there might be specific instances in which that is not so. Perhaps there are terms in a communicative instrument that make sense only if one is familiar with *Candide*, the molecular structure of plastic, or the distinction between hypothetical and categorical imperatives, in which case the enterprise of ascertainment of meaning may require the assistance of French literature, chemistry, or moral theory. Perhaps the communicative meaning of a text, as ascertained through the use of linguistic, epistemological, and communicative theory, directs one to some other discipline; imagine a text that says something like "Congress shall have the power and duty to do whatever is objectively morally right in any given circumstance" or "Congress shall have the power and duty to do whatever *Candide*'s Professor Pangloss would probably do in any given circumstance." But one would only be able to recognize those instances in which other disciplines are necessary through application of the philosophy of language, the theory of concepts, and the theory of communication. As an initial strategy for ascertaining communicative meaning, those three disciplines are, as Lieutenant Commander Montgomery Scott

once said, "the right tool for the right job."[29]

A corollary of this observation about the appropriate domains of knowledge for ascertaining communicative meaning is that ascertainment of communicative meaning is, at least in part, independent of the purposes for which one seeks to ascertain it. There are many reasons why one might seek to ascertain the communicative meaning of a text. Perhaps one thinks that the text provides sound moral guidance for action. Perhaps one thinks the text is almost surely going to provide unsound guidance, and one wants to know what kinds of actions to avoid. Maybe one is writing a doctoral dissertation in history or political science for which the meaning might be relevant. Maybe one has been inspired to write a poem about the meaning. Or perhaps one simply has an intellectual curiosity about the text's meaning. Whatever the reasons might be, the tools for ascertaining meaning are the same: One needs to employ the philosophy of language, a theory of concepts, and a theory of communication. In principle, people pursuing an answer for any of the above (or other) reasons will reach exactly the same answers if they correctly apply the tools at hand. The communicative meaning of the text is the communicative meaning of the text. The meaning does not care why anyone is seeking it or what the seeker plans to do with that meaning once he or she has it.

The foregoing is only partially true. There is at least one potentially important respect in which the purpose of ascertaining meaning could affect the answer. The ascertainment of meaning, in any context and any discipline, involves at least five elements: (1) principles of admissibility that tell you what to count for or against right answers, (2) principles of significance that tell you how much to count whatever you find, (3) standards of proof that tell you how much of whatever you find you need to have in order to justify declaring an answer correct, (4) burdens of proof that tell you what to do when the evidence is inconclusive, and (5) principles of completeness that tell you when you have acquired an adequate evidence set on which to base a judgment and can

29. STAR TREK V: THE FINAL FRONTIER (Paramount Pictures 1989). This was not, of course, Mr. Scott's most profound observation. That title is reserved for the epic line: "The best diplomat I know is a fully charged phaser bank." *Star Trek: A Taste of Armageddon* (NBC television broadcast Feb. 23, 1967).

therefore stop looking for more evidence.[30] Several of these elements—certainly (3) and possibly (5) as well—are not derivable from theories of language, concepts, and communication. They are inescapably normative. The standard of proof that one employs when writing a dissertation probably is not going to be identical to the standard of proof that one employs when deciding whether to start a thermonuclear war, and one perhaps will put a bit more energy into producing an adequate evidence set in the latter case than in the former.[31] With respect to (1) and (2), however, which are the usual subjects of interpretative theory, it is not clear how the purposes or consequences of the interpretative enterprise have any relevance. If theories of language, concepts, and communication set forth principles of admissibility and significance for ascertaining communicative meaning, those principles apply whether one is a scholar, a judge, or a disinterested observer. As I said before, a text does not care who is trying to ascertain its meaning or why anyone is trying to ascertain it. The text simply is what it is.

So understood, the fixation thesis is what Sai Prakash has called a "default" principle of human communication.[32] The meaning of a communication is determined first and foremost by its meaning at the time of issuance. That is how just about everybody in just about every context, including the interpretation of law review articles complaining about originalism, understands communication. It is certainly possible for the content of an act of communication to refer the reader or listener to some time period other than the time of issuance. A text could say, for instance, "Interpret me as though I was issued at the moment in time at which any particular interpreter is reading me" or "Interpret me

30. See GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 19–28 (2017), for a fuller exposition of these principles in the specific context of proof of legal propositions.

31. One must say "perhaps," because there is a nontrivial set of cases in which a smaller evidence set may prove to be a better basis for decision than a larger one, even if the costs of acquiring and processing more evidence are insignificant. It all depends on the shape of the path to complete knowledge and one's location on that path at any given marginal point of decision. *See* Gary Lawson, Essay, *The Epistemology of Second Best*, 100 TEXAS L. REV. 747, 753 (2022) (arguing that a smaller, incomplete data set can be better for decision-making than a larger-but-still-incomplete data set). If the costs of acquiring and processing more information are large, there is a much wider set of cases in which smaller evidence sets are better than bigger ones. This point will become important in Part II. *See infra* text accompanying notes 54–56.

32. Saikrishna B. Prakash, Review Essay, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998) (book review).

as though I was issued 4,000 years before my historically correct date of issuance." But in those instances, one determines that a non-issuance time period is relevant by reference to the meaning at the time of issuance; the use of non-issuance, or non-originalist, time frames is a second-order conclusion that follows from the first-order employment of originalism. The first-order method of interpretation is set by the fixation thesis, meaning that some form of originalism is simply part of what it means to engage in communication. Scholars who say that there is no such thing that "just is" interpretation[33] are simply wrong—at least if one is talking about the descriptive act of ascertaining the meaning of a communicative act.[34] Enterprises that do not employ the fixation thesis as a first-order method for ascertaining communicative meaning are simply not engaging in the act of ascertaining communicative meaning. They may be doing other things that are very important, and perhaps more important than the act of ascertaining communicative meaning, but they are doing other things.

The last implication from the descriptive character of the fixation thesis that I want to highlight is that if one reads someone's discussion of a text and one does not see that discussion cast, either explicitly or implicitly, in terms of theories of language, concepts, and communication, one is almost surely not reading a discussion that seeks to ascertain the communicative meaning of the text. The discussion might be doing many other things—making normative claims, trying to persuade, resolving a dispute, pursuing power over others, seeking publication, etc.—but it will not be seeking to ascertain communicative meaning. Or if it is at least subjectively, from the standpoint of the author, seeking to ascertain communicative meaning, it is doing so badly and is very unlikely to succeed.

The bottom line is that one possible use of the word *originalism*, as reflected in the fixation thesis, is to describe a method for ascertaining communicative textual meaning. There are many different methods that can all fall under that label. It may be the

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33. *See* Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015) (arguing that "there is nothing that interpretation 'just is.' . . . Any approach must be defended on normative grounds—not asserted as part of what interpretation requires by its nature").

34. *See* Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, 1460–62 (2016) (arguing that the meaning of a communicative act is what was intended to be communicated).

case (and I think it is the case) that one of those methods is correct and the others are all mistaken, but they are all still recognizably methods for ascertaining communicative textual meaning. All can plausibly be considered a form of originalism-as-description.

The second part of Professor Solum's definition of originalism, the constraint principle, does not logically follow from the fixation thesis. Indeed, the constraint principle is within a wholly separate domain of knowledge from the fixation thesis. The constraint principle is a claim about appropriate human conduct. It is a normative prescription about how people, or perhaps certain people such as judges and others who exercise official governmental power, should conduct their affairs. It tells them to utilize the communicative meaning of certain texts in real-world actions. That is not a claim that one can derive from linguistic, conceptual, or communicative theory. It requires at least the additional discipline of moral theory, plus whatever other disciplines (economics? empirical psychology?) moral theory may make relevant.

More broadly, the enterprise of choosing appropriate courses of action is separate from the enterprise of ascertaining communicative meaning. Thus, originalism as represented by the constraint principle, as a way of resolving real-world disputes, is conceptually separate from originalism as represented by the fixation thesis, as a way of ascertaining communicative meaning. They are very different things, and to use the term *originalism* to describe both invites the risk of equivocation if the term is not used consistently within an argument or carefully defined at each step of the analysis.

In the specific context of constitutional adjudication, one can accept originalism as a method for ascertaining meaning (figuring out what the Constitution actually says) while rejecting it as a guide to action (figuring out how to decide real-world cases). Maybe one thinks that real-world cases should be decided in whatever way maximizes social welfare, however one chooses to define that term. Maybe one thinks that the communicative meaning of the current platform of one's favorite political party is a better guide to those results than the communicative meaning of the Constitution. And by the same token, one can accept originalism-as-prescription while rejecting originalism-as-description. One might think, for example, that originalism is a poor way to try to ascertain the communicative meaning of the

United States Constitution but nonetheless choose it as the best method for deciding constitutional cases for any number of reasons. Perhaps one thinks that the (wrong by one's standards) meaning derived from originalism would yield better results—with "better" determined by reference to one's preferred normative theory, whatever that might be—when applied to actual cases than would whatever one regards as the best and most accurate account of constitutional meaning. One might think that regardless of which account of meaning is best, the use of originalism as a method for deciding cases is most appropriate to the role of a specific decision maker, such as a judge. There are many reasons that one might give for deciding (or not deciding) real-world cases based on the original communicative meaning of the constitutional text that have nothing to do with the fixation thesis.

Of course, one might connect the two theses in any number of ways as well. Perhaps one believes, as a normative matter, that it is a good idea to decide cases in accordance with the actual meaning of the Constitution.[35] In that circumstance, the ascertainment of communicative meaning will have direct implications for one's choice of action. But that is a result of the choice of a normative premise. It is the result of two distinct enterprises: the ascertainment of meaning and the prescription of appropriate action. One can use the term *originalism* to describe either enterprise or the joint product of the two. But precisely because the term can be used in those multiple fashions, clear thinking and communication require careful attention to the way in which they are used. In particular, the kinds of arguments that one might make in support of originalism as ascertainment of meaning will not necessarily say much about originalism as a prescription for action—just as one can figure out the communicative meaning of *The Communist Manifesto*, *Mein Kampf*, or the constitution of the Confederacy without regarding that meaning as relevant for action.[36]

The bottom line is that simply describing oneself, or someone

35. Why might one believe this? That is a question within the domain of moral theory, psychology, or both, rather than law, so as a legal scholar I have nothing of consequence to say about it.

36. *See* Evan D. Bernick & Christopher R. Green, *There Is Something that Our Constitution Just Is*, 27 TEX. REV. L. & POL. 247, 278 (2022) (distinguishing the Confederate constitution's meaning from its moral force).

else, as an originalist leaves open many important questions. Originalist in what sense? With respect to the ascertainment of meaning? With respect to the appropriate method for resolving real-world disputes? Both? Note that these questions are independent of more specific questions about how to operationalize a commitment to either descriptive or prescriptive forms of originalism. To say that one is an originalist with regard to ascertainment of meaning leaves open precisely what one's theories of language, concepts, or communication might involve. It says that one will try to bring those theories to bear in accordance with some version of the fixation thesis, but it says little else. In that sense, it is a decision standard rather than a decision procedure, to use Professor Sachs's recommended terminology. And to say that one is an originalist with respect to the constraint principle leaves open (1) why one thinks that way, (2) how large a constraint one thinks communicative meaning should provide, and (3) how one would in practice connect the two enterprises to bring interpretative theory to bear on adjudication.

Thus, the ambiguity of the term *originalism* runs far deeper than one might glean from intramural squabbles among self-described originalists about which sources to look at and in what order.

Almost everything that I have said thus far, at least in substance if not in terminology or detail, is old hat to sophisticated constitutional theorists. Such is the import of a characteristically thoughtful comment by Professor Mitchell Berman on Professor Sachs's attempt to draw attention to the distinction between decision standards and decision rules. That is a fine distinction to draw, says Professor Berman, but it does not necessarily add much to the set of distinctions that legal theorists have drawn over the past half-century that already cover much of the territory surveyed by Professor Sachs.[37] As Professor Berman explains:

> [T]he *general* distinction is not new; it has been pressed vigorously by more than a few legal philosophers and constitutional theorists especially over the past decade. It is reflected in the familiar jurisprudential distinction between "theories of law" and "theories of adjudication," in the work of

37. *See* Berman, *supra* note 15, at 136–41 (noting that Professor Sachs's distinction is nothing new).

many originalists . . . .[38]

Professor Berman generously includes[39] in this set of prior works by originalists my distinction between interpretation and adjudication, first put forth at length in 1997,[40] along with Professor Berman's own long-advanced distinction between constitutive theories, or claims concerning "either the metaphysics of law, or the truthmakers of propositions about law, or something similar,"[41] and prescriptive theories, or claims about "how judges should engage in a particular activity."[42] In view of this long history of clarifications of different enterprises, Professor Berman finds it "disheartening"[43] that Professor Sachs thinks that theorists and jurists still need to hear about such distinctions.

In fairness to Professor Sachs, I suspect, based on personal experience over more than three decades, that all of these distinctions, whether between interpretation and adjudication or between decision standards and decision rules, are familiar to fewer people than Professor Berman might suspect.[44] They are familiar to the sorts of people with whom Professor Berman's scholarship engages, but there are only so many Larry Solums, Fred Schauers, Larry Alexanders, Christopher Greens, and Dick Fallons in this business. Outside a small circle of law-and-philosophy nerds,[45] I doubt whether all that much attention is paid to any of the distinctions discussed by Professor Sachs, Professor Berman, or me. It is certainly not true in my experience "that 'the practical objection' to originalism [i.e., that it is often very hard in specific cases to ascertain original meaning] that motivates . . . [Sachs's] article is a much less prominent objection to originalism in today's scholarly debates than Sachs seems to think."[46] Professor Berman might need to get out a bit more.

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38. *Id.* at 134.

39. *Id.* at 137.

40. *See* Lawson, *On Reading Recipes, supra* note 18, at 1823 (noting that modern constitutional theories fail to distinguish between interpretation and adjudication).

41. Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 790 (2017) (book review) (footnote omitted).

42. *Id.*

43. Berman, *supra* note 15, at 141.

44. It is possible that Professor Berman knows this full well and it is therefore this fact about the legal community that he finds disheartening.

45. Lest there be any doubt at all, I regard "nerd" as one of the highest compliments one can bestow. I hereby apologize to the many deserving nerds who did not make this list; I limited myself to five names and picked them largely at random.

46. Berman, *supra* note 15, at 135 (footnote omitted) (quoting Sachs, *supra* note 12, at 782).

But are these other distinctions from law-and-philosophy nerds actually "strikingly like . . . Sachs's"?[47] Here I am not so sure. The key distinction drawn by Professor Sachs is between decision standards, or abstract criteria for ascertaining rightness, and decision procedures, or norms explaining how those criteria can give answers in specific instances. In constitutional terms, a decision standard would be something like "figure out the original communicative meaning of the Constitution." A decision procedure would be something that tells you how to do that, which would require some combination of theories of language, concepts, and communication. Those are indeed distinct aspects of an interpretative enterprise. But they are also distinct aspects of any other enterprise as well. Consider a normative project that seeks to tell judges how to decide cases. A decision standard could be something like "figure out in each case, using some sort of reflective equilibrium involving original communicative meaning, current values, ease of application, and stability over time, which result in any given case seems best." A decision procedure accompanying that standard could provide methods for ascertaining any of the relevant variables and perhaps for discerning an appropriate balance among them if they point in different directions. The distinction between decision standards and decision rules is a precept of general epistemology. It is a way of thinking about just about anything in any discipline: first figure out what you are looking for and then figure out how you might go about finding it. There is nothing special about its application to originalism. The universality of the distinction hardly makes it valueless. But it does mean that Professor Berman is profoundly right that it must work alongside many other distinctions if it is to advance knowledge or discussion of originalism (or any other specific subject) to any significant degree.

For example, if one distinguishes, as I think one should, between interpretative and adjudicative enterprises, the decision standards and decision rules for interpretation are not necessarily going to be the same as the decision standards and decision rules for adjudication. They might be the same if, in fact, it turns out that the correct decision standard for adjudication is "decide all cases in accordance with, and only in accordance with, the interpretatively correct communicative meaning of the

47. *Id.* at 136.

Constitution." But it is not self-evident that that is the correct decision standard for constitutional adjudication. (Nor is it self-evident that it is not. Relatively few normative propositions are self-evident, though concededly one would not necessarily suspect this if one never leaves the echo chamber of mainstream legal academia.) And even if the decision standards and decision procedures turn out to be the same in both enterprises, one would have to reach that conclusion through two entirely different lines of reasoning. The considerations that would make a set of standards and procedures optimal for ascertaining communicative meaning are categorically different in principle from those that would make them optimal for deciding real-world cases correctly. By the same token, people who are really good at ascertaining communicative meaning might be really bad at prescribing normatively correct action, and vice versa. It would be an extraordinary Renaissance person who turned out to be really good at both. And it would be a tremendous coincidence if exactly the same arguments carried exactly the same weight for both interpretation and adjudication.

Thus, it remains central to any intellectually clear discussion of originalism to specify, at each step of an argument, whether one is talking about the ascertainment of communicative meaning or the prescription of real-world action. Other distinctions, such as the standards-and-procedures distinction, are surely going to be important to either or both enterprises, but that distinction remains basic.

II

Enter Judge Andrew Oldham, who also commented on Professor Sachs's article. Unsurprisingly, given his office, Judge Oldham is less concerned with theoretical distinctions that interest academics and more concerned with deciding cases:

> Sachs's theoretical refinement of originalism may help to earn originalism credibility—or at least ward off certain criticisms—in the academy. But originalism's credibility among practitioners depends less on its theoretical sophistication than on its ability to guide lawyers interpreting the constitutional text.
>
> . . . Sachs seems willing to stipulate that . . . (originalism is an impractical way to decide cases) . . . , but then avoids the conclusion (originalism is misguided or wrong) primarily by redefining originalism to make it something that need not be a

> practical interpretive tool. This reframing may make originalism easier to defend in philosophy, but it does little to help guide originalists in practice.[48]

Judge Oldham wants a decision procedure, not a standard, and he wants one that will work for originalism-as-adjudication as well as for originalism-as-interpretation.

It is no accident that there is no canonical work on originalism as a decision procedure for either interpretation or adjudication. I have the ambition of writing the former, though it is going to take some years to get a project of that scope right. I have no ambition of writing the latter, which is what Judge Oldham is seeking. Why not? And why has no one else delivered? It is not as though there is not a demand out there waiting to be filled. Surely Judge Oldham's plea from the bench is not a lonely one.

Consider what Judge Oldham sees as lacking in the existing literature: "We need 'thick' original meanings—that is, we need more and more work that shows particular constitutional provisions have objectively determinate meanings based on rigorous analysis and academic debate over relevant sources of original meaning."[49] That means "we need rules of originalist procedure. . . . Where should we start the research? What sources are probative? What do we do when historical sources point to divergent meanings? When can we be confident that we've identified something approximating the original meaning?"[50] Concretely, we need more historical exegesis:

> It's easy (and perhaps appropriate) to denigrate "law-office history." But someone has to do it. I would imagine that every lawyer (and certainly every law clerk) would prefer to find the definitive article or book on the original meaning of the nondelegation doctrine instead of trying to write that work under the time pressures of a given case. And in terms of comparative advantages, academics are obviously better positioned to devote time and attention to matters of historical inquiry. But at the risk of sounding impatient or ungrateful, it's remarkable how few provisions of the Constitution have generated robust historical effort, debate, or agreement in the academy. I am worried that we sometimes focus so much

48. Oldham, *supra* note 16, at 170–71.
49. *Id.* at 170.
50. *Id.* at 171.

> on *theory* that we lose the energy necessary for *history*.[51]

This is obviously an ambitious research program. It would surely have some measure of intellectual value in addition to being useful to Judge Oldham. But is it an *originalist* research program? More to the point, is it *the* originalist research program—the uniquely correct one?

Here is where the distinction between interpretative and adjudicative enterprises has some real bite. First, it is far from clear that, from an interpretative standpoint, more and better historical research of the kind envisioned by Judge Oldham actually gets you much closer to original communicative meaning. If communicative meaning in the context of the Constitution is a hypothetical rather than historical fact, that is, if it is something that must be legally constructed from the standpoint of hypothetical rather than historically concrete authors and readers,[52] a historical search for meaning might look very different from a search for specific references in concrete historical sources to specific clauses or issues. One would be looking at general linguistic and conceptual practices to see what things and relations a hypothetical author's communications, considered in context, take as their referents. That is a kind of historical study, to be sure, because one is looking for a conceptual structure that would have been appropriate to a historically distinct point in time. It is a study, however, that asks very different questions than might be asked by an actual historian. To some extent, that supports Judge Oldham's intuition that lawyers rather than historians might be the best situated persons to perform that particular inquiry. Original meaning, on this hypothetical understanding, is a kind of fact, but it is not a strictly historical fact in the way that dates might be, or even in the way that the thoughts of a specific historical figure might be. Perhaps one should call those kinds of facts legal-historical facts to reflect the constructivist nature of the enterprise of discovering them.[53] In any event, Judge

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51. *Id.* at 171–72.

52. *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 78 (2006) (noting the different types of professionals that may aid in determining the mental states of historical actors).

53. As an aside, these considerations can also be part of a response to Professor Richard Fallon's recent critique of some forms of originalism. *See* Fallon, *supra* note 9, at 1427 (arguing that the original public meaning theory is insufficient to resolve historical debates). Professor Fallon wonders how there can be historical facts about meaning when

Oldham is making assumptions about the kind of linguistic, conceptual, and communicative theories that drive the search for meaning. Those assumptions are controversial, and they are more fundamental than the "which sources come first" kinds of questions that he imagines academics answering. One needs to know what one is looking for before one starts to look for it.

Second, Judge Oldham has himself identified one of the key differences between what academics and judges do when they search for answers to what seem at first glance like the same questions. He notes that one large problem for originalism is what I term the problem of closure: When is the evidence set adequate to ground a judgment? He writes:

> So even if *we think* we know that the Fourteenth Amendment covers X and not Y, we don't really know because we haven't read what we haven't read. It could be that 1,000 pages of new historical research will show that the Amendment covers Y and not X. Perhaps the next 1,000 pages of historical research will show that it covers neither. How do we know that the next 1,000 pages won't show that the Amendment covers both again, only X again, only Y again, and so on ad infinitum?[54]

Just so. All decisions are made on the basis of a given set of materials, or evidence set. No claim, whether interpretative or adjudicative, is really meaningful without a specification of the evidence set on which it is based. One possible criticism of a claim is always that it is based on an inadequate evidence set. Maybe there is something important that the claimant has not yet considered. Judge Oldham is absolutely right to focus attention on this concern. But once that attention is focused, it becomes clear (I think) that the adequacy of an evidence set is not a legal

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there was widespread disagreement among real-world actors about meaning at the time and when there is no unitary speaker who can provide the pragmatic enrichment necessary to break through those semantic disagreements. *See id.* at 1428, 1452–53, 1459 (explaining the problem of speaker context and the lack of a sufficient or uniform response). There are indeed originalists who claim that meaning is a direct historical fact. *See id.* at 1445 (acknowledging that the public meaning originalist believes that original public meaning exists as matter of fact). But others, such as myself, see meaning as a hypothetical rather than concrete historical fact. And if it is hypothetical, then there is actually a unitary speaker for the Constitution: the singular "We the People" announced by the Preamble as the Constitution's author. U.S. CONST. pmbl. On the unitary character of the Constitution's legal author, see Lawson & Seidman, *supra* note 52, at 49 (explaining that the Constitution's author "We the People" is a "hypothetical rather than historically real author or group of authors").

54. Oldham, *supra* note 16, at 155; *see also id.* at 162 ("Perhaps the next historical exegesis by Professor William Baude, or Professor Michael McConnell, or Professor Ilan Wurman will show that what we thought we knew was, in fact, wrong.").

question. It is not even purely an epistemological question. It is a normative question, and it is quite possible that the normative considerations will be very different for interpretative and adjudicative claims.

For one thing, getting and using more information is costly. It takes resources to acquire more information. And once one has more information, it is costly to process that information in light of what one previously knew (or suspected, or surmised). Perhaps one will need to reassess a complex network of judgments and inferences in light of the new information. That can be an enormous task, not just in the currency of money but also in the currency of time.[55]

For another thing, the benefits of more information are not always obvious. It is easy to assume that more knowledge will always lead to better decisions than less knowledge. But that assumption is flatly false. As I explain at some length in a recent article, while more knowledge sometimes, and perhaps even often, leads to better decisions than less knowledge, there are many circumstances in which the opposite is the case.[56] Unless the additional knowledge is the last piece of information needed to assemble a universally complete evidence set,[57] the contribution of a marginal addition of knowledge to an existing knowledge base depends on the shape of the path to complete knowledge and one's location on that path at the moment of decision.[58] If one is on a downward-sloping portion of a path (and it is easy to envision paths to knowledge that have peaks and troughs along the way), an increment of knowledge at that precise spot can leave one worse off than before, even if the acquisition of the new piece of evidence is costless.[59] Figuring out the shape of a path to knowledge and identifying one's spot on that path are difficult, and perhaps impossible, tasks.[60] But without knowing the path, one cannot know how to treat the next marginal unit of

55. For a somewhat, though not much, more extensive discussion of the costs of acquiring and processing information when building evidence sets, see LAWSON, *supra* note 30, at 134–38 (noting that the discernment of truth is sometimes sacrificed due to scarcity of resources).

56. Lawson, *supra* note 31, at 750.

57. *See id.* at 755–56 (arguing that if one has good reasons to think that the new evidence will result in a complete evidence set, there is an argument for obtaining it).

58. *Id.* at 754.

59. *Id.* at 753.

60. *Id.* at 750.

information.[61]

The desirability of more information thus depends on a complex cost-benefit analysis. Whether it is worth it to look for (and then process) new information is a function of what it will take to get that information and how much one thinks it will move the ball—and in what direction it will move the ball if one cannot justify an assumption of an upward-sloping path to knowledge at the relevant margin. Those kinds of judgments inescapably include a normative element that cannot wholly be derived from principles of epistemology.

How one balances these costs and benefits depends to some extent on what one is trying to accomplish. If one is trying to ascertain the communicative meaning of a text, perhaps it is worth spending a lifetime of study on one small aspect of that text, especially if someone (say, a law school) is paying you to do precisely that. Such a cost-benefit analysis, however, does little good to a judge who has to decide a case within a limited time span or a lawyer who has to advise a client in the here and now (or a faculty member whose promotion or pay depends on getting an article out now). Different actors pursuing different tasks operate under different constraints. As a result, the "correct" answer from the standpoint of interpretation is not necessarily the "correct" answer from the standpoint of adjudication, simply because correctness is always a function of the evidence set, and the adequacy of the evidence set can vary dramatically with the task at hand. Answers are correct or incorrect given a particular evidence set. What counts as an adequate evidence set for reaching an interpretative judgment will not necessarily count as adequate for reaching an adjudicative judgment. One can imagine a judge demanding more than would a scholar, and one can equally imagine a judge settling for less than would a scholar, depending on the circumstances.

None of this is to say that Judge Oldham is wrong to call for what he calls for. It is only to say that it is not a simple order. In particular, it sets forth a research agenda that calls for careful distinction between interpretation and adjudication.

Precisely because of the epistemological and normative problems posed by defining adequate evidence sets, legal actors often come up with decision procedures that those actors

61. *Id.* at 754.

themselves regard as inadequate. We live in a world of second-best. Much as Churchill said of democracy, one often chooses decision procedures that are the worst possible procedures except for all the others.[62] Professor Sachs points out how doctrines, including doctrines that seem ridiculous from the standpoint of first-best interpretative theory, can often be adjudicatively optimal.[63] Judge Oldham is skeptical: "But in originalism, how are we supposed to craft and apply external decision procedures [i.e., doctrines] that implement a provision's underlying original meaning—rather than judge-invented 'alternative requirements'?"[64]

If one is searching for interpretatively correct answers, Judge Oldham's skepticism is warranted. By definition, these doctrinal substitutes for original meaning are . . . well, substitutes. They are not the real thing. How can a jurist committed to both the fixation thesis and the constraint principle justify relying on these concededly inaccurate decision procedures?

That is a question that originalism-as-interpretation cannot answer. More precisely, it is a question that originalism-as-interpretation does not seek to answer, just as chemistry does not try to answer questions about optimal corporate governance structures. Once you have concluded, using originalism-as-interpretation, that the correct interpretation is *X* and that doctrine *Y* is going to yield something other than *X*, that is the end of the story for originalism-as-interpretation. For originalism-as-adjudication, however, the answer to the problem of doctrine is the same as one is likely to get when looking at the relationship between doctrine and anything-as-adjudication. The problems of constructing an adequate evidence set, and the second-best problems that accompany that enterprise, are not unique to originalism. Any theory of interpretation loses something when translated into adjudication, simply because the enterprises, and their respective balancing of costs and benefits, are different. As Rob Natelson, Guy Seidman, and I wrote a decade ago:

> Even assuming that constitutional meaning is relevant to

62. *See* GORSUCH, *supra* note 6, at 110–11 ("I hope to convince you (to borrow from Churchill) that originalism is the worst form of constitutional interpretation, except for all the others.").

63. *See* Sachs, *supra* note 12, at 808–09 (discussing Thayerian deference and originalism).

64. Oldham, *supra* note 16, at 166.

> constitutional action, it is far from obvious that adjudication either can or should directly apply what one regards as the correct theory of constitutional meaning (whatever that theory may be). Adjudication takes place in real time, with limited resources. Anyone who says that there is no price tag on justice understands neither price tags nor justice. It is virtually inevitable that any sensible, workable system of adjudication will adopt shortcuts, or rules of thumb, for dealing with recurring situations, which almost certainly means that some decisions that are adjudicatively "correct" will be interpretatively "wrong," simply because getting the interpretatively "correct" answer would be too costly. A theory of adjudication probably cannot follow in a straight line from a theory of interpretation even if the conceptual and normative gap between meaning and adjudication can be bridged.[65]

While we wrote those words when discussing originalism, they seem, at least to me, to be universalizable to all interpretative theories made relevant by some constraint principle. The practical demands of adjudication are not something that legal theory, as opposed to interpretative theory, can wave aside.

The most serious gap between interpretative theory and adjudicative theory, however, may concern the standard of proof. What makes an interpretation of a text correct? Of course, one needs truthmakers, things that tell you when an offered interpretation maps onto an objective reality. One also needs an evidence set, a body of those things that form the basis for decision at a specific point in time and space. One also needs a standard of proof, a principle (or principles) that tell you how much of whatever you consider to be truthmakers you need to have in order to warrant a judgment. I have been obsessed with the problem of standards of proof for more than three decades.[66] If there is a non-normative way to fix a standard of proof in any context, I have not yet found it.

Consider, for example, a scholar engaging in precisely the kind of law-office history hoped for by Judge Oldham. The scholar

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65. Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 446 (2014) (footnote omitted).

66. I raised it in the first law review article I ever wrote. *See* Gary Lawson, *In Praise of Woodenness*, GEO. MASON U. L. REV., Winter 1998, at 21, 25 (1988) (noting that the evidentiary standard influences the effectiveness of an interpretative theory). Thirty years later, I wrote a book about it. *See* LAWSON, *supra* note 30, at 193 (arguing that a standard of proof is critical for any cognitive exercise). The articles in between are too numerous to cite.

assembles an evidence set, applies a decision procedure, and comes up with a concrete conclusion that will seemingly help Judge Oldham decide a case (say, by figuring out whether shooting at someone is a "seizure" under the Fourth Amendment[67]). Is that conclusion interpretatively correct? Is it adjudicatively correct?

Those are potentially two distinct questions even if one has the same evidence sets and decision procedures in each enterprise. When a scholar is looking for an interpretative conclusion, how confident must the scholar be in order to assert the claim? There is an infinite gradation of standards of proof that one could select, from "beyond a conceivable doubt" to "beyond a reasonable doubt" to "by a preponderance of the evidence" to "not embarrassingly silly." A conclusion that is "correct" under one standard of proof may not be "correct" under a different standard. No claim, in any discipline, is meaningful unless it implicitly or explicitly provides a standard of proof for evaluating the claim.

For many academics, the operative standard of proof for their own work is fairly low. Claims are taken as at least publishable, and certainly citable, if they meet a very low threshold of plausibility. Indeed,

> A cynic might infer that the operative standards of proof in legal scholarship are as follows: if your own work is involved, the claims are determinately established as long as they are not laughable; if someone else's work is involved, the standard of proof is "beyond a conceivable doubt," and if the flaws in the other person's work are not immediately evident, it is only because Rene Descartes's evil demon is preventing you from seeing them.[68]

A low threshold makes a lot of sense in academic work, even apart from the (perhaps bad) professional expectation of voluminous publishing. Academics are part of a network that builds, often incrementally, on the work of others. Sometimes the "best" marginal contribution is something that is dubious, and perhaps even wildly wrong, if it drives further work and sparks thinking.

When judges announce interpretative claims and then, pursuant to a constraint principle, apply those claims to the

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67. *See* Torres v. Madrid, 141 S. Ct. 989, 993–94 (2021) (holding that "a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting").

68. Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 422 n.25 (1996).

disposition of real cases, they are affecting people's lives, fortunes, and sacred honors. There are stakes in the decisions of cases by judges that are not involved in the decisions of academics to write (and of editors to publish). Claims that are adequate for scholars are not necessarily adequate for judges. Indeed, there is a non-trivial case to be made that judges should not be upsetting the status quo through the use of government-sanctioned force unless they have a very high degree of confidence in their answer, perhaps approaching the beyond-a-reasonable-doubt standard for fact-finding in criminal proceedings.[69] Are scholars going to produce work that meets that standard of proof?

Perhaps, if there are a lot of scholars (think of infinite monkeys) toiling away, over the course of time one might generate a body of claims that can meet that high level of certainty. Unfortunately for Judge Oldham, the chances of that happening in his lifetime are zero. Modern originalism, as a theorized enterprise, has only been around since the mid-1980s. There have been relatively few people during that time pursuing anything that can plausibly be called an originalist project. It is not at all surprising that, in many respects, originalism is both undertheorized and underdeveloped. Nor is one likely to see a large increase in the number of academic originalists in the foreseeable future, given the tendency of law faculties to reproduce themselves. I do not think Judge Oldham should be counting on a lot of thick meanings unless he has a relatively low threshold for what counts as thick.

So does that mean that scholars, including originalist scholars (and perhaps including me), are useless to Judge Oldham and are likely to continue to be useless? Perhaps, though that is not inevitable. It all depends on what Judge Oldham thinks he needs. But to coordinate what scholars and judges are doing might require substantially more thought than even Judge Oldham recognizes. It requires focusing on the different activities involved in ascertaining meaning and deciding cases. It requires thinking through problems of second-best and how those might affect the translation of interpretative truths into adjudicative truths. It requires careful attention to the construction and adequacy of evidence sets and the costs and benefits associated with more

69. I suggest this possibility without fully endorsing it in LAWSON, *supra* note 30, at 202–07.

knowledge (including the distinct possibility that more knowledge will lead to worse decisions than will less knowledge). And it requires specification of the standard of proof in each context. That is a lot. That is why there is presently no canonical source for originalist decision procedures, for either interpretation or adjudication.[70]

Life is tough all over. Unfortunately for Judge Oldham, life for originalists is probably tougher in adjudication than in interpretation. In order to define an evidence set and a standard of proof for interpretative claims, one needs to engage in a cost-benefit analysis and a consideration of second-best concerns. But those concerns can all be fixed by one's own intellectual interests and goals. In the form of a hypothetical imperative: if one wants to accomplish task *X* given an existing set of resources and constraints, then one should specify the evidence set and the standard of proof in a certain way. To make similar claims for adjudication, however, requires deep engagement with political theory. That is a very different enterprise than figuring out one's own circumstances. The chances of a good interpretative theorist also being a good normative political theorist does not seem large; they are different tasks calling for different skill sets. That is why I am willing to devote substantial energy to interpretative theory but not to adjudicative theory. I have no reason to think that I (or any other legal scholar) is likely to be particularly good at normative political theory. Without that grounding, however, I do not see how one can provide Judge Oldham with what he wants. That is perhaps an unhappy state of affairs, but it might nonetheless be the state we are in.

So where does that leave the Judge Oldhams of the world who want to be good originalist judges? They need to take what they can get and think very carefully about what kinds of evidence sets and standards of proof they need for their decisions. They might need decision procedures that avoid rather than apply interpretative conclusions in the face of uncertainty; allocations of burdens of proof become more important as levels of

70. I emphasize that these problems are hardly unique to originalism. If I was a devotee of some other interpretative theory, I suspect that I would be raising the same concerns in that context. I focus on originalism only because I think it is interpretatively correct and is therefore of the most intellectual interest to me.

uncertainty rise.[71] We scholars will do what we can. But expectations need to be realistic. Much of law consists of the fine art of muddling through. Originalist adjudication will be in good company if that is its fate.

71. *See* LAWSON, *supra* note 30, at 110–11 (noting that if there is uncertainty about a fact, the evidence may satisfy a lower burden of proof but fail to satisfy a higher burden of proof).