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ORIGINALISM AND THE INSEPARABILITY OF DECISION PROCEDURES FROM INTERPRETIVE STANDARDS

MICHAEL L. SMITH*

ABSTRACT

In his article, Originalism: Standard and Procedure, Professor Stephen E. Sachs describes a never-ending debate between originalism's advocates and critics. Originalists argue that certain historical facts determine the Constitution's meaning. But determining these facts is difficult, if not impossible for judges, attorneys, and the public. Sachs seeks to rise above this debate, arguing that the legal community should not expect originalism to offer a procedure for interpreting the Constitution. Instead, the legal community should treat originalism as a standard to judge interpretations.

This Article takes issue with this approach. Originalism is not like other instances in law where statutes or opinions refer to other opinions, statutes, or third-party publications. Instead, originalism requires rigorous and complex analysis of historical facts to determine the Constitution's original public meaning—an undertaking that most judges, attorneys, the public, and even legal academics may find challenging. Treating originalism as a standard does not avoid this concern, and originalism therefore remains unappealing when compared with alternate approaches to interpretation that do offer procedures for their implementation. Regardless, the legal community should confront these issues, rather than evade them.

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INTRODUCTION

In *Originalism: Standard and Procedure*, Professor Stephen E. Sachs seeks to cut through what he claims is a circular debate over theories of originalism.[1] According to Sachs, originalists argue that historical facts are important for answering legal questions, while critics of originalism believe judges and attorneys are ill-suited to do the necessary work to evaluate these historical facts.[2] This debate, Sachs observes, goes back and forth without making any apparent progress.[3]

Sachs suggests that we can escape this cycle by treating originalism as a *standard* for determining constitutional provisions' true meanings,

1. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778 (2022) [hereinafter Sachs, *Originalism: Standard and Procedure*].
2. *Id.*
3. *Id.*

rather than as a *procedure* for reaching decisions about cases.[4] Drawing on philosophical debates over ethical theories, Sachs argues that an ethical standard itself may be used to label certain actions or sets of consequences as right or wrong even if that standard is difficult or impossible to implement.[5] When framed this way, a standard's failure to direct actors how to act is not a reason to reject it. A theory that offers an account of "right-making characteristics" may be useful and important even if it only offers this account of what makes something right or wrong without telling people how to arrive at that determination.[6] Moreover, standards may still have some bearing on everyday activities by providing rules of thumb for what to look for or how to act.[7]

Sachs argues for a similar approach to originalist debates: treat originalism as a standard, rather than as a decision procedure. Under this approach, originalists need not trouble themselves with the practical difficulties of historical investigation to determine constitutional provisions' original meanings. Originalism as a standard "picks out a destination, not a route," and provides a way of labeling particular interpretations as correct or incorrect, depending on the type of originalist theory that is being employed.[8] Sachs even goes so far as to label demands that originalism provide clear guidance for determining correct answers a "category error."[9]

This Article takes issue with Sachs's approach, arguing that a standard like originalism that, by its nature, precludes clear and identifiable decision procedures, is still flawed. Treating originalism as a standard, rather than a procedure, takes the discussion too far afield to be useful to judges, attorneys, and the public, who must determine what the Constitution means. While treating originalism as a standard sidesteps common critiques about how judges and attorneys cannot realistically implement originalism, it does so at the cost of alienating originalism from the practice of law. Sachs theorizes that "[i]f standards of rightness are still worth having in philosophy, then they're probably

4. *Id.*
5. *Id.* at 787–88.
6. *Id.* at 788–89.
7. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 789.
8. *Id.* at 779.
9. *Id.* at 787.

also worth having in law."[10] But this attitude overlooks (or at least minimizes) the theoretical nature of metaethical discussions—debates that are often several levels removed from everyday questions of right and wrong (outlandish hypotheticals not included). But discussions about originalism are discussions about the law, which judges and attorneys must ultimately apply and which the public must follow.

First, this Article takes issue with Sachs's characterization of originalism as an "opaque specification," which he uses to analogize his theory of originalism as "the Founders' law, as lawfully changed," to other examples.[11] Sachs responds to objections that originalism is a vague and unhelpful standard by noting that law frequently fails to give specific guidance, which often requires the interpreter refer to other areas of law or third-party materials.[12] I distinguish Sachs's examples from the far more daunting challenge originalism presents in requiring interpreters to determine the original public meaning of the U.S. Constitution.[13] Additionally, because originalism relies on resolving difficult questions about distant history, it lends itself to abuse, shoddy analysis, and poor application. This is primarily because judges and attorneys lack the time to engage in the rigorous research required to find answers about the Constitution's original public meaning.

While Sachs may respond to these concerns by accusing me of converting objections over procedures into objections against standards, this accusation overlooks the importance that procedures have when choosing between standards of interpretation and justifying that choice. Even if originalism is treated as a standard, the question of how to choose between standards like originalism and other theories of interpretation remains. While Sachs notes that normative concerns, like con-

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10. *Id.*

11. *See id.* at 790–91 (citing William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019)) (when referencing "the Founders' law, as lawfully changed," Sachs refers to how legal precedent has adapted "the Founders' law" to the present).

12. *Id.* at 792.

13. *See infra* Section II.B (focusing on this "original public meaning" version of originalism because it is presently the most common form of originalism that academic advocates adopt). *But see* Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 792 (Sachs's original-law version of originalism presumably requires some understanding of the Constitution's original public meaning to determine the law of the Founders).

straint and democratic values, play a role in this determination, questions of decision procedures should be part of the discussion as well. A standard that is easier to implement, or which lends itself to a clearer decision procedure, is preferable to another standard that is harder to implement. Another key consideration is whether a given standard may be prone to exploitation (particularly in light of Sachs's recognition of constraint as a frequently touted basis for selecting an originalist approach to interpretation).[14] Legal actors may purport to employ the standard of originalism—which they may claim is objective and politically neutral—yet do so in a manner that pursues certain policy-oriented results. With this risk in mind, transparency-centric approaches—even fanciful ones like resolving disputes with coin tosses—gain a certain level of appeal over originalism. Accordingly, objections that originalism is still difficult, if not impossible, for judges, attorneys, and the public to consistently implement in a rigorous, objective manner still have force—even at the standard level.

Finally, I return to Sachs's move away from procedures to standards and evaluate whether such a move results in any meaningful progress or contribution to originalist debates in the present academic, legal, and political contexts. I conclude that it does not. Originalism is a theory of interpretation that requires theorizing and debating over the Constitution's original meaning, not only in academic settings but in practical contexts as well. If real-world actors are to treat originalism as a standard, much of the existing literature—including that written by originalism's proponents who tout it as a theory that actors can implement consistently and easily—no longer makes any sense, as it commits the "category error"[15] of which Sachs warns.

At some point, academic originalist theorizing and debate must account for decision procedures. After all, judges, attorneys, and the public have to operationalize interpretations of the Constitution by issuing opinions, making legal arguments, and conforming their behavior to the law. These actors' paramount concern is what originalism means for the methodology that particular judges will employ in interpreting and applying the Constitution's meaning. Whether certain opinions or interpretations are ultimately consistent with an abstract legal standard is of little use to these actors if such a standard is divorced from procedure.

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14. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 781.

15. *Id.* at 787.

I. ORIGINALISM AND THE LANDSCAPE OF THE DEBATE

A. A Brief Background on Originalism's History and Current State

Before diving into the issue of treating originalism as a standard or a procedure, some background on the history of originalism, the current landscape of originalist theory, and its position in the political landscape is warranted. This is not an exhaustive treatment of originalism's history and all the present variations on the theory, as such a discussion would likely fill several articles. Those articles have already been written, so there is no need to rewrite them here.[16]

Modern originalism originated as a reaction to concerns about judicial overreach in the wake of the Warren Court. Early aspects of this reaction included moves toward judicial restraint—reflected in President Nixon's 1971 nomination of William Rehnquist to the U.S. Supreme Court with the expectation that Rehnquist would take a strict, constrained approach to interpreting the Constitution.[17] Raoul Berger's *Government by Judiciary: The Transformation of the Fourteenth Amendment* came several years later, in which he criticized the U.S. Supreme Court as revising the Constitution "under the guise of interpretation."[18] In 1985, Attorney General Edwin Meese urged a similar theme of pushing back against the Warren Court's "radical egalitarianism and expansive civil libertarianism" in a speech to the American Bar

16. *See* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 11–24 (2017) (providing an approachable summary of modern originalism's origins and development); *see also* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) [hereinafter Solum, *Originalism Versus Living Constitutionalism*] (presenting a detailed survey of variations on originalism, as well as competing theories).

17. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 600 (2004).

18. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3, 464–67 (Liberty Fund, 2d ed., 1997) (1977).

Association.[19] Originalists today credit this speech with bringing originalism to the focus of the broader public.[20]

These early originalists urged that originalism was crucial, because it would restrain judges to the fixed meaning of constitutional text and require them to defer to legislative majorities.[21] Early originalism also focused on defining original constitutional meaning by looking to the Founders' intentions—a view that soon came under fire.[22] Today, not many originalist scholars support a view that the original meaning of the Constitution should be determined by looking to the intentions of the Founders.[23]

As a result of sustained attacks against originalist theory based on the Founders' intentions, originalist theory shifted to a focus on the Constitution's original meaning.[24] Justice Antonin Scalia encouraged this shift in a speech to attorneys with Meese's Department of Justice, telling them to determine the Constitution's original public meaning rather than the Founders' original intentions.[25] Justice Scalia urged a similar approach in his 1989 article, *Originalism: The Lesser Evil*.[26] There, he described the "originalist approach to constitutional interpretation" as looking to the "contemporaneous understanding" of the Constitution,

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19. Edwin Meese III, Att'y Gen. of the U.S., Address Before the House of Delegates of the American Bar Association 6 (July 9, 1985).

20. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4 (2015) [hereinafter Solum, *The Fixation Thesis*].

21. Whittington, *supra* note 17, at 602.

22. *Id.* at 603.

23. *But see* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228 (1988); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004).

24. Solum, *The Fixation Thesis*, *supra* note 20, at 4.

25. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9–10 (2018); *see also* EDWIN MEESE III, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (U.S. Dep't of Just. ed., 1987).

26. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

with focus on "the understanding of the First Congress and of the leading participants in the Constitutional Convention."[27] This approach also considered background principles of English law and state constitutional law in existence at the time of the framing.[28] Following Justice Scalia's lead, several other law professors elaborated that the theory of originalism is based on the Constitution's original public meaning, rather than on the Founders' original intentions.[29]

Scholars continued to develop the originalist approach—introducing an "interpretation-construction distinction," where the "discovery of the linguistic meaning of the constitutional text ('interpretation')" is recognized as a distinct enterprise from the "determination of the legal effect associated with the text ('construction')."[30] Where interpretation determines the meaning of the constitutional text is clear or has straightforward implications; the text may be implemented with little additional effort.[31] But where meaning is unclear or where there are multiple potential implications of the constitutional text, additional work may need to be done through the process of "constitutional construction."[32] In contrast, other scholars argue the Constitution's original meaning is more determinate than advocates of construction contend, or that construction may not be required by resorting to strong default rules.[33]

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27. *Id.* at 851–52.

28. *Id.*

29. Solum, *The Fixation Thesis*, *supra* note 20, at 4 (referring to Gary Lawson, Steven Calabresi, and Saikrishna Prakash as scholars taking this approach).

30. *Id.* at 5.

31. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468–69 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*].

32. *Id.* at 469.

33. *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919 (2021) (arguing that the Constitution is a technical document and that interpreting the original meaning of its provisions is sufficient to find implementable meanings); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 882 (2009) (urging a broad, default rule of "[w]here the document's broad or unspecific language admits of a range of possible actions, consistent with the language, government action falling within that range is not unconstitutional").

Even if originalists agree that legal actors should look to the Constitution's original public meaning to determine the meaning of constitutional text, there are variations on what is the original meaning, how to interpret it, and how to apply it. A survey of originalist theory variations is beyond the scope of this Article.[34] But it is worth noting that debates and variations exist—as they may be evidence of whether originalism as a standard lends itself to confusion or unmanageable implementation.

Professor Lawrence B. Solum claims that while there are varying theories of originalism, the "originalist family" of theories are those that affirm the "Fixation Thesis" and the "Constraint Principle."[35] The Fixation Thesis is the claim that "the original meaning ('communicative content') of the constitutional text is fixed at the time each provision is framed and ratified."[36] The Constraint Principle is "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."[37] Solum claims that, despite debate over interpretive method and the scope of construction, originalists generally agree on these two points.[38]

This Article will treat originalism as a theory of constitutional interpretation that fixes constitutional meaning to the Constitution's original public meaning at the time of ratification. This approach applies some, but not all, of Solum's approach. First, while the Constraint Principle is consistent with originalism's development—as a theory that should prevent judges from relying on meaning other than original public meaning—there are several originalists who take issue with the notion of originalism as a constraining theory.[39] Additionally, requiring originalism to include, by definition, a procedural requirement would prevent originalism from ever being treated as a standard. This would

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34. For such a thorough survey, see Solum, *Originalism Versus Living Constitutionalism*, *supra* note 16.

35. Solum, *The Fixation Thesis*, *supra* note 20, at 13.

36. *Id.* at 6–7.

37. *Id.* at 8.

38. *Id.* at 13.

39. *See* Whittington, *supra* note 17, at 611 (arguing that originalism should not be treated as a force that can prevent judges from abusing their discretion but should instead be treated as a guide for interpreters to employ the "correct forms of evidence and argumentation for understanding constitutional meaning").

end the debate over standards and procedures before it began. Even if procedures of implementation are important, it does not make for a good debate to claim to prove this point by simply defining originalism so that legal actors can never treat it as a standard.

B. What is Sachs's Definition of Originalism?

Before moving on to originalism as a standard or procedure, it is worth addressing what Sachs does (or does not) define originalism to be. Sachs's background discussion of originalism, its development as a theory, and his definition of originalism is quite brief. This treatment is a welcome change for regular readers of originalist scholarship. Originalist scholarship is a genre that tends to include identical—and sometimes quite lengthy—background sections. Sachs's brief treatment minimizes the context of the discussion to a point where his treatment almost ignores the state of originalist theorizing and its implementation.

Indeed, it is difficult to pinpoint what precisely Sachs claims originalism is for purposes of his article. Early in his article, Sachs presents the idea that "the original Constitution is law, and that it remains law until lawfully altered," but he suggests this is an "example" of a theory of originalism.[40] Later, after discussing the difference between standards and procedures, he asks the reader again to "[c]onsider the theory that the Founders' law, as lawfully changed, is still our law today"—a nearly identical restatement of the earlier "example."[41] Sachs later repeats the theory: after asserting "the standard is the standard," he asserts that the theory of originalism is that "our law is the Founders' law, as lawfully changed."[42] Elsewhere, Sachs's scholarship certainly suggests that his view of originalism is the theory that the law of the Founders, as lawfully changed, is the law of the United States today.[43]

It is unclear how Sachs's approach relates to other varieties of originalism, such as the notion that legal actors should interpret the Constitution in a manner consistent with its original public meaning. Sachs gives an example of his "original-law" approach, suggesting that "the key standard for interpreting the Imports-Exports Clause is that it

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40. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 782.

41. *Id.* at 790.

42. *Id.*

43. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) [hereinafter Sachs, *Theory of Legal Change*].

enacts whatever rule of law it enacted at the Founding."[44] At least to an extent, this incorporates the original public meaning approach—that the words of a constitutional clause "mean whatever they publicly meant at the Founding . . . ."[45]

This Article will not get into the weeds of Sachs's "original-law" approach to originalism or the responses and defenses of the approach that have been set forth over the past several years.[46] For one, Sachs's light-handed approach to defining originalism fits the goal of his argument for treating originalism as a standard. Legal actors can still apply the standard-procedure distinction, and (according to Sachs) the distinction is worthy of attention, regardless of whether originalism defined the Founders' original intentions; the constitutional text's original public meaning; or the Founders' law, as lawfully changed.[47] I will focus on originalism as theories of constitutional interpretation, constrained by the Constitution's original public meaning, because this is the mainstream approach to originalism—in the realm of legal scholarship and, more importantly, in judicial and political spheres.[48]

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44. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 817.

45. *Id.*

46. For further literature consistent with, and in support of, Sachs's approach to originalism, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Baude & Sachs, *supra* note 11. For criticism of the so-called "positive turn" in originalism, see, e.g., Eric J. Segall, *Originalism Off the Ground: A Response to Professors Baude and Sachs*, 34 CONST. COMMENT. 313 (2019); *see also* Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017); Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401 (2021).

47. Sachs's distinction between standards and procedures is discussed in greater depth below. *See infra* Section III.

48. Sachs's article setting forth his original-law theory, as of August 5, 2021, has been cited in a single concurring opinion. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 542 n.2, 543 (6th Cir. 2021) (Bush, J., concurring) (citing Sachs, *Theory of Legal Change*, *supra* note 43, but stating that the proper originalist approach is to "interpret the Constitution in light of its text, structure, and original understanding") (quoting NLRB v. Noel Canning, 573 U.S. 513, 573 (2014) (Scalia, J., concurring)). Scalia's article, *Originalism: The Lesser Evil*, on the other hand, has been cited in eleven opinions, and Justice Scalia's original public meaning approach to originalism—as set forth in his opinions—has been cited extensively by courts purporting to apply originalist reasoning. To the extent that Sachs may contend that courts have applied some version of his original-law approach, a question remains whether references to more specific theories may be correctly deemed instances of Sachs's broader view of originalist theory. Moreover, an even larger question remains as to whether courts have been as originalist as Sachs and his sometimes co-author, William Baude,

II. DISTINGUISHING STANDARDS AND PROCEDURES

Drawing from debates over ethical theories, Sachs argues that originalism should be characterized as a "standard," rather than a "decision procedure."[49] Sachs recognizes that originalist theories do not provide a "step-by-step procedure" for finding out how to make true statements about the Constitution's meaning, but he argues that these originalist theories should not be blamed for failing to offer this procedure.[50] Originalism is not so much a methodology as it is a description of the outcome of correct constitutional interpretation.[51] Using this approach, it appears that originalists may avoid a great deal of criticism—including critiques that originalism is challenging to implement and that judges, attorneys, and politicians only selectively employ originalism when it suits them.

To describe the distinction between standards and procedures, Sachs cites Professor Eugene Bales, who employed a similar approach in addressing critiques of theories of consequentialist ethics.[52] Bales addresses objections against a theory of act-utilitarianism: the theory that a particular action is proper "if and only if its utility—that is, its contribution toward intrinsically good states of affairs—is no less than that of some alternative."[53] The objections Bales confronts are those that emphasize the "practical difficulties" that arise in attempting to apply this theory to scenarios.[54] In particular, Bales addresses the objection that difficulties in predicting the complex consequences of outcomes make it impossible to determine whether a particular action is right or wrong under the ethical theory.[55] Bales argues that these objections are mistaken "in conception," and that the theory of act-utilitarianism can still

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have claimed. *See* Segall, *supra* note 46, at 323–26 (noting that extensive research by scholars suggests that Justices' political and personal values guide the Supreme Court's decisions and arguing that Baude and Sachs have not provided sufficient empirical evidence to counter this).

49. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 778.

50. *Id.*

51. *Id.*

52. *Id.* at 787 (citing R. Eugene Bales, *Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?*, 8 AM. PHIL. Q. 257 (1971)).

53. Bales, *supra* note 52, at 257.

54. *Id.*

55. *Id.*

carry out at least some ethical theory functions, including to provide an account of "right-making characteristics."[56] Even if act-utilitarianism does not provide a procedure to produce immediate and correct guidance on a correct action to take, it can still correctly outline which aspects of a particular action make it right or wrong.[57] Bales rejects the notion that accepting an act-utilitarian approach commits one to a particular procedure of evaluating consequences.[58] However, he suggests that act-utilitarianism may serve as "a standard against which to measure the success or failure of rules-of-thumb and moral codes," and that it can at least tell us what to look for when selecting among particular options.[59]

Sachs adapts this approach to the debate over originalism and argues that originalist theories can be treated as a standard rather than a procedure.[60] Referring to the theory that "the Founders' law, as lawfully changed," is still current United States law, Sachs notes that this theory includes a major premise that law "is determined by certain social practices" and "an empirical minor premise about the practices we happen to have."[61] Nevertheless, Sachs says nothing about "how to dig up the law at the Founding," identify alterations to that law, and apply the resulting law to present-day facts.[62]

Portraying originalism as a standard rather than a procedure avoids faulty or impractical originalist methodology criticisms. Sachs notes that originalism, as a standard, evaluates legal propositions, "not scholarly methods of discovering them."[63] Sachs asserts that originalism remains the right standard, even if "[t]he theory's conclusions might be uncertain, the historians might often disagree, [and] the judges might balk at wading through the materials."[64] Sachs claims the theory that

56. *Id.* at 260–61.
57. *Id.* at 261.
58. *Id.* at 264.
59. Bales, *supra* note 52, at 264.
60. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 790.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

"our law is the Founders' law, as lawfully changed" is "as much information about constitutional law as we could need . . . ."[65]

Sachs, borrowing a phrase from John Foster, refers to this as "opaque specification," which is, in short, a description of something that requires reference to another source of information in order to determine an object's specific meaning.[66] Perhaps anticipating concerns that treating originalism as a standard is too detached from practical realities, Sachs argues that this sort of a description—which is primarily a reference to other laws or sources—is commonly employed in a wide variety of laws.[67]

Sachs suggests that many problems with implementing originalism—such as the issue of applying the Constitution's original text to novel factual scenarios—are issues that would have confounded the Founders in the same manner as they would confound a present-day reader.[68] Indeed, Sachs suggests that, "If you'd asked Alexander Hamilton whether Vice Presidents would preside over their own impeachments (as the text suggests, but in conflict with longstanding rules of construction), he might have said 'Huh,' scratched his head, and started rereading the relevant passages just like the rest of us."[69]

There are several problems with this account, however. First, this characterization of the complexity of constitutional interpretation sidesteps the opacity of original public meaning. Hamilton (unlike Sachs, our present U.S. Supreme Court Justices, and average folks on the street) has the advantage of knowing the ordinary meanings of words at the time of the Constitution's drafting. Hamilton is from that time period and was therefore immersed in the relevant language and terminology. The upshot is that solving the problem of applying originalism to new circumstances still assumes a familiarity with the constitutional text's original meaning on an intimate, immersive level that only a resurrected Hamilton may attain.

Moreover, the two-century gap in history certainly contributes to problems of applying law to unusual or unforeseen circumstances. Yet, Sachs asserts that problems of applying existing legal rules "have less

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65. *Id.*
66. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 790.
67. *Id.*
68. *Id.* at 786.
69. *Id.* at 794 (citation omitted).

to do with the two-century gap separating Hamilton from today than with the far less bridgeable chasm between creating a new rule and applying one already adopted."[70] The passage of time since the founding necessarily means that unforeseen circumstances will arise that will present challenges to those who would implement centuries-old constitutional provisions in modern cases. That originalism purports to bind itself to original public meaning, and to apply that meaning to present circumstances, *is* an originalist problem, contrary to Sachs's suggestion otherwise.

Moving past this, Sachs goes on to confront other objections against originalism—including its "incapacity to secure compliance."[71] Critics of originalism, Sachs argues, contend that originalism does not change the behavior of judges or other decisionmakers.[72] Sachs responds by claiming that testing whether originalism truly constrains judges is flawed, and that examples of "flawed decisions" and "every instance of originalism done half-heartedly or for show" cannot support the conclusion that originalism demands such results.[73] Drawing another analogy to moral debates, Sachs notes that even though interest or ideology may motivate moral arguments, this does not mean that we give up on moral reasoning as a result.[74] As for originalism, Sachs argues that even if there is a chance that legal rules may be misapplied, that is not a reason to abandon the rule.[75]

III. TREATING ORIGINALISM AS A STANDARD IGNORES THE IMPORTANCE OF DECISION PROCEDURES AND IS INCONSISTENT WITH PRACTICAL REALITIES

A. An Initial Concern: Is Originalism Really Just Another Opaque Specification?

Sachs recognizes that treating originalism as a standard rather than a procedure will likely incite criticism that such an approach renders

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70. *See id.*
71. *Id.*
72. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 794.
73. *Id.* at 795.
74. *Id.* at 796.
75. *Id.*

originalism of little use to anyone.[76] As a preliminary defense against this critique, Sachs suggests that the law takes similar approaches "*all the time*."[77] Sachs suggests that defining originalism as a standard is an instance of opaque specification, where a description of something refers to another source of information that must be known to understand the description.[78]

Sachs borrows the "opaque specification" language from John Foster and simultaneously quotes Foster's specification example. Quoting Foster, Sachs analogizes to describing the contents of a sealed envelope by directly referencing the contents (a triangle) or indirectly describing it ("an instance of that type of figure whose geometrical properties are discussed in the fourth chapter of the only leather-bound book in Smith's[79] library").[80] To adapt Foster's description of opaque specifications, say I had a sealed envelope containing a piece of paper with the word "Kumamon" on it.[81] I could give you a transparent description of what is on the piece of paper by telling you that it is the word, "Kumamon." Alternatively, I could give you an opaque description, such as "the name of Michael Smith's favorite mascot," "the character Michael Smith portrayed at Glaser Weil's Halloween party in 2019," or "the winner of the 2011 Yuru-Chara Grand Prix."[82] For each of these opaque descriptions, you need some knowledge of a separate source of information. The interpreter must ask Michael Smith what his favorite mascot is, ask an attendee of the 2019 Glaser Weil Halloween party what Michael Smith's costume was,[83] or look up the winner of the 2011

76. *Id.* at 790–91.

77. *Id.* at 791.

78. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 790.

79. No relation to the present Author.

80. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 791 (quoting JOHN FOSTER, THE CASE FOR IDEALISM 62 (Ted Honderich ed., 1982).

81. Kumamon is, of course, a mischievous, black bear with distinctive red cheeks who is the mascot of the Kumamoto prefecture in Japan, and one of Japan's most popular mascots, or "yuru-chara." *See generally*, *Kumamon*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kumamon (last visited Mar. 11, 2022).

82. *See Yuru-chara*, WIKIPEDIA, https://en.wikipedia.org/wiki/Yuru-chara (last visited Mar. 11, 2022).

83. This may be overly generous, as most attendees' descriptions, assuming they remember, would likely be something like, "some kind of cartoon bear."

Yuru-Chara Grand Prix. Without additional information, none of these descriptions will tell you what the paper in the envelope says.

Sachs claims that the law contains numerous examples of opaque specifications. For instance, Sachs notes that Kentucky's law "includes whatever Virginia's law was as of June 1, 1792."[84] He notes that "conduct in a federal enclave is governed by whatever local criminal laws were 'in force at the time . . . .'"[85] He cites the Federal Rules of Civil Procedure, which state that courts may grant new trials for any reason a new trial has "heretofore" been granted.[86] He references the Constitution, which provides that federal "[d]ebts" and "[e]ngagements" from before the Constitution's adoption are "just as valid 'as under the Confederation.'"[87] He also refers to other laws that refer to third-party publications, such as the edition of the laws and treaties of the United States, published by Little and Brown and referred to as "competent evidence" of the Acts of Congress in the United States Code.[88] And he points out that the Assimilative Crimes Act applied California's substantive criminal law to naval bases in California, requiring courts adjudicating crimes at such locations to determine "which California laws define substantive offenses and which address criminal procedure."[89]

Each of these examples (as well as my Kumamon examples) are instances where the opaque description does not provide a usable description of the subject matter without reference to some other source of information. But all these examples refer to external sources of information where answers may be found. For instance, if I want to know what Kentucky's law includes, I can dust off the old set of late eighteenth century Virginia statute books sitting on my bookshelf. If I want to know what federal debts and engagements were outstanding before the adoption of the Constitution, I can dust off the paperwork setting forth those details. If I want competent evidence of congressional acts, I can dust off the copy of the Little and Brown editions of the United States Code tucked away in my office filing cabinet. If I want to know

84. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 791 (citing KY. CONST. § 233).

85. *Id.* (citing 18 U.S.C. § 13(a)).

86. *Id.* (citing FED. R. CIV. P. 59(a)(1)(A)–(B).

87. *Id.* at 791 (citing U.S. CONST. art. VI, cl. 1–2).

88. *Id.* at 791 n.95 (citing 1 U.S.C. § 113 (2018)).

89. *Id.* at 792–93 (citing United States v. Roberts, 845 F.2d 226, 228–29 (9th Cir. 1988) and 18 U.S.C. § 13 (1982)).

California's substantive criminal law, I can make my way through the clouds of dust and log on to Westlaw to examine criminal statutes and court cases to determine which are substantive and which are procedural.

While these examples are inefficient and likely to present difficulties to those with dust allergies, they are distinct from the opacity that originalism presents. Originalism, as a standard, requires divining the law of the Founders (should one adopt Sachs's proposed theory). Or, if one adopts one of the more widespread approaches to originalism, determining the Constitution's "original public meaning."[90] Like the Sachs and Kumamon examples, originalism provides an opaque meaning of the Constitution's terms, but unlike those examples, there is no clear place where one can go to find an answer to what the meaning of those terms are.

To illustrate, return to my original Kumamon example, where I informed you that the word contained in the sealed envelope is the name of my favorite mascot. To complicate the scenario, though, assume now that I have been dead for well over 200 years, so asking me the identity of my favorite mascot is a non-starter. Instead, you must find some other way of divining the meaning—either by looking through my old papers or the recorded recollections of those who endured my discussions of niche mascots. This may not be so difficult if the inquiry is taking place 200 years in the future, assuming that future algorithms can mine data from social media, emails, texts, and the like. But had I died 200 years ago, it might be more of a difficult undertaking. It may not be impossible, but the uncertainty of where to look and whether an answer even exists makes this type of question more opaque than the examples Sachs cites.

However, this example only gets us part of the way to illustrating the difficulties of parsing out the original public meaning of a constitutional provision. Unlike my Kumamon example, originalist analysis requires more than simply determining the views and intentions of a single person. Even under the mostly-abandoned original intents originalism approach, the views and understandings of multiple founders must be investigated—and an interpreter must find some way of balancing

90. *See* Solum, *The Fixation Thesis*, *supra* note 20, at 27–29.

likely contradictions in those intentions.[91] But under the more generally accepted original public meaning approach to originalism, the interpreter must determine the "public meaning" of a provision at a particular time.[92] This requires additional work, including determining whether a given meaning was truly widespread enough to be "public," as well as contemplating what and who is the contemporaneous reader when parsing out the original public meaning of a text.[93]

These are a few examples of obstacles that originalists face in implementing the theory that legal actors should interpret the Constitution by referencing its original public meaning. I have gone into far more detail elsewhere regarding other obstacles facing originalists—particularly judges and attorneys who attempt to engage in originalist analysis.[94] Barriers resulting from a lack of time, resources, and historical expertise, along with the motivations of parties' counsel to present the strongest case possible, all encourage goal-oriented, incomplete originalist analysis.[95] Further details on these points is beyond the scope of this Article and Sachs's article, in which he seeks to bypass these concerns even if they are assumed to be true.

Indeed, Sachs all but admits that judges who engage in originalist analysis may not appear to be doing so rigorously because they are "working on government time."[96] Therefore, judges have "good reason to make rough cuts through the pile of available evidence" and consequently give more attention to particular sources than others.[97] Later, he argues that recognizing the standard-procedure distinction should give rise to a "more charitable understanding" of the U.S. Supreme

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91. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212–13 (1980); *see also* Robert Bennett, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 355, 355 (1988) (describing the problem of determining a single intent from the various intents of those responsible for drafting and ratifying the Constitution as the "summing problem").

92. *See* WURMAN, *supra* note 16, at 35.

93. *See* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 299 (2014).

94. *See generally* Michael L. Smith & Alexander S. Hiland, *Originalism's Implementation Problem*, 30 WM. & MARY BILL RTS. J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902216.

95. *Id.*

96. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 827.

97. *Id.*

Court's attempts at historical investigation and methodology.[98] Sachs confronts criticism about U.S. Supreme Court Justices' failure to cite a variety of historical sources, including primary sources, and concludes that the absence of such citations may not be all that bad for originalist analysis in the context of the Court's decision-making.[99]

While Sachs suggests that judges may in fact be engaging in solid originalist analysis even if they do not show their work through citations, his later concessions indicate that this may not be the case. Sachs suggests that while judicial opinions "bear a burden of justifying the conclusions they reach," this is "not so heavy a burden as more scholarly treatments" of the Constitution's meaning.[100] Sachs compares judicial opinions with encyclopedia entries: a survey of the "well-regarded secondary works in a given field" that reach conclusions based on any new evidence and arguments presented to them by the brief writers, who have read the scholarship.[101] While this method of analysis is not in line with "ideal research methods," it is still "good enough for government work."[102]

Describing expected originalist analysis as "good enough for government work"[103] suggests that it is not in line with the methods that originalists working in academia assume judges will employ. Originalists generally assume that judges and attorneys will make good faith, rigorous efforts to determine the Constitution's original public meaning.[104] But this tends to ignore the realities of time-constraints, party

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 828.

102. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 828.

103. *Id.*

104. *Compare* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2017) (setting forth a comprehensive, three-part approach to interpretation requiring immersion in history, review of the constitutional record, investigation of corpus linguistics, and triangulating commonalities between the results of all three forms of investigation), *with* Smith & Hiland, *supra* note 94 (demonstrating why all methods Solum proposes cannot be applied with the necessary rigor by practicing judges and attorneys, and arguing why reliance on academic work with these methods results in a host of separate problems).

advocacy, and the sheer volume of contradictory scholarship regarding the Constitution's original meaning.[105]

By now, those like Sachs who advocate to treat originalism as a standard would likely accuse me of missing their point and leveling an inapplicable procedures critique. To an extent, this is correct. The above discussion focuses on what Sachs describes as "procedures" for implementing originalism—not originalism as a standard—and the force of the above arguments are based on these procedures' complexity, indeterminacy, and abuse. As the remainder of this Article explains, however, this is still an important point when it comes to debating particular standards. If originalism, as a standard, cannot be feasibly implemented through a procedure, then this raises serious questions about whether originalism is a standard worth using or pursuing.

B. The Relevance of Decision Procedures to Selecting a Standard

Criticism that casts doubt on originalism's usefulness as an interpretive theory for judges, attorneys, and the public, affects higher-level debates over which interpretive standard these actors should employ when determining the Constitution's meaning. If originalism tends to create situations where procedural implementation of the standard is difficult or impossible, then alternative standards may be preferable. For example, if originalism cloaks goal-oriented legal arguments or conclusions in a guise of objectivity, then a standard that tends to prompt more transparent legal reasoning may be preferable.

As for how the standard-level debate is to take place, Sachs, along with Bales, whose standard-based analysis Sachs applies, do not provide much of an explanation. Bales, for instance, suggests that even if a theory like act-utilitarianism cannot spell out a procedure that provides "immediately helpful answer[s] to questions" faced by actors, the theory may still fulfill one expectation of an ethical theory: to provide an account of right-making characteristics.[106] Indeed, Bales suggests that act-utilitarianism may provide such an account "very nicely."[107] But Bales does not explain why act-utilitarianism provides an account

105. *See* sources cited *supra* note 104 and accompanying text.

106. Bales, *supra* note 52, at 261.

107. *Id.*

of right-making characteristics any better than alternate theories. Perhaps this is because the ultimate outcome—the maximization of positive results once all things are considered—is, in itself, a good thing. Sachs seems to think this is what Bales is getting at when he suggests that a standard of maximizing utility is "a better standard than any alternative."[108]

But why is a standard that actions are right if they maximize utility *in itself a good standard*?[109] It cannot be just because such a standard could result in the most good for the most people; such a conclusion begs the question, as it employs the very evaluation standard that is supposed to be up for debate.[110] And why is a theory that maximizes something preferable to a theory that is not about maximizing things whatsoever? Perhaps a theory that *minimizes* something, like harm or suffering, is preferable.[111] Perhaps theories that are made up of a series of rules are preferable to the unpredictable approaches of measuring each act based on whether it maximizes utility or minimizes negative outcomes.[112]

While this Article is not the place to delve into these metaethical questions, one approach to selecting a particular ethical standard is to evaluate which standard is easier to implement. If a standard is an account of right-making characteristics, a standard that is easier to implement may result in a higher frequency of actions or consequences that achieve those right-making characteristics. And if evaluators employ a right-making characteristics standard, then a standard that is easily applicable to evaluating real world conduct may be preferable to a standard that leads to doubt or confusion.[113]

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108. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 787.

109. *Id.* at 788.

110. *Id.*

111. *See* PETER MARKL & ERICH KADLEC, KARL POPPER'S RESPONSE TO 1938, at 107–09 (Peter Markl & Erich Kadlec eds., Peter Lang GmbH 2008). *But see* R. N. Smart, *Negative Utilitarianism*, 67 MIND 542, 542–43 (1958) (suggesting that a theory that prioritizes the avoidance of suffering could lead to justifying the instant, painless destruction of the human race to avoid future suffering, and, on the individual level, noting that "the amount of toothache and illness in store for a man will usually far outweigh the brief misery of the stiletto in his back").

112. *See, e.g.*, Brad Hooker, *Rule Consequentialism*, THE STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/consequentialism-rule/ (Nov. 18, 2015).

113. In the context of act-utilitarianism, for example, it may remain difficult, or impossible, to evaluate actions that have previously occurred in the real world. Doing

The reasoning behind this metaethical critique applies even more directly to originalism. Originalism is a standard that ultimately has a greater purpose than being theorized and parsed over by legal academics analyzing it, because legal actors, like judges and attorneys, are meant to employ the standard in their day-to-day work. Additionally, as the Constitution and the Bill of Rights serve to define and limit the government's power and functions, whatever standard legal actors use to interpret the Constitution should be readily accessible for the public to use. After all, members of the public must conform their activities and expectations to what they understand to be permitted and protected under the law.

If judges, attorneys, or the public cannot readily apply a standard for interpreting the Constitution, then the question is *not only* why these actors would bother using such a standard, but also why it is preferable to alternate applicable theories. Sachs's article largely serves as an answer to the first question—attempting to explain what purposes originalism serves. Up until now, this Article has addressed the deficiencies in that explanation. However, why originalism is preferable to alternate approaches that do provide a decision procedure is a question that Sachs barely addresses.

This presents a separate problem for originalism if one is to fully embrace it as a standard rather than a procedure. Making the move to treat originalism as only a standard sidesteps the various critiques against originalist methodology—including how judges, attorneys, scholars, and the public determine original public meaning, original intent, or the law of the Founders. But this leaves originalism vulnerable when compared against alternate theories that provide a coherent decision procedure.

Take, for example, the proposal that the U.S. Supreme Court flip a coin to determine what meaning to apply when confronted with ambiguous constitutional provisions that a prior Court did not yet determine. In a conference, the Justices work out the potential interpretations to which a constitutional provision is susceptible. Assuming that there are two potential interpretations, the Justices move to the next stage, the

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so requires accounting for the consequences—both immediate and long term—of alternative actions. And a full accounting of the consequences of the actions requires predicting outcomes of the action that have not yet come to pass, even months or years after the action has been taken. To Bales's credit, he explains the complexity of evaluating such consequences in great detail. Bales, *supra* note 52, at 258.

coin flip method.[114] The Court will use a quarter minted during the year the Court begins its fall term. Each side of the coin is associated with a particular constitutional interpretation. The most senior, non-Chief Justice flips the coin, while the Chief Justice calls the flip's result. However the coin lands, that is the interpretation the Court uses.

This alternate approach is extreme, but I present it to highlight how originalism does not lend itself to a coherent decision procedure. Many people's first reaction to this alternative is to balk at its reliance on mere chance. Yet, this reaction may be tempered if they are told that an alternative approach is to engage in goal-oriented, non-robust historical research to collect citations aligning with a Justice's preferred policy, in an effort to make the opinion appear to rest on an objective basis.[115] Perhaps a standard of interpretation based on little more than a coin flip's random outcome is preferable to a goal-oriented approach that masquerades as a quest for objective truth.

It is also worth considering other alternative standards with decision procedures that are more robust than coin flipping. For instance, judges could use an interpretation standard holding that the correct constitutional meaning is the Constitution's present public meaning, rather than the public meaning at the time of ratification.[116] While controversies may arise over the ambiguous terms' present meanings, judges who live in the relevant time period can presumably resolve such ambiguities more easily—providing transparent determinations for the public. Or maybe judges should employ common good originalism, a method in which judges determine the most conservative possible interpretation

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114. If there are more than two interpretations, I am sure that an alternate dice-based theory can be worked out—probably with certain numbers delineating certain theories and other numbers requiring a re-roll. If a Justice is a Dungeons and Dragons enthusiast, this method may account for up to twenty interpretations.

115. *See* Rebecca Piller, *History in the Making: Why Courts are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187, 197–200 (2015) (arguing that originalists may rely on selective citations to historical sources and goal-oriented readings of these sources to arrive at preferred conclusions); *see also* ERIC J. SEGALL, ORIGINALISM AS FAITH 123–24 (2018) (arguing that Justices Scalia and Thomas use originalism in a selective manner to support particular outcomes).

116. Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269 (2013). For a similar approach to statutory interpretation, see Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103 (2012).

they can imagine.[117] Then, judges apply an interpretation that is at least twice as politically conservative while repeating the phrase "human flourishing" and pointing in the general direction of the Constitution's preamble in response to any who dare question them.[118]

Choosing originalism as the standard for constitutional interpretation involves sacrificing transparency and methodological consistency by mandating procedures in which nonexpert historical analysis, that overwhelmingly tends to coincide with Justices' political preferences, dictates case outcomes. If this sounds preferable to alternate approaches, perhaps there is a deeper discussion that should be had beyond whether originalism should be treated as a standard or procedure. Moreover, treating originalism as a standard only avoids critiques based on decision-making procedure if originalism is truly divorced from procedure. As soon as originalism is used to formulate or guide procedures, critiques of originalist methodology become fair game. This leaves supporters of the standard approach in an awkward position. They can embrace a theory of originalism that is immune to procedural critiques, but only by admitting that originalism, as a theory, does not bear on decision procedures—thereby rendering their theory useless to actual legal actors. Once originalists try to set forth procedures, they open themselves up to the procedural critiques they had initially tried to avoid. The following section addresses whether treating originalism as a standard, divorced from concerns over decision procedures, is a feasible approach in the context of today's academic and political discussions of originalism.

C. A Further Concern: Can Originalism Be Recast as a Standard in the Present Academic and Political Environment?

A problem with dismissing concerns over implementation and originalist "procedures" associated with treating originalism as a standard is that this is contrary to how originalism is typically presented in academic, judicial, and political discussions. Discussions of "originalist methodology" in the academic sphere suggest that originalism is more

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117. *See generally* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917 (2021).

118. *Id.*

than just a standard of determining the correct constitutional meaning.[119] This seems to be even more the case with judicial and political treatment of originalism, which often casts originalism as a method for judges to follow—as "a theory focused on *process*, not on *substance*."[120] Originalist scholars, when speaking in the political context, tend to portray originalism as a methodology and emphasize its constraining effects.[121]

Sachs recognizes this. He acknowledges that originalists tend to agree that originalism is meant to constrain judicial behavior and curtail

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119. *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Solum, *Originalism and Constitutional Construction*, *supra* note 31; Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019); 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 (2017).

120. *See* Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/; *see also* Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, UNIV. OF VA. SCH. OF L. (Apr. 20, 2010), https://www.law.virginia.edu/news/2010_spr/scalia.htm (describing a lecture by Justice Scalia and recounting his remarks that legal interpretation requires historical inquiry, critics "exaggerate the difficulty of determining original meaning," and the claim that originalism is far easier for attorneys to apply than alternate theories).

121. *See, e.g.*, Akhil Reed Amar, Testimony Before the United States Senate Committee on the Judiciary on the Nomination of Brett Kavanaugh to the United States Supreme Court 2, 9 (Sept. 7, 2018) (noting that originalists examine the Constitution's text, history, and structure, as well as other constitutional sources to determine the Constitution's meaning, and asserting that now-Justice Brett Kavanaugh follows originalist methodology with greater rigor than other purported originalists); Saikrishna Bangalore Prakash, James Monroe, Distinguished Professor of L., Statement Before Senate Judiciary Committee on the Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States 4 (Oct. 14, 2020) (testifying in favor of now-Justice Amy Coney Barrett's originalist philosophy and describing originalism as a methodology and recognizing that it "can take a lot of work" to determine original meaning and contrasting originalism with living constitutionalism, characterized as the notion that federal officials and judges should reinterpret the Constitution "in light of modern morals and contemporary needs").

judicial discretion—citing various originalists as well as originalist critics who make this point.[122] While some academic originalists may argue that this point is an overstatement,[123] it appears to capture popular and political understandings of originalism, which is often portrayed as a theory that curtails judicial overreach and prevents judges from deciding cases based on personal policy preferences.[124]

But treating originalism as a standard runs contrary to common conceptions of originalism and expectations of how originalism should function. Members of the public, politicians, judges, and even academics may expect originalism to provide some guidance to judges—an expectation that views originalism as a procedure, rather than a standard. Treating originalism as a standard is a far cry from common expectations and understandings of what originalism is.

It may be that Sachs's revelation will change the rules of the game—that originalism will be reconceptualized as a standard, and that critiques of originalism as a procedure will be met with the rejoinder that such criticism is a category error. This is not too different from how the theory currently addresses methodological critiques. Many originalist treatments either bypass the question of how to implement originalism or cook up minimally crafted, last-minute suggestions as to how judges and attorneys may apply originalism in the real world.[125] Still,

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122. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 5.

123. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013) ("Limiting judicial discretion has rarely been offered as a compelling justification for the adoption of originalism in the recent literature.").

124. *See Grassley Opening Remarks at Senate Judiciary Committee Hearing on the Nomination of Judge Amy Coney Barrett to Serve as Associate Justice of the Supreme Court*, CHUCK GRASSLEY (Oct. 12, 2020), https://www.grassley.senate.gov/news/news-releases/grassley-opening-remarks-senate-judiciary-committee-hearing-nomination-judge-amy ("A good judge understands it's not the Court's place to re-write the law as it sees fit."); *see also* ALEC Action, *Open Letter to the Senate: Confirm Judge Brett Kavanaugh*, COMM. ON THE JUDICIARY (Aug. 24, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-08-24%20308%20State%20Legislators%20(American%20Legislative%20Exchange%20Council)%20-%20Kavanaugh%20Nomination.pdf (requesting confirmation of Judge Brett Kavanaugh as Supreme Court Justice and arguing that then-Judge Kavanaugh would enforce the "original understanding of the Constitution" rather than making law or policy).

125. *See* Lee & Phillips, *supra* note 119, at 331–32 (recognizing, in the final section of an article, that it is a "caveat worth noting" that judges are not corpus linguists and may not have the capacity to engage in this method of originalist analysis);

throwing procedural concerns to the side and fully embracing the standard is a bold move, which may not sit well with originalists who hope that their scholarship may have an impact on the real world behavior of judges and practitioners.

Transitioning to a standard is a move that Sachs does not seem entirely willing to adopt, as he discusses several options for decision procedures in his article—although these procedures are a far cry from what most originalists typically encourage.[126] But as soon as any sort of practical influence on judges, attorneys, or the public becomes an explicit or implied goal of originalism, procedural concerns suddenly become relevant. These audiences must employ some method to meet the standard of originalism.

Originalists are therefore left with a choice. They can treat originalism as a standard, thereby sidestepping a number of critiques about implementing originalism, yet embracing the notion that originalism will have little impact on judges and attorneys who must undertake the work of constitutional interpretation. Alternatively, originalists can stick with originalism as a theory of procedure for constitutional interpretation and find some other way to address practical critiques. Sachs seems to suggest the former option, although it is unclear if he is willing to fully commit. His article ends with several suggestions of how originalism may still be of some practical use, even if it does not go so far as providing a step-by-step guide for judges and attorneys.[127] While embracing a theory as a standard, rather than a procedure, may be useful in theoretical discussions of ethics, such a full-on rejection of implementation procedures may not sit well with judges and attorneys who are left with coming up with a procedure themselves.[128]

WURMAN, *supra* note 16, at 100–02 (confronting objections that lawyers cannot undertake rigorous historic research by noting that judges receive briefs from both sides and analogizing the process of making determinations regarding prior events (the facts of a case) based on witness testimony to the process of historic analysis); JOHN O. MCGINNIS & MICHAEL B. RAPPARPORT, ORIGINALISM AND THE GOOD CONSTITUTION 197–207 (2013) (addressing, in the last ten pages of a book arguing for originalism and claiming that originalist methods generally lead to better outcomes, how originalism can be implemented—with most discussion devoted to how the legal academy would perform research).

126. *See* Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 14–16.

127. *See id.* at 24–26.

128. To an extent, such legal actors are assumed to be among the readership of such scholarship—and presumably would be those whose actions might be influenced

CONCLUSION

Academic discussions of originalism tend to delve into discussions that are overly technical, theoretical, or both—rendering the scholarly output of such discussion and debate of little use to judges and attorneys, let alone the public. Treating originalism as a standard, rather than a procedure, doubles down on this approach to theorizing about originalism. While proponents of this approach may argue that originalism as a standard avoids troublesome questions about implementation, this does not necessarily free originalism from implementation considerations. After all, whether a standard may be implemented or acted upon is relevant to whether a particular standard is worth adopting over others.

The larger problem with treating originalism as a standard is that doing so consistently requires avoiding discussions of procedures altogether. Even broad claims about originalism pointing in a general direction or providing rules of thumb for interpreters veer towards the procedural discussion that the move to a standard is meant to bypass. Originalists face the difficult choice between moving towards that procedural discussion and encountering the accompanying objections to their theory or sticking with the standard approach and divorcing their theory from the everyday practice of law. While the latter approach may be acceptable in certain academic contexts, it is of little use for legal actors who want to know how to interpret the Constitution.

Originalists argue that historical facts about original constitutional meaning are necessary to correctly interpret the Constitution.[129] Conversely, critics (like myself) respond that the investigation necessary to determine such facts accurately and reliably in uncertain, controversial cases is beyond the capacity of most judges and attorneys.[130] Sachs claims that treating originalism as a standard breaks out of this argument cycle.[131] Even if this is the case, the cost of breaking free from

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by this scholarship, causing the writing to make some difference beyond the purely academic realm. *See* Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 867–68 (1991) (describing how normative legal thought "demands and desires" to be enacted in the "social realm").

129. Sachs, *Originalism: Standard and Procedure*, *supra* note 1, at 778.

130. *Id.*

131. *Id.*

these arguments and critiques is that originalist theory becomes divorced from practical questions of interpretation that judges and attorneys face. For legal interpretation, an activity that legal actors must carry out in the real world with significant effects on society, this is too high of a cost. Originalists must therefore discuss and defend originalism with an eye towards its implementation and related decision procedures, otherwise it will be of little use to anyone.