
ON INKBLOTS AND TRUFFLES[†]

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In *Originalism: Standard and Procedure*, Professor Stephen Sachs makes yet another important contribution to the literature. Sachs defends originalism by making its purpose more modest. Drawing on Professor R. Eugene Bales and the ethics literature,¹ Sachs argues that originalism should be assessed as a standard of correctness, not as a procedure for finding the correct answer. In other words, originalism “picks out a destination, not a route.”² Or put differently, originalism tells us whether the Fourteenth Amendment protects X or Y, not *how to go about determining* the original meaning of the Fourteenth Amendment, X or Y.³ And importantly, the standard-procedure distinction shows why it’s unfair to criticize originalism for failing to offer easy answers or even easy methods for finding answers. That criticism, Sachs concludes, is not the point of originalism as a standard of correctness.

I applaud the project and commend Sachs’s characteristic rigor. But I have three lingering questions. First, by making originalism’s aims more modest, I wonder whether Sachs risks turning originalism into something that isn’t worth defending. Sachs tells us that the standard-procedure distinction will help us to determine who’s doing originalism correctly and who’s doing it incorrectly.⁴ But I struggle to see how that’s so. Judges can agree that originalism is the standard of correctness and

[†] Responding to Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

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¹ See generally R. Eugene Bales, *Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?*, 8 AM. PHIL. Q. 257 (1971).

² Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022).

³ At least I think this is an accurate illustration of Sachs’s understanding of the originalism standard. For example, Sachs compares the originalism standard of correctness to the following example of geometric correctness:

Suppose I have a sealed envelope and I know that inside it there is a piece of paper on which someone has drawn a geometrical figure, but I do not know what type. If someone who does know tells me, correctly, that the figure is a triangle, his specification of the type is *transparent*. If he tells me, again correctly, that it is 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 library, his specification is *opaque*. In both cases, the information he provides is, in a sense, *about* the intrinsic nature of the figure. . . . [But u]nless I already have further relevant information about the contents of the leather-bound book in Smith’s library, the second specification leaves me, in the most obvious sense, none the wiser as to what type of figure the envelope contains.

Id. at 791 (alteration in original) (quoting 1 JOHN FOSTER, *THE CASE FOR IDEALISM* 62 (1982)). I take it that Sachs would say the original meaning of the Fourteenth Amendment is like that triangle: it’s fixed, specified (even if only opaquely), and discoverable (even if only with some difficulty).

⁴ *Id.* at 781, 795–96.

then reach wildly different judgments. Judges can even agree on some or all of the relevant decision procedures — such as which historical materials to read, or which English precedent is the most pertinent — and *still* reach wildly different judgments. In these circumstances, someone must be correct, and someone must be incorrect. But it seems the standard for determining which judge falls where must come from somewhere *outside* of originalism as a standard of correctness. If that's so, then one of the principal purposes of the standard-procedure distinction remains unaccomplished.

Second, if originalism tells us only the “destination, not [the] route,” then how do we know which road to take? And how will we know when we arrive? Take the inkblot example that Sachs borrows from Judge Bork⁵: An imaginary constitutional provision says: “Congress shall make no [inkblot].”⁶ If our only copy of the relevant constitutional provision is ruined by that inkblot, there's obviously no way to determine the rightness or wrongness of any interpretation of its meaning. But if originalism is only a standard of correctness, does Sachs's theory mean that the original meaning of *every* constitutional provision is effectively an indecipherable inkblot? After all, as Sachs reminds us: “[W]e don't know what we don't know.”⁷ 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? And all of this is made more problematic if originalism doesn't tell us whether to start with the first 1,000 pages, the second 1,000, or perhaps some completely different library of material altogether. If originalism is only supposed to give us a standard for the correct meaning of the Amendment, then does it give us nothing at all?

Third and finally, what does Sachs's standard-procedure distinction offer to those of us “who find originalism too theoretical already”?⁸ I worry that the answer is “not much.” Of course, Sachs might say that's by design. He might say that the purpose of the standard-procedure distinction is to provide analytical clarity of what originalism is and

⁵ *Id.* at 798–99.

⁶ *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) [hereinafter *Nomination of Robert H. Bork*] (statement of Judge Bork).

⁷ Sachs, *supra* note 2, at 801.

⁸ *Id.* at 787.

what it's not. Or perhaps its purpose is to help us choose decision procedures in the face of uncertainty. Or perhaps the purpose is to show that some of the principal arguments against originalism — that it's difficult to apply, that it's indeterminate, that it fails to constrain judges, and so on — are bad arguments.⁹ Those are important purposes. But if I might make a plea from the bench, it's that all the theory in the world won't convince originalism's critics. The best (dare I say only?) way to define and defend originalism against its critics is to show that some (dare I hope all?) provisions of the Constitution have determinate or "thick" original meanings — that is, that we can find the true, genuine, and objectively correct meaning of a constitutional provision with greater ease than a hound blindly searching for a truffle.¹⁰

I. IS IT REALLY A STANDARD OF CORRECTNESS IF IT DOESN'T MEASURE CORRECTNESS?

Sachs states that one of his goals in the standard-procedure distinction is to "avoid certain mistakes with regard to originalism's use in practice."¹¹ Specifically, he observes that originalism is a standard of correctness; it tells us what makes a legal answer correct. The fact that it's sometimes hard to find the correct answer — because the history is murky, for example — doesn't make the correct answer any less correct. To the contrary, the correct answer is correct in and of itself; it has all of the "right-making characteristics" that make the originalist proposition "true," regardless of whether it's sometimes difficult or even impossible to find that truth in a given case.¹²

Sachs gives us this illustration, which he paraphrases from Professor Frank Jackson:

[S]uppose that a doctor must find a treatment for her patient. Drug A would partly relieve a minor skin complaint; Drugs B and C would cure it entirely, but each is fatal to half the population, and we can't tell which half the patient is in. In one sense, the correct answer is obviously Drug A; a partially uncured skin complaint isn't worth a fifty percent chance of death. But in another, more accurate sense, the correct consequentialist answer is

⁹ *Id.* at 781.

¹⁰ For reasons that are unclear to me, some have popularized the pig as the protagonist in the truffle-hunting metaphor. See, e.g., *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("Judges are not like pigs, hunting for truffles buried in briefs."). As anyone who's ever hunted for truffles knows, however, hounds are far superior for the purpose. See Ryan Jacobs, *The Dark Side of the Truffle Trade*, THE ATLANTIC (Jan. 15, 2014), <https://www.theatlantic.com/international/archive/2014/01/the-dark-side-of-the-truffle-trade/283073> [<https://perma.cc/7HMF-PA5M>] ("Even the best-trained truffle hunters usually rely on dogs (or pigs, though they have been known to eat the truffles before allowing their handlers to retrieve them).") And as anyone who's ever owned a hound knows, hounds are far superior for all other purposes too.

¹¹ Sachs, *supra* note 2, at 781.

¹² *Id.* at 787 (quoting Bales, *supra* note 1, at 260).

Drug B, which just happens to be the drug that would cure [this particular patient's] condition safely, producing the best outcome overall. If right actions produce the best consequences, then the right action for the doctor is to guess correctly — even though “guess correctly” is hardly useful advice, and no responsible doctor would try it.¹³

Sachs's point is that, if the standard of correctness is “best consequences,” then the correct answer for this patient is Drug B — even if it's impossible to figure that out as a matter of medical or epidemiological decisionmaking procedure.

So too, Sachs reasons, with law. Originalism tells us the correct answer from a “God's-eye view.”¹⁴ God's eye tells us, for example, that the Fourteenth Amendment protects X, just as it tells the omniscient doctor that Drug B will cure her patient. It's the standard of correctness. But neither originalism nor medicine tells us *how to find* that answer. What books to read, what historical background to consider, what default rules to apply in lieu of a wild guess, and so forth — those are all decision procedures.

But I am not sure how well the analogy holds up. Imagine the following debate in the physicians' lounge at the hospital:

Dr. Elizabeth: “I believe the standard of correctness is the treatment that has the best possible consequence. So I choose Drug A.”

Dr. Arthur: “I agree with Dr. Elizabeth on the standard of correctness. We should choose the best possible consequence. That's why I choose Drug C.”

Dr. Lynn: “Y'all are crazy. I believe the standard of correctness is the Hippocratic Oath, and therefore we first should do no harm. I choose Drug C.”

Dr. Stephen: “Dr. Lynn is quite right about the standard of correctness. But she's wrong about the drug. I choose Drug B.”

It's obvious that each doctor is wrong on their own standard of correctness. Each doctor announces a standard and then chooses a drug that violates that chosen standard. We don't need to know anything at all about their decision procedures to see that. We can just look at the standard announced and the judgment reached to know that the latter is wrong. I would think that's what Sachs's conception of a standard of correctness should do: it should tell us whether the judgment is right, without regard to the decision procedures employed.

¹³ *Id.* at 804 (footnote omitted) (citing Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection*, 101 *ETHICS* 461, 462–63 (1991)).

¹⁴ *Id.* at 803.

Originalism doesn't do that. One of the most frustrating practical problems in originalism is that judges can agree on the same standard of correctness — namely, the original public meaning of a constitutional provision — and then differ wildly in their chosen “drug” (read: judgment). In these circumstances, what help does the standard-procedure distinction provide? How do we know who's the “good” originalist and who's the “bad” one? It appears that we can answer that question only by looking at their decision procedures — that is, something *outside* of their standard of correctness — which defeats at least one purpose of the standard-procedure distinction. And even then, I'm not sure how helpful the procedures are because originalists can agree on them and still reach conflicting judgments.

For example, take a well-worn case in the originalist literature: *Heller v. District of Columbia*.¹⁵ It's the paradigmatic case supporting Justice Kagan's view that “we are all originalists” now.¹⁶ Justice Scalia and Justice Stevens agreed on a lot — including (apparently) that the original meaning of the Second Amendment provided the standard of correctness. They even agreed on a lot of the decision procedures because, in searching for the Amendment's original meaning, they turned to the same historical sources. For example, they debated the proposed inclusion and ultimate removal of a conscientious-objector clause in the Second Amendment.¹⁷ They debated contemporaneous provisions in state constitutions.¹⁸ And they even debated the muster practices of free Black people in Virginia.¹⁹

How do we know who's right and who's wrong? It's not like the doctors in the break room; we can't just look at their standard of correctness and their judgments. It's also not obvious that we can look at their decision procedures because they largely agreed on those too. They just disagreed about what inferences to draw from looking at the historical record — and it's unclear where that fits in Sachs's standard-procedure dichotomy. To return to Sachs's geometry example,²⁰ it's as if Justice Scalia and Justice Stevens each held a sealed envelope inside of which was a sheet of paper with a triangle printed on it. They opened

¹⁵ 554 U.S. 570 (2008); see Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 38–41 (2018); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344–45 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 924–26 (2009).

¹⁶ *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solic. Gen. of the United States).

¹⁷ Compare *Heller*, 554 U.S. at 589–90, with *id.* at 660–62 (Stevens, J., dissenting).

¹⁸ Compare *id.* at 591 (majority opinion), with *id.* at 686–87 (Stevens, J., dissenting).

¹⁹ Compare *id.* at 611 n.21 (majority opinion), with *id.* at 662 n.29 (Stevens, J., dissenting).

²⁰ See *supra* note 3.

the envelopes simultaneously, and then one proclaimed “It’s a triangle!” while the other yelled “It’s a banana!”

Or take a more recent case, *Torres v. Madrid*.²¹ The question presented was whether a police officer “seizes” a person by shooting at him, even if the person drives away and does not have his freedom terminated.²² The majority said yes.²³ Of relevance to the present discussion, the majority said the answer was easy. Sure, originalist research does not always give clear answers: “Sometimes the historical record will not yield a well-settled legal rule.”²⁴ But the Court emphasized that this was a case without any inkblots: “We do not face that problem here. The cases and commentary speak with virtual unanimity on the question before us today.”²⁵

The majority then surveyed the typical sources of original meaning — Blackstone, common law rules from English courts, and precedents from early American courts.²⁶ All of these sources, according to the majority, stand for the proposition that any “laying hands” of any kind — even without possession — constitutes a “seizure” under the Fourth Amendment.²⁷ And it does not matter, according to the majority, that police laid bullets (not hands) on Torres because the same mere-touch rule applies when officers touch an arrestee with a weapon:

The closest decision seems to be *Countess of Rutland’s Case*. In that case, serjeants-at-mace tracked down Isabel Holcroft, Countess of Rutland, to execute a writ for a judgment of debt. They “shewed her their mace, and touching her body with it, said to her, we arrest you, madam.” We think the case is best understood as an example of an arrest made by touching with an object, for the serjeants-at-mace announced the arrest at the time they touched the countess with the mace. Maybe the arrest could be viewed as a submission to a show of authority, because a mace served not only as a weapon but also as an insignia of office. But that view is difficult to reconcile with the fact that English courts did not recognize arrest by submission to a show of authority until the following century.²⁸

The dissent agreed with the majority that “the historical record . . . yield[s] a well-settled legal rule” and that “[t]he cases and commentary speak with virtual unanimity on the question.”²⁹ The dissent just thought that unanimity ran in the *opposite direction*. It pointed out that “[c]ountless contemporary dictionaries” all define “‘seizure’ or the

²¹ 141 S. Ct. 989 (2021).

²² *See id.* at 993–94.

²³ *Id.* at 994.

²⁴ *Id.* at 996.

²⁵ *Id.*

²⁶ *Id.* at 996–97.

²⁷ *Id.* at 996.

²⁸ *Id.* at 997 (citations omitted).

²⁹ *Id.* at 996; *see id.* at 1006–10 (Gorsuch, J., dissenting).

act of ‘seizing’ in terms of *possession*.³⁰ The dissent relied upon common law sources at the Founding — like Blackstone, Hale, and Hawkins — all of which also understood “seizure” as “possession.”³¹ The dissent chastised the majority for misconstruing the civil bankruptcy rules in precedents like the *Countess of Rutland’s Case*.³² And it criticized the majority for conflating the concept of “arrest” with the concept of “seizure”:

The majority implores us to study the common law history of arrests. But almost immediately, the majority realizes it cannot find what it seeks in the history of criminal arrests. So it is forced to disinter a long-abandoned mere-touch rule from civil bankruptcy practice. Then it must import that rule into the criminal law. And because even that isn’t enough to do the work it wishes done, the majority must jettison both the laying on of hands requirement and the rationale that sustained it. All of which leaves us confusing seizures with their attempts and arrests with batteries.

The common law offers a vast legal library. Like any other, it must be used thoughtfully. We have no business wandering about and randomly grabbing volumes off the shelf, plucking out passages we like, scratching out bits we don’t, all before pasting our own new pastiche into the U.S. Reports. That does not respect legal history; it rewrites it.³³

Can the standard-procedure distinction tell us who’s right? As in *Heller*, the majority and dissent in *Torres* agreed that the standard of correctness is the original meaning of the relevant Amendment. And as in *Heller*, the majority and dissent in *Torres* agreed on at least some of the decision procedures. After all, they looked at the same *Countess of Rutland’s Case*, the same dictionaries, and at least some of the same pages in Blackstone.³⁴ This similarity is all the more striking because both sides in *Torres* — unlike Sachs’s foils, who criticize originalism for being difficult or impossible to apply in practice³⁵ — said this originalist exercise is easy. So wherever the dividing line is between “good” and “bad” originalism in *Torres*, I am afraid we cannot find it using the standard-procedure distinction. In that sense at least, the standards of correctness in medicine or geometry are significantly different than the standard of correctness in law. And when it comes to the latter at least, I wonder if originalism can really be a standard of correctness if it doesn’t measure correctness.

³⁰ *Id.* at 1006 (Gorsuch, J., dissenting) (emphasis added).

³¹ *Id.* at 1008; *see also id.* at 1008–09.

³² (1605) 77 Eng. Rep. 332, 6 Co. Rep. 52b; *see Torres*, 141 S. Ct. at 1013–14 (Gorsuch, J., dissenting).

³³ *Torres*, 141 S. Ct. at 1014 (Gorsuch, J., dissenting).

³⁴ *See id.* at 1012 n.4.

³⁵ *See, e.g., Sachs, supra* note 2, at 787 (responding to “[t]he practical objection” to originalism by arguing that “[o]riginalism might turn out to be difficult but not impossible”).

I suppose one answer to all of this is that I'm really just complaining about the opaqueness of the original meaning that attaches to the Second and Fourth Amendments.³⁶ If we had a God's-eye view of the meaning of each Amendment, then perhaps we could grade each opinion's correctness in *Heller* and *Torres* in the same way that we graded the performances of the four doctors above. But I'm not sure that's an effective rejoinder. Cases like *Heller* and *Torres* illustrate that, even when judges agree on the relevant sources, they can still disagree about their meaning — and I'm not sure that disagreement would disappear if all judges had God's infinite time and infinite knowledge of the infinite relevant sources. And in any event, insofar as the standard-procedure distinction is supposed to offer practical guidance for separating good originalists from bad ones in the *absence* of God-like omniscience,³⁷ it seems like that distinction turns more on the procedures the jurists use to discern meaning than the standards of correctness they adopt (and often share) for that meaning.

II. IS THAT AN INKBLOT OR A TRUFFLE?

Now let's talk about decision procedures. Sachs argues that originalism is not really an "interpretive methodology" because "there's no particular method to follow."³⁸ It's not like originalism requires us to start with the *Federalist Papers*,³⁹ then move to Elliot's Debates, and then finish our search for meaning with corpus linguistics. As anyone who's ever searched for original meaning knows, it's way messier than that.

In fact, the jurist searching for original meaning can feel like a hound blindly searching a plot for truffles. The beagle starts at some seemingly random point, wherever his trainer happens to stop the truck. Then the hound starts scanning the ground with his nose — sometimes fast, sometimes slow, sometimes left, sometimes right — until he gets a hit and starts to dig. Maybe the hunt lasts a day; maybe it lasts an hour. Maybe he finds a truffle; maybe not. But there are no hard-and-fast rules for how to start, conduct, or end the hunt. The profit-hungry (or belly-hungry) trainer just trusts the beagle's nose and goes from there.

One of Sachs's more ambitious claims is that originalists aren't blindly rooting in the dirt for truffles. Sachs turns to ethics, which can tell us how "we ought to act with the knowledge and capacities that are given to us," whether that's the "God's-eye view" or some less-perfect level of knowledge.⁴⁰ So too with originalism as a standard: it can help

³⁶ And indeed I am. But more on that later. See *infra* Part III, pp. 170–72.

³⁷ See Sachs, *supra* note 2, at 787–88, 829–30.

³⁸ *Id.* at 779.

³⁹ Even if there were an originalists' method, I hope that it wouldn't start with the *Federalist Papers*, given that the Anti-Federalists wrote theirs first. See Andrew S. Oldham, *The Anti-Federalists: Past as Prologue*, 12 N.Y.U. J.L. & LIBERTY 451, 461 (2019).

⁴⁰ Sachs, *supra* note 2, at 803.

us pick decision procedures based on our epistemic confidence in a given case. On my read, Sachs's theory attempts to provide originalist decision procedures for four different levels of epistemic confidence: (1) cases where we can see the correct answer with God's eyes and epistemic perfection; (2) cases where the constitutional text provides less-than-perfect confidence in its meaning but nonetheless supplies "internal" decision procedures; (3) cases where the constitutional text provides less-than-perfect confidence in its meaning and supplies no "internal" decision procedures — hence leaving us only with "external" decision procedures; and (4) Borkian inkblots. Let's consider each in turn.

A. *The God's-Eye-View Case*

The first case should be the most straightforward. Sometimes the original meaning is clear. And we know we found the truffle — the genuine *Tuber magnatum*, worth an eye-watering \$7,000 or more per kilogram.⁴¹ In that case, the decision procedure is equally clear: follow the original meaning with the reckless abandon of a famished man tucking into a delicious dinner.⁴² Right?

I'm not so sure. As Sachs points out, we never know what we don't know. So even if we *think* we've found the true meaning, we can't be sure — ever. In truffles, this uncertainty creates an entire industry of fraud, crime, and corruption because diners can never really know if the "truffles" on the menu came from a forest in Italy or a lab in China.⁴³ We don't know what we don't know about where the restaurateur got them, where the myriad middlemen got them, and so on. Sachs suggests it's the same in originalism. 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. Maybe someone will find the long-lost ratification records from Rhode Island.⁴⁴ Or maybe someone someday will discover that the People ratified a "lost" amendment to the constitutional text we're trying to understand.⁴⁵ And so on — so the *real* standard is always just over the horizon and just beyond our present knowledge.

⁴¹ RYAN JACOBS, *THE TRUFFLE UNDERGROUND: A TALE OF MYSTERY, MAYHEM, AND MANIPULATION IN THE SHADOWY MARKET OF THE WORLD'S MOST EXPENSIVE FUNGUS* 11 (2019).

⁴² See Sachs, *supra* note 2, at 803; see also *id.* at 805 ("The best legal world is the one where the court enforces the actual rule, and we have an obligation to bring that about if we know how.")

⁴³ See JACOBS, *supra* note 41, at 219 (noting one truffle fraudster passed off cheap Chinese mushrooms "sprayed with a synthetic scent" as genuine truffles).

⁴⁴ See Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 481 (noting virtually no state records exist).

⁴⁵ See Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L.J. 577, 582–90 (1999) (describing historical debate that

If that's right, then what good is the standard of correctness? If we can never really know that we're holding the actual, genuine meaning, we basically have two choices: (A) we can act *as if* we're holding the meaning, or (B) we can turn to some internal or external decision procedure. (A) is not particularly appetizing — we're dropping \$7,000 on dinner and blindly hoping or guessing that whatever we get is a genuine truffle. And (B) might or might not be appetizing, but in all events, (B) is not the actual standard of correctness. Option (B) is — at best — a good shadow of Plato's form.⁴⁶ And the important point for present purposes is that, even when we guess correctly or have a good shadow of the form, the standard of correctness is not the thing doing the decisionmaking work. Even in this first case, aren't we *always* relying on some sort of decision procedure and *never* "enforc[ing] the actual rule" itself?⁴⁷

B. "Internal" Decision Procedures

What about Sachs's second kind of case? Sometimes the original meaning is hidden by some level of opacity. Maybe we found a truffle; maybe we found a poisonous mushroom. We don't have enough information to be sure.

If applicable, we should start with an "internal" decision procedure — that is, one that's internal to the standard of correctness itself.⁴⁸ In truffles, we might throw the fungus away rather than risk death. In law, we might use burdens of proof, *stare decisis*, rules of evidence, rules of waiver, or rules of deference.⁴⁹ These internal decision procedures can be highly frustrating because they "forbid us from reaching what would otherwise be the legally [or culinarily] correct answer — correct, that is, from the God's-eye view."⁵⁰ We might throw away a perfectly safe (and delicious) truffle in fear of death by poisoning. Or we might ignore the original meaning of the Constitution in adherence to erroneous precedent.

Still, Sachs says "[l]egal systems include rules like these precisely because we aren't omniscient, and because we often make mistakes about

the States might have ratified a heretofore unrecognized amendment to the Titles of Nobility Clause, U.S. CONST. art. I, § 9, cl. 8, in the early nineteenth century); cf. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 536–42 (1992) (describing the story of Gregory Watson's discovery of the lost records of the constitutional amendment eventually ratified as the Twenty-Seventh Amendment).

⁴⁶ See PLATO, *THE REPUBLIC* 220–23 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000).

⁴⁷ Sachs, *supra* note 2, at 805.

⁴⁸ *Id.* at 806.

⁴⁹ See *id.*

⁵⁰ *Id.* at 807.

what our own standards require.”⁵¹ So we forgo the form, the original meaning, or the genuine truffle for fear that we don’t know what we’re holding. And we settle instead for some inferior substitute. That’s ok, Sachs says, as long as our inferior internal decision procedures have an “originalist pedigree” — that is, as long as they are descendants of the form.⁵²

This approach makes some sense for truffles and ethics. If my beagle digs up something that looks like a truffle, but that might be a deadly look-alike fungus, there’s a zero percent chance I eat it. No culinary experience is worth a fifty percent chance of death. So too with the doctor trying to treat a minor skin condition.

Embedded in Sachs’s “internal” decision procedures for law are both positive and normative arguments. The positive argument is that internal decision procedures actually come from a place of historical ignorance. That is, we use these procedures because we don’t know what the originalist standard requires. The normative argument is that we ought to use these procedures so long as — and only so long as — they have “an originalist pedigree.”⁵³

I’m not sure about either proposition. As noted above, we never really know what the standard of correctness requires. But it’s unclear that ignorance of the standard is what, as a positive matter, drove the creation of *stare decisis* and Thayerian deference.⁵⁴ In fact, as a positive matter, these decision procedures stem from something *other than* the originalist standard. *Stare decisis* comes from a desire to make legal rules somewhat predictable and stable; Thayerian deference comes from a comparative trust in elected officials and distrust in unelected judges. But as far as I’m aware, no early Anglo-American court or Thayerian justified these procedures on the idea that we can’t figure out what the law actually requires — or that elected officials are better than unelected ones at historical exegesis.

More problematic in my view is Sachs’s normative argument for internal decision procedures. Supreme Court precedent,⁵⁵ the Fifth

⁵¹ *Id.* at 808.

⁵² *Id.* at 803.

⁵³ *See id.* at 808–09.

⁵⁴ On the latter, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), who argues that courts generally should defer to the political branches and that courts “can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question.” *Id.* at 144.

⁵⁵ *See* *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Circuit's rule of orderliness,⁵⁶ and the Madisonian compromise⁵⁷ all require me to obey stare decisis. I shudder to think what would happen if I decided to ignore the on-point decision in *A v. B* because I decided either that stare decisis does not have an originalist pedigree or that I somehow uncovered the true, God's-eye original meaning of the Fourteenth Amendment.

C. "External" Decision Procedures

In some cases, no internal procedures will help; the standard itself and the internal decision procedures derived from it cannot guide our decision.⁵⁸ That's when we turn outside of the standard of correctness and look to Sachs's "external" decision procedures. In truffles, these are tests external to the mushroom that detect organic compounds contained in genuine truffles and not cheap imposters — such as gas chromatography coupled with combustion-isotope ratio mass spectrometry.⁵⁹ In law, these consist of judge-made frameworks which make (or purportedly make) the "inquiry less open-ended."⁶⁰ Often, they are *n*-factor tests like the levels of scrutiny, the *Mathews v. Eldridge*⁶¹ factors for the Due Process Clause, the *Lemon v. Kurtzman*⁶² factors for the Establishment Clause, or any of the other multifactor balancing tests that dominated constitutional law in the 1970s and 1980s.⁶³ According to Sachs, "[s]o long as these checklists or *n*-factor tests operate as fallible heuristics for the underlying law, rather than alternative requirements

⁵⁶ See *Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018).

⁵⁷ E.g., JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 41 (2009) ("[T]he Framers' very conception of a unitary and hierarchical, rather than a plural and horizontal, judiciary presupposed a duty on the part of lower courts to obey their superior.").

⁵⁸ Sachs, *supra* note 2, at 809.

⁵⁹ See generally Danilo Sciarone et al., *Multidimensional Gas Chromatography Coupled to Combustion-Isotope Ratio Mass Spectrometry/Quadrupole MS with a Low-Bleed Ionic Liquid Secondary Column for the Authentication of Truffles and Products Containing Truffle*, 90 ANALYTICAL CHEM. 6610 (2018).

⁶⁰ Sachs, *supra* note 2, at 809.

⁶¹ 424 U.S. 319 (1976).

⁶² 403 U.S. 602 (1971).

⁶³ Sachs also cites the *McDonnell Douglas* framework, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Miranda v. Arizona*, 384 U.S. 436 (1966), as examples of *n*-factor external decision procedures. See Sachs, *supra* note 2, at 810, 813–15. For an eye-popping reminder of just how dominant these *n*-factor tests once were, see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). Professor T. Alexander Aleinikoff says that when these balancing tests burst onto the scene, their critics argued that their principal shortcoming was that they generated insufficiently liberal results in free speech cases. See *id.* at 944 ("[B]alancing' was largely attacked for the illiberal results it produced in free speech cases."). But by the time of Aleinikoff's 1987 article, "the debate ha[d] all but disappeared," because "[a]s the Supreme Court applied a balancing approach to area after area in constitutional law, the methodology began to appear natural." *Id.*

in place of the law, they can serve as external decision procedures for adhering to an originalist standard.⁶⁴

Again, such an approach makes some sense in truffles and ethics. We can use science to prove whether a particular sample contains bis(methylthio)methane.⁶⁵ If it does, it's *Tuber magnatum*; if it doesn't, it's not. Maybe doctors can likewise devise a test to determine whether our dermatology patient will be cured (or killed) by Drug B. Or maybe the couple buying the house can use a checklist to determine whether 101 Elm Street is a good fit for their family.⁶⁶ The point of these *n*-factor heuristics is to generate a yes or no — eat, treat, or buy — and perhaps they serve that purpose well.

But in originalism, how are we supposed to craft and apply external decision procedures that implement a provision's underlying original meaning — rather than judge-invented “alternative requirements”? I am not sure that Sachs provides clear guidance. For one, Sachs's prototypical external decision procedures seem to be “checklists or *n*-factor tests” like *Mathews v. Eldridge*.⁶⁷ Such tests cannot be made falsifiable in the sense that the truffles, medical-ethics, and home-buying tests above are.⁶⁸ That characteristic is one reason (if not the principal one) that the Supreme Court has abjured multifactor decision procedures.⁶⁹ As Justice Scalia famously put it, balancing one constitutional value against another is like asking “whether a particular line is longer than a particular rock is heavy.”⁷⁰ How can we be confident that such tests accurately approximate original meaning when they are amenable to such indeterminate and subjective application?

Even if one or more of these tests might be falsifiable, they are not necessarily falsifiable tests for the Constitution's *underlying original meaning*. Take Sachs's example of the *Miranda* rule.⁷¹ It's easy to imagine a case where a police officer fails to administer a *Miranda* warning, conducts a custodial interrogation, and gathers statements that are plainly and inarguably inadmissible under *Miranda*. In that particular case, *Miranda* provides an easy-to-administer rule that would satisfy

⁶⁴ Sachs, *supra* note 2, at 810.

⁶⁵ See Sciarrone et al., *supra* note 59, at 6610–11.

⁶⁶ Sachs, *supra* note 2, at 810.

⁶⁷ *Id.*

⁶⁸ See KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 17–20 (Routledge Classics 2002) (1959).

⁶⁹ *Lemon* has fallen into desuetude for similar reasons. See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring) (noting the Court “no longer applies the old test articulated in *Lemon*”); see *id.* at 2081–82 (plurality opinion) (similar); *id.* at 2097–98 (Thomas, J., concurring in the judgment) (similar); *id.* at 2101 (Gorsuch, J., concurring in the judgment) (similar).

⁷⁰ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

⁷¹ See Sachs, *supra* note 2, at 813–15.

even the most Popperian conception of falsifiability. But how do we know that the statement is also inadmissible under the original public meaning of the Fifth Amendment's Self-Incrimination Clause? The answer to the latter question matches the answer to the former question only insofar as *Miranda* is a proxy for original public meaning.

It's hardly surprising that "external" decision procedures sometimes do not provide tests for original public meaning because they were not designed for that purpose. As Professor T. Alexander Aleinikoff puts it, scholars and jurists created balancing tests under "the flags of pragmatism, instrumentalism[,] and science."⁷² Many of these tests come from a period of American constitutional law that long predates even protean theories of originalism. So I am not sure which, if any, *n*-factor heuristics originalists should trust in this third type of case. I'm also unsure when and how Sachs would have originalist judges create new external decision procedures. Should courts invent a new balancing test or heuristic whenever they're "[c]onfronted by uncertainty about how to satisfy a constitutional standard"?⁷³ That seems like every case, because as explained above, we *never* have God's epistemic certainty regarding original meaning.⁷⁴

D. Borkian Inkblots

Fourth and finally, sometimes the original meaning is hidden by a Borkian inkblot.⁷⁵ Maybe we found a truffle; maybe we found a rock. We have zero information. None of our tests can remove the inkblot or the encasement protecting our hound's find. In that case, it's an impeachable offense (or an inchoate medical emergency) to guess at what's underneath.⁷⁶ So we ought to pack the beagles into the truck and just go home.

This fourth type of case is the most confusing to me. Sachs agrees with Judge Bork that if a constitutional provision reads, "Congress shall make no [inkblot]," then "ignoring the provision is the only responsible course" — even though doing so necessarily fails to enforce that provision's original meaning.⁷⁷ But as noted above, one of the central themes in Sachs's standard-procedure dichotomy is that we don't know what we don't know. So everything in a sense is an inkblot. How do we know when something is a real inkblot — so we should just pack up the

⁷² Aleinikoff, *supra* note 63, at 949.

⁷³ Sachs, *supra* note 2, at 811.

⁷⁴ See *supra* section II.A, pp. 162–63.

⁷⁵ As Judge Bork explained it:

[I]f you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it[,] and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

Nomination of Robert H. Bork, supra note 6, at 249.

⁷⁶ See Sachs, *supra* note 2, at 805.

⁷⁷ *Id.* at 804.

beagles and go home — versus a pseudoinkblot that merits some exegetical exercise?

Suppose a hunter needs to know how many truffles are in France's truffle country before deciding whether to move his operation across the Atlantic. We could come up with an estimate in any number of ways. Burgundy and Dordogne are the epicenters of truffle hunting in France, so perhaps we could sample an acre and multiply the number of truffles we find by the number of acres in those regions. Or perhaps we could come up with a more accurate estimate by limiting the number of acres to those containing oak, poplar, and beech trees (all of which truffles love). But however we craft our estimate, the *actual* number of truffles in France (our hunter's standard of correctness) is and always will be obscured, just like Bork's inkblot. Does that mean we give up? Of course not — a hunter goes hungry and broke that way. And presumably the same is true in law — the judge can't just give up every time. So I wonder how Sachs's conception of the inkblot helps us decide when to abandon judicial enforcement of a constitutional provision and when to keep digging.

E. Whither Good-Faith Originalism?

More problematically, from my perspective at least, is that I am not sure how Sachs's four types of cases guide good-faith originalist effort in the cases I encounter every sitting. Take a decision I wrote last year involving a boyfriend's effort to suppress GPS data collected from his girlfriend's cell phone.⁷⁸ I don't think the Fourth Amendment is an inkblot, and heaven forbid that I (or any judge I suppose) would be so hubristic as to think I discerned its meaning from a God's-eye view. The question presented didn't trigger an internal decision procedure, like *stare decisis* or Thayerian deference. But there was an applicable *n-*

⁷⁸ See *United States v. Beaudion*, 979 F.3d 1092, 1093 (5th Cir. 2020).

factor heuristic — under the rubric of Fourth Amendment “standing”⁷⁹ — so we tried to apply it.⁸⁰ Should that have been the beginning and the ending of the opinion?

Because our panel did not start or end there. We tried to explain what the original meaning of the Fourth Amendment has to say about Person *A* challenging the search of Person *B*’s property.⁸¹ We discussed the English common law origins of the warrant requirement, the reasonableness requirement, and the remedies associated with unlawful searches and seizures.⁸² We drew inferences from landmark cases like *Entick v. Carrington*.⁸³ And we described early American search-and-seizure rules.⁸⁴ From my perspective, the purpose of a judicial opinion is to explain a *judgment*. So explaining where the legal rules came from is part of not only being a good originalist but also being a good judge.

What is unclear to me is whether and to what extent Sachs’s account of originalism permits our approach. And if it does permit it, how and why? Reading *Entick* and William J. Cuddihy’s masterwork on the common law history of the Fourth Amendment doesn’t fit neatly into any of the four boxes that Sachs offers. And some of Sachs’s boxes seem to prohibit the enterprise altogether. (If I can’t get to the first box of a God’s-eye view, am I supposed to not even try and instead settle for an internal or external decision procedure?) At the same time, however, consulting the English common law and doing our best to discern an originalist rule is the whole point of originalism — isn’t it?

Or go back to *Heller* and *Torres*. In both cases, the majority and dissenting opinions were trying, in good faith, to find the original meaning. What kind of decision procedures did the Justices use? Presumably no Justice in either case thought they were dealing with case one (God’s-eye view) or four (inkblot). And presumably no opinion in either case

⁷⁹ The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits.

Byrd v. United States, 138 S. Ct. 1518, 1530 (2018). At one point, possession of the thing searched or seized was sufficient to confer automatic standing to bring a Fourth Amendment claim. *Jones v. United States*, 362 U.S. 257, 264 (1960), *overruled by United States v. Salvucci*, 448 U.S. 83 (1980). In the 1970s and ’80s, however, the Court jettisoned the bright-line test from *Jones* and adopted instead various *n*-factor heuristics to assess privacy interests:

While property ownership is clearly a factor to be considered in determining whether an individual’s Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court’s inquiry. In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court held that an illegal search only violates the rights of those who have “a legitimate expectation of privacy in the invaded place.”

Salvucci, 448 U.S. at 91–92 (citation omitted); *see also id.* at 85 (overruling *Jones*).

⁸⁰ *Beaudion*, 979 F.3d at 1097–99.

⁸¹ *Id.* at 1094–96.

⁸² *Id.*

⁸³ (1765) 95 Eng. Rep. 807 (KB); *Beaudion*, 979 F.3d at 1095–96.

⁸⁴ *Beaudion*, 979 F.3d at 1096.

used a checklist or *n*-factor heuristic like *Mathews v. Eldridge* or the levels of scrutiny. Does that mean both cases are examples of “internal” decision procedures? If yes, how so? If not, where do these opinions fit in the standard-procedure distinction? And perhaps most importantly, can the standard-procedure theory help us decipher who was the “better” or “worse” originalist?

Originalism is as much an art as it is anything else. I cannot imagine any theory that could tell us whether to read the *Countess of Rutland’s Case*, how much to care about it if we read it, what other sources to consider before or after reading it and caring about it, or what inferences to draw about the Fourth Amendment’s meaning based on any discrepancy between the *Countess of Rutland’s Case* and any other source. In that sense, originalism is arguably different than medicine, geometric figures in envelopes, truffles — and perhaps ethics.

III. A PLEA FROM THE BENCH

I understand that one of the most common responses to any article in the proverbial faculty lounge is: “Here’s the article that you should’ve written.” And I understand that one of the most common responses to that response is: “You can write *that*; I’m interested in *this*.” Well, I know next to nothing about faculty lounges. I’m unqualified to write *this* or *that*. And far be it from me to suggest anything to an academic giant like Professor Sachs. But as someone who is called upon from time to time to put originalism into practice, perhaps I can close with a plea from the bench.

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.⁸⁵ 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. For example, what constituted a “privilege,” an “immunity,” or “due process” when the People ratified those words?

⁸⁵ I don’t mean to wade into the debate among scholars like Professors John McGinnis and Michael Rappaport (who argue that originalism should suffice to answer most constitutional questions because most constitutional provisions have “thick” meanings) and Professor Jack Balkin (who’s skeptical of that approach and thinks that originalism offers only “thin” meanings for most of the Constitution’s text, hence leaving most questions to judicial discretion). Compare, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 133–43 (2013), with JACK M. BALKIN, LIVING ORIGINALISM 4–15 (2011). See generally Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459 (2016) (chronicling the debate).

Originalist debates — and the debate over originalism’s jurisprudential value — would change radically if we knew the answers with greater clarity and specificity. Cases like *Heller* and *Torres* show that the absence of widely accepted and thick constitutional meanings allows sharp disagreements about originalism. This feeds the very criticisms that Sachs so admirably wants to address — like the concern that originalism is not “a practical way of deciding constitutional issues.”⁸⁶ But I am not sure how responsive Sachs’s article is to this criticism. Sachs seems willing to stipulate that the premise of the criticism (originalism is an impractical way to decide cases) is correct, 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.

In my view, expounding, refining, and defending thick original meanings will provide originalism’s best defense. These activities respond directly to the premise of the criticism that originalism is impractical and therefore wrong. And they will help convince practitioners, academics, and civic-minded nonlawyers that originalism offers a fair and reliable way to interpret the constitutional text. Well-researched, scholarly expositions of thick original meanings both guide judges and practitioners and hold them accountable, increasing the originalist accuracy of constitutional rulings and making it harder for judges to mistakenly view their own interpretive preferences as historically mandated.

A skeptic might ask, how are we supposed to find and agree on thick original meanings of major importance? Decades of debates among originalists show that this is not a trivial task. But there are ways that originalists can work toward agreement on thick original meanings. For one thing, we need rules of originalist procedure. *These* are the battle lines that often divide originalists: 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? As noted above, it’s unclear to me how Sachs’s four decision procedures help answer these questions. But to actually do originalism in a given case, these rules are essential.

We also need a division of labor. 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 non-delegation doctrine instead of trying to write that work under the time

⁸⁶ Sachs, *supra* note 2, at 783 (quoting DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 16 (2002)).

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 on *theory* that we lose the energy necessary for *history*.

A focus on history need not make originalist scholarship stale, repetitive, or boring. Many forms of scholarly historical inquiry can contribute to the creation of thick original meanings. A work might make available or systematize new or scattered sources, as with the competing efforts of Professors Kurt Lash, Randy Barnett, and Evan Bernick to understand the Reconstruction Amendments.⁸⁷ Or perhaps it might look at evidence from various Founding-era practices or statutes to infer and debate the existence and robustness of the nondelegation doctrine.⁸⁸ The important point, I think, is that the process is iterative, driven by healthy academic competition to understand key pieces of the Constitution, and rigorous — so that by the time the constitutional question reaches a court, the range of possible meanings carried by a clause is as narrowly circumscribed as possible. As these projects narrow the scope of disagreement, they not only show that originalism is useful, they also help sort “good” originalists from “bad.”

⁸⁷ Compare 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021), with RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021).

⁸⁸ Compare Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), and Nicholas R. Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021), with Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).