IS ORIGINALISM BULLSHIT?

by
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It's finally time to answer the big question. This Article draws on the surprisingly robust literature examining the definition, essence, and significance of bullshit and evaluates whether originalist constitutional interpretation fits the bill. I begin with Harry Frankfurt's definition of bullshit as utterances made in pursuit of the speaker's goals without regard for their truth value. I also rely on alternate formulations, including bullshit as unclarifiable nonsense as well as contextual and audience-centric variations of bullshit.

While not all instances of originalism are bullshit, I identify those instances which are, and go on to demonstrate that originalism is uniquely prone to bullshit as a result of institutional demands on those involved in constitutional disputes. When interpreters engage in historical analysis for purposes other than determining the correct original public meaning or original intentions, they veer into bullshit territory. An attorney who argues from selective historical research or citations designed to support his client's case or a judge who relies on what she suspects may be incomplete party submissions but which are enough to reach the desired outcome are both engaging in bullshit originalism.

Originalist bullshit is more likely in light of the Supreme Court urging parties to resolve complex historical questions with nothing more than party submissions, as well as originalists' discounting of historians' work. Ethical and institutional demands incentivize bullshitting—especially when these actors are working outside of their comfort zone by attempting to make arguments regarding historical meaning and tradition. Legal actors' unfamiliarity with historical analysis also makes originalist bullshit harder to call out. This Article begins the task of calling out bullshit in originalist theory and practice. It also serves as a template for further work devoted to calling out bullshit elsewhere in the legal field.

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I. IS ORIGINALISM BULLSHIT?

Yes. You're welcome.

Who am I kidding? You've likely printed this Article and killed most of a tree, or you've accessed it on a system that's displaying an unreasonably high page total for the document. If you've read my star footnote, you've learned that I'm a law professor, and therefore unable to give you a one-word answer. Indeed, my profession should have been enough to reveal my initial answer: it depends.

To start, it depends on what "bullshit" means. We're all familiar with the term's use as an invective. One might use the term to express disapproval over something one doesn't like. One might use the term to describe something that isn't of the quality one expects—be it a bullshit argument or a bullshit attempt at making a breakfast taco. One might also use the term to describe a task or job that is particularly mundane, repetitive, or unpleasant.[1]

Rather than using "bullshit" as a catch-all invective, I draw on the surprisingly robust literature surrounding the term to identify various definitions. Most discussion of bullshit tends to focus on the speaker and their intentions, with one of the most prominent definitions describing speech made without regard for its truth value.[2] Under this definition, bullshit is distinct from lies, in which a speaker knows that they are saying something false and works to convince the listener of the opposite of what is true.[3] Bullshit may be true or false—what distinguishes it from other forms of speech is that the speaker doesn't care whether the statement is true or false, choosing to make the statement in pursuit of some other goal.[4]

But this only scratches the surface. Other formulations focus on the speech, rather than the speaker, defining bullshit as unclarifiable nonsense utterances.[5] Still other versions of bullshit focus on the context in which utterances are made, with certain professions or types of speech expected to mislead or manipulate the truth.[6] In these circumstances, bullshit is expected, and the term tends to be invoked by those who recognize and call out its inevitable occurrence.[7] Other formulations focus on the relationship between the speaker and the audience, with bullshit proliferating as a result of power asymmetries and speakers taking advantage of audience biases or cognitive shortcuts.[8]

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[1] Cite-checking, for example.

[2] *See* HARRY G. FRANKFURT, *On Bullshit*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 117, 118 (1988).

[3] *See id.* at 130.

[4] *See id.* at 130–31.

[5] *See* G.A. COHEN, *Complete Bullshit*, *in* FINDING ONESELF IN THE OTHER 94, 104 (Michael Otsuka ed., 2013).

[6] *See* Joshua Wakeham, *Bullshit as a Problem of Social Epistemology*, 35 SOCIO. THEORY 15, 26, 30–32 (2017).

[7] *Id.*

[8] *See* Kenneth A. Taylor, *Bullshit and the Foibles of the Human Mind, or: What the Masters of the Dark Arts Know*, *in* BULLSHIT AND PHILOSOPHY 49, 49–51 (Gary L. Hardcastle & George A. Reisch eds., 2006); James Fredal, *Rhetoric and Bullshit*, 73 COLL. ENG. 243, 254 (2011).

Determining whether originalism is bullshit also depends on the type of originalist we're discussing. To start, there are many theories of originalism, with some focusing on original public meaning of constitutional provisions, others focusing on the original intentions of the Constitution's drafters, and still others focusing on the Founders' interpretive methods.[9] While it's worth keeping these variations in mind, my focus will be on the intentions and expertise of the interpreters themselves. Earnest originalists who truly wish to determine the Constitution's original meaning are unlikely to be bullshitters—even if they end up botching the historical analysis and reaching incorrect conclusions. But originalists may have goals other than the truth, including furthering a client's interest, reaching a single conclusion in the face of conflicting historical evidence, or gaining the attention of law review editors. These originalists are more likely to stray into bullshit territory. In particular, originalists with greater expertise and education are more likely to be bullshitters, as they're more likely to know or suspect when they're getting things wrong.

Investigating constitutional law from this perspective isn't anything new.[10] George Carlin, perhaps the pre-eminent modern authority on profane language, emphasized that America's foundations amount to "one big steaming pile of red, white, and blue, all-American bullshit."[11] Carlin backs this up by arguing that the founders were profound bullshitters by claiming that "all men are created equal," while owning slaves and treating women and Native Americans as less than human.[12] In a similar vein, Neil Diamant draws on Frankfurt's discussion of bullshit, reaching similar conclusions about China's Constitution—although Diamant emphasizes the utility of such bullshit in furthering various governmental objectives.[13]

This analysis is promising in a world of high-profile constitutional litigation and theorizing. When originalism strays into bullshit territory, it's worth calling out. Doing so may prompt bullshitters to change their ways. Should they refuse and continue to play fast and loose with the truth despite being called out for bullshitting, they are on notice of their errors and may be even more easily called out for bullshitting or outright lying. Additionally, drawing attention to bullshitters' practices alerts their audience who may otherwise be led astray. And where this

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[9] *See infra* Section III.A.

[10] And that's okay. *See* Noah Chauvin, *Against Gap-Filling*, CARDOZO L. REV. DE NOVO (2024), https://cardozolawreview.com/against-gap-filling/ (arguing that some legal scholars pretend that their work fills a "gap" in known academic scholarship in order to win acclaim or further their career, despite the fact that they are aware that the presence of this "gap" is highly unlikely).

[11] *George Carlin: You Are All Diseased* (HBO television broadcast Feb. 6, 1999).

[12] *Id.*; *cf.* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these Truths to be self-evident, that all Men are created equal").

[13] *See* NEIL J. DIAMANT, USEFUL BULLSHIT: CONSTITUTIONS IN CHINESE POLITICS AND SOCIETY 13–14 (2021).

investigation reveals contexts in which bullshit is persistent or seemingly inevitable, we may wish to ask whether a deeper change is warranted—whether it's a change in what interpretive theory ought to be employed, amending procedures to guard against bullshit, or reforming institutions that produce or are particularly susceptible to bullshit.

At the same time, it's worth noting when originalism is not bullshit. Some originalists may perform the rigorous work necessary to determine original meaning, and those instances are worth recognizing.[14] Others may make earnest mistakes,[15] in which case it's worth calling out these mistakes to prevent further error. Bullshit exists in the originalist endeavor—and it may well be inevitable in some circumstances—but it's not an all-encompassing problem.

And bullshit isn't a problem unique to originalism either. One need only look to public perceptions of attorneys to conclude that the profession has a trust problem.[16] Bullshit undoubtedly plays a role, and this Article isn't meant to preclude similar analysis into other theories of constitutional interpretation or legal practice more generally. Indeed, such analysis is likely to be fruitful and worthwhile.

Originalism, however, lends itself to bullshit in certain unique ways.[17] Originalism involves the use and manipulation of historical evidence in manners that veer beyond the training of most attorneys and judges—rendering originalist analysis uniquely prone to bullshit tactics.[18] Recent Supreme Court opinions increase the risk of successful bullshitting by encouraging judges to decide complex questions of historical meaning and tradition based on nothing more than the submissions of the parties—parties typically represented by non-historian legal advocates.[19] And originalists themselves exacerbate the situation by disclaiming the relevance of work by historians—asserting that their legal training is sufficient to tackle questions regarding the centuries-old, purportedly unified mindset of a dynamic

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[14] *See infra* Section III.C.1.

[15] *See infra* Section III.C.3.

[16] Susan T. Fiske & Cydney Dupree, *Gaining Trust as Well as Respect in Communicating to Motivated Audiences About Science Topics*, 111 PROC. NAT'L ACAD. OF SCI. OF THE U.S.A. 13593, 13595 (2014) (describing public perception of lawyers as highly competent, but untrustworthy); *see also* Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913, 913, 919 (1990) [hereinafter Bok, *Lawyers*].

[17] *See infra* Section IV.B.

[18] *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 16–17 (2002) ("Most lawyers and judges are neither equipped nor inclined to deal with the complexities and ambiguities of history."); DAVID A. STRAUSS, THE LIVING CONSTITUTION 43 (2010) ("Originalism requires judges and lawyers to be historians."); *see, e.g.*, Michael L. Smith, *Disingenuous Interpretation*, 93 MISS. L.J. 350, 370–72, 375, 383–85 (2023) (arguing that originalism is susceptible to abuse by disingenuous actors).

[19] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2130–31 n.6 (2022).

and often divided public.[20] While bullshit is something that all legal actors ought to understand and anticipate, these aspects of originalist practice and scholarship warrant a closer examination of originalism.

Part II delves into scholarship and commentary that parses out the nature of bullshit. I begin with what is likely the best-known work on the subject, Harry Frankfurt's essay, *On Bullshit*, which inspired theorists across a range of disciplines in the years following its publication.[21] I summarize Frankfurt's discussion in which he identifies the essential component of bullshitting as a disregard for the truth value of one's utterance in favor of some other goal the speaker seeks to accomplish.[22] But the literature ranges well beyond Frankfurt's popular piece, and the remainder of Part II introduces other variations, including bullshit that emerges as a result of the context in which an utterance is made, bullshit as unclarifiable nonsense, and bullshit that depends on taking advantage of audience shortcomings.[23]

In Part III, I take on the titular question of whether originalism is bullshit. To do so, I distinguish between earnest originalists—who seek to engage in originalist analysis but who end up getting things wrong—and disingenuous originalists—who engage in the trappings of originalist analysis in the service of a desired personal, professional, or political agenda.[24] I argue that earnest originalists tend not to be bullshitters, even if they're impacted by biases of which they are unaware. Disingenuous originalists are a different story, however, and may veer into bullshit territory—although one must be sure to distinguish between bullshit and outright lies by disingenuous actors. I also address how level of expertise impacts the inquiry, noting that greater expectations of knowledge and expertise are associated with a higher probability of bullshitting. After all, these actors are more likely to know when they're playing fast and loose with the analysis—rather than less sophisticated actors who think they've checked all the necessary boxes.

Part IV explores broader questions of originalist interpretation and bullshit, focusing primarily on whether originalist historical analysis constitutes a "bullshit genre," or a form of speech that carries expectations of deception or disregard for truth.[25] I argue that originalism performed by lawyers and judges is more likely to end up being bullshit, as these actors' institutional roles often preclude them from

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[20] *See infra* Section IV.A.2.

[21] *See* FRANKFURT, *supra* note 2; *see also* Philip Eubanks & John D. Schaeffer, *A Kind Word for Bullshit: The Problem of Academic Writing*, 59 COLL. COMPOSITION & COMMC'N 372, 372 (2008) (highlighting the academic and popular engagement with Frankfurt's work).

[22] *See infra* Section II.A; FRANKFURT, *supra* note 2.

[23] *See infra* Part II.

[24] *See infra* Part III.

[25] *See infra* Section IV.A; *see also* Alan Richardson, *Performing Bullshit and the Post-Sincere Condition*, *in* BULLSHIT AND PHILOSOPHY 83, 87 (Gary L. Hardcastle & George A. Reisch, eds., 2006) (discussing "bullshit genres").

focusing on historical truth. While our expectations of bullshit in legal argumentation and adjudication may cause us to be on guard in these contexts, I explore a more concerning phenomenon among certain academic originalists of disregard for historical methodology. In the face of criticism from historians who argue that originalists' historical methods are lacking, some originalists respond by arguing that the work of historians is ill-suited for legal interpretation. They claim that historians lack legal training and engage in investigations that disregard the interpretive goals of originalists.[26] This response from originalists who purport to ground their work in historical fact suggests that originalists not only know that they are often bullshitting, but that they do so with pride.

Before proceeding further, a note on the scope of this Article: I primarily address whether instances of originalism in practice are bullshit rather than addressing whether originalism itself is bullshit at the theoretical level. That is, I do not get into the weeds of whether arguments in favor of adopting originalism as a theory of interpretation are bullshit or not. To be sure, if a theory is prone to bullshit, this should count against the theory on normative grounds of transparency and predictability.[27] Here, however, I do not delve into reasons for the theory itself, as readers may find that similar work has already been done—albeit in a somewhat less vulgar manner.[28]

Additionally, while this Article focuses on uncovering bullshit in originalist constitutional interpretation, I do not suggest that bullshit is absent from other interpretive theories or forms of legal argument. Bullshit is worth calling out wherever it may be, and my focus on originalism should not preclude others from applying this form of analysis elsewhere. Should this Article inspire others to identify, critique, and reform bullshit practices elsewhere in the legal profession, I will consider this endeavor well worth it.

II. THE NATURE OF BULLSHIT

Before beginning an investigation into whether originalism is bullshit, it's worth taking some time to dig into the literature on the subject. Doing so serves several ends. First, one can learn a lot from the surprisingly extensive literature,

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[26] *See infra* Section II.A.

[27] For more on why theories' tendency toward abuse and misuse is relevant to debates over adopting the theories themselves, see, for example, Smith, *supra* note 18. For related points in the context of metaethical debates, see NICK FOTION, THEORY VS. ANTI-THEORY IN ETHICS: A MISCONCEIVED CONFLICT 279–81 (2014) (arguing that procedures for implementation and decision making are necessary for theories of ethics, and ought to be considered when comparing theories).

[28] *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 37–38, 69, 94 (2009) (addressing various arguments in favor of originalism, and arguing that they tend to be false or implausible).

which parses out the nature of bullshit in the domains of philosophy,[29] theology,[30] sociology,[31] and rhetoric.[32] Second, proceeding from a set of clear definitions—and remaining consistent in referencing those definitions—keeps the discussion orderly, which is crucial when discussing a term that is both versatile and potentially inflammatory. Those readers hoping for nothing more than invective and mudslinging[33] may be disappointed, but they can take solace in the existing, robust literature on originalism as (undefined) bullshit.[34]

This Part surveys a range of meanings and identifies several key definitions to apply in the legal context. I begin with Harry Frankfurt's brief, yet insightful, discussion of the topic, as it's often credited as inspiring much of the existing literature on the issue.[35] I then survey additional treatments of bullshit and identify some

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[29] *See* FRANKFURT, *supra* note 2 (parsing out the nature of bullshit); COHEN, *supra* note 5, at 94–96 (responding to Frankfurt's account of bullshit and arguing for an alternate formulation of the term).

[30] *See, e.g.*, Stewart Clem, *Post-Truth and Vices Opposed to Truth*, 37 J. SOC. CHRISTIAN ETHICS 97, 98 (2017) (approaching bullshit from a theological perspective with the goal of developing "the philosophical and theological resources necessary to condemn the harm done by systemic bullshit").

[31] *See, e.g.*, Wakeham, *supra* note 6, at 19, 26 (arguing for examining bullshit as a problem of social epistemology).

[32] *See, e.g.*, Leonard Shedletzky, *Seeing Bullshit Rhetorically: Human Encounters and Cultural Values*, 5 RES RHETORICA 31, 32 (2018) (examining the notion of bullshit through a rhetorical lens to draw out insights on the role that listeners play in interactions involving bullshit); Fredal, *supra* note 8, at 251–52 (applying rhetorical analysis and noting the importance of taking an audience-centric approach to analyzing bullshit).

[33] Wait a minute, that isn't mud!

[34] For critiques of originalism as bullshit in a less technical sense, see Jill Filipovic, *9 Reasons Constitutional Originalism Is Bullsh*t*, COSMOPOLITAN (Mar. 21, 2017, 12:55 PM), https://www.cosmopolitan.com/politics/a9162680/neil-gorsuch-constitutional-originalism-supreme-court/ (labeling originalism—specifically as espoused by then-nominee Neal Gorsuch—as "bullshit" without defining the term and by raising claims of inconsistency, discrimination, and changes in technology and society as support for this conclusion); Rick Ladd, *Originalism is Bullshit!*, SYSTEMS SAVVY (Oct. 14, 2020), https://rickladd.com/2020/10/14/originalism-is-bullshit/ (arguing that originalism is bullshit not because it demonstrates an indifference to the truth but because it requires one to reject the notion that society evolves). Others use similar labels for the theory, although they are less specific about the fecal source. *See, e.g.*, Ritchie Calvin, *Originalism and the Constitution, or, Originalism Is Crap*, MEDIUM (Aug. 25, 2023), https://ritchie-calvin.medium.com/originalism-and-the-constitution-or-originalism-is-crap-5509840a1b44 (arguing that originalism is "built upon a theory of language that does not work in reality," and suggesting that the Justices know that they are lying about "reading the Constitution *as it is*"—a practice that more closely resembles lying than bullshitting).

[35] *See* Wakeham, *supra* note 6, at 16 (noting that Frankfurt was the "first scholar to put a serious academic polish on bullshit," and that his "initial diagnosis of the problem of bullshit has proven influential as others have sporadically returned to the topic."); *see also* Philip Eubanks & John D. Schaeffer, *A Kind Word for Bullshit: The Problem of Academic Writing*, 59 COLL.

alternate definitions worth considering, and others that may take things too far afield in a discussion on law and constitutional interpretation.

Spending some time parsing out different forms of bullshit is worthwhile, as I apply various formulations to originalist methodology throughout the remainder of the Article. In evaluating originalism (and other methods) I tend to use Frankfurt's formulation as a starting point, but I make room for other versions of bullshit when applicable. This initial roadmap of theories clarifies that analysis in the interest of achieving precision rather than invective.

A. Harry Frankfurt: On Bullshit

In his essay, *On Bullshit*, Harry Frankfurt defines "bullshit" as statements by a speaker who is indifferent to the truth or falsity of what is espoused.[36] Bullshit is therefore distinct from lies or deliberate misrepresentations in which the speaker knows that what they are saying is false.[37] The bullshitter requires no such knowledge of falsity. Indeed, it may even turn out that the statements the bullshitter espouses aren't false at all. Frankfurt elaborates:

> What bullshit essentially misrepresents is neither the state of affairs to which it refers nor the beliefs of the speaker concerning that state of affairs. Those are what lies misrepresent, by virtue of being false. Since bullshit need not be false, it differs from lies in its misrepresentational intent. The bullshitter may not deceive us, or even intend to do so, either about the facts or what he takes the facts to be. What he does necessarily attempt to deceive us about is his enterprise. His only indispensably distinctive characteristic is that in a certain way he misrepresents what he is up to.[38]

Frankfurt's formulation of bullshit extends beyond this brief essay, thanks to the work of other, enterprising academics. Scott Kimbrough argues that instances of false rationalization or justification fall into Frankfurt's definition—citing a hypothetical situation of a boss promoting a less-experienced individual, justifying the promotion with claims that the candidate will "bring fresh ideas into the organization," despite their lack of qualifications and the fact that they used to work with the boss at the boss's old firm.[39] Kimbrough argues that the "fresh ideas" rationalization is bullshit because it demonstrates a lack of concern for the truth due to a failure "to communicate the true reasons for the decision."[40] While the

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COMPOSITION & COMMC'N 372, 372 (2008) (highlighting the academic and popular engagement with Frankfurt's work).

[36] *See* FRANKFURT, *supra* note 2, at 130.

[37] *Id.*

[38] *Id.*

[39] Scott Kimbrough, *On Letting It Slide*, *in* BULLSHIT AND PHILOSOPHY 3, 8 (Gary L. Hardcastle & George A. Reisch eds., 2006).

[40] *Id.*

rationalization may not be irrelevant to the decision, it's not the real reason.[41] And it isn't quite a lie because the boss may have "sincerely convinced herself of the truth of her argument."[42]

While Frankfurt wrote as a philosopher rather than a lawyer, his discussion of what "bullshit" is—and is not—finds ready analogies in the legal field. In the defamation context, for example, public officials and public figures typically cannot sue for defamation without proving by clear and convincing evidence that statements about them were false, and that the defendant made these statements knowing that they were false, or in "reckless disregard" of their truth or falsity.[43] This reckless disregard for the truth occurs when a speaker makes a statement knowing that there was a reason to doubt the statement's veracity (without getting all the way to knowing that the statement is, indeed, false), yet goes ahead and makes the statement anyway.[44] To be sure, the analogy isn't perfect, as "the truth must be fairly overt for it to be recklessly disregarded."[45] But the shift from knowing untruth to recklessness demonstrates law's contemplation of false statements that result from bullshit rather than deliberate lies or earnest misstatements of fact.

B. Alternate Formulations of Bullshit

Frankfurt's discussion of bullshit has proven influential, and is often the starting point for further work on the subject.[46] Scholars in a range of fields draw on Frankfurt's definition of bullshit—either to apply it in their own analysis, or to use it as a starting point for creating field-specific definitions of bullshit.[47] Legal

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[41] *Id.*

[42] *Id.*

[43] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that "actual malice," consisting of knowledge of a statement's falsity, or "reckless disregard" for a statement's falsity, must be demonstrated in a defamation suit brought by a public official); Curtis Pub. Co. v. Butts, 388 U.S. 130, 134, 155 (1967) (extending the actual malice requirement to public figures).

[44] *See Curtis Pub.*, 388 U.S. at 153.

[45] *See* Lawrence M. Solan, *Lies, Deceit, and Bullshit in Law*, 56 DUQ. L. REV. 73, 103 (2018).

[46] *See, e.g.*, Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH. L. REV. 1383, 1384, 1412 (2007) (beginning a discussion of how various forms of bullshit relate to criminal procedure with a discussion of Frankfurt's account); James A. Montanye, *Merdecracy*, 15 INDEP. REV. 295, 295–99 (2010) (beginning a discussion over the role of bullshit in politics with a reference to Frankfurt's work).

[47] *See, e.g.*, Wakeham, *supra* note 6, at 19 (arguing for examining bullshit as a problem of social epistemology); Fredal, *supra* note 8, at 251–52 (applying rhetorical analysis and noting the importance of taking an audience-centric approach to analyzing bullshit); Michael Wreen, *A P.S. on B.S.: Some Remarks on Humbug and Bullshit*, 44 METAPHILOSOPHY 105, 105–07 (2013) (drawing on Frankfurt's (and others') definitions of bullshit in arguing how bullshit should be defined and approached).

scholarship is no exception, with law review articles applying the term to certain attorney-client interactions and forms of promises.[48] Because of its central place in the literature, I treat Frankfurt's definition of bullshit as the central definition for the remainder of this Article. This is not to say that other forms of bullshit don't exist and aren't useful—and it is to these alternate forms that I now turn.

1. Bullshit as Unclarifiable Nonsense

G.A. Cohen presents an alternate definition of bullshit, which he defines as "a certain variety of nonsense, namely, that which is found in discourse that is by nature *unclarifiable*," which is "not only obscure but which cannot be rendered unobscure[d]" without "creat[ing] something that isn't recognizable as a version of what was said."[49] While Cohen does not define what makes a statement clear, he suggests that a suitable definition for "unclarity" that qualifies as bullshit is a statement for which "adding or subtracting (if it has one) a negation sign from a text makes no difference to its level of plausibility."[50]

Those who produce "Cohen-bullshit are clearly not by nature bullshitters, in Frankfurt's sense," because their intentions are not decisive.[51] A person producing Cohen-bullshit may intend to do so and fail, but that person may also end up producing bullshit for any reason—even without intending to do so.[52] Still, Cohen acknowledges that one may have a reason to resort to bullshit if there is some advantage to one's reasons or thoughts remaining impenetrable.[53]

2. Context-Centric Bullshit

Other scholars emphasize bullshit's dependence on context. Joshua Wakeham seeks to present a sociological account of bullshit and argues that bullshit is not so much about the bullshit, the speaker, or the audience, but instead related to "unsettled epistemic conditions" that affect receptivity to bullshit.[54] Wakeham argues that the mindset of the bullshitter is "less important than the fact that he or she is able to get away with it," and argues that speakers may become bullshitters by developing "distinctive epistemic standards that often seem opaque or misleading to

[48] *See, e.g.*, Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435, 1436–38 (2015) (arguing that lawyers are often bullshitters in the Frankfurtian sense and highlighting particular risks of this bullshit in the context of tribal representation); Curtis Bridgeman & Karen Sandrick, *Bullshit Promises*, 76 TENN. L. REV. 379, 379–83 (2009) (identifying "bullshit promises" in various contractual arrangements in which a party makes certain promises that are subject to future modification by other provisions); *see also infra* Section II.C.

[49] COHEN, *supra* note 5, at 104–05.

[50] *Id.* at 105.

[51] *Id.* at 106.

[52] *Id.* at 106–07.

[53] *Id.* at 107.

[54] Wakeham, *supra* note 6, at 26.

laypeople."[55] These speakers include people in "particular professions" such as lawyers and politicians, as well as institutions like bureaucracies and academia.[56]

Wakeham relies on Alan Richardson's identification of "bullshit genres" to make this claim.[57] Richardson identifies bullshit genres as activities one cannot engage in without engaging in bullshit, with the writing of grant proposals and letters of recommendation as examples of such activities.[58] In a similar vein, Wakeham argues that "certain professions . . . have a reputation for being flexible with the truth," such as "lawyers, politicians, corporate managers, salespeople, advertisers, and public relations professionals."[59] The incentives (and even obligations) that people in these professions have to lie make bullshit inevitable—to a point where believing people in these professions "not only represents a kind of epistemic naïveté but also amounts to a kind of cultural incompetence."[60]

3. Audience-Centric Bullshit

Other scholars urge a focus on the audience or recipient of statements in determining whether those statements are bullshit. Kenneth Taylor argues that a great deal of bullshit's success and proliferation capitalizes on audience susceptibility resulting from unconscious cognitive shortcuts and biases.[61] Cognitive phenomena like confirmation bias—in which people tend to be more receptive to information that confirms preexisting beliefs—may lead audience members into "information cocoons" that "promote a certain narrow range of views and outlooks" and render the listener susceptible to bullshit.[62] Other research suggests that those who use bullshit to persuade others may themselves be more susceptible to fall for bullshit—particularly bullshit that sounds profound but is, in fact, nonsense.[63]

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[55] *Id.* at 26, 30.

[56] *Id.* at 30.

[57] *Id.* at 17 (citing Richardson, *supra* note 25, at 87).

[58] Richardson, *supra* note 25, at 87*; see also* Eubanks & Schaeffer, *supra* note 21, at 378–79 (arguing that certain social situations in which expectations of truth are distorted result in rhetorical games that complicate the nature of bullshit).

[59] Wakeham, *supra* note 6, at 31.

[60] *Id.* at 31.

[61] *See* Taylor, *supra* note 8, at 50–51.

[62] *Id.* at 52–53 (discussing how "information cocoons" allow someone to ignore or misinterpret information that doesn't support their point of view, and instead accept bullshit supporting their point of view).

[63] *See* Shane Littrell, Evan F. Risko, & Jonathan A. Fugelsang, *'You Can't Bullshit a Bullshitter' (or can you?): Bullshitting Frequency Predicts Receptivity to Various Types of Misleading Information*, 60 BRITISH J. SOC. PSYCHOLOGY 1484, 1499–1500 (2021); *see also* Martin Harry Turpin, Mane Kara-Yakoubian, Alexander C. Walker, Heather E.K. Walker, Jonathan A. Fugelsang & Jennifer A. Stolz, *Bullshit Ability as an Honest Signal of Intelligence*, 19 EVOLUTIONARY PSYCHOLOGY 1, 5 (2021). The pseudo-profound bullshit to which study participants in the Littrell, Risko, and Fugelsang study were exposed appears to fit Cohen's

Those who discuss bullshit from a rhetorical perspective also tend to emphasize the role of the audience in the communication of bullshit.[64] James Fredal argues that bullshit should be identified "in terms of audience *sensitivities*," and defines bullshit as "a function of social encounters," particularly those that involve "asymmetrical power relations."[65] Bullshit also occurs in instances where "rituals of politeness are carried out," but in a manner "so perfunctor[y] that the illusion of a mutual encounter . . . is broken."[66] Fredal cites the example of a prerecorded hold message stating "[y]our call is important to us," and argues that "the feebleness of the attempt, not merely to get away with something, but to retain the patina of politeness . . . gives rise to the feeling of unfairness and unexpectedness that underlies charges of bullshit."[67] The "dominant party" conveys empty symbols of politeness, but "none of the warmth or spontaneity" of true courtesy—and just "goes through the motions."[68] Behind the façade is "the raw pursuit of efficiency or advantage," the perception of which results in a feeling of offense and the desire to call out the bullshit one is enduring at the hands of the dominant party to the exchange.[69]

Awareness of the relationship between speaker and listener is of particular help in analyzing questions of constitutional interpretation because of the variation among actors and audiences. Attorneys speak to courts in presenting arguments in favor of a particular constitutional interpretation.[70] Courts speak through their opinions on the meaning of the Constitution to a variety of audiences including counsel and parties to the case before the court, lower court judges bound by the higher court's ruling (through direct orders or vertical precedent), and the wider world of attorneys and entities subject to the court's ruling by virtue of their

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definition of unclarifiable communications, as the test used grammatically correct sentences with randomly generated buzzwords, such as, "'We are in the midst of a high-frequency blossoming of interconnectedness that will give us access to the quantum soup itself.'" Littrell et al., *supra* note 63, at 1488–89. *Cf.* COHEN, *supra* note 5, at 104–06 (discussing the unclarifiable nature of bullshit and describing what level of unclarity qualifies to be counted as bullshit).

[64] *See, e.g.*, Shedletzky, *supra* note 32, at 32 (arguing for a shift in attention from the bullshitter and bullshit to the process of bullshitting itself—particularly the part that the audience plays "in experiencing bullshit").

[65] Fredal, *supra* note 8, at 252–54.

[66] *Id.* at 255.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See* Walter Probert, *Law and Persuasion: The Language-Behavior of Lawyers*, 108 U. PA. L. REV. 35, 46–48 (1959) (describing attorney arguments using strategic definitions or implied meanings may persuade courts); *see also* Stephen J. Dwyer, Leonard J. Feldman & Ryan P. McBride, *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 418, 420–22, 426 (2008) (setting forth guidelines for how attorneys may better persuade courts in their brief-writing).

existence and activities in the relevant jurisdiction.[71] Asymmetries abound, including power imbalances between courts and those subject to their rulings, resource imbalances between various parties to the cases, time imbalances between parties, counsel, and court clerks, and knowledge asymmetries between those with and without legal expertise.[72] This environment of rigid and varying relationships and asymmetries lends itself to theories of bullshit that account for these interactions.

C. Bullshit in Legal Scholarship and Commentary

Bullshit's relevance to legal questions hasn't gone unnoticed in the legal literature. Legal scholars have examined how bullshit fits into cases of fraud and breach of contract, using the term as a foil for other forms of deception or misrepresentation.[73] Others address how bullshit might fit into varying notions of sincerity by government actors and questions of whether these actors are truly motivated by reasons given for their decisions.[74] Donald Trump's presidency prompted additional scholarly discussions of bullshit.[75]

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[71] *See* Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971, 1973, 1981–84 (2021) (arguing that despite examples of precedent being overruled, the doctrine of stare decisis continues to exert a strong force, and surveying examples of Supreme Court rhetoric endorsing stare decisis); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) (defining "vertical stare decisis" as "a court's obligation to follow the precedent of a superior court," and describing this form of stare decisis as "an inflexible rule that admits of no exception"); *see also* Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 194–95 (2002) (describing the rhetorical strategies of several Supreme Court Justices and how these strategies "serve to express the author's jurisprudential vision").

[72] *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1674–75 (2017) [hereinafter Solum, *Triangulating Public Meaning*] (describing a disparity in the amount of time law clerks may spend on determining original meaning compared with time legal academics may spend—with law clerks facing far more stringent time constraints); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076–77 (1984) (arguing that resource disparities between parties in civil litigation may lead to unfair settlement practices); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 677–82 (1989) (describing resource disparities between prosecutors and public defenders and how this influences effective representation and defendants' chances of success in criminal cases).

[73] *See, e.g.*, Madeleine M. Plasencia, *No Right to Lie, Cheat, or Steal: Public Good v. Private Order*, 68 U. MIA. L. REV. 677, 699 (2014) (contrasting bullshitting with lying).

[74] *See* Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1128 n.109 (2010) [hereinafter Cohen, *Sincerity*].

[75] *See* TIMOTHY K. KUHNER, TYRANNY OF GREED: TRUMP, CORRUPTION, AND THE REVOLUTION TO COME 98 (2020) (describing Trump's "relationship to reality" as bullshit); *see also* W. Bradley Wendel, *Truthfulness as an Ethical Form of Life*, 56 DUQ. L. REV. 141, 163–65 (2018) (discussing bullshit in the context of Trump's travel bans); Daniel P. Tokaji, *Truth,*

As noted above, Neil Diamant relies on the term in analyzing and explaining the drafting, development, and role of China's Constitution—arguing that while much of its language is bullshit, it's ultimately "useful bullshit" that serves a variety of governmental and social purposes.[76] In the American context, Lawrence Solan discusses the distinction between bullshit, lying, and deceit, and discusses contexts in which bullshit may implicate certain legal rules and causes of action.[77]

Popular discourse tends to cast attorneys as untrustworthy, goal- and profit-oriented actors—making them prime candidates for bullshitters.[78] Bennett Gershman explores how bullshit may emerge as a result of attorneys' communications, discourse, and arguments, using Rudy Giuliani as a case study.[79] Gershman argues that bullshitting lawyers "may be a more insidious threat to the rule of law" than lying lawyers, as a blatant display of a disregard to truth "does far more to destroy the bedrock principle" that truth is important to questions of law.[80]

The legal literature also includes attempts at applying the notion of bullshit to judicial opinions—an undertaking that seems to be of particular relevance to the present essay. Adam Kolber discusses bullshit in the context of Supreme Court opinions, arguing that judges use bullshit to maintain flexibility through the creation of muddled rules, to make their reasoning sound more important or "high-minded," and to avoid inconvenient facts.[81] Kolber claims to employ Frankfurt's definition of bullshit, and while some of his examples are on point, others—such as flowery prose and majestic generalities—don't easily fit the mold of Frankfurtian bullshit.[82]

Democracy, and the Limits of Law, 64 ST. LOUIS U. L.J. 569, 591–93 (2020) (arguing that Trump was guilty of bullshitting and that this practice undermined democracy).

[76] *See generally* DIAMANT, *supra* note 13, at 13, 172, 193.

[77] *See generally* Solan, *supra* note 45, at 76, 93–94, 98, 101–02.

[78] *See* Fiske & Dupree, *supra* note 16, at 13595 (describing public perception of lawyers as highly competent, but untrustworthy); Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 211–12 (2006) ("Many accuse lawyers of being liars with little devotion to the truth, while the law imposes on them a fiduciary obligation to put their clients' interests ahead of their own."); *see also* Bok, *Lawyers*, *supra* note 16, at 914, 919 (ascribing public mistrust of lawyers in part to rules governing confidentiality and duties to clients); John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93, 94 (1999) (stating that "lawyers, on the whole, can *not* be trusted . . . . On the questions that ultimately matter, most lawyers do not even purport to present the objective truth."); Robert A. Clifford, *The Public's Perception of Attorneys: A Time to be Proactive*, 50 DEPAUL L. REV. 1081, 1083 (2001) (discussing public perceptions of lawyers wishing to win at all costs and seek profits above other ends).

[79] *See generally* Bennett L. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 DUQ. L. REV. 293, 294, 297, 299, 300 (2019).

[80] *Id.* at 300.

[81] Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 151, 157, 161 (2018).

[82] *See id.* at 147, 160.

Despite this discussion of bullshit in the legal literature, a systematic examination of constitutional interpretation from a bullshit perspective is lacking. Kolber's discussion of bullshit is restricted to judicial opinions, and only a subset of that discussion concerns constitutional interpretation.[83] Martin Flaherty comes even closer, contrasting shoddy historical reasoning with bullshit originalist reasoning—but he does so only in passing, opening the door for a more sustained treatment.[84] This Article takes on that task.

III. IS ORIGINALISM BULLSHIT?

A. Originalism: A Brief Background

The preceding discussion sought to clarify the "bullshit," portion of this essay's titular question. This Section offers a brief background on the "originalism" part—discussing originalism, its use and development, and the variety of constitutional interpretive theories that fall under the originalist umbrella. Lawrence Solum emphasizes that originalism is best thought of as a family of interpretive theories rather than a single approach to constitutional interpretation:

> Let us stipulate that "constitutional originalism" is a family of constitutional theories, almost all of which endorse two ideas: (1) the meaning of the constitutional text is fixed at the time each provision is framed and ratified and (2) that fixed meaning ought to constrain constitutional practice.[85]

Several distinct versions of originalist interpretation exist within this theory.[86] Original intent originalism, for example, derives constitutional meaning from the intentions of those who drafted and debated the Constitution.[87] This approach reflects initial versions of originalism which developed as a reaction to the Warren Court's jurisprudence—interpretive theories that urged a focus on the framers' intent along with judicial restraint and deference to legislatures.[88] Original public meaning originalism, on the other hand, focuses on what the public, or a "reasonable person," at the time of ratification would have understood the Constitution to

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[83] *See id.* at 142, 144–45.

[84] Martin S. Flaherty, *Foreword*, 84 FORDHAM L. REV. 905, 912–13 (2015).

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

[86] *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1253 (2019) (describing originalism as including "at the very least," public meaning originalism, original intentions originalism, original methods originalism, and original law originalism).

[87] *See generally* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 706, 709, 715, 717, 721 (2009) (discussing and defending this approach to interpretation).

[88] Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 602–03 (2004).

mean.[89] This approach to interpretation is often described as "New Originalism," and is presented as taking the place of the "old" original intent approach to constitutional interpretation.[90]

Other versions of originalism exist as well. John McGinnis and Michael Rappaport support an "original methods" approach which they claim unites original intent and original meaning by interpreting the Constitution using "the conventional legal interpretive rules that would have been deemed applicable to a document of [the Constitution's] type at the time it was enacted."[91] In support of an argument that originalism is, in fact, America's law of constitutional interpretation, Will Baude refers to "inclusive originalism," under which "the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision" so long as "original meaning incorporates or permits" the use of "precedent, policy, or practice" in constitutional interpretation.[92] Precedent, for example, was a "well-established common-law-doctrine at the time of the Founding," so "the original meaning of Articles III and VI allows judges to apply precedent."[93] Baude uses this theory to support "the positive turn," which suggests that originalism is the law, meaning that "neither the conceptual nor normative justifications need to bear as much weight," in justifying the use of originalist interpretive methods.[94]

While this summary is by no means an exhaustive discussion of the varieties of originalism or the details of each version of originalism, it should serve to orient the following analysis of when originalism veers into bullshit territory. While a number of originalist theories exist, original public meaning originalism tends to be the most

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[89] Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377, 379 (2013) ("At its most basic, originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation."); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) ("The reasonable American person of 1788 determines, for 1788 and today, the meaning of the federal Constitution."); *see also* Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 958 (2009) (suggesting that when the historical record is reviewed, "it is often clear that the text had a commonly accepted, though unarticulated public meaning.").

[90] *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412–13 (2013) ("Rather than attempt to identify some collective intentions of the Framers, the New Originalism looked to identify the original public meaning of the words of the text.").

[91] John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).

[92] William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015).

[93] *Id.* at 2360.

[94] *Id.* at 2352.

common approach to originalism.[95] Accordingly, unless noted otherwise, this Article's general references to "originalism" refer to this approach.

B. Investigating Originalism: A Roadmap

Having identified species of bullshit and originalism, the next question is how to apply the former to the latter. From the outset, a breakdown by interpreters' mental states seems to make the most sense. Under a Frankfurtian approach to bullshitting, the speaker's mental state is determinative; whether or not one is bullshitting comes down to whether one is speaking with a disregard for the truth value of one's statement—all to achieve some separate goal.[96] Additionally, the speaker's intent plays a significant role in alternate formulations of bullshit.[97] With bullshitting as such a speaker-centric practice, it seems that the variety of originalist theory makes no difference to what the speaker may try to do with that theory. Those who espouse and defend theories of interpretation make this point frequently—arguing that theories of constitutional interpretation themselves have no bearing on whether any given interpreter will apply that theory in good faith.[98]

Still, considerations other than speaker intent are worth noting—especially if this Article is to take an approach to bullshit that accounts for the varied literature on the subject. If a variety of originalism is more prone to unclarifiable obscurity, for example, this would implicate versions of bullshit that focus on this aspect of utterances.[99] Additionally, a great deal of discussion about bullshit draws attention

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[95] *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1424–25 (2021) (describing original public meaning originalism as the "leading current version" of originalism and surveying instances of the theory's adoption by various Justices); *see also* 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, 1188 (2017) (stating that "[m]ost originalists" moved from focusing on original intent to a focus on original public meaning in the shift from Old Originalism to New Originalism).

[96] *See* FRANKFURT, *supra* note 2, at 130.

[97] *See, e.g.*, Kimbrough, *supra* note 39, at 8.

[98] *See* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1761 (2015) ("All methodologies can be executed well or poorly. Poor execution is not a reason for dispensing with them, which would be impossible in any event."); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 538 (1998) ("[O]riginalism will never constrain judges (or any other interpreter) because no theory can accomplish this hopeless task. A judge dedicated to a particular theory in the abstract may betray it in specific cases."); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996) (arguing that abuse of his moral readings approach to constitutional interpretation isn't a problem with the theory itself, as his approach is "a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be").

[99] *See* COHEN, *supra* note 5, at 104; Neil Postman, *Bullshit and the Art of Crap-Detection*, Delivered at the National Council of Teachers of English Convention, Washington D.C. (Nov. 28, 1969).

to the context of the utterance (such as whether the speaker or speech is expected to be misleading by virtue of profession or genre) as well as audience-speaker asymmetries (including disparities in authority and audience biases or cognitive features a bullshitter may exploit).[100] For example, professional context makes a difference to expectations of honesty and thoroughness when comparing an interpretive argument by a legal academic in a scholarly paper with an op-ed by an attorney representing a party in a case that turns on that interpretive question. The notion of bullshit genres comes into play when either of these parties make similar arguments in a brief to a court—rather than op-eds or scholarly articles—as briefs are expected to be persuasive and one-sided.[101] Any systematic discussion of bullshit in constitutional interpretation should account for these aspects of bullshit.

In evaluating when originalism is or isn't bullshit, I work from an initial division based on the type of originalist interpreters—earnest and disingenuous. Earnest originalists are those presumed to be acting in good faith, who genuinely believe they can seek out the relevant original meaning, intent, or method needed to interpret a particular term or provision of the Constitution. Disingenuous originalists are those seeking to manipulate the task of interpretation to a desired policy or personal end. These originalists use the method of originalism as a means to that end—walking through a methodology that purports to seek out original meaning, intent, or method, yet doing so in an artificial manner as the end is already preordained. The notion of the disingenuous judge or Justice manipulating originalism to a desired political end makes frequent appearances in critiques of originalism and its claimed adherents.[102]

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[100] *See supra* Section II.B.2.

[101] *See* Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 65–66 (2001) (describing how attorneys can make effective policy arguments in briefs by tying them into parallel legal arguments for a particular position and identifying those policy arguments that best support their client's interests).

[102] *See* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 63, 165 (2022) (arguing that originalists rely on selective evidence as well as selective use of originalism itself to accomplish their desired ends); ERIC J. SEGALL, ORIGINALISM AS FAITH 123–25, 134 (2018) (arguing that Justices Scalia and Thomas profess to be originalists, yet apply the theory inconsistently or rely on selective use of evidence to further their ideological goals); FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 181–83, 186–87, 194 (2013) (discussing the manipulability of originalism for ideological ends, "We simply cannot just assume that our optimal approach to the use of originalism will be sincerely and accurately applied by the justices."); Smith, *supra* note 18, at 351–52, 370–73, 375, 378–82, 384–87, 415, 421; Ruth Marcus, *Originalism is Bunk. Liberal Lawyers Shouldn't Fall for It*, WASH. POST (Dec. 1, 2022, 9:21 AM), https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/ ("When originalist arguments favor a result the conservative Justices dislike, they're content to ignore them, or to cherry-pick competing originalist interpretations that comport with their underlying inclinations."); Madiba Dennie, *Originalism is a White-Supremacist Scam*, THE NATION (Nov. 5, 2018), https://www.thenation.com/article/archive/constitution-

Within each category of disingenuous and earnest interpreters, I explore whether and when originalist interpretation crosses the line and becomes bullshit.[103] The analysis begins in the abstract, focusing on mindset-focused hypothetical scenarios. Fleshing out these skeletal abstractions, I then address how these situations are more or less likely to arise depending on the type of actor engaging in the interpretation. In particular, I will analyze originalist claims and arguments by attorneys, judges and Justices, and legal academics.

The next several subsections get into the weeds of the bullshit analysis. I analyze earnest originalists first, parsing out whether it's possible for a truly earnest interpreter to bullshit, and what facts may affect whether someone can be deemed earnest or disingenuous. I then turn to disingenuous originalists, distinguishing between different forms of disingenuousness and where goal-oriented analysis may result in bullshit. Finally, I analyze recent trends to define originalism both to encompass a larger body of law and methods, as well as to restrict originalism to the role of a standard of correctness rather than a guide to decision making, and interrogate whether such an approach is better thought of as an attempt at defining away originalism's risk of bullshitting (and other falsehoods and mistakes).

C. Earnest Originalists: Bullshit, Mistakes, and Expertise

Our quest to evaluate originalism begins with the earnest originalists. These are individuals who genuinely seek to apply originalist methodology to questions of constitutional interpretation. These individuals do not (knowingly) let a desired case result or political goals guide their analysis.[104] With the time and resources they have, these actors conduct what they believe is the analysis and investigation necessary to determine original meaning, intent, or methods so that they may espouse an originalist meaning of the Constitution.

1. Originalism and Tough Constitutional Questions

Many of us are earnest, and accurate, originalists on certain occasions. For some provisions of the Constitution, the original intent behind them and their original public meanings are relatively easy to derive. Consider certain constitutional

originalism-republicans-14-amendment-birthright-citizenship/ ("Republicans value original intent only as far as it serves as a link to the framers and their slave-era beliefs that defined people of color by the ways they could be exploited and discarded.").

[103] *See infra* Sections III.C–.D.

[104] *But see* LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 3841 (2013) (arguing that doctrines like harmless error, plain meaning interpretation, and stare decisis (among others) are often justified as time-saving techniques for judges, but that they are "not substantively neutral" as they weigh more heavily "on persons seeking to expand legal rights," expansions which "generally advance the liberal political agenda," like "antidiscrimination, prisoner rights, immigrant rights, consumer protection, and environmental litigation").

provisions regarding the presidency. There's likely little dispute that the original meaning of the Constitution supports the claims that the president's term of office is four years,[105] that all states must vote on who shall be president on the same day,[106] that the president must be 35 years old,[107] and that the president must state an oath prior to taking office which states, "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[108] One need not be a historian or originalist to determine the original public and intended meanings of these particular provisions.[109]

But many constitutional provisions—indeed, those that tend to draw the most attention and litigation—are not so simple. Consider, for example, the Fourteenth Amendment. This amendment contains several provisions, each of which have amassed their own sub-literature on their original meaning, including the Equal Protection Clause,[110] the Privileges or Immunities Clause,[111] and, more recently,

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[105] *See* U.S. CONST. art. II, § 1, cl. 1.

[106] *See* U.S. CONST. art. II, § 1, cl. 4.

[107] *See* U.S. CONST. art. II, § 1, cl. 5. On the other hand, Michael Stokes Paulsen makes the satirical case that 35 years was understood to be relatively closer to the end of one's life as it is today in light of increased lifespan expectations, so a living constitutionalist would be tempted to read the Constitution to require a far older president than one who is only thirty-five. *See* Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 219–20 (1996). Paulsen's argument is tongue-in-cheek, and his satire extends too far—mocking a theory of interpretation so entirely divorced from the Constitution's text that one would be hard pressed to find any scholar or commentator who would make such an argument unironically.

[108] *See* U.S. CONST. art. II, § 1, cl. 8 (internal quotation marks omitted).

[109] This is not to say, however, that the implications of these provisions on constitutional interpretation and theory isn't up for debate. *See, e.g.*, Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 302–05 (2016) (discussing the constitutional oath requirement and its implications for constitutional law and its development).

[110] *See*, *e.g.*, Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 72, 74, 81 (2013); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RIGHTS L.J. 1, 2, 5 (2008); Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 2–3 (2021); Grant Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J.L. & SOC. CHANGE 237 (2013).

[111] *See, e.g.*, CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 2–3, 6–8, (David Marrani ed., 2015); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277–78, 283, 286 (2015); Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause: Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499 (2019); David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117 (2016); John Benjamin Schrader, *Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 VAND. L. REV. 1285 (2009).

Section Three's disqualification of those who have previously sworn oaths to support the Constitution who go on to engage in "insurrection or rebellion" or who give aid and comfort to enemies of the United States.[112] And don't forget the originalist literature about the Fourteenth Amendment overall.[113]

These are the provisions that are the subject of litigation and debate. And these are the provisions that make for blockbuster Supreme Court terms and catch the attention of the country.[114] Examining when constitutional analysis in these

[112] *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 606, 736 (2024) (arguing that the original meaning of Section Three of the Fourteenth Amendment disqualifies former President Donald Trump from office); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, 28 TEX. REV. L. & POL. 350 (2024) (responding to Baude and Paulsen and arguing that the original meaning of Section Three does not support a conclusion that Trump is disqualified); J. Michael Luttig & Laurence H. Tribe, *The Constitution Prohibits Trump From Ever Being President Again*, THE ATLANTIC (Aug. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibited-presidency/675048 (agreeing with Baude and Paulsen); Michael B. Mukasey, *Was Trump "An Officer of the United States"?*, WALL ST. J. (Sept. 7, 2023, 12:59 PM), https://www.wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26?mod=article_inline (making a similar—though far more abbreviated—argument as Tillman and Blackman); Adam Liptak, *An About-Face on Whether the 14th Amendment Bars Trump From Office*, N.Y. TIMES (Sept. 18, 2023, 8:11 PM), https://www.nytimes.com/2023/09/18/us/politics/trump-calabresi-14th-amendment.html (reporting on Professor Steven Calabresi's reversal of his own opinion regarding Trump's disqualification and statement that he'd been persuaded by Tillman, Blackman, and Mukasey, as well as Professor Akhil Amar's assertion that Mukasey's claims were "'a genuinely stupid argument'"); F.E. Guerra-Pujol, *The Limited Sweep and Ineffectual Force of False Analogies: A Brief Reply to Baude and Paulsen*, (Sept. 12, 2023) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4564998 (arguing that Baude and Paulsen's interpretation runs counter to due process requirements); *see also* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1 (2021).

[113] *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 1, 19–21 (2021); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 15–17, 35 (2020); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009).

[114] *See* Jimmy Hoover, *Supreme Court Embraces Originalism in "Momentous" Term*, LAW360 (July 1, 2022, 9:58 PM), https://www.law360.com/insurance-authority/articles/1508127/supreme-court-embraces-originalism-in-momentous-term (highlighting the Supreme Court's constitutional cases in its October 2021 term and describing the term as "the most consequential one in generations" that "establish[ed] a new conservative vision of constitutional law"); *see also* ERWIN CHEMERINSKY, A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021 4–5, 14–15, 71, 76–77, 123 (Am. Bar Ass'n, 2022); Alexandra Hutzler, *Blockbuster Supreme Court Decisions to Come on Student Loans, Affirmative Action, and More*, ABC NEWS (June 27, 2023, 6:35 AM) https://abcnews.go.com/Politics/blockbuster-supreme-court-decisions-student-loans-affirmative-action/story?id=100378197 (describing the court's decision on cases involving constitutional interpretation (or closely related to issues of interpretation) as "blockbuster" cases).

difficult constitutional cases goes wrong, and determining when and whether these mistakes constitute bullshit, therefore cuts to the core of key constitutional disputes.

This Section focuses on the "earnest originalist," an interpreter who wishes in good faith to determine the original meaning of a Constitutional provision. For purposes of this Section, we assume that political, moral, religious, and other personal biases play no (conscious) influence in guiding the analysis—these interpreters are concerned with reaching whatever answer is correct under their chosen theory of originalism.

2. Some Hypothetical, Earnest Interpreters

A more fleshed out hypothetical is necessary to illustrate how and where earnest originalist interpretation may raise concerns over bullshitting. To that end, consider the following scenarios:

Scenario 1:

> An attorney is representing a client who is challenging a city ordinance prohibiting the carrying of firearms on subways as violative of her Second Amendment rights. The attorney proceeds with what he thinks is a comprehensive survey of the literature on the Second Amendment's original meaning. As it turns out, that literature consists only of caselaw and modern law review articles—with no resort to primary sources, historical journals or literature, or even older law review articles.[115] As a result, of this research, the attorney fails to uncover a number of relevant primary sources that demonstrate a strong history of firearm regulation in mass transportation contexts (such as trains, streetcars, and boats), as well as contemporaneous newspapers, books, pamphlets, and speeches that recognized a right to serve in a militia and, in some cases, to keep firearms in the home, but supporting restrictions on the carrying of firearms.[116] On

[115] Such a hypothetical may not be so farfetched in light of barriers to accessing certain scholarship and the failure of the most popular legal databases to include older scholarship. *See* Simon Canick, *Availability of Works Cited in Recent Law Review Articles on LEXIS, Westlaw, the Internet, and Other Databases*, 21 LEGAL REFERENCES SERVS. QUART. 55, 66 (2002) ("LEXIS and Westlaw's coverage gets thinner as sought-after material gets older."); Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 798 (2006) (describing Lexis and Westlaw as a "competitive duopoly"). *See generally* James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 L. LIB. J. 553 (2011) (surveying citation patterns for open access articles (which are common in law reviews) compared with non-open access articles and concluding that open access scholarship is more likely to be cited).

[116] While this is a hypothetical set of restrictions and statements, ongoing work suggests that work by attorneys and courts to determine historical traditions of firearm restrictions tend to miss quite a bit. *See* Mark Joseph Stern, *The Volunteer Moms Poring Over Archives to Prove Clarence Thomas Wrong*, SLATE (Aug. 31, 2023, 5:45 AM), https://slate.com/news-and-politics/2023/08/moms-demand-action-gun-research-clarence-thomas.html. For purposes of this Article, I am not

this basis, the attorney argues that the Second Amendment's original meaning extends to the carrying of firearms in public transportation settings, and that a lack of historical regulation of the right to bear arms in mass and public transportation settings requires that the ordinance be overturned on Second Amendment grounds.[117]

Scenario 2:

The judge overseeing the case in which the plaintiff is challenging the subway firearm restriction believes that the best way to determine the meaning of the Second Amendment, and whether it applies to the present case, is to determine the Second Amendment's original public meaning. She reviews the pleadings of the parties as well as several amici curiae who file briefs in support of the parties. Beyond checking the key citations to confirm that they appear to support what is stated in the briefs, the judge does not conduct independent research, relying on the Supreme Court's guidance in *New York State Rifle & Pistol Assoc., Inc. v. Bruen* that the principle of party presentation allows judges to rely on the "historical record compiled by the parties."[118] As it turns out, the challenger was not alone in failing to conduct a thorough historical investigation—all parties relied primarily on secondary sources (mostly law review articles), and failed to present a complete history that includes numerous examples of analogous restrictions, as well as contemporaneous statements demonstrating an understanding of the Second Amendment's limited scope. Relying on the record, the judge rules in favor of the challenger and rules that the ordinance is unconstitutional, relying on the sources cited by the challenger and concluding that the sources cited by the government in defense of the ordinance are insufficient to overcome the challenger's historical evidence.

Scenario 3:

A law professor is writing an article on the state of Second Amendment law and wants to determine whether the court's opinion in the preceding case was correct as a matter of original public meaning. While the law professor is familiar with the literature on originalism and constitutional interpretation more generally, as well as cases in which the Supreme Court has purported to take an originalist approach, he has no formal historical

making a claim that the Second Amendment's original meaning permits or disallows the carrying of firearms in public transportation settings.

[117] *Cf.* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (requiring that where the "Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation").

[118] *See id.* at 2130–31 n.6.

> education or training and relies on much of the same literature as the parties, amici curiae, and court. The professor's research is more detailed, as he tracks down many of the citations in the literature upon which the court relied—but that literature consists primarily of legal scholarship written by others who lack historical training. While the professor finds some additional examples the court overlooked, the investigation is still woefully incomplete, and the professor concludes that the court's decision was right as a matter of original public meaning. The professor writes a law review article setting forth this conclusion, walking through the court's conclusions, recapping the evidence, and adding hundreds of additional footnotes providing background on originalist methodology and additional sources (which largely consist of legal secondary sources like opinions and law review articles). He submits the article for publication in a prominent law journal, and the student editors (all of whom lack formal historical education or training) approve it for publication in light of its timeliness and relevance to ongoing public debates over the Second Amendment.

All of these examples involve various legal actors getting things wrong.[119] By failing to conduct thorough research, all of the interpreters missed evidence of the Second Amendment's ordinary public meaning, as well as evidence of historical restrictions on carrying firearms that could serve as further evidence of original meaning.[120] This evidence all supported a conclusion contrary to that reached by all interpreters: The Second Amendment's original meaning does not protect the carrying of firearms on public transportation.

3. Earnest Mistakes Generally Aren't Bullshit

None of these actors appear to be bullshitters. By stipulation, they're engaging in what they honestly believe to be proper originalist analysis. The actors found what they believed to be the relevant evidence of original meaning and used that evidence to reach a conclusion in good faith. Things went wrong because the evidence they reviewed was incomplete—a mistake resulting from their lack of expertise and experience in historical investigation and analysis.

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[119] While *Bruen*'s short life has proven to be one of chaos and confusion in the lower courts, we will assume for simplicity's sake that the strong history of firearm regulation that all of these actors overlooked would meet its requirement of a historical tradition of firearm regulation. *See id.* at 2130–31; *see also* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 76, 154 (2023) (analyzing hundreds of decisions applying *Bruen* and arguing that they demonstrate that *Bruen*'s history and tradition test is unworkable).

[120] *See* Solum, *Triangulating Public Meaning*, *supra* note 72, at 1637–38 (arguing that while original expected applications of a constitution's text "do not *constitute* the original meaning of the constitutional text . . . they [still] can provide *evidence* of the original public meaning.").

Accordingly, none of these actors are bullshitters in the Frankfurtian sense, as their genuine effort to determine original meaning demonstrates a concern with the truth.[121] There is no evidence that these actors are guilty of engaging in Cohen-bullshitting either, as their work product is sufficiently clear for the various audiences (the judge, the professor, the student editors, and the millions of people who read law reviews) to understand and apply in their own work.[122] Audience-centric approaches to bullshit also don't seem to apply here, as there is no indication of any speaker taking advantage of audience implicit biases or susceptibilities to falsehoods.[123] There is also no evidence that the speakers are (at least intentionally) taking advantage of asymmetries in power and authority. The judge is in a position to make the call and have the final word on interpretation in this universe (setting aside the possibility of appeal, for the moment), but she still researches the parties' briefs and citations and provides reasons not only in support of her ruling for the challenger, but also for finding why the government's historical arguments and evidence were insufficient.[124]

A more open question is whether these instances are examples of contextual bullshit. Recall that some theorists focus on the context of utterances to determine whether they are bullshit, and note that certain contexts constitute "bullshit genres" in which bullshit is not only to be expected, but tends to be encouraged by the norms of a certain profession (lawyers and politicians) or situation (writing a recommendation letter).[125] Applying this notion to all of the scenarios above gets mixed results. Academics, for example, may be more prone to obscure and unclear utterances—but they do not seem to share the same level of distrust as lawyers and politicians[126]—with evidence on the question being, at worst, unclear.[127]

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[121] *See* FRANKFURT, *supra* note 2, at 130.

[122] *See* COHEN, *supra* note 5, at 104 (describing bullshit as unclarifiable utterances).

[123] *See* Taylor, *supra* note 8, at 50–51.

[124] *Cf.* Fredal, *supra* note 8, at 254–55 (describing how bullshit arises in asymmetrical social and power relations, and emphasizing that bullshit is characterized by stronger parties' feebleness in attempting to justify their justifications for actions or commands).

[125] *See* Richardson, *supra* note 25, at 87–88 (discussing bullshit genres); Wakeham, *supra* note 6, at 31 (noting that those practicing law or politics tend to have reputations for being flexible with the truth).

[126] *See* COHEN, *supra* note 5, at 106–07; Wakeham, *supra* note 6, at 31.

[127] Gallup measures the comparative trust of various professions, including members of Congress (9% of respondents view them with "high" or "very high" trust, and 62% of respondents view them with "low" or "very low" trust—with the other 28% of respondents rating them as "average"), lawyers (21% of respondents view them as trustworthy, and 28% of respondents view them as untrustworthy) and judges (39% trustworthy, 19% untrustworthy), but the polling does not include a place for legal scholars (or academics in general). Megan Brenan, *Nurses Retain Top Ethics Rating in U.S., But Below 2020 High*, GALLUP (Jan. 10, 2023), https://news.gallup.com/poll/467804/nurses-retain-top-ethics-rating-below-2020-high.aspx. High school teachers are included, and rank fairly highly, with 53% of respondents having "very high" or "high"

Things are more interesting with the attorney. Here, the case against bullshit is strong, as the attorney conducted what he thought to be thorough research of the issue when writing his brief. Even so, attorneys are expected to present and frame facts in a manner that supports the client's case—emphasizing (and perhaps stretching) evidence in favor of a desired interpretation, and distinguishing or disregarding evidence against that interpretation, rather than acknowledging and weighing the evidence.[128] Judges may also employ similar techniques to make their opinions sound more inevitable, uncontroversial, and absolute.[129] The adversarial approach to litigation, coupled with levels of expertise and resource limitations, may weigh in favor of concluding that even honest attempts at originalist analysis in constitutional litigation constitute a bullshit genre. I explore this possibility in greater detail below.[130]

4. Further Considerations: Unconscious Bias and Level of Expertise

While not explicitly implicated by the hypothetical scenarios above, it's worth noting that actors who genuinely believe they are trying to interpret the Constitution in an originalist manner may inadvertently do so in a biased manner.[131] Consider an attorney writing an initial case evaluation for a client on whether a constitutional provision supports that client's case. While an effective attorney would be expected to do thorough research for the client and uncover evidence and arguments both for and against the client's preferred outcomes,[132] that attorney may inadvertently take on the role of an advocate for the client even at this early stage of analysis

perceptions of honesty, and only 15% of respondents ranking teachers with "low" or "very low" levels of honesty. *Id.* Other research tests student perceptions of professor honesty and suggests that trust perception is affected most by how benevolent professors are perceived to be (with benevolence having a greater impact on trust perceptions than competence). *See* Silvia Di Battista, Heather J. Smith, Chiara Berti & Monica Pivetti, *Trustworthiness in Higher Education: The Role of Professor Benevolence and Competence*, SOC. SCIS., Jan. 12, 2021, at 8–9.

[128] *See* MARY-BETH MOYLAN & STEPHANIE J. THOMPSON, *Persuasive Legal Writing*, *in* GLOBAL LAWYERING SKILLS 129, 136–37 (2013) (contrasting a persuasive statement of facts with an objective statement of facts and noting that a "persuasive brief weaves a compelling story and attempts to deemphasize unfavorable facts").

[129] *See* Kimberly Y.W. Holst, *The Fact of the Matter*, 26 PERSPS.: TEACHING LEGAL RSCH. & WRITING 21, 24 (2017) (discussing how to teach examples of Justices framing facts in a persuasive manner that supports their rulings); *see also* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 681 (2015) (describing how "Justices often dismiss opposing constitutional views as 'frivolous' or 'without merit,' despite colorable—even persuasive—arguments to the contrary.").

[130] *See infra* Section IV.A.

[131] Samuel R. Bagenstos, *Implicit Bias's Failure*, 39 BERKELEY J. EMP. & LABOR L. 37, 39–40, 45–51 (2018) (arguing that, despite some criticism, there is a strong case that people are affected by implicit bias, and that prospects of changing or confronting this are complicated by defensive reactions).

[132] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2024).

and weigh evidence more strongly in favor of the client's opinion without realizing she is doing so. Or consider a judge who has a gut feeling that a case should come out in a certain way and who prematurely terminates her research into historical meaning because the results of the initial investigation are consistent with that gut feeling.

Neither of these actors appear to be Frankfurtian bullshitters. If the biases in this situation are truly unconscious and each interpreter thinks that they are doing a genuinely honest and thorough job of reviewing the evidence and reaching a conclusion, they do not act with the disregard for truth required of Frankfurtian bullshit.[133] This may change, however, if the actors are educated regarding unconscious biases and other cognitive shortcuts that may contribute to mistaken conclusions.[134] Should legal actors continue to act in accordance with these inclinations—even after being alerted to their potential influence—their conclusions may cross the line from earnest mistake to knowing or reckless bullshitting.

It is also worth considering the influence that knowledge levels and expertise may have on whether one is guilty of a disregard for truth in constitutional interpretation. To be guilty of bullshitting in the Frankfurtian sense, one must display a disregard for the truth of one's statements.[135] As the preceding discussion on unconscious bias demonstrates, the ability to disregard the truth requires some level of awareness that one may be mistaken.[136] Such an awareness may take a variety of forms, and include the awareness of the existence (or potential existence) of historical facts that may compromise one's interpretive stance, the existence of alternate avenues of research that one has failed to pursue, or the knowledge that others have reached contrary conclusions. All of this relates to the speaker's level of expertise—particularly when it comes to historical investigation.

Much of this Section's discussion involves scenarios that assume that the interpreters are making a good-faith effort at originalist analysis. In practice, things won't be so clear, as determining whether someone made a mistake in good faith or with ulterior motives may be difficult to derive.[137] In the face of the challenging task of determining whether one is acting as a good-faith interpreter, the speaker's level of expertise may be a useful proxy. For constitutional interpreters who have more experience, education, or expertise in interpretive methodology, the complexities of

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[133] *See* FRANKFURT, *supra* note 2, at 130.

[134] *See* Jacqueline M. Kirshenbaum & Monica K. Miller, *Judges' Experiences with Mitigating Jurors' Implicit Biases*, 28 PSYCHIATRY, PSYCH. & L. 683, 689 (2021) (reporting that many judges surveyed lack "awareness of what implicit bias is and how it can affect the courtroom").

[135] *See* FRANKFURT, *supra* note 2, at 130.

[136] *See supra* notes 133–34 and accompanying text.

[137] Although not impossible if one takes the time to review other work of the speaker that contradicts the speaker's present assertions or betrays a deeper knowledge of historical facts or resources that the speaker neglects to mention or engage in a later case.

constitutional history, and the risks of oversimplification or neglect of historical sources are more likely to be bullshitting than making good-faith mistakes because they are more likely to be aware of their lack of historical expertise and alternate potential interpretations.[138]

Revisiting our earlier hypothetical actors, we can see how expertise may play a role in determining which of them is more likely to be bullshitting absent confirmation of their intent. The attorney and the judge are less likely to be engaged in bullshitting because their day jobs involve litigating and deciding a variety of cases rather than delving into the weeds of constitutional interpretation and historical gun regulations. It's therefore more likely that they are simply unaware of theoretical nuances in interpretive theory or key historical facts that fall outside of their standard domains of legal research.

To be sure, this is "more likely," but not guaranteed. A judge or attorney may have enough experience or education in history or constitutional interpretation to know or suspect that her analysis is incomplete. And yet, the tight deadlines of litigation may require the judge or attorney to go forward based on this incomplete analysis. In this situation, the judge or attorney may end up being forced to bullshit as a result of the procedural demands of litigation. One might argue that this sort of forced bullshitting should be treated less severely than the intentional bullshitting explored in the next Section. But this argument may be undermined to the extent that the judge or attorney has the option of choosing an alternate theory of interpretation that may not force them to bullshit.[139]

The law professor is a different story. We expect the professor to have more time to delve into the weeds of historical questions than the attorney or judge, as the professor is unconstrained by the procedural deadlines of litigation.[140] We also expect the professor to have a deeper grounding in the background literature on originalism and how to properly engage in originalist analysis. Even if the professor isn't a trained historian, we expect him to at least know enough to be aware that he doesn't have all the answers and that his research is incomplete. For that professor to go ahead anyway is a red flag that we're being bullshitted. And to the extent that the professor acknowledges his lack of credentials and background and makes excuses for failing to engage in rigorous historical analysis, these are further warning signs that we've entered bullshit territory.[141]

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[138] *See supra* notes 133–36; *infra* notes 139–41.

[139] *See generally* CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION (2023) (discussing the variety of theories of interpretation available to legal actors).

[140] *See* Solum, *Triangulating Public Meaning*, *supra* note 72, at 1674–75.

[141] I explore this particular tendency in greater detail below. *See infra* Section IV.A.2.

D. Disingenuous Originalists and Distinguishing Bullshit and Lies

We now turn from earnest originalists to disingenuous originalists. These are actors who are using originalism to pursue some desired end—whether it is a result in a particular case, or a result that aligns with one's personal or political values. These actors go through the motions of originalism, but they do so with goals that are different from determining original intent, original meaning, or original methods.

1. New Characters: Disingenuous Originalists

In discussing disingenuous originalists, this Section will rely on variations of the genuine interpreters introduced previously. Consider the following variation on the prior scenarios:

Scenario 1:

> An attorney is representing a client who is challenging a city ordinance prohibiting the carrying of firearms on subways as violative of her Second Amendment rights. This attorney wants to win the case by any means possible, and suspects that the judge will be receptive to originalist arguments. As a result, the attorney crafts a brief that claims that the original public meaning of the Second Amendment protects a right to carry firearms on public transportation—choosing to rely only on secondary sources that support the client's account and omitting references to the few primary sources that appear to undermine the client's position.[142] The scope of the attorney's overall research is still limited and the attorney never uncovers contrary evidence in primary sources and hard-to-locate historical laws and regulations that undermine the client's position. Based on the historical evidence the attorney cherry-picks from a limited range of sources, he argues that the Second Amendment's original meaning extends to the carrying of firearms in public transportation settings. The attorney omits most contrary evidence he finds, and for the few he includes, he argues that they are irrelevant.

Scenario 2:

> The judge overseeing this Second Amendment case believes that people have the right to carry firearms wherever they please and therefore plans to find in favor of the challenger before reviewing the parties' briefs. In light of the Supreme Court's turn to history in Second Amendment cases, she expects that an opinion employing an original public meaning

[142] For purposes of this hypothetical, the attorney is still relying on the limited review of secondary sources and time-limited legal scholarship that the genuine attorney character relied upon. *See supra* Section III.C.2.

approach to the Second Amendment will survive on appeal.[143] As in the prior hypothetical, the judge receives briefs from the parties as well as several amici curiae but does not conduct research beyond cite-checking the key citations in the filings. Consistent with the prior hypothetical, the parties' and amici curiae's failure to conduct a thorough historical analysis results in the omission of significant historical evidence undermining the challenger's claims. The judge rules in favor of the challenger and rules that the ordinance is unconstitutional, relying on the sources cited by the challenger and omitting most of the sources cited by the government, other than a few examples that the judge argues are irrelevant to the inquiry.

Scenario 3:

A law professor is writing an article about the court's opinion in the preceding case. The law professor personally agrees with the outcome in the case and plans from the outset to write an article agreeing with the outcome. While the law professor is well-versed in the literature of originalism, and is aware of cases in which the Supreme Court has purported to take an originalist approach, he has no formal historical education or training and relies on much of the same literature as the parties, amici curiae, and court. Based on this review, which corresponds to the professor's initial impressions of the case, the professor concludes that the court's decision was right as a matter of original public meaning. The professor writes a law review article setting forth this conclusion, walking through the court's conclusions, emphasizing the evidence the court relied upon, and dismissing contrary evidence cited by the state and amici curiae as irrelevant. The article is accepted for publication, and the student editors, who, as earlier, lack formal education and experience in historical research, verify the author's citations but do not perform additional research to locate the evidence the professor fails to cite.

Like the genuine interpreters, all three of these actors get things wrong as a matter of original public meaning.[144] Unlike the genuine interpreters, each of these actors had a conclusion in mind before embarking on their originalist analysis. Rather than delve into the limited contrary evidence available to them, these goal-oriented actors emphasized the evidence that supported their desired end, dismissed

[143] *See generally* District of Columbia v. Heller, 554 U.S. 570, 605 (2008); N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022).

[144] The "correct" original public meaning of the Second Amendment as applied to public transportation is part of the hypothetical—I am not making an independent claim that this is, in fact, consistent with the Second Amendment's original meaning.

contrary evidence as irrelevant, and presented a work product that reflected this one-sided analysis.

While these actors are useful characters to illustrate how bullshit may arise in originalist reasoning, real world attempts at originalism offer examples as well.

District of Columbia v. Heller[145] serves as an example of Justices "believ[ing] their own bullshit."[146] Justice Scalia's opinion for the Court is hailed as a quintessential example of originalist analysis (at least by some scholars and commentators).[147] But critics of the opinion highlight mistakes and omissions in Scalia's reasoning and conclusions.[148] To be sure, there may be room for debate over whether these are earnest mistakes or something more nefarious. Scalia enters bullshit territory, however, in his absolutism—framing historical evidence as one-sided in support of an obvious conclusion.[149] Here, originalist reasoning becomes bullshit as a result of its framing, with Scalia's overarching goal of making a strong statement in

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[145] 554 U.S. 570 (2008).

[146] *See* Kimbrough, *supra* note 39, at 10–13; *see also* LAURA PENNY, YOUR CALL IS IMPORTANT TO US: THE TRUTH ABOUT BULLSHIT 212 (2005) (distinguishing examples of those who believe their own bullshit from other forms of bullshitting).

[147] *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926, 941–46 (2009) (arguing that the Court "embraced originalism" in at least some parts of the Heller opinion, though further explanation of "unarticulated assumptions" are required to "square the result in *Heller* with a fully articulated originalist theory of constitutional interpretation"); Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-*Heller *Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413, 414 (2020) ("*District of Columbia v. Heller* marks the high point for the Supreme Court's originalist jurisprudence."); Randy E. Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J. (June 27, 2008, 12:01 AM), https://www.wsj.com/articles/SB121452412614009067. *But see* Nelson Lund, *The Second Amendment*, Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1366–68, 1376 (2009) (arguing that Scalia's reasoning in *Heller* was unoriginalist and that, based on the opinion, "not a single member of the current Court takes originalism, or the purpose of the Second Amendment, quite that seriously").

[148] *See generally* William G. Merkel, *The* District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 349 (2009) (arguing that Justice Scalia's analysis and claims of singular meaning misrepresent the "hotly contested" original meaning of the Second Amendment); Noah Shusterman, *Why Heller Is Such Bad History*, DUKE CTR. FOR FIREARMS L. (Oct. 7, 2020), https://firearmslaw.duke.edu/2020/10/why-heller-is-such-bad-history ("*Heller* . . . is bad history because it viewed the individual right to bear arms as *why* the amendment was written in the first place; it is bad history in its claim that the Second Amendment protected '*only* individuals' liberty to keep and carry arms.'" (quoting *Heller*, 554 U.S. at 603)).

[149] Berger, *supra* note 129, at 684–85.

support of an individual right to bear arms, even in the face of extensive doubts raised in Justice Stevens' contrary conclusions in the face of the same evidence.[150]

Kennedy v. Bremerton School District[151] is another example of the Court bullshitting about the role historical analysis plays in constitutional interpretation. There, the Court confronted a First Amendment challenge by a public high school football coach, who claimed that his free speech rights were violated when he was suspended after insisting on praying on the football field after several games.[152] The Court began with a dubious statement of the case's facts, which portrayed the prayers as quiet and peaceful when, in fact, they were the subject of public and media attention that the coach had sought out.[153] The Court rejected the School District's argument that it was seeking to avoid violating the First Amendment's Establishment Clause.[154] To get there, the Court first asserted that the test for determining an Establishment Clause violation required "'reference to historical practices and understandings,'" and rejected the alternative test based in *Lemon v. Kurtzman* with the dubious assertion that the *Lemon* test had been "long ago abandoned."[155] Moreover, once the Court established that the test for determining an Establishment Clause violation was grounded in history and tradition, it refrained from applying its own test—instead ultimately rejecting the School District's Establishment Clause

[150] *See* Eileen Kaufman, *The Second Amendment: An Analysis of* District of Columbia v. Heller, 25 TOURO L. REV. 703, 714–16 (2009) (noting the overlap in evidence that Justices Scalia and Stevens considered and highlighting Justice Stevens' opposite conclusions); *see also* Matt Ford, *When John Paul Stevens Eviscerated Antonin Scalia*, NEW REPUBLIC (July 17, 2019), https://newrepublic.com/article/154488/john-paul-stevens-obituary-dc-heller-dissent-antonin-scalia (arguing for Stevens' interpretation of the historical evidence in *Heller* over Scalia's conclusions); Berger, *supra* note 129, at 673–74 (critiquing absolutist rhetoric regarding difficult questions of constitutional law in *Heller* and in other contexts).

[151] 142 S. Ct. 2407 (2022).

[152] *Id.* at 2418–19.

[153] *See id*. at 2415–19 (asserting that Kennedy offered "a quiet prayer of thanks" and that he "offered his prayers quietly while his students were otherwise occupied"). *But see id.* at 2434, 2437–40 (Sotomayor, J., dissenting) (arguing that the Court's opinion "misconstrues the facts" by portraying the "prayers as private and quiet," and detailing Kennedy's media appearances and the resulting atmosphere at games in which members of the public and media stormed the field to join Kennedy in prayer). *See also* Chris Gilbert, *A Tale of Two Football Fields:* Kennedy v. Bremerton School District, JD SUPRA (Feb. 22, 2023), https://www.jdsupra.com/legalnews/a-tale-of-two-football-fields-kennedy-v-7817818/ (arguing that the Court's factual findings "appear highly dubious . . . based on the record that was actually before the Court.").

[154] *Kennedy*, 142 S. Ct. at 2427–28, 2431.

[155] *Id.* at 2427–28 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)). *But see id.* at 2449 (Sotomayor, J., dissenting) (disputing the Court's claim that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which set forth the Court's test for determining establishment clause violations, had already been abandoned).

arguments by resorting to hypothetical consequences that would result from the School District's desired outcome.[156]

The *Kennedy* opinion demonstrates multiple levels of bullshitting (if not outright lying). The Court's efforts to spin the facts are bullshit, as the Court abandons the complete and accurate conveyance of facts in the record in favor of framing Kennedy's actions as quiet and peaceful, which in turn make his case seem stronger.[157] The Court's assertion that history and tradition had taken the place of *Lemon* also appears to be bullshit, as a majority of the Court had never explicitly overruled the case—yet the Court presses on with this assertion with the goal of rejecting the School District's argument.[158] And, particularly relevant to this Article's discussion of bullshit, the Court's initial emphasis on history and tradition in determining the scope of the Establishment Clause is also bullshit, as the Court goes on to decide the case by reference to hypothetical concerns rather than engage in any investigation of historical prayer practices at public school extracurricular events.[159] The Court ultimately seems unconcerned with historical truths, instead emphasizing the importance of history and tradition only to the extent that it brushes aside the School District's Establishment Clause arguments.

2. Bullshitting, Lying, and Mitigation Strategies

While all of these actors are behaving disingenuously, it's worth scrutinizing their actions and intentions to determine what sort of dishonesty is at issue. In particular, there are questions over whether these actors are lying or bullshitting, a distinction central to Frankfurt's inquiry into the nature of bullshit. Lies, according to Frankfurt, are characterized by the speaker's knowledge of their falsity—they are statements that are not true, which the liar knows to be untrue.[160] Lying is different from bullshitting in at least two key ways. First, a lie must be untrue, while bullshit may be true or false.[161] Second, a liar must know that what they are saying is untrue and, as a result, "[t]he liar is inescapably concerned with truth-values" in a way the bullshitter is not.[162]

To be sure, there is far more to be said on lies than their distinction from bullshit. Frankfurt notes work by St. Augustine on distinguishing various types of lies, which breaks lies into eight types that depend on "the characteristic intent or

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[156] *Id.* at 2431 (raising concerns that the district's interpretation of the Establishment Clause would permit schools to "fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice.").

[157] *Id.* at 2434, 2444 (Sotomayor, J., dissenting).

[158] *Id.* at 2434, 2449.

[159] *Id.* at 2428–29, 2431–32 (majority opinion).

[160] *See* FRANKFURT, *supra* note 2, at 17, 128 (1988).

[161] *Id.* at 130.

[162] *Id.*

justification with which a lie is told."[163] Sissela Bok defines lies in a broad manner, stating that a lie is an "intentionally deceptive message in the form of a statement," choosing this broad formulation to include cases in which false statements may be justified by circumstances or relationships.[164] Other formulations of lies may be even broader, including statements that are misleading to the audience—taking advantage of confusion over definitions or how questions are stated to mislead without saying something that is clearly false.[165] To avoid wandering astray into the extensive literature on lying, I will focus on Frankfurt's distinction of lies from bullshit. From this perspective, the intention of the speaker becomes paramount—particularly the speaker's level of knowledge as to whether what they say is true or false.

With this focus on intention in mind, it seems like none of our disingenuous interpreters are lying, but all of them appear to be bullshitting. The attorney does not know that what he writes in his brief is false—rather his paramount concern is to present the information he finds in a manner that most effectively supports his client's position. Because this client-centric strategy guides the attorney's statements, rather than the consideration of whether those statements are true, the attorney is bullshitting. Due to the inexpert efforts of all counsel and parties in the case, the judge also doesn't know that her conclusion is wrong, but she is also a bullshitter because her goal in rendering her opinion is to reach a particular conclusion—a conclusion that happens to be largely consistent with the parties' submissions. And the law professor is a bullshitter rather than a liar, since he is unaware of the historical evidence that contradicts his account, but proceeds with writing his article with the goal of framing the evidence in a manner that supports the outcome in the case.

These scenarios also implicate alternate definitions of bullshit. Consider the attorney's statement. This is now a clean example of the "bullshit genre" of legal pleading—an argumentative document produced with the goal of winning a client's case rather than presenting a thoroughgoing account of historical fact.[166] The attorney lives up to our expectations of the legal profession as one filled with untrustworthy individuals who will disregard the truth to the extent that doing so will better serve their clients.[167] Audience-centric theories of bullshit also fit into the attorney's

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[163] *Id.* at 131.

[164] *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 15 (1978) [hereinafter BOK, LYING].

[165] *See* Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297, 309–10 (2022); *see also* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 18–21 (2014) (distinguishing lies from deceptive statements).

[166] *See* Richardson, *supra* note 25, at 87 (describing bullshit genres); *see also* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (1965) (describing "law-office" history as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.").

[167] *See* Wakeham, *supra* note 6, at 31.

statement, as the attorney likely expects to get away with his bullshit more easily in light of the time constraints the court faces—thereby decreasing the likelihood of an independent review that will reveal the bullshit nature of the attorney's claims.[168] The judge also takes advantage of asymmetric power dynamics that aid in the proliferation of bullshit—ruling in favor of a particular interpretation with confidence as a result of the judge's power over the attorney and the parties, as well as with little fear of acquittal in light of the Supreme Court's approval of making decisions based only on the evidence the parties are able to amass.[169]

What might it take for these interpreters to cross the line from bullshitting into lying? Under Frankfurt's conception, this shift would largely depend on the actors' knowledge about the truth value of their statements.[170] If the attorney had come across damning historical evidence that contradicted his client's desired reading of the Second Amendment and had nevertheless written a brief reaching the same conclusions by simply omitting that historical evidence, the attorney would be lying when making claims regarding the meaning of the Second Amendment, since the attorney knows these claims are proven false by the historical evidence. Similarly, if one of the parties or amici curiae submits this conclusive historical evidence and the judge nevertheless concludes that the Second Amendment protects the carrying of firearms on public transportation, there would be a strong case that the judge is lying in light of her knowledge of evidence disproving her conclusions. The same would be true of the professor, if he is able to track down that contrary evidence in writing his article on whether the judge got it right, but nevertheless concludes that the judge was indeed correct.

While legal rules tend to prohibit outright lies, there is still a fair amount of leeway they may permit for bullshitting and similar dishonesty.[171] And there is an argument to be made that bullshit might be easier to engage in than lying. For liars, the knowledge that one has made a false statement affects the speaker, as he knows his integrity has been compromised and runs the risk of being found out.[172] The bullshitter, though, lacks this knowledge, and may feel absolved by the possibility that her statements made without regard to their truth may, incidentally, end up being true after all.

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[168] *See* Fredal, *supra* note 8, at 254 (noting the role that power disparities play in communicating bullshit).

[169] *See id.* at 254, 255; *see also* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) (stating that judges may reach historical conclusions based on the records presented by the parties to a dispute).

[170] FRANKFURT, *supra* note 2, at 130–31.

[171] *See* Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J. L. & POL'Y 37, 75 (2022) (noting false or misleading statements that may be permitted under the model rules).

[172] BOK, LYING, *supra* note 164, at 24–25.

If this is the case, then those who might be prone to bullshit may not be willing to cross the line into the more psychological and clear-cut realm of outright lies. From here, the importance of educating would-be bullshitters becomes apparent. Consider Scott Kimbrough's discussion of the bullshitter who ends up believing his own bullshit.[173] Informing the bullshitter of the complexity of the topic being discussed and the range of evidence that bears on the statement may force him to reckon with what he is saying and potentially change his ways before veering into becoming a liar.[174] Additionally, efforts to inform both legal actors and the broader public regarding facts that undermine bullshit arguments and conclusions may prompt others in the legal field—or the broader public—to call bullshit on attorneys and courts.[175]

All of this further demonstrates the need to examine the arguments of attorneys, judges, and legal academics with an eye not only to incorrect statements, but also with an eye to whether the statement is bullshit or some other form of dishonesty. If a misstatement crosses the line from an honest mistake and veers into the realm of bullshit or lies, this should be called out. Doing so may prevent these claims from perpetuating in further scholarship or in judicial opinions. Calling out bullshit in the context of judicial opinions is important as well, as these opinions may serve as precedent for cases down the line. All of this makes meaningful progress toward keeping the legal system from living up to its reputation as a bullshit genre, or institution that rewards lies and deceit.[176]

3. Bullshit Laundering and Mandatory Bullshit

This Article's discussion has thus far focused on earnest or disingenuous originalists all working in tandem in relation to a particular dispute. Things become more complicated when we mix these actors. One such complication is what I label as "bullshit laundering," in which bullshit is repackaged by an actor who lacks the intent required to be a bullshitter.

To illustrate: Assume we are dealing with the disingenuous attorney discussed earlier in this Section.[177] Recall that this attorney's sole focus is winning the case for

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[173] *See* Kimbrough, *supra* note 39, at 10–13; *see also* PENNY, *supra* note 146, at 212 (distinguishing examples of those who believe their own bullshit from other forms of bullshitting).

[174] *See* Jonathan Webber, *Liar!*, 73 ANALYSIS 651, 656 (2013) (noting that it is "essential to bullshit that the speaker intends to conceal the fact that they are speaking without regard to the truth.").

[175] *See* Taslitz, *supra* note 46, at 1411 (urging that attorneys take on the role of alerting people about the scope of their rights in the criminal procedure context so they may push back against practices that undermine their rights).

[176] *See* Clem, *supra* note 30, at 109 (identifying and criticizing political "structures" that "foster the vice of truth indifference" by rewarding actors who lie or bullshit); *see also* Wakeham, *supra* note 6, at 31–32 (discussing "bullshit genres").

[177] *See supra* Section III.D.1.

his client, and that he engages in selective research and framing of evidence based around this goal without regard for historical evidence that might contradict his client's position—tactics which amount to bullshitting under Frankfurt's and others' definitions.[178] But now assume that the judge overseeing the case is earnest and wishes to determine the correct, original public meaning of the Second Amendment. This judge, however, relies on the attorney's bullshit to reach her decision, resulting in an opinion that reflects the attorney's arguments.

Is the judge in this situation bullshitting? Based on these hypothetical facts, it appears that she is not. The judge honestly believes that counsel's submissions are an accurate account of the historical evidence of the Second Amendment's original meaning. Perhaps she's convinced by the law and literature on originalism that asserts that such submissions are an acceptable way of reaching these complex historical conclusions.[179] While the judge's statement may not be bullshit, it should still be called out for perpetuating the bullshit in the attorney's submission. This practice of "bullshit laundering" involves the practice of earnestly repeating bullshit assertions, causing them to proliferate in the form of earnest utterances.[180]

Now consider a scenario in which attorneys and judges may be pressured into bullshitting. An attorney making an argument about the Second Amendment may be aware of his shortcomings—knowing that he's not a historian, that he hasn't found all evidence relevant to his claims, and that he needs to frame the evidence in a manner most likely to advance his client's case. The attorney, however, is aware of the Supreme Court's recent opinions requiring parties to rely primarily on historical evidence, and feels pressured to make historical arguments that he recognizes may

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[178] FRANKFURT, *supra* note 2, at 130*; e.g.*, COHEN, *supra* note 5, at 104.

[179] N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) (stating that judges may rely on the submissions of the parties before them as sufficient evidence of historical meaning and tradition); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813–14 (2019) (claiming that historical questions over the content and meaning of laws requires a narrow inquiry compared with other forms of historical analysis). *But see* Joseph Blocher & Eric Ruben, *Originalism-By-Analogy and Second Amendment Adjudication*, 133 YALE L. J. 99, 146–47 (2023) (arguing that analogizing to prior historical restrictions is a far more complex undertaking than the Court suggests); *see also* Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699, 726, 728, 734–36, 743 (2023) (noting the difficulties in determining whether questions of historical laws are questions of fact or law, and emphasizing appellate courts' lack of a fact-finding apparatus similar to that of trial courts).

[180] G.A. Cohen raises a similar hypothetical in discussing honest people who follow bullshitters or who inadvertently produce their own bullshit (recall that Cohen's bullshit is defined as unclarifiable utterances rather than dependent on speaker intent). *See* COHEN, *supra* note 5, at 106–07. Cohen then distinguishes between those who aim for bullshit and intentionally produce unclarifiable statements, and those who are disposed to produce such bullshit, either because of confusion or poor writing skill, or because they are following the bullshit of others. *Id.*

be lacking.[181] And consider the judge overseeing this case. She may be aware of her own shortcomings as a historian—she is trained as a lawyer, not a historian, and has an extensive caseload that precludes her from digging into whether the parties before her have canvassed all relevant historical evidence in formulating their arguments. And yet this judge is also aware of the Supreme Court's emphasis on historical tradition, along with the Court's assurance that judges may simply rely on the evidence presented by parties to resolve these tricky historical questions.[182]

These scenarios illustrate how otherwise earnest actors may be pressured into bullshitting due to institutional pressures. Attorneys who want to best represent their clients and judges who lack resources may spin evidence or take shortcuts to best achieve desired outcome. To an extent, this may be an inevitability of legal practice in general—in which attorneys face constant pressure to conform evidence and authorities to serve a client's interests.[183] The extent and inevitability of bullshit in lawyering are important questions—though a thorough exploration would go far beyond the scope of this Article. It's worth exploring, however, whether originalist analysis lends itself to bullshitting, bullshit laundering, or mandatory bullshit—a question to which I now turn.

IV. BULLSHIT'S CONSTITUTIONAL IMPLICATIONS

The preceding sections' primary goals were to identify bullshitters, distinguish them from genuine actors and liars, and make the case for identifying and calling out bullshit where it occurs. This Section turns to the broader implications of bullshit for originalism and constitutional interpretation more generally. I begin with a question hinted at throughout the earlier analysis: Whether historical analysis ought to be considered as so susceptible to bullshit that it should be considered a bullshit genre? This inquiry is sharpened by a focus on academic originalists who meet objections from historians by deeming historical analysis irrelevant to the originalist inquiry. I then address objections, starting with the possibility that originalists honestly believe that the work of historians has no place in history-oriented constitutional interpretation. Finally, I address objections that there's nothing we can do about bullshit at the theoretical level, and that concerns over bullshit can apply to any form of constitutional interpretation.

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[181] *See Bruen*, 142 S. Ct. at 2130.

[182] *Id.* at 2130–31 n.6.

[183] *See* Drury Stevenson, *Forensic Linguistics: An Introduction to Language in the Justice System, By John Gibbons*, 77 U. COLO. L. REV. 257, 280 (2006) (book review) ("[I]t is the attorney's job to advocate zealously for his client, and everyone assumes attorneys will spin facts, slant evidence, and present everything in as biased a manner as possible."); Matt Dodd, *Crossing the Cop: Constructive and Destructive Cross-Examination in DUI Cases*, THE CHAMPION, Nov. 2016, at 22, 23 (discussing how defense attorneys can spin officers' recitations of facts in favor of their clients).

A. History in Legal Arguments: A Bullshit Genre?

Identifying originalism as a form of constitutional interpretation that is uniquely prone to abuse by bullshitters raises the question of whether the entire endeavor of using history in legal practice ought to be viewed as its own bullshit genre. Recall that bullshit genres are forums or contexts of communication in which speakers are expected to be lying or bullshitting—and one who approaches these communications with the expectation of honesty is thought to be confused or naïve.[184] These genres are shaped in part by institutional contexts—as there are certain professions or settings in which one expects to be bullshitted.[185] In a world where these bullshit genres exist, bullshit is best dealt with by recognizing the genres and adjusting one's expectation of the truth accordingly.[186]

1. Bullshit Genres: Applied to Originalism

Bullshit literature is rife with references to context, and how bullshit may be defined or how people may expect to encounter bullshit in certain scenarios. Cornelis de Waal contrasts bullshitting with genuine inquiry, and argues that encouraging the latter practice may help reduce the proliferation of bullshit.[187] Genuine inquiry, according to de Waal, is "any inquiry that is fueled by the desire to find true answers to the questions one is asking" and, crucially, must be "something attainable," rather than an abstract notion like the "whole truth" or some other undefinable or idealized goal.[188] De Waal argues that failing to engage in genuine inquiry, as well as "being forced to speak on issues one knows too little about, all contribute to a culture of bullshitting."[189]

Definitions of bullshit matter in this evaluation. In contrast to Frankfurt, for example, Gary Hardcastle takes a broader view of bullshit that relates more to how speakers discuss a concept, suggesting that "bullshit arises when people have something they want to get across and are confused, perhaps but not always culpably so, about what tools are appropriate to that task."[190] Hardcastle ties this formulation to critiques of metaphysical inquiry, which accuse those purporting to make true or false statements about the nature of reality to be speaking in terms that ultimately

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[184] *See* Richardson, *supra* note 25, at 87; *see also* Eubanks & Schaeffer, *supra* note 21, at 378–79 (arguing that certain social situations in which expectations of truth are distorted result in rhetorical games that complicate the nature of bullshit); Wakeham, *supra* note 6, at 31.

[185] Wakeham, *supra* note 6, at 31–32.

[186] *Id.* at 33.

[187] Cornelis de Waal, *The Importance of Being Earnest: A Pragmatic Approach to Bullshitting*, *in* BULLSHIT AND PHILOSOPHY 99, 103–05 (Gary L. Hardcastle & George A. Reisch eds., 2006).

[188] *Id.* at 104–05.

[189] *Id.* at 109.

[190] *See* Gary L. Hardcastle, *The Unity of Bullshit*, *in* BULLSHIT AND PHILOSOPHY 137, 148 (Gary L. Hardcastle & George A. Reisch eds., 2006).

cannot be characterized as true or false assertions.[191] Whether or not such a critique is warranted, it illustrates how one might identify bullshit in other contexts: The speaker is using terms or concepts that are not appropriate to the topic discussed. Other formulations of bullshit emphasize the context of the utterance. George Reisch describes the tactic of using confusion over the context of speech to mislead the listener, and describes how bullshitters may communicate in a manner that sounds like one form of speech when they are, in fact, engaging in a different form of speech.[192] The example Reisch cites is of advocates for the teaching of intelligent design co-opting the language and structure of scientific rhetoric in favor of their religious teachings, in service of pursuing political and moral goals rather than scientific truth.[193] One may see how this characterization of bullshit applies to legal arguments that seek to take on the mantle of historical fact.

For decades, scholars have critiqued how lawyers and judges employ historical argument to advance arguments and outcomes. In 1965, Alfred Kelly coined the phrase "law-office history" to describe how legal actors abused history, defining it as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered."[194] Kelly criticized lawyers for this practice, arguing that attorneys "do not attempt to present a court with balanced and impartial statements of truth."[195] Were an attorney to do this, rather than make the strongest case for his or her client, the attorney would "presumably not be functioning within the values of the system," by failing to fulfill his or her role as an advocate for the client's interests rather than "objective truth, historical or otherwise."[196] Kelly argued that judges engaged in similar practices as well, employing the "historical essay" to exert power and avoid precedent—often through the use of what ended up being "very bad history indeed," as a result of its partisan, acontextual, and cherry-picked nature.[197]

Kelly's work parallels the version of unclarifiable bullshit G.A. Cohen describes—as the historical essay may serve to obscure the Court's true purpose of overruling precedent or imposing policy preferences behind a smokescreen of historical claims.[198] While the historical essays Kelly critiques may not be as unclarifiable as Cohen's bullshit, the underlying theme of obscurity rather than substance is

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[191] *Id.* at 147–48.

[192] *See* George A. Reisch, *The Pragmatics of Bullshit, Intelligently Designed*, *in* BULLSHIT AND PHILOSOPHY 33, 34–36, 38 (Gary L. Hardcastle & George A. Reisch eds., 2006).

[193] *Id.*

[194] Kelly, *supra* note 166, at 122 n.13.

[195] *Id.* at 155.

[196] *Id.* at 156.

[197] *Id.* at 125–26.

[198] *See* Cohen, *supra* note 5, at 104; *see also* Kelly, *supra* note 166, at 125–26.

present in both contexts.[199] We also see parallels to contextual bullshit formulations—particularly that which George Reisch describes in which the bullshitter blurs lines between different forms of discourse to mislead the audience.[200] Here, historical evidence is presented as though it supplements—or substitutes—legal argumentation, but the context is still one of a legal opinion and constitutional interpretation remains the end result.

Kelly is far from the only critic of legal actors' use of history. William Nelson critiques legal actors' use of history, noting that historical investigation requires determinations over the credibility of historical fact—determinations far different from standard judicial determinations regarding determinations of adjudicative fact.[201] Judges may be good judges of the credibility of witnesses who appear before them, but "they may reason anachronistically when they use their present-day behavioral assumptions to assess the accuracy of a particular interpretation of the past."[202] Judges' determinations of historical credibility are therefore likely to reflect modern moral and political values, a practice that "is likely to mislead both himself and his audience as to the ultimate basis of his decisions."[203] Joseph Blocher and Brandon Garrett raise similar concerns over judicial factfinding in modern contexts—noting that the Supreme Court's recent emphasis on historical legal traditions requires judges to make historical analogies that are misleadingly complex and for which judges are ill-prepared.[204]

Critiques sounding in history aim at originalists in particular.[205] Bernadette Meyler critiques originalist references to the common law, arguing that finding original meaning of constitutional provisions is complicated by the fractured nature of the common law, which tends to support "several distinct positions" rather than "a single common law answer to a constitutional question."[206] Jack Rakove criticizes the originalist effort to determine original public meaning, highlighting overlooked

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[199] COHEN, *supra* note 5, at 104; Kelly, *supra* note 166, at 125–26.

[200] *See* Reisch, *supra* note 192, at 35–36, 38 ("An effective bullshitter will make use of the diverse beliefs and convictions that populate our world.").

[201] William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1250–51 (1986).

[202] *Id.*

[203] *Id.*

[204] *See* Blocher & Garrett, *supra* note 179 (describing the complexity of litigating the historical facts essential to originalism and emphasizing the need for fact-finding protocols such as introduction at trial, expert testimony from historical experts, and adversarial testing).

[205] *See, e.g.*, Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 935–36 (2015) (critiquing originalists' disregard for the work of historians, and false assumptions that the founding era was similar enough to the modern era to draw conclusions about original meaning without sufficient background investigation).

[206] Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 555–57, 581–82 (2006).

complexities in both determining the nature of the founding-era ordinary public reader, as well as often-ignored complications in parsing out a unified original meaning.[207] Saul Cornell raises similar concerns, accusing originalists of constructing fictional original readers, misusing historical sources such as dictionaries, ignoring views expressed by Founding-era Americans, and ignoring Founding-era disagreements "about constitutional interpretation and meaning."[208] Helen Irving argues that historical inquiry tends to identify a range of potential meanings, but that arguing for, or seeking out, a particular meaning is not historical analysis.[209] Calls for history to "produce an enforceable conclusion" are therefore calls for an inquiry other than historical investigation.[210] H. Jefferson Powell highlights the complexities of determining historical understandings of meaning—noting the deep understanding of context and background information required, and warning against the temptation towards hasty conclusions.[211] Larry Kramer responds directly to originalist critics—emphasizing the need for historical rigor, and warning against attorneys' and legal scholars' tendency toward advocacy in historical investigation.[212]

Critiques of legal misuse of history merge well with the literature on contextual bullshit. Legal briefing and judicial opinions in particular raise bullshit concerns. Traditional legal argument is a one-sided, adversarial endeavor, in contrast with historians' goals of thorough investigation and accounting for a diverse range of

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[207] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 133 (1996) (highlighting aspects of complexity in determining the original meaning of the Constitution) [hereinafter RAKOVE, ORIGINAL MEANINGS]; Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 583–84, 586 (2011) [hereinafter Rakove, *Joe the Ploughman*]; Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI. KENT L. REV. 103, 105–06 (2000) (describing originalists as "raiders who know what they are looking for, and having found it, they care little about collateral damage to the surrounding countryside that historians better know as context.").

[208] Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 298–99 (2011) (critiquing originalists for misusing dictionaries "as a shortcut around the laborious process of doing genuine historical research" and "[i]gnoring the real voices of eighteenth century Americans"); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 723–24 (2013) [hereinafter Cornell, *Meaning and Understanding*] (arguing that originalists "assume the existence of a constitutional consensus where none existed and gather evidence in an arbitrary and highly selective fashion.").

[209] Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 964 (2015).

[210] *Id.* at 964.

[211] H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 673 (1987).

[212] Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 390–92, 402–04 (2003).

evidence.[213] Judging requires decisive and implementable determinations of a particular constitutional meaning—a task often inconsistent with the complex historical evidence which may reveal multiple meanings.[214] Historical discussion is ill-suited to these contexts, creating a risk of bullshit through contextual confusion in which the audience may be convinced into thinking true history is occurring—when in fact the context is still one of legal argumentation and opinion.[215] Legal actors engaging in the activity may find themselves caught up in the contextual confusion as well by applying well-worn notions of fact-finding and party presentation principles to an undertaking far different from a typical trial or appeal.[216] Bullshit proliferation is more likely in these circumstances because judges' and attorneys' lack of expertise results in arguments and analysis over subjects in which the speakers aren't well-versed, precluding a genuine inquiry into historical facts and meaning.[217]

While the time constraints and institutional roles of attorneys and judges may create a high probability of bullshit, one might expect things to be better on the academic front. Legal academics, after all, have far more time to delve into historical research and the complexities that a search for original meaning may entail than time-pressured attorneys, judges, and court clerks.[218] With the time and resources of an educational institution (including ready access to professional historians and otherwise-paywalled historical journals and resources), legal academics may be less-inclined to bullshit their way through originalist claims.[219] And if legal academics are able to do originalist analysis without bullshitting, perhaps they can work with

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[213] Kelly, *supra* note 166, at 155–56.

[214] Irving, *supra* note 209; *see also* Cornell, *Meaning and Understanding*, *supra* note 208, at 724.

[215] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 (2018) (arguing that candor and humility, while "admirable" virtues "in intellectual circles," "are of little use to the judge who must determine whether and whither the Constitution has wandered and who is not permitted to render a candid and humble judgment of 'Undecided.'"); Hardcastle, *supra* note 190, at 146–48 (arguing that bullshitting occurs through the use of terms or concepts not appropriate to the topic under discussion); *see also* Reisch, *supra* note 192, at 35–36, 38.

[216] *See generally* Blocher & Garrett, *supra* note 179, at 728 (arguing that facts about historical law are meaningfully different from typical conclusions of law that courts frequently decide); Nelson, *supra* note 201, at 1250 (arguing that judges' lack of historical expertise counsels against expecting judges to make determinations of constitutional meaning that "affect millions of citizens if not the very shape of American society").

[217] *See* de Waal, *supra* note 187, at 103–04, 109 (contrasting genuine inquiry with bullshitting and noting that the former is more likely to occur and proliferate when actors are forced to speak on topics they know little about).

[218] *See* Solum, *Triangulating Public Meaning*, *supra* note 72, at 1674, 1675 (describing a disparity in the amount of time law clerks may spend on determining original meaning compared with time legal academics may spend—with law clerks facing far more stringent time constraints).

[219] *See generally id.* at 1667, 1676–77, 1681 (proposing a complex approach to originalist analysis that triangulates results from multiple interpretive methods and acknowledging that academics are better suited for this form of analysis).

other legal actors to avoid bullshit originalism in legal argument and judicial opinions.[220]

But there are reasons to doubt that legal academia will rescue the rest of the legal field from bullshit historical analysis, as some originalists suggest.[221] To start, it's a stretch to claim that busy attorneys and judges will engage with lengthy, complex, and often abstract legal scholarship.[222] And even if attorneys and judges seek out that work, they will need to distinguish the solid historical research from flawed or incomplete scholarship. Doing so requires time and expertise that these attorneys and judges lack.[223] Additionally, originalists' vision of cooperation between legal academics and legal actors assumes that those actors share the truth-seeking goals of the scholars—a conclusion undermined by the institutional features that give rise to legal abuse of history in the first place.[224] These features include attorneys' overriding interest in advocating for their client's position and using manipulative selection and framing of evidence to do so, as well as judges' need to reach determinations of meaning which may not be consistent with historical evidence of multiple original meanings. As a result, attorneys and judges may still end up looking to the scholarship that best fits their institutional needs, rather than that which does the best job of determining original public meaning.[225] As a result, the bullshit is likely to continue unabated in practice, despite the contrary efforts of earnest academic originalists.

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[220] *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 198–99 (2013). The accessibility of legal scholarship—both online generally and through legal search engines like Westlaw and Lexis—may count in favor of this vision, as legal scholarship on historical questions may be easier for judges and attorneys to access, even if they lack access to paywalled professional journals or primary sources.

[221] *See id.* (envisioning "a world dominated by originalism" in which "academics would work to create the knowledge that would improve the performance of originalist judges and reinforce their inclination to be consistently originalist.").

[222] *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 871–72 n.189 (1991) (arguing that "[j]udges simply do not have the time, the inclination, or the patience to read this stuff" and even where judges cite scholarly work, "[i]t is at least equally plausible" that these citations serve only to "bolster already pre-formed opinions" rather than reflecting actual reliance on or engagement with the scholarship).

[223] *See* Solum, *Triangulating Public Meaning*, *supra* note 72, at 1674–75; *see also* Alexandra Michalak, *Historians Wear Robes Now? Applying the History and Tradition Standard: A Practical Guide for Lower Courts*, 32 WM. & MARY BILL OF RTS. J. 479, 480, 508 (2023); Mike Rappaport, *Historians and Originalists*, THE ORIGINALISM BLOG (Aug. 21, 2013), [hereinafter Rappaport, *Historians and Originalists*] https://originalismblog.typepad.com/the-originalism-blog/2013/08/historians-and-originalistsmike-rappaport.html .

[224] *See* Schlag, *supra* note 222, at 871–72 n.189; *see also* Solum, *Triangulating Public Meaning*, *supra* note 72, at 1674–75; MCGINNIS & RAPPAPORT, *supra* note 220, at 198.

[225] Schlag, *supra* note 222, at 872 n.189.

2. Originalists' Explicit Disregard for Historical Standards

Perhaps even more concerning from a bullshit perspective, are assertions among certain originalists—particularly those in the legal academy—that the methods and ideals of history are ill-suited to originalist analysis. Originalists argue that they are determining questions of original legal meaning or original law, and distance themselves from historians who they claim are interested in questions unrelated to these legal issues.[226] Saikrishna Prakash critiques historians for employing "history department law" in critiquing originalists, and argues that if originalists are unable to uncover original meaning, historians cannot make claims about the past either—as doing so requires the "reconstruction of the meanings of ancient words."[227] Gary Lawson contends that originalists need not have PhDs to determine original meaning, asserting that the "source of meaning is a legally constructed fiction," and arguing that "history department law" poses "a much greater threat to sound constitutional interpretation than . . . 'law office history.'"[228] Michael Rappaport argues that "[h]istory office law can involve a failure to understand and be careful about legal issues," with historians often failing to understand "the enterprise of interpretation as practiced by originalists."[229] Others tout their self-proclaimed expertise to an alarming degree. Rob Natelson, for instance, claims that after enough immersion in founding era sources, "you know which common words have changed meaning and which have not," and suggests that he only needs to provide dictionary definitions in instances where "a law review editor wasn't going to just take my word for it."[230] This overconfidence—particularly in the face of repeated critiques of such overconfidence—creates a substantial risk of making claims that are bullshit. [231]

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[226] *See* Prakash, *supra* note 98, at 534–35 (accusing historians' critiques of originalism for engaging in "history department law" and asserting that originalism seeks out the "most natural reading of the word or phrase," thereby avoiding historian concerns over multiple or unclear original meaning); Gary Lawson, *No History, No Certainty, No Legitimacy…No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012) (arguing that a "lack of a Ph.D. in history is not disqualifying for the task of constitutional interpretation when the source of meaning is a legally constructed fiction," and asserting that "'history department law' is a much greater threat to sound constitutional interpretation than is 'law office history'" (quoting Prakash, *supra* note 98, at 534)); *see also* Calvin TerBeek, *Originalism's Obituary*, 2015 UTAH L. REV. ONLAW 29, 30 (2015) ("New originalist scholars largely ignore the insights of historians, political scientists, and other academic disciplines. Indeed, for a theory that purports to take history seriously, some originalists have taken to referring to historians' questions and critiques as 'history department law.'").

[227] *See* Prakash, *supra* note 98, at 534–35.

[228] Lawson, *supra* note 226, at 1559.

[229] *See* Rappaport, *Historians and Originalists*, *supra* note 223.

[230] *See* Andrew Hyman, *The Last Three Installments by Robert Natelson at the Epoch Times About Invasion and Immigration Plus His Thoughts on Infinite Regress*, THE ORIGINALISM BLOG (Jan. 15, 2024), https://originalismblog.typepad.com/the-originalism-blog/2024/01/last-three-installments-by-natelson.html.

[231] *See* Michael Smith, *Originalism, Bullshit, and Overconfidence*, MICHAEL SMITH'S L. BLOG (Nov. 13, 2024, 4:15 PM), https://smithblawg.blogspot.com/2024/11/originalism-bullshit-and-

This move should raise alarms for those concerned with bullshit. Originalists who earnestly try, but fail, to engage in rigorous historical analysis generally are not bullshitters.[232] But earnestness may no longer be possible once poor methodology or shoddy results are brought to the originalist's attention. Gary Hardcastle points this out, warning that a "more egregious," "Frankfurt-style" bullshit arises where the speaker is aware that what they are saying may well be bullshit.[233] Bullshitters who are called out, and nevertheless continue to produce bullshit act "more offensive[ly]" than they had been before being accused of bullshitting.[234] There is a strong case that the originalist who has been called out on their historical flaws, and who continues to engage in the same methodology anyway, has crossed the line from earnest mistake into bullshit.

Affirmative statements by the originalists rejecting the underlying methodology of their critics serves as evidence of these interpreters' awareness of these critiques. There are at least two reasons to think so. First, originalist critiques of historians' methods that characterize the work of historians' as uniformly or mostly inapplicable are already suspect because they are oversimplifications. Assertions that history departments have little or nothing to provide to legal history suggest a lack of understanding of the varied forms of historical investigation that exist among professional historians—some which may be inappropriate to the legal task at hand, but others which may well illuminate crucial historical facts or context.[235] Second, originalist assertions that historians' work is inapplicable to originalist interpretation[236] tend to be question-begging—succeeding only if originalists both have sufficient knowledge as to what historians bring to the table and an understanding of what the Constitution's original meaning is, so that they can dismiss the historians' contributions as irrelevant to discerning this already-determined meaning.

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overconfidence.html?m=1 (detailing Natelson's claims, critiques of these claims, and how overconfidence may lead one into bullshitting).

[232] *See supra* Section III.C.3.

[233] Hardcastle, *supra* note 190, at 148.

[234] *Id.*

[235] *See generally* EILEEN KA-MAY CHENG, HISTORIOGRAPHY: AN INTRODUCTORY GUIDE (2012) (surveying various approaches historians have taken to writing about history, throughout history); ANNA GREEN & KATHLEEN TROUP, THE HOUSES OF HISTORY: A CRITICAL READER IN HISTORY AND THEORY (Manchester Univ. Press 2d ed. 2016); JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST 33–34, 125 (2002) (arguing that continuing historical work fills in gaps in knowledge about the past, and noting that while present circumstances may influence how historians conduct their research, the reality of the past constrains the range of theories and interpretations historians may uncover); LYNN HUNT, HISTORY: WHY IT MATTERS 54–55, 60–61 (2018) (arguing that continuing historical research leads to the discovery of new facts which may lead to differing standards of completeness in historical evidence and interpretations).

[236] *See infra* Section IV.A.3.

Originalists' avoidance of, and critique of, historical methods hasn't gone unnoticed. Jonathan Gienapp calls out originalists' claims that they don't need special historical expertise to discover original meaning, describing the method as bearing "the imprimatur of history without the actual work and, in fact, assert[ing] that the work [is] wholly unnecessary."[237] Elsewhere, he argues that originalists' work typically imposes present conceptions onto the provisions at issue, a process that "erase[s] the Constitution's historical identity," and "change[s] what it says" as a result.[238] Addressing originalists' critiques of historians, Sean Kammer highlights the notion of anti-intellectualism, or the stance of "be[ing] against acquiring knowledge itself," and contrasts this with ignorance which is the mere "absence of knowledge."[239] Anti-intellectualism, Kammer argues, is "far more dangerous to a society than mere ignorance," because it involves the active avoidance of knowledge in favor of opinions and slogans.[240] Kammer argues that when originalists disregard history as relevant to their inquiry into original public meaning, they embrace anti-intellectualism.[241]

While Kammer doesn't use the terminology of bullshit in his critique of originalist methods, his criticism of anti-intellectual practices draws on the same concerns that motivate those who identify and call out bullshit. The anti-intellectual speaker who rejects the endeavor of learning more in order to correct mistakes demonstrates an active disregard for the truth of his or her statements.[242] Applying theories of bullshit to this phenomenon, it seems that originalists who actively disregard historical standards and investigation in their own work are enthusiastic bullshitters, and perhaps even liars to the extent that they engage in active ignorance of underlying historical truths. After all, these originalists claim to engage in historical analysis—whether it is parsing out Founding- or Reconstruction-era meanings, intentions, or interpretive methodology—yet reject historians' demands for more rigorous, contextual evidence.[243] In doing so, their rejection of historians' work rests on little more than the dubious claim that determining original legal meaning is

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[237] Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: BLOG FOR AM. HIST. (Mar. 20, 2017), [hereinafer Gienapp, *Constitutional Originalism and History*] https://www.processhistory.org/originalism-history/.

[238] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 43, 53–54, 222 (2024) [hereinafter GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM].

[239] Sean M. Kammer, *"Whether or Not Special Expertise is Needed": Anti-Intellectualism the Supreme Court, and the Legitimacy of Law*, 63 S.D. L. REV. 287, 291 (2018).

[240] *Id.* (citing WILLIAM HARE, OPEN-MINDEDNESS AND EDUCATION 41 (1979)).

[241] *Id.* at 313.

[242] *See* FRANKFURT, *supra* note 2, at 130.

[243] *See, e.g.*, Sean M. Kammer, *"Whether or Not Special Expertise is Needed": Anti-Intellectualism, the Supreme Court, and the Legitimacy of Law*, 63 S.D. L. REV. 287, 311–13 (2019) (comparing the selective reliance on historical analysis by Justices Brennan, Breyer and Scalia).

simpler and more focused than historians' work,[244] and best suited to lawyers play-acting as historians than the historians themselves.

3. An Earnest Disregard for Historical Facts?

Originalists may respond that they aren't bullshitting because their rejection of historians' critiques and methods are grounded in a concern for the truth about original legal meaning—an inquiry distinct from other forms of history. As an example, consider Randy Barnett, who responds to Gienapp's critique of originalist methods:

> I agree that bracketing the assumptions, values, and logics that shape contemporary consciousness is important in seeking to understand the past. But, as a consumer rather than a producer of the works of historians, I must say that, when they venture into the constitutional arena, historians far too often fall short of this objective. Oddly, for some, the past never fails to disappoint their presentist ideological agenda . . . .
>
> This is why I like to check their footnotes. I like to see for myself if they have successfully "bracket[ed] the assumptions, values, and logics that shape contemporary consciousness." But nowadays, such footnotes are often sparse, and are very general in what they do report. All too often we must take their narrative of the "alien, past world" on faith.[245]

Barnett also critiques historians who lack legal training, arguing that this lack of expertise undermines their attempts to discuss original meaning of constitutional provisions.[246] This is in line with earlier critiques from Barnett, asserting that historians aren't "experts in identifying the meaning of language in legal context," and asserting that historians are "particularly interested in explaining why what happened in the past happened [and] why people did what they did."[247]

Perhaps some originalists truly believe that historians are so disconnected from the enterprise of determining original meaning that their critiques are simply inapplicable. But, as noted above, such a belief assumes a monolithic view of historical investigation—one which is undermined by even a cursory glance at readily available and accessible historical literature.[248] Originalists also risk inconsistency, arguing

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[244] Gienapp, *Constitutional Originalism and History, supra* note 237.

[245] Randy Barnett, *Challenging the Priesthood of Professional Historians*, WASH. POST (Mar. 28, 2017, 12:51 PM) [hereinafter Barnett, *Priesthood*], https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/.

[246] *Id.*

[247] Randy Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, VOLOKH CONSPIRACY (Aug. 19, 2013, 4:22 PM) [hereinafter Barnett, *Original Meaning*], https://volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/.

[248] *See, e.g.*, GREEN & TROUP, *supra* note 235, at 2–3 (surveying a wide range of theories of historical investigation, as well as critics and proponents of each theory); GADDIS, *supra* note 235, at 124–25 (describing how historians investigate the past in different ways, including considering

against the work of historians on historians' own terms. Barnett's response to Gienapp is instructive. At some points, Barnett appears to push back on historians' terms, critiquing their "presentist ideological agenda" and arguing that their works are sparsely footnoted.[249] Now things aren't so clear—is the problem that historians' work is irrelevant to the endeavor of constitutional interpretation, or are historians simply doing bad history?

A broader problem with originalists' responses to history is their defensiveness and dismissiveness of historical methodology and critiques. Originalist responses to historians are defensive—rejecting from the outset any value that historians may provide to originalist constitutional interpretation. Michael Rappaport, for example, argues that historians tend to claim that "there was no original meaning" at the time of the founding "because there was disagreement at the time," a conclusion with which Rappaport disagrees, and which he chalks up to historians' lack of legal training, concern with oversimplification, and lack of skill more generally.[250] Jack Balkin highlights Rappaport's critique as an example of originalists' resistance to historians claim that originalist history is "narrow, parochial, and anachronistic."[251] Balkin's view of historians is more charitable, as he argues that historians' critiques could just as easily "be described as a theoretical disagreement about the best way to interpret the Constitution," rather than a simple lack of legal training or other skills.[252]

Further complicating originalist pushback against historians is the relevance of historical context to determining original meaning. Claiming that historical investigations into the language, intentions, motivations, and beliefs of various groups at certain points in history are irrelevant doesn't square with originalist efforts to determine original public meaning—an endeavor that requires a determination of what some founding-era reader would have taken the constitution to mean. For that reader to be anything more than the modern-day originalist (with all of their presentist instincts and inclinations) superimposed into the distant past, one must flesh

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the past in light of shifting modern concerns); CHENG, *supra* note 235, at 1–3 (surveying how writing about history has changed over time). *See generally* GEORG G. IGGERS, HISTORIOGRAPHY IN THE TWENTIETH CENTURY: FROM SCIENTIFIC OBJECTIVITY TO POSTMODERN CHALLENGE (1997) (undertaking a similar survey).

[249] Barnett, *Priesthood*, *supra* note 245.

[250] Rappaport, *Historians and Originalists*, *supra* note 223; *see also* Barnett, *Priesthood*, *supra* note 245 ("[H]istorians who opine on constitutional 'meaning' or political argumentation (without legal or philosophical training) tend to avoid the substance or merits of legal or philosophical arguments made by their historical subjects and choose instead to focus on the hopes, fears, ends, objectives, agenda, and expected applications of historical figures, groups and movements.").

[251] *See* Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 368 (2020).

[252] *Id.* at 368–69.

out the context in which that interpretation would have taken place.[253] Originalists like Lawrence Solum also note the importance of "contextual enrichment," in which the context of constitutional provisions informs their meaning.[254] A deep knowledge of original context may be crucial in reading legal documents from that era, and determining meaning and import that may not be apparent from a mere reading of the text.[255] If taking an original public meaning approach to interpreting the Constitution is to make any difference, the context of the relevant time period must play some role in the interpretive process. And yet, originalists who argue in favor of this mode of interpretation simultaneously argue against considering the original context that makes their approach unique.

An earnest originalist who hopes to engage in a rigorous investigation of historical meaning ought to be concerned by claims that originalists' methods are flawed from the outset due to the circumstances of the inquiry and interpreters' lack of relevant expertise. Faced with these critiques, an earnest originalist would be expected to reflect on the originalist endeavor, identify failings, present counterexamples of methodological rigor, and request clarification where necessary. While some of Barnett's response could be spun to include some of this, his reactions are instead characteristic of those originalists who respond to historians' critiques by rejecting the historians and their methods altogether as inconsistent with originalism.[256] As noted previously, this move begs the question—it assumes that originalism is the correct method for determining constitutional meaning, leading to the inevitable conclusion that any alternate meaning derived from a different approach or consideration of alternate evidence is therefore incorrect.[257]

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[253] *See* Rakove, *Joe the Ploughman*, *supra* note 207, at 584, 586; GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM, *supra* note 238, at 52.

[254] *See* Lawrence B. Solum, *Construction and Constraint: Discussion of Living Originalism*, 7 JERUSALEM REV. LEGAL STUD. 17, 26–27 (2013); *see also* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) ("The communicative content of a text is determined by linguistic facts (facts about conventional semantic meanings and syntax) and by facts about the context in which the text was written.").

[255] Shannon McSheffrey demonstrates how knowledge of relevant social context may change the meaning of seemingly straightforward legal records in the context of an examination into a divorce lawsuit—revealing that a seemingly straightforward case of annulment due to a preexisting marriage may well have involved a fabricated prior marriage and may have even been brought in the wife's name despite her potential lack of involvement in the case. *See generally* Shannon McSheffrey, *Detective Fiction in the Archives: Court Records and the Uses of Law in Late Medieval England*, 65 HIST. WORKSHOP J. 65 (2008). Because of their relation to myriad facts of historical social context, many of the key inferences McSheffrey makes throughout her investigation would have been missed by a less-knowledgeable interpreter.

[256] *See* Barnett, *Priesthood*, *supra* note 245.

[257] *See generally* Balkin, *supra* note 251, at 368, 373 (arguing originalism is uniquely authoritative due to lawyers' ability to determine "*legal meaning* and the *legal consequences*," while historians lack these skills and therefore provide inaccurate critiques of originalism).

And does Barnett believe that historians' methods are entirely misguided? It seems unlikely in light of Barnett's accusations of poor historical methodology by the historians themselves.[258] Even if originalists honestly believe that historians' work tends to focus on evidence irrelevant to questions of legal meaning, the criticism itself should prompt originalists to inquire into whether historical research is indeed as monolithic and irrelevant as they contend.[259]

To be sure, there may well be originalist scholarship out there that fits the mold of historical rigor. Some legal scholars who investigate original meaning are professional historians as well.[260] And some originalists, when confronted with historical critiques over their work, engage with those critiques—defending their interpretations with additional evidence where applicable, and revising theories where need be.[261]

But those originalists who fail to engage in the discussion to determine whether these standards are met in the first place, and instead react to critiques from historians by rejecting the historians' premises altogether, demonstrate a lack of concern with historical rigor and accuracy—strongly suggesting that they're not only bullshitting, but doing so with pride. Bullshit scholars warn of instances in which bullshitters begin to believe in their own bullshit, and this position among originalists appears to be an example of this phenomenon.[262]

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[258] One might wish to dive deeper into whether originalists like Barnett end up reaching correct conclusions about original meaning through their methodology—even if they lack the expertise and fail to consider the context to which historians refer. While this is likely a worthy inquiry, it is a matter to be addressed by those who have the knowledge and who have done the research to reach those conclusions. And it is ultimately irrelevant to the question of whether originalists are bullshitting, as the bullshitter may say things that end up being correct despite the bullshitter's lack of care for the truth of their statements. *See* FRANKFURT, *supra* note 2, at 130.

[259] Such an inquiry would likely reveal investigation of relevant contextual evidence that sheds light on questions of original meaning. *See, e.g.*, JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA, 1, 3–4, 12, 18–19 (2018) (arguing that the original meaning of the Constitution was, in many cases, unclear at the time of ratification, and it is only through early implementation of its provisions that its meaning became fixed); KATHLEEN S. SULLIVAN, CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH-CENTURY AMERICA, 10–11 (2007) (arguing for a consideration of the common law alongside examination of the enactment and development of constitutional rights to flesh out the tension between liberalism and traditional prejudices).

[260] Balkin, *supra* note 251, at 346; Barnett, *Original Meaning*, *supra* note 247.

[261] Barnett, *Priesthood*, *supra* note 245; Gienapp, *Constitutional Originalism and History*, *supra* note 237.

[262] *See* Kimbrough, *supra* note 39, at 10–13 (discussing the phenomenon of bullshitters believing their own bullshit).

B. Is Bullshit Inevitable? And What About Other Theories?

One may object to my focus on originalism by arguing that the preceding sections could just as easily focus on a group of interpreters who apply an alternate theory of constitutional interpretation. Common law interpreters, for example, may earnestly engage in an incomplete survey of existing law, resulting in arguments and opinions that are inaccurate as a matter of precedent.[263] These same interpreters may also be bullshitters by engaging in selective citation and manipulation of precedents to accomplish desired ends, even though these arguments may paint an inaccurate picture of the legal landscape. On an even broader level, judges may tend toward bullshit or outright lies to the extent that they issue opinions that purport to lay out the reasons for reaching a conclusion when, in fact, these reasons are post hoc justifications written up after a judge already makes a determination on a hunch or other unstated grounds.[264] Bullshitters are everywhere, and they may ply their trade as originalists, common law constitutionalists, or pragmatists.

There are two points here. First is the argument that a bullshitter may manipulate originalism just as much as they may manipulate an alternate theory, so there's no need to call out originalism. Second, because legal actors are going to bullshit or lie by virtue of the institutions in which they function, there's little reason to discuss bullshit in the constitutional interpretive space. Theories of interpretation assume good faith and can't do anything about a bad faith actor like a bullshitter.

One response to both objections is that even if bullshit is generally common in legal contexts, certain theories of interpretation may lend themselves to abuse by certain disingenuous interpreters. As a result, engaging in this form of theoretical argumentation is more likely to result in bullshit or dishonesty beyond baseline levels that might already exist.

As I explain at length elsewhere, certain theories are easier to abuse than others, and to the extent that originalism lends itself to bullshit more readily than alternate theories, this is worth pointing out.[265] While I will not repeat those arguments, the discussion above illustrates how originalism and other forms of historical analysis—especially the particular method the Court has recently endorsed in *Bruen*—may aid

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[263] *See* Eric J. Segall, *Chief Justice John Roberts: Institutionalist or Hubris-in-Chief*, 78 WASH. & LEE L. REV. ONLINE 107, 114–16 (2021) (identifying a likely case of such bullshitting in which Chief Justice Roberts omitted crucial qualifying language from a quoted excerpt of precedent to effectively create a doctrine of states' equality, eventually used to "render mostly useless what many people think is the most important statute ever enacted by the Congress—the Voting Rights Act").

[264] *See* Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653, 655 (1932) (reporting that candid discussions with judges have revealed some judges arrive at their decision "with little or no preliminary attention to legal rules or a definite statement of facts," only providing legal bases and justifications ex post facto when writing up their opinions).

[265] *See generally* Smith, *supra* note 18.

in the bullshitter's endeavor.[266] We've seen the Supreme Court assert that courts may simply rely on the submissions of the parties before them as the sole basis for determinations of historical meaning and tradition.[267] We've seen lower courts go along with this suggestion.[268] We've also seen originalists suggest that historical investigation isn't all that difficult in the originalist context, as only narrow questions of law must be investigated.[269] Other originalists acknowledge that the endeavor may be a bit more complicated, but that original meaning is still discoverable for judges, attorneys, and other legal actors.[270]

All of this overlooks the complexities of historical analysis,[271] downplays how legal advocates inevitably skew the inquiry from the outset,[272] glosses over judges'

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[266] *See supra* Sections IV.A.1–3.

[267] *See* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022).

[268] *See, e.g.*, United States v. Yates, No. 1:21-cr-00116-DCN, 2023 WL 5016971, at *3 (D. Idaho Aug. 7, 2023) (recognizing the *Bruen* Court's ruling that it was not up to the court to sift through historical evidence but that it was instead the government's burden to demonstrate a history of analogous gun regulations, and declining to appoint an expert on the issue). Other courts are more explicit about the dangers of manipulating history and the danger of poor legal scholarship by non-historian professors. *See* United States v. Bullock, 679 F.Supp.3d 501, 529 (S.D. Miss. 2023) (surveying legal secondary sources that are cited most on Second Amendment issues and demonstrating how the articles might be used to support conclusions in opposing directions).

[269] Baude & Sachs, *supra* note 179, at 813–14.

[270] *See* Solum, *Triangulating Public Meaning*, *supra* note 72, at 1673–74, 1680 (explaining that different legal actors employ different approaches to discovering original meaning, some more complicated and immersive than others, depending on their position and the final product they are constructing).

[271] *See* Blocher & Ruben, *supra* note 179, at 146–47 (arguing that analogizing to prior historical restrictions is a far more complex undertaking than the Court suggests); GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM, *supra* note 238, at 221–23 ("[I]n defining the Constitution's content according to the terms of modern law and jurisprudence, orthodox originalists don't merely describe the Constitution but in fact *give* the Constitution an identity and core characteristics that, at its inception, it did not obviously possess."); *see also* Blocher & Garrett, *supra* note 179, at 726, 728, 734–36, 743 (noting the difficulties in determining whether questions of historical laws are questions of fact or law, and emphasizing appellate courts' lack of a fact-finding apparatus similar to that of trial courts); RAKOVE, ORIGINAL MEANINGS, *supra* note 207, at 133 (highlighting aspects of complexity in determining the original meaning of the Constitution); McSheffrey, *supra* note 255 (demonstrating how archived materials that appear clear on their face may have different meanings that a deeper knowledge of context may reveal).

[272] *See* Kelly, *supra* note 166, at 122 n.13, 155–56 (describing "law-office" history as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered" and arguing that the attorneys "preparing briefs do not attempt to present a court with balanced and impartial statements of truth," and that failing to present arguments designed to advance a client's case would fail in his or her role as advocate).

and attorneys' lack of historical expertise,[273] and fails to grapple with the inconsistency of needing to reach a conclusion in a legal argument or opinion and the reality in situations where there is no clean original meaning of certain constitutional provisions.[274] All of these failings make originalism particularly fertile ground for abuse—especially for bullshitters who may combine the appearance of historical complexity with the power disparities of legal practice to produce and proliferate effective bullshit.[275] Because originalism lends itself to abusive bullshit, it is worth singling out, and these critiques are properly leveled against the theory itself rather than the actors alone.

Alternative interpretive methods, while prone to some degree of abuse, do not raise the same concerns as originalism. Take, for example, common law constitutionalism—an approach in which the Constitution's text and original meaning generally take a backseat to working from precedents developed over centuries of disputes.[276] Attorneys and judges may attempt to stretch or distinguish precedent through exaggeration, selective citation, or misrepresentation. Indeed, they may do so to such a degree that they end up bullshitting opposing parties and the court. But this method still may be preferable to originalist bullshitting, as judges and attorneys are trained to spot and call out shenanigans in reasoning from precedent.[277] That training is lacking when the arguments at issue concern historical minutia rather than reported cases.

Additionally, it's still worth calling out bullshitters, even if their bullshit doesn't cast doubt on a theory of interpretation. Originalism as a theory of interpretation

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[273] *See* Nelson, *supra* note 201, at 1250–51 (arguing that judges' lack of historical expertise counsels against expecting judges to make determinations of constitutional meaning that "affect millions of citizens if not the very shape of American society").

[274] *See* Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 281 (1973) (arguing how lawyers' approach to legal history tends toward justification of present professional realities in a manner that characterizes common law methods and traditions as superior to alternate approaches like codification). *See generally* Fallon, *supra* note 95, at 1421 (arguing that constitutional provisions have multiple meanings and that public meaning originalism is ill suited to address these multiple meanings); Irving, *supra* note 209, at 958, 960 (arguing that "[h]istory and judging operate in different fields," and history "is not instrumental" and that when history "lends itself to a particular purpose—the purpose of deciding whether a law is constitutionally valid, [it] ceases to be history."); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 82–83 (2016) (highlighting the challenge that original public meanings pose to original public meaning originalism); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 477–78 (2016) (describing criticisms of originalism regarding the lack of a "single, settled common law meaning for particular constitutional terms").

[275] *See* Fredal, *supra* note 8, at 254.

[276] *See* STRAUSS, *supra* note 18, at 43–45, 48–49 (describing and advocating for this theory).

[277] *See id.* at 43 ("Originalism requires judges and lawyers to be historians. The common law approach requires judges and lawyers to be, well, judges and lawyers.").

may be unaffected by the abuse of bad actors, but this doesn't mean that there's no value in recognizing and calling out instances of abuse. Indeed, calling out bullshit is a crucial endeavor—as knowledge of one's analytical or argumentative shortcomings may cause a speaker to cross the line from being one who espouses good faith falsehoods to becoming a bullshitter—and thereby become open to criticism.[278] Some legal actors may recognize this risk and take pause before crossing that line.[279] And calling out bullshit may lead to improvements in originalism itself—such as the development of more detailed standards and procedures for parties seeking to analogize from history, or recognition of the value that historical expertise provides and working to incorporate the work of historians into constitutional analysis.[280]

One final point: nothing in this Section, or in this Article more broadly, is meant to suggest that bullshit is a phenomenon exclusive to originalist constitutional interpretation. While I do argue that originalism inclines itself toward bullshit to a noteworthy degree, there's little doubt that bullshitters may take advantage of alternate theories of interpretation to further their goals. Indeed, there's a case to be made that overt focus and claims of reliance on grand theories of constitutional interpretation leads to an inevitable lack of candor and divorce from the complex realities of courts' case-specific work.[281] Moreover, one should not ignore Frankfurt's closing point about people's limited knowledge of their true natures and the ensuing possibility that "sincerity itself is bullshit" should awareness of our "elusively insubstantial" natures prove unattainable.[282] This philosophical concern sounds quite similar to realist concerns over judicial sincerity in their stated reasons for opinions—reasons meant to sound deliberative and authoritative, but which may ultimately originate in little more than conclusory preferences or hunches.[283] Should

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[278] *See* Hardcastle, *supra* note 190, at 148.

[279] *See* Stevens v. Mich. State Ct. Admin. Off., No. 21-1727, 2022 WL 3500193, at 6 (6th Cir. filed Aug. 18, 2022) (recognizing that the *Bruen* Court permits courts to decide cases based on the "historical record compiled by the parties" but concluding that the parties had "compiled no such record" and thereby declining to decide the case rather than "conducting an amateur historical inquiry" (quoting N.Y. State Rifle & Pistol Ass'n., v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022))).

[280] *See, e.g.*, Atkinson v. Garland, 70 F.4th 1018, 1023–24 (7th Cir. 2023) (recognizing the need for the parties to develop their positions, ordering the parties to focus on a number of particular historical questions, and requiring that both sides of the dispute "cast a wider net and provide more detail about whatever history they rely on").

[281] *See generally* FARBER & SHERRY, *supra* note 18, at 140–41, 151, 168 (critiquing overreliance on "grand theory" in debates over constitutional interpretation); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 4, 6 (Geoffrey R. Stone ed., 2012) (raising a similar critique of theories of interpretation taking on a life of their own and distracting from ideals like judicial restraint).

[282] FRANKFURT, *supra* note 2, at 133.

[283] *See* Frank, *supra* note 264, at 653, 655.

these realist concerns prove correct—even partially so—one wonders whether a great deal more of purportedly sincere judicial output amounts to little more than bullshit.[284]

Critics of endeavors to evaluate originalism through a bullshit lens may point to these broader implications as demonstrating the pointlessness and danger of the task.[285] What does it matter if originalism is bullshit if the same can be said of the bulk of legal practice and decision making? Such a response, I suggest, papers over deeper concerns. If originalism is not the only avenue for bullshit in legal argument, opinion, and scholarship, it is still worthwhile to call it out, if only to begin a broader inquiry into shaky foundations elsewhere in the legal system. When bullshit occurs elsewhere through alternate theories of constitutional interpretation—or in other legal or social contexts altogether—it ought to be called out as well. Some legal scholars have begun to do so, but in our bullshit-saturated age, more vigilance won't hurt.

C. Lies, Damned Lies, and Originalism

While bullshit may be a useful concept for evaluating originalist analysis and conclusions, it's worth remembering that other forms of dishonesty and untruth remain relevant. Scholarship and theorizing over the nature of lies goes back centuries. Frankfurt, for instance, engaged with the work of St. Augustine in setting forth his formulation of bullshit.[286] Augustine, in turn, defines lies as deliberate false statements, made with the intention to deceive.[287] He went on to devise a list of lies that he arranged in order of severity, which included the following entries (from most to least severe):

1. A lie "uttered in the teaching of religion";
2. A lie "which injures somebody unjustly: such a lie as helps no one and harms someone";
3. A lie "which is beneficial to one person while it harms another, although the harm does not produce physical defilement";
4. A lie "which is told solely for the pleasure of lying and deceiving, that is, the real lie";

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[284] The question, to be sure, is a complicated one. *See generally* Cohen, *Sincerity*, *supra* note 74 (addressing the complexities of judicial sincerity, including the impossibility of giving all reasons for decisions, the difference between actual and sufficient justifications for conclusions, and the desirability and reasons for judicial transparency).

[285] *See* FRANKFURT, *supra* note 2, at 177, 132–33 (1988).

[286] *Id.* at 131.

[287] 16 SAINT AUGUSTINE, *Lying*, *in* THE FATHERS OF THE CHURCH, TREATISES ON VARIOUS SUBJECTS 47, 60 (Roy J. Deferrari ed., Sister Mary Sarah Muldowney trans., 1952) (395).

5. A lie "which is told from a desire to please others in smooth discourse";
6. A lie "which harms no one and benefits some person" such as a lie told to prevent the unjust taking of another person's money;
7. A lie "which is harmful to no one and beneficial to some person, with the exception of the case where a judge is questioning," in cases where telling the truth would "betray a man sought for capital punishment, that is, not only a just and innocent person, but even a criminal" in light of the "opportunity for repentance" that all people hold;
8. A lie "which is harmful to no one and beneficial to the extent that it protects someone from physical defilement."[288]

Augustine's writing in the late 300s reveals how complex and varied lies may be. Augustine believed that all types of lies were prohibited.[289] But he acknowledged the distinctions between these types of lies and argued that the seriousness of one's sin associated with each decreased "as he tends toward the eighth" and becomes more serious "as he turns toward the first."[290]

Augustine's particular taxonomy of lies may not be immediately applicable to instances of constitutional interpretation by judges, attorneys, and academics. But there are helpful lessons to draw from his work which—while not developed in full at the end of this already lengthy paper—are worth keeping in mind when evaluating the truthfulness of constitutional claims. To start, there's Augustine's definition of lying as requiring deliberate falsehoods, which maps onto the preceding discussion of negligent untruth by earnest originalists.[291] A genuine mistake of fact, under Augustine's formulation, does not appear to constitute a lie, similar to my preceding conclusion that a truly earnest mistake is not an instance of bullshitting.[292]

Augustine's categorization of lies and their respective severity is worth considering as well. In a perfect world, calling out bullshit makes it less likely, as doing so may thwart the bullshitter from accomplishing their underlying goal, as well as put

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[288] *Id.* at 86–87.

[289] *Id.* at 107–08.

[290] *Id.* at 109; *see also* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1552 (2009) ("Even the absolutists like St. Augustine assign degrees of severity to lying, with the lie 'harmful to no one' low on the scale, albeit a sin.").

[291] *See supra* Section III.C.

[292] *See supra* Section III.C.3; *see also* Jeremiah Russell & Michael Promisel, *Truth, Lies, and Concealment: St. Augustine on Mendacious Political Thought*, 79 REV. POLS. 451, 458–59 (2017) (stating that false statements that a speaker does not recognize to be false are "better described as mistaken than lying" under Augustine's formulation).

audience members on alert regarding the bullshitter's disregard for the truth.[293] For those bullshitters who are put on notice that their statements are incorrect or misguided, continuing to make the same statements crosses a line into bullshitting—as they are deliberately making statements they now know to be false with the intention of misleading their audience.[294] Once bullshitters have crossed into the realm of lies, Augustine's taxonomy of lies provides insight into gauging the severity of the lies being told.

While the landscape of attorneys' argumentation, judicial opinions, and legal scholarship may not immediately lend itself to Augustine's religiously oriented categories, there's an argument to be made that originalist lies, particularly those made by attorneys and judges, are close to Augustine's third type of lies—those made to benefit one while harming another.[295] Indeed, much of the case has already been made by demonstrating how the context of such statements may be bullshit.[296] Attorneys (or parties) advancing false statements about original meaning or historical fact do so to derive the benefit of a strong argument which may end up winning their case. Judges or Justices who make such statements derive credibility and legitimacy from setting forth purportedly sufficient reasons for conclusions. But these benefits come at a cost: Attorneys risk misleading even earnest judges into issuing opinions based on a false historical foundation, and lying judges contribute directly to such a state of affairs, resulting in a framework of constitutional law based on false understandings of history.[297] For those who may hold doubt over whether a given state of the law—however tenuous in its foundation on historical fact—may constitute an inherently harmful state of affairs, the fact remains that the adversarial approach to determining constitutional questions means that at least the adverse party will be harmed through the loss of their case (along with the expenditure of money, time, and effort that pursuing the case requires).

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[293] *See* André Spicer, *Playing the Bullshit Game: How Empty and Misleading Communication Takes Over Organizations*, ORG. THEORY, April 2020, at 20 (describing how organizations may "de-sanction[]" bullshit by calling it out, and that "[w]hen this happens, organizational members are less likely to routinely bullshit").

[294] *Cf.* SAINT AUGUSTINE, *supra* note 287, at 59.

[295] *See id.* at 86–87.

[296] *See supra* Sections II.B.2, III.D.2.

[297] William Baude and Stephen Sachs describe the influence the "official story" of the law has on the broader public. William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 200 (2023) ("[I]n ordinary legal systems, many citizens do generally subscribe to the official story, either directly or through trust in others' expertise: they employ it as a standard of behaviour in identifying legal rules, think themselves in compliance with whatever law it generates and so on."). For more on how lies in legal contexts may cause harm in the sense Augustine contemplates, see Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 745–48 (1989) (describing harm to other parties, long term harms, as well as to the liar's own integrity).

A thorough exploration of when and how originalism may cross the line from bullshit to lies, and the harms that such line crossing may cause, is a project for another day. But the prospect of originalist lies, and the ease with which bullshitting may become lying, shouldn't be ignored.

CONCLUSION

So where does this leave us with the titular question: "Is Originalism Bullshit?" The answer—perhaps upsetting to both originalists and their critics alike—is that it depends. It depends in part on how we define "bullshit." It depends on the intentions of the originalist interpreter. And it often depends on the type of actor involved, and how that actor's institutional goals, ethical and professional standards, and level of knowledge and expertise relate to the originalist inquiry.

Despite these variations, there are some patterns worth noting. Bullshit may be more likely in instances where the interpreter has a higher level of expertise. Attorneys and judges who face tough deadlines, client billing requirements, and the needs of a particular case may have less time to become aware of the intricacies of originalist theory and the breadth of historical evidence that bears on a question of constitutional interpretation. As a result, they may be more prone to engage in earnest—if mistaken—originalism. Academic originalists face heightened scrutiny, as they have the time, education, and expertise to at least be aware of what it is they do not know—and to act accordingly by educating themselves, collaborating with those with greater historical expertise, or refraining from making interpretive claims for which they are unprepared.[298]

As for disingenuous originalists, the complexities of historical analysis and the adversarial nature of court proceedings create an environment in which bullshit thrives. It's therefore important to identify and call out bullshit where it occurs—both to put interpreters on notice and to give them the chance to change their ways, or to call out ongoing patterns of bullshit so that it may be rejected or reformed. Doing so may also alert those who might inadvertently repeat, or launder, bullshit from an earlier stage of legal proceedings—whether it's a court relying on bullshit from counsel, or a scholar repeating the bullshit espoused by a court.[299]

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[298] *See supra* Sections III.C.3–.5.

[299] One would hope that scholars know better, but a desire to maintain good relationships with judges along with a misplaced reverence for courts instilled through clerkships may yet serve to cloud law professors' judgment. *See* Aliza Shatzman, *Law Schools are Part of the Problem—but They Can (and Should) be Part of the Solution*, YALE L. & POL'Y REV.: INTER ALIA, https://yalelawandpolicy.org/inter_alia/law-schools-are-part-problem-they-can-and-should-be-part-solution (last visited Dec. 26, 2024) (describing law schools' desire to maintain positive relationships with judges, education that instills a need to give judges "absolute respect and total unquestioning deference," and the reverence former clerks have for the judges for whom they previously worked).

While much of this Article focuses on the intentions of the interpreter, one must not disregard the ample scholarship on how context may give rise to bullshit formation and perpetuation.[300] With this wider view of bullshit, there is a case that the use of historical evidence and argumentation in originalist analysis is its own bullshit genre—at least in the context of actual cases. Counsel arguing these cases aren't concerned about historical truths so much as they are about their client's interests. And even those courts that attempt to take a balanced and rigorous approach to originalist analysis may find that the goal of accurate historical investigation must give way to the institutional need of reaching a final decision in favor of one of the parties.

These institutional features should raise concerns to originalists everywhere—including academic originalists who would rather concern themselves with theoretical nuance than how originalism looks on the ground.[301] If originalism, in practice, lends itself to incomplete investigation and misleading historical claims, there is a strong argument that practical originalism is its own bullshit genre. This bears on broader debates over how legal actors should go about interpreting the Constitution. While originalism may not always be bullshit, if it tends to veer into bullshit interpretation when applied by practicing attorneys and judges, this raises doubts over originalism's utility and desirability for real-world questions of constitutional interpretation.

[300] *See supra* Section II.B.2.

[301] *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022) (arguing that originalism should be thought of as a standard for whether claims of constitutional meaning are correct, rather than as a roadmap for how interpreters can go about determining questions of original meaning or law).