AGGREGATING ORIGINAL MEANING

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Public-meaning originalism—the theory that the meaning of legal texts, including the U.S. Constitution, is fixed when authoritatively adopted and binding until authoritatively changed—is ascendant. Although scholars debate this theory, a majority of U.S. Supreme Court Justices describe themselves as originalists and advocates increasingly advance arguments sounding in public-meaning originalism. And even jurists who are not originalists often recognize history's relevance.

The Court, however, has overlooked a conceptual puzzle: What should originalists do when deciding a case with multiple steps, each requiring its own originalist analysis? For example, courts routinely decide what a constitutional provision means and whether it has been incorporated against the states. Courts also determine whether a right has been violated and what the remedy should be. Because finding original public meaning is difficult, however, judges cannot be certain they have resolved each step correctly. Nonetheless, after resolving one step, they proceed to the next step as if resolution of the first was certain. Such inattention to possible error runs headlong into the mathematical concept of aggregation, which requires using the product rule or conditional probability when assessing the likelihood that multiple claims are true.

This Article introduces aggregation into the originalist literature and demonstrates how the premises of public-meaning originalism support accounting for aggregate uncertainty. Although aggregation may help judges reach decisions more consistent with original meaning, its disruptiveness heightens the significance of many other debates, such as what it means to "prove" the law, the strength of stare decisis, the scope of construction, the validity of liquidation and tradition, the legitimacy of compensating adjustments to offset nonoriginalist precedent, and the value of corpus linguistics. Aggregation, however, should be more than just disruptive. Rather, it may add at least some stability to the law by shoring up familiar features of constitutional doctrines that originalists thus far have struggled to defend, including the presumption of constitutionality, clear-statement rules, and hybrid rights. It may also provide additional arguments in support of originalism itself.

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INTRODUCTION

Justice Neil Gorsuch is a public-meaning originalist.[1] He believes that the Constitution's meaning was fixed upon adoption, the Constitution's meaning reflects how the public at the time of adoption would have read the Constitution's text, and such meaning remains binding until the Constitution's text is authoritatively changed.[2] Gorsuch thus cites originalist sources,[3] advances originalist arguments,[4] and criticizes nonoriginalist approaches.[5] And he is not alone. Justices Clarence Thomas, Brett Kavanaugh, and Amy Coney Barrett describe themselves the same way,[6] and Justice Samuel Alito calls himself a "practical originalist."[7] Even Justices who are not card-carrying originalists, moreover, often appeal to the historical record as at least relevant.[8] Accordingly, advocates have increasingly framed their arguments using public-meaning originalism.[9]

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1. See Neil M. Gorsuch, A Republic, If You Can Keep It 116–27 (2019) (embracing and defending public-meaning originalism).

2. See, e.g., Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018) (Gorsuch, J.) ("[P]eople may rely on the original meaning of the written law."); see also Lawrence B. Solum, The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning, 101 B.U. L. Rev. 1953, 1964–65 (2021) [hereinafter Solum, Public Meaning Thesis] (identifying premises of public-meaning originalism).

3. See, e.g., Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 348 (2018) (Gorsuch, J., dissenting) ("[O]riginal public meaning supplies the key . . . .").

4. See, e.g., Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036 n.2 (2021) (Gorsuch, J., concurring in the judgment) (focusing on "the right question," namely "what the Constitution as originally understood requires").

5. See, e.g., id. at 1039 n.5 ("Seeking to understand the Constitution's original meaning is part of our job.").

6. See David E. Pozen & Thomas P. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317, 2384 & n.383 (2021) (including "Justices Amy Coney Barrett, Neil Gorsuch, Clarence Thomas, and . . . Brett Kavanaugh in this category" of "'self-avowed originalists' on the Court" (quoting Ilan Wurman, What Is Originalism? Debunking the Myths, The Conversation (Oct. 24, 2020), https://theconversation.com/what-is-originalism-debunking-the-myths-148488 [https://perma.cc/R7CD-W679])).

7. J. Joel Alicea, The Originalist Jurisprudence of Justice Samuel Alito, 46 Harv. J.L. & Pub. Pol'y 653, 654–55 (2023) [hereinafter Alicea, Originalist Jurisprudence of Justice Samuel Alito] (internal quotation marks omitted) (quoting Matthew Walther, Sam Alito: A Civil Man, Am. Spectator (Apr. 21, 2014), https://spectator.org/sam-alito-a-civil-man/ [https://perma.cc/EX62-4QH8]).

8. See John F. Manning, The Necessary and Proper Clause and Its Legal Antecedents, 92 B.U. L. Rev. 1349, 1362 n.81 (2012) (book review) ("Even committed nonoriginalists . . . find the text's historical meaning at least relevant to, even if not dispositive of, constitutional decision making." (citing, inter alia, Philip Bobbitt, Constitutional Interpretation 11–22 (1991))).

9. See, e.g., Mila Sohoni, The Puzzle of Procedural Originalism, 72 Duke L.J. 941, 946–47 (2023) [hereinafter Sohoni, Puzzle of Procedural Originalism] (explaining the changes in briefing strategy spurred by Justice Gorsuch's call for originalist analysis regarding personal jurisdiction).

In *Ramos v. Louisiana*, one of his most significant opinions, Justice Gorsuch made a point to rely on public-meaning originalism.[10] Writing at times for the Court and other times for a plurality, he concluded that the Sixth Amendment requires unanimous juries and that the Fourteenth Amendment incorporated that right against the states.[11] To reach his first conclusion, Gorsuch surveyed historical sources "to determine what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption,"[12] including Blackstone, Founding-era practice, and opinions and commentary from soon after ratification.[13] After doing so, he concluded that the Sixth Amendment's requirement for jury unanimity is incorporated against the states.[14] In reaching that second conclusion, Gorsuch avoided the Fourteenth Amendment's Due Process Clause but rather explained that incorporation occurred through "the Fourteenth Amendment" generally[15]—apparently because he believes, like many originalists, that the correct clause is the Privileges or Immunities Clause.[16]

Whatever one thinks of *Ramos*, it is hard to describe Justice Gorsuch's opinion as anything but originalist.[17] He is a principled jurist who works hard, and it is apparent from *Ramos* that he wants to get history right. Despite such care, however, the likelihood that *Ramos* accurately reflects the Constitution's original public meaning could well be about the same as a coin flip coming up "heads." This is not because Justice Gorsuch overlooked historical evidence.[18] Nor is it because either of his steps is plainly wrong. No, *Ramos*'s problem is not its history but its math.

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10. See 140 S. Ct. 1390, 1396 (2020) (focusing on the "original public meaning").

11. See id. at 1394–95 ("We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.").

12. Id. at 1395 (quoting U.S. Const. amend. VI).

13. See id. at 1395–97 (citing, inter alia, 4 William Blackstone, Commentaries on the Laws of England 343 (1769); Del. Declaration of Rights § 14 (1776); 2 Joseph Story, Commentaries on the Constitution of the United States § 777, at 248 (1833)).

14. See id. at 1397 ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.").

15. Id.

16. See id. at 1424 (Thomas, J., concurring in the judgment) (faulting the Court's doctrine for not grounding incorporation in the Privileges or Immunities Clause); see also Timbs v. Indiana, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring) (same). It thus appears that Gorsuch intended *Ramos* to advance originalist jurisprudence and to implicitly critique nonoriginalist approaches.

17. See Daniel Epps & William Ortman, The Informed Jury, 75 Vand. L. Rev. 823, 887 (2022) (describing *Ramos* as "originalist"); Aaron Tang, Consequences and the Supreme Court, 117 Nw. U. L. Rev. 971, 986 n.82 (2023) (same).

18. To be sure, some question Justice Gorsuch's historical account. See, e.g., Nicholas M. Mosvick & Mitchell A. Mosvick, The *Heller*-ization of Originalism: *Ramos v. Louisiana* and the Problem of Frozen Context, 2019–2020 Cato Sup. Ct. Rev. 309, 310 (claiming that history "paint[s] a far more complicated picture"); Lawrence Rosenthal, The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem

It is a basic rule of probability that, all else being equal, it is less likely for two necessary things to be true than just one. For example, there's a 50% probability that an unweighted coin flip will come up heads, but the odds that it will come up heads twice in a row are only 25%.[19] Scholars have attempted to apply this probability concept—often called "aggregation" or "the conjunction paradox"[20]—to the law. For example, Professors Ariel Porat and Eric Posner have explained that when broad multistep propositions like "this criminal defendant should be convicted of (i) conspiracy to (ii) defraud" require running the table for multiple truth claims, it can be bad math to ignore aggregate uncertainty even if each claim is more likely than not correct.[21]

Returning to *Ramos*, even if historical evidence suggests that (i) the original public meaning of "trial[] by an impartial jury"[22] more likely than not requires unanimity and (ii) the original public meaning of the Fourteenth Amendment more likely than not requires "that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government,"[23] it still need not follow that the Court should overturn a state conviction for lack of a unanimous jury. *Ramos* required the Court to answer at least three distinct questions, including whether: (i) the Sixth Amendment requires unanimous juries, (ii) states are bound by that requirement, and (iii) the U.S. Supreme Court has the power to resolve such questions to begin with. None of these questions has an answer that is 100% certain. Aggregate uncertainty thus creates a puzzle, at least with respect to assessing the validity of the *result*—who wins or loses—in a case involving multistep originalist analysis.

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of Incorporation, 18 J. Contemp. Legal Issues 361, 365 (2009) (challenging incorporation on originalist grounds).

19. See Stephanie H. Barclay, Tension Between Constitutional Meaning and Constitutional Construction, 47 Harv. J.L. & Pub. Pol'y 613, 626 (2024) [hereinafter Barclay, Tension Between Constitutional Meaning and Constitutional Construction] ("As any statistician could point out, while the probability of flipping heads in one coin toss is 50%, the probability of flipping heads twice in a row is only 25%." (citing If I Flip a Coin Twice, What Is the Probability of Getting Both Heads?, Cuemath, https://www.cuemath.com/questions/if-i-flip-a-coin-twice-what-is-the-probability-of-getting-both-heads/ [https://perma.cc/CH9E-2PL6] (last visited Nov. 17, 2024))).

20. See, e.g., Saul Levmore, Conjunction and Aggregation, 99 Mich. L. Rev. 723, 723 (2001); Ariel Porat & Eric A. Posner, Aggregation and Law, 122 Yale L.J. 2, 4 (2012); Alex Stein, Of Two Wrongs that Make a Right: Two Paradoxes of the Evidence Law and Their Combined Economic Justification, 79 Tex. L. Rev. 1199, 1203 (2001) [hereinafter Stein, Of Two Wrongs that Make a Right]. Like Porat and Posner, this Article generally refers to the concept as "aggregation."

21. See Porat & Posner, supra note 20, at 38 ("If several elements of the same offense must be proven to establish the defendant's guilt, then cross-element aggregation could generate a different outcome than if each element were considered separately.").

22. U.S. Const. amend. VI.

23. Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (citing Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).

To see the puzzle, assume it is 70% likely that the Sixth Amendment's original public meaning requires jury unanimity and that it is also 70% likely that the Fourteenth Amendment's original public meaning (through whatever clause) incorporates the Sixth Amendment.[24] Scholars will disagree about those assumptions, but given that the Constitution does not plainly answer either,[25] 70% seems reasonable enough for a thought experiment. Next, assume (generously) that it is 99% likely that Article III's original public meaning allows the U.S. Supreme Court to determine on direct review whether a state criminal judgment violates the federal Constitution.[26] And finally, assume that these questions are all independent[27]—that is, the answer for one tells us nothing about the answer for another.

Under these assumptions, it is more likely than not that the judgment in *Ramos* does not reflect the Constitution's original public meaning. To find the probability of three independent events, the product rule requires multiplying the probability of each event occurring: *70% × 70% × 99% = 49%*.[28] Of course, these assumed probabilities might be too high or too low. But precise percentages do not matter yet; this is just a thought experiment. The point is that even if the answer to each step in a multistep problem is more likely right than wrong, the ultimate conclusion can still probably be wrong. Evidence theorists have recognized the challenge that aggregation's probability rules pose for the law,[29] but no one has

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24. Some of the difficulties operationalizing such analysis (including what happens when different courts are deciding different parts of a multistep question) are addressed below. See infra note 261 and accompanying text.

25. Cf. Richard H. Fallon, Jr., The Chimerical Concept of Original Public Meaning, 107 Va. L. Rev. 1421, 1430–32 (2021) [hereinafter Fallon, Chimerical Concept of Original Public Meaning] (reasoning that it is easy to determine the meaning of some provisions but not for "historically disputed questions"). For a discussion of the conceptual and practical difficulties of actually assigning probability, see infra section III.C.

26. That number is surely too high. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), is canonical, not bulletproof. See Richard A. Epstein, A Speech on the Structural Constitution and the Stimulus Program, 4 Charleston L. Rev. 395, 416 (2010) ("*Hunter's Lessee* is dubious as well." (footnote omitted)).

27. This assumption is not conceptually necessary; conditional probability applies if there is dependence, but the math is harder. See infra notes 142–145 and accompanying text.

28. The answer is 48.51%, which rounds up to 49%. See David M. Lane, David Scott, Mikki Hebl, Rudy Guerra, Dan Osherson & Heidi Zimmer, Introduction to Statistics 192, https://onlinestatbook.com/Online_Statistics_Education.pdf [https://perma.cc/9CTK-EUJN] (last visited Sep. 1, 2026) ("When two events are independent, the probability of both occurring is the product of the probabilities of the individual events."); see also James Brook, A Lawyer's Guide to Probability and Statistics 43 (1990) ("If and only if two statements, A and B, are probabilistically independent, then: P(A & B) = P(A) × P(B).").

29. See, e.g., Ronald J. Allen, Factual Ambiguity and a Theory of Evidence, 88 Nw. U. L. Rev. 604, 605–06 (1994) (describing a "relative plausibility theory"); Edward K. Cheng, Reconceptualizing the Burden of Proof, 122 Yale L.J. 1254, 1256–57 (2013) (questioning whether prosecutors should quantify certain burdens of proof, like beyond a reasonable doubt, using statistical analysis); John Kaplan, Decision Theory and the Factfinding Process,

systematically assessed originalism through the lens of aggregation, even though originalism also involves the search for historical facts through the use of evidence.[30]

The purpose of this thought experiment is not to pick on Justice Gorsuch or anyone else. On the contrary, similar probabilistic questioning could be done for almost any opinion (originalist or otherwise) written by any judge or justice. Almost no one approaches law probabilistically.[31] What's more, the likelihood of correctness for each question in *Ramos* could be greater than 70%, so the judgment there may be more likely than not correct anyway. Instead, the point of this thought experiment is to show how courts address multistep analysis. What often happens is the Court considers one question, decides who has the better of the argument with respect to that question even though the answer is not 100% certain, and then proceeds to the next question *as if* the answer to the first question was 100% certain.[32]

Setting aside the risk of aggregated error in this way may not be a problem for some methodologies, or at least not as much of a problem. Some pragmatists, for example, are not necessarily trying to figure out the answer to multiple independent questions; they generally want to know the pragmatically best ultimate answer.[33] Or for someone who does not

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20 Stan. L. Rev. 1065, 1084–86 (1968) (exploring what may "influence the completely rational decision theorist"); Charles Nesson, The Evidence or the Event?: On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357, 1385–88 (1985) (exploring the role of statistics in fact-finding); Michael S. Pardo, The Paradoxes of Legal Proof: A Critical Guide, 99 B.U. L. Rev. 233, 266 (2019) (explaining that statistical evidence may lack substantial significance for evidence law, theory, or policy); Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1335 (1971) (criticizing the use of probabilistic proof in a criminal trial).

30. See Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 Notre Dame L. Rev. 1, 47 (2015) [hereinafter Solum, Fixation Thesis] ("[W]hen we are looking for communicative content, the . . . evidence will be found in historical fact . . . ."); Cass R. Sunstein, Originalism, 93 Notre Dame L. Rev. 1671, 1677 (2018) ("[T]he crucial point is that the original meaning is a question of *fact*—a matter of history."); accord Alex Stein, Probabilism in Legal Interpretation, 107 Iowa L. Rev. 1389, 1394 (2022) [hereinafter Stein, Probabilism in Legal Interpretation] ("What these commands say and do not say is a purely empirical fact.").

31. See Levmore, supra note 20, at 723 ("Legal practice seems at odds with scientific logic, or at least with probabilistic reasoning."); Porat & Posner, supra note 20, at 9 n.8 ("Aggregation has largely been ignored by legal writers.").

32. See Levmore, supra note 20, at 726 ("[T]he mathematics . . . instructs us to multiply the two probabilities . . . . Law, however, appears not to abide by this rule."). As explained below, if courts assigned probabilities to each analytical step, they could avoid treating each of them as certain. See infra note 261.

33. See John F. Manning, Statutory Pragmatism and Constitutional Structure, 120 Harv. L. Rev. 1161, 1168–69 (2007) (explaining Judge Richard Posner's view that "[t]he ultimate criterion of pragmatic adjudication is reasonableness" (alteration in original) (internal quotation marks omitted) (quoting Richard A. Posner, Law, Pragmatism, and Democracy 61 (2003))).

believe that meaning is a fact at all,[34] or at least rarely a knowable one,[35] perhaps aggregated uncertainty also doesn't matter. Some other methodologies have also mitigated aggregation's effect through tools such as stare decisis and deference to fact finders (what happens in the jury room often is essentially a black box[36]). But one of the premises of originalism is that courts, for reasons sounding in legitimacy, should issue decisions that reflect the fixed meaning of the text being interpreted.[37] So, if it is more likely than not that a judicial judgment is not actually supported by the constitutional provisions at issue, it should be harder for a committed originalist to proceed.

In other words, although aggregation could be relevant to many methodologies, including nonoriginalist ones, it certainly should be relevant (at least presumptively) to originalism.[38] By assuming the answer to each question in multistep analysis to be 100% certain rather than assigning each step a probability of correctness, courts applying originalist analysis may side with parties whose ultimate claim more likely than not is wrong as a matter of historical fact. Indeed, even modest degrees of uncertainty about historical meaning can undermine ultimate judgments. Yet courts regularly decide cases with multistep analysis.[39] As with *Ramos*, for example, any case in which a party argues to the U.S. Supreme Court that a state official has violated a right in the Bill of Rights requires answering (at least) whether the right was violated and whether the right was incorporated.[40] Many of the Court's most significant cases fall within this

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34. See Frederick Mark Gedicks, The "Fixation Thesis" and Other Falsehoods, 72 Fla. L. Rev. 219, 240 (2020) ("[P]hilosophical hermeneutics maintains that textual meaning is mutually constituted by past and present . . . .").

35. See Fallon, Chimerical Concept of Original Public Meaning, supra note 25, at 1471 ("[T]he contention that disputed constitutional provisions have uniquely correct original linguistic meanings . . . is unsustainable.").

36. See Peña-Rodriguez v. Colorado, 580 U.S. 206, 218 (2017) (explaining that jurors are generally barred from testifying about what occurred during deliberations).

37. See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1792 n.11 (2005) [hereinafter Fallon, Legitimacy and the Constitution] (explaining "the 'originalist' position that the legitimacy of judicial decisionmaking requires adherence to the original understanding of constitutional language").

38. As detailed below, this Article focuses on originalism (the Court's ascendant methodology), but aggregation can be relevant to other methodologies as well. See infra notes 348–355 and accompanying text. Additionally, as explained infra section IV.B, aggregation sometimes may help defend public-meaning originalism against methodological challenges.

39. Of course, aggregation need not extend so far—it could be limited, for example, to provisions that are litigated or for which stare decisis does not apply. This is a threshold question that originalists must confront. See infra notes 271–276 and accompanying text.

40. See Ramos v. Louisiana, 140 S. Ct. 1390, 1393–94 (2020). Indeed, as discussed below, given uncertainty about judicial review itself, any constitutional decision would be subjected to this type of analysis. See infra notes 307–308 and accompanying text. For now, however, put that point aside—there are at least two steps in any case about an alleged violation of a right incorporated through the Fourteenth Amendment.

category.[41] Likewise, every case in which a criminal defendant asks a court to exclude evidence because of an alleged constitutional violation requires evaluating at least whether: (i) the claimed right exists; (ii) the claimed right was violated; and, if so, whether (iii) exclusion is required.[42] And courts often decide (i) whether a right or power exists and then (ii) whether an "edge" case falls within that right or power.[43] If originalists wish to issue judgments reflecting what is most likely the Constitution's original public meaning, why would probability-sensitive rules designed to minimize aggregate error not play at least some role? Ignoring the possibility of being wrong "could leave us less rather than more faithful to the original plan."[44]

There are significant obstacles, however, to incorporating aggregation into originalism. For one, doing so raises questions about legal interpretation itself and how likely propositions of law must be before courts should enforce them. Should judges only accept propositions about meaning that have a greater than 50% likelihood of being accurate?[45] Originalists presumably should not accept Interpretation A when historical evidence suggests that competing Interpretation B is more likely, but is a "more likely than not correct" standard appropriate or is a greater

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41. See, e.g., Mahmoud v. Taylor, 145 S. Ct. 2332 (2025) (Free Exercise Clause); Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (Free Speech Clause); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (Establishment Clause); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (Right to Bear Arms Clause); Torres v. Madrid, 141 S. Ct. 989 (2021) (Seizure Clause); *Ramos*, 140 S. Ct. 1390 (Jury Trial Clause); Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (Cruel and Unusual Punishment Clause); Timbs v. Indiana, 586 U.S. 146 (2019) (Excessive Fines Clause).

42. See, e.g., Case Comment, Michigan Supreme Court Holds Exclusionary Rule Inapplicable in the Civil Context, 138 Harv. L. Rev. 1941, 1943–44 (2025) (discussing a case in which the Michigan Supreme Court assumed a Fourth Amendment violation but did not require suppression).

43. See Derek W. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1095 (2019) ("The recognition of a fundamental right involves two distinct inquiries: (a) whether a right exists, and (b) the scope of the right."); William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 14 (2019) [hereinafter Baude, Constitutional Liquidation] ("Even if the law has a clear core, . . . there will always be edge cases.").

44. Stephen E. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 802 (2022) [hereinafter Sachs, Originalism: Standard and Procedure]; accord William Baude, Precedent and Discretion, 2019 Sup. Ct. Rev. 313, 327 [hereinafter Baude, Precedent and Discretion] (explaining "halfway originalism" as selectively invoking original meaning while retaining favorable precedent (internal quotation marks omitted) (quoting Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 585 U.S. 878, 903 (2018))); Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 232 (2023) (defining "selective originalism" as professing adherence to original meaning in some cases while subordinating it without obligatory reasons in others).

45. See Gary Lawson, Proving the Law, 86 Nw. U. L. Rev. 859, 877 (1992) [hereinafter Lawson, Proving the Law] (noting that the legal system does not specify "standard[s] of proof" for every "proposition of law"); Rohith V. Srinivas, The Exclusionary Rule as Fourth Amendment Judicial Review, 49 Am. Crim. L. Rev. 179, 208 (2012) (urging a "clear and convincing evidence" standard for originalist claims (internal quotation marks omitted)).

showing required?[46] This threshold question of how one "proves" the law is even more significant when multistep analysis—and with it, aggregation—is considered.

Aggregation, moreover, can be difficult to do. It is easy to posit as a thought experiment that incorporation is 70% likely; it is more challenging in the real world to accurately assign such a probability.[47] A strong form of aggregation also may change the outcome of many cases. For example, putting aside stare decisis (which lower court judges, of course, can't do), originalists may be hard pressed to ever exclude evidence on Fourth Amendment grounds in state criminal trials—even if the violation is egregious and even assuming (probably a stretch) that the Constitution's original public meaning more likely than not requires the exclusionary rule.[48] After all, assuming for argument's sake that there is 60% originalist support for the exclusionary rule, uncertainty about whether the Fourth Amendment is incorporated *by itself* could prevent exclusion even when it is 100% certain that the right at issue was violated.[49] Aggregation, moreover, may destroy "congruent" constitutionalism, which treats federal and state governments the same when enforcing the U.S. Constitution, because of uncertainty about the incorporation of the Bill of Rights.[50] Yet many of the Court's highest-profile cases in recent years involve state officials.[51]

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46. See Gary Lawson, Legal Indeterminacy: Its Cause and Cure, 19 Harv. J.L. & Pub. Pol'y 411, 422 (1996) [hereinafter Lawson, Legal Indeterminacy] (arguing that "nothing in the nature of interpretation, of originalism, or of the Constitution" answers how to prove meaning).

47. See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2137–39 (2016) (book review) (assigning probabilities but admitting that "judgments about clarity versus ambiguity turn on little more than a judge's instincts"); see also Aditya Bamzai, Delegation and Interpretive Discretion: *Gundy*, *Kisor*, and the Formation and Future of Administrative Law, 133 Harv. L. Rev. 164, 191 (2019) (noting limits of the "judicial mind" when confronted with "different gradations of deference").

48. Cf. Richard M. Re, The Due Process Exclusionary Rule, 127 Harv. L. Rev. 1885, 1928 (2014) (arguing that the Due Process Clauses incorporate Fourth Amendment exclusionary requirements into the procedures necessary for a lawful conviction). Compare Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 793 n.135 (1994) ("[T]ext, history, structure, and early implementation do not support the exclusionary rule."), with Roger Roots, The Originalist Case for the Fourth Amendment Exclusionary Rule, 45 Gonz. L. Rev. 1, 4 (2010) ("[T]he Fourth Amendment exclusionary rule is soundly based in the original understandings of the Constitution and the practices of the Founding period.").

49. Even if incorporation were 80% probable, *60% (exclusionary rule) × 80% (incorporation) × 100% (constitutional violation) = 48%*.

50. See Jay S. Bybee, The Congruent Constitution (Part One): Incorporation, 48 BYU L. Rev. 1, 5–7 (2022) [hereinafter Bybee, Part One] (explaining congruent constitutionalism); Jay S. Bybee, The Congruent Constitution (Part Two): Reverse Incorporation, 48 BYU L. Rev. 303, 309 (2022) [hereinafter Bybee, Part Two] (same).

51. See cases cited supra note 41. "[R]everse incorporation" cases—those that apply the Fourteenth Amendment against the federal government, see Bybee, Part Two, supra note 50, at 308–09—would be the exception.

Aggregation's potentially disruptive implications thus elevate the importance of other already significant debates, including those about the strength of stare decisis,[52] the manner and scope of construction,[53] the legitimacy of appeals to liquidation and tradition,[54] the permissibility of a "compensating adjustment that approximates" what originalism might require,[55] and the value of corpus linguistics.[56] If, for example, a court could treat the likelihood of incorporation as 100% certain because of stare decisis, one step would disappear. The opposite, of course, is also true; if such doctrines should play little role, many cases may have to be revisited. Even "fearless originalists,"[57] however, may stagger before discounting *every* constitutional decision by the possibility (even if slight) that *Marbury* is wrong.[58]

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52. See, e.g., Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1924 (2017) [hereinafter Barrett, Originalism and Stare Decisis] ("[O]riginalism prioritizes what we might think of as the original precedent: the contemporaneously expressed understanding of ratified text."). Compare Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 24–25 (1994) [hereinafter Lawson, Constitutional Case Against Precedent] (characterizing precedent as potentially unconstitutional), with John O. McGinnis & Michael B. Rappaport, Reconciling Originalism and Precedent, 103 Nw. U. L. Rev. 803, 836–38 (2009) (defending some uses of precedent).

53. Compare Fallon, Chimerical Concept of Original Public Meaning, supra note 25, at 1477 ("[M]ost constitutional issues requiring decision by the Supreme Court arise in the 'construction zone' . . . ."), with John O. McGinnis & Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, 96 Notre Dame L. Rev. 919, 921 (2021) [hereinafter McGinnis & Rappaport, Power of Interpretation] (arguing that the construction zone is "small" and the Constitution's original meaning solves the "great bulk" of constitutional issues).

54. Compare Baude, Constitutional Liquidation, supra note 43, at 4 ("Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise."), with Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 9 (2020) (arguing that "attention to post-Founding historical practice fits more naturally with non-originalist theories").

55. See Adrian Vermeule, The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution, 123 Harv. L. Rev. 4, 20 (2009) ("[T]he President's veto power might be interpreted . . . as authorizing a line-item veto—a form of compensating adjustment that approximates the first-best regime."). But see E. Garrett West, Refining Constitutional Torts, 134 Yale L.J. 858, 931 (2025) (noting "legitimacy" questions about such "adjustments").

56. Compare Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 795 (2018) (describing corpus linguistics), and Thomas R. Lee & Stephen C. Mouritsen, The Corpus and the Critics, 88 U. Chi. L. Rev. 275, 281–87 (2021) [hereinafter Lee & Mouritsen, Corpus and Critics] (explaining how it increases accuracy), with Kevin P. Tobia, Testing Ordinary Meaning, 134 Harv. L. Rev. 726, 799 (2020) (questioning the accuracy of using corpus linguistics).

57. See Randy E. Barnett, It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt, 90 Minn. L. Rev. 1232, 1232–33 (2006) (contrasting "'faint-hearted originalists'" who apply stare decisis with "fearless originalists" (quoting Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989))).

58. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); see also infra note 307 (discussing the originalist debate about judicial review itself). Reluctance to think

Aggregation, however, need not be only disruptive—it also can lend at least some additional stability to constitutional law by offering conceptual support for features that originalists struggle to defend.[59] For example, is there a place for hybrid-rights analysis?[60] Maybe, because the Court might have misapplied more than one provision, making it more likely than not overall that the alleged right exists somewhere. Should courts embrace a presumption of constitutionality?[61] Perhaps, not because any discrete provision creates the presumption, but because judicial review itself is subject to some historical doubt (even if slight) that it may be wrong. So why wouldn't close questions favor judicial restraint? Similarly, should there be clear-statement rules?[62] Possibly, at least sometimes, because when it is not certain the federal government has power to act in the first place, statutory clarity is more important. And what about qualified immunity, another doctrine often attacked by originalists?[63] Even setting aside historical support for such immunity,[64] this defense may also be supported by everyday math. If the doctrine is applied correctly, the cases in which qualified immunity bars recovery should be those in which it is not obvious that a constitutional violation occurred.[65] Finally, although aggregation matters for originalism because debates about stare decisis are particularly sharp among originalists, aggregation may also help shore up public-meaning originalism itself because certain competing methodolo-

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probabilistically about every step may cut in favor of the less rigorous "soft aggregation" discussed infra Part V.

59. No doubt, aggregation on net may produce more instability than stability; this Article is not making a claim about overall stability. Rather, the point is that aggregation is not *entirely* disruptive.

60. See Michael Coenen, Combining Constitutional Clauses, 164 U. Pa. L. Rev. 1067, 1070 (2016) [hereinafter Coenen, Combining Constitutional Clauses] (describing "combination analysis," in which courts derive constitutional outcomes from multiple clauses acting together (internal quotation marks omitted)).

61. Compare Bowen v. Kendrick, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers) (stating that a presumption of constitutionality is given to every Act of Congress), with Steven G. Calabresi, On Originalism and Liberty (Sep. 17, 2015), *in* 2015–2016 Cato Sup. Ct. Rev. 17, 18 ("[O]riginalism means endorsing a presumption of liberty and not a presumption of constitutionality . . . .").

62. See John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 404–05 (2010) (criticizing clear-statement rules).

63. See, e.g., Ziglar v. Abbasi, 582 U.S. 120, 157–60 (2017) (Thomas, J., concurring in part and concurring in the judgment) (questioning the Supreme Court's current doctrine of qualified immunity as compared with its roots); William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 88 (2018) [hereinafter Baude, Qualified Immunity] (arguing that qualified immunity lacks support in Section 1983 or the common law).

64. See, e.g., Scott A. Keller, Qualified and Absolute Immunity at Common Law, 73 Stan. L. Rev. 1337, 1344–45 (2021) (offering a partial originalist defense of qualified immunity).

65. Cf. Hope v. Pelzer, 536 U.S. 730, 735, 745–46 (2002) (finding that prison guards were not entitled to qualified immunity from a Section 1983 suit because prior law provided officials with fair notice of the unconstitutionality of their actions and the constitutional violation arising from their actions was "obvious").

gies may be less able to account for aggregation. For example, purposivists who believe they can "cull legislative 'intent' or 'purpose'" from sources other than the text[66] must also account for the possibility that they have performed that difficult—perhaps impossible[67]—task wrongly, thus increasing uncertainty; such risk becomes more important given multistep analysis.

These are not the only potential consequences, but they illustrate why aggregation creates a puzzle for constitutional theorists, including and perhaps especially originalists. But that puzzle comes with an opportunity. By confronting aggregation, originalists can better appreciate the stakes of other significant debates, while also finding a conceptual path to defend some familiar aspect of constitutional law. This may be particularly true, moreover, if judges adopt what this Article dubs "soft" aggregation that focuses on aggregation's intuition against stacking inference upon inference rather than taking the concept so far as to exceed judicial competence. Just because it may not be realistically possible for courts to do the types of calculations that the purest form of aggregation requires, it does not follow that courts should disregard aggregation's intuitive value—everyday logic teaches that, all else equal, it is more likely for one proposition to be true than for a party to run the table for multiple necessary propositions, or for two easy questions to be both right rather than two difficult ones. By itself, following that intuition should lead to greater accuracy for judgments requiring multiple propositions to all be resolved in favor of the same party.

* * *

This Article proceeds as follows. It first explores the basics of originalism. It then explains aggregation and how evidence scholars have addressed the product rule and conditional probability. Next, it shows how the premises of public-meaning originalism support aggregation and offers five exemplars of what such analysis may include. The Article then sketches aggregation's disruptive and stabilizing effects. Finally, it concludes with a potential path forward that relies on a softer, more administrable form of aggregation dubbed soft aggregation. Even if the most demanding form of aggregation is beyond judicial competence, there still may be a place for soft aggregation.

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66. See John F. Manning, Inside Congress's Mind, 115 Colum. L. Rev. 1911, 1912 (2015) [hereinafter Manning, Inside Congress's Mind] (explaining that a complex, multimember legislature generally lacks collective intent on difficult questions).

67. See id. at 1919–20 ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition." (internal quotation marks omitted) (quoting Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870–71 (1930))).

I. THE BASICS OF ORIGINALISM

Originalism is now "ascendant," especially in the U.S. Supreme Court.[68] How this happened has been told many times before,[69] and debates about it remain fierce. This Article does not rehash these fights but instead explains how aggregation may affect them. This Part introduces originalism's core premises, with focus on one—the premise that the Constitution's meaning is a historical fact. This Part also briefly summarizes debates that have divided originalists about stare decisis, compensating adjustments, construction, liquidation, tradition, and corpus linguistics.

A. *Originalism's Two Conditions*

Originalism is (relatively) simple to describe but (sometimes) hard to do. It rests on the proposition that in a constitutional democracy like the United States, those who purport to wield governmental power need permission from the People, and such permission is found, if at all, in the Constitution.[70] Applied to judges,[71] the conventional account of originalism's most predominant form (public-meaning originalism) holds that judges legitimately wield power when they issue decisions consistent with the Constitution's original meaning and may usurp it when they depart from that meaning.[72] As Judge Frank Easterbrook observes, "The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist . . . interpretation by the judicial branch."[73]

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68. Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1498 (2021) ("Originalism . . . appears to be ascendant on the Supreme Court.").

69. See, e.g., Elias Neibart, How Originalism Became "Our Law" and Why That Matters, 24 Geo. J.L. & Pub. Pol'y 141, 151–54 (2026) (tracing how originalism's normative justifications contributed to its widespread acceptance).

70. See, e.g., Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 18 (2018) (explaining that the Constitution "creates a particular kind of relationship between 'We the People' and their *agents* in government, who wield delegated powers on . . . behalf of their *principals*").

71. Originalism is also relevant to other constitutional actors. See, e.g., Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. Pa. J. Const. L. 1, 2–4 (2016) (examining the implications of originalism for Congress and legislative decision-making). For ease of exposition, this Article focuses on originalism within the judiciary.

72. See Fallon, Legitimacy and the Constitution, supra note 37, at 1792 n.11 (providing examples of originalist scholars who take the position that legitimacy is tied to the "original understanding of constitutional language").

73. Frank H. Easterbrook, Textualism and the Dead Hand, 66 Geo. Wash. L. Rev. 1119, 1121 (1998) [hereinafter Easterbrook, Textualism and the Dead Hand].

Although scholars continue to discuss the history of originalism,[74] this concept "as a movement in jurisprudence took flight in the 1980s."[75] Professor Paul Brest, who appears to have first coined the term, described "originalism" as "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."[76] As Professors William Baude and Stephen Sachs have explained, "[W]e treat the Constitution as a piece of enacted law that was adopted a long time ago; whatever law it made back then remains the law, subject to various de jure alterations or amendments made since."[77] Whether that approach is sound has launched a thousand debates about the authority of prior generations to bind the future,[78] the role of consequences in interpretation,[79] the possibility (or wisdom) of ascertaining the meaning of texts—especially old ones[80]—and the extent

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74. Compare Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution 14–16 (2019) ("[E]arly American constitutional practice directed constitutional interpretation toward the goal of ascertaining the text's original meaning."), and John O. McGinnis, Were the Founders Themselves Originalists?, 46 Harv. J.L. & Pub. Pol'y 1, 1 (2023) (similarly noting that "[t]he founding generation was broadly originalist in constitutional interpretation"), with H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 887–88, 903–04 (1985) (explaining that the framers did not anticipate reliance on subjective intent), and Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era 9–10 (2018) (arguing that the framers did not initially accept the Constitution as written law with fixed meanings).

75. Bradley Rebeiro, Frederick Douglass and the Original Originalists, 48 BYU L. Rev. 909, 928 & n.77 (2022) (tracing the existence of originalism prior to the 1980s).

76. Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 204 (1980); see also Antonin Scalia, God's Justice and Ours, First Things (May 1, 2002), https://firstthings.com/gods-justice-and-ours/ [https://perma.cc/C8WE-EYXC] ("[The Constitution] means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted.").

77. William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1457 (2019).

78. See, e.g., Jamal Greene, Rule Originalism, 116 Colum. L. Rev. 1639, 1684–85 (2016) (describing the "dead hand" objection to originalism (citing, inter alia, Thurgood Marshall, Commentary, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1, 1–2 (1987) (arguing that constitutional meaning evolves, rather than remaining fixed since the time of its conception); Richard A. Primus, When Should Original Meanings Matter?, 107 Mich. L. Rev. 165, 192 (2008) (describing the dead-hand problem as "[t]he most important limitation on originalism's capacity to serve the constitutional end of respecting democratic-enactment authority"); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1348–53 (2006) (challenging the authority of judges to make final decisions on issues of public morality))).

79. See James E. Ryan, Does It Take a Theory? Originalism, Active Liberty, and Minimalism, 58 Stan. L. Rev. 1623, 1637 (2006) (book review) (noting "scary" consequences of the Court's embrace of originalism); Sunstein, supra note 30, at 1690 (claiming originalism may produce "bad consequences"). But see John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 98 Geo. L.J. 1693, 1695 (2010) (arguing that originalism produces better consequences for present-day citizens).

80. See Gedicks, supra note 34, at 224–26 (questioning whether the meaning of past texts can be objectively determined without being shaped by the interpreter's present concerns); Andrew Koppelman, Why Do (Some) Originalists Hate America?, 63 Ariz. L. Rev.

to which the Constitution's original meaning requires originalism (and, if it does, what flavor of originalism),[81] among many others.

Even those who subscribe to originalism, moreover, may disagree not just about the original meaning of individual provisions (indeed, it is hard to find a provision that has not prompted at least *some* debate[82]), but more fundamentally about the nature of the project. Brest's definition of "originalism," for example, identifies an important question: Is the goal to discover the intent of those who wrote the document or the public meaning of the words they used? Because it can be difficult or even impossible to ascertain the subjective intent of a multimember body[83] and because of associated rule-of-law concerns,[84] many originalists adhere to "public meaning originalism," which focuses on the public meaning of the text rather than the intentions of the Constitution's framers.[85] Of course, some critics question whether public-meaning originalism is administrable. Public-meaning originalism avoids the problem of determining the subjective intent of a multimember body, but it often may be difficult to determine "objective intent" of an entire population.[86] Despite such difficulty, however, today the "predominant form" of originalism is "Public Meaning Originalism."[87] As Professor Lawrence Solum has explained,

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1033, 1042 (2021) ("Rule-Reductive Originalism means that every area of constitutional law is ripe for revision . . . .").

81. See Joel Alicea & Donald L. Drakeman, The Limits of New Originalism, 15 U. Pa. J. Const. L. 1161, 1164 (2013) (contending that the framers also considered intent).

82. Compare Fallon, Chimerical Concept of Original Public Meaning, supra note 25, at 1454 (conceding that the requirement for each state to have two senators is clear), with Larry Alexander, The Method of Text and ?: Jack Balkin's Originalism With No Regrets, 2012 U. Ill. L. Rev. 611, 613 (arguing that some originalist theories could cast doubt even on that provision).

83. See Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983) ("Although legislators have individual lists of . . . preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.").

84. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 3, 38 (Amy Gutmann ed., 1997) [hereinafter Scalia, A Matter of Interpretation] (describing rule-of-law objections).

85. See, e.g., Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 722 (2011) (describing the "move from original intent to original meaning"); Keith E. Whittington, The New Originalism, 2 Geo. J.L. & Pub. Pol'y 599, 609 (2004) (explaining that "the new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text").

86. See Larry Kramer, Two (More) Problems With Originalism, 31 Harv. J.L. & Pub. Pol'y 907, 911 (2008) [hereinafter Kramer, Two (More) Problems With Originalism] (explaining that "public meaning originalism has some pretty serious defects of its own—the main one being that there was no agreed-upon public meaning of the constitutional terms most often in dispute").

87. Lawrence B. Solum, Original Public Meaning, 2023 Mich. St. L. Rev. 807, 809 [hereinafter Solum, Original Public Meaning]. That said, other forms still have adherents. See Sunstein, supra note 30, at 1674 n.13 (describing other supported versions of originalism). Likewise, one form of "new originalism"—called "new new originalism" or "framework originalism"—relies upon the text's original understanding "at a much higher level of abstraction." Ryan Fortson, Was Justice Antonin Scalia Hercules?: A Re-Examination

however, all variants of originalism must satisfy at least two conditions: To count as originalist analysis, (i) the meaning of a legal text must be understood to be fixed either when written or authoritatively adopted (the fixation thesis) and (ii) that meaning must be binding until authoritatively changed (the constraint principle).[88] For public-meaning originalism, a third condition is that the text's fixed meaning must be what the public would have understood at the time of the text's authoritative adoption.[89] Thus, if a dispute concerns, say, the Appointments Clause, a jurist doing public-meaning originalism would ask how the clause would have "been understood by an ordinary adult citizen"[90] in 1789.[91]

B. *Originalism and Historical Facts*

For originalists, the meaning of a legal instrument, including the Constitution, is tied to or at least involves "historical facts" to be discovered.[92] For an originalist who focuses on intentions, the fact to be discovered is the original intentions of the framers.[93] And for public-meaning originalists, the fact is "the communicative meaning conveyed or made accessible to the public by the text, where 'the public' is understood as a linguistic community . . . encompassing the contemporaneous competent speakers of the natural language in which the text was written, in the jurisdiction in which the text has legal effect."[94] Either way,

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of Ronald Dworkin's Relationship to Originalism, 13 Wash. U. Juris. Rev. 253, 285–86 (2021) (internal quotation marks omitted) (first quoting Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707, 719 (2011); then quoting Jack M. Balkin, Framework Originalism and the Living Constitution, 103 Nw. U. L. Rev. 549 (2009)).

88. See Solum, Fixation Thesis, supra note 30, at 1, 13.

89. See Solum, Public Meaning Thesis, supra note 2, at 1957; see also id. at 1962–63 (defining "public meaning").

90. Lawrence B. Solum, Originalism, Legal Theory Lexicon (Jan. 18, 2004), https://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html [https://perma.cc/6KCD-NSM2] (last updated Apr. 1, 2026).

91. See Lucia v. SEC, 585 U.S. 237, 253–54 (2018) (Thomas, J., concurring) (looking to the "original public meaning" to interpret the Appointments Clause (citing, inter alia, Jennifer L. Mascott, Who Are "Officers of the United States"?, 70 Stan. L. Rev. 443, 564 (2018))).

92. Jamal Greene, On the Origins of Originalism, 88 Tex. L. Rev. 1, 85 (2009) [hereinafter Greene, Origins of Originalism]; see also Richard H. Fallon, Jr., Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?, 34 Harv. J.L. & Pub. Pol'y 5, 8 (2011) ("Proponents of originalism agree that historical facts at the time of a constitutional provision's adoption normally determine its meaning."); sources cited supra note 30 (treating originalism as a historical fact).

93. See, e.g., Robert H. Bork, The Constitution, Original Intent, and Economic Rights, 23 S.D. L. Rev. 823, 823 (1986) (emphasizing the original intent of the Constitution's framers).

94. Solum, Public Meaning Thesis, supra note 2, at 1962–63 (footnote omitted); see also Randy E. Barnett, The Gravitational Force of Originalism, 82 Fordham L. Rev. 411, 415 (2013) [hereinafter Barnett, Gravitational Force of Originalism] ("[New Originalism] seeks to discover an empirical fact . . . .").

"[o]riginalism . . . relies on ostensibly verifiable historical facts about the world."[95]

Originalists concede (as they must) that it sometimes can be difficult to accurately find such historical facts.[96] Justice Antonin Scalia—perhaps still originalism's foremost champion—put it this way:

> [Originalism's] greatest defect, in my view, is the difficulty of applying it correctly. Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning. They have meaning enough, as the scholarly critics themselves must surely believe when they choose to express their views in text rather than music. But what is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.[97]

Yet although such facts can be difficult sometimes to find, originalism ties meaning to historical facts.[98] Both original-intent and public-meaning originalists, for example, care about "the debates at the Constitutional Convention in Philadelphia," and for public-meaning originalists, "[t]he ratification debates and Federalist Papers can be supplemented by evidence of ordinary usage . . . [and] by the constructions placed on the Constitution by the political branches and the states in the early years after

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95. Greene, Origins of Originalism, supra note 92, at 85.

96. See, e.g., Barnett, Gravitational Force of Originalism, supra note 94, at 416 ("This is not to say that the objective meaning of words is always discoverable." (emphasis omitted)); Solum, Public Meaning Thesis, supra note 2, at 2014 ("Recovering original public meaning is always difficult when the provision has been ignored for decades or current doctrine has drifted far away from original meaning."). Cf. Jamal Greene, The Age of Scalia, 130 Harv. L. Rev. 144, 150–51 (2016) ("Originalism requires the exercise of often difficult judgments about the state of the historical record . . . .").

97. Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856–57 (1989) [hereinafter Scalia, Originalism: The Lesser Evil] (emphasis omitted). As Professor Gary Lawson explains, "Good interpretative originalism . . . requires a combination of law, legal history, history proper, philosophy . . . , intellectual history, political science (both past and present), psychology, linguistics, economics, religious studies, classical studies, and probably a host of disciplines that I cannot even name." Gary Lawson, Does Good Originalism Need Good History?, 77 Fla. L. Rev. 1975, 1989–90 (2025) [hereinafter Lawson, Does Good Originalism Need Good History?].

98. See Solum, Fixation Thesis, supra note 30, at 12 ("Interpretations are either true or false—although in some cases we may not have sufficient evidence to [know].").

its adoption."[99] Because public-meaning originalism is the primary variety used today, this Article focuses on it.[100] But conceptually, originalism's premise that meaning is connected with historical facts applies to any variety of originalism.

C. *Some Open Questions*

Although originalism is ascendant, there are conceptual puzzles. One question concerns how strong evidence must be to warrant case-dispositive effect; in other words, what standard of proof must an originalist argument satisfy? Must a judge be certain, quite confident, or persuaded by a preponderance of the evidence, or is it enough that no other competing argument is better?[101] Justice Scalia, for example, "often wrote as if the constitutional rule involved was established with near one hundred percent certainty. But he did not always do so, and it is not clear if he thought his methodology required a high degree of certainty."[102]

Such questions matter because the more certainty required to adopt an originalist argument, the fewer disputes that originalism can resolve.[103] Similarly, what type of techniques of "adjudicative fact-finding," such as rules of "party presentation," are relevant (and if so, why)?[104] Originalists, moreover, do not (generally) claim that appellate judges should defer to trial judges' finding of fact regarding such questions, but this is a question the "Supreme Court has never definitively" resolved.[105]

Originalists also debate what to do with precedent. Precedent, especially precedent nearly contemporaneous with a provision's ratification, can be valuable to almost all originalists as evidence of original meaning.[106] But precedent—via stare decisis—can also entrench decisions

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99. Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 498–99 (2013).

100. See Solum, Original Public Meaning, supra note 87, at 809.

101. See Lawson, Legal Indeterminacy, supra note 46, at 422 ("[I]f the correct standard of proof is the best-available-alternative standard, the problem of indeterminacy largely disappears. If the correct standard of proof involves some absolute threshold, . . . then indeterminacy may be a serious problem.").

102. Michael D. Ramsey, Beyond the Text: Justice Scalia's Originalism in Practice, 92 Notre Dame L. Rev. 1945, 1971 (2017) (footnote omitted).

103. See Thomas B. Colby, The Federal Marriage Amendment and the False Promise of Originalism, 108 Colum. L. Rev. 529, 601 (2008) ("If we demand one hundred percent certainty about the original meaning, then originalism can never deliver.").

104. Ryan C. Williams, Historical Fact, 99 Notre Dame L. Rev. 1585, 1590 (2024). See generally Randy E. Barnett & Lawrence B. Solum, Making the Party Presentation Principle Safe for Originalism, 174 U. Pa. L. Rev. 947 (2026) (discussing questions that the party presentation principle raises for originalism).

105. See Williams, supra note 104, at 1611. That said, the Court's reliance on "third-party amicus briefing . . . [or] the Justices' own independent historical research," id. at 1602, suggests de novo review.

106. See Lee J. Strang, An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent, 2010 BYU L. Rev. 1729, 1731 [hereinafter Strang, Originalist Theory

that are not originalist. The Court has decided many cases since 1789, often without using originalism at all. Are those cases entitled to controlling weight or something less in the face of contrary originalist evidence? Some originalists more readily respect stare decisis, while others are warier of it,[107] especially where the precedent is "demonstrably erroneous" as an originalist matter.[108] Because one reason to disregard stare decisis is error, moreover, the law of precedent itself may de facto impose only a "weak form of stare decisis."[109] This question is one of the oldest in the originalist literature.[110]

Related to precedent is the concept of "compensating adjustments."[111] If courts are not willing to toss aside all nonoriginalist precedent, is it permissible to adopt doctrines that at least more closely approximate originalism, even if through nonoriginalist means? Professor Adrian Vermeule, for example, notes (but does not himself adopt) the argument that "independent administrative agencies" can be seen as "a compensating adjustment that offset[s] the power of the presidency, restoring something like the original Madisonian system of checks and balances in a world where legislative and judicial checks on the executive proved inadequate."[112] Yet he also notes that "judges" may be "ill-suited to identify valid compensating adjustments, so that the mistakes they make would have even more harmful consequences than would failure to adjust the constitutional rules to take account of systemic interaction between the originalist and nonoriginalist components of those rules."[113]

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of Precedent] ("[S]ome originalist precedent performs the epistemic role of providing evidence of how the Constitution's original meaning governs a case.").

107. See Barrett, Originalism and Stare Decisis, supra note 52, at 1928–29 & n.35 (describing originalist criticism of Justice Scalia's respect for stare decisis).

108. See Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring); see also Note, The Paradox of Precedent About Precedent, 138 Harv. L. Rev. 797, 814 (2025) ("Justice Thomas's view, then, looks very similar to the precedent as permission view (although with mandatory overruling of demonstrably erroneous precedents).").

109. Lisa Schultz Bressman, The Rise and Fall of the Self-Regulatory Court, 101 Tex. L. Rev. 1, 41 (2022).

110. See, e.g., Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 724 (1988) ("[O]riginal understanding must give way in the face of transformative or longstanding precedent . . . ."); H. Jefferson Powell, Rules for Originalists, 73 Va. L. Rev. 659, 694 (1987) (acknowledging that originalists might accept decisions inconsistent with original understanding to comply with stare decisis); Scalia, Originalism: The Lesser Evil, supra note 97, at 861 ("[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis* . . . ."); see also Strang, Originalist Theory of Precedent, supra note 106, at 1731 (canvassing literature showing that "most scholars believe that stare decisis is normatively attractive").

111. See Benjamin Eidelson & Matthew C. Stephenson, The Incompatibility of Substantive Canons and Textualism, 137 Harv. L. Rev. 515, 564 n.251 (2023) (collecting literature on "compensating adjustments" (internal quotation marks omitted)).

112. Vermeule, supra note 55, at 21.

113. Id. at 62; see also Sohoni, Puzzle of Procedural Originalism, supra note 9, at 998 (explaining that "the subject of 'compensating adjustments' is a 'familiar, if undertheorized,

Another question concerns construction—that is, how courts give legal effect to the text's meaning, especially for more indeterminate provisions.[114] Public-meaning originalists (generally) agree that "[w]hen the original meaning is determinate, the content of a provision can be settled entirely by interpretation within the interpretation zone," yet if "the original meaning of a constitutional provision is indeterminate—when the original meaning runs out—the content of the provision cannot fully be determined by interpretation."[115] In such cases, "content must be established in some other manner."[116] Originalists disagree about whether and when construction is permissible (including which provisions are indeterminate and to what extent) and what judges can legitimately do within the construction zone. Some scholars contend that many of the Constitution's most important provisions are indeterminate.[117] Proponents of "original methods originalism"—that is, the theory that courts should apply the methodology that courts used at ratification—rejoin that many seemingly opaque terms like "due process" actually only have small construction zones.[118] Original-law originalists, who "employ original norms of interpretation, legal backdrops, and subsequent changes of law made in accordance with then-existing rules,"[119] perhaps often would do the same.

Originalists also debate what to do with post-ratification evidence.[120] As Justice Amy Coney Barrett has detailed, "Scholars have proposed competing and potentially conflicting frameworks for this analysis, including

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problem for constitutional originalists'" (footnote omitted) (first quoting Adrian Vermeule, Hume's Second-Best Constitutionalism, 70 U. Chi. L. Rev. 421, 421 (2003); then quoting Evan D. Bernick, Envisioning Administrative Procedure Act Originalism, 70 Admin. L. Rev. 807, 864–65 (2018))).

114. See Solum, Fixation Thesis, supra note 30, at 5 (explaining the concept of "construction zones," where "judges and officials" must "develop constitutional doctrines and practices" based on "normative considerations that are not fully determined by the communicative content of the constitutional text" (internal quotation marks omitted)).

115. McGinnis & Rappaport, Power of Interpretation, supra note 53, at 921.

116. Id.

117. See, e.g., Fallon, Chimerical Concept of Original Public Meaning, supra note 25, at 1427 (contending "that original public meanings . . . are insufficient to resolve any historically contested" issue); Kramer, Two (More) Problems With Originalism, supra note 86, at 911 (noting that, at the Founding, "there was no agreed-upon public meaning of the constitutional terms most often in dispute").

118. See Max Crema & Lawrence B. Solum, The Original Meaning of "Due Process of Law" in the Fifth Amendment, 108 Va. L. Rev. 447, 450–51 (2022) (arguing that "[t]he phrase 'due process of law' had a very precise and restricted meaning"); McGinnis & Rappaport, Power of Interpretation, supra note 53, at 921–22.

119. Sherif Girgis, The Abuses of History in Constitutional Interpretation, 173 U. Pa. L. Rev. 1995, 2002 (2025).

120. See Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 424–25 (2012) ("A strict originalist . . . may resist relying on later practices . . . [but] there are less strict versions of originalism that are likely to be more receptive to historical practice.").

liquidation, tradition, and precedent."[121] Liquidation posits that post-ratification "practice" can "settle the meaning of individual rights as well as structural provisions,"[122] either by helping to identify the original meaning (for example, if a provision was interpreted immediately after ratification, that interpretation may be strong evidence of original meaning) or, more provocatively, by imposing a meaning that was not contemporaneous with the provision's ratification.[123] By contrast, tradition may comprise "three features . . . (1) political and cultural practices; (2) duration, understood as a composite of age and continuity; and (3) presumptive, but defeasible, interpretive influence."[124]

Finally, one of the most significant developments for originalism in recent years is the emergence of corpus linguistics, which uses computers to analyze large bodies of texts from the relevant period.[125] Corpus linguistics can be used for contemporary texts, but also for historical ones.[126]

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121. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (citing Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519 (2003); Michael McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745 (2015)).

122. Id. (citing Baude, Constitutional Liquidation, supra note 43, at 49–51 (discussing arguments for constitutional liquidation)).

123. See Bradley & Siegel, supra note 54, at 7–9 (distinguishing "liquidation" from "gloss" and noting that broader versions of liquidation "fit[] more naturally with non-originalist theories"); see also Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908, 933–37 (2017) (explaining why contemporaneous interpretations receive greater weight).

124. Marc O. DeGirolami, The Traditions of American Constitutional Law, 95 Notre Dame L. Rev. 1123, 1125–26 (2020); see also Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1480 (2023) (explaining that liquidation and traditionalism can be originalist but "living traditionalism" is not).

125. See, e.g., Thomas R. Lee & James C. Phillips, Data-Driven Originalism, 167 U. Pa. L. Rev. 261, 319 (2019) ("We have no hesitation in advocating the use of corpus linguistic analysis as a central element of the first stage of any inquiry into the original communicative content of the Constitution."); Lawrence B. Solum, Triangulating Public Meaning: Corpus Linguistics, Immersion and the Constitutional Record, 2017 BYU L. Rev. 1621, 1624 (discussing three component techniques of originalist methodology, including the method of corpus linguistics).

126. See, e.g., Lee & Phillips, supra note 125, at 294–98 (explaining the Corpus of Founding-Era American English, a "large and representative" database that includes ordinary and legal writing from 1760 to 1799).

Scholars debate whether this tool improves accuracy,[127] but its use is increasing.[128]

II. AGGREGATION AND UNCERTAINTY

Finding the historical meaning of texts can be challenging. Although originalism presumably should help narrow disagreement by limiting the range of permissible considerations, originalists interpreting the same provision may (and often do) disagree.[129] This is unsurprising. If public meaning is a question of historical fact, all the epistemological and evidentiary problems associated with fact-finding are implicated. The passage of "time," moreover, "obscures all human evidence" and "thus removes from the parties all the immediate means to verify the nature of the original transactions."[130]

Courts regularly accept contentions as true even when doubts exist. Even criminal law, in which the burden of proof is most demanding, only requires a fact to be proved beyond a reasonable doubt—not *all* doubt.[131] Though scholars debate whether one can or should quantify doubt, jurists often capture the concept of "preponderance of the evidence" as "more than fifty percent."[132] That means that even a fact proven to 49% certainty

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127. See, e.g., Anya Bernstein, Legal Corpus Linguistics and the Half-Empirical Attitude, 106 Cornell L. Rev. 1397, 1398–99 (2021) (explaining that legal corpus linguistics ignores the communicative context of the words); Donald L. Drakeman, Is Corpus Linguistics Better Than Flipping a Coin?, 109 Geo. L.J. Online 81, 84 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/07/Drakeman-Is-Corpus-Linguistics-Better-than-Flipping-a-Coin.pdf [https://perma.cc/SR96-NVQN] (explaining that corpus linguistics struggles with accuracy because scholars are making historical and methodological assumptions); Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, Hidden Bias in Empirical Textualism, 109 Geo. L.J. 767, 771 (2021) ("[T]he COHA [Corpus of Historical American English], one of the primary corpora that is used in legal interpretation, reflects structural gender bias."). But see Lee & Mouritsen, Corpus and Critics, supra note 56, at 278–81 (responding to criticisms).

128. Tobia, supra note 56, at 732 ("[C]orpus linguistics . . . has also grown in use and esteem.").

129. See Amy Coney Barrett, Assorted Canards of Contemporary Legal Analysis: Redux, 70 Case W. Rsrv. L. Rev. 855, 861 (2020) ("[E]ven card-carrying originalists don't always wind up at the same spot, and it oversimplifies originalism to expect that they always will."); Michael J. Perry, The Legitimacy of Particular Conceptions of Constitutional Interpretation, 77 Va. L. Rev. 669, 715 (1991) ("Originalist judges can, and often will, disagree among themselves as to the original meaning of a constitutional provision."). Of course, the amount of disagreement should not be overstated; not only do originalists often agree, but many questions may not be litigated at all because litigants foresee likely agreement.

130. Prevost v. Gratz, 19 U.S. (6 Wheat.) 481, 498 (1821).

131. See, e.g., United States v. Delibac, 925 F.2d 610, 614 (2d Cir. 1991) ("The law does not require proof that overcomes all possible doubt . . . .").

132. Andrew Manuel Crespo, Probable Cause Pluralism, 129 Yale L.J. 1276, 1341 (2020) (internal quotation marks omitted); see also id. at 1341 n.279 ("Debates over whether to quantify probable cause (of which there are many) are largely proxy battles over the probabilistic method . . . ."). Some courts adopt numerical representations. See, e.g.,

may not count for purposes of a legal judgment. What should happen, however, when multiple facts must be established, each of which is at least somewhat debatable? To help answer that question, this Part explains aggregation in situations when a judgment is dependent on two or more determinations of the meaning of constitutional or statutory provisions, with focus on the product rule and conditional probability.

A. *Aggregation and Factual Uncertainty*

Legal judgments are based on facts—that is, "[s]omething that actually exists" or "[a]n actual . . . event" from the past.[133] Unfortunately, "[e]mpirical facts are virtually never certain and can only be probable."[134] Indeed, "however strong the evidence in favour of historical statements may be, their truth can never become more than highly probable."[135] Not only are there often facts cutting both ways, but new facts may yet be uncovered. And "[i]t is always possible that the facts are otherwise than as represented."[136] René Descartes's musings on "the difficulty of distinguishing vivid dreams from real perceptions . . . broadly cast[] doubt on most, if not all, of our knowledge claims."[137] Accordingly, anyone making a "truth claim of any sort, in the context of a legal discussion or otherwise," should be able "to answer each of these questions: what did you count, or not count, as evidence of truth or falsity; how heavily did you count it; and how much evidence, and of what quality, did you require before making your claim?"[138]

Uncertainty is inevitable when assessing historical facts, even for only a single claimed fact. Uncertainty, however, increases when multiple claimed facts are involved. This creates a puzzle when multiple facts must all be true for a broader claim to hold—for example, the claim that "only Sally knows where the key is" has at least two embedded factual contentions: that Sally knows where to find the key and no one else does. The likelihood that both claims are true cannot exceed the likelihood that only one is true.

Probability analysis, however, can help. The product rule (sometimes called the multiplication rule) can be used to identify the likelihood that

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Harvey S. Perlman & Stephen A. Saltzburg, Alaska Civil Pattern Jury Instructions § 2.04 (Civil Pattern Jury Instructions Committee 1999) ("If you believe that the chance that something is true is 50/50 or less, you must decide that it is not true.").

133. Fact, Black's Law Dictionary (11th ed. 2019).

134. Stein, Probabilism in Legal Interpretation, supra note 30, at 1400; see also Louis L. Jaffe, Judicial Control of Administrative Action 548–49 (1965) ("There is . . . no difference in kind between an inference as to the past and an inference as to the future . . . .").

135. Stein, Probabilism in Legal Interpretation, supra note 30, at 1400 n.48 (internal quotation marks omitted) (quoting A.J. Ayer, Language, Truth and Logic 8 (1936)).

136. Citibank, N.A. v. Brigade Cap. Mgmt., LP, 49 F.4th 42, 68 n.17 (2d Cir. 2022).

137. Lawson, Proving the Law, supra note 45, at 871.

138. Id.

multiple independent truth claims are all correct. Under this familiar rule, "the probability of two separate events occurring simultaneously is the product of their probabilities."[139] That is, $P(A \text{ and } B) = P(A) \times P(B)$. For example, because "the probability of rolling a five on a six-sided die is one in six," and assuming that nothing about one roll affects the next, "the product rule can be used to calculate the combined probability . . . that a five will be rolled on each of three consecutive rolls."[140] Multiplying the probability of each roll coming up five—that is, $1/6 \times 1/6 \times 1/6$—shows that "[t]here is a one in 216 chance that three separate rolls of the die would produce a five each time."[141] The product rule is a standard probability principle featured in fields ranging from artificial intelligence to biology to finance to weather forecasting.[142]

The product rule requires that the events be truly independent. If the probability of one event is not independent of the probability of another—in other words, if there is correlation between the events (such as being famous and being wealthy)[143]—then it is still possible to calculate the probability of both events being true, but the analysis is more complicated, and conditional probability must be used.[144] For example, if one knows that the probability that it is cloudy is 25% and that the probability that it is both raining and cloudy is 15%, "[a] weather forecaster could . . . calculate the probability that it will rain on a particular [cloudy] day" with the formula "$P(rain|cloudy) = P(rainy \cap cloudy) / P(cloudy)$."[145] In the real world, of course, it can be difficult to know whether events are independent (let alone to what degree), but conceptually, one can assess the probability of multiple claims being true even if the relationship between those events is dependent. To avoid misunderstanding, it is key to stress that although this discussion of conditional probability is short, the concept is not small. Rather, as explained below, conditional probability (when it applies) may be a path through many otherwise difficult applications of the conjunction paradox.[146] It may also matter in certain cases if aggregation is applied to

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139. Ming W. Chin, Michael Chamberlain, Amy Rojas & Lance Gima, Forensic DNA Evidence: Science and the Law § 5:1 (2026 ed.).

140. Id.

141. Id.

142. See Dimitri P. Bertsekas & John N. Tsitsiklis, Introduction to Probability 24–25 (2d ed. 2008) (demonstrating the general application of the product rule to probabilities involving three or more events).

143. See Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010) (explaining that for dependent events, "the occurrence of one of them makes the occurrence of the other more or less likely" (internal quotation marks omitted) (quoting John Allen Paulos, Beyond Numeracy: Ruminations of a Numbers Man 189 (1991))).

144. See Bertsekas & Tsitsiklis, supra note 142, at 52 (explaining conditional probability).

145. Zach Bobbitt, 4 Examples of Using Conditional Probability in Real Life, Statology (May 13, 2022), https://www.statology.org/conditional-probability-real-life-examples/ [https://perma.cc/2GJR-FFHD] (emphasis added).

146. See infra text accompanying notes 170–172.

originalism; if the likelihood of multiple necessary propositions is dependent, then aggregation may be less disruptive.[147] And because calculating conditional probability is more complicated than just multiplying probabilities, especially because the degree of dependence also must be identified, conditional probability ultimately lends more support for soft rather than hard aggregation.[148]

B. *Aggregation and Evidence*

Although aggregation is often applied in law (in fact, DNA evidence depends on it),[149] aggregation can produce "anomalies," such as when a plaintiff manages to strongly prove each element of her claim and yet still perhaps should lose—badly.[150] "[C]onsider," for example, a securities suit that "require[s] plaintiffs to prove six elements . . . . [Assuming] independence, then each element would need to be proven to a likelihood of approximately 0.9 before their conjunction becomes more probable than not!"[151]

Scholars have long puzzled over how the law should address this dynamic—often called the "conjunction paradox."[152] To solve it, Professor Kevin Clermont calls for use of "fuzzy logic,"[153] in which the "conjoined likelihood" that an event at issue in litigation occurred "equals the likelihood of the least likely element," so "if each element of a claim or defense passes the standard of proof, the conjunction of elements will pass the standard of proof."[154] This approach "seeks to take account of vagueness where the factual dispute turns not on our degree of belief in whether an event either did or did not occur but on the degree to which an occurrence

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147. See infra text accompanying notes 207–210.

148. See infra text accompanying notes 357–364.

149. See Demosthenes Lorandos, Litigator's Handbook of Forensic Medicine, Psychiatry and Psychology § 4:50 (2024 ed.) (documenting "good" uses of the product rule in the courtroom); Michael J. Saks, David L. Faigman, David H. Kaye & Joseph Sanders, Annotated Reference Manual on Scientific Evidence (2d ed.), Westlaw RMSCIEVID-ANN 485, at *26 ("In all U.S. jurisdictions, some version of the 'product rule' has been found to be valid or generally accepted . . . .").

150. Kevin M. Clermont, Conjunction of Evidence and Multivalent Logic, *in* Law and the New Logics 32, 58, 60 (H. Patrick Glenn & Lionel D. Smith eds., 2017).

151. Mark Spottswood, Unraveling the Conjunction Paradox, 15 Law, Probability & Risk 259, 265 (2016).

152. See David S. Schwartz & Elliott Sober, The Conjunction Problem and the Logic of Jury Findings, 59 Wm. & Mary L. Rev. 619, 623–24 (2017) (describing "evidence scholars" long grappling with the problem of the "conjunction paradox" (internal quotation marks omitted)); see also id. at 635–54 (listing proposed solutions).

153. Kevin M. Clermont, Death of Paradox: The Killer Logic Beneath the Standards of Proof, 88 Notre Dame L. Rev. 1061, 1110 (2013) [hereinafter Clermont, Death of Paradox].

154. Kevin M. Clermont, Common Sense on Standards of Proof, 48 Seton Hall L. Rev. 1057, 1058 (2018); see also id. at 1077 ("The strength of the chain is the strength of its weakest link. In other words, the conjunction of many fairly true propositions is fairly true, not almost completely untrue. If *truth(a) = 0.70* and *truth(b) = 0.60*, then *truth(a AND b) = 0.60*.").

fits a category," since "'causation, consent, coercion, good faith, intent, and a host of other legal issues' occur by degrees rather than as all-or-nothing propositions."[155] Such "fuzzy logic," however, has prompted pushback.[156] Even if it makes sense for concepts like vagueness, it is hard to see how it "better captures the probability of a conjunction than standard probability theory" across the board.[157]

Rather than attempting to solve the conjunction paradox with logic (fuzzy or otherwise), others argue that the law should ignore the product rule for pragmatic reasons, and that "we simply have to come to terms with the fact that in most cases, the conjuncts will multiply out to less than a 0.5 probability for the whole claim—[but] the plaintiff [still] should win many of those cases."[158] Pragmatic approaches to evidence could entail a rule that "[o]nce jurors have decided that an element is probable, they are to consider the element established, *repress any remaining doubts about it*, and proceed to consider the next element."[159] Furthermore, then-Professor Alex Stein argued against strict application of the product rule because any harm to defendants is offset by other problems in evidence that unfairly burden plaintiffs.[160]

Some scholars also dismiss the conjunction paradox's relevance altogether for deciding legal questions and argue that the law should (or perhaps already does, de facto) reconceptualize what we mean by burdens, and that "litigation fact-finders decide cases by choosing the more plausible of the two competing explanations offered by the claimant and the defendant, instead of considering all possible explanations."[161] Sounding themes akin to "the philosopher L. Jonathan Cohen['s]" critique of "classical probability" as "even a theoretically appropriate model for the law's apparently probabilistic language,"[162] Professors Michael Pardo and Ronald Allen, for example, challenge the conjunction paradox's use in law.[163] As Solum explains, "On their view, legal proof is best modeled as inference to the best explanation rather than as Bayesian probability

155. Schwartz & Sober, supra note 152, at 637 (quoting Clermont, Death of Paradox, supra note 153, at 1082).

156. See, e.g., id. at 637–39 ("We are less convinced by [Clermont's] attempted demonstration that fuzzy logic better captures the probability of a conjunction than standard probability theory, or that it entails abandonment of the multiplication rule for conjunctions.").

157. Id. at 637.

158. Id. at 640.

159. Id. at 639 n.64 (emphasis added by id.) (quoting Nesson, supra note 29, at 1386).

160. See Stein, Of Two Wrongs that Make a Right, supra note 20, at 1200 (arguing that two evidentiary paradoxes impose offsetting costs on plaintiffs and defendants).

161. Schwartz & Sober, supra note 152, at 643.

162. Carl G. Wagner, Book Review, 1979 Duke L.J. 1071, 1074 (reviewing L. Jonathan Cohen, The Probable and the Provable (1977)).

163. Michael S. Pardo & Ronald J. Allen, Juridical Proof and the Best Explanation, 27 Law & Phil. 223, 261–62 (2008) ("Understanding [evidence] standards in terms of competing explanations . . . avoids the formal conjunction paradox . . . .").

assignment. If that account is correct, the conjunction problem is a problem for the Bayesian formalization of legal reasoning, not for legal reasoning as such . . . ."[164] Because this Article, like others, accepts the Bayesian framework (at least with respect to truth claims subject to the fixation thesis),[165] the Article's insights obviously are less relevant if Pardo and Allen's objection is about the nature of legal reasoning. As with debates about issues within an originalist framework,[166] this Article thus also adds to the importance of resolving debates about legal reasoning itself.

The motivation driving some arguments against applying the conjunction paradox to law is normative.[167] Because the law "is already very demanding on the plaintiff," it seems "unfair to demand the further establishment of the overall case."[168] That said, fairness concerns may not always point against aggregation. For example, if a criminal defendant advances two defenses, both of which are not quite persuasive enough, some scholars may permit aggregation.[169] Like many things in law, the same principle may have different normative implications depending on particular facts and normative frameworks.

Professors David Schwartz and Elliott Sober take a different approach. They argue that rather than tossing aside ordinary rules, jurists should recognize "the probabilistic dependence of most facts internal to a given claim," and, thus, use "the correct multiplication rule for probabilistically

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164. Email from Lawrence B. Solum to author (Apr. 11, 2026, at 06:24 AM) (on file with the *Columbia Law Review*). By "Bayesian probability assignment," Solum is referring to using insights like conditional probability to assess evidence. See, e.g., Michael O. Finkelstein & William B. Fairley, A Bayesian Approach to Identification Evidence, 83 Harv. L. Rev. 489, 498 (1970) (choosing to "begin [a] discussion of Bayes' theorem by deriving an expression for the probability that defendant used the knife, assuming that an incriminating print from a right hand palm is found on it"); see also Deborah F. Buckman, Annotation, Use of Bayes' Theorem in Criminal and Civil Cases, 47 A.L.R.7th Art. 4 (2019) ("Bayes' Theorem . . . [is] used to calculate conditional probabilities leading to a variety of statistical 'Bayesian' methodologies. It speculates on the probability that a particular fact is true or that a particular event will occur, given our knowledge of one or more related facts or events.").

165. See, e.g., Barclay, Tension Between Constitutional Meaning and Constitutional Construction, supra note 19, at 626–27 (multiplying probabilities of independent events); Porat & Posner, supra note 20, at 4–5 & nn.2–3 (same); see also supra note 149 and accompanying text (discussing importance of analysis to DNA evidence).

166. See infra Part IV.

167. See Schwartz & Sober, supra note 152, at 642, 650 (explaining that a plaintiff could lose a case under the "inference to the best explanation" approach or conjunction paradox even though they "offered the best explanation as to each element").

168. Id. at 634 n.39 (internal quotation marks omitted) (quoting A.P. Dawid, The Difficulty About Conjunction, 36 Statistician 91, 92 (1987)). Pardo and Allen's critique, of course, is not normative, nor necessarily is Clermont's.

169. See, e.g., Porat & Posner, supra note 20, at 35–36 (suggesting a single conviction when a defendant is just barely guilty beyond a reasonable doubt of two crimes).

dependent events."[170] Because it is rarely the case that each element is independent, conditional-probability analysis often should mitigate some concerns. As they put it, in a case where the elements are "(1) the taking of property by means of, (2) force or threat, (3) while using a weapon," it is almost inevitable that "[f]acts showing the threat will also tend to show the use of the weapon," and "[f]acts showing the taking of property will be relevant to show the threat."[171] Because "[t]he conditional probability of one element given another will be higher than the unconditional probability of that element" and sometimes can be so dependent on the proof of that other element as to approach 100%, worries about aggregation often can be more of a theoretical problem than a real one for tort claims and the like.[172]

Finally, one way to address aggregation is to bypass the need for multistep analysis through regulation. Because it may be effectively impossible for someone to overcome aggregated uncertainty (for example, that a substance can cause an illness, and that it caused a specific plaintiff's illness), sometimes lawmakers impose across-the-board rules on the theory that a substance may harm some individuals, even if it is difficult to identify those individuals with standard causation analysis.[173]

C. *Aggregation and Questions of Law*

Usually, aggregation in a legal context concerns questions of fact—such as, in a conjunction paradox case, whether a plaintiff has satisfied each factual element of a multi-element claim. But the intuition behind aggregation sometimes appears with respect to questions of law, too.[174]

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170. Schwartz & Sober, supra note 152, at 627; see also id. at 634 ("Axioms of logic and probability, such as the multiplication rule, are analytically true.").

171. Id. at 666.

172. Id. at 667.

173. See Alex Stein, The Domain of Torts, 117 Colum. L. Rev. 535, 543 (2017) (explaining how "causation" changes depending on whether the law can "create a match" between injury, clarity of violation, and compensation).

174. No scholar has systematically considered whether and how to apply aggregation to constitutional law. Stein's "probabilism" theory, however, posits that what a statute means is a question of fact that judges should assess probabilistically. See Stein, Probabilism in Legal Interpretation, supra note 30, at 1394 ("At its core, probabilism maintains that judges should view legal rules as a communication between individuals . . . . What these [legal rules] say and do not say is a purely empirical fact."). Professor Stephanie Barclay has observed that it should be harder to defend decisions resting on more than one doubtful proposition of law. See Barclay, Tension Between Constitutional Meaning and Constitutional Construction, supra note 19, at 626–27 (explaining that the "compounded communicative content" was "less certain" in *City of Boerne v. Flores* due to "dubious" interpretations of the First Amendment's Free Exercise Clause and Section 5 of the Fourteenth Amendment). And Professor Courtney Cox notes the expected utility approach to illustrate the difficulty judges face about which jurisprudential theory to apply. See Courtney M. Cox, The Uncertain Judge, 90 U. Chi. L. Rev. 739, 741–42, 748 (2023) ("[W]hen [a judge] is uncertain about what . . . to do . . . there is a question about what she ought *rationally* do

As Porat and Posner explain, for example, the "hybrid rights exception" permits aggregation, such that "[a] less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test."[175] Thus, in *Employment Division v. Smith*, the Court recognized an exception from its "valid and neutral law of general applicability" test for so-called "hybrid" claims involving both the Free Exercise Clause and other provisions.[176] Justice Alito unsuccessfully attempted to introduce a similar idea into Appropriations Clause doctrine, reasoning—in dissent—that even if various funding mechanisms may not be independently violative of the Constitution, "the CFPB's unprecedented combination of funding features affords it the very kind of financial independence that the Appropriations Clause was designed to prevent."[177] In 2025, the Court—in a decision written by Justice Elena Kagan—appeared to have rejected aggregation with respect to the nondelegation doctrine, reasoning that "a meritless public nondelegation challenge plus a meritless private nondelegation challenge cannot equal a meritorious 'combination' claim."[178]

Nor is such probabilistic analysis limited to constitutional questions. A good example of aggregation in statutory interpretation is found in *Yates v. United States*—the *is a fish a tangible object?* case.[179] There, a plurality concluded that a statute providing that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" for certain prohibited reasons "shall be" criminally liable does not cover a commercial fisherman who caught and destroyed "undersized red grouper" to prevent detection.[180] The plurality reasoned that although "[a] fish is no doubt an object that is tangible . . . [,] it would cut [the statute] loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent."[181] To reach that conclusion, the plurality did what courts often do: It rested its analysis on

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given her aim of doing what is judicially right . . . . I use the expected utility approach not to suggest a path forward, but to illustrate the difficulty of the work ahead.").

175. Porat & Posner, supra note 20, at 49 (internal quotation marks omitted) (quoting Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 Notre Dame L. Rev. 393, 430–31 (1994)).

176. 494 U.S. 872, 879, 881–82 (1990) (internal quotation marks omitted) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)); see also Mahmoud v. Taylor, 145 S. Ct. 2332, 2361 n.14 (2025) (noting but not resolving the application of the hybrid-rights exception under *Smith*); Kenji Yoshino, Rights of First Refusal, 137 Harv. L. Rev. 244, 257 (2023) (describing the doctrine applied in *Smith* but noting it has "been relentlessly excoriated as unworkable").

177. CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1505–06 (2024) (Alito, J., dissenting).

178. FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2511 (2025).

179. 574 U.S. 528, 532 (2015).

180. Id. at 531 (internal quotation marks omitted) (quoting 18 U.S.C. § 1519).

181. Id. at 532.

considerations in favor of that interpretation, including context and legislative history, plus statutory history and canons of construction, and then invoked the rule of lenity to the extent any doubt remained.[182]

The decisive vote, however, came from Justice Alito,[183] who used something approaching conditional-probability analysis to conclude that Congress more likely did not intend to capture destroying fish. He concluded that "[t]hree features" of the statute "stand out": its "list of nouns, its list of verbs, and its title," and reasoned that even if "none of these features by itself would tip the case in favor of Yates, the three combined do so."[184] Alluding to the insight that "[t]hose who do not take into account conditional probability are prone to making mistakes" by disregarding as 100% irrelevant any fact that "does not itself prove the ultimate proposition,"[185] Justice Alito—narrowly—sided with the fisherman because of the "aggregat[e]" "'product'" of the combined evidence.[186] In dissent, Justice Kagan rejected such conditional-probability analysis, protesting that "the sum total of three mistaken arguments is . . . three mistaken arguments" that "do not get better in the combining."[187]

More recently, conditional probability has emerged in the context of preliminary injunctions. In *American Federation of Teachers v. Bessent*, a case about the "Department of Government Efficiency," a panel of the Fourth Circuit explained that the plaintiffs faced a "multiplicative problem," because "[t]heir likelihood of success overall is the product of their probability of success on each of the independent, dispositive issues. And as probabilities are multiplied, their product shrinks rapidly."[188] The court concluded that the plaintiffs could not meet that daunting task.[189] Judge Robert King dissented and accused the court of "conjur[ing]" too high a standard because "[a] multi-issue likelihood-of-success analysis turns on the facts and the law relevant to each issue, not statistical odds."[190] The en banc court later "disavow[ed] any suggestion that district courts should assign numerical probabilities to a plaintiff's chances of success on each

182. See id. at 545–48.

183. See Struniak v. Lynch, 159 F. Supp. 3d 643, 659 n.21 (E.D. Va. 2016) (describing Justice Alito's opinion as "controlling" but reading it as "exceptionally narrow" because it required the confluence of "three important factors").

184. *Yates*, 574 U.S. at 549 (Alito, J., concurring in the judgment).

185. Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

186. *Yates*, 574 U.S. at 552 (Alito, J., concurring in the judgment) (quoting Wash. State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler, 537 U.S. 371, 384–85 (2003)). To be fair, finding aggregation may read too much into Justice Alito's short analysis, which contains a "cf." to *Al-Adahi*. See id. (citing *Al-Adahi*, 613 F.3d at 1105–06). But he did cite the portions of *Al-Adahi* discussing conditional probability.

187. Id. at 569 (Kagan, J., dissenting).

188. 152 F.4th 162, 170 (4th Cir. 2025) (internal quotation marks omitted), abrogated by Am. Fed'n of State, Cnty. & Mun. Emps. v. SSA, 172 F.4th 361 (4th Cir. 2026) (en banc).

189. See id. ("[I]t is simply harder to avoid a loss when there are more issues to lose on.").

190. Id. at 178 & n.1 (King, J., dissenting).

issue and then multiply those probabilities together to determine whether the plaintiff's 'overall odds' of success are high enough to warrant a preliminary injunction."[191] Although the court had "no quarrel with the general proposition that it can be harder to win a complex case with multiple issues than a straightforward case that turns on a single issue," it declined to adopt a "mechanical algorithm."[192]

Similarly, the United States advanced an aggregation argument at oral argument before the D.C. Circuit in *Harris v. Bessent*.[193] In arguing that the court erred in granting a preliminary injunction with respect to the President's power to remove certain officials, counsel challenged the district court's assessment of likelihood of success for failing to apply the product rule.[194] In a comical moment, Judge Justin Walker even attempted to do the math from the bench.[195] Judge Patricia Millett, however, was skeptical, and asked the United States if it really wished to apply such analysis across the entire universe of cases to which the government is a party.[196]

Finally, although not framed as aggregation, courts sometimes appear to be motivated by aggregation's intuitive appeal. Consider punitive damages. Such damages may be awarded "if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law."[197] If there are doubts about the claim's underlying legal theory, however, it is harder to say that the defendant's conduct rises to that level. For example, the Supreme Court has explained that even if liability is appropriate for intentional discrimination under Title VII of the Civil Rights Act, punitive damages may not be warranted because "[t]he underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide . . . defense or other statutory exception to liability."[198] In such cases,

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191. *Am. Fed'n of State, Cnty. & Mun. Emps.*, 172 F.4th at 366.

192. Id. (internal quotation marks omitted) (quoting Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 203 (3d Cir. 2024)).

193. Oral Argument at 1:30:13–1:32:35, Harris v. Bessent, 160 F.4th 1235 (D.C. Cir. 2025) (No. 25-5037), https://media.cadc.uscourts.gov/recordings/docs/2025/03/25-5037-25-5057.mp3 (on file with the *Columbia Law Review*) (arguing that a 40% chance of prevailing on each of its two independent grounds for success would produce an approximately 65% overall likelihood of success).

194. Id. at 1:30:20–1:31:00.

195. Id. at 1:32:20–1:32:30.

196. Id. at 1:31:30–1:31:40 (asking whether the government's method would also apply to parties seeking stays that the government opposed).

197. Ninth Cir. Jury Instructions Comm., Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 5.5 (2025).

198. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 537 (1999); accord Elmer J. Schaefer, Uncertainty and the Law of Damages, 19 Wm. & Mary L. Rev. 719, 740 (1978) (highlighting the role of uncertainty in determining whether a plaintiff receives full compensation or no compensation).

presumably, it is less likely that the law was violated.[199] Tying the remedy to the certainty of the violation should result in less aggregate error.

III. AGGREGATION AND ORIGINALISM

For their judgments to be constitutionally legitimate, courts only have power to do what an authoritative law empowers them to do. The meaning of authoritative law (at least generally) is the original public meaning of the text at issue, which is a question of historical fact. So, if the Court is confronted with the argument that a state criminal conviction must be vacated because the jury was not unanimous (as in *Ramos*), it must decide—as a question of historical fact—whether a law's original meaning provides jurisdiction to consider the claim in the first place and, if so, whether the original public meaning of some authoritative law supports vacatur.[200] If the prisoner's theory is that Article III provides the Court with constitutional power to review state judgments and that the Fourteenth Amendment incorporates the Sixth Amendment, which in turn requires unanimous juries, the Court should find out how likely it is that each of those claimed facts is true. Because an order of release requires the prisoner to run the table with respect to all three questions, it follows that the Court should account for aggregate uncertainty for each step in the prisoner's theory and refuse to grant relief unless, one, the prisoner is more likely correct with respect to each step and, two, the prisoner is also more likely entitled to release even when uncertainty is combined for all three questions.

Until the final sentence, everything in the foregoing paragraph should read like standard public-meaning originalism.[201] The conclusion, however, is anything but standard. But doesn't it follow from the premises underlying public-meaning originalism? And if not, why not? Here, this Part explains why the logic of public-meaning originalism may require accounting for the risk of aggregated error, offers five exemplars of what such analysis could look like, and discusses some puzzles these exemplars present.

Before doing so, however, it is important to answer a conceptual question: Is aggregation only relevant for originalism? No. This Article focuses on originalism because (i) it is ascendant; (ii) originalism's fixation and constraint theses should make greater accuracy especially important for

199. See, e.g., EEOC v. Flambeau, Inc., 846 F.3d 941, 947 (7th Cir. 2017) (barring punitive damages because the theory was novel and "the statute's plain text" did not "resolve" the question). Notably, the Americans with Disabilities Act allows punitive damages "if the defendant discriminated 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" Id. (quoting 42 U.S.C. § 1981a(b)(1)). This seems consistent with the intuition that heightened damages should not be available when the content of the right is less certain.

200. See supra notes 10–16, 22–27 and accompanying text.

201. See supra notes 82–100 and accompanying text (describing public-meaning originalism's legitimacy, fixation, constraint, and historical-fact premises).

originalists, especially compared to methodologies less concerned with evidentiary correctness; and (iii) debates about stare decisis (which could mitigate a lot of the disruption caused by aggregation) and the like are especially lively for originalists.[202] Conceptually, however, insights from the aggregation literature should apply beyond originalism. For example, aggregation obviously should also be relevant to nonoriginalists who do not subscribe to strong stare decisis but do think about sequential analysis. Because that category is less well defined, this Article focuses on originalism, but that focus should not be understood as suggesting that aggregation is only relevant for originalism.

A. *Aggregation and the Logic of Public-Meaning Originalism*

As explained above, originalism ties judicial legitimacy to adherence to the original meaning of the Constitution.[203] Public-meaning originalism posits that the meaning of the Constitution—the "contract" adopted by "the People"[204]—is found in the original public meaning of the Constitution's text.[205]

Under the premises of public-meaning originalism, the argument that courts should consider aggregation thus seems elementary. If a judgment requires one party to prevail with respect to each step in a multistep analysis, and if aggregated uncertainty means it is extraordinarily unlikely that the party can carry such a burden, why should it matter that a court is unsure which precise step in that party's theory is wrong? And although aggregation is not always taken to its logical conclusion in other contexts due to fairness concerns,[206] what fairness exception allows a court to issue a judgment that does not jibe with the Constitution's most likely original public meaning?

Nor can courts escape consideration of aggregation by positing that the required steps in a multistep analysis are so dependent on each other that the real-world consequences of aggregation may be de minimis and so should be ignored altogether. That may be the best way out of the conjunction paradox for certain contexts.[207] But necessary steps in resolving many constitutional claims are not obviously dependent on each other, if

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202. See supra note 68 and accompanying text (discussing originalism's ascendancy); supra notes 33–38, 88–100 and accompanying text (explaining why originalism's premises make accuracy especially important); supra notes 106–110 and accompanying text (discussing originalist debates over stare decisis).

203. See Easterbrook, Textualism and the Dead Hand, supra note 73, at 1121 ("The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist . . . interpretation by the judicial branch.").

204. Id. at 1121, 1123.

205. Solum, Public Meaning Thesis, supra note 2, at 1965.

206. See supra notes 158–169 and accompanying text (describing arguments for limiting aggregation based on perceived unfairness related to probabilistic determinations).

207. See supra notes 170–172 and accompanying text (explaining dependent conditional probability as a mitigator of fairness concerns related to aggregation).

at all. For example, there's no self-evident correlation between whether Article III (ratified in 1788) allows judicial review of a supposed violation of the Fifth Amendment's Grand Jury Clause (ratified in 1791), much less between whether the latter provision is incorporated via the Fourteenth Amendment (ratified in 1868). Of course, evidence going to one question may be relevant for another question, especially depending on how one decides (for example) whether a right is incorporated. One also could posit a grand unified theory that favors many rights and strong enforcement, but public-meaning originalists presumably would view such a theory skeptically.[208] Granted, the meaning of some provisions may be correlated; for example, different provisions of the same clause may all share a common pedigree.[209] But even if the meaning of clauses may be related, it would not mean conceptually that aggregation should be irrelevant; it would just mean some sort of conditional probability analysis would be required. Conditional probability would be more difficult to do, especially because the amount of dependence would also have to be identified,[210] but in theory aggregation could help judges more accurately find historical facts about meaning.

Put all this together and there is at least a prima facie case that public-meaning originalists should account for aggregation. To take an extreme case, if each step in a six-step claim[211] is only 50.1% likely to be correct, could a committed public-meaning originalist really grant relief when confronted with an aggregate likelihood of almost 99% that the requested relief is not supported by the Constitution's original public meaning? At a minimum, it is not obvious how issuing such an implausible judgment could be reconciled with the premises of public-meaning originalism.

Of course, multistep analysis is not unique to originalism, but methodologies with a robust view of stare decisis and deference to factfinders should be less affected by aggregation. After all, if one step is conclusively resolved by precedent, presumably it can be treated as 100% certain. Yet,

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208. See John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1701 (2004) [hereinafter Manning, Eleventh Amendment] (arguing that "the Court has, if anything, a more obvious duty to respect the boundaries set by a constitutional rather than statutory text").

209. See, e.g., William Ortman, Confession and Confrontation, 113 Calif. L. Rev. 377, 387 (2025) ("Confrontation and compulsory process are 'conceptual twins.'" (quoting Peter Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1197 (1979))).

210. See supra notes 143–148 and accompanying text (discussing conditional probability).

211. For example, such a claim could involve a questionable constitutional theory of (i) personal jurisdiction; (ii) subject matter jurisdiction; (iii) standing; (iv) a Bill of Rights provision; (v) incorporation; and (vi) remedy. If each step is independent and each is only 50.1% likely to support the judgment (in other words, each question is very difficult), the overall likelihood of all being correct is just over 1%. After all, $(50.1\%)^6$ is approximately 1.6%.

as discussed above,[212] originalists disagree about how much weight (if any) to give to precedent and do not defer to trial courts' findings about historical meaning. Furthermore, aggregation is relatively less important for methodologies that do not tie legitimacy to accuracy, especially with respect to individual steps.[213]

B. *Five Exemplars*

Operating within the premises of public-meaning originalism, aggregation arguably should be relevant to every constitutional case because each such case involves at least one specific constitutional provision (the one the court is likely to focus on, such as the meaning of the First Amendment) and at least one threshold justiciability question about whether a court can decide the case to begin with. More specific illustrations of how aggregation could work, however, help put finer points on the analysis. The following five examples are exemplars of how aggregation *could* affect originalism. Whether originalists should apply the analysis from them (in whole or in part) is a difficult question that heightens the importance of many other constitutional debates, as discussed below. For purposes here, however, these exemplars are intended to help illustrate the issue.

1. *Bill of Rights and Incorporation.* — Debates about incorporation are longstanding.[214] The Bill of Rights, by its terms, focuses on the federal government, so applying those rights against state governments requires an extra step.[215] By the same token, the Equal Protection Clause speaks to limits on state governments, so applying it against the federal government requires an extra step.[216] These necessary "extra steps" have prompted considerable discussion, but the trend has been incorporation against the

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212. See supra notes 106–110 and accompanying text (describing how originalists debate the best ways to use precedent); see also infra notes 276–281 and accompanying text (describing the implications of aggregation for the originalist debate on stare decisis).

213. See, e.g., Lawrence B. Solum, Pragmatism, Legal Theory Lexicon (Sep. 10, 2006), https://legaltheorylexicon.com/2006/09/legal_theory_le_1-2/ [https://perma.cc/LHD4-A6VG] (last updated Dec. 31, 2023) ("[L]egal pragmatism focuses on neither the theory of truth nor the theory of meaning and is instead directed at the normative . . . .").

214. See, e.g., Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 290–95 (2014); Akhil Reed Amar, Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?, 19 Harv. J.L. & Pub. Pol'y 443, 447–48 (1996); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding, 2 Stan. L. Rev. 5, 5–6 (1949); Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 74–75 (1963); Gerard N. Magliocca, Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?, 94 Minn. L. Rev. 102, 103–05 (2009).

215. See Bybee, Part One, supra note 50, at 4 (explaining that applying the Bill of Rights to the states requires incorporation through the Fourteenth Amendment).

216. See Bybee, Part Two, supra note 50, at 306 ("Without consideration of text, history, or precedent, the Court declared the Equal Protection Clause applicable to federal legislative and executive action.").

states and reverse incorporation against the federal government.[217] Justice Gorsuch's opinion in *Ramos*, discussed in the Introduction, is a good example.[218] Several rights in the Bill of Rights, however, have not (yet) been held by the Court to be incorporated, including the Third Amendment, the Fifth Amendment's Grand Jury Clause, and the Seventh Amendment's Civil Jury Clause.[219]

Recently the Court declined the opportunity to take incorporation further in *Thomas v. Humboldt County*, which asked the Court to hold that the Civil Jury Clause binds the states, too.[220] The incorporation debate in *Thomas* raises particularly difficult questions because the Court rejected incorporation of the Civil Jury Clause more than a century ago.[221] Thus, to rule for the petitioner, the Court would have needed to do more than just hold that the Fourteenth Amendment incorporates the clause; it also would have had to overrule precedent. Because of how the case had been litigated, moreover, the second question necessary to the petitioner's ultimate victory received less attention: whether the Seventh Amendment's jury requirement applies to the imposition of certain fines related to cannabis permitting. Under what circumstances the Seventh Amendment provides a right to a jury—a question that requires understanding of the meaning of "the rules of the common law"[222]—also can be a difficult originalist question, especially given questions about what falls within

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217. See Bybee, Part One, supra note 50, at 18 ("[I]n the past ten years, the Court has deemed three more provisions of the Bill of Rights applicable to the states." (citing Ramos v. Louisiana, 140 S. Ct. 1390 (2020); Timbs v. Indiana, 586 U.S. 146 (2019); McDonald v. City of Chicago, 561 U.S. 742 (2010))). The originalist argument against "reverse incorporation" may be stronger than that against incorporation. See Gregory Dolin, Resolving the Original Sin of *Bolling v. Sharpe*, 44 Seton Hall L. Rev. 749, 749–53 (2014) (explaining originalist objections to applying the Fourteenth Amendment against the federal government).

218. See supra notes 10–16 and accompanying text.

219. See Bybee, Part One, supra note 50, at 20–21, 48–49 ("The Court has yet to articulate why some provisions of the Bill of Rights apply word-for-word and why other provisions do not apply at all."); accord F. Andrew Hessick & Elizabeth Fisher, Structural Rights and Incorporation, 71 Ala. L. Rev. 163, 167–68 (2019) (arguing against incorporation of certain "structural" provisions); Alvin Padilla-Babilonia, The Imposition of Constitutional Rights, 123 Mich. L. Rev. 1289, 1344 (2025) (arguing the same with respect to territories).

220. See 146 S. Ct. 27, 27 (2025) (Gorsuch, J., respecting the denial of certiorari).

221. See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916) ("[T]he Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts . . . .").

222. See U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

historical equity practice.[223] Rather than addressing either of these complicated questions, the Court denied certiorari.[224]

Thomas is an interesting example of why aggregation matters. Although the Court has been moving toward incorporation, no one can say it is 100% supported by public-meaning originalism, especially since the Fourteenth Amendment's text says nothing explicit about it, despite the framers' knowledge of how to incorporate by reference to other laws.[225] At the same time, there also is a plausible argument that "the County's enforcement action attempts to enjoin public nuisances, a paradigmatic suit in equity to which the jury trial right does not apply."[226] Answering that question may also require a deep dive into history. Aggregating uncertainty for these two necessary questions (plus uncertainty about any other necessary questions) may cast doubt on the petitioner's ultimate right to relief, even assuming he has the better argument with respect to each individual question.

Nor is that the only puzzle. Had the Court granted review of only the incorporation question (and the Court rarely decides entire cases anymore—something else that has prompted originalist concern[227]), and held that the Civil Jury Clause is incorporated, the lower courts on remand presumably would have taken that holding as conclusive and then proceeded to decide the second question *as if* any doubt about the first question were gone. In a hierarchical system, lower courts are not in the business of discounting decisions of the U.S. Supreme Court by the possibility of error.[228] The upshot therefore could be a situation in which both the Supreme Court and the court of appeals have doubts about the correctness of their holdings, yet the petitioner prevails because neither court aggregates uncertainty.

This exemplar, however, also shows something else: Aggregation is not a recipe for constitutional anarchy. No doubt, aggregation makes cases

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223. See, e.g., SEC v. Jarkesy, 144 S. Ct. 2117, 2128–29 (2024) (explaining that determining whether a statutory suit is legal in nature requires considering the cause of action and its remedy); see also Martin H. Redish & Samy Abdelsalam, The Seventh Amendment Right to Jury Trial in the Administrative State: Recognizing the Dangers of the Constitutional Moment, 99 Notre Dame L. Rev. 1743, 1750 (2024) (arguing that the Court has "significantly expanded the scope of the jury trial right in suits in federal court beyond its reach in 1791").

224. *Thomas*, 146 S. Ct. at 27 (Gorsuch, J., respecting the denial of certiorari).

225. See Bybee, Part One, supra note 50, at 48–49 (explaining that the Fourteenth Amendment's text could have incorporated Bill of Rights provisions by express reference but did not).

226. See Brief in Opposition to Petition for a Writ of Certiorari at 32, *Thomas*, No. 24-1180 (U.S. filed July 10, 2025), 2025 WL 1997533 (citing Tull v. United States, 481 U.S. 412, 423 (1987)).

227. See, e.g., Benjamin B. Johnson, The Origins of Supreme Court Question Selection, 122 Colum. L. Rev. 793, 863 (2022) (critiquing this practice).

228. See DHS v. D.V.D., 145 S. Ct. 2627, 2630 (2025) (Kagan, J., concurring) (reminding that lower courts cannot undermine Supreme Court orders).

with multiple necessary steps more difficult, but some cases have fewer steps. For example, if *Thomas* concerned an action by the federal government, incorporation would not be relevant. So, aggregation does not affect all types of constitutional claims the same way. And even for claims requiring incorporation (or reverse incorporation), it need not necessarily follow that claims must fail, so long as the claimed right has a strong originalist basis. The strength of that basis, however, would have to be stronger than in a case without an overlay of incorporation or reverse incorporation.

Finally, *Thomas* is also worth noting because it raises an issue that this Article has flagged but does not dwell on: conditional probability. In assessing original meaning, it is possible that there is (perhaps often) not complete independence because the historical evidence about issue one may be relevant to issue two. For example, if the evidence were to show overwhelmingly that at the Founding the right to a unanimous civil jury was deemed extraordinarily important and was widely embraced by the states, such facts could potentially be relevant (depending on one's theory of incorporation) to the incorporation question. To the extent there is such dependence, then the magnitude of the aggregation puzzle may be lessened—though, as this discussion illustrates, it is not easy to identify just how dependent such propositions are. The larger point is that some cases may involve conditional probability, which may complicate the case-specific calculation while also lessening the magnitude of aggregation's effect.[229]

2. *Rights and Remedies.* — Constitutional litigation is about more than just rights—it also often concerns remedies. Yet constitutional remedies is another field with uncertainty, so courts must take additional steps before issuing judgments. Additional steps mean more aggregate error.

Consider *Utah v. Strieff*, a case about the Fourth Amendment and the exclusionary rule.[230] The Utah courts concluded that the police violated the Fourth Amendment by engaging in surveillance based on an anonymous tip; after watching people come and go in a way consistent with drug dealing, an officer stopped Strieff and relayed his identification to headquarters and learned that a warrant was outstanding.[231] The officer arrested Strieff and found drugs.[232] According to the Utah Supreme Court, that search was unconstitutional and the drugs should be excluded under the exclusionary rule,[233] a constitutional remedy.[234] The U.S. Supreme Court, in an opinion by Justice Thomas, reversed. The Court did not revisit

229. See supra notes 143–148 and accompanying text (discussing conditional probability).

230. 579 U.S. 232 (2016).

231. Id. at 235.

232. Id. at 235–36.

233. Id. at 236.

234. See Arnold H. Loewy, The Exclusionary Rule as a Remedy, 46 Tex. Tech L. Rev. 369, 369 (2014) ("[T]he Court views the exclusionary rule as a remedy.").

whether the Fourth Amendment had been violated but concluded that exclusion was not required under an exception for cases in which "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance," such as a "valid, pre-existing, and untainted arrest warrant."[235] Justice Sotomayor dissented.[236]

The back-and-forth between Justices Thomas and Sotomayor was sharp, but should it have been? Think of the steps necessary for exclusion of the evidence. At a minimum, Strieff would have needed to run the table for the following: (i) the Fourth Amendment was violated; (ii) the Fourth Amendment was incorporated; (iii) the Constitution creates an exclusionary rule (or at least empowers courts to create one as a matter of common law); (iv) the exclusionary rule was also incorporated; and (v) the exclusionary rule, as applied to Strieff's case, required exclusion. Given that string of necessary conditions, none of which is certain, perhaps Strieff would have no path to exclusion in a world with robust aggregation *even if* Justice Sotomayor were right about how to apply the exclusionary rule's exceptions.

3. *Edge Cases*. — "Edge cases"—cases near the cutoff of a right or power—are ubiquitous.[237] A court sets out a rule of law and then decides whether a particular set of facts falls within that rule; because litigation should occur less frequently when everyone knows ex ante that a situation falls squarely within a rule,[238] it follows that many cases are edge cases for which there is at least some plausible reason to argue that the set of facts does not fall within the rule. This means there are at least two steps in edge cases: A court must decide (i) the rule and (ii) whether a situation falls within the rule.

For example, in *Collins v. Yellen*, the Court addressed whether the President has the power to fire the head of the Federal Housing Finance Agency (FHFA) despite a statutory "for cause" removal protection.[239] The Court's rule more or less came from *Seila Law v. CFPB*, which broadly recognizes a presidential removal power for agencies wielding executive power headed by a single person.[240] FHFA, however, is an atypical agency. Whereas the CFPB regulates millions of private sector transactions and

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235. *Strieff*, 579 U.S. at 238 (citing Hudson v. Michigan, 547 U.S. 586, 593 (2006)).

236. Id. at 243 (Sotomayor, J., dissenting).

237. See Yoshino, supra note 176, at 277 (explaining how common "edge cases" can be); see also Craig M. Bradley, The Uncertainty Principle in the Supreme Court, 1986 Duke L.J. 1, 3 (explaining why the complexity of rules makes it difficult to definitively resolve any issue).

238. See D. Brock Hornby, Appellate Judges: Think Before You Publish, Litigation, Winter 1996, at 3, 4 ("[C]lear rules reduce litigation by enabling lawyers to advise—unambiguously—their client defendant to pay, or their client plaintiff not to sue . . . .").

239. 141 S. Ct. 1761, 1781–83 (2021). By way of disclosure, the author was Court-appointed amicus.

240. Id. at 1783–84 (citing Seila Law v. CFPB, 140 S. Ct. 2183, 2192, 2197 (2020)).

almost certainly wields executive power in its main operations, one of the primary functions of the FHFA—and the one at issue in *Collins*—concerns conservatorship of quasi-governmental entities that operate in connection with mortgages, most prominently Fannie Mae and Freddie Mac.[241] Yet conservatorship is not always an executive power.[242]

The Court could have combined doubt about the correctness of *Seila Law*[243] with doubt about whether the FHFA falls within *Seila Law*'s rule.[244] Instead, the Court doubled down on *Seila Law* by treating it as "all but dispositive."[245] Thus, even if the judgment in *Collins* were unchanged, this failure to wrestle with aggregation may prove significant in future cases in which the entity is further out on the constitutional "boundary."[246]

True, a court could simply distinguish precedent rather than extend it to a new circumstance, so one might wonder why aggregation matters. But if each necessary proposition in a holding is more likely than not correct, what would be the basis other than aggregation for not extending precedent? Aggregation thus may provide a reason not to extend some precedents.

4. *Combination Theories.* — Aggregation doesn't always mean that the person advancing a right should lose. As noted above, many originalists are skeptical of hybrid rights.[247] But if a plaintiff has two theories, neither of which by itself is more likely than not correct, the logic of aggregation may lead to victory. Consider *Mahmoud v. Taylor*—a recent First

241. See id. at 1770–72.

242. See Jacob Trieber, The Abuses of Receiverships, 19 Yale L.J. 275, 277–78 (1910) (explaining that private individuals served as conservators at common law).

243. See John Manning, Tribute to Justice Elena Kagan, 78 N.Y.U. Ann. Surv. Am. L. 177, 180 (2023) ("Kagan's dissent in *Seila Law* powerfully articulates what I regard as the proper standard of review in separation-of-powers cases. No text, history, or tradition compelled the majority's result."). The originalist debate regarding the President's removal power is extensive and longstanding. Compare Aditya Bamzai & Saikrishna Bangalore Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756, 1758 (2023) (defending "[t]he assertion that Presidents enjoy a constitutional power to remove executive officers"), with Jed H. Shugerman, The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity, 171 U. Pa. L. Rev. 753, 755 (2023) (criticizing "the historical foundation for a series of major Supreme Court precedents, both old and new, concerning presidential removal").

244. See *Collins*, 141 S. Ct. at 1783–86 (considering asserted differences between the FHFA and the CFPB but concluding that they did not justify a different result).

245. Id. at 1783. Had the Court considered aggregation, it could well have reached the same judgment, but the analysis would have been different.

246. See Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 U. Pa. L. Rev. 841, 856–57 (2014) (addressing the border between the government and the private sector as it relates to government corporations in federal law). For example, litigation is pending regarding the U.S. Institute of Peace. See U.S. Inst. of Peace v. Jackson, 783 F. Supp. 3d 316, 360 (D.D.C. 2025) ("USIP does not exercise executive power in the constitutional sense."). But see id. at 363 ("To be sure, USIP conducts activities abroad to facilitate peace and avoid conflict that may look, at first glance, like foreign diplomacy.").

247. See Coenen, Combining Constitutional Clauses, supra note 60, at 1071–72 (describing judicial and scholarly skepticism toward hybrid-rights theories).

Amendment case about whether parents could opt their children out of parts of a public-school curriculum for religious reasons.[248] The Court's majority sided with the parents based on the Free Exercise Clause alone.[249] Given that the case concerned a local policy, perhaps a higher showing under the First Amendment should have been required due to uncertainty about incorporation.[250] That didn't happen; the Court never mentioned incorporation beyond observing that precedent holds that the Free Exercise Clause "applies equally to the States by way of the Fourteenth Amendment."[251]

At the same time, however, the Court also did not consider the possibility that *other* provisions of the Constitution may have supported the parents, thus making the Court's judgment stronger. To illustrate, assume it is 70% likely that the First Amendment contains a right like that in *Mahmoud*, but incorporation of that right is only 70% likely. Under the product rule, that is less than 50% overall. Now, however, assume further that it is 40% likely that some other provision (such as one in the Fourteenth Amendment) would support the right.[252] The probability that a right exists under *either* the First Amendment (discounted by doubts about incorporation) or the Fourteenth Amendment would be almost 70%.[253] Thus, when multiple clauses may support a judgment, aggregation may suggest that the party should prevail even if no individual clause is itself more likely than not to contain the right.

5. *"Mixed" Questions of "Law" Fact and "Fact" Fact.* — A fifth exemplary category, and the one that takes aggregation furthest, concerns cases that present both hard questions of fact and hard questions of law. Such cases may include those in which a prosecutor advances an aggressive legal

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248. 145 S. Ct. 2332, 2342 (2025).

249. Id. at 2361 & n.14.

250. See supra notes 214–225 and accompanying text.

251. *Mahmoud*, 145 S. Ct. at 2350 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

252. Few questions are more disputed than what rights are protected by the Fourteenth Amendment's Due Process Clause. See, e.g., Noah Feldman, History and Tradition? Anatomy of a Constitutional Revolution, 74 Duke L.J. 1597, 1597–98 (2025) (describing the Court's shift from originalist analysis to a "history and tradition" approach in Fourteenth Amendment cases); Leah M. Litman, The New Substantive Due Process, 103 Tex. L. Rev. 565, 575–82 (2025) (tracing debates over substantive due process and unenumerated rights under the Fourteenth Amendment).

253. The probability of no incorporated right under the First Amendment is one minus the probability of there being an incorporated First Amendment right, which is the probability of the First Amendment containing such a right multiplied by the probability of that right being incorporated. Thus, *P(no incorporated First Amendment right) = 1 – P(incorporated First Amendment right) = 1 – (.7 × .7) = 1 – .49 = .51, or 51%*. The probability of no Fourteenth Amendment right is similar. *P(no Fourteenth Amendment right) = 1 – P(Fourteenth Amendment right) = 1 – .4 = .6*. The probability that neither amendment provides a right is thus *P(neither incorporated First Amendment right nor Fourteenth Amendment right)*, which equals *P(no incorporated First Amendment right) × P(no Fourteenth Amendment right) = .51 × .6 = .306, or 30.6%*. Of course, these are assumed probabilities.

theory that the facts may not even support. Should aggregation apply across both types of uncertainty?

Consider, for example, a stylized version of *McDonnell v. United States*.[254] There, prosecutors secured a conviction under federal bribery law of the former governor of Virginia by advancing a broad understanding of "official act"—specifically, a theory of the "quo" in quid pro quo bribery that potentially could capture "nearly anything a public official does—from arranging a meeting to inviting a guest to an event," which the Court rejected as contrary to the statute and in tension with federalism.[255] For purposes here, moreover, assume that the prosecution's theory of the "quid pro" was just as aggressive as its theory of the "quo," such that there was just barely enough evidence for a jury to conclude beyond a reasonable doubt that any exchange for anything occurred at all.

In this stylized example, if an originalist were to conclude (i) that federal constitutional law allows the prosecutor's theory of the quo, but just barely, and (ii) that the case-specific evidence presented would allow conviction under the prosecution's factual theory, but again just barely, should the conviction stand? Or should the jurist aggregate uncertainty about case-specific facts with uncertainty about the (factual) meaning of the law? If aggregation extends this far, it could apply in essentially every case.

C. *Preliminary Questions*

As these exemplars demonstrate, incorporating aggregation into originalism prompts many questions, including whether we should think about it at all. The questions identified here are not intended to be exhaustive, but they should help explore aggregation's implications.

Indeed, a threshold question is a meta one: How likely is it that aggregation is required or that, indeed, originalism is required? Under original-methods originalism,[256] for example, "the Constitution is interpreted using the conventional legal interpretive rules that would have been deemed applicable to a document of its type at the time it was enacted."[257] So, if courts would not have applied aggregation at the time various provisions were ratified, why should courts do it now? That said, wariness of piling inference upon inference is hardly a new concept.[258] As to whether

254. 579 U.S. 550 (2016).

255. Id. at 574–75 (internal quotation marks omitted).

256. As discussed above, this approach says that courts should find original meaning by using the methods that the court would have used at the time of enactment. See supra text accompanying note 118.

257. John O. McGinnis & Michael B. Rappaport, Unifying Original Intent and Original Public Meaning, 113 Nw. U. L. Rev. 1371, 1373 (2019).

258. See, e.g., United States v. Ross, 92 U.S. 281, 283 (1875) ("They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible.").

originalism is required, that threshold question ultimately may turn on one's view of U.S. constitutional democracy.[259] Beyond such meta-questions is also a normative one: Even if the law does not require aggregation, should we *want* aggregation? If so, law can change.

Debates about what it means to "prove the law" are also highly relevant. "If interpretative propositions must be established beyond a reasonable doubt to be true, 'I dunno' is going to be a popular answer; if truth, however, requires only a best rather than an unanswerable supporting argument, the zone of interpretative indeterminacy will be very small."[260] Yet just as aggregation makes debates about how to prove the law more significant, it also complicates those debates. With aggregation, if there are multiple steps, even a little "interpretative indeterminacy" with respect to each can add up to a lot of uncertainty about the judgment. And, as noted, every constitutional question has at least two steps, and some may have many more, especially when justiciability questions are considered.

Furthermore, how could a court rigorously do the type of analysis that aggregation may require? Operationally, perhaps courts would have to stop issuing binary answers (yes/no) but instead assign probabilistic values for each step in multistep analysis. And maybe probabilistic assignments (such as 90% for judicial review, 70% for incorporation, and so on) from the U.S. Supreme Court—if announced as part of a holding—could be used by all courts.[261] Such assignments would allow courts to aggregate multiple issues in cases before them and would also allow aggregation when different courts decide distinct issues in the same case. That potentially could solve the problem mentioned in the first exemplar above, since different courts would resolve different analytical steps of the same case.

Moving beyond big picture questions, a more granular question concerns jurisdiction. In assessing whether federal courts have power to hear certain types of arguments, should courts aggregate uncertainty

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259. See, e.g., Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) ("[D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made . . . ." (internal quotation marks omitted) (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting))). Of course, to the extent that originalism requires adopting the interpretative methodology used at the Founding, aggregation may be relevant to that inquiry.

260. Lawson, Does Good Originalism Need Good History?, supra note 97, at 1991.

261. This may raise concerns about dicta; what happens if a court rules against a party based on aggregate uncertainty but concludes that individual steps in that party's claim are more likely than not correct? Cf. Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1250 (2006) (explaining the problem of dicta). Would those step-specific determinations be dicta? See Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1065 (2005) (arguing that analysis is part of a holding only if it "lead[s] to the judgment"). The Court has addressed somewhat similar concerns in the context of qualified immunity. See Note, Calling Balls and Strikes in Prisoner Litigation, 137 Harv. L. Rev. 1160, 1178 (2024) (explaining the prospect of "appealable dicta").

about jurisdiction with uncertainty about the merits? Aggregation is more important if it cuts across both categories because every constitutional question involves a possible jurisdictional question—namely, a court's constitutional power to hear certain claims.[262] Yet courts often distinguish jurisdiction from the merits.[263] Relatedly, should aggregation cut across constitutional and statutory questions? It is hard to see why courts should distinguish the two categories—courts presumably should enforce the public meaning of statutes for the same legitimacy reasons that they enforce the public meaning of constitutional provisions.[264] But to the extent that different theories drive constitutional and statutory interpretation,[265] perhaps aggregation is inappropriate.

Finally, there is also a question about aggregation across time. This point will be discussed in greater detail below with respect to liquidation and tradition,[266] but perhaps the principle that the later-in-time provisions (generally) govern[267] carries with it the rule that the legal background surrounding the last-in-time provision's enactment controls. For example, because judicial review was already established when the Fourteenth Amendment was ratified,[268] perhaps any doubt about the availability of review of incorporated rights should fall away as somehow "baked in" to the Fourteenth Amendment. Or perhaps uncertainty about that question should be included in aggregation. A cousin to this question is already being discussed by originalists: Should judges "primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or "when the Bill of Rights was ratified in 1791"?[269] Under aggregation, such timing questions could be even more important.

IV. AGGREGATION AS A FORCE OF DISRUPTION AND STABILITY

If applied in its hardest form, aggregation threatens significant disruption—if that application is even realistically possible. It is easy for

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262. See U.S. Const. art. III (enumerating the cases and controversies to which the federal judicial power may extend).

263. See Mata v. Lynch, 576 U.S. 143, 150 (2015) (explaining that jurisdictional questions and merits questions are "of course distinct").

264. See Manning, Eleventh Amendment, supra note 208, at 1701 (arguing that courts should adhere strictly to enacted constitutional text because constitutions, like statutes, are the product of political compromise).

265. See id. (describing some scholars' belief that "whatever the proper approach to statutes, judges must not read the specifics of the Constitution in a rule-bound way").

266. See infra section IV.A.4.

267. See Jared A. Goldstein, Equitable Balancing in the Age of Statutes, 96 Va. L. Rev. 485, 541–42 (2010) ("[W]hen two statutes cannot be reconciled, the Court has held that the later-enacted statute should be read to repeal an earlier statute.").

268. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing judicial review decades before the Fourteenth Amendment's ratification).

269. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138, 2163 (2022).

courts today to ignore that *Marbury* or *Hunter's Lessee* could be wrong because—apart from two centuries of tradition—there are good arguments in those cases' favor.[270] So, it is natural for an originalist to check the box once and move on without thinking about it again. But if the goal, driven by legitimacy concerns, is to issue judgments supported by accurate historical analysis, originalists should pause before brushing doubts away. That goal is why a great many other debates about how to do originalism become more important once aggregation is considered. Aggregation, however, may also provide at least some new stability by providing an originalism-based defense to features of constitutional litigation that may otherwise be hard for originalists to defend. This Part addresses these points.

A. *Disruption and Potential Mitigation*

Aggregation could significantly change how judges decide cases. Even putting aside legitimacy questions about judicial review itself, the idea that judges may interpret the same clause differently (and thus come to different probabilistic determinations) depending on who the defendant is (state versus federal) would strike at the heart of congruent constitutionalism,[271] just as assigning probabilities rather than binary answers to meaning would challenge standard practice. One could also imagine complaints with scores of half-baked theories cobbled together in hopes of winning by dint of aggregation.[272] Ironically, the best argument against aggregation may be that its consequences are so significant that it is improbable that the Constitution requires it.

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270. See Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 815–16 (1984) (explaining that federalist distrust of state courts led the framers to vest "the judicial power of the United States in the federal judiciary"); Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887, 893 (2003) (arguing that the Constitution's text, structure, and history authorize judicial review).

271. There is some support in the literature for the idea that incorporated rights should sometimes be treated differently from nonincorporated rights. See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 215–22 (1998) (discussing a theory of "refined incorporation," which requires identifying whether a right is a personal right as opposed to "a right of states or the public at large").

272. The Court has warned that offering a "[m]ultiplicity" of supposed errors "hints at lack of confidence in any one." Jones v. Barnes, 463 U.S. 745, 752 (1983) (internal quotation marks omitted) (quoting Robert H. Jackson, Advocacy Before the United States Supreme Court, 25 Temp. L.Q. 115, 119 (1951)); see also Fifth Third Mortg. Co. v. Chi. Title Ins. Co., 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing . . . that usually means there are none."). If taken too far, that view isn't logical. The general point, however, is true. There are limits to how many arguments a party can make in good faith.

Thus, one possible response to aggregation is to ignore it. Accounting for aggregation significantly complicates legal analysis[273]—so why do it? As explained above, if original-methods originalism is correct (itself perhaps a question of probability), and if that method rejects aggregation (another historical question), then perhaps aggregation should be ignored.[274] On the other hand, what about the case hypothesized above in which there is only a 1% chance that a judgment is based on the correct resolution of the necessary steps?[275] Can a judge legitimately issue such a long-shot judgment? Conceptual questions about what it means to prove the law and how that inquiry fits within the originalist framework are already important but may become downright essential when aggregation is considered. Indeed, aggregation would seem to put added pressure on any distinction between dispute resolution and law declaration because the outcome of actual cases and legal analysis about constitutional provisions would not be as tight; a litigant who is more likely than not right on each step may still lose.

Aggregation also adds fuel to the fire of other debates about originalism and constitutional law more generally. Consider the following.

1. *Stare Decisis.* — Many originalists argue that because the Constitution is supreme, it follows that judges should only follow judicial decisions that correctly interpret the Constitution.[276] Whatever the merits of that view, it isn't stare decisis.[277] Others suggest, by contrast, that stare decisis may be required by originalism.[278] And others still accept stare decisis for "pragmatic" reasons.[279] This debate matters even more with aggregation because if originalist courts can only revisit, say, "demonstra-

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273. See Porat & Posner, supra note 20, at 56 ("Aggregation would create a more complicated rule for both the parties to the contract and the courts, and thus increase decision costs.").

274. See supra text accompanying notes 256–258.

275. See supra note 211.

276. See Lawson, Constitutional Case Against Precedent, supra note 52, at 32 (arguing that any interpretive theory prescribing objectively correct constitutional answers and treating the Constitution as the supreme law forbids reliance on conflicting precedent).

277. See Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 570 (2001) ("If a court believes a prior decision to be correct, it can reaffirm that decision on the merits without reference to stare decisis.").

278. See, e.g., Stephen E. Sachs, Precedent and the Semblance of Law, 33 Const. Comment. 417, 423–24 (2018) (book review) ("Maybe a common-law rule of precedent . . . was part of the 'original law' of the Founding, which courts must continue to enforce until that law is properly changed." (quoting Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 863–64 (2015))).

279. See id. at 423 (internal quotation marks omitted) (quoting Scalia, A Matter of Interpretation, supra note 84, at 140) ("Courts sometimes call stare decisis 'a principle of policy' . . . ." (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991))); see also Scalia, A Matter of Interpretation, supra note 84, at 139 ("The whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.").

bly erroneous" cases,[280] the universe of challengeable precedents would decrease. By contrast, if courts can overrule any precedent that is 51% wrong, more cases would be overruled. Similarly, if courts also must consider other factors before overruling precedent—like reliance[281]—less overruling would result. Aggregation makes this debate more significant. For example, if courts can take incorporation as 100% certain because of stare decisis, one step would disappear. Indeed, the most effective way to cabin the effects of aggregation is likely stare decisis. If, as some originalists say, judges should not apply stare decisis, the implications of aggregation therefore would be much more significant.

2. *Compensating Adjustments.* — Although it could increase accuracy, aggregation sometimes may make it more difficult to determine original meaning. If there is more uncertainty about what the Constitution requires, how one thinks about compensating adjustments (and judicial competence to create them) may change. If fewer acts are found unconstitutional, there may be less need for compensation. But if other bodies of precedent are highly disrupted by aggregation, then compensating adjustments may be more tempting to prevent significant change. Either way, it may be harder to adopt a one-size-fits-all approach to compensating adjustments because the topics for which such adjustments are necessary may require mathematical consideration.[282] For example, the Court may have heightened the standard for facial relief because it doubts as an original matter that courts can issue such relief.[283] If so, aggregation could cut both ways. If those originalist doubts are wrong, there may be less need for an adjustment. But if doubt about facial relief is yet another reason why plaintiffs bringing certain types of claims should lose, perhaps a heightened standard is even more important.

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280. See Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("In my view, if the Court encounters a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.").

281. See Gregory E. Maggs, Justice Thomas and Stare Decisis, Harv. J.L. & Pub. Pol'y Per Curiam, Fall 2021, at 1, 1, https://journals.law.harvard.edu/jlpp/justice-thomas-and-stare-decisis-gregory-e-maggs/ [https://perma.cc/MTN5-2U3R] ("When asked to overrule a prior decision, the Supreme Court typically considers several factors, such as: (1) the 'workability' of the rule established by the precedent, (2) the 'antiquity' of the precedent, (3) the 'reliance interests at stake,' and (4) 'whether the decision was well reasoned.'" (quoting Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009))).

282. See Baude, Precedent and Discretion, supra note 44, at 326 ("Perhaps, like *The General Theory of the Second Best* in economics, it has no general solution.").

283. This idea comes from Stephanie Barclay, who suggests that the Court's heightened standard of facial relief in cases like Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024), may reflect an underlying discomfort with facial relief at all. See Stephanie Hall Barclay, Constitutional Rights as Protected Reasons, 92 U. Chi. L. Rev. 1179, 1251 (2025); see also Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 449–50, 450 n.196 (2017) (positing that the view that injunctions were "a challenge to [a] law itself" could be related to the development of facial challenges).

3. *Construction*. — The size of the "construction zone" also divides originalists.[284] If multiple answers to some constitutional questions are equally legitimate, there should be less error. And if there is less error for constituent questions, then there will be less aggregate error. But if the construction zone is large, many of originalism's benefits may be lost because judges would decide a larger number of important constitutional questions without direction from the original public meaning of any clause—which many originalists find alarming.[285] Indeed, construction may also prompt a meta-question of its own: Thinking probabilistically about the nature of constitutionalism and the framers' design for the separation of powers, how likely is it that the Constitution's original meaning permits broad construction? If broad construction is allowed, in what sense would the judiciary be "the least dangerous" branch?[286] A court's power to engage in construction may thus have to be discounted.

Put differently, to the extent that originalism allows robust construction (which some subspecies of originalism allow), perhaps the exemplars discussed above should be seen more as presenting questions of construction rather than interpretation. This Article does not intend to wade too deeply into the interpretation–construction debate, though a relative lack of words should not be understood as suggesting a relative lack of importance. Indeed, the amount of scholarship devoted to this question is extraordinary.[287] Much of that scholarship, however, goes beyond the Article's scope. For purposes here, the main point is that debates about construction are even more important in a world with aggregation than one without it.

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284. See supra notes 114–119 and accompanying text.

285. See, e.g., Alicea, Originalist Jurisprudence of Justice Samuel Alito, supra note 7, at 666–68 (explaining that originalist theories rooted in textual analysis, rather than the Founders' expected applications of the Constitution, threaten to collapse originalism into living constitutionalism).

286. The Federalist No. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

287. See, e.g., Stephanie Hall Barclay, Constructing Constitutional Rights, 138 Harv. L. Rev. Forum 140, 143–45 (2025), https://harvardlawreview.org/forum/vol-138/constructing-constitutional-rights/ [https://perma.cc/BK55-KHGJ] (summarizing agreement and disagreement among originalist scholars about the interpretation–construction distinction); Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol'y 65, 66 (2011) ("Originalists may disagree about many things, but they should all agree on the meaningfulness of [the interpretation–construction] distinction."); Lawrence B. Solum, The Interpretation–Construction Distinction, 27 Const. Comment. 95, 95–96 (2010) ("[T]he [interpretation–construction] distinction is helpful in that it enables legal theorists to clarify the nature of important debates, for example debates about constitutional interpretation."); Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 455–56 (2013) ("Recently, the concept of constitutional construction has come to play an important role in contemporary originalist constitutional theory . . . ."); Gregory Klass, A Short History of the Interpretation–Construction Distinction 1–6 (June 6, 2024) (unpublished manuscript), https://ssrn.com/abstract=4857430 [https://perma.cc/C3HV-2KXK] (tracing the interpretation–construction distinction from Francis Lieber's 1839 work through Arthur Linton Corbin's 1951 reconceptualization).

4. *Liquidation and Tradition.* — To the extent they reduce uncertainty about meaning, liquidation and tradition may also limit the importance of aggregation. Yet, as with construction, how do originalists understand the relevance of liquidation and traditionalism? Do proponents of liquidation and traditionalism believe these tools are part of the Constitution's original public meaning? If so, that would be an empirical claim that itself could be subject to probabilistic analysis. Or is the theory that the Constitution's original meaning does not compel such tools, but judges can accept them as a matter of construction? Then see above. Or do these tools simply provide evidence of the Constitution's original meaning? If so, they would not eliminate the need for aggregation but may help judges be more certain about the answers whose risks of error they are aggregating.

5. *Corpus Linguistics.* — Finally, aggregation also makes the debate over corpus linguistics more significant. The promise of corpus linguistics is that it can provide more "evidence about meaning and usage that before we could only guess about, making our assessment of the meaning of the language . . . more transparent and independently verifiable."[288] If so, corpus linguistics should increase accuracy. Given aggregation, it can matter a lot whether a judge is 90% or 60% certain. Yet if corpus linguistics simply makes the law muddier, or itself conflicts with original-methods originalism, combining it with aggregation could produce even less clarity.

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Each of these issues is the subject of lively debate. Aggregation, however, is important to all of them—and makes their resolution more important. Aggregation also may make it more difficult to resolve some of these debates; if the answer isn't binary (for example, "yes, stare decisis comports with the Constitution's original public meaning") but instead is probabilistic (for example, "there is a 60% chance stare decisis is allowed"), then such tools may partly limit the case-outcome effects of aggregation while further complicating the analysis that courts may have to do.

B. *Aggregation as a Stabilizing Force*

Aggregation also can be a stabilizing force for constitutional law by providing justifications for familiar features that otherwise may be difficult for originalists to defend.[289] To be sure, this Article does not claim that courts intentionally created doctrines like the presumption of constitutionality to address aggregation. Even so, aggregation may support such doctrines. Furthermore, aggregation may provide a sort of meta-stability to the law by shoring up public-meaning originalism (which is ascendant)

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288. Lee & Mouritsen, Corpus and Critics, supra note 56, at 277.

289. As explained, this Article does not claim that aggregation on net will increase stability; whether that is possible may depend on how questions about stare decisis and the like are resolved. Instead, more modestly, the point here is that aggregation does not only create instability; it may also add some stability. See supra note 59.

against some competing methodologies. Importantly, moreover, as discussed in greater detail in Part V, even if courts are reluctant to apply a strong form of aggregation, a softer form may still justify these doctrines. And to be clear, features of constitutional law like a presumption of constitutionality arguably could be justified by other theories falling within originalism (deference to coordinate branches, etc.); this Article does not claim that aggregation offers the *only* possible justification. But it provides an additional justification, and perhaps the best one.

1. *Hybrid Rights.* — Originalists have not provided a compelling defense of hybrid rights—the idea that the combination of two provisions can be sufficient to justify a judgment of unconstitutionality even when neither can by itself.[290] Although Justice Scalia invoked hybrid rights in *Employment Division v. Smith*,[291] "[m]ost originalists properly scoff at the search for 'penumbras'" and "denounce the quest as 'thoroughly unprincipled.'"[292] True, structural analysis is important,[293] but the line between structural reading and penumbral reasoning can be blurry. Relying on high-level principles from a mishmash of provisions may undermine the bargain struck in any particular provision since no law "pursues its purposes at all costs."[294] To date, the best originalist defense of hybrid rights comes from Professor Dan Coenen, who defends them as an application of the "whole-document" canon of construction.[295] Such analysis, however, may not satisfy many originalists, especially because the "whole-text" canon "can lend itself to abuse."[296]

Aggregation, however, is different in kind from a structural/penumbral defense of hybrid rights. Aggregation does not look for rights in penumbras

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290. See, e.g., Coenen, Combining Constitutional Clauses, supra note 60, at 1072 (advancing a "systematic examination of combination analysis," albeit one that does not address the product rule or conditional probability).

291. 494 U.S. 872, 880–82 (1990) (expounding that free exercise claims have not been exempt from the neutral and generally applicable test except when brought alongside other constitutional rights, including freedom of speech).

292. Dan T. Coenen, Reconceptualizing Hybrid Rights, 61 B.C. L. Rev. 2355, 2361 (2020) [hereinafter Coenen, Reconceptualizing Hybrid Rights] (alteration in original) (internal quotation marks omitted) (first quoting Mark Pulliam, Unleashing the "Least Dangerous" Branch: *Quis Custodiet Ipsos Custodes?*, 22 Tex. Rev. L. & Pol. 423, 441 (2018); then quoting Glenn H. Reynolds, Penumbral Reasoning on the Right, 140 U. Pa. L. Rev. 1333, 1336 (1992)).

293. See Lawson, Does Good Originalism Need Good History?, supra note 97, at 1983 ("[T]he Constitution is an integrated instrument that must be read in its entirety . . . not simply because intratextual evidence can be powerful evidence of meaning, but because individual provisions often make sense only because of their role in the overall constitutional structure." (footnote omitted)).

294. Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam).

295. See Coenen, Reconceptualizing Hybrid Rights, supra note 292, at 2397 ("Properly understood, hybrid rights stem from applying the whole-document canon of interpretation, which itself has deep originalist roots, to a single and ambiguous text.").

296. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167–68 (2012).

but instead can account for aggregate uncertainty about what multiple provisions mean. Because of aggregation, an originalist does not have to believe that there is an atextual right floating, say, between the Free Exercise Clause and the Free Speech Clause. Instead, the originalist just needs to recall that it is possible that either clause, as originally understood, *by itself* protects the conduct. Without aggregation (and assuming a more-likely-than-not standard as well as independence), if the Court concludes there is only a 49% likelihood of unconstitutionality under each clause, the plaintiff may lose, despite a nearly 74% likelihood that at least one of the clauses favors the plaintiff (*51%* × *51%* is just over 26%). In cases where a plaintiff has a strong argument that falls short of ultimate success under multiple constitutional provisions, why not aggregate? And if a "right" does not have a strong grounding in *any* provision, adding the word "hybrid" still shouldn't result in victory, thus providing a limiting principle.

Wisconsin v. Yoder[297]—a prominent example of hybrid-rights analysis[298]—illustrates the point. As originalist scholars like Professor Michael McConnell have observed, there is strong historical evidence that the Free Exercise Clause was intended to allow exemptions to generally applicable laws.[299] The Court disagreed in *Smith*, but it is at least a debatable question. If so, *Yoder* may follow naturally given the possibility that *Smith* is wrong combined with the possibility that another clause by itself (like one of the Fourteenth Amendment's) could protect such a right. Granted, uncertainty about incorporation may add complexity, but, conceptually, aggregation can provide a sound foundation for hybrid rights.

2. *Presumption of Constitutionality.* — Courts also sometimes invoke a presumption of constitutionality.[300] Although the strength of the presumption varies, the idea is that courts should uphold legislation unless its unconstitutionality is "clear."[301] This doctrine is controversial for originalists (and others). Indeed, Professor Steven Calabresi believes it is impossible to be an originalist and an adherent of Professor James Bradley Thayer's view that courts should only declare a statute unconstitutional

297. 406 U.S. 205 (1972).

298. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 880–82 (1990) (describing how *Yoder*, among other cases, was decided using a hybrid-rights analysis of the "Free Exercise Clause in conjunction with other constitutional protections").

299. See Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1117, 1120–21 (1990).

300. See, e.g., Willey v. Harris Cnty. Dist. Att'y, 27 F.4th 1125, 1130 n.9 (5th Cir. 2022) (emphasizing "the presumption that states act constitutionally"); United States v. Wallace, 885 F.3d 806, 811 (5th Cir. 2018) (noting the "strong presumption of constitutionality due to an Act of Congress" (internal quotation marks omitted) (quoting United States v. Watson, 423 U.S. 411, 416 (1976))).

301. See New York v. O'Neill, 359 U.S. 1, 6 (1959) (explaining that courts should presume that a statute is constitutional unless it is clearly incompatible with the Constitution).

when the evidence is overwhelming.[302] Under the strong form of Thayerism, courts should not declare an act of Congress unconstitutional except when "those who have the right to make laws have not merely made a mistake, but have made a very clear one[]—so clear that it is not open to rational question."[303] But softer forms of Thayerism are available, such as the idea that courts should not declare an act unconstitutional unless it "clearly conflicts with the Constitution."[304] Thayerism may even simply operate as a "tiebreaker."[305]

Aggregation suggests that at least the tiebreaker form of Thayerism is appropriate—and perhaps sometimes stronger forms may be, too. It is at least debatable whether judicial review is constitutional. Today, the judiciary takes *Marbury* and *Hunter's Lessee* as given.[306] And that conventional wisdom is probably correct—perhaps quite probably. The ins and outs of that debate are far beyond this Article's scope. Yet the permissibility of such review is not certain.[307] Even if we are 99% confident that *Marbury* is right, anytime a federal court confronts a hard constitutional question, aggregation suggests that it should rule in favor of constitutionality: By definition, *99%* × *50%* is always less than 50%.[308] And if originalists are only 90%

302. See Steven G. Calabresi, Originalism and James Bradley Thayer, 113 Nw. U. L. Rev. 1419, 1421 (2019).

303. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893).

304. Edward Whelan, The Presumption of Constitutionality, 42 Harv. J.L. & Pub. Pol'y 17, 17 (2019); see also id. at 18–19 (arguing that "the presumption . . . is built into the very justification for judicial review" (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810))); John O. McGinnis, The Duty of Clarity, 84 Geo. Wash. L. Rev. 843, 918 (2016) (offering a "clear incompatibility" standard).

305. See Jonathan F. Mitchell, Stare Decisis and Constitutional Text, 110 Mich. L. Rev. 1, 57 (2011).

306. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024) ("The APA thus codifies . . . the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment."); Ortiz v. United States, 585 U.S. 427, 441 (2018) (explaining the Court's appellate jurisdiction over decisions outside Article III courts).

307. See Epstein, supra note 26, at 416 (noting that the originalist case for Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), is debatable); Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 4, 64 (2001) (explaining that even proponents of judicial review recognized the practice's uncertain status during the Constitutional Convention). Of course, many originalists defend *Marbury*. See, e.g., Prakash & Yoo, supra note 270, at 893 (arguing that there is textual, structural, and historical support for the Constitution's authorization of judicial review). It also is hard to imagine any originalist rejecting *Marbury* in the real world. See Scalia, Originalism: The Lesser Evil, supra note 97, at 861 (arguing that originalism would not reject *Marbury*, "even if" it "unassailably . . . got the meaning of the Constitution wrong"). For purposes of aggregation, it is enough that such cases are not *certainly* correct.

308. Cf. Barbara White, Coase and the Courts: Economics for the Common Man, 72 Iowa L. Rev. 577, 629 n.221 (1987) ("Since the probability of an accident occurring is always less than 1, . . . the value of the harm multiplied by its probability, is always less than the value of the harm if it actually occurred.").

certain about *Marbury*, a court should be at least 55% sure before it holds that an act of Congress is unconstitutional, assuming a more-likely-than-not standard.

Furthermore, aggregation also explains why "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."[309] By definition, as it becomes more likely that the Constitution was violated, any uncertainty about judicial review becomes less significant.

True, aggregation's version of the presumption of constitutionality is not a perfect match for how things work today. For one, the Court has said it isn't going to revisit *Marbury* and that the "debate over whether [it] was wrongly decided" now belongs "to forums more otherworldly than ours."[310] But that does not mean that courts could not account for the chance (even if slight) that *Marbury* is wrong. The Supreme Court has also suggested that the presumption does not apply to restrictions on political participation.[311] That type of carveout doesn't make as much sense under aggregation. Political participation is important, but, for probability purposes, the extent that participation is protected has no necessary relevance to whether there should be a presumption of constitutionality.

Invoking something like liquidation or tradition, the Court has also suggested that longstanding practices may be entitled to a presumption of constitutionality.[312] For an originalist, that conclusion may follow to the extent that longstanding practices have probative value for understanding original meaning. But that presumption would not be grounded in the possibility, even if slight, that judicial review itself is improper.

3. *Clear-Statement Rules.* — One of the fieriest debates in originalist circles concerns the validity of clear-statement rules: rules that something either is or is not allowed unless there is clear textual indication.[313] One

309. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The Court also said the same principle would apply to state legislation so long as the relevant provision of the Bill of Rights was incorporated against the States. Id. That conclusion does not necessarily follow when the question is viewed probabilistically.

310. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 688 (1999).

311. See Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 219–20, 281–85 (1991) (explaining that "[t]he normal presumption of constitutionality" may be inapt "not only when specific provisions of the Bill of Rights were plainly contravened, but also . . . where the ordinary operations of majoritarian institutions were distorted by artificial constraints").

312. See Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019) ("[R]etaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.").

313. See Clear-Statement Rule, Black's Law Dictionary (12th ed. 2024) (defining "clear-statement rule" as "[a] doctrine holding that a legal instrument, esp. a statute, will not impinge by mere implication on certain areas of jurisprudence, such as sovereign

possible argument in favor of them is that they reflect original-methods originalism, since courts have created many such clear statements over the centuries.[314] Others disagree. Thus, although Justice Gorsuch defends clear-statement rules based on historical practice, scholars like Professor Michael Ramsey argue that "it is not evident to an originalist how the judicial power conveys authority to do anything other than to determine a text's original meaning."[315]

Aggregation, however, may offer a mathematical path to justify some clear-statement rules. If a particular piece of legislation is 100% within Congress's power (assuming that is possible), and it is 55% certain that Congress has chosen *X* rather than *Y*, then applying *X* is more likely than not the correct thing to do. But if it is only 90% likely that Congress has the power to do *X* (say, apply some rule directly against the states) but 100% certain that Congress can do *Y* (say, apply the rule only against private parties), a court may need to be more than 55% certain that Congress has chosen *X*—since otherwise the probability that *X* is the correct thing to do is 49.5%. A clear-statement rule helps provide that certainty.

For example, a perplexing question in constitutional law is why federalism sometimes receives "freestanding" weight—that is, courts account for it with a clear-statement rule even without pointing to a specific constitutional provision requiring such a rule.[316] Aggregation, however, may provide a justification, at least sometimes. Many clauses could require courts to respect federalism. For example, how far does the term "commerce" go? And even if the term "commerce" includes certain types of transactions, is a state's decision to impose a certain retirement age for public officials commerce "among the several States"?[317] Maybe, maybe not. And

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immunity, retroactivity, and federal-court abstention, but that the result sought must be unquestionably expressed in the text"). Clear statements appear throughout the law, but some scholars claim that they allow courts—by departing from ordinary interpretation—to undo legislative bargains. See, e.g., Eidelson & Stephenson, supra note 111, at 553–57 (providing an example of how clear-statement rules can disregard congressional bargains).

314. See, e.g., Jonathan Meilaender, Structural Textualism and Major Questions, 48 Harv. J.L. & Pub. Pol'y 369, 376–77 (2025) ("[O]ur law is full of clear-statement rules and has been since the Founding." (alteration in original) (internal quotation marks omitted) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring))).

315. Michael D. Ramsey, An Originalist Defense of the Major Questions Doctrine, 76 Admin. L. Rev. 817, 824 (2024).

316. See Thomas B. Colby, Originalism and Structural Argument, 113 Nw. U. L. Rev. 1297, 1330 (2019) (criticizing "freestanding federalism" (internal quotation marks omitted) (quoting John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2040 (2009))). But see Gillian E. Metzger, The Constitutional Legitimacy of Freestanding Federalism, 122 Harv. L. Rev. Forum 98, 99 (2009), https://harvardlawreview.org/forum/vol-122/the-constitutional-legitimacy-of-freestanding-federalism/ [https://perma.cc/EQ99-9PRD] (offering a limited defense of freestanding federalism).

317. U.S. Const. art. I, § 8, cl. 3; see also Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (refusing to consider these questions and instead applying a pro-federalism clear-statement rule).

if not, what effect does the Necessary and Proper Clause[318] have on that state law? Is it "proper" for Congress to regulate the states? Given uncertainty about the scope of such provisions, it is possible—even if far from certain—that Congress lacks authority, in which case a clear-statement rule may logically ensure that aggregate uncertainty does not become too great. In other words, if a court is only 90% sure that Congress could enact a law, then why not require more confidence about the meaning of a law if a judge seeks to issue judgments more likely than not authorized by written law?

Similar analysis may apply to the nondelegation doctrine, and more specifically, the major questions doctrine. For certain especially important delegations of authority, courts require Congress to speak clearly.[319] This doctrine too is highly controversial, and many scholars accuse the Court of ignoring textualism.[320] After all, such critics ask, why should a court not simply give a statute its best reading? Aggregation may provide some justification. Even if it is less than 50% likely that the delegation violates the Constitution, when that possibility is aggregated with the possibility that Congress did not delegate the authority at all, why not require a clear statement to ensure that the overall judgment is more likely than not correct? If it is only, for example, 70% likely that Congress can delegate the power to begin with, then perhaps a court needs to be more than 70% certain that Congress, in fact, intended to delegate the authority.

The clear-statement rule against retroactive legislation may fit the same mold. Although the Constitution forbids ex post facto laws and bills of attainder,[321] the judiciary has long held that Congress can give many legal rules retroactive effect. Specifically, "[w]hile the Ex Post Facto Clause on its face might appear to bar all retroactive legislation, courts have applied the Clause only to penal laws."[322] Nonetheless, courts require Congress to speak clearly before it can impose such retroactive effect.[323] Without aggregation, such a rule is odd—what business do courts have using notions of fairness to give a statute something other than its most

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318. U.S. Const. art. I, § 8, cl. 18.

319. See *West Virginia*, 142 S. Ct. at 2609 (explaining that "in certain extraordinary cases, . . . more than a merely plausible textual basis for the agency action is necessary" such that "[t]he agency instead must point to 'clear congressional authorization' for the power it claims" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

320. See, e.g., Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1040 (2023) (rejecting the major questions doctrine as inconsistent with textualism); Eidelson & Stephenson, supra note 111, at 541–44 (same); Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 282–90 (2022) (same).

321. See U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

322. Joanna R. Lampe, Cong. Rsch. Serv., IF11293, Retroactive Legislation: A Primer for Congress 1 (2019), https://www.congress.gov/crs_external_products/IF/PDF/IF11293/IF11293.1.pdf (on file with the *Columbia Law Review*).

323. See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994) (requiring "that Congress first make its intention clear" before a court grants a statute retroactive effect, even when retroactivity does not violate any constitutional provision).

likely reading?[324] Yet with aggregation, one cannot as easily brush aside the possibility that the Ex Post Facto Clause may not be limited to penal laws.[325] If it is a debatable question whether Congress intended retroactive application, and there is at least some constitutional doubt whether Congress could authorize retroactivity even if lawmakers wanted to, then aggregating uncertainty could produce something like a clear statement against retroactivity.[326]

Of course, none of this is to say that every clear-statement rule is justified by aggregation,[327] nor—given that not all errors are equally likely—that the strength of all clear-statement rules should be the same. It does suggest, though, that mathematics may support some clear-statement rules.

4. *Qualified Immunity.* — Finally, aggregation may also support another controversial feature of constitutional litigation: qualified immunity. Because of qualified immunity, officers generally are not subject to individual liability under Section 1983 (a federal cause of action) unless they violated the Constitution *and* the constitutional right was "clearly established" at the time.[328] This means that unless the violation was "obvi-

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324. See Scalia, A Matter of Interpretation, supra note 84, at 29 ("Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?").

325. "Few if any readers would deny that Crosskey makes a strong *prima facie* case that the original meaning of 'ex post facto law' encompassed retroactive civil laws." John Mikhail, James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto Law", 17 Geo. J.L. & Pub. Pol'y 79, 85 (2019) (discussing William Winslow Crosskey, The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws, 14 U. Chi. L. Rev. 539 (1947)).

326. The Court has recognized a clear-statement rule against giving laws extraterritorial effect. See Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (recognizing a presumption against the extraterritorial application of federal statutes without clearly expressed congressional intent). Applying aggregation principles, this may account for concerns about Congress's exercise of its Foreign Commerce Clause authority.

327. For example, courts often say that Congress must speak clearly before courts will construe statutes to supersede common-law rules. See, e.g., Peer v. Liberty Life Assurance Co. of Bos., 992 F.3d 1258, 1262–63 (11th Cir. 2021) (reasoning that Congress may displace common-law rules only by saying so explicitly). It is hard to see the constitutional basis for this rule. See Scalia, A Matter of Interpretation, supra note 84, at 29 ("The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab."); see also Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 177 (2010) [hereinafter Barrett, Substantive Canons] (criticizing such canons "[w]hen employed . . . to stretch plain [statutory] language").

328. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity generally applies in suits against state officials brought under Section 1983 and against federal officials in suits brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). See Aaron L. Nielson & Christopher J. Walker, The New Qualified Immunity, 89 S. Cal. L. Rev. 1, 9–10 (2015) (explaining that *Monroe* permits constitutional damages suits against state officials under Section 1983 and *Bivens* supplies a similar implied damages action against federal officials).

ous,"[329] liability is only permissible if "existing precedent . . . placed the statutory or constitutional question beyond debate."[330]

Qualified immunity is divisive, including among originalists. Justice Thomas has urged the Court to revisit it,[331] and Baude has suggested on originalist grounds that such an immunity may not be "lawful."[332] Not everyone agrees, however, that qualified immunity lacks an originalist basis.[333] Given stare decisis, it appears the Court has concluded that only Congress can reform qualified immunity.[334]

For the sake of argument, though, assume that qualified immunity has *no* historical support and that stare decisis does not stand in the way of eliminating it. Even so, something like qualified immunity could be justified by aggregation alone. To begin, it is far from certain whether Section 1983 can support liability for acts by state officials that violate state law. In *Monroe v. Pape*, the Court adopted a broad reading of Section 1983,[335] but *Monroe* has its detractors. Justice Scalia argued, for example, that it "converted an 1871 statute covering constitutional violations committed 'under color of any statute, ordinance, regulation, custom, or usage of any State,' into a statute covering constitutional violations committed without the authority of any statute, ordinance, regulation, custom, or usage of any State."[336] Scalia thus had no compunction applying qualified immunity, regardless of its pedigree, because he did not believe that the cause of action applied in the first place.[337] Justice Thomas has continued to

329. See Hope v. Pelzer, 536 U.S. 730, 745 (2002) (not requiring prior on-point precedent because of "[t]he obvious cruelty inherent in this practice").

330. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

331. See Ziglar v. Abbasi, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part and concurring in the judgment).

332. See Baude, Qualified Immunity, supra note 63, at 77–78 (arguing that "much [of] the immunity doctrine is a product of the Court's own choices and not ordinary posited law"); see also Alexander A. Reinert, Qualified Immunity's Flawed Foundation, 111 Calif. L. Rev. 201, 203–04 (2023) (offering additional arguments against qualified immunity).

333. See, e.g., Keller, supra note 64, at 1344–45 (arguing that common law around 1871 recognized a doctrine in some ways akin to qualified immunity); Andrew S. Oldham, Official Immunity at the Founding, 46 Harv. J.L. & Pub. Pol'y 105, 105–06 (2023) (arguing that Founding-era common-law immunities could bar some Fourth Amendment claims against officers); see also Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Rsrv. L. Rev. 396, 414–33 (1987) (explaining the murkiness surrounding immunities).

334. See Aaron L. Nielson & Christopher J. Walker, Qualified Immunity's 51 Imperfect Solutions, 17 Duke J. Const. L. & Pub. Pol'y 321, 323 n.8 (2022) (collecting citations suggesting that the Court has implicitly relied on stare decisis).

335. See 365 U.S. 167, 187 (1961) (concluding that "under color of" does not only include actions taken by state officials pursuant to state law).

336. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (emphasis omitted) (citation omitted) (quoting 42 U.S.C. § 1983).

337. See id. ("Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted."); see also Tyler B. Lindley, Anachronistic Readings of Section 1983, 75 Ala. L. Rev. 897, 900 (2024) (claiming that today's understanding of Section 1983 is anachronistic because it was not

express such misgivings.[338]

If Scalia is right about the history (itself a disputed question[339]), it would make little sense to toss out qualified immunity without also revisiting the cause of action to which qualified immunity applies. And even if *Monroe* is more likely than not correct, there is at least a *chance* it is wrong.[340] When the possibility that *Monroe* is wrong is combined with the possibility that the Constitution was not violated in the first place, why wouldn't the rule be that only relatively clear violations trigger liability? Such analysis, moreover, presumably should apply with greater force to so-called *Bivens* claims against federal officials.[341] Because Congress has not enacted this cause of action, such claims are already of dubious validity.[342] No wonder some originalist jurists are reluctant to award monetary damages in new circumstances.[343]

Beyond questions about Section 1983's scope, however, there are also often questions about incorporation. If a right has not been incorporated, then a state official cannot violate it. Because incorporation is not certain, this point too may counsel in favor of requiring extra confidence that conduct violates the Constitution. Sure enough, that is roughly how qualified immunity works. Absent on-point precedent, a court may establish the rule forward but should not impose liability for past acts.[344] Yet if a court con-

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originally "understood to have created a new 'cause of action' as that term was understood in 1871").

338. See, e.g., Medina v. Planned Parenthood S. Atl., 145 S. Ct. 2219, 2242 (2025) (Thomas, J., concurring) (explaining the "jurisprudential shift [that] has transformed § 1983 litigation").

339. See, e.g., Baude, Qualified Immunity, supra note 63, at 64 (citing Steven L. Winter, The Meaning of "Under Color of" Law, 91 Mich. L. Rev. 323, 344 (1992)).

340. See Richard H.W. Maloy, "Under Color of"—What Does It Mean?, 56 Mercer L. Rev. 565, 565 (2005) ("If one is reading this article to find out the meaning of 'under color of' you have come to the wrong place; Cause I don't know." (emphasis omitted)); Aaron L. Nielson & Christopher J. Walker, A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853, 1869–72 (2018) (explaining why the meaning of "under color of" is difficult to determine).

341. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). Professor Katherine Mims Crocker has argued that "compensating adjustments" is a bad framework for some applications of qualified immunity (those in suits against federal officers). See Katherine Mims Crocker, Qualified Immunity and Constitutional Structure, 117 Mich. L. Rev. 1405, 1445 (2019). The analysis here, however, is different because it is about how likely it is that the Constitution's original meaning authorizes something like *Bivens*; what to do if it does not is a separate question.

342. See, e.g., Goldey v. Fields, 145 S. Ct. 2613, 2615 (2025) (declining to extend *Bivens* to new contexts).

343. See Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022) (imposing a heightened burden where case raises "a new *Bivens* context" (internal quotation marks omitted) (quoting Ziglar v. Abbasi, 582 U.S. 120, 139 (2017))).

344. See, e.g., Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

fronts an "egregious" or obvious violation, it can impose liability in the case before it.[345] For example, if a court believes that it is 70% likely (again, that percentage is simply an assumption being used here for illustration's sake) that Section 1983 has been properly interpreted, and that the aggregated likelihood that the allegedly incorporated right was violated is 51%, that may be enough to justify a decision recognizing the alleged right, but the likelihood that originalism requires monetary damages would be well less than 50%. By contrast, if the aggregated likelihood of the incorporated right is 90%, a court could be much more confident that damages are warranted.

Qualified immunity is also not a perfect fit for aggregation. After the Court has found a violation in one case, courts take that holding as correct in future cases.[346] That is hard to square with aggregation. Yet even that feature is not absolute in effect. The Court has stressed that precedent that supposedly provides clear notice must not be framed at too high a level of generality, which limits the liability-creating effect of precedent.[347] Certainly, there are significant policy debates about qualified immunity. But before imposing monetary damages for possible constitutional violations based on a possible interpretation of an 1871 statute, aggregation suggests that any constitutional violations should be at least relatively clear.

5. *Meta-Stabilization.* — As explained above, this Article focuses on originalism for three reasons: "(i) it is ascendant; (ii) originalism's fixation and constraint theses should make greater accuracy especially important for originalists, especially compared to methodologies less concerned with evidentiary correctness; and (iii) debates about stare decisis (which could mitigate a lot of the disruption caused by aggregation) and the like are especially lively for originalists."[348] Yet any constitutional theory that involves multistep reasoning should account for aggregation. Aggregation, moreover, may help shore up public-meaning originalism against methodologies that do not place the same primacy on text.

For example, purposivists who believe they can identify legislative intent outside of a legal instrument's text must address the likelihood that they have done so correctly. Yet as Professor John Manning—quoting Professor Max Radin—has explained:

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345. See, e.g., Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.").

346. See Carroll v. Carman, 574 U.S. 13, 16 (2014) (explaining that existing precedent can establish a constitutional right).

347. See City & County of San Francisco v. Sheehan, 575 U.S. 600, 613 (2015) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011))).

348. Supra text accompanying note 202. As explained above, aggregation should not only be relevant to originalism, but its prima facie relevance to originalism (the Court's ascendant methodology) should be apparent. See supra note 38 and accompanying text.

> The chances that of several hundred [lawmakers] each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small . . . . Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of [lawmakers], and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways . . . . It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.[349]

Obviously, what follows is a contested statement, but to the extent that textualist decisions better reflect the actual bargain of the lawmaking process, textualism—including public-meaning originalism—should result in more accurate determinations,[350] at least if the goal is to reflect the lawmakers' actual bargain.[351] Because the risk of error increases (potentially dramatically) the more steps a judgment requires, anything that can reduce error becomes that much more significant. Thus, methods that invite greater error at any step become harder to defend in a world of multistep analysis. To be sure, debates about which methodology is best at reflecting legislative bargains are longstanding and sharply fought, as are debates about whether that should be the aim of interpretation anyway.[352] This Article does not purport to resolve those debates. Instead, more modestly, it notes that if those accuracy debates are resolved in textualism's favor, the overall case for textualism/public-meaning originalism is even stronger given aggregation.

Similar points could be made with respect to living constitutionalism, whose adherents must determine not only a constitutional principle (a search that runs into problems akin to those just discussed), but also decide how such constitutional principles relate to contemporary social circumstances, and what the implications of those combined principles and circumstances mean for particular cases.[353] Deciding even a single

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349. Manning, Inside Congress's Mind, supra note 66, at 1919–20 (quoting Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870–71 (1930)). As explained above, some question whether courts can identify a single public meaning, see supra note 86; the more meanings that must be identified, the greater likelihood of error.

350. See John F. Manning, What Divides Textualists From Purposivists?, 106 Colum. L. Rev. 70, 96 (2006) ("[T]extualists believe that judicial adherence to semantic detail (when clear) is essential if one wishes legislators to be able to strike reliable bargains.").

351. See id. at 111 (arguing that "textualism continues to represent a superior account of legislative supremacy").

352. See Manning, Inside Congress's Mind, supra note 66, at 1912–13, 1934–37 (explaining that although "most of textualism's competitors" agree that "interpreters cannot reasonably expect to identify what [the lawmaking body] actually decided" other than through negotiated text, they differ on the appropriate response, and discussing scholarship that challenges such "intent skepticism").

353. See, e.g., Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243, 1257 (2019) (identifying

question under such a framework involves difficult aggregation questions. If multiple questions must be combined for a court to issue a judgment, therefore, aggregation may prove to be more difficult for living constitutionalists than originalists. Again, no doubt some will disagree (the relative difficulty of deciding questions under such methodologies is also disputed[354]), but the point is that, to the extent originalists are correct that originalism results in less error when there is just a single step of analysis, that correctness may be even more pronounced with multiple steps.[355]

V. SOFT AGGREGATION: A PATH FORWARD?

Originalism can be complicated, and aggregation can be complicated. Combined (no pun intended), they are even more complicated. In fact, even setting aside originalism, if aggregating doubt across multiple questions is done too precisely, litigation may exceed judicial competence. Aggregation's far-reaching, disruptive implications no doubt explain why the field of evidence has largely shuttered it away as a powerful but impractical concept.[356] Originalists could do the same with aggregation—though putting it on a shelf would require an explanation, which to date has not been offered. What does seem clear is that the hardest form of aggregation sometimes—perhaps often—would devolve into such an unmanageable slog that it would leave "a supernatural being as the only possible juror."[357]

But there may be a way for judges to apply aggregation to originalism in an administrable way, at least if originalists are willing to be "faint-

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living constitutionalism as "an approach to interpreting the text [that] account[s] for the existence of . . . substantive value choices and . . . accept[s] the ambiguity inherent in the effort to apply them to modern circumstances" (quoting William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, 27 S. Tex. L. Rev. 433, 437 (1986))).

354. Compare Supreme Court Justice Holds Court in San Francisco, NBC Bay Area (Sep. 18, 2010), https://www.nbcbayarea.com/news/local/supreme-court-justice-holds-court-in-san-francisco/1852960/ (on file with the *Columbia Law Review*) ("Originalism gives 'easy, easy answers' to such questions, while constitutional evolutionists constantly have to assess changing societal circumstances, Scalia said."), with David A. Strauss, Originalism, Precedent, and Candor, 22 Const. Comment. 299, 305 (2005) (noting that it may be "very hard—very, very hard—to do originalism correctly, and very easy to be mistaken about the original understandings").

355. If living constitutionalism is more compatible with stare decisis, this operational point (which is separate from deeper questions about whether originalism or living constitutionalism is conceptually superior) may not follow, but whether that is true is also debatable; living constitutionalists also overrule precedent. See, e.g., Wolf v. Colorado, 338 U.S. 25, 33 (1949) (rejecting exclusionary rule for states), overruled by Mapp v. Ohio, 367 U.S. 643 (1961). At a minimum, this issue—like others presented here—becomes more significant in a world with aggregation.

356. See supra section II.B.

357. See Allen, supra note 29, at 607.

hearted" aggregators.[358] There is a strong form of aggregation that would require assigning definite probabilities to questions of law, deciding whether each necessary question for any particular judgment is truly independent (thus triggering the product rule) or partially dependent (thus requiring assigning a definite degree of dependence, and then applying conditional probability), and breaking out calculators to find aggregate probability. Such hard aggregation would require resolving the conceptual debates set forth in sections III.C and IV.A, as well (no doubt) as many others, and perhaps assigning probabilistic answers (for example, there is an *X*% likelihood that the standard of proof for constitutional claims is more likely than not, and a *Y*% likelihood that Article III's original meaning incorporates some form of stare decisis) to those debates, which could then be inputted into the formulas. As Professor Richard Re observes, because (among other things) it is hard to do accurately given the limits of the human mind, "[d]iscussing legal confidence in terms of percentages" can be "misleading despite its convenience—which probably explains why judicial opinions almost never discuss clarity in percentile terms."[359]

But there is also a softer form of aggregation. Judges can tell the difference between hard and easy questions.[360] And there is also no robust opposition among originalists to standards such as preponderance of the evidence for questions of fact[361]—which has a long pedigree.[362] So it is possible for courts to identify whether a question is easy or difficult, and then refuse to grant relief to the party whose position requires prevailing with respect to multiple difficult questions, or where one question is extraordinarily close. If a party must run the table for multiple hard questions, it is quite unlikely that the odds will be in that party's favor—which may counsel in favor of greater skepticism of the claim. And if a party can assert multiple theories in favor of an ultimate proposition, each backed by seri-

358. Cf. Scalia, Originalism: The Lesser Evil, supra note 97, at 861–63 (arguing that given practical "reality" and historical complexity, "most originalists are faint-hearted," but that "a thing worth doing is worth doing badly").

359. Richard M. Re, Clarity Doctrines, 86 U. Chi. L. Rev. 1497, 1503 (2019); see also, e.g., Kavanaugh, supra note 47, at 2138–39 (discussing the difficulty of assigning precise confidence levels to legal conclusions).

360. Judges already often make such determinations—for example, with respect to certificates of appealability in habeas law. See Slack v. McDaniel, 529 U.S. 473, 484 (2000) (holding that courts should issue certificates of appealability if the issue is debatable); see also Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1060 (1975) (identifying hard cases); Joshua B. Fischman, How Many Cases Are Easy?, 13 J. Legal Analysis 595, 598–99 (2021) (identifying easy cases). But see Ryan D. Doerfler, How Clear Is "Clear"?, 109 Va. L. Rev. 651, 653 (2023) (explaining why "clarity" is a difficult concept).

361. See Sachs, Originalism: Standard and Procedure, supra note 44, at 780 ("Burdens of proof, waiver rules, and some forms of stare decisis might have their own originalist pedigrees.").

362. See John Leubsdorf, The Surprising History of the Preponderance Standard of Civil Proof, 67 Fla. L. Rev. 1569, 1583 (2015) ("The earliest clear published statement of the standard appears in Edward Wynne's *Eunomus* in 1768 . . . .").

ous arguments—such as in a hybrid rights case like *Yoder*[363]—then the court could side with the plaintiff. Such rough approximation was sufficient for the Fourth Circuit panel in *American Federation of Teachers*.[364] Although labeling questions as "hard" or "easy" isn't as rigorous as assigning specific probabilities, it would be more administrable and, even if not perfect, should result in more accurate judgments than ignoring aggregation altogether.

To return to *Ramos*, for example, if an originalist thinks it fairly likely that the original public meaning of the Fourteenth Amendment requires incorporation but overwhelmingly likely that the Sixth Amendment's original public meaning requires jury unanimity, perhaps nothing would change in *Ramos*.[365] But identifying which questions are hard or easy may affect the judgment in a future case involving more difficult Sixth Amendment questions, such as whether a jury must know a crime's potential punishment.[366]

Soft aggregation, moreover, should capture many of aggregation's stability-creating benefits while avoiding nihilism—especially because there already are plausible non-aggregation-based arguments in favor of, for example, the presumption of constitutionality and clear-statement rules.[367] As Justice Gorsuch has observed, there is an originalist case for clear-statement rules that "operate[] to protect foundational constitutional guarantees."[368] That history, combined with insights from aggregation, thus can support doctrines that already exist. Judges do not need to use a calculator (or quantum computing), for example, to identify cases that (i) require answering a relatively tricky statutory question to know whether Congress intended to allow or forbid a particular act, and (ii) also require answering a hard constitutional question to know whether Congress, in all events, could allow or forbid that act. In such situations, aggregation's basic intuition amply supports a clear-statement rule.

Similar analysis can apply to federalism—if a constitutional question is quite close, soft aggregation would give states greater room to experi-

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363. See supra notes 297–299 and accompanying text.

364. See Am. Fed'n of Tchrs. v. Bessent, 152 F.4th 162, 174 (4th Cir. 2025) ("[E]ven if standing on its own did not foreclose Plaintiffs' path at this preliminary juncture, the combination of the remaining issues would."), abrogated by Am. Fed'n of State, Cnty. & Mun. Emps., 172 F.4th 361 (4th Cir. 2026) (en banc).

365. See Ramos v. Louisiana, 140 S. Ct. 1390, 1394–99, 1408 (2020) (discussing the Sixth Amendment's unanimity requirement and its history, as well as incorporation through the Fourteenth Amendment).

366. See Epps & Ortman, supra note 17, at 888 (explaining why this is a difficult question).

367. See West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) ("[C]lear-statement rules help courts 'act as faithful agents of the Constitution.'" (quoting Barrett, Substantive Canons, supra note 327, at 169)).

368. Id. (noting that Chief Justice Marshall advised courts to resist statutory constructions that retrospectively affect parties in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

ment. For example, there is at least a plausible originalist argument that states can ensure nondiscrimination by communications providers under the doctrine of common carriage.[369] Whether and how that originalist argument should apply to modern social media companies is a question that the Court recently struggled with in *Moody v. NetChoice, LLC*, with at least five justices expressing doubts about how far the First Amendment goes.[370] Given such hard questions, soft aggregation would recognize that it is not clear that the states surrendered their authority to regulate such matters. If the Court is going to extend the First Amendment up to or even beyond what originalism allows,[371] soft aggregation suggests caution against applying strong theories of incorporation against the states in the same case. Yet soft aggregation also would not allow states to do *anything*; not only would obvious violations still fall, but hybrid rights—especially those supported by clear tradition and so most plausibly already within the Fourteenth Amendment's scope—would have an even stronger basis than they do today.

Like "soft" forms of many concepts, a soft form of aggregation may not be the most intellectually satisfying.[372] Yet that need not be a vice. By way of example, Justice Alito's "practical originalism" may not be as theory-heavy as academic originalism, but it does address "the difficulty of changing current doctrine to better accord with the original meaning of the Constitution," as well as "the recent tendency of originalism to become increasingly abstract."[373] Something similar may be said for soft aggregation; because it is quite difficult to assess, for example, how to apply conditional probability, attempting to apply aggregation too strictly may inadvertently increase total error. A simpler inquiry—like, does this claim obviously require more than one hard question to cut the same direction—may prove more accurate in application.[374] And even if that were not so, soft aggregation still sometimes would be better than *no*

369. See Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299, 2320 (2021) (describing nondiscrimination duties for telegraphs); Eugene Volokh, Treating Social Media Platforms Like Common Carriers?, 1 J. Free Speech L. 377, 383–85 & n.13 (2021) (same).

370. See 144 S. Ct. 2383 (2024) (including separate writings by Justices Barrett, Jackson, and Alito, with Justice Alito being joined by Justices Thomas and Gorsuch). By way of disclosure, the author argued *Moody*'s companion case on behalf of Texas.

371. See Jud Campbell, The Emergence of Neutrality, 131 Yale L.J. 861, 874–75 (2022) (explaining the understanding of the First Amendment at the Founding); see also Note, Blasphemy and the Original Meaning of the First Amendment, 135 Harv. L. Rev. 689, 690 (2021) (arguing that the Founding era had a very different conception than today).

372. See, e.g., Scalia, Originalism: The Lesser Evil, supra note 97, at 864–65 (noting such "dissatisfaction").

373. Alicea, Originalist Jurisprudence of Justice Samuel Alito, supra note 7, at 654.

374. In fact, if originalism continues to be "abstract," id., soft aggregation may help prevent error from spreading. Combined with soft aggregation, "practical originalism" thus may also be the more accurate form of originalism. Cf. Cox, supra note 174, at 787 ("This is *not* to suggest that a perfect algorithm can be obtained; only that improving our models and heuristics is possible.").

aggregation. So, if hard aggregation cannot easily be done in the real world, why not use the softer version?

To be clear, this preliminary defense of soft aggregation is just that—preliminary. Aggregation is too big a concept to be resolved at once. The point, though, is that aggregation need not be simply an academic question; by focusing on whether a case requires answering multiple questions (something judges already do) and identifying whether those questions are hard or easy (something else judges already do), aggregation's core intuitions could be applied to help resolve difficult cases while defending longstanding aspects of constitutional litigation from legitimacy-based attacks.

CONCLUSION

It is no small thing to say that every originalist might do originalism wrong. Failing to account for aggregation, however, *could* be such an error. Aggregation is grounded in the cold logic of math, and originalism ties legitimacy to accuracy. Scholars no doubt will disagree with this Article about many particulars, both in concept and in application. That should happen. Aggregation, after all, introduces a significant new concept into scores of debates. Yet ours is an age of "abstract methodology."[375] Aggregation should top the list of originalism's methodological questions.

375. Sachs, Originalism: Standard and Procedure, supra note 44, at 786; see also J. Joel Alicea, Practice-Based Constitutional Theories, 133 Yale L.J. 568, 572–73 (2023) ("[T]he Supreme Court's recent cases have generally indicated a shift toward 'text, history, and tradition' over other methods." (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring))).