ARTICULATING OUR LAW: SOME REMARKS ON BAUDE AND SACHS

Quentin Fisher*

INTRODUCTION

In a recent series of articles, William Baude and Stephen E. Sachs have defended originalism on positivist grounds.1 Originalism is the correct theory of constitutional interpretation, they claim, because our law is originalist. If our law is originalist, then originalism is true (for us) neither because of a conceptual truth about written constitutions (e.g., that writtenness implies originalism), nor because of normative considerations (e.g., originalism successfully curbs judicial subjectivity). Rather, originalism is true in virtue of our positive law. Baude and Sachs argue that reflection on our current constitutional practices demonstrates a commitment to a specific version of originalism—what they call inclusive originalism. From a positivist perspective, to ask whether originalism is true just is to ask whether, as an empirical matter, our practices demonstrate a commitment to originalism.2

* This article began its life as a term paper for Prof. Mitchell Berman’s seminar on constitutional interpretation. Whatever is interesting in this paper stems from Prof. Berman’s thoughtful and incisive engagement with this work. I have likewise discussed these and related topics with many friends and colleagues—Lachlan Athanasiou, Samuel Klein, Alex Geisel, Jason Farr, Michael Zschokke, and Terry Pinkard. To confess misunderstanding is, I think, a virtue, and those listed here have provided me ample opportunity to confront my own confusions. Many thanks to you all. Finally, a special thank you to the editors, especially Simone Hunter-Hobson and Trevor Kirby, at the Journal of Constitutional Law for their wonderful editing and recommendations.


2 Baude, Is Originalism Our Law?, supra note 1, at 2365 (“This [i.e., the question whether originalism is our law] is ultimately an empirical question, of a sort.”).
This positive turn is a welcome shift in contemporary jurisprudence. It is part and parcel of a general turn towards “constitutive” theorizing in constitutional law—namely, theorizing about what makes it the case that constitutional norms have the content they do. As theorists across the ideological spectrum have observed, a potentially fruitful strategy for resolving first-order constitutional questions is by reflection on general jurisprudence. If we can get clear on what makes it the case that constitutional propositions have the content that they do, that may help us think through concrete constitutional cases. Baude and Sachs extend this general project. Their jurisprudence is, they claim, positivism, of a Hartian variety. Originalism is the correct interpretive method because it is, simply, our positive law.

Important to any constitutional positivism—originalist or otherwise—is what I will call the practice-constraint principle. It states, generally: our judgments about “what is the correct constitutional theory are themselves answerable to, and informed by, any considered judgments we may have about the legally correct resolution of concrete constitutional disputes.” Like most positivists, Baude and Sachs explicitly endorse a version of the practice-constraint principle. This is for good reason. The practice-constraint

---

3 But see Charles L. Brazun, The Positive U-Turn, 69 STAN. L. REV. 1323, 1330 (2017) (arguing that the promise of the positive turn is “more apparent than real”).
5 For an illustration of this kind of applied constitutive theorizing, see Mitchell N. Berman, Our Principled Constitution, 166 U. PA. L. REV. 1325, 1395–1411 (2018).
6 RONALD DWORKIN, LAW’S EMPIRE 90 (1986) (“Jurisprudence is the general part of adjudication, silent prologue to any decision at law.”). Although I am in full agreement with Dworkin’s claim, I suspect that Dworkin is also correct when he writes that “no firm line divides jurisprudence from adjudication or any other aspect of legal practice.” RONALD DWORKIN, LAW’S EMPIRE 90 (1986).
7 Mitchell N. Berman, The Tragedy of Justice Scalia, 115 MICH. L. REV. 783, 792 (2017); see also Berman, supra note 5, at 1357. Berman introduces this principle in his discussions of reflective equilibrium. He does not refer to this as the ‘practice-constraint principle’. Though I am sympathetic with the method of reflective equilibrium, I think that the practice-constraint principle can be justified on independent grounds. I argue for this claim in § 2.
8 See Baude & Sachs, Grounding Originalism, supra note 1, at 1462 (“Yet a good theory of law ought to generate most of the familiar aspects of the existing legal system, or else it ought to be especially plausible in explaining why those familiar aspects are wrong.”). By ‘generate’ Baude and Sachs mean ‘is consistent with.’ Indeed, they go to great lengths to explain why our current law is plausibly originalist. In so doing, they are attempting to show that inclusive originalism fits and is sensitive
principle codifies the positivist intuition that our legal norms are sensitive to and reflective of our particular judgments within legal practice. In Section II I attempt to motivate and defend the practice-constraint principle. I argue that a correct understanding of the practice-constraint principle casts serious doubt on aspects of Baude and Sachs’s positivist account of inclusive originalism. On my account, Baude and Sachs violate the practice-constraint principle at the ground level of their account. According to Baude and Sachs, originalism is our law is an empirical proposition. However, the practice-constraint principle, correctly understood, shows that there can be no strict separation of the empirical and the normative in questions concerning the general content of legal social practices.

On my account, what we are generally committed to is not, in the first instance, a matter of empirical discovery. To understand a social practice is not the same as understanding inanimate stuffs, e.g., rocks, stars, or the dynamics of fluids. As Raz rightly notes, “the way a culture understands its own practices and institutions is not separate from what they are.” This means, I will argue, that empirical discovery is not the right epistemological lens to adopt vis-à-vis our own practices. We need a different model. To articulate our law is, among other things, to take a stand on how an often-messy set of cases ought to be understood. This requires judgments about relevance, purpose, and coherence. Moreover, to articulate our law requires making certain kinds of generalizations that are ineliminably normative and constructive. It is, I’ll suggest, not insignificant that Baude’s paper features the first-person plural possessive—i.e., “Is Originalism Our Law?” It is first-person plural because, at bottom, generalizations about the content of our law concern our legal self-conception(s). For a positivist, what we think and do is the data from which we construct our positive legal theory. But this data is not self-interpreting. We can fail to understand what we are doing and what we are committed to in our practices—indeed, sometimes global misrecognition can alter the character of our legal practices themselves. Who we are, legally speaking then, is not the kind of question that can be settled through mere empirical inquiry, though it certainly involves such inquiry.

---

9 JOSHER ZAZ, BETWEEN AUTHORITY AND INTERPRETATION 96 (2009).
10 This is not to deny that social practices are, ontologically, just so much matter.
Rather, the question requires taking a stand, normatively, on what is characteristic about our practices and why those characteristics matter. Taking such a stand can, in certain successful cases, help to alter the content of our law.

In Section I, I introduce Baude and Sachs’ positivist account of originalism, and I outline where their account fits within the contemporary landscape of originalisms. In Section II I articulate and defend the practice-constraint principle. My aim in this second section is to show that a proper understanding of the practice-constraint principle casts serious doubt on the cogency of Baude and Sachs’ positivist account of originalism.

I. BAUDE AND SACHS: THE BASIC ACCOUNT

Originalism describes a theory—or family of theories—of constitutional interpretation. But what is originalism a claim about? Or, better, to what question is originalism an answer? Traditionally, originalism has been an answer to one of two questions. The early originalists forwarded their theories as an answer to a normative question. How ought legal actors, especially judges, interpret the Constitution? These originalists were principally concerned with curbing judicial subjectivity, and these theories were attempts to offer normative guidance for judges. They thus argued for originalism on explicitly normative grounds, citing values such as popular sovereignty, liberty, public welfare, or the compatibility with democracy.

So, for instance, Robert Bork famously suggested that “[w]here constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.” This, Bork reasoned, was the only way to reconcile judicial review with democracy.

On the other hand, originalists have sometimes been concerned to argue on philosophical grounds that originalism is true in virtue of the nature of some core theoretical notion—e.g., ‘interpretation’, ‘semantic content’, or

11 This brand of originalism was also in large part a reaction to the perceived excesses of the Warren Court’s rights revolution as well as the actions of the Burger court. For more on this history, see Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & Pub. Pol’y. 599, 599–607 (2004).


communicative intention’. Originalists of this stripe start with a simple proposition such as ‘federal judges, at least sometimes, have to interpret the U.S. Constitution’. They then ask a conceptual question—for instance, but what is interpretation? The proposed answer to this conceptual question is then used as fodder for their constitutional theorizing. So, one might reason, if concept C just is x (where x is some conceptual truth), then (some version of) originalism follows in virtue of the nature of C.14 These conceptual or philosophical strategies are both common and perilous. As is well-known, there is almost no agreement among philosophers and legal theorists on the best way to understand the nature of basic theoretical concepts, let alone neutral ground on which a constitutional theorist could rest his or her hat.15 That said, it is likely that no theory of interpretation—originalist or otherwise—can fully ignore the conceptual issues that undergird these pursuits. Just as metaethics is a “silent prologue” to ethics, the philosophy of language and law are prolegomena to theories of constitutional interpretation.16

Baude and Sachs are after different quarry. By their lights, the normative accounts and the conceptualist accounts are at a theoretical impasse. There is, however, a third way. Originalism can be justified, they suggest, on positivist grounds—namely, by showing that (some version of) originalism is the correct theory of constitutional interpretation because our law is originalist.17 If originalism is our law, then it does not matter if originalism

14 For a lot more on this originalist strategy, see Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. REV. 1, 37–68 (2009).
15 For some illustrative examples, one need only look at contemporary work in metaethics or the philosophy of language (or any other branch of philosophy for that matter). While certain views may enjoy significant scholarly support, there is certainly no view that can be assumed immune from legitimate scholarly dissent.
16 To paraphrase Dworkin. See RONALD DWORKIN, LAW’S EMPIRE 90 (1986) (“Jurisprudence is the general part of adjudication, silent prologue to any decision at law.”). Baude and Sachs do have a point, however, in suggesting that a theorist need not solve every basic philosophical issue in their domain before making progress at an intermediate level. They correctly analogize this to the position of the biologist in relation to the physicist: “[i]f one wants to know how plants grow, it’s often best to defer questions about fundamental determinants (like particle physics or quantum mechanics) and to work at the intermediate level of proteins and enzymes instead.” See Baude & Sachs, Grounding Originalism, supra note 1, at 1461.
17 Sachs, Originalism as a Theory of Legal Change, supra note 1, at 818 [“Originalism is usually called a theory of interpretation, a particular way to read a text. Best understood, though, originalism is much more than that. It’s a theory of our law: a particular way to understand where our law comes
is conceptually confused or normatively problematic. If originalism is our law, then it “occupies a privileged position” vis-à-vis other methods of interpretation in our legal practice.\textsuperscript{18} Seen from one angle, that law might be able to provide its own means of interpretation fits with its own self-image. As Pajanowski and Walsh write, “[o]ne of law’s signal features, after all, is its promise to resolve questions that divide reasonable people.”\textsuperscript{19} Baude and Sachs thus argue that reflection on our current constitutional practices—both our higher-order practices and our lower-order practices—demonstrates a commitment to a specific version of originalism. They call this view “inclusive originalism.” Inclusive originalism is a label for the claim that “the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision.”\textsuperscript{20} Since originalism is our law and judges have a prima facie duty to apply the law, originalism is the correct method for solving constitutional problems.\textsuperscript{21}

Before diving into Baude and Sachs’s defense of originalism-as-positive-law, a quick proviso. Baude and Sachs originally published their defenses of originalism as separate articles. They subsequently started publishing together, and their work is—on their account—an attempt to articulate one view. Although there are differences in the early articles between Baude’s “inclusive originalism” and Sachs’s “original-law originalism,” I will treat them as holding one view, jointly held. My goal is to diagnose an assumption from, what it requires, and how it can be changed.”\textsuperscript{22} Thus, this third way is largely independent, they argue, from contentious normative considerations. It is not, however, independent from conceptual considerations. As Baude and Sachs note, “[w]hat our law makes of a legal text is a legal question, and it deserves a legal answer. That answer depends in part on principles of abstract jurisprudence, which determine the law in general . . . .” Baude & Sachs, \textit{Grounding Originalism}, supra note 1, at 1457.

\textsuperscript{19} Jeffrey A. Pojanowski & Kevin C. Walsh, \textit{Enduring Originalism}, 105 GEO. L.J. 97, 103 (2016).
\textsuperscript{20} Baude, \textit{Is Originalism Our Law?}, supra note 1, at 2352.
\textsuperscript{21} See id. at 2392 (“It is generally agreed that judges have some kind of prima facie obligation to remain within the bounds of the law—whatever those bounds may be.”). Baude describes this proposition as a “moral intuition” as opposed to a philosophical axiom. \textit{Id.} It is unclear why this proposition could not be a feature of our law. In other words, it is unclear whether Baude (i) thinks that it is a contingent feature of our legal order that this proposition is merely moral as opposed to an aspect of our law or (ii) whether it is necessary that this proposition be external to law.
that undergirds their positivistic account. This assumption is independent of the differences in their respective early approaches.

Baude and Sachs’s view is, at a certain level of generality, easy to state. If positivism is true, then what our law is depends on a constellation of the right kinds of social facts. Importantly, this is also true of the interpretive rules we use to determine or interpret what our law is. To ask whether originalism is the correct interpretive method under U.S. law “is to ask a question about modern social facts.” More specifically, to ask whether inclusive originalism is true just is to ask whether, as an empirical matter, our practices demonstrate a commitment to inclusive originalism. Since the content of our law is determined by certain kinds of social facts, if inclusive originalism as a constitutional methodology is supported by the right kinds of social facts, then inclusive originalism is our law. Baude and Sachs then argue that reflection on our higher-order practices (e.g., our general recognition of the Framers’ authority or our general agreement about structural questions about the U.S. government) empirically support the claim that inclusive originalism is our law. Likewise, reflection on what our courts, especially, the Supreme Court, do and say (“lower-order practices”) suggests a strong commitment to inclusive originalism. Reflection on these practices shows, they argue, that what counts as a legally sufficient justification in our legal regime is largely beholden to originalist commitments.

---

22 I want to be clear that I am not denying that there are differences between Baude’s and Sachs’s positions, despite their insistence to the contrary. For better or for worse, my aim is to put pressure on an assumption that undergirds their constitutional positivism. Whatever their respective differences, they are certainly at one in holding that positivism is the correct theoretical account of our law. This will be my central concern going forward.

23 Baude, Is Originalism Our Law?, supra note 1, at 2364 (emphasis omitted).

24 Id. at 2371. Baude is not especially clear on the distinction between higher-order practices and lower-order practices. Taking his statements at face value, I think the distinction is best understood as a difference in degree rather than a difference in kind. At issue for Baude are the norms that legal actors treat as relevant for determining what the law is. When he speaks of higher-order practices, he has in mind propositions of a highly general nature such as ‘look to the constitutional text.’ Id. at 2365–70. When he speaks of lower-order practices, he has in mind the sorts of justifications given by courts when deciding concrete constitutional disputes—e.g., “this rule is consistent with the text of the Recess Appointments Clause.” Id. at 2370–76. The propositions articulated under the heading of lower-order practices are subsumable under the propositions articulated by the higher-order practices. But whether some at-issue proposition is treated as a higher-order practice norm or a lower-order practice norm does not, it seems to me, make much
It is important to note that Baude and Sachs are not suggesting that inclusive originalism is a deductive consequence of legal positivism. Rather, it is an empirical question whether our collective legal commitments support the view that our law is originalist. This is one way to understand the so-called positive turn. Questions that, at first blush, appear to be conceptual or normative are better thought of as empirical—i.e., truths that can be disclosed by our ordinary methods of legal research and analysis. This does not mean that engaging in this kind of inquiry is straightforward. As Baude and Sachs write, “[a]la, legal history is hard.” While it is true that the positive turn is predicated on acceptance of some version of legal positivism, Baude and Sachs think that positivism enjoys wide consensus among American legal scholars, especially the kind of positivist theory articulated by H.L.A. Hart in *The Concept of Law* and related writings. Baude and Sachs are, at some moments, steadfast that they are not interested in attempting “to resolve the questions of technical jurisprudence.” At other moments, they seem anxious to align themselves with Hartian positivists and to articulate that system in a way that fits with their overall originalist project. Their version of Hart is, as Barzun has pointed out, a “creative reinterpretation,” which may or may not be consistent with Hart’s view. But whatever their stance on this question, the details of their positivism are, I think, important to have in view, even if they are preliminary or up for renegotiation.
For the positivist-originalist-Hartian, the central question is: is inclusive originalism part of our contemporary rule of recognition? But what is the rule of recognition? According to Hart, it is a “complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.” The rule of recognition is, then, a shorthand term to refer to the set of rules that provide the criteria for making valid law. Hart is a positivist because the rule of recognition is constituted by “the practice of officials taking the internal point of view with respect to it” and thus “the key social facts for Hart are facts about what officials do and say.” The internal point of view is a stance one can take to a rule such that that rule is taken as a guide for one’s behavior. The linguistic marks of such a perspective are given by words such as ‘ought’, ‘should’, or ‘must’ when employed in sentences like “one ought always iron a shirt before a performance” or “you must wait for the light to turn green—it’s the law after all.” The internal point of view stands in contrast to the external point of view, which is a perspective one can take to the self-same rule, treating the rule as an empirical generalization or predictive statement—e.g., “the TSA tends to check IDs” or “those Californians tend not to follow dermatological advice—that’s why they all look like raisins.”

If one takes this approach, then the difficult questions (Baude and Sachs urge) turn out to be empirical questions. Is inclusive originalism a definitional feature of our constitutional practice today? That is, “do courts explicitly or implicitly demand (even if only indirectly) satisfaction of” inclusive originalism? Many scholars have parted ways with Baude and Sachs on this point, especially if it is necessary that most or all judges need to endorse inclusive originalism in order for it to be our law. As Barzun writes:

If I am right that the opinions of judges might vary on this question, then that would seem to be enough to establish my negative claim that OLO [original law originalism/inclusive originalism] is not our law. Remember that in order for a rule to be part of the rule of recognition, all or nearly all judges must accept it as a criterion of legal validity. So, you might think that,

34 It should be noted that the same sentences can be used to assert a rule from the internal or external perspective, depending on the context. This is why I have called words like ‘should’ merely marks of the internal perspective. They are not sufficiency conditions.
unless virtually all judges agree that the use of customary law is only valid if the law at the Founding authorized its use in that particular domain, Baude and Sachs have failed to show that OLO is part of our rule of recognition. Where there is disagreement, there can be no rule of recognition. 36

Though I am in broad sympathy with this line of argument, I am going to press a different kind of objection below. As many theorists have argued, this is likely what a Hartian account requires—namely, that “[c]onstitutional judgments are legally correct only if they are validated by a test that consists of criteria established by a near-consensus among legal officials, especially judges.” 37 And it is also likely that Baude and Sachs have not established that nearly all judges recognize inclusive originalism as our law. Be that as it may, more can be said about their theoretical assumptions, which will be my main concern below. 38 I am going to suggest that Baude and Sachs are not orthodox Hartians. On my reading, they treat the rule of recognition differently from the above characterization. To get this alternative in view, however, requires an in-depth look at what they are doing, which I turn to below.

Lastly, it is worth pausing a moment to get clear on what, exactly, the positive turn amounts to, according to Baude and Sachs. There are, I think, two ideas operating within Baude and Sachs that ought to be kept distinct. First, constitutional interpretation is the activity of figuring out what the law is. The question for the positivist is, then, what is the law? At certain moments, Baude and Sachs fall squarely into this understanding of positivism. Here is a representative statement:

[T]he original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision. 39

In my exposition, I have represented them as positivists in this sense. The task for the positivist is to figure out what the law is, and to do this in a way that looks to contemporary social facts. At other points, however, Baude and Sachs characterize the positive turn as the articulation of what kinds of moves are licit in our constitutional game. Here, the positive turn is a theory of the

36 Id. at 135.
37 Berman, supra note 5, at 1349.
38 Would Baude and Sachs simply reply that they aren’t interested in technical jurisprudence? Perhaps. But I don’t think they can do so while maintaining a coherent system of constitutional interpretation. Barzun has been the chief defender of this point.
39 Baude, supra note 1, at 2352.
constitutionally valid ways of going on in constitutional practice. In other words, the principal aim is not to discover what the law is, but to articulate the various moves—i.e., the inferential licenses, material incompatibilities, and related phenomena—that are acceptable within constitutional law writ large. To again take a representative sample:

[Inclusive originalism] means that judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them. What is important is not whether or not constitutional interpreters always look exclusively at the original meaning, but whether they look at those things in cases where the original meaning would say not to.

The Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document’s past. . . . So the decisions of the dead still govern, but only because we the living, for reasons of our own, receive them as law.

In their work, they vacillate between these two ways of characterizing the positive turn and their project. I don’t think that this is a totally innocent slippage on their part. Here is the problem: if constitutional interpretation—for a positivist—is the activity of discovering constitutional rules, then there can be no independent rules to govern this activity. What the constitutional interpreter ought to do is utilize whatever methods are germane for discovering the independently existing constitutional rules. On analogy, if the task of the physicist is to discover truths about the physical world (e.g., the nature of electrons) but she is constrained by methods articulated in the Bible, then she will fail in her pursuit. This seems to suggest that in the domain of discovery, the means of discovery ought to be dictated by the goal and not vice versa. But Baude and Sachs seem to think that interpretive rules and substantive rules are equiprimordial. There is no priority relation; both kinds of rules must be followed in our activity of constitutional interpretation.

---

40 Id. at 2355.
41 Id. at 2358.
43 Thank you to Prof. Mitchell Berman for helping me to see this point.
Baude and Sachs appear to be stuck, then, between competing visions of what positivism is, and it is not clear whether these visions are mutually compatible. Taking seriously interpretive rules suggests a picture of constitutional interpretation as a kind of self-contained game. There is nothing to constitutional interpretation save making moves authorized by the interpretive rules themselves. On this version of positivism, constitutional interpretation is like chess. The aim is not to discover anything, it is to engage in a certain kind of rule-governed activity. On the other hand, if one accepts substantive rules, then, as articulated above, the aim is to discover what these rules are, using any means appropriate. But Baude and Sachs appear to want it both ways. They think that there are genuine substantive rules and genuine interpretive rules, which are the authorized means of discovering the substantive rules.

Absent further argument, it is not clear that these visions of positivism are mutually compatible.

II. THE PRACTICE-CONSTRAINT PRINCIPLE

Law is something that is characteristically used, and it is used in at least one characteristic way: it is applied by legal actors. This immediately raises a question. What is the relation between a system of legal norms and the population that uses and applies those norms? When confronting this question, the legal positivist suggests that the relation is a grounding relation. Legal norms exist in virtue of some set of social facts. Speaking generally, to say that a system of legal norms exists just is to say that some population (e.g., legal officials) constitutes them in some way—e.g., the norms feature in their beliefs, intentions, dispositions, and the like.44 (These are, generally, the ‘right’ kinds of social facts, though the details of the grounding relation are not at issue here.) This claim is metaphysical in the sense that it attempts to articulate a dependence relation between legal norms and the activities of some relevant class of persons. Many theorists, including Baude and Sachs, have focused on this and allied dependence relations.45

---


45 For a wide sample, see Christina Bacchieri, THE GRAMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2006); Vincent Descombes, THE INSTITUTIONS OF MEANING:
There is, however, an epistemological correlate to this metaphysical principle. If we are the ones who are responsible for and to our legal norms, then our judgments about these norms and their application are not wholly separate from what the norms are. This does not mean that we cannot be wrong about aspects of our normative practice, but it does mean that our beliefs, judgments, attitudes, and behaviors are not wholly separable from our system of legal norms. Although Baude and Sachs nowhere discuss in detail this epistemological aspect of their positivism, Baude and Sachs are everywhere committed to the practice-constraint principle. It states that our judgments about “what is the correct constitutional theory are themselves answerable to, and informed by, any considered judgments we may have about the legally correct resolution of concrete constitutional disputes.”46 This principle is operating as a core methodological assumption throughout Baude and Sachs’s account of inclusive originalism. They write, for instance, “[y]et a good theory of law ought to generate most of the familiar aspects of the existing legal system, or else it ought to be especially plausible in explaining why those familiar aspects are wrong.”47 By ‘generate’ they mean ‘is consistent with’. Indeed, they go to great lengths to explain why our current law is plausibly originalist. In so doing, they are attempting to show that inclusive originalism fits and is sensitive to our considered judgments about what the law, in fact, is.

* * *

My goal in this section is to begin to clarify the status of this principle. I am going to suggest that a proper understanding of this principle casts doubt on the plausibility of Baude and Sachs’ positivist account of inclusive originalism. A proper understanding of the practice-constraint principle shows that there can be no strict separation of the empirical and the normative in questions concerning the general content of legal social practices, at least on the way they attempt to understand this content.

46 Mitchell N. Berman, The Tragedy of Justice Scalia, 115 Mich. L. Rev. 785, 792 (2017); see also Berman, supra note 5, at 1357.
47 Baude & Sachs, Grounding Originalism, supra note 1, at 1462.
To begin, let’s reflect on some of the ordinary ways in which we report that some legal system is in force in some population or group: “Ss follow \( L \),” “their practice is to follow \( L \),” or “we follow \( L \) around here.” Taking these propositions at face value, a system of legal norms has two features. First, it has a certain kind of generality—i.e., the subject term in the propositional schemas catches a set of persons under a general order. Second, these propositions also suggest that a system of legal norms is actual; it is something in the order of reality. To speak metaphorically, a system of legal norms is alive when propositions like the ones above are applicable to a population and true. Like a language, a system of legal norms can be dead in the sense that it has no binding force in any population. Dead legal systems are the interest, principally, of legal historians. The legal philosopher—or, anyways, the kind of legal philosopher engaged with Baude and Sachs—is interested in (i) what gives legal norms the content that they do⁴⁸ and (ii) how such systems of norms become binding over a set of persons.⁴⁹

I want to dig a little deeper into the character of these simple propositions. Reflection on the character of these propositions will help get in view the problematic in which the practice-constraint principle operates.

What kind of generality is represented in these propositions? A system of legal norms is general in the sense that a system of legal norms can be exhibited in or instanced in a potentially infinite series of judgments in a potentially infinite number of agents, each act sharing a common explanation or description.⁵⁰ To get this kind of generality in view, consider a simple case. Suppose that \( R \) is some legal rule articulated by a precedent court.⁵¹ While a later court is not required to apply \( R \) to every dispute that

---

⁴⁸ Berman, supra note 5, 1329 (“It will prove convenient to have a term for accounts of a general and theoretical nature that explain how constitutional ‘norms’—rights, powers, rules, prohibitions, and the like—have the contents they do. Let’s call any such account a ‘constitutive theory’ of constitutional law.”).

⁴⁹ Baude and Sachs only approach this latter question obliquely. I leave it to the side for purposes of this paper.


⁵¹ Here, I adopt what Horty has called the standard model of precedential constraint. See John Horty, Constraint and Freedom in the Common Law, 15 PHILOSOPHERS’ IMPRINT 1, 2 (2015). For a helpful amendment to this picture, see Gabriel L. Broughton, Vertical Precedents in Formal Models of Precedential Constraint, 27 A.I. & L. 253 (2019).
falls within its scope, \( R \) is available for application and can be deployed in an indefinite number of judgments across an indefinite number of legal actors with the authority to deploy \( R \) with legal effect. In other words, the rule is inexhaustible in application. We can say, for instance: “they, the Supreme Court, hold that \( R \)—in fact, they applied \( R \) in \( A \) v. \( B \), \( C \) v. \( D \), and \( E \) v. \( F \).” Let’s call this kind of description a “description by exemplification”. They are descriptions that relate something general (e.g., a rule) to a particular instance of application.

The second feature, actuality, also concerns the relation between a system of legal norms and individual actions, judgments, or behaviors that instance those norms. This feature is displayed, semantically, by the ‘in fact’ in the above propositions—i.e., “N.N. holds that \( R \)—in fact, they applied \( R \) in \( C \).” That a population acts on, is disposed to act in accordance with, and commonly exemplifies a set of legal norms is part and parcel of what it is for such a system of norms to exist. To put this point in Hartian terms, once a group of relevant persons develop a practice such that these persons accept, from the internal point of view, some set of rules and the relevant population that falls under these rules generally accepts them and acts in accordance, such a system of norms is in effect. In the terminology used here, some system of legal norms is actual only if the sorts of propositions introduced above can be given determinate content and are applicable and true with respect to some population.

But here is where problems tend to arise. While these two features—generality and actuality—seem to be real features of operative systems of legal norms, it is difficult to see how they fit together. One of the chief problems follows from the following intuitive line of thought. Between the description of a system of legal norms and the individual actions, beliefs, and behaviors endemic to that legal practice, there always exists the possibility of a gap—sometimes large gaps. There is nothing that guarantees that the behavior of an individual in a legal practice will align with the generalizations that articulate the system of legal norms (or a part thereof). What counts as

---

52 I am going to ignore one much-discussed aspect of the relation between particular legal judgments and our general reflections on law—namely, what it means to say that the doctrine of precedent requires precedent courts to respect past rulings. It is worth noting, however, that there are deep conceptual and normative questions here. For example, if courts have the power to distinguish applicable precedents, then what exactly is the scope of precedential constraint? See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989).
a departure will, perhaps, be beholden to an individual’s conception of the relevant rule or principle, but it is, I think, uncontroverted to say that individual actions and judgments that fall under a legal order can deviate from the general rules and principles that make up the system. Indeed, Baude and Sachs are eager to accommodate such deviations in their account: “. . . it’s perfectly coherent to say (as we have) that while originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard.”

Is this really a problem? Baude and Sachs argue that a simple distinction between secondary rules and primary rules allows their account to accommodate mistakes and departures. The thought here is that one can hold that “originalism is the official story of our legal system,” though “individual cases may turn out to be “wrongly decided under that standard.” But notice what is going on here. Baude and Sachs rightly notice that there is a different logical character between (i) particular judgments in individual cases and (ii) originalism qua rule of recognition, which only must be “generally accepted and its outputs obeyed.” The word ‘generally’ is carrying a lot of weight here. Baude and Sachs rightly realize that the generality of this statement cannot be that of universal quantification. If that were the case, then any deviation from the standard would falsify the standard. Rather, the generality at play here is that of a semantically generic statement. Let me explain.

Like the proposition “ticks carry Lyme disease” or “lions (Panthera leo) hunt as a pack,” to judge these propositions as true is not to bar certain sorts of exceptions from logical space. “Well, yes, ticks carry Lyme, but not this one—lucky for you.” Or, “well, lions do hunt as a pack, but this one is in the zoo, poor thing.” Or, to our case at hand, “well, this case is inconsistent with the original meaning of the Constitution, but our law is originalism. Read

---

54 Id.
55 Id.
56 This is my best attempt to make sense of a few disparate claims that Baude and Sachs make on this point. To make sense of mistakes or departures, Baude and Sachs suggest the following: (a) “[p]ositivism might ground law on social practice, but it doesn’t reduce law to social practice”; (b) the hierarchical structure of a legal system “makes it possible for the correct ground-level rules to surprise us”; (c) there is a distinction between primary rules and secondary rule; and (d) legal reasoning is often surprising since it involves inferences from familiar premises to surprising conclusions. *Id.* at, 1464–69.
57 Baude & Sachs, *Grounding Originalism*, supra note 1, at 1465.
Baude and Sachs—you’ll see!” If this way of understanding their position is correct, then we can come to see how there can be a disconnect between the ‘official story’ and particular legal judgments in concrete cases.

Although they don’t explain their position in these terms, I think that this is a faithful way of reconstructing their view, though it may spell trouble for the details of their account. To see why, consider those legal officials who do not think that originalism is our law. In fact, they find the idea implausible, to say the least. Let’s suppose that many of these legal officials who believe the law is not originalist are not grossly mistaken about the ordinary or plain meanings of our core constitutional case history. If so, then what is it that they are missing? What is the character of their cognitive error, if they are in error?

The question might be reframed as the following. What are Baude and Sachs doing when they attempt to articulate our law? More specifically, what are they doing when they attempt to characterize our law as originalist? If what they are doing is empirical discovery, then it seems like a very odd sort of discovery, especially when some of the chief dissenters from their position are themselves legal officials. If we can get clear on what they are doing, then perhaps we can also begin to understand the practice-constraint principle and its functional role in the doctrine.

Start again with generic generalizations—that is, the kind of generalization exhibited by the claim that “originalism is our law”. Generic generalizations tend, as Sarah-Jane Leslie points out, to involve normative assumptions about what counts as essential or characteristic of the kind, especially when they relate to social kinds and structures like law. Importantly, what counts as essential or characteristic is often not statistically robust—for instance, less than 1% of the tick population actually carries Lyme disease despite wide acceptance of the proposition that ticks carry Lyme disease. In fact, the contestability of the characteristic feature may be an essential aspect of its content, given that they function as default

---

generalizations in reasoning.\textsuperscript{60} Moreover, generic generalizations exhibit an asymmetric contrast of rule and exception that explains exceptions as exceptions. That some act or judgment counts as, for instance, a legal deviation is only intelligible against the background generic proposition: “well, yes, they did rule $R^*$, but that was a mistake since $p$ is the law, and $p$ (rightly understood) is incompatible with $R^*$.”

Keeping this fact in view, I want to suggest that Baude and Sachs’ work ought to be seen as a particularly sophisticated attempt to reframe our legal self-conception(s) through generic characterization. To reframe is, importantly, not to unearth some new empirical facts about our legal landscape, though it may involve significant empirical inquiry. Rather, it is to give us—the audience concerned with what our law is—a new way to understand our own basic commitments. If this reframing is successful, the account ought to transform our conception of what we are already committed to. Notice that although they frequently discuss cases—e.g., Bush v. Gore, Home Building & Loan v. Blaisdell, or Miranda v. Arizona—they are not simply reporting the various holdings. They are attempting to weave together a kind of narrative about how our constitutional order has come to be what it now is. The narrative is as much empirical as it is selective, focusing on cases that clearly illustrate the characteristic property they want to treat as essential to our constitutional order; or, as in their discussion of Blaisdell, to urge that the common understanding of the case is not anti-originalist, as even most originalists concede.\textsuperscript{61}

To state the obvious, Baude and Sachs do not and cannot discuss every constitutional case that has come to the Supreme Court. They must select, frame, and bring out what they believe are the salient elements in each of their test cases. To use their own preferred locution, they must articulate the “official story.”\textsuperscript{62} Importantly, the narrative can be told differently, and it has

\textsuperscript{60} Sarah-Jane Leslie, Carving Up the Social World with Generics, 1 OXFORD STUDS. IN EXPERIMENTAL PHIL. 208, 209–13 (2014).


\textsuperscript{62} Baude & Sachs, Grounding Originalism, supra note 1, at 1458 (emphasis added) (citing Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 HARV. J.L. & PUB. POLICY 817, 870 (2015)).
been told differently.63 Indeed, Baude and Sachs must rely on some normative assumptions when articulating our law, especially if they are to avoid certain repugnant conclusions. As Jamal Greene has shown, anticanonical cases such as Plessy and Dred Scott are not and cannot be distinguished by unusually weak legal reasoning or uniquely repugnant conclusions.64 And this conclusion ought to worry originalists even more than non-originalists. For, there is strong evidence to suggest, for instance, that Judge Taney’s opinion in a key anticanonical case, Dred Scott, is explicitly originalist in its orientation.65 If so, then an originalist must find some way to distinguish such a case from the official story.66 This is not to say that this cannot be done, but to distinguish the case from the official story will, following Greene, require adopting assumptions that are external to the case itself.

So, where does this leave us? What is the significance of the practice constraint principle? To review, the practice-constraint principle states that our judgments about “what is the correct constitutional theory . . . are themselves answerable to, and informed by considered judgments we may have about the legally correct resolution of concrete constitutional

63 See DAVID A. STRAUSS, THE LIVING CONSTITUTION 55 (2010) (“These are just the basic contours of the American law of freedom of expression. But where do even these basic principles come from? Obviously, they are not explicit in the spare words of the First Amendment. In fact, they are in some ways difficult even to reconcile with the words of the First Amendment. They are also not to be found in the intentions or understandings of the framers of the First Amendment. To put the point bluntly but accurately, the text and the original understandings of the First Amendment are essentially irrelevant to the American system of freedom of expression as it exists today.”).

64 See Jamal Greene, The Anticanon, 125 HARV. L. REV. 379, 381 (2011) (discussing the “distinct problem[s]” that the anticanon poses on constitutional law scholars and students).

65 See Christopher L. Eisgruber, The Story of Dred Scott: Originalism’s Forgotten Past, in CONSTITUTIONAL LAW STORIES 151, 157 (Michael C. Dore ed., 2004) (“What distinguished Taney’s jurisprudence from that of the Scott dissenters was not its recourse to fundamental values (for Taney made none), nor its rejection of originalism (for Taney embraced it). What separated Taney’s jurisprudence from the dissenters’ was its explicit and stark indifference to justice.”); but see William H. Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693, 700 (1976) (“The apogee of the living Constitution doctrine during the nineteenth century was the Supreme Court’s decision in Dred Scott v. Sanford.”).

66 I am especially sympathetic to Greene’s thesis that “the status of a decision as anticanonical . . . depends on the attitude the constitutional interpretive community takes towards the ethical propositions that the decision has come to represent, and the susceptibility of the decision to asr as an antiprecedent. These factors might not relate to the decision’s internal logic.” Jamal Greene, The Anticanon, 125 HARV. L. REV. 379, 381 (2011).
disputes.”67 I’ve argued that Baude and Sachs recognize a logical difference between the standard that articulates our law and particular legal judgments. Generalizations that articulate our law are semantically generic in the sense articulated above. This logical difference allows for the possibility of deviant cases. But if this is so, then Baude and Sachs must admit that what counts as characteristic of our legal system cannot be a purely empirical matter. Although one must marshal individual cases to support any proposed characteristic trait, the plausibility of any proposed characteristic will rest on normative considerations about which cases are relevant and why. In other words, normative judgments about what counts as characteristic as opposed to deviant must come into play.

Baude and Sachs might concede that in the construction of any adequate explanatory theory, a theorist must be guided by judgments that reflect “meta-theoretic values” about what is important to explain and why.68 Legal theories are not, after all, miscellaneous lists of facts, even true facts. Legal theories, when constructed well, attempt to illuminate what is essential or characteristic about a legal regime—either as it is or as it might ideally be.69 Thus, even H.L.A. Hart admits that some meta-theoretical values are necessary in the construction of a positivist theory of law.70 As Julie Dickson has rightly argued, “judgments about which data to focus on and how to order and arrange materials for explanation in order to exhibit such general theoretical virtues as simplicity, clarity, consistency, and comprehensiveness” are common to all theoretical explanations, legal or otherwise.71 I happily accept this claim. I want to suggest, however, that there are more normative assumptions at work in Baude and Sachs than thin meta-theoretical norms such as simplicity, clarity, and consistency.

67 Mitchell N. Berman, The Tragedy of Justice Scalia, 115 Mich. L. Rev. 783, 792 (2017); see also Mitchell N. Berman, Our Principled Constitution, 166 U. Pa. L. Rev. 1325, 1357-58 (2018) (“While the legally correct resolution of concrete constitutional disputes will be a function of the actual mechanics of our constitutional law . . . it is essential to remember that we don’t yet know what the mechanics are; we don’t know what the correct general theory is. That’s what we’re trying to figure out.”).
69 As Berman helpfully writes, a general, theoretical account of law ought to answer the question “[w]hat are the fundamental determinants of true constitutional norms?” Mitchell N. Berman, Our Principled Constitution, 166 U. Pa. L. Rev. 1325, 1329 (2018).
70 See HART, supra note 67, at 39.
As I argued above, Baude and Sachs’ work ought to be seen as a particularly sophisticated attempt to reframe our legal self-conception(s) through generic characterization. It is to give us—the audience concerned with what our law is—a new way to understand our own basic commitments. But, as I also argued and that Baude and Sachs are quick to admit, not just any purported legal rule or principle articulated by a legal actor or set of legal actors counts as our law. Mistakes are made and have been made. By their lights, a successful legal theory ought to help us understand our law and legal commitments in a way that allows us to differentiate our true law from deviant cases. This requires judgments about what sorts of features, properties, commitments, and principles count as characteristic within the legal system under investigation. These normatively characteristic features are not given merely empirically; they require the theorist to take a stand on how an often messy set of cases hangs together and why.

To say that a set of cases “hang together” is not to say that they are merely logically coherent, though of course this is an important feature. Rather, Baude and Sachs must be guided by implicit or explicit ideas about what our law ought to look like and what characteristics are truly exemplary of our law.

Thus, on my understanding, the practice-constraint principle is properly understood as a normative epistemological principle: our general constitutional theorizing is beholden to our considered judgments about the legally correct resolution of concrete constitutional disputes, but which judgments count and why requires the theorist to implicitly or explicitly identify certain normatively characteristic features of the practice.

Laws are articulated in certain contexts, and legal actors are expected to project them into further contexts. Nothing ensures that this projection will take place in one way, nor that a later court will apply them with the same commitments in mind. But we nonetheless must weave together, if only provisionally, a general account of our law, and how it all hangs together. This requires a deep knowledge of the relevant cases, their trajectories, and

---

72 This is a paraphrase of Cavell’s characterization of Wittgensteinian forms of life. See Stanley Cavell, MUST WE MEAN WHAT WE SAY? 52 (1969) (“We learn and teach words in certain contexts, and then we are expected, and expect others, to be able to project them into further contexts. Nothing ensures that this projection will take place (in particular, not the grasping of universals nor the grasping of books of rules), just as nothing ensures that we will make, and understand, the same projections.”).
a sense for what matters. This last requirement rests on something more than mere empirical judgment. But that’s OK. To articulate our law is, among other things, to put forward a conception of our legal identity and to defend that conception against competing ones. When I say, “we don’t do that around here! We are Penn students after all,” I am not attempting to articulate what each and every student in fact does. Rather, I am proposing something like an ideal or standard—a normative conception of what it means to be part of a certain group. My suggestion is that Baude and Sachs are doing roughly the same thing. We want and need ideals or standards. They help us get in view what matters and how to go forward in our practice. But this is not an empirical inquiry. It requires taking a stand on what it means to be one of us.