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Mitchell N. Berman
University of Pennsylvania Carey Law School

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KEEPING OUR DISTINCTIONS STRAIGHT: A RESPONSE TO "ORIGINALISM: STANDARD AND PROCEDURE"

Mitchell N. Berman*

August 9, 2021

INTRODUCTION

Let's start at the end, the very end. "If 'law and philosophy are both in the distinction business,'" Steve Sachs's *Originalism: Standard and Procedure* concludes, "we ought to keep our distinctions straight. Distinguishing standards from decision procedures will help."[1]

I accept that first, conditional, claim. (Who would deny it?) Going further, I affirm its antecedent heartily: law and philosophy *are* both in the distinction business. So, yes, we lawyers and legal scholars ought to keep our distinctions straight. The question remains: *will* distinguishing standards from decision procedures help us see our way clearer? And the answer depends, I think, on how we are to take the distinction—as analogy or as template.

The locus classicus of the distinction, as Sachs faithfully recounts, is a fifty-year-old article by the philosopher Eugene Bales distinguishing two questions that philosophers and ordinary folk might want an ethical theory to answer.[2] The first question is: what makes an act right? What properties or characteristics must an act possess in virtue of which it is right? The second asks: how ought an agent to determine whether an act-token available to it on a given occasion is right? Terming an answer to the first question an ethical "standard," and an answer to the second a "decision procedure," Bales observed that many philosophers think that a standard should imply a decision procedure, so that the inadequacy of a standard *as* a decision procedure reveals the deficiency of the standard as a standard. Bales argued that this was wrong: ethical standards do not imply ethical decision procedures. Sachs observes that constitutional law and theory, much like ethics, addresses two basic questions: What makes an act or event constitutional (i.e., constitutionally permitted or constitutionally authorized)? And how ought a court determine whether a given act or event before it is constitutional? Therefore, he reasons, the standard/decision procedure that has clarified matters in ethics should apply in the constitutional domain too: a "constitutional standard" answers the first question and a "constitutional decision procedure" the second.

* Leon Meltzer Professor of Law, the University of Pennsylvania Carey Law School, and Professor of Philosophy, The University of Pennsylvania. mitchberman@law.upenn.edu.

[1] Stephen E. Sachs, *Originalism: Standard and Procedure,* 135 HARV. L. REV. __ (forthcoming 2022) (ms at 60) (quoting Christopher R. Green, *Originalism and the Sense-Reference Distinction,* 50 ST. LOUIS U. L.J. 555, 561 (2006)).

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

In saying that Sachs could be deploying Bales's distinction as an analogy, I mean that he might be intending only to "point toward" a broadly similar distinction in the legal realm without maintaining that the constitutional distinction is isomorphic to the ethical distinction, or that Bales's vocabulary and definitions capture that distinction optimally well. Sachs would be offering Bales's distinction as a "template" if intending to argue that the standard/decision procedure distinction drawn from ethics does a better job than previous conceptualizations and related terminologies bandied about in the constitutional theory literature at capturing the truth of the matter, that it comes closer to the joints of law and legal practice.

As an analogy, Bales's standard/decision procedure distinction is tremendously helpful: what determines what our law is, or what makes true legal propositions true, is indeed a different question than how judges should resolve constitutional disputes. The problem is that the *general* distinction is not new; it has been pressed vigorously by more than a few legal philosophers and constitutional theorists especially over the past decade. It is reflected in the familiar jurisprudential distinction between "theories of law" and "theories of adjudication," in the work of many originalists who have denied that doubts about originalism's workability undermine its correctness, and in my own distinction between "constitutive" and "prescriptive" constitutional theories.[3]

As a template, on the other hand, the proposal to embrace this distinction might well be novel. The problem now is that Sachs does not make adequately clear how the standard/decision procedure distinction is meant to fit with, and improve upon, existing philosophically inflected distinctions that seem intended to cover the same broad conceptual space, and there is good reason to worry that it muddies at least as much as it clarifies. This is for two reasons. First, the distinction is not as secure and well accepted in ethics as Sachs intimates. Second and more importantly, ethics and law are disanalogous in one way that frustrates the clean transposition of this distinction from the former domain to the latter: moving from fundamental standard to a case-specific verdict is a one-step journey in ethics but a two-step journey in law. The ethical case requires only "application" of the standard to yield a verdict, whereas the constitutional case involves the analytically distinct stages of "interpretation" (a journey from standard to law) and of "application" (a journey from law to verdict).

That is not the end of the story, however. It might be if Sachs's sole intended contribution—beyond, as always, his lively prose, sharp wit, and keen eye for illuminating examples—were either to draw attention to a general distinction of which constitutional theorists had supposedly been innocent (they hadn't been), or to advocate that Bales's precise conceptualization of the relevant distinction and his chosen terminology are clearly to be preferred over existing alternatives (not so clear). But to reduce *Originalism: Standard and Procedure* to these two claims would be to miss its chief ambition. Sachs's principal intended contribution is to put the distinction to a supposedly unnoticed use—a use that understandably made Bales's article irresistible.

Bales was an act-utilitarian who was responding to what he thought was a common but illicit criticism of that theory. The fact (if true) that act utilitarianism works poorly as an ethical decision procedure, Bales argued, is no mark against it as a standard of ethical rightness. Sachs is an originalist. The fact (if true) that originalism (or some particular version of it) works poorly as a constitutional decision procedure, Sachs argues, is no mark against it as a standard of constitutional rightness. Sachs

[3] Part I, *infra.*

contends that previous work in constitutional theory had overlooked that much criticism of originalism as a family of "interpretive" theories rests on ignorance of the basic distinction (law/adjudication, constitutive theory/prescriptive theory, standards/procedures, etc.), and had therefore failed to make clear how careful attention to the distinction strengthens originalism against its critics.

I'm skeptical. I think that "the practical objection"[4] to originalism that motivates his article is a much less prominent objection to originalism in today's scholarly debates than Sachs seems to, and that the crux of Sachs's response is better anticipated in the literature than he recognizes. But I could be wrong on both counts and, in any event, I'm unconcerned to argue it. Sachs's central claim that any practical defects of originalism as a decision procedure have little (or possibly no) bearing on whether originalism *is* our standard,[5] is surely correct, whatever else might be said about it. Even a nonoriginalist need not dissent.

This invited Response develops these ideas over four Parts. Part I runs quickly through recent work in jurisprudence and constitutional theory to show that scholars have been far more attuned to distinctions highly analogous, if not identical, to Bales's cut between standards and decision procedures than the naïve reader of *Originalism: Standard and Procedure* will have surmised. Part II offers reasons to doubt the value of Bales's distinction as a template (rather than analogy) for constitutional theory, and thus to question whether or how far Sachs is advancing the ball relative to the preexisting state of play. Part III sketches components of an alternative picture of constitutional law and adjudication that is more sensitive to the core difference between ethics and law that Part II identifies. Among other things, it proffers reasons to favor the "constitutive" language that I adopt (following Mark Greenberg) over the "truthmaking" language that Sachs does (following Chris Green), and introduces my previously advanced distinction between "operative rules" and "decision rules" as an aid to clear thinking in the broad space that Bales-Sachs "decision procedures" are supposed to cover. Part IV turns to originalism. The goal of Sachs's article is to rebut "one type of argument" against originalism[6]—the "practical objection" that I have already intimated is no objection of mine. But what then *is* my objection? Mine is that originalism is not our standard, that it's the wrong constitutive theory. The last Part explains.

I. The Prior State of Play

If I have one complaint about *Originalism: Standards and Procedures*, as distinct from a substantive disagreement, it's that the exposition invites the impression that, as far as the legal-theoretic literature is concerned, Sachs is writing on a nearly blank slate. That is not so.

This is not the place to attempt a history of jurisprudential engagement with some form of a difference between "theories of law" and "theories of adjudication." It may be enough to note the prominent role it has played in scholarly efforts to make best sense of Ronald Dworkin's anti-positivist challenge to Hartian positivism. Hart himself suggested that his theory was one of law and Dworkin's

[4] Sachs, *supra* note 1, at 7.

[5] The objection does have bearing on whether originalism *should be* our standard insofar as we have power over what our standard is or will be.

[6] Sachs, *supra* note 1 at 6.

one of adjudication when puzzling over "why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conception of legal theory."[7] Joseph Raz agreed with Hart that his and Dworkin's projects differed: Hart's was to propound "a theory of (the nature of) law,"[8] whereas Dworkin's was to construct "a theory of adjudication, a theory which if correctly followed yields a uniquely correct answer to any question of American law."[9] Dworkin's "conception of the tasks and method of jurisprudence" was ultimately defective, Raz concluded, in part because of his "failure to allow that the two [kinds of theory] are not the same."[10] Responding (indirectly) to Raz in these very pages, Dworkin accepted the distinction between a "theory of law" that aims to explain "what makes a statement of what the law of some jurisdiction requires or permits true?" and a "theory of adjudication" that seeks to explain "how judges should decide cases."[11] But he denied that his theory was concerned solely or even primarily with the latter. A theory of what makes a proposition of law true "is certainly the core of" a theory of how judges should decide cases, he explained, because judges cannot have a warranted sense of how they should reason without grasp of what they're looking for.[12]

Far from being of concern only to legal philosophers, the basic distinction is well known to American constitutional theorists, perhaps especially to originalists. In a much-cited article from a quarter-century ago, Gary Lawson aimed to clarify originalism's proper ambitions by distinguishing "theories of interpretation," which typically address "what is the correct way in which to interpret the Constitution," from "theories of adjudication," which typically concern how judges should resolve disputes.[13] Originalism, he argued, is better conceived as a theory of correct constitutional interpretations than as a theory of how judges should adjudicate disputes. The originalist-intentionalist Stanley Fish made much the same point when rebutting a critic's "epistemological objection"—namely, that "it will be difficult for an interpreter to offer convincing justification for the claim that a certain interpretation corresponds to an author's actual intention"[14]—by insisting that the objection misunderstands what intentionalism is a theory of. Intentionalism, Fish explained, is an answer to the question of what determines the meaning of a text, including our constitutional text. It is "not a method":[15] "Knowing that you are after intention does not help you find it; you still have to look for evidence and make arguments."[16] Christopher Green, in an article that Sachs draws on, repackages the

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[7] H.L.A. HART, THE CONCEPT OF LAW 241 (2d ed. 1994).

[8] Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1, 37 (Jules Coleman ed. 2001).

[9] Raz, *Two Views,* at 27-28.

[10] Raz, *Two Views,* at 37.

[11] Ronald Dworkin, *Hart and the Concepts of Law,* 119 HARV. L. REV. F. 95, 97, 98 (2006). Dworkin's article was published as a response to Fred Schauer's review of Nicola Lacey's biography of Hart.

[12] Dworkin, at 101.

[13] Gary Lawson, *On Reading Recipes . . . and Constitutions,* 85 GEO. L.J. 1823, 1823 (1997).

[14] Stanley Fish, *There Is No Textualist Position,* 42 SAN DIEGO L. REV. 629, 646 (2005) (quoting Stoljar).

[15] Fish, at 643.

[16] Fish, at 650.

theory of law/theory of adjudication in terms of a neighboring "distinction[] that philosophers have long drawn in dealing with the nature of reality," that between ontology and epistemology.[17] "If we keep a distinction between constitutional ontology and constitutional epistemology in mind," Green argues,

> many arguments in constitutional theory will immediately be seen to misfire. To stress merely *epistemic* flaws in a competitor constitutional theory is not enough to undermine it. The original meaning, some say, is too difficult to unearth for originalism to be true. Daniel Farber and Suzanna Sherry, for instance, insist that "[o]riginalists necessarily assume that we can ascertain the intent of the founding generation." Not so, if originalism is an ontological thesis about what makes constitutional claims true, rather than an assumption about what we can ascertain.[18]

Writing alone and with others, I, a nonoriginalist, have also been stressing the importance of the distinction. A decade ago, Kevin Toh and I co-authored two symposia articles that, in different ways, turned on the difference between two kinds of constitutional theories, "theories of constitutional law" on the one hand, and "theories of constitutional adjudication" or of "constitutional interpretation proper," on the other.[19] The former we defined as "theories of the ultimate criteria of legal validity, or of the ultimate determinants of legal content—i.e., theories regarding what it is that gives the law in any given jurisdiction the content that it has." The latter, we said, are "theories of what judges should do in the course of resolving disputes," a broad heading that would include accounts of how judges "should try to determine or discover the Constitution's legal content, or what it is that the constitutional law provides."[20] My subsequent work adopted new terminology for the distinction, now contrasting "constitutive" theories that purport to set forth "the grounds of our constitutional law," with "prescriptive" theories that would direct "how judges ought to interpret texts."[21] These two kinds of theory concern different subject matter. A prescriptive theory, David Peters and I explained, addresses such questions as "How should judges interpret the Constitution? How should (unelected) judges exercise their power of judicial review? How ought courts resolve constitutional disputes?" Constitutive theories answer "[a] second cluster of questions," including "What are the grounds of our constitutional rights and powers? In virtue of what does our constitutional law have the content that it does? What are the truthmakers of true propositions of constitutional law?"[22]

Like the other scholars mentioned, I encouraged readers to attend to the distinction because I believed it held lessons of importance, not just to keep busy. First and most critically, Toh and I explained, these are distinct kinds of theory that are often not inter-translatable: "A view about what

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[17] Christopher R. Green, *Constitutional Truthmakers,* 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 498 (2018).

[18] Green, *Constitutional Truthmakers,* at 511 (citing FARBER & SHERRY).

[19] Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take,* 82 FORDHAM L. REV. 545 (2013); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem,* 91 TEXAS L. REV. 1739 (2013).

[20] Berman & Toh, *A Jurisprudential Take,* 82 FORDHAM L. REV. at 552.

[21] Mitchell N. Berman, *The Tragedy of Justice Scalia,* 115 MICH. L. REV. 783, 790 (2017). *See also* Mitchell N. Berman, *Our Principled Constitution,* 166 U. PA. L. REV. 1325, 1329-32 (2018).

[22] Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice,* 46 HASTINGS CONST. L. Q. 311, 323 (2019). *See also* Berman, *The Tragedy of Justice Scalia,* at 790.

the law is or what it consists of does not by itself entail or presuppose any position about how judges are supposed to adjudicate constitutional disputes; and a view about how judges should go about adjudicating constitutional disputes does not by itself entail or presuppose any position about what the law is or consists of."[23] Second, although the two kinds of theory meet different needs, it doesn't follow that they have equal stature. Because (echoing Dworkin) there's no sensible way to figure out how judges should reason without presupposing at least a rough account of what judges should be looking for, a constitutive theory of constitutional legal content has natural priority over a prescriptive theory of constitutional adjudication.

Lots that is of interest follows. For one, these insights suggest a more illuminating way to periodize modern originalism—downplaying the shift in focus from original intentions to original meanings, and highlighting an evolution from prescriptive to constitutive claims.[24] For another, once we start thinking in more explicitly constitutive rather than prescriptive terms, pluralistic theories of "constitutional interpretation"—by far the most popular theories around—might seem to stand on shakier footing. While it is intuitive that very different kinds of facts (historical, semantic, evaluative, etc.) can combine to make out what an agent should do (that's our everyday experience of practical reasoning), it has struck some as mysterious how such disparate factors could jointly determine the law.[25] For a third—and Professor Sachs has reason to find this of particular interest—the distinction underwrites the most persuasive rejoinder, on Justice Scalia's behalf, to Judge Posner's notoriously scathing review of Scalia's book, with Bryan Garner, *Reading Law.*[26] As I have argued, Posner's critique founders on his failure to understand "that Scalia and Garner, along with many originalists, should be understood not as advancing 'normative' arguments about how judges should 'interpret' legal texts but rather as advancing a jurisprudential claim about what the law is."[27]

I could go on, but the goal here is not (only) to plug my recent constitutional writings. It's to spotlight some of the many constitutional scholars who have hammered at a distinction very much like Bales's distinction between standards and decision procedures, and to convey a flavor of their reasons for doing so. Notice too that every thinker mentioned so far prioritized investigations into the determinants of legal content over guidance for legal decisionmaking. As Toh and I urged, "we should

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[23] Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem,* 91 TEXAS L. REV. 1739, 1739-40 (2013). See also Berman, *Our Principled Constitution,* at 1337.

[24] Berman & Toh, *On What Distinguishes New Originalism from Old;* Berman, *Our Principled Constitution,* at 1340-44.

[25] Berman & Toh, *Pluralistic Nonoriginalism, supra* note __ (raising the challenge and explaining why it is surmountable); Berman, *Our Principled Constitution* (presenting and defending a pluralistic constitutive theory of American constitutional law). For Sachs's doubts about my account, see William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1489 (2019). For the more fully elaborate theory in response, see (if, counterfactually, a journal were to find it worthy of publication) Mitchell N. Berman, "Principled Positivism: How Practices Make Principles, and How Principles Make Rules" (unpublished ms., dated July 23, 2021).

[26] Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life,* NEW REPUBLIC, Sept. 13, 2012.

[27] Mitchell N. Berman, *Judge Posner's Simple Law,* 113 MICH. L. REV. 777, 803 (2015); *see also id.* at 778-79 ("Contemporary originalism's center of gravity is not, contrary to the common rhetoric, fundamentally a position about the activity denominated 'interpretation.' It is fundamentally a claim about the content of law. Contemporary originalists by and large believe that what the law is—what our legal powers, duties, and rights are—is fully determined by semantic qualities of promulgated texts.").

be talking more, and more explicitly, about what it is that we should be looking for and less about how we should undertake that investigation."[28] The core lesson that Sachs would have us take from Bales is that standards of rightness, as distinct from procedures for sound judicial reasoning, are "probably also worth having in law."[29] It's disheartening that Sachs would think this a lesson that readers familiar with the existing literature still need to be taught.

II. STANDARDS AND DECISION PROCEDURES?

Of course, the fact that many words had already been written on Sachs's general topic before he entered the fray goes almost no distance toward establishing that any of them should be considered the last. Concepts are continually refined, by slicing some distinctions a little finer, relocating a cut here, altering an angle there, applying different and more perspicuous vocabulary. So nothing I've said in Part I casts doubt on the possibility that Bales's carving gets at what constitutional theorists should care about better than do the distinctions that constitutional theorists already own. But there are significant reasons for doubt.

First, Bales's article, despite its virtues and influence, is, after all, half a century old. Insofar as Sachs wishes to exploit "distinctions that have survived considerable philosophical scrutiny,"[30] a little updating is in order.

To begin with, many normative philosophers simply deny the value or cogency of Bales's distinction, even for ethics.[31] Christine Korsgaard, a Kantian, flatly rejects "the distinction between the outcomes of decision procedures, on the one hand, and standards of rightness, on the other, on which many defenses of utilitarianism ride."[32] Many virtue theorists do as well.[33] But even among those who endorse the distinction in broad strokes, few would accept it "as is," on either side of the slash. Working backwards, talk of "decision procedures" is clearly inapt. Thanks to the influence of computational theory, a decision procedure is generally understood as an algorithm. And while Bales himself does not say that a decision procedure for ethics would be algorithmic, the description he offers—"a procedure which, if followed, would crank out in practice a correct and immediately helpful answer to [ethical]

[28] Berman & Toh, *On What Distinguishes New Originalism from Old, supra* note __, at 552.

[29] Sachs, *supra* note 1, at 13.

[30] Sachs, *supra* note 1, at 13 (quoting Green).

[31] This observation is a bit against interest because one thing (among many) that Sachs and I agree on is the utility of a distinction *broadly* along these lines for constitutional purposes, whether or not for ethical ones. Some "constitutional pragmatists" might deny the value of the distinction for constitutional purposes. *See, e.g.,* Daryl Levinson, *Rights Essentialism and Remedial Equilibration,* 99 COLUM. L. REV. 857 (1999); Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning,* 119 HARV. L. REV. F. 173. For my rebuttal, see Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis,* 119 Harv. L. Rev. F. 220 (2006).

[32] Christine M. Korsgaard, *Natural Goodness, Rightness, and the Intersubjectivity of Reasons: Reply to Arroyo, Cummiskey, Moland, and Bird-Pollan,* 42 METAPHILOSOPHY 381, 389-90 (2011).

[33] *See, e.g.,* Rosalind Hursthouse, *Virtue Theory and Abortion,* 20 PHIL. & PUB. AFF. 227 (1991).

questions"[34]—suggests hope for a much more mechanical and reliable process of ethical decisionmaking than many normative philosophers will think likely.

Bales's standards stand in better stead, but perhaps not under the same label. Bales defined a "standard" of rightness as "that characteristic, or perhaps that very complex set of characteristics, which all and only right acts have by virtue of which they are right."[35] Many philosophers today would eschew "standards" talk in favor of "grounds" and "grounding." Grounding is a non-causal relationship of metaphysical dependence—a label for the relationship by which more fundamental entities determine (in the sense of constitute, not in the sense of "figure out") less fundamental ones. Put in grounding terms, Bales's favored theory, act-utilitarianism, maintains that the fact that an act is optimific (i.e., it produces at least as much good as any alternative) grounds the fact that it is right. "On this proposal," the philosopher Selim Berker explains, "consequentialists insist that facts about rightness *obtain in virtue of* certain facts about goodness, that the latter facts are what *make it the case* that the former facts obtain, that it is *because* of the relevant facts about goodness that the corresponding facts about rightness hold."[36] Formulations such as these "just roll off the tongue," Berker notes, "and for good reason. Grounding is what we are after." (I'll return to this point when advocating for "constitutive" talk over both "standards" and "truthmakers," in Section III.C.)

Second, however apt or useful the distinction is in ethics, its native home, a smooth transposition to the legal context is hampered by law's greater structural complexity.[37] Deriving the case-specific verdict from the standard in the constitutional case (is *this* statute a constitutionally authorized exercise of power? does *this* enforcement action violate *this* person's constitutional rights?) plausibly involves two analytically distinct steps whereas deriving the case-specific verdict in the ethical case (is *this* action in this context right?) involves only one.

In the ethical case, a case-specific verdict is a function of the facts relevant to the case and the ethical standard. Whether it is right to turn the trolley, or to eat animal flesh under thus and such conditions, or to utter this untrue statement is in each case determined by the standard (a normative entity) and the ordinary (non-normative) facts about the act (notably its intrinsic or relational properties and its consequences) . To illustrate, assume with Bales that hedonic act utilitarianism is the correct ethical standard. Whether some act ϕ is right depends constitutively on whether the sum of pleasurable states net of painful states that would be instantiated if ϕ is at least as great as would obtain if the agent performs any alternative action ψ.

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[34] Bales, *supra* note 2, at 261.

[35] Bales, *supra* note 2, at 260, *quoted in* Sachs, *supra* note 1, at 14.

[36] Selim Berker, *The Unity of Grounding,* 127 MIND 729, 741 (2018) (specifically proposing that Bales's "standards" talk be reinterpreted in grounding terms, and emphasizing that this is a natural and uncontroversial interpretation).

[37] I share Sachs's eagerness to draw appropriate lessons of a conceptual or metanormative character for law from ethics. *See, e.g.,* Mitchell N. Berman, *Justification and Excuse, Law and Morality,* 53 DUKE L.J. 1 (2003) (much as the title suggests). But the dissimilarities between the domains warrant careful attention too. *See* Mitchell N. Berman, *Of Law and Other Artificial Normative Systems, in* DIMENSIONS OF NORMATIVITY 137, 159-62 (David Plunkett, Scott Shapiro & Kevin Toh eds. 2019).

Now imagine a representative constitutional dispute—such as whether Congress had constitutional power to mandate that individuals secure health insurance, or whether the City of Philadelphia violated the constitutional rights of a private foster care agency in refusing to place children through it. Assume with Sachs that some form of originalism is the correct constitutional standard—say (just for ease of discussion) that the constitutional law is determined by the original public meaning of the ratified text.[38] In contrast to the ethical case, the casuistic constitutional verdict is *not* determined by direct reference to the constitutional standard. Instead, it is determined by reference to a legal rule that is itself derived from the constitutional standard. Whereas the ethical "adjudicator" reasons from standard to verdict, the constitutional adjudicator first derives a derivative standard from the fundamental standard and then reasons from that derivative standard to verdict.[39] Furthermore, in constitutional theory and adjudication, the main game is at the first stage—"interpretation"—not the second—"application." In the foster care dispute just alluded to, Justice Alito spoke unexceptionally when describing the "question of great importance" as "[t]he correct interpretation of the Free Exercise Clause,"[40] not as the correct resolution of this dispute on its facts.

The thought can be put more precisely in grounding terms (one of the virtues of that idiom). Start with the ethical case and imagine we're asking whether some act token ϕ is right. Still assuming hedonic act-utilitarianism, the fact that [an act is right iff it is optimific][41] directly grounds the fact that ϕ is right. (It is a direct ground but only a partial ground. Other partial grounds are the facts that ground ϕ's being optimific.) Now turn to the constitutional case and imagine the question whether some state action ϕ is constitutionally prohibited. Still assuming public meaning originalism, the fact that [p is the law if p is part of the original public meaning of the constitutional text] does *not* directly ground the fact that [ϕ is constitutionally prohibited]. Instead, the fact that [p is the law if p is part of the original public meaning of the constitutional text] directly grounds the fact that [p is the law]. (As above, it's a direct ground, but only a partial one: the other partial ground is the fact that [p is the original public meaning of the constitutional text].) And the fact that [p is the law] directly grounds the fact that [ϕ is constitutionally prohibited]. (As above: other partial grounds are the facts that ground ϕ's being in violation of p.)

Any process of reasoning designed to ascertain whether ϕ is constitutionally prohibited must investigate separately whether p is the law and whether, if p is the law, ϕ comports with p. These are different inquiries that potentially call upon different skills and might reasonably provoke different theoretical or regulatory responses. This is why Scott Shapiro distinguishes two stages or targets of judicial reasoning, what he calls "legal reasoning" and "judicial decisionmaking": "The object of legal reasoning is the discovery of the law; the aim of judicial decision making, on the other hand, is the

[38] This is not Sachs's own theory, what he and his frequent co-author Will Baude call "original law originalism," William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455 (2019). I'll say a little about that theory in Part IV. But because that version of originalism is both less familiar to readers and harder to spell out, and because Sachs is explicit that the points he's making about the scholarly debate over originalism are not particular to his version of it, I use a simpler and more familiar version to illustrate.

[39] *Originalism: Standard and Procedure* uses "standard" unmodified to refer to the two kinds of norms that I'm characterizing as "fundamental" and as "derivative," and it's not always obvious which sense Sachs has in mind.

[40] Fulton v. Philadelphia, 593 U.S. (Alito, J., dissenting) (slip op. at 10).

[41] When dealing with long complex facts I insert brackets to make the sentences easier to parse.

resolution of a dispute."[42] Collapsing these disparate inquiries under the single ill-defined term "decision procedure" lumps just where, it seems to me, the philosophical instinct must be to split.[43]

III. Four Helpful Distinctions

Whatever terminology and particular conceptualization one prefers, we should all agree that what makes a given act constitutional (or not), and how judges should figure out whether a given act is constitutional are distinct questions that call for distinct answers that might significantly diverge. We should agree as well that that's not the only distinction of a theoretical nature that we need. Here I offer four sets of distinctions that should prove helpful and illuminating to theorists and students of constitutional interpretation. This is not a systematic or comprehensive set of distinctions, but their relevance to Sachs's article and to the broader project will be apparent.

A. Text/Meaning/Law

"[T]he original Constitution is law," says Sachs, "and . . . it remains law until lawfully altered."[44] I would not say that—not because it cannot be construed truly, but because it is highly ambiguous and prone to mislead. The most probable referent of "the original Constitution," and the one that best fits the rest of the sentence, is the constitutional text. The most probable referents for "law" are either legal-normative entities (prohibitions, permissions, powers, etc.) or legal sources. Accordingly, Sachs should be taken to be claiming either that the original constitutional text is a source of law unless and until lawfully amended, or that the original constitutional text is itself a collection of legal norms. The first alternative is true but possibly controverted by nobody. The second alternative commits a category mistake.

Clear thinking is better promoted by consistently distinguishing text, meaning, and law as members of different ontological categories—respectively, a structured arrangement of signs and symbols, the communicative or linguistic content that such signs and symbols convey or carry, and the set of norms (powers and prohibitions and the like) that a legal system comprises or delivers. Doing so allows us to isolate possible or actual disagreements more accurately and precisely. For example, we can formulate public meaning originalism, as I did earlier, as the thesis that the law is fully determined by the original public meaning of the constitutional text. Those who disagree should then specify whether they (a) agree that the law is fully determined by the text's meaning but deny that meaning is

[42] Scott J. Shapiro, Legality 248 (2011).

[43] Sachs might rejoin, I suppose, that the complexity I'm identifying is consistent with thinking and talking in terms of a "decision procedure" because a good procedure would treat these two steps differently. Well, sure. But if the steps are to be treated differently by developing separate normative accounts of how judges should reason, or what they are or should be permitted or required to do, at the separate stages of deriving and applying a legal norm, then it remains to wonder what is gained by talk of a "decision procedure" especially given that nobody with sense thinks either investigation can be made to reliably crank out correct answers. To be sure, Sachs does assert that "in practice we can't do without a decision procedure." Sachs, *supra* note 1, at 4. But rather than disproof by counterexample of what I just asserted, I take this statement only to show that Sachs doesn't mean by "decision procedure" what others do, which is further reason not to encourage this way of speaking.

[44] Sachs, *supra* note 1, at 7.

fixed in time, or (b) deny that the law is fully determined by any linguistic content of the text, whether fixed or evolving, or (c) something else. Meanwhile, failure to keep these distinctions straight leads to a host of errors, such as Justice Scalia's charge that constitutional nonoriginalists deny "that a text does not change."[45]

B. Interpretation/Construction

The distinction between constitutional "interpretation" and "construction" is a hot topic in originalist circles thanks to the work of the "New Originalists." As described by Larry Solum, a leading theorist of the approach, interpretation "is the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text," while construction "is the process that gives a text legal effect."[46]

One point about "interpretation" warrants emphasis. (Construction is fascinating too but space constraints compel me to put it aside.) "[T]he term 'legal interpretation' is often used in a way that is ambiguous between ascertaining the meaning of legal texts and using the relevant texts to ascertain what the law is."[47] Solum and Barnett use it in the former way. Mark Greenberg, Kevin Toh, and I have been arguing for years that that is the less accurate and helpful way to carve things, and that conceptualizing constitutional interpretation as the activity of trying to discover or figure out the law renders debates between and among originalists and nonoriginalists far more intelligible.[48] As Greenberg wrote in this Forum in response to an article by Baude and Sachs: "Once we carefully distinguish between the linguistic meaning of the legal texts and the content of the law, it becomes clear that the main goal of legal interpreters is to find the latter."[49]

In his discussion of interpretation and construction, Sachs starts by accepting Solum's spin on interpretation as the search for the text's "communicative content,"[50] and then reasons himself to the conclusion that "[d]ividing our work between interpretation and construction, though sometimes sensible, doesn't quite capture what's at stake in the controversy."[51] So it might be "more useful[]," he advises, to "split our work across a different pair of activities, identifying legal standards and choosing decision procedures."[52] Agreed. In doing so, it will also be more useful to adopt the alternative

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[45] ANTONIN SCALIA, A MATTER OF INTERPRETATION 40 (1997).

[46] Lawrence B. Solum, *The Interpretation-Construction Distinction,* 27 CONST. COMMENT. 95, 95-96 (2010); *see also, e.g.,* Randy E. Barnett, *Interpretation and Construction,* 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011).

[47] Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants,* 130 HARV. L. REV. 105, 107 (2017).

[48] *See, e.g.,* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space,* 27 CONST. COMMENT. 39 (2010); Berman & Toh, *On What Distinguishes New Originalism from Old, supra* note __, at 561-70; Mark Greenberg, *Legal Interpretation,* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., July 12, 2021).

[49] Greenberg, *What Makes a Method of Legal Interpretation Correct?,* at 106..

[50] Sachs, *supra* note 1, at 44 (quoting Solum 2013).

[51] *Id.* at 46.

[52] *Id.*

conception of what legal interpretation is aiming for: law not meaning, “legal content” not “communicative content.”

C. Constitutive Theory/Truthmaker Theory

Minimal realism about a domain is the thesis that “there really are ways that things might be and that our thoughts and sentences do sometimes correctly represent that reality.”[53] It is compatible with the view that many, even most, claims within the domain are underdetermined. Sachs and I are both minimal realists about constitutional law. Most people are, sophisticates not excluded. For a constitutional realist, what is most wanted is a theory of legal content. A “truthmaker theory” of legal content identifies the “features that make correct legal statements correct, or make true claims about the Constitution true.”[54] Because it involves the contents of propositions, it is plausibly classified as a *semantic* theory. A “constitutive theory” of legal content explains what it makes it the case that a legal normative entity—a prohibition, permission, power, or the like—exists. It explains the grounds and the grounding function of legal norms. It is a *metaphysical* theory. Glossing constitutional standards as means to “evaluate[] legal *propositions,*”[55] Sachs follows Chris Green in describing efforts to describe our constitutional standards as the search for constitutional truthmakers. I don’t object to this vocabulary strenuously. Still, I’d cast my vote for grounds over truthmakers.

As the philosopher Kit Fine explains, “[t]he notion of grounds is a close cousin to the notion of truth-making. Both are bound up with the general phenomenon of what accounts for what . . . .”[56] But “they structure the phenomenon” differently. “The relation of truth-making relates an entity in the world, such as a fact or state of affairs, to something, such as a statement or proposition, that represents how the world is.”[57] When the truthmaker relation obtains, “the *existence* of the worldly entity should guarantee the *truth* of the representing entity.”[58] For example, the truthmaker for the *proposition* that snow is white is the fact that [snow is white] or, put differently, the whiteness of snow. But we might then ask what makes it the case that [snow is white]? What explains the whiteness of snow? To answer this question requires a turn from semantics to metaphysics, from truthmakers to grounds. “For whenever we consider the question of what makes the representation that P true,” Fine continues,

> there will also arise the question of what, if anything, makes it the case that P. Indeed, it might well be thought that the question concerning the representation will always divide into two parts, one concerning the ground for what it is for the representation

[53] MARK VAN ROOJEN, METAETHICS: A CONTEMPORARY INTRODUCTION 9-14 (2015).

[54] Sachs, *supra* note 1, at 3.

[55] Sachs, *supra* note 1, at 17.

[56] Kit Fine, *Guide to Ground, in* METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY 37, 43 (Fabrice Correia & Benjamin Schnieder (2012).

[57] *Id.*

[58] *Id*.

that P to represent P and the other having nothing to with representations as such, but concerning the ground for P.[59]

Turning from snow to law, consider what the truthmaker is for the proposition, say, that the federal government is constitutionally prohibited from criminalizing criticism of the president. Answer: the truthmaker is the fact that [the federal government is constitutionally prohibited from criminalizing criticism of the president] or, put differently, the unconstitutionality of the federal government's criminalizing criticism of the president. But that is barely informative. What we really want to know is what makes it the case that the federal government's criminalizing criticism of the president is unconstitutional. This is most plausibly a metaphysical question not a semantic question, so the answer is not a truthmaker, but a ground. Not surprisingly, philosophers are increasingly embracing "the view that the relation of law-determination is metaphysical grounding."[60] Moreover, if (per Berker) "standards" in Bales talk circa 1971 is faithfully translated as "grounds" in mainstream philosophy talk circa 2021, then a constitutive theory of the grounds and grounding of constitutional norms is just what the request for constitutional standards is asking for.

D. Operative Rules/Decision Rules

In Part II I resisted Sachs's proposal that we transpose the ethical notion of a "decision procedure" to the legal realm in part by stressing that legal reasoning involves the distinct steps of (1) deriving a legal norm from the fundamental "standard" and whatever factors the standard makes legally relevant, and (2) applying the legal norm to the facts of the case. Let me now say a few words to elaborate on the importance of distinguishing those two stages.

Imagine yourself on the Supreme Court. (Don't pretend you haven't.) Once you have identified the constitutional norm to your satisfaction, what next? The most obvious possibility is simply to announce what you take to be the constitutional rule with the expectation that judges should apply it "directly" to future disputes. An alternative is to construct a rule that is non-identical to the operative rule that the activity of interpretation has delivered but is better by reference to whatever desiderata it is within your constitutional authority to consider, and to instruct future courts to adjudicate disputes by application of this constructed doctrine rather than by applying the interpreted rule directly. For example, if you interpret the Constitution to provide that Congress has power to regulate local activities that in the aggregate substantially affect interstate commerce, you might prefer to instruct courts to evaluate challenges to federal regulation by application of a deferential doctrine that would allow invalidation only if the court concludes that Congress *could not rationally have concluded* that the activity being regulated substantially affects interstate commerce in the aggregate. I call these constructed doctrines "decision rules" and argue that, because adjudication requires *some* decision rules (implicit standards of proof, if nothing else), they cannot be *categorically* illegitimate or beyond the Supreme Court's lawful power.[61]

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[59] *Id.*

[60] Samuele Chilovi & George Pavlakos, *Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence,* 25 LEGAL THEORY 53, 54 (2019).

[61] Mitchell N. Berman, *Constitutional Decision Rules,* 90 VA. L. REV. 1 (2004). *Accord* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does,* 91 VA. L. REV. 1649 (2005).

Although Sachs briefly discusses my notion of decision rules, I am frankly uncertain how close or far apart on the topic he thinks we are. Let me make two points. First, decision rules, as I conceive them, are devices that judges create and deploy to determine whether constitutional requirements are satisfied (or what constitutional ruling to issue) in a concrete case given some grasp (even if inchoate) of what the constitutional requirement is. They are not devices used for deriving legal requirements from the fundamental standard or from the fundamental legal grounds. As one might expect given what I have written so far, Sachs is less sensitive to that difference.[62]

Second, even though Sachs and I wholly agree that "the choice of decision [rule] isn't untrammeled,"[63] we differ regarding how much latitude judges have in constructing them and what considerations they are constitutionally authorized, or obligated, to entertain. On the one hand, Sachs is, to my eyes, a little quick to conclude that the Court is "bound by the preexisting rules of evidence and procedure,"[64] given what I think should be, for him, a challenging question regarding the original scope of "the Judicial Power" vested in the federal courts.[65] More strikingly, Sachs posits that, "in choosing decision procedures, our goal is to avoid legal blame."[66] I don't think so. Our goal in choosing decision procedures, including "decision rules," should be to minimize total adjudicatory errors on expectation, or to minimize total error costs, or to optimize across a limited set of diverse desiderata that includes but extends beyond reducing errors and error costs.[67] For a judge to craft a decision rule for the purpose of escaping blame would reflect an inappropriate concern with the moral or legal ledger of the decisionmaker at the expense of whatever public-oriented reasons should guide the exercise of state power. Sachs comes to his surprising view of what should guide us in constructing decision procedures because he thinks that avoiding blame is the goal of decision procedures in ethics.[68] That was not the view of Frank Jackson, from whom Sachs takes the notion of different types of oughts,[69] and it is very doubtful. Avoidance of blame is a classic "wrong kind of reason,"[70] to adopt a particular practice or procedure for ethical decisionmaking. Trying to get things right on expectation would be the right kind of reason.

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[62] Sachs, *supra* note 1, at 39 (discussing the Import-Export Clause).

[63] *Id.* at 41.

[64] Sachs, *supra* note 1, at 42.

[65] U.S. CONST. Art. III, § 1.

[66] *Id.* at 46; *see also id.* at 40, 48.

[67] *See* Berman, *Constitutional Decision Rules, supra* note __, at 88-100.

[68] *Id.* at 34.

[69] *Id.* at 33 (citing Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection,* 101 ETHICS 461, 471 (1991)).

[70] Wlodek Rabinowicz & Toni Rønnow-Rasmussen, *The Strike of the Demon: On Fitting Pro-Attitudes and Value,* 114 ETHICS 391 (2004).

IV. ORIGINALISM AS OUR STANDARD?

Up until now, I have said nothing critical about originalism. That is no accident. The kind of conceptual work and distinction-drawing that Sachs and I are both undertaking is intended not to resolve substantive disagreements that divide originalists from their opponents, but to facilitate their resolution by making crisper what's in dispute. Still, because Sachs offers his philosophical or conceptual arguments in service of (his version of) originalism, and because I'm an avowed nonoriginalist, the reader might appreciate a few words on why I'm not buying the substantive account that he sells elsewhere. I have said that the "practical objection" that provokes *Originalism: Standard and Procedure* is not mine. My objection is the same that several others have already pressed: that his form of originalism is not our law,[71] that the fundamental constitutional standard that he promotes—what he and Baude call "original-law originalism"[72]—is not our standard.

Here's original-law originalism in a bumper-sticker: "Our law is still the Founders' law, as it's been lawfully changed."[73] My disagreement begins with a question that should now be obvious: What makes *that* proposition true? In virtue of what is our law still the Founders' law, except for lawful changes? It is to Sachs and Baude's credit that they sketch an answer, for most originalists who have peddled a standard not a decision procedure, who lean more constitutive than prescriptive, have not even spotted the question. Sachs and Baude accept Hartian positivism, more or less.[74] Put in grounding terms (and telegraphically at that), they maintain that the fact that [our constitutional law is the Founders' law, except as lawfully changed] is grounded in the facts that [Hartian positivism is true] and that [the rule of recognition in the contemporary U.S. legal system is original-law originalism]. Their account is potentially vulnerable at either step.

I will not probe those vulnerabilities here.[75] *Originalism: Standard and Procedure* is not a defense of original-law originalism. It's an explanation of the need for some account that serves the function that original-law originalism serves—and, as far as Sachs argues here, the account need not even be an originalist one. So this is no place to argue that original-law originalism is not our standard today, or that something else is. I'll say only this. Hartian positivism makes notorious demands on the social facts that ground legal norms: no putative derivative norm counts as legal beyond what can be validated by criteria grounded in near-judicial consensus. And most observers of American constitutional practice think that the practice is marked by nontrivial conflict about what the determinants are, not only about how they cut on particular questions. This is one reason why some commentators have doubted that the *current* judicial practice plausibly supports original-law originalism. But even if it does, original-law originalism itself makes the content of our law today depend in significant part upon the convergent judicial practices from yesteryear. That feature substantially exacerbates the problem (insofar as it is one) of constitutional underdeterminacy on issues that reach the appellate courts. Moreover, it greatly magnifies the epistemic difficulty of figuring out what the law is, for, as Sachs cautions, we can't derive the fundamental standard at a given moment in

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[71] *See, e.g.,* Greenberg, *supra* note __; Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1340-41 (2017); Richard A. Posner & Eric J. Segall, *Faux Originalism*, 20 GREEN BAG 2D 109, 110 (2016).

[72] *See supra* note 38.

[73] Sachs, *supra* note 1, at 13.

[74] Baude & Sachs, *Grounding Originalism, supra* note __, at 1459.

[75] For some worries about Hart's version of positivism, though not about positivism generally, see Mitchell N. Berman, *Dworkin vs. Hart Revisited: The Challenge of Non-Lexical Determination,* __ OXFORD J. LEG. STUD. __ (forthcoming).

time—and hence "the actual law"—straight from the contemporary "actual judicial decisionmaking practice."[76] True, that's just the way things are *if* original-law originalism is our standard. But that has yet to be established, and some might find in these upshots reasons for doubt.

Conclusion

In broad strokes, the distinction that *Originalism: Standard and Procedure* offers—between accounts of the determinants of constitutional law and of how judges should resolve constitutional disputes—is surely right and helpful. But, in broad strokes, it's also more than a little familiar. While the article should prove eye-opening to those innocent of the basic distinction, regular consumers of the literature, let alone active contributors, might be uncertain just what they should take away. Hoping to stimulate further conversation, and in the philosophical spirit Sachs rightly champions, I have tried in this Response to sharpen some distinctions that he and I broadly share, and to relocate others. In the meantime, and from where I sit, *Originalism: Standard and Procedure* leaves originalism just where it had been: not our law.

[76] Sachs, *supra* note 1, at 23 (quoting Frank Cross).