# ORIGINALISM AND TRUTH-TELLING: A REPLY TO STEPHEN SACHS

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I thank Conor Casey and Stephen Sachs for their responses to my Vaughan Lecture. While both responses make valuable and insightful contributions, I will focus my reply on Sachs's response, since Casey and I seem to be generally in agreement.

Sachs focuses on my claim that a theory of constitutional adjudication needs to make a moral argument that justifies telling judges why they ought to decide constitutional disputes in a particular way rather than in some other way.[1] Why be an originalist, for example, rather than a common-law constitutionalist? In answering that question, a theory of constitutional adjudication cannot depend exclusively on a positivist, descriptive account of what the law is—even if Sachs correctly identifies originalism as the law—because knowing that originalism is the "law" (in a positivist sense of "law") does not tell us why anyone *ought* to follow originalism

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1. J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. PUB. POL'Y 307, 319 (2025) (Sachs discusses my argument alongside the argument of Francisco Urbina and Cass Sunstein that we must make a normative choice on a case-by-case basis, though he acknowledges that my argument need not adopt a case-by-case approach. Stephen E. Sachs, *Originalism and Truth*, 48 HARV J.L. PUB. POL'Y 345, 347 n.13 (2025). To be clear, my argument is distinct from Urbina's and Sunstein's. While I argue that whether to adopt a constitutional theory is a normative choice, I do not think that normative choices are always necessary in deciding cases, such that one's constitutional theory might vary from one case to the next.

in resolving constitutional disputes. We need a moral account of why judges should choose originalism over its rivals.

Sachs's response is one of "confession and avoidance."[2] He thinks my claim—that a theory of constitutional adjudication requires making a moral argument—is "true but trivial."[3] To Sachs, the moral arguments for adopting originalism "are the uninteresting ones, and all the important work is done" by the descriptive arguments for concluding that originalism is our law.[4] With characteristic humor, Sachs asserts: "Asking 'why be an originalist?' is like asking 'why be a heliocentrist?'"[5] Once one concludes, as a descriptive matter, that originalism is our law or that the Earth does indeed orbit the Sun, the normative reasons for acting accordingly are uncontroversial.[6]

And what are those uncontroversial reasons that Sachs puts forward? "If originalism turns out to be a true description of our law, then judges and other officials would have practical reason to say so, and not to mislead their audiences by omission, even unknowingly or inadvertently."[7] It is a "don't lie or deceive" argument, or a "don't be a hypocrite" argument.[8] "It's perfectly coherent to argue that judges or officials generally ought, as a matter of practical reason, to reconcile their applications of the law with their standard-issue statements about it, and that they ought to reconcile their standard-issue statements about the law with the best and most accurate theoretical understandings thereof."[9]

On the surface, this argument seems plausible, but only because it either relies on an implausible sociological assumption about

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2. Sachs, *supra* note 1, at 352.
3. *Id.* at 354.
4. *Id.* at 353.
5. *Id.* at 348.
6. *Id.* at 348–50.
7. *Id.* at 355.
8. *Id.* at 355–56.
9. *Id.* at 355. While Sachs sometimes describes his truth-telling argument as limited to "say[ing] true rather than false things," *id.* at 356, he elsewhere makes clear that he intends his argument to extend to "applying originalism" or "applications of the law" in resolving cases, *id.* at 352, 355.

judicial commitments or because it attributes to a positivist understanding of "law" an unearned normative heft. "Law" as understood by Sachs[10] (following H.L.A. Hart) is fundamentally a matter of social fact.[11] The law is what our officials *say* the law is.[12] That is why Hart described his approach to law as a form of "descriptive sociology."[13] So "law" in this positivist sense is purely descriptive, referring to how officials speak about the law.[14]

In defining what law is and in identifying originalism as our law, Sachs uses the positivist understanding of law,[15] relying on judges' "standard-issue statements about the law" (i.e., the social facts about what officials *say* the law is).[16] But he then makes the move that judges are engaged in either dishonesty or hypocrisy by failing to "reconcile their applications of the law with their standard-issue statements about it" and by failing to resolve that inconsistency in favor of applying originalism.[17] Yet, from the fact (supposing it is a fact) that officials speak as if originalism is our law, it does not follow that they ought to apply originalism in resolving constitutional disputes. Even granting (again, for the sake of argument) that it would be dishonest or hypocritical for judges to acknowledge

10. Sachs frames his argument against the importance of normative theory as valid under any understanding of law, not only under his positivist understanding of law. Nonetheless, I will examine how his argument against normative theory interacts with his positivist understanding of law, which will highlight the problems with his argument.

11. William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1463 (2019).

12. William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. LEGAL STUD. 178, 181 (2023). I will use "officials" throughout because that is Hart's language, but Sachs has an expansive understanding of whose statements determine what the law is. *See id.* at 195–96. His broader understanding of "officials" does not affect my argument below.

13. H.L.A. HART, THE CONCEPT OF LAW vi (2d ed. 1994).

14. Charles L. Barzun, *The Positive U-Turn,* 69 STAN. L. REV. 1323, 1341 (2017); Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?, in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, 235, 238–39 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

15. *See generally* Baude & Sachs, *supra* note 11.

16. Sachs, *supra* note 1, at 355.

17. *Id.* at 7–8.

originalism as the law in their statements but apply non-originalism in resolving cases, that does not tell us *which way* the inconsistency should be resolved.

In other words, the ostensibly uncontroversial moral premise that Sachs is willing to inject into his argument—that lying or hypocrisy should be avoided—does not lead to the conclusion that judges ought to be originalists (even assuming that originalism is our law in a Hartian sense). Judges might instead resolve the inconsistency by continuing to apply non-originalism and changing the way they speak about the law. Sachs does not provide a reason why the alleged inconsistency between judicial statements and judicial conduct must be resolved in favor of judicial statements.

Sachs might respond to this problem in one of two ways, neither of which succeeds. First, he might assert, as a sociological matter, that judges have a Hartian understanding of the law in mind when they affirm (ostensibly uncontroversially) that they ought to follow the "law." This would be a version of the oath argument that Sachs's co-author, William Baude, has advanced.[18] Thus, because judges have committed to following the law in a Hartian sense, they must adhere to originalism when it is identified as the law, rather than changing how they speak about the law. But Sachs offers no evidence that judges do, in fact, have a Hartian concept of law in mind when they affirm that they ought to follow the "law." Indeed, it is implausible to think that judges have a Hartian concept of law in mind, since it would be unreasonable for a judge to commit herself in advance to following *whatever* a society's social practices say the law is even if the content of the law turns out to be deeply unjust.[19] Rather, when judges agree that they should follow the law, they are presupposing (based on prior evaluation of and experience under the law) that the "law" in question will generally be morally sound (even if unsound in some instances), so that there would be

18. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2392–95 (2015).

19. *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 12 (2022).

no moral problem with committing to obeying it.[20] But insofar as Sachs is assuming a Hartian understanding of "law" throughout his argument, he has no entitlement to those moral assumptions, given that they are excluded from a Hartian concept of law. Sachs would therefore be left assuming an implausible commitment on the part of judges to applying the "law" in a Hartian sense—even if it is deeply unjust—simply because that is the "law" identified through officials' statements.[21]

Alternatively, Sachs might say that a judge ought to resolve an inconsistency between her statements about what the law is (originalist) and her conduct in resolving cases (non-originalist) in favor of her statements because refusal to do so would be to "subvert the law,"[22] which would be a violation of the rule of law. But this response presupposes that originalism's status as "the law" carries with it a presumptive duty of obedience, and under a positivist understanding of law—in which the law is simply a social fact—no such duty follows. If originalism's status as "law" means merely that officials tend to *speak* about originalism as if it were binding, that is an interesting sociological observation, but it is not a reason for anyone to actually treat originalism as binding—just reportage about how officials tend to speak. Thus, if a judge decided to apply non-originalism and to try to change the way officials talk about originalism, the only way for Sachs to criticize such a judge for violating a moral duty—rather than for committing a

20. Indeed, many arrive at those presuppositions having first made the normative choice in favor of a non-originalist constitutional theory, which they in turn apply in evaluating the moral soundness of the "law" of our Constitution prior to taking the oath. It would surprise them to learn, after having taken the oath, that they had committed to originalism because the "law" (in a Hartian sense) that they agreed to uphold meant something radically different than they had in mind (in a non-Hartian sense) when they took the oath.

21. Sachs might respond that the moral evaluation of the law prior to taking the oath is necessary, but since it is uncontroversial that the Constitution is generally morally sound (assuming that it is uncontroversial), his argument can still go through without implicating contested moral truth claims. I have responded to this argument elsewhere. *See* J. Joel Alicea, *Constitutional Theory and the Problem of Disagreement,* 173 U. PA. L. REV. 1, 27–29 (2025).

22. Baude & Sachs, *supra* note 12, at 198.

social faux pas—would be to make a moral argument for why originalism's status as "law" creates a presumptive duty of obedience to originalism. But that is precisely the kind of "high political theory" and evaluation of "the substance of particular legal rules" that Sachs claims (wrongly) he can "prescind[]" from offering.[23]

This discussion highlights the false (though humorous) equivalence in Sachs's comparison between heliocentrism and originalism. If it is true (and it is!) that the Earth orbits the Sun, there is no good reason *not* to act in accordance with this true fact. By contrast, if it is true that officials in our system tend to speak as if originalism was the law, there are potentially many good reasons *not* to act in accordance with this true fact. Officials might say that originalism is the law, but if originalism entails the perpetuation of racist and/or sexist views[24] or presupposes deeply unjust ratification procedures,[25] why should we apply originalism? Whether to adopt heliocentrism does not force us to confront such weighty questions, as Sachs concedes.[26]

The arguments necessary to sustain originalism are hardly "uninteresting" or widely accepted.[27] For example, to say, as Sachs might want to, that judges have a moral obligation to adhere to the limits on their authority imposed by the positive law—even when those limits would prevent the judge from stopping a moral injustice—is a controversial moral claim. Indeed, it is a claim I once devoted an entire article to defending,[28] yet my argument (alas) was not met with universal acclamation and acceptance.[29] As I have argued elsewhere, it is impossible to escape contested moral truth

23. Sachs, *supra* note 1, at 356.

24. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2324–26 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

25. *See, e.g.*, *id.*

26. Sachs, *supra* note 1, at 348.

27. *Id.* at 355.

28. *See* Alicea, *supra* note 19.

29. *See, e.g.*, Adrian Vermeule & Conor Casey, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), *https://iusetiustitium.com/pickwickian-originalism/* [https://perma.cc/G3Z6-YY7F].

claims in justifying a constitutional theory.[30]

Sachs's desire to avoid making such claims is why, even if he could succeed in convincing non-originalist judges that originalism is "the law" in a positivist sense, the response would likely be a collective shrug. Unlike Sachs's argument for originalism, I am not asking those jurists to submit to a theory that they might regard as unjust simply because we tend to speak as if the theory is the law. Rather, I am meeting them on their own ground and arguing that their moral judgment is *mistaken* --that originalism is morally *sound*. That argument, if correct, can carry the day for originalism, and the increasing awareness of its necessity helps explain why our natural law moment in constitutional theory has arrived.

30. Alicea, *supra* note 19, at 10–33.