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Eliminating Constitutional Law

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ELIMINATING CONSTITUTIONAL LAW

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A growing number of constitutional scholars are making arguments about how judges ought to interpret the U.S. Constitution that rest upon claims about the nature of law. I contend that this "jurisprudential turn" leads to a dead end. Interpretive prescriptions to constitutional decision-makers have to be morally justified, and whether something is law carries no moral weight. It is therefore morally irrelevant whether originalism, pluralism, or some other constitutional theory is most consistent with the nature of law or best positions a judge or other constitutional decision-maker to determine what the law is. Accordingly, analytical economy and clarity counsel in favor of legal eliminativism*—the view that we can, and should, do without the concept of law—are important domains of constitutional theory and practice.*

I. INTRODUCTION

Do judges need to grasp the nature of law to figure out how they ought to make constitutional decisions? Yes, according to a growing number of U.S. constitutional scholars. The most prominent and influential contribution to what has been called a "jurisprudential turn"[1] in constitutional theory is a positivist argument for *originalism*—the view that judges should apply the meaning that a constitutional provision carried when it was ratified.[2] In this Essay, I contend that such arguments should be abandoned.

It is uncontroversial that a public official's choice to put a constitutional theory into practice needs to be morally justified. The jurisprudential turn rests upon the premise that it is morally significant whether a theory positions a decision-maker to discover what the law is. Equipped with such a law-tracking theory, a decision-maker is at least somewhat better-positioned to discharge their moral obligations and may not need to reflect any further on what they ought to do.

This premise is false. Morality is hard, and it is tempting to cut moral inquiry short at the surface rather than plumbing its depths. But "legal interpretation takes place on a field of pain and death."[3] Constitutional decisions

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1. Conor Casey, *"Common-Good Constitutionalism" and the New Battle over Constitutional Interpretation in the United States*, 4 PUB. L. 765 n.12 (2021).

2. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3-4 (2018).

3. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

distribute and impose, authorize, and normalize coercion.[4] They define and limit the permissible nature and scope of our efforts to achieve collective goals. Given the stakes, constitutional theories stand in need of justification more robust than any theory of what law is can provide. Accordingly, I endorse *legal eliminativism*—the view that we can and should do without inquiry into the nature of law—in important domains of constitutional theory and practice.

Part II summarizes the leading contributions to the jurisprudential turn. I canvass Professor William Baude and Professor Stephen E. Sachs's positivist arguments for originalism; Professor Jeffrey A. Pojanowski and Professor Kevin C. Walsh's natural-law arguments for originalism; Professor Adrian Vermeule's natural-law argument for a nonoriginalist approach to constitutional interpretation; and discuss criticisms of these arguments.

Part III begins with an overview of *normative constitutional theory*—that is, the theory that is concerned with how decision-makers ought to engage in constitutional interpretation. I argue that any normative constitutional theory that goes beyond identifying the obligations that judges themselves recognize and tells them what obligations they *should* recognize stands in need of moral justification. I then ask whether the truth of any theory that purports to describe what law is, as distinct from criticizing existing law from a moral standpoint—any theory of *analytical jurisprudence*—can justify the adoption of a particular constitutional methodology. I answer, "no."

Part IV asks whether scholars or public officials ought to adopt or endorse constitutional decision-making strategies without even *considering* the nature of law or ascertaining something called "constitutional law." I argue that such a move would be premature. I also stop short of denying the utility of the concept of law to constitutional practice. A decision-maker might conclude that the morally salient reasons for theory-choice support consulting a limited set of legal materials called "law" rather than taking all morally relevant considerations into account in every case.

It is *also* plausible, however, that rule-based decision-making on the basis of wrong beliefs about constitutional law would be worse than all-things-morally-considered-decision-making. And the answer to whether a rule-based strategy is morally superior to an all-things-morally-considered strategy may differ across institutions and individuals. I leave these questions open. I do, however, propose that if our constitutional doctrine is not, in fact, governed by law, we should not pretend that it is.

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4. *See* Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029, 1044 (2015) (adopting the view, attributed by the author to Thomas Hobbes, that "[p]olitical power is coercive, even if based on consent, and law is an exercise of political power"); BENEDICTUS DE SPINOZA, THEOLOGICAL-POLITICAL TREATISE 63 (Samuel Shirley trans., 2001) (contending that "[a]ll men do, indeed, seek their own advantage, but by no means from the dictates of sound reason . . . . Hence no society can subsist without government and coercion, and consequently without laws . . . ."). *See generally* FREDERICK SCHAUER, THE FORCE OF LAW (2015) (contending that coercion is among the differentiating characteristics of law as a social phenomenon, albeit not an essential feature).

II. THE JURISPRUDENTIAL TURN

The jurisprudential turn began as a positivist turn. In a series of articles published in the mid-2010s, Will Baude and Steve Sachs contended that the debate over constitutional interpretation should be resolved on legal grounds in favor of originalism.[5] Their case for originalism has two prongs: (1) Positivism correctly holds that the content of the law is determined by psycho-social facts; and (2) it is a psycho-social fact that the current practices of U.S. courts include a form of originalism.[6]

There followed criticism as well as subsequent efforts by originalists and nonoriginalists to articulate their own theories of law and defend their preferred methodologies of constitutional interpretation on the basis of the latter theories. In this Part, I summarize the jurisprudential turn and assess where it has led normative constitutional theory.

A. POSITIVISTS FOR ORIGINALISM

The Baude-Sachs positivist case for originalism is a case for a particular *kind* of originalism, termed "original-law originalism." It holds 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."[7] The nuances of their case that original-law originalism is part of our positive law are beyond the scope of this Essay. I am focused on the *form* of the argument—specifically, its dependence upon a positivist theory of law that Baude and Sachs apply to U.S. constitutional decision-making.

Again, positivists characteristically hold that psycho-social facts determine the content of the law of a given jurisdiction—although the nature of those psycho-social facts is disputed.[8] Over the course of their writings, Baude and Sachs have become increasingly more explicit that they are *Hartian* positivists, committed to the most distinctive claims of the twentieth century's most influential positivist, Professor H.L.A. Hart. That means that they hold that the psycho-social facts that determine the law in the U.S. are established by a "rule

5. *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) [hereinafter Baude & Sachs, *Grounding Originalism*]; William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) [hereinafter Baude, *Is Originalism Our Law?*]; Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156 (2017); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) [hereinafter Sachs, *Originalism as a Theory of Legal Change*]; William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103 (2016).

6. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1491.

7. Baude, *Is Originalism Our Law?*, *supra* note 5, at 2355.

8. A point that Charles Barzun pressed in an extensive critique. *See* Charles Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1329 (2017) (observing that "legal positivists have long debated which facts are the important ones in determining the existence and content of law.").

of recognition" that U.S. officials consider themselves obligated to follow.[9] More specifically, they claim that U.S. officials view themselves as having an obligation to follow original-law originalism because—drawing from Hart—the "complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria . . . ."[10] make original-law originalism part of that rule of recognition.[11]

Precisely what is the nature of the obligation that follows from originalism's inclusion in our rule of recognition, and how strong is it? Baude has drawn upon Professor Richard M. Re's argument[12] that the Article VI promise that all U.S. officials are required to make to follow the Constitution[13] "gives the Constitution normative force . . . because it is the solemn assertion of a promise, with all the moral force that a promise carries."[14] Baude has also invoked democratic theory, claiming that "judges usurp power when they transgress the terms of the grant [of power] . . . ." that they receive from the public in exchange for their promises to the public to follow the law.[15]

Baude takes no position on whether "law has its own moral force."[16] But he writes as if his promissory and democratic arguments carry considerable normative heft. Explaining that the judicial obligation to original-law originalism is defeasible, Baude imagines a scenario in which "all judges openly decide cases on the basis of astrology" and posits that "[a]strology might be so irrational that its conventional legal status is irrelevant."[17] He offers this scenario as evidence of "how much the positive turn has transformed the normative question" by requiring originalism's opponents, in effect, to show that "it is as bad as astrology" rather than placing the burden on originalists to show that their methodology will "best . . . constrain judges" or "maximize human welfare in the long term."[18] It seems that part of the appeal of the positive turn to Baude is its capacity to shift the terms of the normative debate between constitutional methodologies in a way that "most originalists would be happy" to accept.[19]

Sachs has not adopted these arguments. But, in a short but illuminating reply article by Professor Andrew Coan calling for a constitutional amendment expressly making nonoriginalism the law of the land,[20] Sachs at points suggests

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9. *See* H.L.A. HART, THE CONCEPT OF LAW 94-95, 100-10 (Joseph Raz & Penelope A. Bulloch, eds., 2d ed. 1994) (discussing the rule of recognition).

10. *Id.* at 110.

11. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1465.

12. *See* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 314 (2016) (discussing the oath that elected officials take to follow the Constitution).

13. U.S. CONST., art. VI, cl. 2.

14. Baude, *Is Originalism Our Law?*, *supra* note 5, at 2394.

15. *Id.* at 2395.

16. *Id.*

17. *Id.* at 2396.

18. *Id.*

19. *Id.*

20. Andrew Coan, *Amending the Law of Constitutional Interpretation*, 13 DUKE J. CONST. L. & PUB. POL'Y 83, 85 (2018).

that legal status carries *some* normative heft. For instance, he writes that "the intuition behind original-law originalism is that the law may have taken a position on which interpretive rules apply—and, if it did, those rules *ought* to control."[21] In that very reply, however, Sachs distinguishes between normative arguments for originalism and those that he means to advance. What's going on?

Sachs appears to hold the view that legal scholars should focus their attention on describing the law and that political philosophers should specialize in law-adjacent moral questions. He laments the "tendency to move quickly from legal duties to moral duties, to consider constitutional questions as fundamentally normative questions."[22] He opines that "[t]he problem of political obligation is one best suited for more general philosophical inquiry, using more general philosophical tools . . . . ," thus endorsing a kind of division of labor between legal scholars and political philosophers that sees both groups capitalizing on their respective analytical advantages.[23]

Sachs does suggest that existing law can carry moral weight in certain circumstances. He proposes that one might think that "moral obligations sometimes take account of our legal and social ones . . . ."[24] He offers the example of tax collection: "[O]ne might think that current tax rates are too high, but also think that the recent tax cuts were poorly structured, and that in the meantime the IRS should collect precisely as much in taxes as current law prescribes."[25] This is not the stuff of a *general* moral obligation to follow the law—one that applies regardless of the law's moral content. But Sachs avers that scholars should tell the truth about what the law is and that it might at least sometimes be morally problematic for public officials to ignore existing law.[26]

The positive turn has been successful in changing the structure of the debate over constitutional methodologies within a normative constitutional theory. I would not be surprised if most originalists today do think that originalism is our law, and that it matters. But most is not all. Positivist arguments for originalism have been met with friendly but fundamental criticism from scholars who sought to lay different jurisprudential foundations for originalism.

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21. Sachs, *Originalism as a Theory of Legal Change*, *supra* note 5, at 876 (emphasis added).

22. Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST. L. & PUB. POL'Y 103, 113 (2018).

23. *Id.* at 114.

24. *Id.* at 110.

25. *Id.* at 112.

26. *See id.* at 110 (stating that "surely at least some instability is caused by any departure, however minor, from the existing positive law," and that "we can't help thinking, at least a little bit, about what existing law requires; and once we do, we can't help spending time debating whether one ought, morally, to comply."); *id.* at 112 ("[S]omeone who could take or leave originalism as an abstract matter might still think that . . . government has good reasons for operating according to law.").

B. NATURAL LAWYERS FOR ORIGINALISM

In *Enduring Originalism*, Jeff Pojanowski and Kevin Walsh defend originalism from a natural-law standpoint, drawing in particular upon the jurisprudence of Professor John Finnis—by far the most influential natural lawyer of the twentieth century.[27] Their case for originalism depends upon the original Constitution having salutary moral content.[28] We should begin as they do, with their critique of Baude and Sachs—a critique that has a descriptive and normative component.

Descriptively, Pojanowski and Walsh argue that Hartian positivism fails to capture the nature of law. Law, they contend, is an artifact rather than a natural kind—something that arises from human action rather than something that is discovered.[29] On their account, we cannot understand an artifact without understanding what it is *for*—and that means we must go beyond the psycho-social facts that positivists take to be constitutive of law to do what positivists aspire to do.[30] We cannot merely report; we must evaluate, such as by asking "what the *proper* role for legal interpretation is in light of the kind of law that the Constitution is."[31]

Even if we could identify the essence of law through mere reportage, Pojanowski and Walsh claim that we would come up short of any moral obligation to follow positive law. They observe that "standard legal positivism does not claim to establish even a prima facie duty to obey the law . . . ."; that when Hart speaks of perceived *legal* obligations to follow the rule of recognition, he is quite clear that the mere existence of such perceptions cannot give rise to a *moral* obligation to follow the law.[32]

Pojanowski and Walsh then critique Baude's arguments from promissory obligation and democratic theory. They claim that any legal entailments of the Article VI promise are contingent upon present political practice—thus, "[i]f legal insurrectionists take liberties with the oath or depart from the rule of recognition without rebuke, the positive turn . . . has nothing to say . . . ."[33] They also argue that "other established norms of political morality compete with the duty to follow positive law" under these and comparable circumstances.[34]

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27. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 110 (2016).

28. *Id.* at 115.

29. *Id* at 127; *see also* LAW AS AN ARTIFACT vii (Luka Baruzin, Kenneth Einar Himma, & Corrado Roversi, eds., 2018) (reporting that the "idea that law is an artifact" is commonly held by legal theorists).

30. Pojanowski & Walsh, *supra* note 27, at 127; *see also Law, Problems of the Philosophy of*, *in* OXFORD COMPANION TO PHILOSOPHY 500-504 (Ted Honderich ed., 2d ed. 2005) (describing varying theories of law).

31. Pojanowski & Walsh, *supra* note 27, at 112 (emphasis added).

32. *Id.* at 115.

33. *Id.*

34. *Id.*

In place of positivist justification for originalism, Pojanowski and Walsh offer natural-law justifications. They begin with Saint Thomas Aquinas's definition of law: "[A]n ordinance of reason for the common good, made by him who has care of the community, and promulgated."[35] They argue that *posited* law, understood as "law brought into being by human choice or act," serves the common good by securing "certain goods that persons and communities can achieve only by having authoritative legal institutions."[36] These include protection, coordination, and cooperation.[37] The need for posited law is, on their account, most acute where "the natural law does not dictate precise answers" to questions that have moral content but are underdetermined by morality, whether it be the elements of murder or the size of a legislature.[38]

The moral need to "settle on a reasonable mechanism of authority for making choices to promote the common good" gives rise to the moral need for law.[39] Pojanowski and Walsh acknowledge the possibility of unjust posited laws that are not "central case[s]" of law—they do not see law "do[ing] its job best."[40] But they argue that because the original meaning of the U.S. Constitution sets forth "reasonably just" posited law that is well-calibrated to the public good, "a strong, presumptive moral obligation to respect the authority" of the law does underwrite a methodological obligation to originalism.[41] As they put it: "An approach to the Constitution as law that does not treat the Constitution's legal determinations as fixed and authoritative jeopardizes the benefits this particular positive law offers our community."[42]

For Pojanowski and Walsh, the choice of constitutional theory is a morally weighty one; the identification of the law, a task that cannot be performed without moral analysis. But Pojanowski and Walsh do not—as did prolific anti-positivist Ronald Dworkin—treat legal decision-making as a mere branch of moral decision-making; they write that Dworkin "overstates the . . . importan[ce] . . . of judicial discourse and theory."[43] The next theorist we will consider embraces Dworkin's branch argument, arguing on moral grounds for nonoriginalism.

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35. *Id.* at 120 (citing ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-I, q. 90, art. 4, at 208 (Fathers of the English Dominican Province trans., William Benton 1952) (c. 1265-1273)).

36. *Id.* at 121.

37. *Id.*

38. *Id.* There is a resemblance here to Joseph Raz's argument that even a morally perfect society of angels would need law because they would need systematic guidance to coordinate their activities. JOSEPH RAZ, PRACTICAL REASON AND NORMS 159 (1999). Morality itself would not tell the angels which side of the heavenly circuits to fly on. *See id.*

39. Pojanowski & Walsh, *supra* note 27, at 124.

40. *Id.* at 123.

41. *Id.* at 100.

42. *Id.*

43. *Id.* at 110 n.69.

C. NATURAL LAWYERS FOR DWORKINISM

In a provocative essay, *Beyond Originalism*, Adrian Vermeule calls for conservatives to embrace "common-good constitutionalism"—an approach to constitutional decision-making that "takes as its starting point substantive moral principles that conduce to the common good," whose principles should be "read into the majestic generalities and ambiguities of the written Constitution."[44] The breadth of these principles can only be appreciated by quoting at length:

> Respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers' unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to "legislate morality"—indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority.[45]

As "read into" makes plain, Vermeule recognizes that no positive law promulgates all of these principles.[46] For Vermeule, the law is expressed in—not exhausted by—"positive law, sources such as the *ius gentium*—the law of nations or the 'general law' common to all civilized legal systems—and principles of objective natural morality . . . ."[47] These include principles of legal morality in the sense used by Professor Lon L. Fuller, who famously criticized Hart's positivism as being amoral: "the inner logic that the activity of law should follow in order to function well as law."[48] In practice, Vermeule would have constitutional decision-makers interpret the Constitution in a manner that is "methodologically Dworkinian," although in the service of conservative rather than (Dworkin's) liberal ends.[49]

Like that of the preceding scholars, Vermeule's normative prescription is expressly grounded in a theory of law and draws from a jurisprudential tradition. That it is less tethered to positive law than the prescriptions of others reflects only that (in the case of Baude and Sachs) his theory of law is different from theirs and that (in the case of Pojanwoski and Walsh) he interprets jurisprudential tradition differently.

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44. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

D. CRITICISM

Being the most influential of the above theories, the Baude-Sachs positivist case for originalism has drawn the most fire. Critics have mostly focused on whether Baude and Sachs are correct that originalism is our positive law. Professor Richard Primus, for instance, contends that Baude and Sachs are too attentive to judicial talk and not attentive enough to what judges actually do—and that what judges do is not original-law originalism.[50] But Professor Charles L. Barzun[51] and Faculty Fellow Andrew Jordan[52] question their belief that jurisprudence can shed useful light on legal practice and have supplied distinctive answers.

After testing the Baude-Sachs thesis against three leading accounts of positivism and finding it unjustified on any of them, Barzun suggests that Ronald Dworkin's approach to reconciling legal theory and practice might save it. Dworkin affirmed that "no firm line divides jurisprudence from adjudication or any other aspect of legal practice . . . ."[53] because accounts of what the law is, no less than judicial decisions, are "constructive interpretations" of legal practice that put that practice in its morally best light.[54] Barzun suggests that originalism-as-law might be justified as a constructive interpretation of our law, even if it is not part of our rule of recognition.

Andrew Jordan goes further, contending that no descriptive theory of law—emphatically including positivism—can be morally *relevant* to constitutional decision-making. He maintains that "any descriptive account of law will need normative supplementation in order to explain how it has relevant to questions regarding how any agent, including judges, should act."[55] He notes, however, that there are other, nonpositivist theories of law on offer "that make[] the content of the law hinge on the outcome of . . . normative arguments," and suggests that they might hold more promise.[56]

In a response to Pojanowski and Walsh, Professor Mikolaj Barczentewicz investigates whether their account of natural law supplies law with sufficient moral content to justify their strong endorsement of originalism.[57] He notes that Pojanowski and Walsh agree with Finnis that unjust but "formally or intra-systemically valid law"—that is, a law that is law in virtue of the local rule of

50. Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 44 (2016).

51. *See generally* Barzun, *supra* note 8 (describing the positive turn).

52. *See generally* Andrew Jordan, *The (Ir)relevance of Positivist Arguments for Originalism* (July 30, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3429417 (arguing against the positive turn).

53. RONALD DWORKIN, LAW'S EMPIRE 90 (1986) [hereinafter, LAW'S EMPIRE].

54. Barzun, *supra* note 8, at 1385; *see also* Charles Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 VA. L. REV. ONLINE 128, 146 (2019) (explaining Dworkin's theories).

55. Jordan, *supra* note 52, at 11-12.

56. *Id.* at 12.

57. *See generally* Mikolaj Barczentewicz, *Limits of Natural Law Originalism*, 93 NOTRE DAME L. REV. ONLINE 115 (2018) (arguing that Pojanowski and Walsh's positivity is not required in legal systems).

recognition—is the law.[58] It is not, however, entitled to moral respect due to a *central case* of the law. So, Barczentewicz contends that the Pojanowski-Walsh case for originalism does not rest upon legality alone but upon legality *plus* the reasonable justice of the original Constitution, which *is* a central case of the law.

One trouble with the Pojanowski-Walsh argument is that the content of constitutional law might not be settled on a question of moral importance. Under present circumstances, Pojanowski and Walsh say that decision-makers are obliged to apply originalism. But Barczentewicz observes that current legal practice may now or in the future exclude originalism. Pojanowski and Walsh might concede that that originalism would cease to be our law if that happened. There are, however, some suggestions that so long as the "conception of the Law of the Constitution endures," originalism may be permitted by their theory of law.[59] This could take them well beyond Finnis and towards a natural-law theory far removed from legal practice.

Vermeule's essay triggered swift and fierce criticism, most of which did not focus on his theory of law. An exception is Professor David Dyzenhaus, who charges Vermeule with misreading Dworkin's legal theory—"which, like originalism, seeks to show that it satisfies a dimension of 'fit' with the law of the constitution . . . ."—in favor of "the imposition of a vision of the conservative good that is determined outside of the legal order."[60] Dyzenhaus contends that Vermeule's illiberal substantive vision is incompatible with either Dworkin or Fuller, the latter of whom emphasized "the liberal virtues" of the principles of legality he articulated.[61]

No one has changed their position in the wake of these criticisms. Baude and Sachs have declined Barzun and Jordan's invitation to ground original-law originalism in jurisprudential theories with thicker moral content; they have doubled down on their dependence upon Hart.[62] Vermeule has soldiered on with common-good constitutionalism, resisting efforts to place it under the heading of originalism.[63]

Is there anything more to say? I think so. What has yet to be questioned in these debates is perhaps the most fundamental, unifying assumption on which the jurisprudential turn rests—namely, that accounts of what law is and in what U.S. constitutional law consists can support a compelling argument for what constitutional decision-makers ought to do. Barzun and Jordan do raise doubts about the relevance of jurisprudence to normative constitutional theory, but these doubts are limited in scope—both end up recommending that their targets choose

58. *Id.* at 119.

59. *Id.* at 122.

60. David Dyzenhaus, *Schmitten in the USA*, VERFASSUNGSBLOG (Apr. 4, 2020), https://verfassungsblog.de/schmitten-in-the-usa/.

61. *Id.*

62. *See generally* Baude & Sachs, *Grounding Originalism*, *supra* note 5 (detailing their positions on positivism).

63. *See* Adrian Vermeule, *On "Common Good Originalism"*, MIRROR OF JUST. BLOG (May 9, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/common-good-originalism.html (arguing the breakdown of common-good originalism).

other jurisprudential theories rather than suggesting that jurisprudence cannot help their causes. The next Part will frame and engage the issue of the general significance of jurisprudential theory to normative constitutional theory.

III. CONTRA JURISPRUDENTIA

The jurisprudential arguments for constitutional decision-making approaches canvassed above are works of normative constitutional theory. That is, they ask and answer the question of how judges and other officials *ought* to approach constitutional decision-making. The theories of jurisprudence on which they rely are *analytical* theories—they are accounts of what law is, rather than criticisms of existing law from a moral point of view.[64]

Two questions arise. The first is whether *any* theory of analytical jurisprudence bridges the is-ought gap between law and methodological obligation. The second is whether any moral weight that might seem to be attributable to something's status as law is, in fact, derived from moral goods that can be more constructively confronted and discussed without debating the nature of law. Answering these questions requires an initial overview of normative constitutional theory and analytical jurisprudence. Having provided that overview, I will argue that the jurisprudential turn overpromises and underdelivers.

A. NORMATIVE CONSTITUTIONAL THEORY, (BRIEFLY) EXPLAINED

Normative constitutional theorists propose that certain approaches to constitutional decision-making are correct and others are not. The criteria for correctness, however, varies.

Some normative constitutional theorists are ultimately concerned only with what Hart termed the "internal point of view"—that is, with what decision-makers who consider themselves obligated to follow legal rules do, given that felt obligation. These theorists do not evaluate the felt obligation—they do not ask whether one would be morally justified in following the law rather than doing something else. Nor do they claim that "correct" decision-making approaches really ought to be followed from an outside-the-system perspective. This kind of normativity arises in the context of any system of rules, including those that are widely regarded as having no outside-the-system moral weight—such as the rules of chess or dinner etiquette.[65]

Other normative theorists, however, make what Andrew Coan calls *substantive* claims.[66] They contend that the correct methodological approach "is

64. *See* SCOTT J. SHAPIRO, LEGALITY 2-3 (2011) (considering theories of jurisprudence).

65. On this "formal normativity," *see generally* David Enoch, *Is General Jurisprudence Interesting?*, *in* DIMENSIONS OF NORMATIVITY: NEW ISSUES IN METAETHICS AND JURISPRUDENCE 65 (Scott Shapiro, David Plunkett, & Kevin Toh, eds., 2019) (discussing general jurisprudence).

66. Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833, 859 (2017).

determined by the moral desirability of the decisions it produces, however moral desirability is defined."[67] These theorists are not indifferent to the moral consequences of whether originalism or something else is adopted by decision-makers. Rather, they offer moral reasons for adopting one methodology or another or for thinking that the choice is morally irrelevant.

It would be a mistake to conclude that there is some fundamental disagreement that divides those who are concerned with formal normativity, on the one hand, and those who make substantive claims, on the other. Those who engage in formal constitutional theory seek to identify and explain legal practices; those who engage in substantive constitutional theory offer moral reasons for preserving or changing legal practices. The aims of the respective projects are simply different. It is uncontroversial that methodological choices do carry moral weight and must ultimately be morally justified—even if a theorist who focuses solely on formal normativity is under no obligation to provide those justifications, and even though the grounds of morality are (here as elsewhere) disputed.[68]

The question of what would possibly morally justify a particular approach to constitutional interpretation is a vexed one. Originalism has been defended in terms of popular sovereignty, individual rights, and welfare-consequentialism. Nonoriginalists have defended their methodologies on the grounds of responsiveness to social change, as well as the value of social coordination. Professor Lawrence B. Solum has observed that a theorist might ground the moral claims advanced on behalf of a methodology on "deep" reasons—"foundational views in political philosophy, normative ethics, and/or metaethics"[69]—or on "shallow" reasons "that can be shared by citizens who affirm divergent views on deep matters."[70] To repeat, though: it is uncontroversial that one must have moral grounds for arguing that officials have an obligation to follow a constitutional methodology that is stronger than their obligation not to cheat at chess.

67. *Id.* at 837.

68. *See, e.g.*, R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141 (2004) (considering constitutional decision-making); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999) (discussing constitutional theories); Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853 (1993) (connecting natural and positive law); David Lyons, *Substance, Process and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745 (1987) (examining John Hart Ely's ideas).

69. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 28 (Apr. 13, 2018) (unpublished manuscript), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2940215.

70. *Id.*

B. ANALYTICAL JURISPRUDENCE, (VERY BRIEFLY) EXPLAINED[71]

Analytical jurisprudence encompasses positivist and nonpositivist accounts of the nature of law. Some scholars, like Professor Scott J. Shapiro, frame the inquiry in metaphysical terms and seek to identify properties that make instances of law, law rather than something else.[72] Others, like Professor Frederick Schauer and Professor Brian Leiter, reject identity conditions and essential characteristics in favor of Wittgensteinian family resemblances between laws and orders, legal obligations, and moral obligations.[73] These demarcation disputes notwithstanding, we can distinguish inquiries into the nature of law from efforts to interpret and critique whatever law is from a moral perspective. The latter distinction separates analytical from normative jurisprudence.

The paradigm case of analytical jurisprudence is positivism, which took root precisely because of the perceived importance of distinguishing what the law is from what it ought all-things-morally-considered to be. In England, it was John Austin and Jeremy Bentham who most sharply and systematically distinguished between the projects of understanding the law as it is and evaluating the law's goodness.[74] But H.L.A. Hart's critique of Austin's theory of law as command-backed-by-sanctions, together with Hart's account of law as a system of primary and secondary rules, brought analytical jurisprudence to the U.S.[75] It also inspired exchanges that came to structure jurisprudential discourse for generations.

Of these exchanges, two stand out in respect of their intensity and duration: the Hart-Fuller and Hart-Dworkin debates. Both of them saw Hart insisting upon a distinction between legal is and moral ought that Bentham and Austin had elucidated, and Hart's critics responding that law not only (1) has some irreducible moral content but (2) requires legal actors to engage in moral reasoning to determine the law's content. That a positivist might accept (1) but

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71. For surveys, *see* LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW (2014); OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman, Scott J. Shapiro, & Kenneth E. Himma eds., 2002); A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., 1999); Leslie Green, *Legal Positivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 3, 2003), https://plato.stanford.edu/entries/legal-positivism/.

72. SHAPIRO, *supra* note 64, at 8-10. *See* JULIE DICKSON, EVALUATION AND LEGAL THEORY 17 (2001) (describing analytical jurisprudence).

73. *See, e.g.*, Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 31 OXFORD J. LEG. STUD. 663 (2011) (discussing the Demarcation Problem); Frederick Schauer, *On the Nature of the Nature of Law*, 98 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 457 (2012) (explaining the nature of law); Dennis Patterson, *Alexy on Necessity in Law and Morals*, 25 RATIO JURIS 47 (2012) (considering Robert Alexy's positions).

74. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. H. Burns & H.L.A. Hart, eds., 1996) (1789) (examining the utility principle); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid Rumble, ed., 1995) (1832) (considering elements of jurisprudence); JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (2 Volumes) (R. Campbell ed., 2004) (1875) (questioning types of law).

75. *See* HART, *supra* note 9, at 18-78 (criticizing Austin); *id.* at 79-124 (providing a new positive account). For a discussion of Hart's influence and a concededly lonely defense of Austin, *see* Frederick Schauer, *Was Austin Right After All? On the Role of Sanction in a Theory of Law*, 23 RATIO JURIS 1 (2010).

reject (2) can be appreciated by considering the work of Hart's student and fellow positivist Professor Emeritus Joseph Raz.

According to Raz, one could not understand the nature of law without engaging in moral inquiry.[76] Morality was built into Raz's understanding of what made law a distinctive, normative system—namely, its claim of authority to override all-things-considered moral judgments about what ought to do, to the end of better-overall-compliance with people's moral obligations. If a particular legal system's claim was valid, the authority was legitimate; if not, then not.

But Raz went beyond Hart in claiming that moral reasoning *could not* be required to determine any particular aspects of the law's content[77]—for instance, whether a particular search is "unreasonable" within the meaning of the Fourth Amendment to the U.S. Constitution[78] or a punishment is "cruel" under the Eighth Amendment.[79] It does not matter whether there exists a stable consensus among legal actors that some moral principle is among the criteria of legal validity. The basic problem is that a moral criterion of legal validity cannot perform the function that law-as-such must perform—that of excluding or overriding moral reasons for action for the sake of all-things-considered morality.

Lon Fuller and Ronald Dworkin maintained, not only that law makes moral claims and carries moral weight, but that moral reasoning is required to identify the law. Fuller worried about the moral consequences of Hart's position; he speculated that legal positivism, coupled with a perceived moral duty to obey the law, might have led German lawyers and judges under Hitler to "accept as 'law' anything that called itself by that name."[80] He also proposed that law capable of creating a moral obligation had to have an "internal morality" that consisted in possession of eight properties: generality, publicity, prospectivity, coherence, clarity, stability, and predictability.[81] Anything that did not conform to these principles, he argued, *was not law.*

Dworkin's challenge to Hart and positivism more generally was less obviously connected to concerns about moral consequences. Dworkin contended that Hart neglected the *principles* that guide and constrain judicial discretion and that legal positivism could not explain this phenomenon because it was only concerned with rules.

How so? Dworkin held that principles sometimes originated "not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time."[82] That "sense of

76. JOSEPH RAZ, THE AUTHORITY OF LAW 315-16 (2d ed. 2009).

77. *Id.* at 46-49.

78. *See* U.S. CONST. amend. IV ("The right of people to be secure . . . against unreasonable searches . . . .").

79. *See* U.S. CONST. amend. VIII ("[N]or cruel . . . punishments inflicted.").

80. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 659 (1958).

81. LON FULLER, THE MORALITY OF LAW 38-39 (1964).

82. Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 41 (1967).

appropriateness" is a moral sense; principles have moral content; and you cannot identify them without engaging in moral reasoning.[83] Moreover, you cannot use rules to capture a principle because the entities are so different. Rules do not conflict, principles do; rules are dispositive wherever they apply, principles can be weighed against other principles.[84] According to Dworkin, positivism, as a system of rules that lack moral content and do not require moral reasoning to identify, cannot account for legal entities that are applicable in a nontrivial set of cases, have moral content, and require moral reasoning to identify.

Both Fuller and Dworkin might be said to have written within the natural-law tradition with which Bentham, Austin, and Hart saw themselves to be breaking. Both claimed that morality in at least some cases constitutes a criterion of legal validity. But it is to John Finnis that we owe the most substantial and influential engagement with and contribution to the natural-law tradition in twentieth-century jurisprudence.

Among Finnis's most distinctive claims are those concerning the legal validity of unjust directives and the importance of constructing a theory of law around the internal point of view of a particular participant in the legal system. As to the former, Finnis maintains that natural lawyers have never denied that positive law and morality might diverge without positive law ceasing to be law.[85] Rather, natural lawyers have been concerned to emphasize that an approach to law that excludes moral analysis will fail to enable the law to perform the salutary moral functions of which it is capable or generate moral obligations of obedience.[86] An unjust law is law, but it is defective law; a central case of law serves moral functions and generates moral obligations. Finnis's conception of the central case of law leads him to revisit Hartian positivism and make moral evaluation an essential part of identifying the law.

Recall that on Hart's account, the legal participant who takes the law-determinative internal point of view is not subjected to any moral analysis. It does not matter for the purposes of identifying the rule of recognition whether anyone is morally correct to follow the rule; their perceived obligation is all it takes for law to emerge. Finnis argues that the law-constitutive viewpoint is that of the participant (1) who is following the law because they believe that the law imposes a defeasible moral obligation and (2) who is reasonable in so concluding[87] that it (3) requires moral analysis.

What would make a participant in a legal system reasonable in concluding that they are under a moral obligation to follow the law? Finnis argues that law ought to be understood as performing a moral function and that a reasonable

83. *Id.* at 23, 41.

84. *Id.* at 25, 27.

85. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 363-66 (1980) (considering *lex injusta non est lex*).

86. There is considerable debate about whether Finnis's characterization of the natural-law tradition is accurate. *See, e.g.*, Jonathan Crowe, *Natural Law Beyond Finnis*, 2 JURISPRUDENCE 293 (2011) (examining natural law); Mark C. Murphy, *Finnis on Nature, Reason, God*, 13 LEG. 187 (2007) (looking at John Finnis's work). It does not matter for my purposes.

87. *See* FINNIS, *supra* note 85, at 9-15 (selecting meanings and viewpoints).

participant will appreciate that moral function—one of resolving as many disputes as possible and thereby promoting the "just harmony" of the community.[88] It is not that there is a correct moral answer to every question. Rather, the moral need for law arises because "while there are many ways of going and doing wrong, there are in most situations . . . a variety of incompatible right (i.e., not wrong) options."[89] It is in large part the business of law to settle them one way or the other rather than merely to proscribe wrong options. And this privileging of the standpoint of a reasonable participant will not always yield just law that gives rise to an obligation of obedience. Only within a "by-and-large just legal system" will "every formally or intra-systemically valid law and decision" be entitled to "moral respect-worthiness."[90] Still, the reasonable participant's grasp of the moral purpose of law and of its moral significance distinguishes Finnis's account from those of positivists.

More recently, Scott Shapiro has offered a positivist account that seems at first blush to be quite similar to Finnis's. Shapiro conceptualizes law as a plan for "address[ing] the moral defects of alternative forms of social ordering . . . ."[91] By "guid[ing], organiz[ing], and monitor[ing] the shared activity of legal officials . . . . ," law seeks to "address those problems that less sophisticated methods of coordinating social activity and guiding action are unable to resolve."[92] Law need not *succeed* in these aims—in which case, borrowing from Finnis, it is defective law. It must, however, *have* those aims to distinguish it from the rules governing crime syndicates, which may generate moral benefits but only as a happy accident of facilitating the accomplishment of the shared criminal ends of syndicate members.[93]

Finnis and Shapiro agree that all law has moral aims. They disagree about the jurisprudential significance of the content of those moral aims. Whereas Finnis pronounces defective legal regimes that are directed at unjust ends, Shapiro admits that unjust legal regimes can be central cases of law—they can be excellent at promoting evil.[94] Their moral *content* does not affect their legal content, nor is moral reasoning necessary to identify that content.

Perhaps the most stimulating and original nonpositivist account of recent vintage is Professor Mark Greenberg's moral impact theory of law.[95] Its thesis is easily summarized: The impact of the actions of legal officials on our moral obligations is the law. Legal obligations are moral obligations generated by a legal system—we do not even *have* law until we determine how official actions have affected our "moral profile" (that is, our moral rights, duties, powers, and

88. John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 7 (1990).

89. *Id.*

90. John Finnis, *Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's "Ideal Dimension"*, 59 AM. J. JURIS. 85, 107 (2014).

91. SHAPIRO, *supra* note 64, at 213.

92. *Id.* at 214.

93. *Id.* at 215-26.

94. *See id.* (considering the moral roles of just and unjust regimes).

95. *See generally* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1289 (2011) (elaborating the moral impact theory of law).

immunities).[96] Greenberg offers his moral impact theory as an explanation of why there exist deep, seemingly intractable, disagreements about the meaning of constitutional provisions, statutes, regulations, and judicial doctrine.[97]

Analytical jurisprudence is not committed to moral relativism or detachment from moral inquiry. At some level, each of the scholars discussed above sought to make the world a better place. Yet, each of them aspired to provide an account of what law is, and admitted that the law of a particular jurisdiction might fall short of what would be all-things-considered morally best under ideal circumstances. Hart insisted that Nazi Germany had law; Dworkin denied it, but admitted that the Fugitive Slave Act was law.

Of the above scholars, only Dworkin engaged at length the relationship between the theory of law and normative constitutional theory. As he saw it, there was no meaningful difference between law and adjudication—his prescription for judges followed directly from his theory of law. We have seen that, to varying degrees, all proponents of the jurisprudential turn believe that exploring the question of what law is can enrich normative constitutional-theoretical argument. I will argue otherwise.

C. AGAINST THE POSITIVE TURN

In *The (Ir)relevance of Positivist Arguments for Originalism*, Andrew Jordan argues that positivist arguments cannot justify originalism because the mere existence of positive law cannot give rise to a moral obligation.[98] These arguments are essentially sound; I will summarize them here before providing additional reasons to reject the positive turn.

Correctly perceiving that Baude and Sachs are most indebted to Hart, Jordan points out that Hart himself took pains to stress that affirming the existence of law is not "'to accept the law or share or endorse the insider's internal point of view or in any other way to surrender [a] descriptive stance.'"[99] Indeed, Fuller attacked Hart precisely because he believed the internal point of view to be amoral. Fuller claimed that Hart's theory was descriptively wrong because the law has irreducible moral content and that the theory was dangerous because it could persuade people to obey unjust rules. Hart responded, not by contending that law could underwrite moral obligations but by contending that it was both descriptively and morally better to think of law and morality as distinct. Agreeing with Fuller that people ought to refuse unjust directives, Hart maintained that morally justified disobedience was more likely if people *did not*

96. *Id.* at 1308-09.

97. Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 72-73 (Leslie Green & Brian Leiter eds., 2011).

98. *See generally* Jordan, *supra* note 52 (discussing positivist arguments).

99. *Id.* at 8 (quoting THE CONCEPT OF LAW, *supra* note 9, at 242).

consider themselves to have even a defeasible moral obligation to follow the law.[100]

Perhaps Hart was wrong about that. But Baude and Sachs do not make that case in their joint writings. Baude explicitly disclaims it, relying instead upon promissory obligations and democratic theory. Promissory obligations are said to generate a moral obligation to do that which is promised; democratic theory is said to generate an obligation to do what one was elevated by the public to an office to do, within the terms of the "contract" one has made with the public.

Baude's recourse to these arguments also tells us something about the intended takeaway of his case for originalism. He is not concerned merely with formal normativity; that is, whether legal actors consider themselves obliged to play by certain rules. Professor Guha Krishnamurthi argues that Baude neglects the possibility of a "good replacement theory"—say, a pluralist account.[101] But perhaps this neglect can be attributed to Baude's perception of the force of the promissory and democratic-theoretic arguments in favor of originalism.

Indeed, initial appearances notwithstanding, the promissory and democratic-theoretic arguments for original-law originalism *do not* depend on Hartian positivism being true or originalism being our positive law. Imagine that Fuller's critique is accurate and Hartian positivism fails to capture the nature of law. Or that Hartian positivism is true, but originalism is not part of our rule of recognition, as Barzun, Primus, and others have averred. Baude's argument that judges ought to apply originalism retains its force.

Here's why. The argument for a promissory obligation is contingent upon a judicial oath of office, which Baude reproduces in a footnote. It provides:

> I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.[102]

This promise has three components. The judge promises to (1) "administer justice without respect to persons"; (2) "do equal right to the poor and to the rich"; and (3) "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." Baude interprets only last component, stating that "the 'duties' mentioned in the oath have traditionally been understood to require judges to apply the law . . . ."[103]

The only way in which the traditional understanding of judicial duty to which Baude refers could underwrite an oath-based obligation to original-law

100. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617-18 (1958).

101. Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 B.Y.U. L. REV. 401, 463 (2021).

102. Baude, *Is Originalism Our Law?*, *supra* note 5, at 2394 n.255; 28 U.S.C. § 453 (2006).

103. Baude, *Is Originalism Our Law?*, *supra* note 5, at 2394 n.255.

originalism is if that understanding incorporates some legal criteria that original-law originalism satisfies in some distinctive way. Otherwise, a judge might adopt and apply some other methodology in the good-faith belief that the latter is more consistent with the nature of law, as they understand it. But if one checks Baude's source for the proposition about judicial duty—Professor Philip Hamburger's *Law and Judicial Duty*—one finds nothing so specific.[104] This does not mean that Baude is wrong. But it does mean that one cannot get to a promissory obligation to originalism with a generic duty to obey the law plus Hartian positivism.

Fortunately for Baude's argument, a promissory argument based on the oath need not depend on any particular theory of legality. The oath refers, after all, not to "the law" but to the "Constitution and laws of the United States." Depending upon the specifics of one's theory of the meaning of this language, a public commitment to the "Constitution and laws of the United States" might underwrite some form of originalism. If so, it would not matter whether originalism is part of our rule of recognition; an oath-taking official will have promised to follow it, regardless of its legal validity.[105]

Unfortunately for Baude's argument, it is doubtful that a promise can create *content-independent* moral reasons for action. If I promise a friend that I will take care of their dog while they are away on vacation, it seems like I have taken on a moral obligation to do precisely that. But no one thinks that a Mafia *soldato*'s promise to kill a storeowner's child because the storeowner is late on his "protection" payments can give rise to a moral obligation. Richard Re—upon whom Baude draws for his promissory argument—acknowledges that "an undemocratic regime does not become any more democratic simply because its rulers swear allegiance to the political order they oversee," and analogizes the latter promises to a promise to commit violent crimes.[106]

Now, Re argues that the U.S. *does* have a democratic structure and that "[t]hanks largely to the oath and the practices it generates, the people understand that officials, both elected and appointed, will assume a duty to abide by the Constitution."[107] But nothing about that argument turns upon the Constitution's legal status. Although Re refers to duties to obey the law *and* duties to the Constitution, it is his theory of the Constitution—as understood within our constitutional culture—that is most important to his promissory account of the moral obligation that public officials have to the meaning of the Constitution's text at the time of their promise.[108]

This is no help to any case for a moral obligation to follow original-law originalism. If in a democratically structured polity, official promises to Φ can

104. *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (discussing judicial duty).

105. For doubts about whether any theory of the Constitution can underwrite a methodological choice, *see* Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515 (2019).

106. Re, *supra* note 12, at 314.

107. *Id.*

108. Hence the title of the Article. It is "Promising the Constitution," not "Promising the Law."

trigger moral obligations to Φ, everything turns on what Φ is. There may be a great deal of overlap between the-Constitution-as-understood-at-the-point-of-oath-taking (C1) and the-original-Constitution-plus-any-lawful-change (C2). But the Venn Diagram will not be a circle. And it might be not only reasonable but morally obligatory for a promising official to adopt a form of nonoriginalism rather than original-law originalism to discharge their duty to C1 rather than C2.

Baude's argument from democratic theory also fails to persuade. Baude expresses agreement with Raz that "'there can be no other way [than the law] in which [judges] can justify imprisoning people, interfering with their property, jobs, family relations, and so on . . . . ,'" and adds that "judges usurp power [from the people] . . . ." when they go beyond the law.[109] But Raz is explicit that law is insufficient for morally legitimate coercion; that although law claims moral authority, that claim is not even presumptively morally legitimate. Unpacking Raz's arguments against content-independent legal obligation enable us both to appreciate why they cannot make Baude's argument work, as well as why a slightly different argument predicated on the moral benefits of law-as-such cannot work either.

Raz's *exclusive* positivism denies that morality can be included in the criteria of legal validity or that moral reasoning is required to identify the law. It does not follow, however, that Raz believes the law to be morally neutral. Rather, he holds that law necessarily makes moral claims and can perform a valuable moral function—that of overriding people's moral reasoning in order to overall-better compliance with morality.

Not all law, however, yields a net increase in compliance with morality. And even if *a* law does yield moral benefits net of costs, the case for a general moral obligation to follow *all* law fails. Consent-based theories of legal obligation fail because for most people, consent is neither sought nor given.[110] Arguments that disobedience will undermine a generally valuable system of social cooperation are inapplicable to most people, who are incapable of either disrupting the system enough on their own or setting a dangerous-enough example.[111] And—crucially—where either consent is given or disruption is plausible, it is not a legal status that is creating the moral obligation.[112] It is the particular circumstances that make promise-breaking and disobedience socially destructive.[113]

Raz goes on to demonstrate that any morally beneficial properties that we might be inclined to attribute to law-as-such do not actually depend upon the legal status and thus cannot underwrite an obligation of obedience to whatever the law is. He offers the example of river pollution. Keeping a river clean for public use, Raz observes, is morally good "whether the practice of keeping the

109. Baude, *Is Originalism Our Law?*, *supra* note 5, at 2395 (quoting Joseph Raz*, On the Authority and Interpretation of Constitutions*, CONSTITUTIONALISM 152, 160 (Larry Alexander ed., 1998)).

110. *See* RAZ, *supra* note 76, at 237-40 (contemplating moral reasons for obedience).

111. *Id.*

112. *Id.*

113. *Id.*

rivers clean is sanctioned by law, is maintained by exhortations and propaganda undertaken by enthusiastic individuals, or whether it grew up entirely spontaneously."[114] Conversely, polluting the river is morally bad regardless of whether there is any law on the subject.

If the only way to keep the river clean is to impose legal requirements, an individual decision to violate the law is morally bad to the precise extent that polluting the river is bad, absent further situation-specific details that give away the legal-status game. If law is often necessary to "reinforce[] protection of morally valuable possibilities and interests and encourage[] and support[] worthwhile forms of social co-operation . . . . ," it does not follow that there is some moral significance to legal status.[115] In an evil legal system, there is no reason to trust any given law to improve the moral situation and thus to merit obedience. In a good and just legal system, one has, other things being equal, good reason to believe that there is an independent moral reason to follow any given law, but it is the general moral quality of the system that is ultimately responsible for this confidence, not legal status.[116]

Back to Baude. Public officials might have a general moral obligation to follow whatever they have promised to follow as a condition of being elevated to office. But whether they do have such an obligation turns upon the content of the promise, not upon the nature of law or on the content of existing law. It might be that Hartian positivism is true; that our law is reasonably just; and that original-law originalism best positions decision-makers to distribute the benefits of reasonably just law. Still, positivists cannot read reasonable justice off of legal status; they must perform a moral inquiry into the law. Finally, even if the inquiry worked out in original-law originalism's favor, the legal status would not add anything to the moral ledger above and beyond the particular moral goods that law-as-such/our law delivers in particular confers.

The last point is worth unpacking further. In criticizing Baude and Sachs, Jordan discusses a "double counting worry"—a worry that appeals to the moral value of obedience to the law while simultaneously arguing that law-as-such has certain moral benefits will end up stacking the normative deck in favor of purportedly law-tracking constitutional methodologies.[117] Again, there are no independent moral benefits to law-as-such under a positivist theory of law. Any legal protection of possibilities and interests, any legal support of social cooperation, derives its moral value from moral reasons that must stand on other grounds. Accordingly, to argue that a law-tracking constitutional methodology is supported by a moral obligation to follow the law *and* the moral benefits conferred by law-as-such is to invite confusion comparable to that of a moral theorist "who treat[s] the reasons in virtue of which an act was wrong as reasons

114. *Id.* at 249.
115. *Id.*
116. *Id.* at 246-49.
117. Jordan, *supra* note 52, at 24-31.

not do it, and then also treat[s] the fact that the act is wrong as an additional reason not to do it . . . ."[118]

There are several ways to avoid this double-counting problem. One would entail arguing that original-law originalism captures more moral benefits than its alternatives—say, by solving coordination problems and settling disputes better than *pluralism*, which incorporates some role for original meaning but denies it priority over precedent, text, contemporary values, and so forth. Another would involve claiming that the reasonable expectations associated with official promises to follow the Constitution are best met through original-law originalism because of how that promise was originally/is presently understood. And a third way around would see originalists contending that—consequences and promises aside—original-law originalism best equips officials to comply with the terms of their democratically delegated power, which terms are best fulfilled by means of original-law originalism.

Advancing each of the above arguments would invite counterarguments touting the moral reasons to adopt alternative approaches. It would also require the abandonment of any appeals to any supposed moral duties to obey law-as-such or our law in particular. There are no such duties, and any discussion of these nonentities should be eliminated in the name of analytical economy and clarity, to say nothing of ontological hygiene.

What about Sachs? If all he wants to do is to show that originalism is, in fact, our law, this critique does not apply. If he is committed to the further claim that constitutional decision-makers may under some circumstances have some moral obligation to take account of or follow existing law, the critique does apply. If the IRS should collect taxes as current statutes prescribe until those collection procedures are properly changed, that "should" does not depend upon Hartian positivism being true. The coordination and social-expectation-related benefits of obedience would carry as much moral weight as they carry, even if it so happened that positivism is false and none of these procedures turned out to be law. So, too, for any moral benefits associated with following original-law originalism.

Positivism lacks the resources to earn original-law originalism a moral presumption in its favor. Any promissory or democratic-theoretic arguments for using a constitutional methodology that tracks positive law must be weighed against moral arguments in favor of other methodologies, without an assist from legal status. It remains to be seen whether nonpositivist theories of law can lend more support to either originalism or other methodologies.

D. AGAINST THE NATURAL-LAW TURN

Much of the above criticism sounds notes that may call to mind Pojanowski and Walsh's natural-law intervention. Like Pojanowski and Walsh, I have

118. *Id.* at 26.

argued that the truth of positivism cannot underwrite any moral obligations to follow the law. Like Pojanowski and Walsh, I have argued that Baude's promissory and democratic-theoretical arguments for original-law originalism are unpersuasive. But Finnisian natural-law arguments for originalism are also defective. So is Vermeule's natural-law argument for nonoriginalism.

1. Pojanowski and Walsh

Recall that on Finnis's account, the law has a moral purpose, and a central case of law will provide rules for resolving matters that are underdetermined by morality. The participant in the legal system whose internal point of view determines the law recognizes this moral purpose and interprets posited law in light of that purpose. Moral reasoning is inescapable.

But recall as well that Finnis acknowledges the legal status of unjust but intra-systemically valid norms—that is, norms that satisfy Hartian requirements. Unjust positive law does not give rise to general obligations to follow its dictates. Pojanowski and Walsh stipulate that the original Constitution is reasonably just in arguing for a moral obligation to follow originalism. Like Baude's promissory and democratic arguments, this stipulation reveals the inadequacy of the operative theory of law to the normative argument that is being advanced.

Pojanowski and Walsh make no systematic effort to demonstrate that the original Constitution is reasonably just. But they insist that legal status does not give rise to moral obligation. They are as explicit on this point as Baude and Sachs; the crucial work is being done by other considerations.

Pojanowski and Walsh contend that the original Constitution is not merely law but a *central case of law*—it performs the moral functions that law-as-such performs *well*. Central cases of law are a net moral gain for those who live under them, and for that reason, people in general—perhaps officials in particular—are morally obligated to follow the norms that are promulgated in conformity to them. An unjust law that is not entitled to obedience might be generated from time to time. But legal status is sufficiently strong evidence of morality that there is a strong presumption in favor of following the law.

It might be thought that this is an account of law-as-such/existing law that can lend support to a moral argument for originalism. We need to know the nature of law to identify central cases of law; a central case of law is reasonably just; accordingly, the original Constitution is reasonably just and should be followed via originalism because originalism is our law. But upon close examination, Pojanowski and Walsh's argument does not need a theory of law, and it is not stronger because it has one.

To see this, imagine that Finnisian natural-law theory is wrong and that positivism is true. Imagine that an unjust legal system is not defective in any sense that analytically matters; and that our (positive) law does not, in fact, require originalism. Imagine, however, that absolutely everything else that

Finnis, Pojanowski, and Walsh say about the moral value of what they (wrongly, we are imagining) identify as central cases of legality and about what Pojanowski and Walsh say about the morality of the original Constitution is true. Is the case for originalism any weaker for it?

It seems not. Would it somehow be less morally important that the original Constitution offers "a fixed and authoritative legal settlement of certain matters contributing to the common good of a complete political community . . . ."?[119] Does it make the Constitution's provision for the "liquidation" of previously unsettled matters less reasonable?[120] Does it make the original Constitution overall less just? Would a person be any less bound by morality to support it?

I do not see why any of the answers to these questions would be "yes." Hartian positive law still would not give rise to a moral obligation, so the fact that pluralism is our law would not generate a moral obligation. Even if pluralism is reasonably just, why would one opt for it rather than originalism unless the former is somehow *more* just than originalism?

One answer might be that Hartian positivism captures coordination benefits that pluralism would be better-calibrated to capture. But now, as with Baude and Sachs, we see that law-as-such/existing law is offering nothing of moral weight. The comparative moral worth of constitutional methodologies is contingent, not upon law-as-such but upon the particular benefits that are (arguably) associated with the law.[121] We should talk about those, consider as well the costs, and similarly evaluate other options. And we should do all of this without any morality-based presumption in favor of a methodology that is said to be required by law or to be law-tracking. As in the positivist case, inquiries into the nature of law-as-such/existing law are unnecessary and invite double-counting.

Indeed, the double-counting worry looms larger in the natural-law setting than it does in the positive-law setting. Finnis, Pojanowski, and Walsh distinguish between central and defective cases of law; the former can generate moral obligations, the latter cannot. And, Pojanowski and Walsh are careful to specify that only because the originalism Constitution is a central case of law does it generate moral obligations. But the subtle distinctions that they draw—for instance, between "positivity" and "positive law"[122]—their references to "a moral need for positive law,"[123] and their criticism of Baude for his failure to

119. Pojanowski & Walsh, *supra* note 27, at 126.

120. *See id.* at 128-35 (discussing liquidation and the Constitution).

121. This might sound at first blush like the excuse given by Tom Cruise's cynical hitman, Vincent, in Michael Mann's classic action film *Collateral*. Asked by a horrified cab driver whether he killed someone who has just fallen from a balcony onto the cab, Vincent answers "No, I shot him. Bullets and the fall killed him." COLLATERAL (Dreamworks 2004). The line is darkly funny because it is obvious that Vincent is *responsible* for the bullets and the fall killing the victim. Here, it might be argued that a norm's status as law is responsible for any moral benefits that natural lawyers say are associated with law. But that is not so. Even if natural lawyers are wrong about the nature of the law, the features they (wrongly) think are essential to legal status will still capture those moral benefits. Vincent is responsible for the killing because he is responsible for the bullets and the fall; legal status is not responsible for any moral goods because those goods are captured regardless of legal status.

122. Pojanowski & Walsh, *supra* note 27, at 143.

123. *Id.* at 121.

provide a moral justification for legal obligation might lead readers to (wrongly) conclude that they think that *mere* legality can generate moral obligation. Positivists have been far more explicit in denying that this is so.

2. Vermeule

Vermeule describes his common-good constitutionalism as "methodologically Dworkinian."[124] He has yet to flesh out what that methodological commitment entails.[125] But I see two broad Dworkinian options available, corresponding to two periods in Dworkin's jurisprudence. I will call them "Herculean Dworkin" and "Hedgehoggian Dworkin."[126]

Herculean Dworkin is the Dworkin of *A Matter of Principle*, *Taking Rights Seriously*, and *Law's Empire*.[127] His model adjudicator, Hercules, engages in a two-step interpretive process.[128] Hercules looks to existing legal materials—constitutional provisions, statutes, precedents, etc. He also interprets these materials to make them the morally "best" that they can be by identifying the moral principles that both "fit" them and provide the most compelling moral justification for them.[129] There may be many fitting principles, but a judge must select that which is morally superior. The lynchpin for the requirement of coherence-over-time is the (alleged) moral value of integrity.

Hedgehoggian Dworkin is named for Dworkin's final book, *Justice For Hedgehogs*. Dworkin, in a brisk final chapter, collapsed the two-step process into one step.[130] He proposed that law is a branch of political morality and argued that there is no point in distinguishing between "legal" and "moral" reasons for judicial decision-making.[131] Instead of determining first what fits "the law" and then considering what "morality" requires, all reasons for a decision ought to be weighed at once.[132] Fitness with prior legal materials is among them—morality ought to be sensitive to our history, including unjust legal decisions.[133]

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124. Vermeule, *supra* note 44.

125. Others have started to flesh out common-good constitutionalism. *See* Casey, *supra* note 1 (describing Vermeule's methodology); Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, *The Common Good and Legal Interpretation, A Response to Leonid Sirota and Mark Mancini*, 30 CONST. F. CONSTITUTIONNEL 39 (2021) (examining Leonid Sirota and Mark Mancini's arguments).

126. Debate continues about whether Dworkin did in fact amend his legal theory in any significant way. He *said* that he did, and I take him at his word. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 402 (2011) (considering the meaning of law) [hereinafter HEDGEHOGS]. It turns out not to matter.

127. *See generally* LAW'S EMPIRE, *supra* note 53 (conceptualizing law).

128. Whether these are sequential or Hercules does them altogether at once is not material here. The important point for my purposes is that he does inquire into both fit and justification, and that fit limits the set of available justificatory principles.

129. LAW'S EMPIRE, *supra* note 53, at 67, 336-47, 352-53.

130. HEDGEHOGS, *supra* note 126, at 400-17. For an effort to elaborate this framework, *see* Jeremy Waldron, *Jurisprudence for Hedgehogs* (July 5, 2013) (N.Y.U. Sch. L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 13-45), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309.

131. HEDGEHOGS, *supra* note 126, at 401-04.

132. *Id.*

133. *Id.*

Why might the difference between Dworkins be important to Vermeule? Herculean Dworkin is vulnerable to the objection that there is no good moral case for present-day judges to have recourse to anything but the correct moral principles, regardless of whether they fit our legal history.[134] Hedgehoggian Dworkin maintains that the morally best fitting principles *are* the correct moral principles; that it is all-things-considered morally best for judges to deploy principles that are sensitive to past moral compromises. Given fitting and morally attractive principle A and unfitting-but-also-morally attractive principle B, a judge *could not* produce morally better results by choosing A.

Imagine that Vermeule selects Herculean Dworkin. Any inference he would draw from the legality or law-tracking-ness of Dworkinism to moral justification would be questionable. Even the "best" principles that fit the legal history of an unjust regime—say Nazi Germany or Apartheid South Africa—would be morally deficient. Dworkin himself did not think that Nazi judges had any moral obligation to follow the law.[135] His arguments from the obligation to follow the law presume a reasonably just legal order.

At the risk of tedious repetition, to the extent that reasonably just legal orders are capable of generating moral obligations to do as the law requires, *they do not do so because legal status has moral value*. Dworkin's own arguments for moral obligation to the law rested upon a complex theory of associative obligations that may or may not be correct but definitely do not depend upon anything's status as law, any more than do the arguments we have already surveyed.[136]

Suppose, then, that Vermeule selects Hedgehoggian Dworkin. Now, legal status offers conclusive evidence of all-things-considered morality. Following the morally best principle that exceeds a threshold of fit is legally required and morally optimal. Any moral compromise is only apparent.

If Hedgehoggian Dworkin is right about the nature of law, neither Vermeule nor normative constitutional theorists more generally have any need for or indeed *can use* legal status to justify the choice of a particular constitutional methodology. Law is just a label to be placed on the results of an inquiry into what it is all-things-considered morally best to do, given the particular conditions in which judicial decisions are made. To say "the law requires Φ in this case" communicates no more and no less in favor of Φ than "morality requires Φ in this case." To say that "our law requires nonoriginalism" communicates no more and no less in favor of nonoriginalism than "morality requires nonoriginalism."

If, on the other hand, Hedgehoggian Dworkin is wrong, all is not lost for Vermeule. He can still make every moral argument for the all-things-considered goodness of common-good constitutionalism that comes to his mind. Indeed, it

134. *See* Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 751-52 (1997) (noting that the theory came from case decisions and advancing this criticism).

135. HEDGEHOGS, *supra* note 126, at 411.

136. *Id.* at 407-09.

beggars belief that Vermeule would give up common-good constitutionalism, were he convinced that (say) Hartian positivism is our law and requires originalism. Common-good constitutionalism would still (so he would say) promote "respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function . . . . ," and so forth.[137] But those moral consequences would have to be compared to those of alternative methodologies without the veil of legality obscuring the count.

The limits of Hedgehoggian Dworkin justify us in preemptively dismissing any effort to ground originalism or nonoriginalism in Greenberg's moral impact theory. Moral impact theory is like Hedgehoggian Dworkin in that it attaches the label of law to the outcome of what amounts to an all-things-considered moral analysis under specified conditions. Law is just what is morally required as a consequence of legal-institutional actions; to say that "the law requires Φ" is identical to saying "morality requires Φ." Labeling Φ law would not be useless; it would convey valuable information about what is morally required in the circumstances. But legal status does not constitute a moral reason for Φ, or for any constitutional methodology that might be best at identifying Φ.

In the final analysis, no theories of law currently on offer can make any contribution to any case for the adoption of a constitutional methodology. Nor is it easy to imagine how any future theories of what law is—whether they can or necessarily do include morality among their criteria of legal validity—might be more promising. The problem of moral weight seems to be intractable—morally thin theories cannot underwrite obligation to the law because they lack moral content; morally thicker theories cannot underwrite obligation to the law because the properties of (alleged) law that make obedience obligatory do not depend upon legality; morally thickest theories say nothing in favor of constitutional methodologies that morality does not already say. None of these theories add weight to any moral argument for any methodology.

It does not follow, however, that theories of law are useless to normative constitutional theory, much less to public officials or ordinary people who might select constitutional theories. If law/our law is not a sufficient reason to choose methodology X, a theory of law might help identify whether X is more likely than Y or Z to capture morally desirable goods. The case for eliminating the concept of law from normative constitutional theory or constitutional practice has yet to be made beyond Dworkin's sketch. But its lack of moral weight invites us to consider that case.

IV. DOING WITHOUT CONSTITUTIONAL LAW

By "eliminativism," I mean the view that a term or concept should be removed from a particular context. The term or concept might be removed because it does not refer to anything that exists in the world, is not a useful tool for understanding things that exist in the world, is socially harmful, or for some

137. Vermeule, *supra* note 44.

other reason. Familiar philosophical eliminativisms seek to eliminate free will, consciousness, and the mind-body problem. Political theorists have argued for the elimination of the divine right of kings, sovereignty, the social contract, natural rights, and the commodity form. And legal scholars have sought to eliminate the public-private distinction, the requirement of discriminatory intent in Equal Protection doctrine, steps of *Chevron* deference, qualified immunity, the distinction between law and morality, and—closest to home—the concept of law.

Eliminativism about the law might be traced back to the legal realists, who contended that "the law"—understood as the totality of legal reasons—does not determine the outcome of some nontrivial set of cases.[138] Rather, decisions in this set of cases are best understood as judicial responses to the underlying facts, which responses are driven by judges' professional and social history. To borrow from Professor Herman Oliphant, "over-general and outworn abstractions in opinions and treatises"—the determinants of the law, according to the conventional wisdom that they rejected—did not explain what judges actually did.[139]

The realists did not, however, claim that judges, lawyers, or people generally should cease to think in terms of what law is or what the law requires. Precisely because they had a broadly positivist notion of law, they were able to determine where the law was absent.[140] What has been called "the new eliminativism" in jurisprudential theory either questions or outright denies the value of the concept of law.[141]

Take Hedgehoggian Dworkin. Professor Lewis Kornhauser has identified him as a "proto-eliminativist" because even as Dworkin contends that law is a branch of morality, he does not discourage readers from thinking in terms of the law.[142] Indeed, his concept of law picks out a set of governance structures, "those that resolve disputes according to the interpretive method he identifies . . . as law."[143] All eliminativisms about the law go further. This Part will canvass the legal eliminativisms on offer and assess their plausibility in normative constitutional theory and constitutional practice.

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138. *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 295-96 (1997) (stating that Realists believe outcomes are "indeterminate.").

139. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928).

140. Brian Leiter, *Legal Positivism as a Realist Theory of Law*, *in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 79, 88 (Torbun Spaak & Patricia Mindus eds., 2021).

141. Michael S. Green, *The New Eliminativism*, JOTWELL (Jan. 18, 2016), https://juris.jotwell.com/the-new-eliminativism.

142. Lewis A. Kornhauser, *Doing Without the Concept of Law* 26-29 (Aug. 3, 2015) (N.Y.U. Sch. L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 15-33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2640605.

143. *Id.* at 28.

A. LEGAL ELIMINATIVISMS

Legal eliminativism is theoretically underdeveloped. The closest thing to a general survey of the field is an unpublished[144] manuscript by Lewis Kornhauser, which articulates the strongest form of eliminativism on offer.[145] Other eliminativists include Professor Scott Hershovitz[146] and—arguably[147]—Mark Greenberg, whose moral impact theory is offered as a theory of law but which strongly assimilates law to morality.. In what follows, I will distinguish eliminativisms on the basis of two dimensions: strength and scope.

1. Strength

Eliminativisms can assert stronger or weaker claims. A *weak eliminativism* about the concept of free will might grant that there is a meaningful sense in which people can "do otherwise." It might, however, maintain that the concept of free will should be abandoned and replaced with another concept that captures agency because the former is too closely associated with radical, libertarian freedom that does not actually exist. Another eliminativism—call it *strong eliminativism*—might contend that the concept does not refer to anything in the world; justifies horrific legal practices; and ought to be abandoned and replaced with something entirely different.

So, too, with legal eliminativism. Scott Hershovitz defends *weak legal eliminativism;* he argues that we *can* do without a distinctive domain of legal normativity, not that there is nothing in the world to which "law" refers.[148] He goes beyond Dworkin by explicitly arguing that we should reject the view "that our legal practices make something—the content of the law—whose metaphysics we must unravel."[149] It is, however, the unitary nature of the standard conception of law that troubles him, not the concept as such.[150] He finds the picture of "a single entity called the law" to be confusing but does not "object to talking about what the law requires" in a more nuanced and flexible way that is sensitive to the diversity of decision-making contexts.[151] He is like the free-will skeptic who wants to replace an existing concept with one that better captures agency.

144. The most extensive published discussion of Kornhauser's industrial-strength eliminativism appears in MURPHY, *supra* note 71, at 88-102.

145. *See generally* Kornhauser, *supra* note 142 (discussing eliminativism).

146. Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2016).

147. *See, e.g.*, Green, *supra* note 141 (opining on the new eliminativism); Kornhauser, *supra* note 142 (explaining eliminativism); Michelle Madden Dempsey, *Why We Are All Jurisprudes (or, at Least, Should Be)*, 66 J. LEGAL EDUC. 29 (2016) (considering questions in jurisprudence); Hillary Nye, *The One-System View and Dworkin's Anti-Archimedean*, 40 L. & PHIL. 247 (2021) (arguing Dworkin's one-system view).

148. Hershovitz, *supra* note 146, at 1164-65.

149. *Id.* at 1199.

150. *Id.* at 1201.

151. *Id.* at 1202.

Strong legal eliminativism holds that there is, in fact, nothing in the world to which the doctrinal concept of law refers. There are no facts in virtue of which propositions about the law of a given jurisdiction are true, thanks to the complexity of interlocking institutions, texts, and expectations that govern the decisions of, e.g., judges, legislators, prosecutors, agency heads, and police officers.[152] No single norm constrains the decisions of all of these people, so speaking of "the law" is not merely confusing but akin to talking of phlogiston or unicorns. The strong eliminativist is like the free-will skeptic who argues that free will should be replaced with something completely different that tracks actually existing entities.

A final observation: A legal eliminativist might take an ontologically strong position—denying the existence of law—while advancing a normatively weak prescription—denying that law's nonexistence tells us much about what we ought to do. Law, like free will, might be a tremendously socially useful fiction; an eliminativist might want to encourage the persistence of a false belief. Conversely, an ontologically weak eliminativist might admit that the concept of law tracks some aspects of reality but regard it as so compromised in practice as to be beyond saving.

I have taken an ontologically *very* weak but normatively strong legal eliminativist position on whether theories of law-as-such/existing law can justify the choice of a constitutional methodology. While remaining agnostic as to whether those theories capture reality in any meaningful way, I have argued that even if they do, they cannot justify substantive claims about constitutional methodologies. To save time and to better position ourselves to advocate constitutional methodologies that are morally justified, scholars should stop treating things that do not carry moral weight as if they do.

2. Scope

As legal eliminativisms might differ in strength, they might differ in scope, covering different domains of inquiry and different decision-making contexts. To see this, let us look at Dworkin's list of different concepts of law—doctrinal, sociological, taxonomic, and aspirational.

I have said that the doctrinal concept of law is deployed to identify those facts in virtue of which propositions about the law of a given jurisdiction are true.[153] The sociological concept is used to identify "a particular type of institutional social structure."[154] The taxonomic concept separates "legal standards" from "moral or customary or some other kinds of standards."[155]

152. Kornhauser, *supra* note 142, at 17. *See generally* Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355 (2004) (articulating the concept of governance structures).

153. *See* RONALD DWORKIN, JUSTICE IN ROBES 11-12 (2006) (considering law as an "interpretive concept.").

154. *Id.* at 3.

155. *Id.* at 4.

Finally, the aspirational concept of the law expresses moral and other aspirations associated with the rule of law and legality.[156]

These concepts refer to different things and serve different purposes; accordingly, one could call for eliminating one but not the others. Kornhauser, for instance, is most concerned with eliminating the doctrinal concept of law. He does not deny the possibility or value of determining which institutions are legal institutions in a given society. Indeed, he endorses an *achievement theory* that identifies functioning governments that realize various normatively desirable values *associated with law*—though not *constitutive of law*.[157]

A legal eliminativist might call for the elimination of a concept of law in a particular domain without denying its existence or its utility in other areas. That was my aim in Part III; I argued that what Dworkin called the doctrinal concept of law ought not to be used by normative constitutional theorists to make substantive claims in favor of particular methodologies of constitutional decision-making. I did not, however, recommend that the concept be eliminated entirely from normative constitutional theory; I left open the possibility that it might be used to focus attention on morally salient considerations that ought to be factored into theory-choice. I also left open the question of what constitutional decision-makers should do with the concept of law, whether in "wholesale" choosing between constitutional methodologies or in "retail" resolution of particular constitutional questions. Now, I have to address these questions.

B. THEORETICAL LEGAL ELIMINATIVISM

Perhaps Finnisian natural-law theory accurately captures the nature of law. If so, there are certain normative goods that law is particularly well-suited to capture. And only a legal system that delivers those goods is a central case of law that can justify a moral obligation to do as the law says. We have seen that it is possible to debate whether to choose a maximally-law-tracking decision-making methodology over a less-law-tracking methodology without reference to a Finnisian concept of law by weighing the moral costs and benefits associated with legality against other moral considerations. Indeed, we have seen that we should not treat legal status as an independent moral reason to choose the former over the latter methodology.

This does not necessarily mean that Finnisian natural-law theory should not inform the choice between theories of constitutional interpretation. If Finnisian natural-law theory is true, there are moral projects at which the law is particularly good. Well-functioning legal systems promote social coordination by supplying answers to questions that are underdetermined by the natural law

156. *Id.* at 5.

157. *See generally* Lewis A. Kornhauser, *Law as an Achievement of Governance* (Jan. 7, 2021) (N.Y.U. Sch. L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 21-04), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3762033 (considering law to be an achievement of governance).

and about which practically reasonable people might differ. So, we might use natural-law theory to identify the moral goods that legal systems are best-suited to capture, which goods should be factored into the choice between constitutional methodologies. Without Finnis's help, we would not be equipped to focus our moral inquiry in this way.

It seems that *true* analytical theories of jurisprudence can be useful to normative constitutional theory. But analytical theories might be false, or there just might be no constitutional *law* (by their lights) in the U.S. If Finnis is wrong about the law, weighing the moral goods he singles out could distort the moral choice between constitutional methodologies. If he is right about the law, but we lack a central case of law in the U.S., a similar distortion could take place.

Worries about the falsity of jurisprudential theories or the absence of constitutional law do not justify kicking analytical jurisprudence out of normative constitutional theory. How probable is it that Finnisian natural-law theory or Hartian positivism or any theory of law is false? How valuable would true theories be? The mind reels at the kind of computation that would be required to conclude that any particular theory of law is too unlikely to be true, or that it is too unlikely that we have law by the theory's lights, to even *consider* and debate the matter if we disagree.

There is value in avoiding debates that are very unlikely to lead us in the direction of truth. To endorse the use in the normative constitutional theory of theories of law is to invite debate about whether those theories of law are true. You think that Finnis is right; we have in the original Constitution a central case of law; and we should prioritize the authoritative resolution of morally indifferent questions in our moral analysis. I think that central-case analysis tells us nothing morally interesting; the original Constitution is morally defective, and we should prioritize the protection of individual rights. Would it not be easier to avoid debate over the first and second issues and proceed directly to issue three?

We cannot do that without effectively declaring victory for me. Demanding that you abandon the use of a theory of law prevents you from adequately explaining why you have arrived at your moral conclusions. I can explain why we should prioritize individual rights; you cannot explain why we should prioritize other goods because that priority is connected to your theory of law. The debate may be prolonged by discussing the nature of law. But what we lose in time and energy, we gain in clarity about our respective positions. And if we come to be convinced that the other of us is right, both of us end up in a better position to make the ultimate methodological choice.

So, my "theoretical" eliminativism is ontologically weak, normatively strong, and limited in scope to the use of doctrinal concepts of law to justify methodological choices. It does not apply to their use as epistemological tools to focus attention on moral goods that law-as-such is arguably well-suited to pursue. I turn now to questions about whether those whose actions are constrained by the Constitution—primarily, though not exclusively, public officials—should eliminate the law.

C. PRACTICAL LEGAL ELIMINATIVISM

The methodological counsel provided above to constitutional theorists is applicable as well to methodological choices by constitutional decision-makers. It may be that most constitutional decision-makers believe that legal status is a compelling moral reason to choose a particular constitutional methodology. But this is false, and thinking and speaking as if it is true invites moral error.

Of course, deciding between constitutional methodologies on the basis of an all-things-morally-considered-excluding-legal-status analysis can also go awry. The conventional wisdom holds that most constitutional decision-makers, most of the time, take the law to be whatever the Supreme Court says it is. If—as Brian Leiter argues—constitutional doctrine is, in fact, not governed by (Hartian) law, constitutional decision-makers might still do better to follow that doctrine than to do something else.[158] And perhaps we should discourage them from even *considering the possibility* of doing something else, lest they choose a morally deficient strategy. Perhaps we should tell them that they have a moral obligation to select a methodology that tracks the law, expecting that they will probably follow the Supreme Court, which will be morally better overall than telling them the truth. Perhaps we should lie about law and morality for morality's sake.

Perpetuating false beliefs on such a broad scale implicates pressing and controverted questions, about not only the ethics of deception but the nature and value of democracy, the sociological and moral legitimacy of the Supreme Court,[159] the moral costs and benefits of rules versus those of standards, and deontology versus consequentialism versus virtue ethics, among other things. To endorse such a noble lie, we would have to believe that constitutional theorists have no obligation to seek the input of others concerning their resolution. We would need to be quite confident in the latter belief. And we would have to be confident as well in our own approaches to resolving the questions at issue. Because all of this would seem to require dubious and self-serving assumptions, we should place the burden of persuasion on those who would argue in favor of lying about the value of legality.

Having decided on a constitutional methodology on moral grounds after excluding legality as a relevant moral consideration, should constitutional decision-makers—in particular, public officials to whom the Constitution primarily (though not exclusively) speaks—regard the outputs of that methodology as law and represent it to others as such? Those outputs may indeed be law; their methodology may be law-tracking, even if it was not selected on the basis of its law-tracking capacity. Thinking and saying true

158. *See generally* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as a Super-Legislature*, 66 HASTINGS L.J. 1601 (2014) (using Hartian positivism to analyze constitutional doctrine).

159. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21-24 (2018) (distinguishing between these forms of legitimacy, the distinction between which is basically that between social perception and moral reality).

things about law seems unobjectionable.[160] The harder cases involve (1) the choice of an incorrect theory of law; (2) the choice of a methodology that I not law-tracking; and (3) the absence of law.

As to (1), a constitutional decision-maker might wrongly think that Hartian positivism is the correct theory of law and that pluralism is the best way to track the law. If they have performed the appropriate all-things-morally-considered analysis, they have concluded in favor of their methodology for reasons other than legal status—say, the benefits of social coordination. But the moral goods that grounded the choice of pluralism are out of reach if there is, in fact, no rule of recognition to coordinate social activity. If pluralism is still justified, it must be for other reasons. If the decision-maker still thinks pluralism is law-tracking and calls its outputs law, they are thinking and saying things that are false.

Consider now (2)—the choice of a methodology that is not law-tracking. Hartian positivism may be the correct theory of law, but pluralism might not be our law. Again, if the methodological choice of pluralism was predicated upon the coordination that the rule of recognition facilitates, the decision-maker's decision must be justified on other grounds. That is because pluralism is not part of the rule of recognition. Again, if the decision-maker still thinks and says that they are identifying law, they are wrong, and they are misrepresenting reality.

Finally, if (3) is true—there is no constitutional law—pluralism cannot be morally justified on the ground that it delivers goods that Hartian positive law necessarily delivers. If it delivers those goods, it is not because of Hartian positive law. Perhaps pluralism is better able to keep in step with contemporary values. Perhaps it morally outperforms other methodological options. But if there is no constitutional law, it is *certain* that a pluralist who thinks and says that constitutional law requires Φ is thinking and saying something false.

Would it be desirable, not only for constitutional decision-makers to believe the above falsities, but to encourage others to do the same? Suppose the following:

(1) Hartian positivism is true;
(2) Supreme Court doctrine is not law by Hartian lights;
(3) It is overall morally better for constitutional decision-makers to follow Supreme Court doctrine rather than to do something else;
(4) Constitutional decision-makers are more likely to follow Supreme Court doctrine if they falsely believe that it is the law.

160. *See* Sachs, *supra* note 22, at 111-12 (arguing that "[p]ositive law may or may not have a claim to our obedience, but it certainly has a claim to our honesty . . . ." and offering the useful example of a "writer of a State Department report . . . [who] might feel at least some obligation to present an accurate discussion of the Armenian Genocide, even at the risk of complicating current U.S. relations with the Republic of Turkey (or, alternatively, with the Republic of Armenia.)"). I agree with Sachs that "to the extent that officials are expected to defend their actions to others in legal terms, the question of what law currently governs us is anything but [normatively inert]." *Id.* at 111.

Are (1)-(4) true? For constitutional theorists to be sufficiently confident that those conditions obtain to be justified in telling noble lies, we would have to make assumptions about our moral-epistemic position that we have already rejected. We have concluded that we should not tell constitutional decision-makers that law should govern their choice of methodology when, in fact, legal status is morally irrelevant. By parity of reasoning, we should also not encourage them to believe and say false things about whether their methodology tracks law.

But now we have a new problem. We have said that constitutional decision-makers should think and say true things but not false things about the law. This is not helpful general advice; surely, most constitutional decision-makers think that they have true beliefs about the law, so they will continue to think and speak as if those beliefs are true.

We seem to have five options:

(1) We could encourage constitutional decision-makers to think and say things about the law requiring Φ that they believe to be true; periodically reflect on whether those things are in fact true; and pivot to the truth upon discovering that they have been in error;

(2) Same as (1), but with only initial reflection—no periodic reflection;

(3) Same as (1) and (2) but with an additional step where the decision-maker considers whether to lie for the greater good upon discovery of some truth about the law;

(4) We could encourage constitutional decision-makers to think and say things about the law requiring Φ, disregarding the risk that those things are false;

(5) We could encourage constitutional decision-makers not to think or say things about what the law requires and choose instead to follow an all-things-considered moral analysis in every case and be candid about what they are doing.

Option (3) is unattractive for the same reason that the noble-lie options discussed earlier are unattractive: there are too many dubious, self-serving assumptions involved. So, too, is (4) unattractive. It requires decision-makers to be reckless with regard to the truth and raises similar concerns.

The contest between (1) and (2) boils down to the comparative moral value of rules and particularistic judgments. Option (1) allows more space for updating on the basis of morally relevant information but also is less conducive to the authoritative settlement of contested questions, which settlement necessarily trades off some retail moral error for wholesale net-moral-gain.

I cannot resolve the rules-versus-standards debate here. I will, however, address why (5) is *not* obviously the way to go, even though (1) legal status is morally weightless and (2) it is possible that we (a) do not have constitutional

law; (b) have the wrong theory of law; or (c) have a constitutional methodology that does not track law.

Suppose we do not have constitutional law. It matters very much *what* law we lack. If constitutional law must comport with Fullerian legality principles to *be* law, we might lack constitutional law despite having a constitutional doctrine that satisfies Hartian requirements—call this "law." Constitutional "law" would contain norms of conduct that constrain participants in our legal system.

Constitutional decision-makers might do better to follow constitutional "law" than to routinely engage in all-things-considered moral judgments—judgments that take account of the value of any moral goods associated with norm-following *and* of other morally salient considerations. Mitch Berman has provided a cognitive explanation of why this might be so:

> Suppose . . . that all we really should care about is what we really ought to do. Making this determination is frequently hard, and the felt need to undertake the effort, and to accomplish it successfully, can be stressful, even paralyzing. We may find that we navigate the world more successfully and happily by voluntarily subscribing, as it were, to diverse systems of norms that output directives for particular contexts. Doing so does not require that we abdicate responsibility to reason morally. It's not that we must subject ourselves slavishly to the normative outputs of diverse (artificial) normative systems, but only that we have prudential reason to follow those artificial norms ordinarily, proceeding to the second step of the two-step protocol—consulting other (real) reasons that might weigh against the norms of the system we are first consulting—only when there are unusual grounds to do so.[161]

Felipe Jiménez has recognized that legal decision-makers do not experience their choices in the way that the two-step model posits but contends that this phenomenology does not entail the nonexistence of law or recommend an all-things-considered approach to legal decision-making. If legal decision-makers feel as if they are engaged in a one-step inquiry in which all morally relevant considerations are brought to bear on a problem, that is because "[o]ur moral conceptions are both reflected in the law and impacted by it."[162] Like fish that do not know what water is, even though they are swimming in it and can thrive nowhere else, one-step theorists imagine that legal decision-makers inhabit a world in which they can determine what all-things-considered morality requires

161. Mitchell Berman, *Of Law and Other Artificial Normative Systems*, *in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 137, 153 (David Plunkett, Scott Shapiro and Kevin Toh, eds., 2019); *see also* MURPHY, *supra* note 71, at 92 (hypothesizing alternative reasons for accepting legal norms); Sachs, *supra* note 22, at 110 ("'Do the right thing' is not a very helpful legal rule.").

162. Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMAN. (forthcoming) (manuscript at 45-46), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697615.

without drawing from a repository of tools and information that they have always needed, and will always need, to make those determinations.[163]

Whether a two-step strategy is morally preferable to a one-step strategy cannot be answered in the abstract. Unjust rules may lighten cognitive loads but may be worse for those who live under the rules than all-things-considered moral reasoning that is less predictably evil. And if there are, in fact, no generally applicable norms to follow, any "first step" is a snare and illusion. But we would have to be very confident in this to dismiss the possibility that a law-tracking strategy might be preferable to one that considers all morally relevant reasons at once, without privileging those related to a theory of law.

It is plausible that our constitutional doctrine is not law.[164] And even if it is, our constitutional law might not require a particular approach to constitutional decision-making. The general consensus among those who have studied the question is that our constitutional law does not include originalism or any other-ism as part of its rule of recognition.[165] But we may have *enough* constitutional law to limit the set of permissible methodological options. Our constitutional doctrine does not permit decisions by astrology or coin flip. We should not conclude against constitutional decision-makers thinking or speaking of law and following rules that they call law just yet.

V. CONCLUSION

The concepts of law and constitutional law cannot underwrite the choice of a constitutional methodology. This does not preclude the use of jurisprudential theory or the doctrinal concept of law within a normative constitutional theory or constitutional practice. That the dominant theory of law suggests that our constitutional law is not, in fact, the law, makes it plausible that Hedgehoggian Dworkin was right to call for a one-step approach to constitutional decision-making—albeit not for his precise reasons.

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163. The parable is from DAVID FOSTER WALLACE, THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION, ABOUT LIVING A COMPASSIONATE LIFE 3-4 (2009) ("There are these two young fish swimming along and they happen to meet an older fish swimming the other way, who nods at them and says, 'Morning, boys. How's the water?' And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, 'What the hell is water?'").

164. *But see* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011) (analyzing the constraints of the Supreme Court). *See generally* JEFFERY E. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (explaining the Supreme Court from an attitudinal view); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005) (considering the Supreme Court); ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUDGES ARE NOT JUDGES (2012) (arguing how the Supreme Court is flawed).

165. *See, e.g.*, Brian Leiter, *supra* note 158 (identifying a problem with originalism); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006) (arguing for the group-relative view); Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 175 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (considering H.L.A. Hart's rule of recognition).

But even if the one-step approach is a suboptimal strategy for retail decision-making, it provides an excellent framework for wholesale theory-choice. Scholars should endorse, and constitutional decision-makers should embrace, constitutional methodologies without depending upon a theory of law or existing law. All things morally relevant—including the moral goods associated with legality—should be weighed together. "It's the law" cannot justify a decision to embrace originalism or pluralism or Dworkinism or anything else. It is a recipe for fruitless and confusing debate and an overpopulated ontological universe.[166] We should move on.

166. On the beauty of desert landscapes and the desirability of eliminating concepts that do not aid our understanding of the world, *see* W.V.O. Quine, *On What There Is*, *in* FROM A LOGICAL POINT OF VIEW 4 (1961).