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THE (IR)RELEVANCE OF POSITIVIST ARGUMENTS FOR ORIGINALISM

*Andrew Jordan**

Some constitutional theorists have started looking to jurisprudential accounts of the nature of law for help in resolving disputes in constitutional theory. Most prominent is the “positive turn” defended by William Baude and Stephen Sachs. According to Baude and Sachs, ongoing debates in constitutional theory can be resolved by looking to positive law—that is, to the convergent social practices of legal officials. As a result, they claim that we can avoid the normative debates that have traditionally occupied constitutional theorists. Here, I argue that any attempt to settle substantive debates in constitutional theory via jurisprudential accounts of the nature of law will face two problems. First, they will run the risk of double counting—of treating legality itself as providing additional reasons over and above those earned by the theory’s criteria of legality. Second, they risk a kind of illicit bootstrapping by claiming normative upshots supposedly inherent in legality itself that aren’t traceable to the theory’s criteria of legality. Normative constitutional theorists have traditionally aimed to provide an account of sound adjudication. That is a worthy project. But such theorists must defend their views based on their underlying normative credentials. One cannot avoid that burden by turning to legal metaphysics.

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INTRODUCTION

Constitutional theories aim to tell us how a judge ought to decide a case.¹ If we assume that what judges ought primarily (if not exclusively) to do is apply the law, then it can seem vitally important to discover what the law is. According to a common line of thought, it is there that jurisprudence is supposed to help.² Indeed, the assumption that a jurisprudential account of the nature of law is important for assessing judicial duty is the guiding claim in the opening chapter of Ronald Dworkin's *Law's Empire*.³ And Dworkin is far from alone in making this assumption.⁴ But this assumption, I will argue, is mistaken. Indeed, I shall argue that no theory of the nature or content of law has any bearing on an account of judicial duty.

In getting there, I focus on William Baude and Stephen Sachs's recent work, which exemplifies this jurisprudential trend in constitutional theory. According to their "positive turn," disputes in constitutional theory can be resolved by adopting the positivist jurisprudential theory of H.L.A. Hart, on which the law is identified by looking to the prevailing social practices of legal officials.⁵ One consequence of this

1. Contemporary American constitutional theory is characterized by widespread disagreement. There are ongoing debates between originalists and non-originalists. Within originalism there are debates between original public-meaning theorists and intentionalists. See Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 539–43 (2013). Non-originalist theories include common law theories, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 885 n.23 (1996); theories based in the plurality of modalities of constitutional discourse, PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 6 (1982); and various forms of anti-theory, among others, Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 14 (Apr. 3, 2019) (unpublished manuscript) (on file with the Social Science Research Network), <https://ssrn.com/abstract=2940215> [<https://perma.cc/J2F6-TA48>] (discussing various forms of constitutional theory and anti-theory); Andrew Jordan, *Constitutional Anti-Theory*, 107 *GEO. L.J.* 1515, 1515 (2019) (defending an anti-theoretic account of constitutional decision-making).

2. See, e.g., Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 *PHILOSOPHY COMPASS* 457, 457 (2013) (assessing the common assumption that jurisprudential theories should directly bear on first-order legal judgments).

3. RONALD DWORKIN, *LAW'S EMPIRE* 1 (1986).

4. See, e.g., SCOTT J. SHAPIRO, *LEGALITY* 29 (2011) ("[A]nalytical jurisprudence is capable of making a crucial practical difference."); Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 *HARV. L. REV. F.* 133, 139 (2022) ("[A] constitutive theory of constitutional legal content has natural priority over a prescriptive theory of constitutional adjudication.").

5. See generally William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1079–147 (2017); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *NW. U. L. REV.* 1455 (2018); William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2349–408 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *HARV. J.L. & PUB. POL'Y* 817 (2015).

approach is that, because Hart's view grounds legal content on merely descriptive social facts, moral/political disputes can largely be avoided in identifying the law. If we assume that the task of a judge is primarily just to apply the law, then judges can, and perhaps must, largely avoid moral/political assessment in adjudicating cases. The positive turn thus promises a radical break from the prevailing approach to constitutional theory, which invokes moral and political values, such as concerns about rule of law, democratic authority, or political legitimacy, in defending a preferred theory of constitutional decision-making.⁶ If defenders of the positive turn are right, then there would be no need to look to those sorts of considerations.⁷

While much of what follows focuses on the positive turn, my real target is much broader. My aim is to undermine the very idea that an answer to a jurisprudential question about the nature of law has any bearing on judicial duty whatsoever. Indeed, I argue that any attempt to settle substantive debates in constitutional theory via jurisprudential accounts of the nature of law will face two problems. First, it will run the risk of double counting—of treating legality itself as providing additional reasons over and above those earned by the theory's criteria of legality. Second, it risks a kind of illicit bootstrapping by claiming normative upshots supposedly inherent in legality itself that aren't traceable to the theory's criteria of legality. Normative constitutional theorists have traditionally aimed to provide an account of sound adjudication. I argue that such accounts must stand on their own normative credentials, unmediated by any intervening theory of legal metaphysics.

6. On this point, see Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 172 (2008), who notes that "the normal way of defending a given method of constitutional reasoning is to argue that it respects, or better yet promotes, values like democracy or the rule of law."

7. See Baude, *Is Originalism Our Law?*, *supra* note 5, at 2352–53. As Baude claims, an upshot of the positivist account, if successful, is that "originalist judging can potentially be justified on a much more straightforward and plausible normative ground—that judges have a duty to apply the law, and our current law, in this time and place, is this form of originalism." *Id.* at 2353. I here bracket the dispute between exclusive and inclusive forms of positivism. If inclusive positivism is correct these normative considerations *could* be relevant to law determination if they are properly grounded in social practice. But constitutional theorists typically justify an account of constitutional decision-making by treating the normative considerations as standing on their own bottom.

I. THE POSITIVE TURN IN CONSTITUTIONAL THEORY

A. *How the Positive Turn Fits Into Existing Debates in Constitutional Theory*

Debates in constitutional theory are important because they aim to determine how we ought to adjudicate the rights, obligations, permissions, and powers of actors within our legal system. We want to know, for instance, whether an indigent defendant has the right to an appointed attorney.⁸ Constitutional theory attempts to assess, in a fundamental way, how our constitutional scheme contributes to answering questions like that. And disputes in constitutional theory—indeed disputes in all of legal interpretive theory—can be understood as disputes about how various potential resources—constitutions, statutes, precedential opinions, common law principles, historical practice, moral principles, etc.—contribute to properly adjudicating disputes about the rights, obligations, privileges, and powers that parties have.

There can be a temptation to think that the rights, obligations, privileges, and powers in a legal system are primarily just whatever the linguistic meaning of various legal texts say they are. Marc Greenberg has called that view the “standard picture” and has argued convincingly that it is a mistake.⁹ Baude and Sachs agree with Greenberg on this point.¹⁰ They agree, in part, because to determine what rights, obligations, privileges, and powers arise from the text, one has to first settle on principles of interpretation. And “[d]ifferent legal systems might read their texts in very different ways, without any one of them being wrong.”¹¹ As Cass Sunstein has argued, “[t]here is nothing that interpretation just is.”¹² Rather, there are several different ways of engaging with a text that all can bear the title “interpretation”¹³—e.g.

8. According to existing U.S. Supreme Court precedent, an indigent defendant does have this right. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

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

10. Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1088–92.

11. *Id.* at 1088.

12. Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 205 (2015).

13. For present purposes I am using “interpretation” in a capacious manner that includes what advocates of the interpretation/construction distinction might prefer to call “construction.” Larry Solum, for instance, argues that “interpretation” is the process of getting at the linguistic meaning of the legal text. “Construction,” in contrast, is the process by which one determines the legal effect of that text. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). Baude and Sachs seem happy to adopt Solum’s distinction but proceed to

asking how those who drafted it would expect it to apply, asking how it would have been understood by the public,¹⁴ asking what certain individuals intended it to mean,¹⁵ or asking what principles would fit the language of the text but also make it the morally best that it can be.¹⁶ While ignoring a legal text entirely would jeopardize rule-of-law values by making it seem that judges are “empowered to do whatever they want,”¹⁷ there are many different approaches a judge might take to legal texts that don’t have that particular vice.¹⁸

In constitutional theorizing, the typical way to navigate between these competing accounts of “interpretation” is to make normative arguments about what interpretive theory best serves values such as rule of law, or democratic authority.¹⁹ In a series of articles, Baude and Sachs argue for an alternative to these normative debates that they hope will allow us to make headway in constitutional theory. Rather than asking about the normative merits of a theory, we could just ask “what is the law of constitutional interpretation around here?”²⁰ As they put the point “[w]hatever a theory’s conceptual elegance or normative attractions, it also matters whether that theory already reflects

call the object of their inquiry the law of “interpretation.” Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1128. I don’t have much stake in resolving what falls on the interpretation side of the interpretation/construction distinction. But I wholly agree with Solum that determining the legal effect of various legal resources is a distinct process, not to be confused with determining the linguistic meaning of the text. Indeed, this is a corollary of rejecting the standard picture; determining what the legal effect of a text is may or may not be settled by deciphering its linguistic meaning. And so, as I’ve framed it, the question constitutional theorists ask—how do various resources contribute to the parties’ rights, obligations, etc.—is, using Solum’s terminology, a question of constitutional construction, not interpretation. Nevertheless, while Solum’s distinction is important, his terminology is not yet universally shared, and so, I will follow Baude and Sachs in using “interpretation” in the sense that includes activities that some theorists might call construction.

14. Sunstein, *There Is Nothing That Interpretation Just Is*, *supra* note 12, at 197.

15. *Id.* at 194.

16. *Id.* at 202–03 (describing Ronald Dworkin’s theory of interpretation).

17. *Id.* at 200.

18. To be sure, different approaches might give judges more or less discretion, but as far as I’m aware, none that are seriously considered by constitutional theorists amount to allowing a judge to do whatever he or she wants.

19. See Primus, *When Should Original Meanings Matter?*, *supra* note 6, at 172; see also Solum, *The Constraint Principle*, *supra* note 1 (arguing that we should select among theories of constitutionality based on how they fare in a pairwise comparison of their normative credentials).

20. See Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1456; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 5, at 819.

our law or is instead a call for law reform.”²¹ And their key innovation is to argue that interpretive principles might be settled by law in a manner that would allow us to sidestep the more traditional normative debates over what theory of interpretation best serves relevant moral and political values. Of course, for this to work one must be able to identify the law without engaging in the very normative arguments that Baude and Sachs want to avoid. Thus, Baude and Sachs turn to a Hartian positivist account of the law, under which “what counts as law in any society is fundamentally a matter of social fact.”²²

In one sense, Baude and Sachs are advocating a familiar lawyerly approach to resolving disputes about constitutional interpretation. Drawing on private law examples, they argue that lawyers routinely identify a law of interpretation, which courts then deploy in adjudicating cases.²³ And the idea seems to be that we can identify our law of constitutional interpretation in a way that should be familiar to a practicing lawyer in other interpretive contexts. For instance, a lawyer involved in an insurance contract dispute in Ohio might want to know how a court will interpret insurance contract terms. It won’t take that lawyer very long to discover the following rule: “*ambiguous provisions in an insurance contract will be construed strictly against the insurer and liberally in favor of the insured.*”²⁴ And in many cases that rule will dictate the lawyer’s litigating position. If she represents the insurer, she will argue that the contract terms are not ambiguous.

In light of the ease with which a lawyer can identify that rule it can be tempting to say something like “the law in Ohio is that ambiguities in an insurance contract are construed in favor of the insured.” There are a couple of reasons to be cautious in drawing that conclusion, though. First, the conclusion about the law of Ohio may not be entirely right, or at least not entirely reliable. The rule that ambiguities are construed against the insurer usually comes up in the context of a standardized insurance contract where the insurer unilaterally dictates the terms to the insured, with the insured having to either take it or leave it. In that sort of context, the rule makes a certain kind of moral

21. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1457; *see also* Baude, *Is Originalism Our Law*, *supra* note 5, at 2364 (noting that to decide “whether the written Constitution and original interpretive rules are the law today is to ask a question about *modern social facts*”).

22. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1459; *see also* Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1116.

23. Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1094.

24. *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1380–81 (Ohio 1988) (emphasis added).

or practical sense. But if represented parties had explicitly dickered over the disputed terms, a lawyer representing the insurer would probably have a credible argument that the principle ought not apply.²⁵ So, it's not entirely clear that there really is a legal principle to the effect that ambiguities in an insurance contract are construed against the insurer. Or if there is such a principle, it's not at all clear that it doesn't admit exceptions.

Second, a lawyer identifies "our law" of insurance contract interpretation by looking at what courts have said. So, the lawyer's full judgment involves two premises, not one: (1) the rule for contract interpretation can be identified by looking at what courts have said the rule is; and (2) courts have said that ambiguous terms in insurance contracts shall be construed against the insurer. One might reasonably wonder how we identify principles like (1): Why does looking to what a court has said fix the legal rule for contract interpretation? Similarly, in the constitutional context, we might ask "if there is a law of constitutional interpretation, what makes it the case that some particular theory of constitutional interpretation is our law?"

In answering that sort of question, Baude and Sachs turn to a Hartian positivist account of the law. In brief, the Hartian account claims that at root legal content derives from the convergent practices of courts, officials, and perhaps other persons involved in the legal system. Those convergent social practices ground the rule of recognition in a legal system. And the rule of recognition determines what other rules²⁶ are valid law within that system.²⁷

25. Indeed, some courts have drawn this distinction and held that "the principle that ambiguities in policies should be strictly construed against the insurer does not control the situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy." *E. Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1075 (3d Cir. 1980).

26. For present purposes I am using "rule" in a capacious sense that would include standards and principles as well.

27. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1474. As Baude and Sachs explain, the positivist theory sets up a hierarchical relationship between the rule of recognition which is constituted wholly by convergent social practices, and subordinate legal rules that are determined by applying the rule of recognition. *Id.* One upshot of this relationship is that for something to be the law, convergence is only required at the most fundamental level of the rule of recognition. Subordinate legal rules can maintain their legal status even if there is widespread disagreement about them, as long as those disagreements concern the application of the higher-level standard around which there is convergence.

B. *The Hartian Positivist Program and its Role in
Baude and Sachs's Argument*

Since it is central to Baude and Sachs's argument, it's worth pausing to say a bit about the Hartian program. Hart's aim in *The Concept of Law* is to provide a "descriptive" account of law that could capture "widespread common knowledge of the salient features of a modern municipal legal system."²⁸ The goal is to provide an account that adequately describes and characterizes, across jurisdictions, the diverse range of social phenomenon we might properly call law.²⁹ What Hart settles on is the idea that the law is grounded in a rule of recognition that establishes the criteria of legal validity within a legal system.³⁰ Something is law within a legal system if it either is the rule of recognition itself, or can be derived via the application of the rule of recognition.³¹ The rule of recognition is a social rule identified solely in terms of (1) regular patterns of conduct among legal officials and (2) an attitude on the part of officials involving "acceptance" of those patterns of conduct and a disposition to critically appraise deviations from those patterns of conduct.³² Officials who see "the law as providing guides to their conduct and standards of criticism" adopt the "internal" point of view towards the law of that system.³³ Importantly, however, from the standpoint of the descriptive legal theorist, to say that something is the law of a particular legal system 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."³⁴

This attempt to provide a descriptive account of a social phenomenon is familiar in other contexts. By way of analogy, an anthropologist studying religious practices might decide that it would be useful to formulate a working account of which cultural practices are religious and which ones are not. That account would need to identify, for instance, that the Catholic practice of placing ash on the forehead on a particular spring Wednesday is a religious practice, while Sunday family dinner is not. As she observes the cultural practices of several

28. H. L. A. HART, *THE CONCEPT OF LAW* 240 (1994).

29. *Id.*

30. *Id.* at 100–10.

31. *Id.*

32. *Id.* at 116–17, 255.

33. *Id.* at 242.

34. *Id.*

groups, she might decide that she can best understand what counts as a religious practice in terms of the behaviors that certain religious officials treat as obligatory for participants within the religious group. Of course, if the anthropologist were to ask whether the religious practices are *really* obligatory, she could conclude, without any tension, that they are not. That is, our anthropologist can sensibly describe some of the practices as “religious obligations” without meaning to imply that they are real obligations. Rather, they are just things that are taken to be obligatory from the internal point of view of the religious adherent.

Properly understood, Hart’s aim is to provide a descriptively accurate account of legal practices, including talk of legal obligations. Just as the anthropological orientation remains silent as to whether so-called religious obligations are really obligatory, the positivist account of law is silent as to whether identified legal obligations are real obligations.³⁵ As Hart takes pains to clarify, his aim is not to endorse legal enactments or to establish that they have any morally obligatory force.³⁶

For Baude and Sachs, Hart’s account allows for the possibility that we can identify the law without reliance on the sorts of normative arguments they aim to avoid.³⁷ Remember that for Hart, the law is ultimately identified via social facts alone.³⁸ And so, we can identify the law in an empirical way, by surveying our social practices.

Baude and Sachs do not provide a systematic and detailed account of which social facts matter, or of how we should identify those social facts.³⁹ But they suggest that we can identify the law by looking to the

35. *Id.* at 104–05.

36. *Id.* at 207–12.

37. See Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1458–59.

38. HART, *THE CONCEPT OF LAW*, *supra* note 28, at 100–10.

39. See Sachs, *Originalism as a Theory of Legal Change*, *supra* note 5, at 864 (admitting that a complete account would require a “much more detailed positivist theory—which social conventions determine the law, who has to hold them, how we identify them, as so on”). But a gap in the theory has important implications for understanding some of the objections to Baude and Sachs’s arguments. Baude and Sachs attempt to characterize some criticisms of their view as merely rooted in an empirical dispute about what our convergent social practices are. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1477. Roughly speaking, Baude and Sachs attempt to show that as an empirical matter originalism meets several of their chosen criteria. *Id.* at 1477–78. They then argue that because of these features of our practice we should infer that originalism is the law. *Id.* One could reasonably object that Baude and Sachs owe us an explanation of why this inference is licensed. This is Richard Primus’s point in drawing attention to the fact that, for instance, politicians never explicitly repudiate God, and routinely invoke God. Richard Primus, *Is Theocracy Our Politics*, 116 COLUM. L. REV. SIDEBAR 44, 53 (2016). Primus’s point is that one should not infer from

convergent social practices of courts, particularly to the reasoning that appears in Supreme Court opinions.⁴⁰ For instance, Baude notes that in Supreme Court decisions when there are clashes between the original meaning and things like precedent or policy considerations “the original meaning wins.”⁴¹ He also notes a lack of cases where originalist methods are explicitly rejected by the court.⁴² Baude highlights some features of our legal system that he thinks are commonly acknowledged by legal practitioners.⁴³ For instance, certain basic structures of our political system are picked out wholly by looking to the text of the Constitution—for example, how the president and congress are elected.⁴⁴ Baude also points to the widely-accepted practice of treating the Framers as having a privileged kind of authority in our legal system.⁴⁵ And both authors claim that the best understanding of the way courts handle precedent is that original sources and not precedent determines the content of the Constitution.⁴⁶ Based on considerations like these, they infer that a form of originalism is our (positive) law.⁴⁷

C. *The Core Argument Linking an Account of Law and Judicial Duty*

The aim of the positive turn is not merely to provide a descriptive account of prevailing social practices. As Baude notes, “originalists and their critics are ultimately arguing about how judges *ought* to decide cases.”⁴⁸ Baude and Sachs think that their positivist arguments do have normative implications for how a judge ought to decide a case, because, they claim, at least *prima facie*, judges ought to apply the law.⁴⁹

this fact that our politics is theocratic. *Id.* at 53–54. If that’s right, then Primus’s dispute with Baude and Sachs is decidedly not empirical; it is methodological. It is a dispute about what inferences one is entitled to draw from certain empirical facts.

40. Baude, *Is Originalism Our Law*, *supra* note 5, at 2370.

41. *Id.* at 2374–75.

42. *Id.* at 2376–83.

43. *Id.* at 2367.

44. *Id.* at 2368.

45. *Id.* at 2365–67.

46. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1477.

47. *Id.* at 1477–78.

48. Baude, *Is Originalism Our Law*, *supra* note 5, at 2392 (emphasis added).

49. *Id.*; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 5, at 876.

Thus, Baude and Sachs's complete argument has the following form:⁵⁰

1. The law is whatever is supported in the right kind of way by the right kind of social facts (the Hartian Positivist thesis).
2. Some form of originalism is the rule or method that is supported in the right kind of way by the right kinds of social facts.
3. Therefore, a form of originalism is the law.
4. Judges have a *pro tanto* duty to apply the law.⁵¹
5. Therefore, judges have a *pro tanto* duty to apply a form of originalism.

What to make of this argument? Admittedly, premise 4, the principle that judges have a (defeasible) duty to apply the law, can sound like a bit of common sense. And it can thus seem vitally important to settle a metaphysical question about what constitutes the law. But as we shall see, this sort of approach gets things the wrong way around. That is, we should not start with the assumption that judges have a duty to apply the law, and then go seeking a correct account of what the law is. Rather, we must start with some account of what the law is and ask whether judges plausibly have an obligation to apply *that* law.

To begin to see this, consider Marc Greenberg's account. On his account, identifying the law "requires ascertaining the all-things-considered normative consequences of the ratification of constitutions, enactment of statutes, and other actions of legal institutions."⁵² So, "a statute's contribution to the content of the law is the impact of its enactment on our obligations, in light of fairness, democracy, rule of law, and any other relevant values."⁵³

Thus, Greenberg's theory readily explains why judges have a moral duty to act in accordance with legal content, since the content of the law is identified in terms of the moral implications of our

50. This is a slight variation on Charles Barzun's summary of Baude and Sachs's arguments. See Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1339 (2017).

51. By "*pro tanto*" I mean reasons that are defeasible in the sense that they could be outweighed by other competing considerations, but not undercut—that is, to have their normative force turned off entirely. An outweighed reason is still a reason. An undercut reason is not.

52. Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 118 (2017).

53. Mark Greenberg, *Natural Law Colloquium Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 134 (2020).

political practices.⁵⁴ That said, it's not clear that Greenberg's view establishes a duty to apply the law *as such*. Rather Greenberg's view seems to establish only that where there is law, there is also a moral duty to act in the ways that the law prescribes. That falls short of showing that the moral duty is grounded in the fact that something is law. Nevertheless, there is still a meaningful sense in which the principle that judges have a duty to apply the law is true on Greenberg's conception of legality, even if the moral duty simply comes along with legality, rather than being grounded by it.

Of course, Greenberg's moral impact theory expressly requires the kind of moral and political reasoning that the positive turn aimed to avoid. Remember that it is the merely descriptive character of Hart's theory—grounding the criteria of legal validity in social facts alone—that Baude and Sachs enlist to avoid the normative disputes that typify constitutional theorizing.⁵⁵ But the problem is that because of its merely descriptive character, any connection between an account of law and judicial duty is less obvious than it would be on a view like Greenberg's. Indeed, any descriptive account of legality will need normative supplementation in order to explain how it could be relevant for how anyone, including judges, should act.⁵⁶ Hence, anyone who insists on an obligation to apply Hartian positive law will have to explain why legality, so conceived, is reason-giving.⁵⁷

One upshot of the foregoing remarks is that we should be wary of a non-critical insistence on a judicial duty to apply the law. That

54. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1325–31 (2014).

55. Of course, on Hart's "soft" positivist view, "the rule of recognition may incorporate as criteria of legal validity conformity with moral principles, or substantive values." See HART, THE CONCEPT OF LAW, *supra* note 28, at 250. Something Baude and Sachs seem to overlook is that judges, legal practitioners, legal academics, and even citizens debate constitutional theory on normative, indeed, moral grounds. Thus, the proper "soft" positivist conclusion might be that moral criteria are part of our law of interpretation. Because of this, the turn to Hartian positivism could simply reinstate the very same moral debates that Baude and Sachs hoped to avoid.

56. See SHAPIRO, LEGALITY, *supra* note 4, at 47–49; see also Jordan, *Constitutional Anti-Theory*, *supra* note 1, at 1516–23 (rejecting the view that proper constitutional decision-making stands on a prior account of constitutional content, where that content is fixed by non-normative considerations, such as original public meaning, or the semantic features of the constitutional text).

57. Sachs acknowledges the normative problem, but he frames it in terms of a question about political obligation, which might be answered independently of an account of legal content. See Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST. L. & PUB. POL'Y 103, 109–10 (2018). Baude attempts to address the problem via the oath of office, or alternatively a view about judicial role. Baude, *Is Originalism Our Law*, *supra* note 5, at 2392. I don't think his arguments work. See discussion *infra* note 62 below.

principle will likely illicitly borrow some normative intuitions about law—the very same intuitions that might lead a person to adopt a normative theory of law, such as Greenberg’s, on which the law is partially identified via moral considerations.⁵⁸ To avoid improper reliance on such intuitions, it would be more perspicuous for Baude and Sachs to say that “judges have a *pro tanto* duty to apply the rules that fall out of a convergent set of social practices accepted by certain participants within a legal system” rather than that “judges have a *pro tanto* duty to apply the law.” The former lays bare what the characterization in terms of “law” obscures—that Baude and Sachs rest their arguments on a theory of law in which legality is grounded in contingent social facts.

II. NORMATIVITY AND POSITIVIST THEORIES OF LAW

It is widely acknowledged that Hart’s social-practice-based theory of law has a difficult time explaining how the law could ground duties or obligations or provide officials with a reason for action.⁵⁹ This is because “the existence of a social practice, in itself, does not provide anyone with an obligation to engage in the practice. The rules of recognition only define what the practice is, and they can say nothing on the question of whether one should or should not engage in it.”⁶⁰ This problem is often characterized in terms of Hume’s principle

58. Greenberg claims that a legal system is defective to the extent that it does not yield all-things-considered moral obligations. This leads Greenberg to endorse a normative theory of the content of law, since only such a theory could ensure that there is any obligation to obey the law. Greenberg, *The Standard Picture and Its Discontents*, *supra* note 9, at 84–89, 96–99.

59. This need not count as an objection to the theory. Indeed, in certain modes, Hart suggests that a virtue of his account is that it makes room for the thought that there can be laws that nobody ought to obey. See HART, *THE CONCEPT OF LAW*, *supra* note 28, at 207–12. One of positivism’s virtues is that it encourages skepticism about the thought that law comes with a kind of to-be-doneness built in. And Hart argues that the positivist conception of law lays bare the sort of complex moral considerations that arise when one confronts iniquitous rules of law—something that an insistence that evil law is not law obscures. *Id.* at 211. Others have noted a kind of internal tension in Hart’s jurisprudence regarding whether he aimed to explain the normativity of law or merely to provide a descriptive sociological account. See Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 VA. L. REV. ONLINE 128, 138 (2019).

60. Andrei Marmor & Alexander Sarch, *The Nature of Law*, STAN. ENCYC. OF PHIL. (Aug. 7, 2015), <https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/> [<https://perma.cc/5VEC-FQCN>]; see also Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 113–16 (2016) (arguing that a descriptive legal sociology offers no reason for why legal officials ought to maintain that practice).

that one cannot derive an ought from an is.⁶¹ If for something to be the law is, at root, just for it to either be a rule accepted as a contingent social matter, or a rule derivable from more fundamental rules that are accepted as a contingent social matter, then it is hard to see how being the law, all by itself, can provide reasons for action, much less duties or obligations.⁶² As Gerald Postema explains:

Consider the Judge whose appeal to the alleged rule of recognition is challenged. Why should the fact that *other* officials follow the rule, and think *he* ought to follow it, give him any reason to do so? He might reply that he is among those who accept the rule; so when viewed from the internal point of view, he, like the others, has reasons to follow it. However, this reply begs the question: After all, it is the facts of the practice, when viewed from *outside* the practice, that are supposed to give the judge reason to comply. Thus Hart, having brought us this far, fails to give us an account of how the facts of judicial practice actually generate genuine official duties. His account is seriously incomplete.⁶³

61. See SHAPIRO, *LEGALITY*, *supra* note 4, at ch. 2; Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 642 (2014) (noting that the question of how it is possible for law to be normative is one of the two hardest questions in legal philosophy, and the other is “what is our rule of recognition?”). I do not mean to be relying on a sharp fact/value dichotomy here. Some thick evaluative statements have both descriptive and normative dimensions as when a person says of another that he or she is cruel. And we commonly talk of some facts as though they are reasons. For instance, we might say that John’s back pain is a reason to offer him an aspirin. To the extent that I wish to insist on the importance of differentiating fact judgments and value judgments, it is to highlight that in cases like the latter one, there are two judgments at play—there is the judgment that John is in pain, and there is the judgment that this is a reason to offer him an aspirin.

62. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 56–58 (1999) (discussing Hart’s practice theory); see also Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 171 (1982) (noting that Hart’s account fails to ground genuine duties on the part of officials). Baude tries to address this limitation on positivist accounts of law. See Baude, *Is Originalism Our Law*, *supra* note 5, at 2393–94. He argues that judges have a duty to apply positive law because of the judicial oath. It is a strange view of promissory morality, however, that entails that a judge’s oath-based duty could hinge on the resolution of a contentious and obscure debate in analytic jurisprudence. Better to assume that whatever obligations arise from the oath don’t vary based on whether positivists or anti-positivists are correct about legal ontology.

63. Postema, *Coordination and Convention at the Foundations of Law*, *supra* note 62, at 171. It’s not entirely clear that Hart’s aim was to provide an account that grounded genuine official duties. Others have noted a kind of internal tension in Hart’s jurisprudence regarding whether he aimed to explain the normativity of law or merely to provide a descriptive sociological account. See Barzun, *Constructing Originalism*, *supra* note 59, at 138.

As I will explain shortly, I think these concerns about the normative inertness of Hartian positivism are well placed.⁶⁴ Hence, the positivist theory that Baude and Sachs adopt is an inadequate basis for grounding a judicial duty to adopt originalist methods just because those methods are our (positive) law. But before getting there I want to first ward off a couple potential misunderstandings.

First, those who believe that Hartian positive law within their jurisdiction is morally meritorious in some respect might think there is good reason for judges to apply that law. That strikes me as the right sort of thought. If some bit of positive law, including any interpretive rules, is morally commendable in some way, then those morally commendable features give a judge a reason to comply with it. But in such cases, a judge has reason to apply positive law only *because it is morally commendable in some respect*, which is a rather unremarkable claim. What defenders of the positive turn in constitutional theory need to show is that a judge has reason to apply positive law merely *because it is positive law*.

Consider that some states have statutory rules of construction.⁶⁵ It is plausible, at least *prima facie*, to think that judges would have a reason to use statutory rules of construction where the statutes have certain democratic credentials—they come out of democratically elected bodies, say. But what comes out of democratically elected bodies are *statutes*. For the positivist, whether the content of the statute has any legal relevance, or what contribution the statute makes to the law depends on what role our convergent social practices assign to statutes. A legal system could treat statutes as merely advisory. One might reasonably object that this would be undemocratic. But, of course, for the Hartian positivist, that has no bearing on whether it is law. The point here is that if the reason to apply positive law arises only out of morally meritorious features of positive law within a jurisdiction, then judicial duty depends on substantive, normatively salient facts about our social practices. Whether the practices ground the content of the law has nothing to do with it.

The second potential misunderstanding is the thought that the law itself is intrinsically normative. There is a sense in which this is true, although, as we shall see, not in a way that can ground anything like a

64. Pojanowski & Walsh, *Enduring Originalism*, *supra* note 60, at 113–16.

65. *See, e.g.*, OHIO REV. CODE § 2901.04 (2023).

judicial duty to apply the law. The sense in which it is true is that law is typified by a set of rules that at least purport to govern human behavior. It makes sense to say that a person is conforming or not conforming to those rules. And that looks like a way of setting success conditions against which one can assess an agent's behavior.

Some authors describe this sort of normativity as “formal” normativity.⁶⁶ Formal normativity arises whenever there are criteria for correctness. As David Enoch explains, one creates formal normativity any time one creates rules for a game. For example, the game “don't step on the lines” carries with it a kind of formal normativity.⁶⁷ When playing that game one might sensibly say “you shouldn't step on the lines.” And, at least during the game, that norm governs behavior in a sense, because it sets a standard that distinguishes playing well from playing poorly. If I was engaged in playing the game and started stepping on lines, one might criticize me by saying “you aren't playing this game very well.” Or if I am stepping on the lines intentionally, or without a care, one might say “you aren't playing this game at all.” But the force of these kinds of criticisms is just that I have deviated from a standard.⁶⁸ All else equal there is no requirement that I comply with that standard. Indeed, one of the features of formal normativity is that it can be constraining only if some other normatively relevant consideration makes it the case that one ought to comply with the standard. In some cases this happens. For instance, a child might be disappointed if I don't conform my behavior to the rules of a game—if I start moving my piece up the chutes and down the ladders, say. Because of this, I have some reason to conform my behavior to the rules. But that reason is wholly derivative from the disappointment that I might cause the child. In such a case, it would be more perspicuous to say that I have a reason to not disappoint the child, and that in these special circumstances, avoiding child disappointment requires following the rules. So, while we might talk as if I had a reason to follow the rules, that is just because following the rules is a way of realizing something else that I have reason to do. Absent that feature, I would have no reason to conform my behavior to the rules of the game.

66. David Enoch, *Is General Jurisprudence Interesting?*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE* (David Plunkett et al. eds., 2019).

67. *Id.* § 3.

68. Scott Hershovitz makes a similar point about the FIDE rules for chess. Scott Hershovitz, *The End of Jurisprudence*, 124 *YALE L.J.* 1160, 1183 (2015).

There can be no doubt that many legal resources⁶⁹ have a kind of formal normativity. A statute, or a holding, or an interpretation of either, will most often have the form of a rule. And it can make sense to say that a person is or is not following the rule, or that she is or is not following a certain interpretation of that rule.⁷⁰ But as the example of games illustrates, this will be true of anything with a rule-like form. So, formal normativity is not enough for the purpose of grounding a judicial duty to apply the law.⁷¹ When someone asserts that a judge has a duty to apply originalist principles, for instance, they presumably mean that a judge has *pro tanto* reason to comply with those standards and not just that failure to comply means that she isn't applying some set of rules very well.

The lesson here is that one cannot infer that there is reason to conform to the practice merely from the existence of the practice. What the social practices are is one thing, and what reasons a person has to conform to the social practices are another. To be sure, there might often be a reason to conform to a practice where the practice either is itself morally meritorious or brings about other valuable ends. The judicial practice of not ignoring democratically enacted statutes, for instance, is morally meritorious to the degree that democratic processes are. But some story must be told about why one has a reason to comply with the practice, when one does.

69. I use the term “legal resources” to mark the distinction between a view that says that the semantic content of the text of a statute just is the law, and the view that says that the semantic content of the text of the statute is a contributor to the law, but the law itself may be something else, such as the moral upshots of the statutory text. See Greenberg, *The Moral Impact Theory of Law*, *supra* note 54, at 1306–25. The text of the statute is a legal resource, even if its semantic content is not the law. And the point here is that the statutory text has a kind of formal normativity—one can make sense of the idea that a person succeeds or fails in following it.

70. Any interpretation of a rule will have a rule-like form and hence a kind of formal normativity.

71. Some authors distinguish formal normativity from robust normativity, with robust normativity being authoritative in a way that mere formal normativity is not. See David Plunkett, *Robust Normativity, Morality, and Legal Positivism*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE* (David Plunkett et al. eds., 2019). Given this distinction, one might characterize the challenge to Baude and Sachs as having to show that the law is robustly normative. For present purposes, it is more illuminating to frame the issue in terms of two different questions. First, is there a formally normative standard. Second, ought someone to comply with the standard.

III. HOW LEGAL PRACTICES AFFECT WHAT REASONS JUDGES HAVE (WHEN THEY DO)

As we've seen, the merely formal normativity accompanying any social practice isn't enough to ground a judicial duty, though a person can sometimes have a reason to conform his or her behavior to a social practice, say, when the social practice is morally meritorious in some respect, or when conforming to the practice is a way of achieving something else that is worthwhile. The goal in this section is to provide a more general account of how convergent legal practices bear on the reasons for a judge to act. The arguments that follow have important implications for the traditional question of political obligation "Is there a duty to apply/obey the law?" Indeed, I argue that the traditional question of political obligation unnecessarily obscures the normative upshots of our social and legal practices. Any answer to the question of political obligation depends on how a theory identifies the law—which practices it points to, and what factors outside the practice, including moral ones, are relevant to law-determination. Thus, there is not one question of political obligation, but rather a separate one for each competing theoretical account of law. So, if one accepts a positivist conception of law, one ought to reframe this traditional question of political obligation by asking instead about the normative relevance of the putatively law-constituting social practices themselves. It is to this sort of analysis that I now turn.

A. The Normative Relevance of Social Practices is Context Dependent

A change in the world can alter the reasons a person has to act. This is a familiar phenomenon. If I accidentally run into your car, I thereby have a reason to try and make amends, perhaps by offering to pay for the repairs. If my child is extremely ill, I thereby come to have a reason to seek medical advice. These changes in the world change the normative landscape by making a related norm relevant, something like "when one accidentally harms another, one has reason to try to make amends" or "when a dependent is severely ill, one has reason to seek medical advice." We might call this sort of relationship one of "triggering" related norms.⁷² The key feature here is that the

72. I get the word "trigger" from David Enoch's *Reason-Giving and the Law*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 4–6 (Leslie Green & Brian Leiter eds., 2011).

conditional norm is independent of the event that may have triggered it; the event didn't create the norm, it just made it salient.⁷³

Our legal practices can also trigger related norms. For instance, there is a convergent social practice in which lower courts will treat prior holdings of the Supreme Court as establishing a rule within a legal system. Because of that practice, attorneys will advise clients in accordance with the holdings of the Supreme Court. The convergent practice of treating precedents as binding triggers—makes salient—a norm that has something like the form “one ought not, without good reason, upset the reliance interests of others.” Because of the reliance interest created by this convergent social practice, a court will have reason not to deviate from the prior holding. In such a case, the existence of a social practice makes a reason for conformity with the practice relevant. But the salience of the practice in triggering a norm is context dependent. If the applicability of a precedent to a new case is unclear, or if the precedent has sat unused for a long period of time, the normative force of the precedent wanes, or perhaps is extinguished altogether, because there ceases to be a legitimate reliance interest in trying to follow the precedent. And if a practice is unjust or unfair—imagine a practice of strictly interpreting an ambiguous statute in favor of greater punishment—that may trigger a reason to resist the practice, perhaps by writing an opinion advocating for a change. The point here is that the normative force of any reason triggered by the mere existence of a convergent social practice—even a Hartian-style positive law-constituting one—is a context-dependent matter.

Because the norms that might favor conformity with a social practice are context-dependent in the way just described, there is no stable relationship between the legal practices that constitute positive law and the reasons that might be triggered case by case.⁷⁴ So, the normative relevance of our social practices cannot, standing alone, provide us with a general reason to follow the supposedly law-constituting ones. While the existence of a social practice can trigger a reason to comply with the practice, whether it does so or not depends on the specifics of the case.

73. *See id.*

74. *See id.* at 28 (noting that “the reasons triggered by law will be many and varied” and describing the kinds of context-dependent relevance that the law may have).

To help further illustrate the point, consider two different stories that one might tell about why a judge ought to apply the plain and unambiguous meaning of an employment regulation. One story is that there is a convergent social practice from which an interpretive rule “follow the plain and unambiguous meaning of a text” can be derived, and a judge has a general reason to apply rules that can be derived from that convergent social practice. The problem for this sort of story is that the mere fact that there is a social practice does not all by itself ground a reason to conform to that social practice; there can be a reason to conform only if something else makes conformity normatively salient. The competing story is that there is a social practice where people (and not just legal officials, but employers, employees, and the lawyers who advise them) look to the regulations in deciding what policies to adopt. Given this convergent social practice, a judge would upset reasonable expectations if he or she ruled in a manner that was contrary to the unambiguous meaning of the regulation. Because judges generally have a reason to not unnecessarily upset reasonable expectations, a judge ought to apply the unambiguous meaning of the regulation. In the latter story, the normative relevance of the social practice depends on the contingent features of how others interact with employment regulations and the expectations that are thereby created. Adding “and the regulation is the law” doesn’t add anything of normative relevance, since that is effectively just a shorthand for saying that the regulation satisfies the practice-based criteria.

B. The Limits on the Normative Relevance of Settlement

As we’ve seen, the normative relevance of any social practice is context dependent. But a defender of a judicial duty to apply Hartian-style positive law might try to argue that law-constituting social practices have some distinctive commonality that can ground a uniform judicial duty. There are two related lines of thought that such a theorist might advocate. First, they might focus on the distinctive settlement function that the law tends to play. Second, the theorists might grant that in some sense the normative relevance of our law-constituting social practices are context dependent, but argue that even if the law is, from a moral perspective, suboptimal, as long as the legal system reaches a threshold level of justness there can be a reason to conform. As we shall see, neither line of argument works.

According to the first line of argument, the practices that constitute positive law are distinctive because of the important and valuable role that they play in settling potential disputes by way of public standards. Baude and Sachs seem to have something like this in mind when they remark that “one of the most important functions of a legal system [is] to replace real answers with fake ones.”⁷⁵ As they remark “people persistently disagree on the real answers, and the legal system helpfully offers fake answers instead—answers that hopefully are somewhat close to the real ones, but on which society (mostly) agrees and which allow us (mostly) to get along.”⁷⁶ Put in other terms, the idea is that the legal system can resolve disputes in ways that helpfully allow us to carry on, even when the resolution is, from an objective moral perspective, less than ideal. And being able to mostly harmoniously carry on is of such great normative importance, that judges can have a duty to conform with a legal resolution, even if the legal resolution is less than ideal.

To be sure, there is something to this line of thought, at least in some cases. For instance, there are strong normative grounds for hewing to a social practice that solves a coordination problem—by determining the side of the road on which people will drive, say.⁷⁷ And some rules of interpretation might play similar coordinating roles. Consider, for instance, Baude and Sachs’s discussion of the repeal-revival rule of 1 U.S.C. § 108.⁷⁸ That rule provides that if statute B repeals statute A and statute C repeals B, A is not thereby revived. *Prima facie* there is little reason to prefer the repeal-revival rule to a rule that says that A is revived. But it matters a quite a bit when drafting a statute that we settle on one rule or another.

In cases where a social practice functions to resolve a coordination problem there will be powerful reasons for a judge not to deviate from it. Still, some social practices will satisfy Hartian conditions for counting as positive law but not solve a coordination problem. The social practices that constitute Hartian positive law can be unjust, impractical, or nearly impossible for courts (or attorneys) to consistently

75. Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1096.

76. *Id.*

77. Specific social practices could be valuable in other ways too. For instance, they might preserve a kind of predictability and stability that makes it easier for people to navigate their lives. But the normative relevance of any given social practice will be rooted in the norms that it serves. The mere fact that it is an established social practice plays no role in that analysis.

78. Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1102.

conform to (and hence fail to effectively coordinate).⁷⁹ The coordination examples show that sometimes having a rule be settled matters a great deal. And sometimes this settlement function can carry quite a lot of normative force. Against the background of practicing the repeal-revival rule, we would have solid normative grounds for objecting to a deviating judge, because such deviation would undermine the legislative process.

But the value associated with settlement itself varies based on the context. Sticking with a settled answer can be worthwhile where committing to a resolution of a potential area of dispute is valuable; and (1) no sufficiently robust⁸⁰ reason favors any one of the alternatives (this is typical of coordination examples); or (2) there are sufficiently robust reasons for pursuing each alternative, but the relevant values at stake are incommensurable so that one can't say that there is a reason to prefer one choice over another; or (3) even if there are robust reasons to prefer one choice over another, doing so would contravene values arising from the prior stable settlement—such as reliance interests—that outweigh the value of changing course. But settlement isn't in-itself valuable. Some settlements might be absurd. “The defendant wins on Tuesdays” is a kind of settlement, but one that has no value at all. Rather, settlement has value when it allows us to achieve something independently worthwhile, like facilitating stable and predictable planning towards valuable ends.

So, we should be wary of baldly pointing to an undescribed settlement function as a reason to conform to a practice-based rule. Rather, we should want to know why it is important that something be

79. Arguably, originalist methods fail to effectively coordinate in a large number of cases because of the difficulty in uncovering the law of the past. Borrowing from a distinction most often deployed in debates over consequentialist forms of ethics, Sachs has recently argued that we should conceive of originalism as a standard of correctness and not a decision procedure. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778–81 (2022). One claimed upshot of this distinction is that it can insulate originalism from the charge that it might be useless in serving things like the coordination function. *Id.* at 787–98. After all, a standard can be correct even if totally useless. But now we are again confronted with the question of why anyone has reason to follow that (useless) standard. If Sachs's imagined interlocutor was noting the uselessness of originalist principles to show that they can't be a sound criterion for determining what a judge ought to do, then the invocation of the standard/decision procedure distinction totally misses the mark as a response. Announcing that some criteria is a legal standard leaves totally untouched the question of what reasons one has to act. Noting that the rulebook for a game sets a standard for correctness of play tells us nothing about why that standard has any reason-giving force.

80. I'm using the phrase “sufficiently robust” here to mark out the possibility that there could be cases where *some* reason favors one alternative over another, but that it is of so little weight that we should be unconcerned with pre-committing in ways that run counter to it.

settled, and what sorts of settlement might be worthwhile. In certain circumstances, it may turn out that it's not important that something be settled. Indeed, as Seanna Shiffrin has suggested, it might be valuable for something to not be settled.⁸¹ And there may be limits on what sort of settlement is tolerable and hence can ground a reason for conformity.

It is important, also, to recognize that the normative force associated with settlement may not track “positive law,” at least on some conceptions. The value of settlement is at its peak when a settled rule is publicly accessible and easily grasped by looking to the surface of our legal practices. But it is hard to deny that at the surface level there is widespread disagreement about constitutional decision-making.⁸² It would be an understatement to say that, at least at the surface level, we have not settled on a single method of interpreting the constitution. And some theorists have argued that because of this widespread disagreement no constitutional theory could count as positive law.⁸³ In response to this sort of worry, Baude and Sachs postulate that at a deeper level our practices are committed to a form of originalism, even if at the surface level we haven't realized it. As they imagine it, this is an open possibility based on the hierarchical structure of Hart's way of understanding a legal system, with the rule of recognition standing at the top of the structure determining other legal rules.⁸⁴ The idea is that there can be available inferences from the rule of recognition that we haven't yet drawn, but which identify our law. For this reason, the “hierarchical structure makes it possible for the correct ground-level legal rules to surprise us.”⁸⁵ But rules that “surprise us” are hardly good candidates for serving the kinds of values that settlement serves. In the face of well-established and publicly accessible precedents, discovering a contrary hidden constitution in exile and insisting that it is really the law after all is rather indefensible in terms of the sorts of

81. See Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1218 (2010) (arguing that vague standards—as opposed to clearly settled rules—can have the virtue of inducing moral deliberation).

82. Baude and Sachs seem to admit as much. See Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1458–59.

83. See Primus, *Is Theocracy Our Politics*, *supra* note 39, at 51; Barzun, *The Positive U-Turn*, *supra* note 50, at 1357; Greenberg, *What Makes a Method of Legal Interpretation Correct?*, *supra* note 52, at 115.

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

85. *Id.* at 1465.

values—stability and predictability, say—that might be served by law’s settlement function.⁸⁶

This brings me to the second line of argument. According to that line of argument, we can acknowledge that the normative relevance of our social and legal practices is context dependent but insist that when any legal system is sufficiently just, participants in that legal system have strong moral reason to conform to its dictates. For instance, Jeffrey Pojanowski argues that “even if one has moral qualms about particular provisions of the constitution, any constitutional regime that passes a threshold of moral respectability has a moral claim to our support and respect.”⁸⁷ Thus, he claims that insofar as the original law of the constitution is sufficiently just, we are bound by it, as any alteration of the original law embodied in the constitution could be justified only if it fell short of a threshold of moral respectability.

But Pojanowski’s argument errs in two ways. First, it bites off more than it ought to chew. Why, one might wonder, is the relevant domain of assessment the entire constitutional system rather than its component parts, some of which might be perfectly just, others of which might be reasonably just, and yet others of which might be totally unjust. Suppose we conclude that the legal system is sufficiently just, taken as a whole—whatever that means.⁸⁸ Why should it follow that a judge ought to act in a patently unjust manner, simply because other parts of the legal system supposedly make up for some patently unjust law so as to render the system as a whole sufficiently just. Any partially just system might be very just in some ways and not all that just in others. But once we see this clearly, it is unclear why passing some threshold of legitimacy or justice would trigger a reason to comply with all of the system’s apparent requirements, including ones that are clearly very unjust. Rather, what norm is triggered depends on what part of the legal system is at issue, and the degree to which, and the specific ways in which, that component of the legal system is legitimate or just.

86. *But see generally* Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014) (discussing constitutional changes in theory and practice over time).

87. Jeffrey A. Pojanowski, *Why Should Anyone Be an Originalist*, 31 DIRITTO PUBBLICO COMPARATO ED EUROPEO ONLINE 583, 586 (2017).

88. Are we imagining that we add up the various justices and injustices of its component parts and say that all told it passes some threshold? If that seems sensible to you, I invite you to try it out for a while and then decide whether it’s as workable as it might have seemed at first blush.

Second, Pojanowski's argument underestimates the diversity of methods available for resistance to unjust components of any existing legal system. There are more options on the table than merely ignoring an unjust rule of law. A judge might, for instance, adopt an injustice-mitigating construction. Or a judge might, as it were, narrow from below,⁸⁹ if the legal rule derives from a higher court precedent. What's proper under the circumstances depends, of course, on the value of settlement and other rule-of-law concerns. But the point is that judges ought to respond in a manner that is fitting under the circumstances and that considers the nature of the injustice and the competing values of settlement.

C. Double-Counting, Bootstrapping, and Needed Revision to the Question of Political Obligation

So, whether there is a reason for a judge to conform to the positive law-constituting social practices will depend on what normatively salient considerations are triggered by those practices. Thus, there is no plausible *pro tanto* duty for a judge to apply positive law. Moreover, the normative weight of those considerations will depend on what sort of norm happens to ground the reason to conform.⁹⁰ As David Enoch puts it, sometimes the law gives a person a reason to conform because of a threat of sanctions. Sometimes it does so because the existence of the law resolves a coordination problem. Sometimes it does so because the law creates expectations that others rely on in ways that are substantively important. And sometimes it does so because of the nature of the decision-procedure that led to the law being as it is (for instance where the decision-procedure was an agreed upon fair way of resolving a dispute).⁹¹ Whether someone has a reason to follow the positive law and how weighty that reason is will vary based on which normative consideration is triggered in any specific case.

89. See generally Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (discussing the common practice of lower courts narrowing the rulings of Supreme Court opinions).

90. Enoch, *Reason-Giving and the Law*, *supra* note 72, at 27–28.

91. *Id.* at 28. As Enoch rightly notes, each of these considerations has come under attack when presented as a single story about the normativity of law. And as a univocal unified account of the normativity of law, each would fail. But as an account of a normatively relevant consideration that might, case by case, bear on the relevance of legal resources to the question of how a person should act, each seems hard to deny.

Moreover, the preceding observations invite a reframing of how we think about the normativity of law. Asking “What reasons are triggered by something being the law?” invites the idea that there is a threshold question—“Is this the law?”—which will have some sort of stable normative upshots. But it is more illuminating and avoids confusion to look to the particular features of legal resources and practices within a legal system and ask what reasons do those trigger. Rather than asking “Does one have reason to follow the law of interpretation?” it is better to ask “Does one have a reason to apply the plain meaning of the text of a statute in this instance?”

If the normative relevance of our legal practices depends on the reasons that are triggered by those practices, then it will turn out that framing the traditional question of political obligation in terms of reasons to follow the law invites an impermissible kind of bootstrapping. To see this, consider how Baude and Sachs attempt to establish that originalism is our law. They first point to certain empirical observations—for instance, that the Supreme Court never explicitly repudiates originalism; actors in our legal system do not acknowledge any official break with the founding; the text controls the selection of officials, even if unpopular or contrary to tradition; and original meaning sometimes explicitly prevails over policy arguments, but the contrary does not explicitly occur.⁹² Second, they infer from observations like these that originalism is our law.⁹³ And finally, they further infer, as a normative upshot of the conclusion that originalism is our law, that judges ought to apply originalist methods.⁹⁴ Note how much work is done here by the inference from the empirical observations to the conclusion that something is law. Instead of simply asking about the normative relevance of the identified practices, Baude and Sachs claim further normative credentials for those practices by inferring from them that originalism is the law. This kind of inference should give us pause. Baude and Sachs seem to think that the identified social practices get

92. See Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1477–78. For present purposes, we can assume that these observations are true, though there may be reasons for doubt.

93. *Id.*

94. In some modes, Sachs admits that the question whether judges should follow preexisting law is “always a live one.” See Sachs, *The Law and Morals of Interpretation*, *supra* note 57, at 110. But he suggests that what morally ought to be done might depend on what the law requires because deviation from positive law “however minor” may cause instability. *Id.* That’s mistaken. Deviation from stable practices might cause instability, but those practices’ status as law has nothing to do with it.

additional normative force simply because they satisfy some theoretical criteria for what counts as *law*. Indeed, we should resist the idea that something's status as *law* makes *any* normative contribution over and above what the supposedly law-constituting practices themselves contribute.

There are two related reasons to think that status as law makes no independent normative contribution beyond those made by the law-constituting practices.⁹⁵ First, is a double counting worry. Treating the social practices that ground something's status as positive law as themselves having normative upshots and then also treating the additional fact that those social practices ground positive law as having further normative upshots is an improper kind of double counting. Compare a moral theorist who treated the reasons in virtue of which an act was wrong as reasons not to do it and then also treated the fact that the act was wrong as an additional reason not to do it with independent normative force. That's an improper kind of double counting because the reasons in virtue of which the act is wrong wholly capture the acts wrongness, and that it is wrong doesn't give us yet another reason to throw on the normative pile. We could apply numerous evaluative concepts to the very same act—we could describe it as harmful, as unnecessarily harmful, as unjustified, as cruel, or as wrong. Some of those descriptions might incorporate content not contained in others, e.g., learning that something is cruel tells us more than just that it is harmful. In such a case we might be clued in to additional normative force when we learn that some act was not just harmful but also cruel. But we should avoid multiplying normative force when all we are doing is describing the phenomenon in different ways.⁹⁶ If being cruel is just being harmful in a particular way, then treating harmfulness and cruelty as two independent sources of normativity is a misguided kind of double counting.

A similar point can be made about jurisprudential theories of law and their relation to any supposed judicial duty. If, as the positivist would have it, being the law is wholly cashed out in terms of certain criterial social practices, then it would involve a kind of double counting to insist that law has independent normative force over and above

95. For present purposes, I'll focus on positivist accounts of the law-constituting factors. But as we shall see, the basic point extends even to anti-positivist accounts.

96. For more on this point, see Zoë Johnson-King, *We Can Have Our Buck and Pass It, Too*, in 14 OXFORD STUDIES IN METAETHICS 167, 181–82 (Russ Shafer-Landau ed., 2019).

the normative force of the social practices that constitute it. If “being the law” is just a summary conclusion based on the specific empirical facts that happen to obtain within a legal system, then that conclusion has no independent normative force. Similarly, if the law is cashed out wholly in terms of the moral impact of our political practices, as Greenberg claims, then it would double count to insist that law has additional normative force over and above what is apparent in the moral impact of our political practices.

To see where Baude and Sachs risk double counting, consider their observation that the U.S. Supreme Court never explicitly repudiates originalism (though the Court very often decides a case without reference to originalist methods).⁹⁷ That fact may bear on what reasons a person has to act. For instance, it is likely imprudent for an advocate to explicitly repudiate originalist principles in a brief at the Supreme Court. But the further insistence that originalism is the law, or that because of this and other facts originalism is the law, should not add anything over and above what the ground-level facts themselves contribute to the normative picture.

This brings us to the second worry, which is that a bald assertion that a judge has a *pro tanto* duty to apply the law invites the idea that a judge has a duty to apply whatever falls out of the best jurisprudential account of how we identify the law. Note what is involved in that idea. It presumes there is an identical duty (a duty to apply the law) regardless of which jurisprudential theory is correct and regardless of how the details of that theory are cashed out. And that sort of thought involves a kind of impermissible bootstrapping.

To better see the problem, first consider the questions Baude and Sachs don’t answer regarding “which social conventions determine the law, who has to hold them, how we identify them, and so on,” and their general methodology of picking out certain empirical observations and inferring from those observations that originalism is the law.⁹⁸ A positivist theory of law needs to provide some criterial account of when a social practice counts as law-determining. It must have a view about which people must have which sorts of attitudes toward what sorts of social rules satisfying which sorts of social functions. But answering those questions bears on how we should think

97. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1478.

98. *See* Sachs, *Originalism as a Theory of Legal Change*, *supra* note 5, at 864.

about whether one has reason to comply with those conventions. If the relevant social conventions are just the shared commitments of the Justices of the U.S. Supreme Court, surely that social fact has different normative relevance than if the conventions are shared views of almost all well-aculturated attorneys, and those conventions have yet different implications from the nearly universally shared core political commitments of the people within a polity. Insisting that any of these grounds “the law” doesn’t in any way alter the normative relevance of those social facts. Hence, there is a kind of sleight of hand in moving from “convention X determines the law” to “judges ought to apply the law.” If one is interested in knowing something about the nature of judicial duty, one should ask directly about that. One should not try to bootstrap oneself into an account of judicial duty by presuming that a judge has a duty to apply the law and then arguing for a particular conception of law.

One might be tempted to avoid this problem by identifying the relevant social practices on normative grounds—say, by picking out as law only those practices that have a certain kind of normative relevance. For instance, one might, out of a concern that law be democratically legitimate, insist that the relevant convergent practices are not just those of legal elites but those of a broader group including knowledgeable members of the public. But in that case, the identified practices were selected simply because they have a certain normative upshot, and so adding that the practice satisfies the criteria—i.e., is law—doesn’t add anything normatively relevant (it is nothing more than shorthand).

What this argument shows is that it doesn’t matter how one sets the criteria for how we identify our law. No matter what those criteria are, the status of something as law—i.e., satisfying the criteria set forth in the theory—adds nothing of normative relevance over and above the normative relevance of the criteria the theory selects. Any other view would involve impermissible bootstrapping.

Though I’ve focused on positivist accounts of law, the same bootstrapping problem emerges when we turn to broader families of jurisprudential theories. Consider, again, Greenberg’s moral impact theory and Hart’s positivism. The Dworkinian assumption would have it that either of these theories, if correct, grounds an identical judicial duty—a duty to apply the law according to that theory. But this would be astonishing. It is implausible to think that rules that satisfy Hart’s

positivism ground an identical duty on the part of judges to the rules that satisfy Greenberg's moral impact theory. After all, Greenberg's theory is tailor-made to establish that legal obligations are "genuinely binding."⁹⁹ It achieves this result by identifying legal obligations with certain moral obligations that arise from our legal practices. And one identifies the moral obligations that arise from those practices by asking questions like "[w]hat is the moral consequence of the fact that a majority of the members of the legislature, with whatever intentions they had, voted for this text, with its semantic content?"¹⁰⁰ In contrast, Hart's theory, as an exercise in descriptive sociology, has no such aims.

To avoid bootstrapping, we should admit that resolving jurisprudential debates about how we identify the law has no practical implications for what judges and others ought to do.¹⁰¹ As I noted above, the most that Greenberg's account secures is that there will be moral reasons to act whenever there are legal norms. This is because law is defined in moral terms. But what Greenberg doesn't establish is that legality as such is an independent ground of moral reasons for action. So, instead of assuming that judges have a duty to apply the law, and therefore thinking it vitally important to determine what the law is, we would do better to ask about the moral obligations of a judge directly—that is, without first insisting on any particular account of the law.¹⁰²

Having a clearer view about the context-dependent nature of the relationship between legal sources used within a practice—the text of a statute or regulation or constitution, or legislative history, or the

99. Greenberg, *The Moral Impact Theory of Law*, *supra* note 54, at 1304.

100. *Id.* at 1293.

101. Compare SHAPIRO, LEGALITY, *supra* note 4, at 25 ("[A]nalytical jurisprudence has profound practical implications for the practice of law . . ."); Greenberg, *What Makes a Method of Legal Interpretation Correct?*, *supra* note 52, at 106 (arguing that a method of legal interpretation is correct only if it "accurately identifies the law" and that determining what accurately identifies the law requires first ascertaining "how the content of the law is determined at a more fundamental level than legal standards").

102. For more on this sort of point, see Hershovitz, *The End of Jurisprudence*, *supra* note 68, at 1200–02 (discussing an "eliminativist" view on which we can, and should, do without the concept of law). Brian Leiter has argued that we should "abandon the Demarcation Problem [the problem of attempting to identify criteria that distinguish law from other normative systems] in favour of arguing about *what ought to be done*, whether by judges confronted with novel cases, or citizens confronted with morally objectionable laws." Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 31 OXFORD J. LEGAL STUD. 663, 677 (2011). Evan Bernick has argued for a similar conclusion. See generally Evan D. Bernick, *Eliminating Constitutional Law*, 67 S.D. L. REV. 1 (2022).

words in a precedential opinion—and reasons for action, can also help ward off a kind of misleading metaphysical yearning that tempts some constitutional theorists. This metaphysical yearning, which we can see explicitly in Sachs’s discussion of precedent, manifests itself in the thought that there must be some law out there that it is the duty of a judge to discover.¹⁰³ Sachs claims that precedent rules simply require us to treat something *as if* it was law, even though it may not in fact be law.¹⁰⁴ If one cares about the normative underpinnings of legal decision-making, this metaphysical yearning is puzzling. The social practice of treating higher court precedent as binding creates expectations that normatively constrain judicial decision-making. Given this, one wonders what the upshot is of insisting that the precedent is or is not really law. The received practice is that lower courts continue to follow precedents even if the judges are convinced that the original public meaning—or the original law—is contrary to that precedent. So, for lower courts at least, it looks like the practice is that precedent trumps original meaning or whatever else one’s preferred account of legality is.

Nevertheless, Sachs asserts that in the face of a circuit split we do not actually think that *the law* requires different things in some states than in others.¹⁰⁵ But this just seems like a practically inert metaphysical posit. What we find in the face of a circuit split is that legal practice does diverge in the two jurisdictions. This is to be expected because the reasons for which legal actors should act diverge. The insistence that *the law* is not different merely obscures what practical reason demands. When the Ninth Circuit has ruled one way and the Fifth Circuit has ruled another, we know exactly what is going on. Legal practitioners know what to do if they want to act in accordance with the practice. Advocates rightly see an opportunity to make a set of arguments that otherwise would not be available. And everyone knows what the available procedures are for getting those rulings changed. Given all of this, it is unclear why we should search further for a metaphysical foundation that goes beyond the facial characteristics of the practice. We need not feel the pull of this metaphysical

103. See Sachs, *Originalism as a Theory of Legal Change*, *supra* note 5, at 861; see also Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 560–65 (2019) (discussing the plausibility of a legal system where judges find unwritten law).

104. Sachs, *Finding Law*, *supra* note 103, at 561–67.

105. *Id.*

yearning. And I suspect that most practicing lawyers don't feel it. Moreover, I think it can lead to confusion where no confusion is called for, and it can unnecessarily obscure the normative relevance of social practices that are otherwise perfectly clear. Legal practices that are perfectly clear as a practical matter can look confusing when one asks the metaphysical question about whether they are the law. The antidote to that confusion, it seems to me, is to stop asking it.¹⁰⁶

IV. ON THE RELATIONSHIP BETWEEN THEORIES OF ADJUDICATION AND THEORIES OF LAW

So far, I've argued that we should reject the thought that jurisprudential theories of legal content inform accounts of judicial duty. Instead, I've argued that any account of judicial duty would have to stand on its own normative credentials, unmediated by an account of legal content. Any alternative view, I've argued, raises serious bootstrapping and double-counting worries. In this section, I want to situate some current debates in constitutional theory within a conceptual framework for thinking about the relationship between a theory of the content of law and a theory of sound adjudication. The hope is that this framework can help to clarify the terrain on which disputes in constitutional theory occur.

A. *Theories of Adjudication and Theories of Law*

As Mitchell Berman and Kevin Toh have argued, “constitutional interpretation”—the supposed subject of constitutional theory—is ambiguous.¹⁰⁷ Some constitutional theorists aim to provide a theory of adjudication, that is, a theory “of what judges should do in the course of resolving constitutional disputes.”¹⁰⁸ This is fundamentally a normative question; it relates to what a person ought to do.¹⁰⁹ Other

106. Scott Hershovitz makes a similar point. Hershovitz, *The End of Jurisprudence*, *supra* note 68, at 1203.

107. Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545, 547, 557 (2013) *see also* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *GEO. L.J.* 1823 (1997) (distinguishing theories of interpretation from theories of adjudication).

108. Berman & Toh, *On What Distinguishes New Originalism from Old*, *supra* note 107, at 552.

109. I should clarify here that I understand this question a specific way. That is, the question is “how should a judge decide a case, qua judge,” and not “how should a particular judge decide a case in a particular circumstance.” This latter question may involve considerations that aren't intuitively part of any proper theory of adjudication. For instance, if a judge's family was credibly

theorists aim to provide an account of the content of law. Theories of the content of law attempt to answer the question “What is the ultimate criteria of legal validity, or the ultimate determinant of legal content?”¹¹⁰ This is fundamentally a metaphysical question.

As Baude and Sachs frame their project, their goal is to provide an answer to the question “What would make an interpretive method correct?”¹¹¹ In the abstract, this formulation invites the same ambiguity in the term “interpretation” noted by Berman and Toh: Does the question concern specifically *legal* criteria of validity grounding a set of *legal* rules that allow us to move from legal resources—statutes, regulations, constitutions, etc.—to legal effect. Or does the question concern, more generally, what would count as a sound theory of judicial decision-making when dealing with statutes, constitutions, contracts, etc.?

Baude and Sachs’s innovation is to argue that the move from legal resources to a legal decision could itself be governed by legal principles. So, for them, a full specification of the content of the law would include principles taking us from legal resources to a legal decision (what they call the law of interpretation). But the authors do ultimately have both a theory of the content of the law of interpretation—it’s whatever is derivable from the relevant convergent social practice—and a theory of how a judge ought to decide a case (what I above called a theory of adjudication). Their theory of adjudication is just the principle that a judge should be guided by the rules derived from the social practice.¹¹² As they put the point, a judge’s “job is to ask what [the] law is (and to leave to others what it should be).”¹¹³ And this principle

threatened with death unless the judge found for a certain party, it may be that the judge ought to find for that party, all things considered. But intuitively, this sort of consideration is not part of any plausible theory of adjudication, because it does not speak to what reasons a judge has in his or her capacity as a judge. While the answer to the adjudication question may depend on particular contingent facts about the case, it does not depend on contingent facts about the judge.

110. Berman & Toh, *On What Distinguishes New Originalism from Old*, *supra* note 107, at 552. Gary Lawson makes a related distinction between theories of “interpretation,” which get us to the meaning of a text, and theories of “adjudication” that aim to answer the question “what role, if any, the Constitution’s meaning should play in particular decisions.” Lawson, *On Reading Recipes*, *supra* note 107, at 1824.

111. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1457. The terminology here is tricky because Baude and Sachs’s innovation is to emphasize that there can be a law of interpretation. The law of interpretation is a set of legal rules for how one approaches other legal resources, in order to get at further legal content. See Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1128–32.

112. Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1093–97.

113. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1458.

applies equally to the rules that constitute what they call the law of interpretation as it does to substantive legal rules establishing rights, duties, permission, etc.

The assumption that I've been casting doubt upon is that a metaphysical account of the content of law is explanatorily prior to an account of adjudication. The basic problem is that it is unclear how any metaphysical claim about legal content could, as such, have normative purchase. Thinking that one's legal metaphysics can determine normativity in that way risks impermissible forms of bootstrapping and double counting. Nevertheless, the assumption may seem almost inescapable.¹¹⁴ It seems to underwrite the commonplace idea that judges ought to just apply the law. And it seems to be at play in the most common folk understanding of the law—the “standard picture”—which assumes that the semantic meaning of a legal text determines the content of the law, that a judge ought to just apply the law, and hence a judge ought to just apply the semantic meaning of the text.¹¹⁵ As noted above, Baude and Sachs rightly reject this sort of view.¹¹⁶ But they do so by arguing that the law of interpretation may not treat the semantic content of legal texts as law.¹¹⁷ They still retain the basic form of the view on which an account of legal content is explanatorily prior to determining how a judge ought to proceed in deciding a case.¹¹⁸

B. On the Possible Relationships Between a Theory of Adjudication and a Theory of Law

The standard picture is one of a family of theories that share a common feature of treating a theory of law as explanatorily prior to a theory of adjudication. But it is not the only possible theory of that kind. For instance, there could be doctrinal alternatives that treat precedents as the law and insist that judges ought to follow precedents.

114. Baude and Sachs aren't alone in making this assumption. Mitch Berman claims that “a constitutive theory of constitutional legal content has natural priority over a prescriptive theory of constitutional adjudication.” Berman, *Keeping Our Distinctions Straight*, *supra* note 4, at 139. As I explain, it's not at all natural, clearly false on many theories of legal content (and simply false on others), and at the least needs to be defended. Christopher Green also makes a similar assumption. Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L., ETHICS & PUB. POL'Y 497 (2018).

115. See Greenberg, *The Standard Picture and Its Discontents*, *supra* note 9, at 42–50.

116. See Baude & Sachs, *The Law of Interpretation*, *supra* note 5, at 1085–93.

117. *Id.* at 1088–92.

118. *Id.* at 1093–97.

And there could be normative theories of law that treat the law as partially constituted by certain normative considerations and then define norms of adjudication in terms of that prior account of law (e.g., by insisting that judges ought to follow the law). But the key feature of such theories is that they presume that the answer to the question “How should a judge decide a case?” depends on first answering the question “What is the law around here?” On some such theories, judges might adopt non-legal principles in deciding a case, but those principles play a merely instrumental and epistemic role in helping a judge get at some independently specified legal content.¹¹⁹ Baude and Sachs’s theory isn’t quite like that because they think that the rules governing how to go from legal resources to legal effect are themselves a matter of law—the legally correct outcome is a matter of applying the legally correct principles of interpretation or construction to a legal document. But, again, the shared idea is that the law is explanatorily prior to a theory of adjudication.

Of course, it can’t be the case that a theory of the content of law fully determines an account of sound adjudication. In this vein, consider Phillip Soper’s “plea . . . for a distinction . . . between the concept of legal reasoning and the concept of legal validity.”¹²⁰ Soper’s point is that there can be standards for what counts as good legal reasoning that are not themselves legal standards. And those standards bind judges, even though they lack the status of law. As Soper puts it, the “invitation to collapse all questions concerning how courts ought to decide cases into questions of what the law is” is “misleading.”¹²¹ “An individual judge demonstrates compliance with official duty as respects [judicial technique principles, i.e. standards of adjudication], not by pointing to the fact of convergent peer behavior, but only by pointing to the correctness in fact of the judicial technique principles he employs.”¹²² The thought is that what counts as good legal reasoning can be identified, at least in part, independently from legal rules.

119. This sort of view has been defended by Christopher Green. See Green, *Constitutional Truthmakers*, *supra* note 114, at 509–13; see also Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 269, 286 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (considering the objection that the law-as-argument account he develops may confuse legal metaphysics and legal epistemology).

120. E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 497 (1977).

121. *Id.*

122. *Id.* at 497–98.

And these law-independent standards of good legal reasoning are binding on judges because of their merits.

Soper's point should not be controversial. Even if legal officials routinely commit the fallacy of denying the antecedent, that's still bad legal reasoning. It's bad, not because of our legal practices, but because it violates principles of rationality. And it would continue to be bad even if the majority of legal officials committed the fallacy the majority of the time. Relatedly, it is commonly understood that there are certain moral constraints on sound judging. Hart notes that among those constraints are "impartiality, neutrality in surveying the alternatives; consideration for the interests of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."¹²³ And as Justice Stephen Breyer has remarked, courts have a "general obligation to see that the human conflicts and controversies before them are handled expeditiously and fairly."¹²⁴ As with logical principles, these are features of good judicial reasoning not because they are law, but because they satisfy non-legal (here moral) standards for what counts as good judging. Indeed, it might be possible to formulate an account of judicial virtue and sound judicial reasoning that didn't depend on first establishing what the law is.¹²⁵

Considerations like these should make us open to the possibility that we could formulate a theory of sound adjudication that doesn't depend on first formulating a theory of legal content. There are several ways that this might go. First, one might defend the view that a theory of adjudication is fundamental and that a theory of legal content is derived from the theory of adjudication.¹²⁶ Alternatively, one could adopt a no-priority view of the relationship between a theory of law and a theory of adjudication. On that sort of view, there could be extra-legal principles of sound adjudication that inform legal content, and

123. HART, *THE CONCEPT OF LAW*, *supra* note 28, at 205. Stephen Breyer makes a similar point. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

124. Breyer, *Judicial Review of Questions of Law and Policy*, *supra* note 123, at 377.

125. See generally Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) (for one virtue-theoretic account of judicial decision-making).

126. This could be consistent with many different accounts of the proper role of the meaning of legal texts. Perhaps there is a normative argument that a judge ought to always be wholly guided by the text and the text alone. Or perhaps one might be more equivocal and say that the text is most relevant only when it implicates reliance interests, and that the text is less relevant or even not relevant at all when it does not.

there could be principles of legal content that inform what counts as sound adjudication. And what counts as a “correct” decision will be some sort of composite of both kinds of principles. The result would be that the law of interpretation is not explanatorily prior to a theory of adjudication, nor is a theory of adjudication explanatorily prior to an account of the law of interpretation; judgments on one side can inform judgments on the other.¹²⁷

We might think that either the law of interpretation is explanatorily prior to sound adjudication, or sound adjudication is explanatorily prior to law, or neither is explanatorily prior to the other, though each might inform the other, and so we’ve exhausted the options here. But there are at least two other alternatives. One might simply reject the relevance of an account of the content of law altogether. Scott Hershovitz’s account in *The End of Jurisprudence* arguably falls into this fourth category.¹²⁸ On this view, it is a mistake to think that we need to posit a theory of the content of law at all. Rather there are legal resources—e.g., statutes, constitutions, precedents—and those resources have certain properties—e.g., having a certain public

127. There is an interesting question of how to situate Mark Greenberg’s moral impact theory within this scheme. On Greenberg’s theory, the content of the law just is the moral obligations that result from legal resources or practices—e.g., the text of a statute, the intentions of legislatures, precedent, etc.. See Greenberg, *The Moral Impact Theory of Law*, *supra* note 54, at 1301–04. That might seem to place Greenberg in the camp of thinking that a theory of law is reducible to a theory of adjudication. But there are some grounds for hesitation here. A theory of adjudication, as I’ve conceived it, is a theory about what reasons *judges* have to act. Greenberg’s view, in contrast, isn’t obviously limited to judges. Indeed, at times, he frames the view in terms of the moral powers, privileges, and obligations that arise from certain legal facts—the text of a statute, precedential opinions, and so forth. See *id.* at 1308. And the question “What are the rights and obligations of the parties before a court?” may not be answered in the same way as the question “How ought a judge to decide a case, *qua* judge?” Greenberg seems to get at something like this point by noting that judges may be justified in cleaving to heuristic devices that don’t precisely track the content of the law. See *id.* at 1336; *id.* at 1300 n.28.

The possibility that the answer to the question “What are the rights and obligations of the parties?” can come apart from the question “How ought a judge decide a case?” suggests that the moral impact theory of law is at least conceptually distinct from a theory of adjudication proper, despite the fact that both are essentially normative theories. To put it another way, the view that the law is the moral impact of legal resources and the idea that the moral impact of legal resources in significant part determines the answer to the question “How ought a judge decide a case?” could be combined with denying that the moral impact of legal resources are the law *because* of their role in answering the question “How should a judge decide a case?” On that set of views, the theory of law would be explanatorily prior to the theory of adjudication. I won’t have much to say about this sort of view in what follows.

128. See Hershovitz, *The End of Jurisprudence*, *supra* note 68, at 1199. Hershovitz distinguishes his view from Mark Greenberg’s on grounds that Greenberg is erroneously clinging to the idea that we need a metaphysical theory of the content of the law. *Id.*

meaning, or having been adopted for a certain purpose. And there is the effect of those resources on what a judge (or any other person) ought to do. And that's it; the theory of law just drops out altogether.

Here, I've argued that any attempt to ground judicial duty in a metaphysical account of legal content runs into bootstrapping and double counting problems. That might lead one to adopt something like Hershovitz's position. But there is another option. One might allow that there is a point to providing both theories of legal content and theories of adjudication but insist that neither has any direct bearing on the other. One version of this sort of view says that the content of the law is a wholly descriptive matter, determined by looking to our contingent social practices. What a judge ought to do is a normative matter, determined by looking at what reasons there are for a judge to perform a particular act. And the descriptive theory of law has no bearing on how a judge ought to decide a case, and the normative of theory of adjudication has no bearing on what the law is.

C. Most Constitutional Theorists Reject the Priority of Law Over Adjudication

With the foregoing framework in mind, it is worth looking to extant constitutional theories. As noted above, most theorists provide normative arguments for their preferred account of constitutionality. And the considerations they point to are a good fit for a theory of adjudication, though less obviously so for a theory of law. Indeed, in this vein, Christopher Green argues that constitutional theorists are inadequately mindful of the distinction between constitutional ontology and constitutional epistemology.¹²⁹ Based on this distinction, Green argues that many constitutional theorists provide arguments that are irrelevant to the central question of constitutional law—which for him are fundamentally ontological. For instance, Green criticizes David Strauss for objecting to originalism on grounds that it is difficult to ascertain original public meanings. He criticizes Justice Scalia for faulting non-originalists for their lack of systematic agreement about what living constitutionalism entails. And he criticizes Larry Solum's concern with whether originalism preserves rule-of-law values. Such concerns,

129. Green frames his arguments in terms of constitutionality and not law, but the basic point still applies.

Green argues, miss the mark because “ontological questions about the reference of ‘the Constitution’ come first.”¹³⁰

Green is right that many constitutional theorists don’t make arguments that sound in legal metaphysics. Consider Keith Whittington’s characterization of so-called “Old Originalism.”¹³¹ On Whittington’s account, the primary concern for old originalists was judicial constraint, with originalist methods functioning as a means to that end.¹³² The idea for such old originalists is that normative reasons speak in favor of a certain kind of judicial constraint. And for some such theorists, originalism was favored because it was seen as a way to preserve a kind of deference to legislative majorities by limiting the role of the judiciary in overturning legislative decisions.¹³³ Thus, most old originalist writings focus on claims about how judges should act—that is, on considerations that are relevant to a theory of adjudication.¹³⁴

Or consider John McGinnis and Michael Rappaport’s defense of originalism on grounds that originalist methods are most likely to advance the welfare of contemporary American citizens.¹³⁵ The idea here is that one ought to adopt originalist methods because doing so best serves other valuable ends. That’s the sort of reason that most naturally fits a normative account of what a judge ought to do. But it has no obvious relevance to the content of the law or the nature of the constitution. Larry Solum, too, relies on considerations that most naturally figure into a theory of adjudication. He argues at length that the proper way to decide between constitutional theories is to compare them in a pairwise manner and to ask which of the two theories best serves related normative values.¹³⁶ For Solum, the correct constitutional theory is the one that best serves those values. Again, this looks like a

130. Green, *Constitutional Truthmakers*, *supra* note 114, at 511–13.

131. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601–03 (2004).

132. *Id.* at 602.

133. *Id.*

134. See Berman & Toh, *On What Distinguishes New Originalism from Old*, *supra* note 107, at 556–57.

135. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO L.J. 1693, 1695 (2010); see also Berman & Toh, *On What Distinguishes New Originalism from Old*, *supra* note 107, at 561 (discussing McGinnis and Rappaport’s view).

136. Solum, *The Constraint Principle*, *supra* note 1. Solum explicitly doesn’t take a stand on whether the constraint principle is “our law” in some meaningful sense, and instead argues only that it should guide judges. *Id.* at 27–28.

consideration that makes the correctness of a theory depend on whether that theory is a sound basis for adjudication.

Similarly, non-originalists invoke considerations that most naturally fit into a theory of adjudication, but not a theory of law. Richard Primus explicitly focuses on the best approach to “constitutional decisionmaking” and not on the content of the law. As Primus points out, “the normal way of defending a given method of constitutional reasoning is to argue that it respects, or better yet promotes, values like democracy or the rule of law.”¹³⁷ That is, the “normal way” to defend a constitutional theory is through the kinds of normative considerations that have their natural home in an account of sound adjudication. Similarly, Richard Fallon observes that almost all constitutional theorists defend their preferred theory based on whether it optimizes the possibly competing values of rule of law, promoting democracy, or advancing substantive justice.¹³⁸ Again, these considerations are relevant to a theory of adjudication, but not obviously relevant to a theory of legal ontology.

That said, Green is wrong to accuse these theorists of failing to ask the right questions. Indeed, one would only be tempted to characterize Fallon, Solum, Primus, and others as making a mistake if one assumes that the ontological question bears on and is explanatorily prior to the normative question of adjudication. These theorists need not accept that principle. Indeed, these theorists will be asking the wrong sort of question only if one assumes that a theory of adjudication must be wholly grounded in a prior metaphysical theory of legal (or constitutional) content. But one need not make that assumption. Indeed, such theorists could be committed to thinking: (1) that the theory of adjudication is explanatorily prior to the theory of law; or (2) that there is no need for a theory of law at all—all we need is a theory of adjudication; or (3) while a theory of law might be of some intellectual interest, it doesn’t have any bearing on what these theorists care about—answering the question “how should a judge decide a case”; or (4) that neither a theory of adjudication nor a theory of law is explanatorily prior to the other, though each may legitimately inform the other. Alternatively, such theorists might adopt a normative theory of

137. Primus, *When Should Original Meanings Matter?*, *supra* note 6, at 172.

138. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 549–50 (1999).

legal content such as Mark Greenberg's moral impact theory. In that case, the considerations they cite might be relevant to both a theory of law and a theory of adjudication.¹³⁹

CONCLUSION

I have argued that normative constitutional theorists should be unconcerned with *any* jurisprudential account of the content of the law. Such theorists are best understood as providing an account of sound adjudication. That is, they are attempting to answer the question "How should a judge decide a case?" And that question can be answered on its own without settling on an account of law. This is not to deny that there may be some interest in the sort of sociological account of our legal practices that positivist theories provide.¹⁴⁰ Nor is it to

139. For more on this kind of thought, see Greenberg, *What Makes a Method of Legal Interpretation Correct?*, *supra* note 52, at 112–14. Greenberg quite sensibly argues that if we are to look to the law to determine how to decide a case, then what norms we should adopt to decide a case will very much depend on what the law is. And what the law is will depend on what sort of fundamental theory of law is correct. In response, Baude and Sachs say that they can avoid the question of the fundamental determinants of the law because we can still make progress by looking to standard canons and common law rules. Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1461. And they liken Greenberg's challenge to that of a person who insists on looking to quantum mechanics in order to determine how plants grow. *Id.* But then Baude and Sachs simply assume a controversial (from Greenberg's point of view, anyway) fundamental theory of the law when they explicitly adopt Hartian positivism. *Id.* at 1461–63. The authors' response to Greenberg's challenge therefore misses the mark. If the whole point of Baude and Sachs's theory is to explicate the implications of Hartian positivism for our understanding of the law, then they are taking a stand on a fundamental theory of law, not avoiding such a stand. I should add that the analogy Baude and Sachs rely on—with natural sciences—is not at all apt. In the natural sciences there can be reason to look to higher level descriptions—e.g., to use the resources of ecological biology—instead of looking only to the lower level or fundamental determinants of the universe. For instance, it may be that the causal processes in which we are interested only show up at the higher level. It may not be possible to understand the causal mechanisms within an organism using only the terminology of the lower-level phenomenon—e.g., molecular biology. See Ingo Brigandt & Alan Love, *Reductionism in Biology*, STAN. ENCYC. OF PHIL. (Feb. 21, 2017), <https://plato.stanford.edu/entries/reduction-biology/#ProbRedu> [<https://perma.cc/RTD6-9ZPK>] (especially section 4). Nothing similar seems to be the case for the law, precisely because conceptual legal theory is not typically engaged in a predictive enterprise that is trying to track causal relations. Rather, the debate is wholly focused on how we want to conceptualize legal phenomena. And, plausibly (though I won't argue for this conclusion here), the success conditions for that sort of debate are fundamentally normative. That is, the issue in that debate is how we *ought* to talk and think about the concept "law" and related concepts. For an extended discussion of this sort of idea, see David Plunkett, *Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute Over Legal Positivism*, 22 LEGAL THEORY 205, 210–13 (2016). In any case, much more would need to be said before Baude and Sachs's response to Greenberg's challenge could be vindicated.

140. But on that score, one wonders whether Baude and Sachs's account isn't empirical enough. See Eric J. Segall, *Originalism Off the Ground: A Response to Professors Baude and Sachs*, 34 CONST. COMMENT. 313, 323–26 (2019) (arguing that Baude and Sachs pay insufficient attention to empirical studies of legal decision-making). Indeed, Baude and Sachs's almost singular focus on

deny that social practices matter in deciding what a judge ought to do. But practice matters because of the kinds of normative considerations that the practice makes salient. The reasons provided by that practice are not always reasons for conforming to the rules around which that practice converges.

A further lesson here is that we should pay greater attention to the normative relevance of our legal-social practices and avoid certain kinds of abstraction in legal theorizing that obscure what is normatively relevant about those practices. Instead of asking whether there is a reason for judges to apply the law, we should instead ask more directly about what judges ought to do, given their distinctive social role and a society's contingent political and legal history and practices. Answering that question may well require careful reflection on the role of a judge and the powers that it is legitimate for a judge to exercise. We may find that there are serious limits on when judges are the proper agents to effect social change, even for morally laudable reasons. But that analysis in no way hinges on first settling on a jurisprudential account of law, positivist or otherwise.

what is said in opinions may not be using the best data set for getting at what judges think from the internal perspective in their actual decision-making. Better evidence of that may come from looking to what happens in the judge's chambers, and not just what gets put out on the page, which is often a product of a kind of negotiation between judges on a panel, and the product of other considerations, like preserving collegiality between judges with different viewpoints and trying to reach consensus by incorporating different modes of argument that might appeal to different members of the court.

