IS AND OUGHT IN CONSTITUTIONAL LAW: A RESPONSE TO JOEL ALICEA

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INTRODUCTION

Why be an originalist? One answer might be that originalism is *true:* that it describes what our law actually requires.[1] Not everyone, of course, agrees that originalism is true. Plenty of people think it's false, or that the jury's still out. But some press a different argument: that even granting everything about U.S. law an originalist heart might desire, to "be an originalist" needs something more, namely that originalism is *good:* that it prescribes duties our officials or citizens actually owe.[2]

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1. For suggestions to this effect, *see* Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J.L. & PUB. POL'Y 817, 835–74 (2015); *see also, e.g.,* William Baude, *Is Originalism Our Law?,* 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1477–90 (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism,* 105 GEO. L.J. 97 (2016).

2. *See, e.g.,* J. Joel Alicea, *The Natural Law Moment in Constitutional Theory,* 48 HARV. J.L. & PUB. POL'Y 307 (2025).

For participants in the "natural-law moment" Joel Alicea describes,[3] adopting originalism is a moral choice, so it requires a moral defense.[4] "Justifying a constitutional methodology," Alicea writes, means "arguing that judges ought to employ that methodology," which involves "a moral argument that the methodology is better than its competitors."[5] If originalists want judges—or anyone else—"to accept their view and reject competitor theories," they can't just argue the law: they have to "provide a moral argument based on contested moral truth claims."[6] No matter how we determine what our law *is*, we still might wonder if one really *ought* to follow it, and we can't answer that question by redescribing what our law is (even at louder volume).[7]

Call this the "practical-reason argument" against letting law determine constitutional theory. Adopting an interpretive approach to the U.S. Constitution and applying it to real people is an *action*, a move in the real world. And actions can only be justified by "practical" reasoning—sometimes also called ethical, moral, or normative reasoning, the kind of reasoning that answers "the question of what one is to do."[8] That's distinct from "theoretical" or epistemic reasoning, the kind "concerned with matters of fact and their explanation."[9] If legal and moral reasons can *ever* come apart, as even natural lawyers may think they can, then legal reasoning alone can't tell you what to do, including what interpretive choices to make.[10] Or, as Alicea phrases the claim, a "constitutional theory that

3. *Id.* at 309.

4. *See id.* at 318.

5. *Id.*

6. *Id.* at 319.

7. *See id.*

8. R. Jay Wallace & Benjamin Kiesewetter, *Practical Reason*, STAN. ENCYC. PHIL. (July 31, 2024), https://plato.stanford.edu/entries/practical-reason/.

9. *Id.*

10. On interpretive choice, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); see also Richard Ekins, *Interpretive Choice in Statutory Interpretation*, 59 AM. J. JUR. 1 (2014) (criticizing the notion). On natural lawyers admitting a legal-moral distinction, see infra text accompanying notes 29–41.

proposes a methodology of constitutional adjudication . . . has to explain why judges ought to adopt that methodology."[11]

This demand for an "ought" implies, as Francisco Urbina argues, that only practical reasons—"reasons for choice and action"[12]—can truly "justify adopting or abandoning a method of interpretation."[13] The right theory, in Cass Sunstein's phrasing, is the one that makes "the American constitutional order better rather than worse."[14] Indeed, self-identifying with a particular approach (e.g., "I'm an originalist") might turn out to be foolhardy, because what makes things better or worse might vary by circumstance.[15] To argue for originalism based on democracy, justice, rights, welfare, stability, etc., would make you not an originalist but a democracy-justice-rights-welfare-stability-ist, someone who'd follow those rationales when they support originalism and when they reject it. Better, surely, to treat interpretive choice as "contingent," tracking "the balance of normative reasons," which "change as circumstances change."[16]

How might originalists like me resist this argument? Maybe originalism actually *is* good;[17] maybe it makes other claims on officials.[18] But set those arguments aside for now. The problem with the practical-reason argument is that it proves too much. *Any* action has to be defended, if at all, with practical reasons. Adopting and applying originalism, as a claim about U.S. law, is no more of an

11. Alicea, *supra* note 2, at 317.

12. Francisco J. Urbina, *Reasons for Interpretation,* 124 COLUM. L. REV. 1661, 1688 (2024).

13. *Id.* at 1722.

14. CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 8 (2023).

15. *See* Urbina, *supra* note 12, at 1666.

16. *Id.* (emphasis omitted). To be clear, Alicea needn't adopt this sort of case-by-case approach, so long as his moral argument for a constitutional methodology is sufficiently invariant across circumstances.

17. *See, e.g.,* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); J. Joel Alicea, *The Moral Authority of Original Meaning,* 98 NOTRE DAME L. REV. 1 (2022).

18. *See, e.g.,* Evan D. Bernick & Christopher R. Green, *What Is the Object of the Constitutional Oath?,* 128 PA. ST. L. REV. 1 (2023); Richard M. Re, *Promising the Constitution,* 110 NW. U. L. REV. 299 (2016).

action than adopting and applying any other claim about how the world is. Asking "why be an originalist?" is like asking "why be a heliocentrist?," "why be a Darwinist?," or "why be a string-theorist?" Choosing one's approach to astronomy, biology, or physics is an action, too, sometimes a controversial one.[19] But astronomers, biologists, and physicists don't worry too much about this, given their uncontroversial reasons to represent accurately both the world and their beliefs about it (call these "truth-telling reasons"). In many cases our truth-telling reasons reduce complex practical questions, like whether we should publicly avow heliocentrism, to simpler theoretical questions, like whether the Earth really orbits the Sun. So, in slogan form, we might say that the moral case for originalism rests on its being true: *originalism really is the law around here, and judges and officials should say so.*

This answer is so straightforward as to risk seeming glib. True, the case for originalism is far less settled than the case for Copernicus. But to the extent one goes around talking about U.S. law, one has truth-telling reasons to say true things about it rather than false things, which gives real normative bite to originalism's claim (such as it is) to describe U.S. law accurately. As it happens, judges, officials, and citizens talk a good deal about U.S. law.[20] So they have good reason to investigate their claims before making them, to avoid making sociological, historical, or philosophical errors, and so on. If they don't want to be held to correct descriptions of U.S. law, they don't have to talk about it! But if they *do* talk about it, they should describe it correctly, or else carry the heavy moral burden of not doing so.

In other words, once you grant that originalists are right on the law (and not everyone does), there's not much room left for "interpretive choice."[21] We can choose to read texts in many ways, some of them more enlightening than others. But if we want to know *what*

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19. *See, e.g.*, Peter Woit, *Is String Theory Even Wrong?*, 90 AM. SCI. 110 (2002).

20. *See* Stephen E. Sachs, *According to Law*, 46 HARV. J.L. & PUB. POL'Y 1271, 1285–93 (2023).

21. *See supra* note 10.

law was made by adopting or enacting a text—whether a constitution, a contract, or a municipal building code—then the relevant norms of interpretation might be questions of law too: a law of interpretation, whose myriad defaults, presumptions, and canons of construction all reflect interpretive choices already made.[22] In that respect a methodology of constitutional interpretation is nothing special; it's simply one facet of a legal system that has many different rules for reading many different instruments.

Or to put it another way, paraphrasing a famous argument by Robert Nozick: If legal instruments "fell from heaven like manna"[23]—simply as marks on paper, unconnected to any particular interpretive approach—then it might be plausible to choose among ways of interpreting them on ordinary normative grounds. But is *this* the appropriate model for deciding how legal instruments are to be read?[24] To the extent that these instruments come into being in the context of some existing legal system—not just as arbitrary marks on paper, but as well-formed legal objects, statutes and contracts and constitutions and so on—there's no need to search for some optimal interpretive theory to apply to them. "The situation is not an appropriate one for wondering, 'After all, what is to become of these things; what are we to do with them.'"[25] In the non-manna-from-heaven world in which legal instruments are made or produced or transformed by preexisting legal institutions, with an eye to preexisting legal rules, there's no separate process of interpretive choice for a theory of interpretive choice to be a theory *of*.[26]

None of this, of course, tells us whether our current law of interpretation leads to clear answers—or whether, once we understand the law that our instruments make, it ought to be obeyed or disobeyed. In that sense officials and citizens really do sometimes face

22. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1118–21, 1132–40 (2017).

23. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 198 (1974).

24. *See id.*

25. *Id.* at 219.

26. *See id.*

tough choices. But the tough choices are rarely the *interpretive* ones. Our obligation to do the right thing is ever-present, when the law is clear as much as when it's ambiguous, whether we should follow that law or break it. But we also have obligations, albeit defeasible ones, to talk about the law truthfully—and usually that's enough to go on with.

I.

Start by giving the practical-reason argument its due. Showing that an interpretive approach *is* the law doesn't show that anyone, judges included, *ought* to obey and apply it in a particular case. Only practical reasons can do that.[27]

Importantly, this argument isn't part of the usual fights between positivism and natural law, such as whether (or how often) legal questions might depend on moral answers. Terms like "law" and "legal" can be used to refer only to obligations that bind in conscience, but they aren't always used exclusively in that sense.[28] And the practical-reason problem remains so long as you might *ever* have all-things-considered moral reasons to do what your all-things-considered legal reasons forbid.[29]

Even on standard natural-law accounts, in which moral reasoning is part and parcel of legal reasoning, a society's law isn't just a summary of what its members really ought to do—including what they ought to do given the past activities of legislatures and officials. Jaywalking, for example, might sometimes be legally forbidden but still morally permissible, even required. (An attorney racing to a court appearance for an imperiled client might have a moral duty to jaywalk, even a duty resulting from the actions of legal institutions, but no legal defense to a ticket.[30]) Nor is law just a summary of when police officers really ought to issue tickets or when

27. *See supra* notes 8–10 and accompanying text.

28. *See* Sachs, *supra* note 20, at 1274.

29. *See* Hasan Dindjer, *The New Legal Anti-Positivism*, 26 LEGAL THEORY 181, 187–91 (2020) (discussing conflicts of these all-things-considered reasons).

30. *See* Sachs, *supra* note 20, at 1276–79.

judges really ought to enforce them. Ordinary citizens have legal rights and obligations just as much as officials do, and a judge or other official might similarly face a "jaywalking case" with both clear law and a clear duty to disobey it.[31] What the law *is* may be one question and whether we *ought* to follow it another.

While some people see law simply as a subtopic of morality, with legal and moral requirements always on all fours, that view is implausible, as the jaywalking case shows.[32] It's also widely rejected, including by natural lawyers.[33] Suppose one grants (for purposes of argument) that the central case of law involves rational, beneficent ordinances announced by legitimate authorities:[34] this fully admits the possibility of noncentral but unremarkable cases in which authorities are less-than-fully legitimate or their ordinances less-than-fully rational—"intra-systemically valid laws, imposing 'legal requirements,'" that fail to bind in conscience.[35]

The point of the practical-reason argument is to show that our legal system's rules of interpretation might fall in this noncentral category. We deploy legal texts as part of some larger enterprise: "deciding a case, declaring what the law is, passing legislation coherent with other norms," and so on.[36] If there's more than one way of "carrying out that enterprise,"[37] then we have to decide what to

31. *See id.* at 1278.

32. *See* Dindjer, *supra* note 29, at 188–89 (describing such theories and noting their implausibility).

33. *See* Brian Bix, *Natural Law Theory, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209, 214–15 (Dennis Patterson ed., 1996) (noting rejection by natural lawyers).

34. *See* Alicea, *supra* note 2, at 312. On central cases generally, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9–19 (1980).

35. *See* John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1603 (2000); *see also* J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 568, 605 n.276 (2023) (noting the possibility of incoherent human laws); Urbina, *supra* note 12, at 1731 (addressing "noncentral cases of law").

36. Urbina, *supra* note 12, at 1687.

37. *Id.* at 1689.

do next—a decision governed by practical reason, the kind "concerned with what to intend" as distinct from "what to believe."[38] Theoretical questions are still important; we need to understand the world to know how to act in it. But those inquiries supply only "'subordinate' reasons" supporting one normative reason or another;[39] the right choice has to be determined by *all* "the relevant normative reasons,"[40] not just "legal reasons" only.[41]

II.

The response to this practical-reason argument is one of confession and avoidance. No, theoretical reason never justifies actions on its own; yes, practical reason always gets the last word. Yet these true claims are often trivial, for by the time one gets to practical reason, the important moves may have already been made.

We might frame the practical-reason argument as follows:

(O1) Acting in a certain way can only be justified, if at all, by practical reasoning.
(O2) Adopting and applying originalism is acting in a certain way.
∴(O3) Adopting and applying originalism can only be justified, if at all, by practical reasoning.

This argument is perfectly sound. Practical reasoning is the kind appropriate to action, rather than belief, so one needs it to justify acting in one way rather than another. And adopting and applying originalism *is* acting in a certain way; it involves real conduct in the real world and has real consequences for real people.

But now consider a parallel argument:

38. *Id.* at 1688 n.130 (quoting Gilbert Harman, *Practical Reasoning,* 29 REV. METAPHYSICS 431, 431 (1976)).

39. *Id.* at 1670.

40. *Id.* at 1704.

41. *Id.* at 1701.

(H1) Acting in a certain way can only be justified, if at all, by practical reasoning.
(H2) Adopting and applying heliocentrism is acting in a certain way.
∴ (H3) Adopting and applying heliocentrism can only be justified, if at all, by practical reasoning.

This argument is perfectly sound too! Avowing heliocentrist claims in front of others, corrupting the youth with heliocentrist doctrines, designing and launching satellites as if heliocentrism were true, and so on, are all undoubtedly actions. (One could, after all, just shut up about the whole Earth-Sun thing.) So engaging in them requires normative defense, the kind capable of justifying action. Indeed, these choices commonly *are* justified by practical reasoning: If challenged to explain why we design satellites as if heliocentrism were true, we might say not only that heliocentrism is true, but also things like "Satellites cost lots of money, and it'd be bad if they crashed into the Sun." It's just that the specifically *practical* parts of this reasoning are the uninteresting ones, and all the important work is done by the subordinate reasons—by considerations of what's theoretically reasonable to believe about our solar system. Likewise, whether there's "a ravenous lion in the middle of the classroom"[42] is a question for theoretical reason, not practical; yet it's hardly academic, and the fact that we have practical reason to run screaming from the room is highly dependent on our having theoretical reason to believe a ravenous lion is there.

The same is true of more contestable disciplines. What to tell your twelve-year-old about why the Soviet Union fell (as mine recently asked me) depends partly on what's practically reasonable, like how much time one should spend explaining or how detailed an account a twelve-year-old might need. But it also depends on

42. *See* Scott Alexander, *Are We All Doxastic Voluntarists?*, ASTRAL CODEX TEN (Mar. 15, 2023), https://www.astralcodexten.com/p/are-we-all-doxastic-voluntarists [https://perma.cc/4YW3-HFGU] (quoting @freganmitts, X (Jan. 25, 2023, 1:15 PM), https://x.com/freganmitts/status/1618311520244625410 [https://perma.cc/NX8H-CBNV].

what's theoretically reasonable, like what we ought to believe happened in the late twentieth century or which facts we should consider salient or as having high explanatory value. We can't wholly reduce this theoretical rationality to the practical kind, such as by asking what strikes us as *useful* to believe happened, or what the causes of the Soviet Union's fall really *ought* to have been; we need some separate notion of what our evidence supports.[43] That only practical reason can independently guide action is true but trivial, for often the subordinate, dependent reasons are decisive, especially as to the explanations we don't give (say, aliens).

This reasoning easily extends to law. Whatever your "account of what law is," whether "purely descriptive" or thoroughly normative, you may have to look elsewhere for "normative premises that can justify adherence."[44] (Again, think of the jaywalking case.) But usually you won't have to look very far. Whether the top marginal income tax rate should be 37 percent or 39 percent is a choice, and one that ought to be justified by practical reason. But it isn't hard to imagine why individual tax collectors might have practical reason not to collect more taxes than are legally required[45]—and, in particular, not to *represent* more taxes as due than are legally required, in the sense of "legally required" that sometimes departs, even for natural lawyers, from what true morality demands. Likewise, judges hearing a jaywalking case might have good reason to let the accused go free, but they'd need an extra-good reason before they could lie about whether that result was required by law. To the extent that judges or other officials regularly have practical reason not only to follow the law but to *say* true rather than false things about

43. *See* David Christensen, *The Ineliminability of Epistemic Rationality,* 103 PHIL. & PHENOMENOLOGICAL RES. 501, 513–516 (2021); *see also* NOZICK, *supra* note 23, at 247 (discussing the curious field of "[n]ormative sociology, the study of what the causes of problems *ought to be"*).

44. *See A*licea, *supra* note 35, at 575.

45. *Cf.* Emad H. Atiq, *There Are No Easy Counterexamples to Legal Anti-Positivism,* 17 J. ETHICS & SOC. PHIL. 1, 6 (2020) (arguing that "if a rule is widely accepted, then quite plausibly there is always some moral reason for agents to follow it," though contending that this undermines positivism).

their having done so, the practical questions are the uninteresting ones, and the theoretical questions the whole ballgame.

As it happens, when judges and other officials explain and defend their conduct, their statements are absolutely shot through with law-talk. These officials are routinely in the business of describing various norms as either belonging or not belonging to our legal system—usually explicitly, and in other cases by implication. Knowledge being the norm of assertion,[46] these officials have practical reason to investigate the truth of what they say about the law before saying it. So whatever the right theory of law might be, positivist or natural-law-based or anything else, if on that theory originalism turns out to give a true account of U.S. law (as some people argue it does),[47] then judges and other officials would have practical reason to say so—and not to mislead their audiences by omission, even unknowingly or inadvertently.

All this is regularly presupposed by originalist arguments that judges and officials should straighten up and follow a more consistently originalist understanding of our law. This may look like a moralized effort at changing the law, and to some people it is. But others make these arguments by way of calling for our official class to follow the law, to do what they already *claim* to be doing. It's perfectly coherent to argue that judges or officials generally ought, as a matter of practical reason, to reconcile their applications of the law with their standard-issue statements about it, and that they ought to reconcile their standard-issue statements about the law with the best and most accurate theoretical understandings thereof—whatever those might be. The originalist objection to lower-level legal practice, that it often fails to adhere to shared higher-level legal standards, charges officials with a version of hypocrisy, something we usually have good practical reasons (among them truth-telling reasons) to avoid. As our reasons to avoid hypocrisy are by-and-large uncontroversial, and the exceptions few and

46. *See, e.g.*, Christopher R. Green, *Constitutional Theory and the Activismometer: How To Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 427 (2014).

47. *See, e.g.*, sources cited *supra* note 1.

far between, originalists can often levy criticisms on such grounds while otherwise prescinding from "controversial moral views,"[48] whether about high political theory or the substance of particular legal rules. If our truth-telling reasons are strong enough, we can plan in general to rely on them, and to worry about unusual exceptions as they arise.

III.

Maybe one has to resolve controversial moral questions just to identify the law in the first place. That's a deep question of jurisprudence, on which my disagreements with Alicea needn't be fleshed out here.[49] But there's nothing particularly *interpretive* about these disagreements: Morality has as much to say about the content of tax rates or copyright terms as it does about how to *read* the tax code or the copyright law. If interpretive method can be a matter for law (as it can), then there's nothing special about interpretive choice as distinct from the many other choices the law makes. Whatever your theory of what the law *is,* you still need a good explanation of why you *ought* to follow it—and if you've got one, the law of interpretation will usually come along for the ride.

Whatever one's ideal theory of interpretation might be, there are different interpretation-like things that a particular legal system might *do* with a text, and each system will usually contain instructions on which we're supposed to use.[50] For holographic wills, say, a legal system might care about what the author intended;[51] for

48. Alicea, *supra* note 2, at 318.

49. *Compare* Baude & Sachs, *supra* note 1, at 1459, 1463 (espousing positivism), *with* Alicea, *supra* note 2, at 322 (rejecting it).

50. *See generally* Baude & Sachs, *supra* note 22.

51. *E.g.,* In re Dern's Est., 251 P. 2d 28, 29 (Cal. Dist. Ct. App. 1952).

street signs, what reasonable members of the public would understand;[52] for debt collection letters, what "'unsophisticated' consumers" might think;[53] and so on. Some legal systems treat statutes as oral agreements among legislators, only later and imperfectly reduced to writing;[54] others care intensely about the words chosen for the statute book, whether legislators read them or not.[55] And some legal systems rely extensively on customary rules that have no canonical formulation in text,[56] while at the same time providing that certain enactments (say, the Constitution) retain their original content over time until they're lawfully changed.[57] All these choices might be wise or foolish, just as other legal rules might be. Yet in the non-manna-from-heaven world in which we live, they're just the sort of choices that legal systems tend to make.

These decisions about interpretation are inextricable from substantive law, not just because they're part of the same corpus juris, but also because they're part of *how we express* the legal system's commitments on more substantive topics—contractual obligations, say, or tax rates, or whether the President can remove executive officers. What makes a legal system a *system* is that "rules of different kinds" might "fit together in a structured and articulated whole."[58] In a jurisdiction that's adopted the subjective theory of contract, for example, judges who impose on contracting parties a different, more objective interpretation run the risk of imposing on them legal duties that neither had undertaken; so too judges in an objective-

52. *E.g.,* Commonwealth v. Loy, 2 Pa. D. & C. 2d 268, 269–70 (Cumberland Cnty. Quar. Sess. 1954).

53. *E.g.,* Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507, 511 n.2 (5th Cir. 2016).

54. *See* S.E. Thorne, *The Equity of a Statute and* Heydon's Case, 31 ILL. L. REV. 202, 203 (1936).

55. *See* United States v. Tinklenberg, 563 U.S. 647, 655 (2011) (stating that, "in a close to definitional way, the words [of a statute] embody Congress'[s] own view of the matter").

56. *See* Stephen E. Sachs, *Originalism Without Text,* 127 YALE L.J. 156, 159–60 (2017).

57. *See* Baude & Sachs, *supra* note 22, at 1134–36.

58. Jeremy Waldron, *"Transcendental Nonsense" and System in the Law,* 100 COLUM. L. REV. 16, 25 (2000).

theory state who ignore the standard interpretation in seeking out a meeting-of-the-minds. The point isn't that such a bait-and-switch would be morally wrong, or even that its costs would have to be balanced against its moral benefits; the point is that if such judges told the parties "you undertook the following legal obligation," they'd be stating something *false.* Enforcing the substantive law on contracts, taxes, or removal powers means enforcing the legal rules of interpretation that identify this substantive law: There's no separate process of "interpretive choice" that can be carried out without revising the substance.

That's why moral arguments made for or against methods of constitutional interpretation can often be made just as easily against the constitutional rules themselves. Sunstein, for example, describes "[t]he problem" for constitutional interpreters as being "that the Constitution does not contain the instructions for its own interpretation."[59] But even had the Framers set out instructions with unnerving clarity, one might still argue, as Sunstein does, that the "fixed meaning of an old law is hardly sufficient for legitimacy" in the modern day[60]—or wonder "[w]hy on earth" it'd be "'legitimate,' here and now, for judges to strike down laws" based on the decisions of "long-dead people in 1788."[61] The concerns about interpretive method and about substance are one and the same; they're both part of the same legal system, for better or worse.

Constitutional interpretation is no more dependent on moral argument than anything else in law. The Founders' choice to rely heavily on unwritten interpretive rules instead of written ones might offer more opportunities for confusion or disagreement today.[62] But if the natural lawyers were right that we need to consider morality to identify the law, then we'd need to consider it when the text is clear no less than when it's ambiguous, or even when there's

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59. SUNSTEIN, *supra* note 14, at 9 (emphasis omitted).

60. *Id.* at 71 (emphasis omitted).

61. *Id.*

62. *See, e.g.*, THE FEDERALIST NO. 83, at 559 (Jacob E. Cooke ed., 1961) (Alexander Hamilton) ("The rules of legal interpretation are rules of *common sense,* adopted by the courts in the construction of the laws.").

no text at all. Interpretive methods needn't operate on some special plane external to the law; they might be just so many more internal features of a legal system, like when taxes are due or whether burglary has to be at night.

Given a sufficiently hideous constitution, written or unwritten, it's an official's moral duty to disobey. Identifying such cases is vitally important, but it needn't be a *legal* question, nor one on which trained attorneys might have any particular expertise. While nothing stops a legal system from adopting an absurdity canon (or otherwise discouraging hideous readings),[63] its rules for constitutional interpretation are no more likely to be hideous than anything else. And once one ascertains what those rules entail, the resulting constitution would have to be *extra* hideous to justify, not just disobedience, but concealment. (In this respect the Garrisons have an advantage over the Spooners of the world: They tell it like it is.[64])

No matter what the law says, one always has the obligation to do the right thing. In many cases, the right thing is to follow the law. In yet more cases, it's to describe that law honestly. Originalism's main claim on our attention is that it might tell us how to do that. If it can, we have very good practical reason to listen.

63. *See* Christopher R. Green, *Moral Reality as a Guide to Original Meaning: In Defense of U*nited States v. Fisher, 14 J. CHRISTIAN LEGAL THOUGHT 35 (2024) (discussing the Founding-era interpretive role of consequences).

64. *Compare* [William Lloyd Garrison], *The Union,* LIBERATOR (Boston), Nov. 17, 1843, at 182, *with* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Boston, Bela Marsh 1845).