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Metatheory

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Constitutional theory has been challenged in recent years, by significant figures in the legal field, as essentially pointless. Too much normativity, not enough neutrality; too much conjecture, not enough data; too much politics, not enough truth. How should we constitutional theorists answer this basic challenge to the foundation of our research program? I suggest one possible solution here: we can make the discipline more rigorous by changing the way in which we assess competing claims in constitutional theory. Drawing on important work in epistemology, the philosophy of science, and legal theory, I examine the question of theory assessment and selection. I propose a set of criteria for constitutional theory selection consistent with the most cutting edge work in these fields and explain how we can use these criteria—simplicity, consilience, conservatism, and fruitfulness—and demonstrate how they operate to make theory assessment more sophisticated by applying them to two distinct sets of competing theoretical claims. Along the way, I discuss perennial debates like the controversy between those who claim that adjudication should be conducted with reference to legal reasons only and those who claim that courts may consider extra-legal reasons, including moral reasons, to decide cases. I then turn to examine a much more recent debate about the nature of certain doctrinal structures in constitutional adjudication. I argue, in the end, that more nuanced theory assessment techniques will advance constitutional theory in a manner that simultaneously answers foundational challenges and makes the research program more likely to produce testable, provable claims about the nature of constitutionalism going forward.

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INTRODUCTION

Judge Posner and, more recently, Judge Wilkinson have issued a fairly stout challenge to constitutional theorists[1]: show that constitutional theory is actually good for something or abandon it as a crumbling, Ptolemaic research program. I want to answer this challenge by undermining its hidden premise—namely, that constitutional theory is not actually rigorous enough to disclose truth or generate real knowledge such that it can only be valuable, if at all, in an instrumental sense. My goal here is to rebut this premise by developing a way to make constitutional theory somewhat more rigorous.

In this Article, "metatheory" means the analysis of the properties of theories in some field. Here, I will focus on constitutional theory and on one particular metatheoretical problem: constitutional theory choice or assessment. Theorists have no well-settled criteria for choosing among competing theses and are all over the place with respect to how to proceed. I will canvass proposals that exist in the current literature and develop a proposal of my own regarding how we should do constitutional metatheory. The big issue here seems to be whether we should treat constitutional theory as a descriptive or normative discipline for metatheoretical purposes. I will argue that we must develop different assessment regimes for each category of claim—descriptive and normative, and perhaps others—because constitutional theory inescapably involves both kinds of claims. And, contrary to the view that has stymied previous metatheoretical efforts, we cannot evaluate descriptive and normative constitutional theory claims according to a

1. *See* Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) (Madison lecture); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2012).

single criterion or set of criteria. Instead, because descriptive and normative claims serve different functions (or have different objectives), they must be assessed differently.

Constitutional theory does not have much of a literature on theory selection criteria,[2] and what there is suggests normative criteria—Professor Fallon, for example, argues that

> the choice among theories should be based on which theory will best advance shared, though vague and sometimes competing, goals of (1) satisfying the requirements of the rule of law; (2) preserving fair opportunity for majority rule under a scheme of political democracy; and (3) promoting substantive justice by protecting a morally and politically acceptable set of individual rights.[3]

But this cannot be right generally, because normative criteria are inappropriate for *descriptive* constitutional theory claims—claims that aspire to reveal what is the case, rather than demonstrate what should be the case. Or so I shall argue.[4]

Theory assessment is arguably not objective—for normative theories this is probably obvious, though it will need some explaining because I will argue eventually that we want to adopt a process that brings us closer and closer to objectivity. For positive (or descriptive) claims, this is more

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2. There have been a couple of preliminary efforts in other fields of legal theory that are not obviously immediately applicable to constitutional theory claims of the kind I consider here. *See, e.g.*, Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215 (2009) (deploying a set of theory selection criteria for assessing competing claims in general jurisprudence); W. Bradley Wendel, *Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis*, 96 CORNELL L. REV. 1035, 1041–42 (2011) (exploring theory selection criteria for legal theory generally, and in particular legal theory claims of the following form: "(1) Here is some legal doctrine or rule; (2) courts and scholars . . . tend to think that its point, rationale, purpose, or function is *X* . . . ; (3) but I think they're mistaken, and the doctrine is really 'all about' *Y*; (4) here is some evidence supporting my claim; (5) therefore, we should understand the point of the rule or doctrine as *Y*.").

3. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 538–39 (1999). Fallon's discussion is in a sense confusing—he argues that a "sound" constitutional theory should satisfy this sort of composite normative criterion, *see id.* at 538, but by "sound" he must not mean logically sound, as a logically sound theory (having true premises and a conclusion that follows logically from those premises) will not necessarily comport with Fallon's evaluative criteria. Put simply, logical soundness is a criterion distinct from other evaluative criteria, as I argue criteria for descriptive effectiveness are distinct from criteria of normative desirability.

4. Different criteria are probably appropriate for different kinds of theories—we can distinguish (1) descriptive or positive theory claims whose object is to say something accurate about what there is; examples include realism, attitudinal modelers, etc.; (2) prescriptive or normative theory claims whose object is to say X should be the case (or Y should not be the case); examples include 1 BRUCE ACKERMAN, WE THE PEOPLE (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE (1998); RONALD DWORKIN, LAW'S EMPIRE (1986); and (3) conceptual theory claims; examples include ADRIAN VERMUELE, THE SYSTEM OF THE CONSTITUTION (2011); Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307 (2008).

controversial and bound up in the movement from the verificationism that held sway in the nineteenth and early twentieth century to the realization occurring after Kuhn, Quine, and Hempel that even in science, theory assessment criteria are in some sense subjective.

One thing that seems clear is that theory selection rubrics should be selected according to the *broad purpose of the category of theories to which the candidates that you are assessing belong*. Thomas Kuhn argues that there is not an objectively correct set of theory selection criteria—it is no longer generally viewed as correct to characterize scientific theories as actually disclosing true facts about the world; instead, we say that they approximate truths about reality, and these theory selection criteria are meant to identify the likely more accurate approximation among competitors.[5] Accordingly, in science, theories are evaluated on criteria that are broadly considered appropriate in the light of the general characteristics and aims of science as a practice.[6] There is some debate, of course, about what distinguishes science from other forms of inquiry;[7] but it seems relatively uncontroversial to suggest that science as a practice "avoids appeals to final causes, vital forces, or general bunkum," "answer[s] to criteria of empirical adequacy," and makes claims that are "general, capable of supporting counterfactuals, and above all . . . that purport to be true or false with reference to something external; that is, science must relate to the natural world."[8] Given these aims, it is unsurprising that criteria for theory selection that enjoy consensus support among scientists include simplicity, consilience (or explanatory power and capacity), conservatism (or consistency with other well-accepted views about the world), and potential fruitfulness for future research.[9]

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5. This is a matter of serious debate in the scientific and philosophical communities; thus, rather than defend at length a controversial position, I am instead assuming that the best a descriptive constitutional theory claim can aspire to is an accurate approximation of the reality of our constitutional norms. More might be possible, but I set that possibility aside here.

6. *See* Wendel, *supra* note 2, at 1051–52; Thomas Kuhn, *Objectivity, Value Judgment and Theory Choice*, *in* THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 320, 320–21 (1977); Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259, 269 (2013).

7. *See, e.g.*, *infra* notes 58–65 (discussing the controversy surrounding Popper's attempt to demarcate science).

8. Wendel, *supra* note 2, at 1060–61 (citing ROBERT NOLA & HOWARD SANKEY, THEORIES OF SCIENTIFIC METHOD 55–56, 74–77, 341–44 (2007); CARL G. HEMPEL, *The Logic of Functional Analysis*, *in* ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 297, 304 (1965)).

9. Kuhn, *supra* note 6 at 320–22; *see* Brian R. Leiter, *Legal Realism and Legal Positivism Reconsidered*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 59–80 (2007) (applying criteria of explanatory capacity,

The few theorists to have considered the question of theory assessment in legal theory suggest that a similar account of the "characteristics and virtues" of law as a practice should inform the choice of evaluative criteria.[10] They tend to view legal reasoning and thus legal theory as inherently normative; based on this view they maintain that at least some of the criteria for theory selection must be drawn from the substantive "background" normative commitments of legal practice.[11] I do not think anyone believes that incorporating such a criterion is logically necessary or that theory assessment is impossible without doing so;[12] and I doubt that such a criterion would be appropriate or yield broadly acceptable results given the absence of consensus on just about any value drawn from legal practice that could serve as a theory selection criterion.[13] Consistent with this position of intrasystemic neutrality, I will orient the following discussion in terms of my aim of explaining what law courts are applying in structural cases—that is, the aim to make a theory-of-law claim—and assess alternative theories that claim the same goal.[14] The competitor theories are the value-based and interpretive theories some examples of which were discussed above. To be clear, the choice here is between these theories, which hold that the content of the law is only that which accords with some value proposition or interpretive theory, on the one hand, and my view on which we recognize *both* norms constituted by deep patterns of convergent official practice *and* norms validated according to one—or more than one—alternative theories as parts of the

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"ontological austerity" (simplicity), and consistency with empirical research programs (conservatism) to argue that legal positivism is the best going general theory of law).

10. *See, e.g.*, Fallon, *supra* note 3, at 538–41 (arguing that basic values of the legal system must bear on theory choice); Wendel, *supra* note 2, at 1060 ("I believe a criteria of theory-acceptance in legal scholarship can (and indeed must) be derived from higher-order characteristics and virtues of legal reasoning as a practice.").

11. *See supra* notes 16–73 and accompanying text; *see also* Wendel, *supra* note 2, at 1061–64 (considering whether the assessment of explanations in legal theory should be "connected with wider normative and epistemological" commitments).

12. *Cf.* Wendel, *supra* note 2, at 1063 (expressing uncertainty about incorporating substantive value-based criterion into theory assessment; leaving open the question whether such an approach is possible or justifiable).

13. *See supra* notes 16–73 and accompanying text. This is not to deny that the entire project of selecting among competing theories is inherently normative—of course it is, but that it is makes only second-order normative claims about what constitutional theorists should do and believe and is in this sense similar in normative orientation to the application of the inference to the best explanation approach in scientific theory selection. *Cf.* Wendel, *supra* note 2, at 1049 (noting the inherent normativity of inference to the best explanation).

14. *Cf.* Bartrum, *supra* note 6, at 269 (noting that Kuhnian "value judgments" about theory selection are not entirely idiosyncratic; and instead, observing scientific practice suggests that scientists "assess competing theoretical paradigms against the values [they] judge[] to be most important to a particular scientific endeavor").

Constitution, on the other.[15]

Accordingly, our theory selection process should vary as between descriptive legal theory claims and normative constitutional theory claims. I will argue that we can readily analogize descriptive theory claims to scientific theory claims and import theory selection criteria from the sciences for use in law, and I will illustrate how this might work. The caveat here is that two criteria one frequently sees in discussions of scientific theory assessment—falsifiability and predictive power—are not always apt in the context of descriptive legal theory (artifacts, deeply opaque causal sequences, etc.). This is of course not to say that predictive hypotheses are impossible in law—the attitudinal model, and large volumes of empirical legal theory in commercial law fields, demonstrates that it is. But not all descriptive legal theories are readily empirically testable. That, alone, does not render them invalid or less good than competing theories (often, the directly competing theories will suffer this same flaw). What we want is a second-best set of criteria to apply where falsification and predictive power are inapt. I will discuss inference to the best explanation criteria as a good set of criteria in this regard.[16]

The much more difficult metatheoretical problem is how to choose among *normative* legal theory claims. I will hope to resolve a conceptual problem with the approach to normative theory choice that is suggested in the tiny literature that exists on the question. They suggest using normative criteria from within the competing theories (evaluating theoretical claims according to their tendency to promote justice, the rule of law, and so forth), but that cannot be right; it is question begging. We need more work on this problem and I will make some preliminary suggestions about what that research program should look like.

In Part I, I canvas the literature on theory assessment in legal theory and then draw lessons from work on theory evaluation from the philosophy of science to suggest ways in which we can improve our theory assessment methods in law. The point is to articulate a set of criteria by which we may effectively compare theoretical claims that compete with one another and say, with some plausible certainty, that one is better or more correct than another. My focus will be on constitutional theory claims, but the criteria that I endorse here can be applied to most claims in legal theory. The bulk of Part I focuses on positive (descriptive)

15. This idea of a combination of merit-based and merit-neutral criteria of legal validity is predicated on my neutrality as between inclusive legal positivism, which allows that a given rule of recognition might validate some norms as law based on their merits, and exclusive legal positivism, which does not.

16. *See infra* note 24.

claims in legal theory; that is because for the most part normative claims are foreign to the sciences. But I will turn in the last section of Part I to consider the more difficult challenge: evaluating competing normative claims in legal theory. While I cannot resolve the difficulties attendant to the task of assessing such claims here—there is basic work in epistemology that remains to be done to complete that task—I will hope to frame future research on this issue. In Part II, I turn to an application of these insights, applying the evaluative criteria that I develop in Part I to a very nuanced claim in constitutional theory—namely, the argument that it is beneficial to distinguish a category of constitutional doctrines ("anti-evasion doctrines") from other such categories. I examine the purported benefits of this claim, and the ways in which it compares to other claims in what has come to be called metadoctrinal constitutional theory, to demonstrate the usefulness of the theory assessment tools I propose here. The conclusion is preliminary, and provisional: It seems that we can deploy a more rigorous system of theory assessment criteria in legal theory. It will take a number of additional applications to move this metatheoretical insight to the center of the legal theory research program. But if we do that, we can answer Judge Posner's and Judge Wilkinson's challenges, and make legal theory more acceptable across disciplines. And that is no small thing.

I. POSITIVE THEORY ASSESSMENT

Selecting among positive (descriptive) theories is not easy, but at least it is not terribly controversial. There is a ready analogue in the philosophy of science.

A. The Analogy to Science

There is nothing objectionable in principle about applying normative criteria in selecting among competing constitutional theories; it is just not the kind of evaluation I want to highlight here. I want to distinguish theories by the likely correspondence of their descriptive claims with reality; normative criteria distinguish theories by their likely practical results if adopted. As Fallon argues, "theories should be judged by their likely fruits. To determine which theory would best promote ultimate goals, it is crucial to assess what kinds of judicial decisions would likely be made if a particular theory were adopted."[17] He goes on to argue that "methodological" theories—that is, theories that do not entail any particular substantive outcomes, like legal positivism[18]—are of "less

17. Fallon, *supra* note 3, at 538–39.

18. *See* John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 201–02 (2001)

clear" attractiveness.[19] But this is simply a different question to ask about constitutional theories, and it bears no necessary (logical or empirical) relationship to my question about descriptive accuracy. Moreover, applying normative criteria to select among descriptive theories of law is question begging; after all, the goal of such theories is to provide an accurate picture of what the constitutional law is, and theorists tend to claim that "the Constitution" or "our constitutionalism" is the *source* of the values that form the basis for normative assessments.[20] To the extent that descriptive constitutional theories of law, to satisfy the consilience criterion (or, more roughly, Fallon's "fit" criterion), must identify which values out of the field of possibilities are in fact accepted in constitutional practice or otherwise entrenched in constitutional law, then we cannot evaluate the success of the theory based on assumed values that the theory itself is supposed to identify.

Descriptive legal theory, which purports to reveal what is the case, is distinct from scientific theory for various reasons: Law is different from the natural phenomena that are the objects of science insofar as law is not a natural kind—it is an artifact that is constituted by human practice.[21] Among other things, human practices and their artifacts may change over time while physical phenomena (for the most part and excepting quantum mechanical phenomena) remain fixed regardless of human observation or action. Moreover, the object of descriptive constitutional theory—constitutional practice—is a notoriously difficult, moving target; for example, "a number of interpretive paradigms can coexist peacefully in constitutional practice, and no one paradigm is likely to force the others out of business."[22] Even if some of our constitutional norms can be clearly identified, then, it is very difficult to use that information to predict practical outcomes in the light of the widely varying approaches observable in constitutional practice under which constitutional norms may be given legal effect in constitutional disputes. For this reason, among others, one typical scientific theory evaluation criterion—

(explaining that legal positivism's core claim—norms are legal norms in virtue of their sources, not their merits—is "normatively inert").

19. Fallon, *supra* note 3, at 539.

20. *See* Fallon, *supra* note 3, at 551 ("[I]n identifying three commonly accepted evaluative criteria for constitutional theories, I do not mean to offer transcendent or foundational arguments. Questions about appropriate evaluative criteria for constitutional theories arise within the same debates in which those criteria are invoked."); Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 598 (1999) ("Any claim that some set of [normative] priorities and [relative] weights [among such priorities] is best is itself a highly contestable claim of constitutional theory.").

21. *See supra* notes 66–67 and accompanying text.

22. Bartrum, *supra* note 6, at 272.

predictive power[23]—seems inapt for choosing among descriptive constitutional theory theses.

Consider, for example, the question which of the following two positive legal theory claims is better: Realism versus some kind of Formalism (judges consider only the syllogistic legal reasons). We will want to choose a way to evaluate these competitors according to their basic objective. As that seems to describe accurately some aspect of reality, the natural analogue is scientific theory, and luckily there is very robust and well-developed literature on theory assessment and selection in science. I cannot do it justice here, but I will provide an overview.

Positive constitutional theory claims, like descriptive claims in other disciplines, should be subjected to the theory selection criteria that we apply to theories that aim to disclose what is the case (the truth about or at least our best estimate of reality).[24] In this one, limited sense—that they aim to reveal something about what is the case—descriptive constitutional theory claims are like claims in natural and social sciences. This is emphatically not to assert something like "Langdell's widely mocked claim that law can be treated as a science";[25] nor is it to deny that

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23. *See, e.g.*, MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 7–9 (1984) (arguing that the principal, perhaps only, proper test of a positive economic theory should be its predictive power). Friedman's view is broadly indicative of the falsifiability approach suggested by Karl Popper (under which the best way to test a theory is not to ask about its conformance to reality but instead about whether additional observations falsify it). *See generally* KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 150–75 (1972); KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 44 (1968) [hereinafter POPPER, LOGIC]. Although the Popperian approach is routinely cited in legal literature, see Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001) (collecting citations), there is debate within the sciences and the philosophy of science about the propriety of these criteria for evaluating scientific theories. Thomas Kuhn, for example, does not include falsifiability on his list of five criteria for choosing among scientific theories. *See* Kuhn, *supra* note 6, at 321–22 (noting scientific consensus on accuracy, simplicity, scope, consistency (internal and with other theories), and fruitfulness (not limited to predictive power, but more broadly a theory's potential to "disclose new phenomena or previously unnoted relationships among those already known")).

24. I am using the language of the inference to the best explanation approach to theory-building and explanation, rather than anything like a hypothetico-deductivist approach, to avoid vexed debates in the philosophy of science about the logical possibility of confirmation, whether science creates knowledge, and so forth. For an overview of these debates, see generally CARL G. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 5–51 (1966) (canvassing problems with deductive models of scientific explanation) [hereinafter HEMPEL, NATURAL SCIENCE]; NOLA & SANKEY, *supra* note 8, at 335–45 (canvassing the realism/antirealism debate in philosophy of science); CARL G. HEMPEL, *Studies in the Logic of Confirmation*, *in* ASPECTS OF SCIENTIFIC EXPLANATION (examining the hypothetico-deductivist method of confirming proposed explanatory hypotheses with empirical evidence); Gilbert H. Harman, *The Inference to the Best Explanation*, 74 J. PHIL. 88 (1965); Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76 (1978).

25. Wendel, *supra* note 2, at 1064 (referring to Gilmore's characterization of Langdell's views in GRANT GILMORE, THE AGES OF AMERICAN LAW 42–48 (1977)).

the process of assessing competing theories is inherently normative.[26] (I want to set aside the question of what exactly an "explanation" is—both this and the related question of whether science or other descriptive inquiries describe reality (that is, reveal truth) or instead merely describe phenomena of our experience are controversial and would take more space than I have to engage.[27] An intuitive sense of these concepts will suffice for the argument that follows.) Instead, while acknowledging that value judgments inevitably inform the choice of theory selection methods in science, law, and other disciplines, we must cabin that normative move to its limited second-order status to avoid conflating the question what makes a good theory of law with the question what values does law serve or reflect, as the latter is the kind of question that some theories of law seek to answer.[28] It may be that identifying what the law is requires the application of some moral, economic, or other criterion, but that is one of the core disputes between competing theories of law. If we want to evaluate descriptive constitutional theory claims according to how well they discharge the aim of disclosing what is the case about law—that is, if we want to be able to select among competing descriptive constitutional theory claims according to which is the more descriptively accurate—then the general theory selecting criteria developed in the philosophy of science should apply.[29] We need not want to compare theories with similar objectives; we could instead merely want to critique (or praise) the claimed facts of the matter the theory serves up rather than determine the extent to which those claims accurately approximate reality. But that is not the only position one could take, nor is it the most natural evaluative

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26. *See* Kuhn, *supra* note 6, at 321–22; Wendel, *supra* note 2, at 1064–65; *see also* Bartrum, *supra* note 6, at 269.

27. Relevant debates in the philosophy of science include the methodological debate between hypothetico-deductivist explanation and inference to the best explanation, see *supra* note 24; and the epistemological debate between scientific realists (who argue that science explains reality) and anti-realists (who argue that science's aim is to explain our experience, but there is no guarantee that our experience reflects reality), *see* NOLA & SANKEY, *supra* note 8, at 335–45.

28. *Compare, e.g.*, DWORKIN, *supra* note 4 at 190 (arguing that any account of the concept of law must "explain how what it takes to be law provides a general justification for the exercise of coercive power by the state"), *with* H.L.A. HART, THE CONCEPT OF LAW 8, 239–40 (3d ed. 2012) (arguing that a general theory of law can be "morally neutral and [with] no justificatory aims: it [need] not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law").

29. See generally Kuhn, *supra* note 6, at 327–29, for an argument that theory selection criteria in science are properly drawn by theorists based on their perception of the objectives of the relevant inquiry. *See also, e.g.*, Leiter, *supra* note 2 (applying the criteria of simplicity, consilience, and conservatism from the philosophy of science to argue that positivism is the better theory of law even if it explains certain minor phenomena less well than alternatives because it explains the majority of the phenomena of the legal system better than alternatives); Leiter, *supra* note 9, at 9–13 (comparing, similarly, legal positivism to natural law theories and Dworkin's theory).

posture to adopt with respect to descriptive claims.[30]

B. Assessment Criteria for Legal Theory Claims

In the remainder of this Part, I apply the standard scientific theory selection criteria to compare my view with other positive theory-of-law claims in constitutional theory. I explain each criterion, provide examples, and then argue that the thin-norms account of structural constitutional doctrine outstrips competing accounts on each of them. Theories may fare differently along different dimensions, and there is no consensus as to the weight that should be accorded, say, simplicity relative to conservatism; but it seems reasonable at least to think that theories may compensate for failure on some dimensions with success on others.[31]

First, it is generally accepted in the philosophy of science, and science at large, that simpler explanations are preferable to more complex ones, all else equal.[32] In arguing that legal positivism is preferable to alternative theories of law including natural law theory and Dworkin's "law as integrity" account, Leiter highlights positivism's "ontological austerity," or its capacity to explain phenomena "in ways that do not involve unnecessary, controversial or incredible metaphysical commitments."[33] My explanation for the dormancy doctrines, immigration doctrine, and obstacle preemption is simpler than conventional accounts in two senses. As I have argued elsewhere, positing a single implied structural norm to underwrite all these doctrines is simpler than conventional accounts that posit multiple underlying norms, perhaps one for each of these lines of doctrine—now beyond the dormant Commerce Clause, dormant Admiralty Clause, and dormant foreign affairs powers doctrines;[34] State Preclusion Thesis ("SPT") explains immigration doctrine more simply than conventional accounts such as the external sovereignty rationale;[35] and obstacle preemption

30. *Cf.* Gardner, *supra* note 18, at 203–04 (speculating that legal positivism may be misunderstood in part because "[l]awyers and law teachers find [its] comprehensive normative inertness . . . hard to swallow").

31. *See* Kuhn, *supra* note 6, at 327–29 (noting this relative weights problem). The truly troublesome case is where competing theories each excel the other one some, but not all, theory choice criteria. Kuhn argues that in these marginal cases, theory choice is largely a value judgment particular to individual scientists. *See id.*

32. Kuhn, *supra* note 6, at 321–22.

33. Leiter, *supra* note 9, at 12.

34. *See* Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 500–02 (2012) (discussing the simplicity advantage of the State Preclusion Thesis ("SPT") account of the dormancy doctrines).

35. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (articulating the external sovereignty rationale for federal immigration power); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power*

doctrine more simply than the conventional Supremacy Clause explanation about which I have noted in previous work.[36] Further, the idea of a consensus-based constitutional norm like SPT is more ontologically austere than, for instance, a value-based account that posits additional, contestable rule-of-law or social justice principles to explain and justify these doctrines, with distinct normative cases to be made for each line of decisions. Similarly, the thin norms account is more analytically austere than interpretive theory accounts insofar as it posits norms acceptable across interpretive disciplines and explains the shape of various doctrines according to pragmatic factors; it does not require the complex interpretive moves to derive the norms and explain their implementing doctrines that an originalist account would require.

A second generally accepted criterion is consilience, or how many phenomena the competing theories are capable of explaining[37]: "We prefer more comprehensive explanations—explanations that make sense of more different kinds of things—to explanations that seem too narrowly tailored to one kind of datum."[38] Everyone agrees that theory must *fit* the phenomena under consideration—it cannot have explanatory power if the theory does not explain anything.[39] But among competing theories that roughly fit some aspects of the phenomena under consideration, the consilience inquiry shifts to *how many* phenomena the theories explain, respectively.[40] So, for example, "Darwin's theory of natural selection was able to account for observations that initially seemed unrelated, such as those pertaining to anatomy (the presence of vestigial organs) and

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over Foreign Affairs, 81 TEX. L. REV. 1 253 (2002) (discussing and criticizing the "inherent powers" of sovereignty justification for immigration doctrine).

36. *See generally* Pursley, *supra* note 34.

37. *See* Kuhn, *supra* note 6, at 321; Thagard, *supra* note 24, at 79; *see also, e.g.*, Leiter, *supra* note 2, at 1239–40 (applying consilience to assess legal positivism versus competing theories of law).

38. Leiter, *supra* note 2, at 1239.

39. *Id.* (emphasizing explanatory power as a desideratum for positive legal theories); Fallon, *supra* note 3, at 549 ("[I]t appears to be agreed all around—indeed, accepted as nearly definitional of the enterprise of constitutional theorizing—that one important criterion is 'fit.' A good constitutional theory must fit either the written Constitution or surrounding practice. In the absence of a fit requirement, constitutional theory would lose its anchor in law and collapse into political theory."); *accord* DWORKIN, *supra* note 4, at 65–68 (emphasizing the importance of explanatory "fit" for accounts of constitutional law and practice).

40. *See* Thagard, *supra* note 24, at 79 (noting that a "theory is more consilient than another if it explains more classes of facts than the other"). Fallon articulates a descriptive criterion, "fit," and argues that "fit" must be with more than the text—it must fit with the larger "practice," which is in a sense what I am pressing here. Fallon's "fit" criterion is somewhat imprecise—as is Dworkin's, see DWORKIN, *supra* note 4, at 67–68. Breaking this rough notion of "fit" out into the simplicity, consilience, and conservatism criteria is more precise, allows us to draw on the philosophy of science, and to compare theories for different kinds of fit issues.

zoology (the observed differences in related species)."[41] As I have explained, the SPT view explains all at once a wide variety of doctrines that alternative accounts typically characterize as based on several *different* constitutional norms (and thus as in this sense unrelated). A built-out theory including a few more SPT-like norms would *ex hypothesi* explain a great deal more, perhaps most structural doctrine. Moreover, the interpretive and value neutrality of this thin-norms account means that it explains doctrines and judicial decisions that proponents of value-based or interpretive theories would have to characterize as non-lawful—for example, it explains why, despite the protestations of originalists that the dormant Commerce Clause doctrine is not legitimately derived from the original meaning of the Constitution,[42] courts continue to apply the doctrine and other government officials systematically behave as though it is valid law.[43] Originalists advancing a theory-of-law claim would have to maintain that the many judges and justices who appear to accept the validity of the dormant Commerce Clause doctrine in its current form are either mistaken about what the constitutional law is or are intentionally disregarding the law.[44] Accuracy—a theory's capacity to explain actual observations—is a closely related criterion.[45] The thin-norms view explains distinctions legal practitioners and scholars make in everyday talk between, say, what the law is and what the law should be;

41. Wendel, *supra* note 2, at 1052.

42. *See, e.g.*, Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 260–63 (1987) (Scalia, J., concurring in part and dissenting in part) (attacking the dormant Commerce Clause doctrine because "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce").

43. Similarly, if we hypothesized a converse norm—the National Preclusion Thesis ("NPT"), namely: the national government may not take actions that undermine the constitutional structure—to explain the anticommandeering doctrine, see *New York v. United States*, 505 U.S. 144, 161–63 (1992), and other federalism doctrines; strict textualists might object that these doctrines have no textual foundation. *See, e.g.*, John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009). The NPT account, however, better explains the realities of practice in which these federalism doctrines continue to be applied and are treated as legally valid by most officials.

44. Some originalists appear to embrace this consequence of their views and argue that non-originalist precedent should be disregarded—see, for example, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005), but this is hardly a consensus position among originalists. *See generally* Leiter, *supra* note 2, at 1225–26 (discussing error theoretic accounts in philosophy, and noting that "[a] standing puzzle about [such] accounts is why a particular discourse persists when all its judgments are false"); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009) (canvassing the debate and arguing that originalism can be reconciled with stare decisis).

45. *See* Kuhn, *supra* note 6, at 320. *See also* Wendel, *supra* note 2, at 1054 (discussing an "empirical adequacy" criterion concerned with the extent to which competing theories "account for observed phenomena").

many competing accounts cannot capture this distinction because they hold that the law is only that which is consistent with the very interpretive theory or value criterion that answers the "should" question. Moreover, the thin-norms theory can explain, in a manner that competing theories cannot, an even larger and in some senses more obvious phenomenon: the stability and durability of the constitutional system despite various apparently deep disagreements of method and value.

Another accepted criterion, conservatism, suggests that desirable descriptive theory should leave intact other of our well-accepted views about the world.[46] Leiter maintains that legal positivism is more desirable than alternatives like natural law theories on this dimension because, among other things, positivism is consistent with, supported by, and potentially generative of empirical work on related issues.[47]

> A theory of law that makes explicit the tacit or inchoate concept at play in scientific research is probably to be preferred to its competitors. If one surveys . . . the now vast literature on adjudication, which aims to explore the relative contributions of legal versus non-legal norms to decision-making by courts, that literature *always* demarcates the distinction in positivist terms.[48]

So, too, the thin-norms account's capacity to distinguish what the law is from what one thinks the law should be facilitates empirical analysis of the influence of legal versus non-legal reasons for decision. Again, what matters on my view is that judges act as if they accept SPT and similar norms as valid norms of the constitutional system, and not, rather, act as though those norms are the reasons for that acceptance. In other words, the law is the set of norms judges accept, regardless of their reasons, so that we can assess those reasons without conceding that discovering a particular set of reasons for acceptance of legal norms invalidates those norms. Thus the thin-norms view is also consistent with nearly every theory of adjudication or of constitutional interpretation. It leaves intact our well-established belief that the constitutional system is robust and stable despite observed disagreement. Moreover, because it treats issued judicial decisions as instances of law and identifies consensus norms from patterns in judicial conclusions rather than their reasoning; the thin-norms theory is consistent with any account of the *real* causes of judicial decisions.[49] Value-driven and interpretive theory-

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46. *See* Kuhn, *supra* note 6, at 320; Leiter, *supra* note 2, at 1239. Some argue that this is more of an ex ante threshold for distinguishing facially plausible theories from those unworthy of serious consideration. *See, e.g.*, Wendel, *supra* note 2, at 1049.

47. Leiter, *supra* note 2, at 12.

48. *Id.* at 12.

49. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE

of-law claims, however, are inconsistent with empirical work like that on the attitudinal model—they claim that judges should decide cases based on some set of values or interpretive commitments, but the empirical evidence suggests that such proposals are unrealistic in light of judges' persistent tendency to act in ways not predicted by the relevant legal reasons.[50]

A related criterion is fruitfulness—or the extent to which a theory "enable[s] us to say significant things, generate[s] insights, and ha[s] implications for future research."[51] Of course it is not right to say that legal theory cannot generate predictive hypotheses. The literature on the attitudinal model of judicial decision making, which tests the hypothesis that proxies for judges' political views (such as the party of the appointing president), is widely viewed as a robust and successful predictive research program.[52] This shows that legal theory can spur empirical research—the attitudinal model was prompted and supported by the theoretical claim of the American Legal Realists and others that legal reasons alone are insufficient to explain many judicial decisions.[53] The abstractness of norms like SPT means that positing them has little predictive power in itself—without more, the hypothesis that SPT is accepted predicts some constellation of judicial actions aimed at preventing state interference with the constitutional structure. That is what we see, but these observations are not terribly surprising and do not crisply distinguish the SPT view from other explanations. Yet, the thin-norms theory frames more determinate and testable hypotheses. For example, the argument that SPT is implemented by a variety of doctrines whose differences are attributable to non-legal considerations is more fruitful: we could design experiments to test the likely causal power of various instrumental or other non-legal factors in doctrinal formulation; we would just need to find reliable proxies for things like judges' concern about institutional capital, interbranch conflicts, adjudicatory error rates,

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ATTITUDINAL MODEL REVISITED 44–115 (2002) (presenting the attitudinal model of judicial decision making that tests for the causal power of non-legal reasons in adjudication).

50. *Id.*

51. Wendel, *supra* note 2, at 1053; *accord* Kuhn, *supra* note 6, at 321; PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 34 (2004).

52. *Cf.* Rob Robinson, *Does Prosecutorial Experience "Balance Out" a Judge's Liberal Tendencies?*, 32 JUST. SYS. J. 143, 144 (2011) (arguing that "the 'attitudinal model' has proven remarkably robust in explaining much of the aggregate variance in appellate decisions" compared to other models measuring the influence of social background factors); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 405–07 (2007) (arguing that the attitudinal model is incomplete; articulating various critiques and concluding that law's independent normative force explains many judicial decisions).

53. *See supra* notes 49–52 and accompanying text.

among others.[54]

There exists broad and long-lived consensus among scientists and philosophers of science on the foregoing criteria being generally correct.[55] There appears to be no such consensus with respect to the propriety of some set of normative values of the kind that Fallon and Bartrum propose for choosing among normative constitutional theory theses (for example, democracy, rule of law, judicial constraint, substantive justice, and so forth).[56] If we agree that robust consensus on theory selection is the best approximation of objectivity available, there is substantially more robust consensus with respect to the criteria I have mentioned for distinguishing scientific, social scientific, and descriptive constitutional theory claims—enough consensus for Kuhn to suggest that scientific theory selection decisions on these criteria can, over time, approach objectivity.[57] The selection process I have outlined here, accordingly, does not suffer from the kind of instability that I argue threatens proposals for normative constitutional theory assessment.

One conventionally cited criterion for assessing scientific theories—Karl Popper's idea of falsifiability[58]—is occasionally mentioned in legal scholarship[59] and, of course, frequently discussed in judicial decisions involving the *Daubert* test for the reliability of expert testimony.[60] Falsifiability is, however, both contested among philosophers of science and a poor fit for legal theory.[61] A scientific proposition is falsifiable if a statement about some occurrence is incompatible with the proposition;[62] science on Popper's view should proceed by "conjecture and refutation" in which proposed explanations for observed phenomena are tested not for conformance with corroborating evidence but by

54. Of course, the truth of statements in responses to survey questions like this or, for example, "Do you accept SPT as obligatory even if you would not be sanctioned for violating it," that capture Hart's idea of the internal point of view, will generate answers that are ultimately unverifiable. But that is an epistemic problem facing all survey evidence; we will have to use the best evidence rule and wait to be disproved.

55. Kuhn, *supra* note 6, at 321.

56. *See supra* notes 70–73 and accompanying text.

57. *See* Kuhn, *supra* note 6, at 325.

58. *See generally* POPPER, LOGIC, *supra* note 23.

59. *See supra* note 23 (canvassing legal scholars' treatment of Popper's view).

60. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993); *see* Susan Haack, *Federal Philosophy of Science: A Deconstruction—and a Reconstruction*, 5 N.Y.U. J.L. & LIBERTY 394, 417–27 (2010) (canvassing federal court treatments of Popper's view under *Daubert*).

61. By the time Popper was cited in *Daubert*, his views had been for the most part abandoned by mainstream philosophers of science. *See, e.g.*, Haack, *supra* note 60, at 415–16; David Stove, *Cole Porter and Karl Popper: The Jazz Age in the Philosophy of Science*, *in* AGAINST THE IDEALS OF THE AGE 3–8 (Roger Kimball ed., 1999); D.H. Mellor, *The Popper Phenomenon*, 52 PHIL. 195 (1977).

62. POPPER, LOGIC, *supra* note 23, at 86–87.

subjecting test after test designed to falsify the proposed explanation.[63] Falsifiability was Popper's proposed criterion for demarcating real science from other kinds of pursuits that purport to be scientific (for instance, Popper argued that the latter category includes metaphysics, psychoanalysis, history, and so forth).[64] Popper held other extreme views about science, including that science does not use inductive logic (because inductive logic cannot truly confirm any proposition as true), and that observation does not justify belief in the reality of what is observed.[65]

Aside from these internecine struggles within the philosophy of science, there are reasons to hold falsifiability particularly inappropriate as a criterion for assessing competing constitutional theory claims. The first problem is that falsifiability as a way to distinguish science from other forms of inquiry is inapt for assessing constitutional theory claims that do not purport to be scientific, but merely descriptive of the artifacts of human practice. Another problem is the following: Assuming that constitutional norms are meaningfully constituted (validated) by patterns of convergent official practice of acceptance, then for claims of the form "Proposition X is a constitutional norm in system Y," potentially falsifying counterexamples (e.g., a judicial decision in which the court upholds some state action that pretty clearly threatens structural stability) could be interpreted as *either* (1) proof that Proposition X is not in fact a norm of the system; *or* (2) evidence that Proposition X was (or perhaps still is) a norm of the system but that the official consensus that X is a norm is changing or has changed. It is not obvious how, absent explicit judicial specification, we should decide between these two interpretations. But it is possible in principle for SPT to be falsified by, say, an unambiguous judicial statement that it has never been a valid norm.

C. Normative Theory Assessment

This is the hard part. The vast majority of constitutional theory is normative, but this is the most difficult kind of theory for which to do metatheory. Existing literature suggests normative criteria that are themselves at issue in the debates between competing theories, and that will not work, at least not without more.

Again, start with their purpose: to make some improvement that

63. *Id.* at 30–33.

64. *See id.* at 40; KARL R. POPPER, UNENDED QUEST: AN INTELLECTUAL AUTOBIOGRAPHY 38–41 (rev ed. 1976).

65. *See* POPPER, LOGIC, *supra* note 23, at 102–05.

maximizes some value. So the general purpose is to give an account on which values are maximized. The metatheoretical question, then, is "which value is preferable to maximize" (for example, should we prefer justice, or should we seek a balance between liberty and justice).

The tiny literature to address this question directly suggests solving this problem (that these criteria are essentially contested by looking for values on which there is consensus); this resonates with Fallon's more general claim that constitutional legitimacy can be established by sociological fact of consensus, but that does not solve the larger logical problem that this is question begging. To put it abstractly, the metatheoretical question here is which of the following two theses is best or preferable: "We should do X to maximize value P" or "We should do Y to maximize value Q"?

The task of metatheory here is to determine which value, P or Q, is to be preferred when it comes to maximizing values. (Of course, there are lots of other criteria that could be applied to distinguish normative theories—feasibility, accuracy of the descriptive predicate, cost, side-constraints, and so on; but here we want to assume those away as they do not answer the more basic question-begging problem of how to evaluate competing value claims). I do not want to suggest that there is an answer here—Bartrum and Fallon suggest consensus, but that is not good enough as the question "which is more important, freedom or justice," is one for which it is not obvious that "whichever everyone agrees is more important" is the best answer (even if everyone does, in fact, so agree). This is the old debate about whether there are moral truths or, in fact, morality is only relative.

Even reading Fallon's claim that most constitutional theorists agree on this set of normative criteria as a kind of descriptive sociological claim that there exists a convergent practice among legal officials and practitioners, it is not obvious that the claim is true or what its significance would be if it were true. Bartrum says something similar: "'constitutional values' . . . [or] the important or essential purposes we ascribe to the Constitution within our democratic structure . . . can provide some *objective* grounds to assess particular theory choices, even if the ultimate act of decision remains essentially subjective."[66] By "objective" here, he must mean something like "consistent with a broad and deep consensus of legal officials and the public"—and, indeed, he characterizes these "constitutional values" that provide the evaluative criteria as reflected in "extra-constitutional texts that have settled most deeply into our interpretive practice—under the hypothesis that those

66. Bartrum, *supra* note 6, at 264 (emphasis added).

texts are canonical precisely because they speak forcefully to widely held ideas about what the Constitution means or how it should function."[67] These claims alone are not evidence of the indicated consensus—and other theorists persuasively argue against the generality and durability of a consensus on constitutional values among either theorists or judges and practitioners.[68] In addition, it is not clear that these sorts of values can be applied in a determinate enough way to serve as crisp criteria for distinguishing among competing theories. Bartrum's suggestion resonates in a general way with my view—I agree that we should seek consensus because, at the end of the day, consensus is what establishes whatever approximates the true facts of the matter of legal phenomena. I just disagree that a sufficiently robust and definite consensus may be found on questions of political morality. Even superficial agreement that recommendations for constitutional decision making should promote democracy seems likely to generate significant disagreement; such a standard would invite essential contestation on, among other things, the aspects of democracy (accountability, participation, actual actions reflecting majoritarian preferences, etc.) that should be maximized.[69]

It might be that this kind of normative assessment is simply unavoidable in constitutional theory. There is a fairly strong intuitive impulse toward this conclusion; and constitutional theory work is overwhelmingly normative.[70] My own view, however, is that constitutional theory is not inescapably normative. While the lack of descriptive constitutional theory might tell us something about the scholarly community's implicit assessment of such work's value—more likely, I think, it tells us something about what the community finds *interesting*[71]—it does not establish that descriptive theory is somehow

67. *Id.* at 265.

68. *See* Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 149–50 (2004) ("When the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well. Over the last century or more there have been two general positions taken about judicial review: that it is a blight in a democratic system that must be curtailed and that it is a valued part of U.S. government essential to the protection of constitutional liberty. . . . Progressives and conservatives have advanced both positions (in various permutations) at different times, depending upon which position seemed most apt to present circumstances, given their political views."); Dorf, *supra* note 20, at 603–05 (arguing that the appearance of consensus on the values Fallon points up is largely illusory).

69. *See* Dorf, *supra* note 20, at 603–04 ("[A]greement (at a very high level of generality) about the constitutional values identified by Fallon pales in significance when contrasted with the disagreement about particulars.").

70. *See* Fallon, *supra* note 3, at 540–41.

71. *Cf.* Gardner, *supra* note 18, at 202–03 ("[B]y itself [legal positivism's core claim] does not point in favor of or against doing anything at all. . . . When a philosopher of law asserts a proposition that neither endorses nor criticizes what they do, but only identifies some necessary feature of what they do, lawyers and law teachers are often frustrated . . . [and] automatically start

impossible. Normative constitutional theories of course differ from scientific theories in just the way that I have mentioned—normative theories purport to establish what should be the case; scientific theories purport to explain what is the case. Normative constitutional theory, then, cannot "coerce agreement" in the same way that we like to think that scientific theories can.[72] If one disagrees with the evaluative proposition driving the normative proposal (e.g., constitutionalism should be more democratic as a driver for "popular constitutionalist" proposals for reforming judicial review[73]), the proposal itself cannot change one's mind because it *presupposes* agreement with the underlying evaluative claim.

We need more work on these questions of normative theory assessment, and along different lines than what exists—consensus alone (for example, if a consensus arose that justice-seeking constitutionalism is the correct view of how our theoretical claims about constitutionalism or constitutional development should be formulated) without a showing that consensus is or should be the single criterion for prioritizing competing value systems. Demonstrating that is a very deep task, and one for another day. For the moment, and for our purposes, is it enough to note that normative theory assessment is a project that can proceed, along the foregoing lines. This suggests that we might, at some point, actually arrive at some criterion or set of criteria P on the basis of which we might sort through normative constitutional theory claims and assign them their relative merits in a manner more comprehensive, systematic, and consistent with the best-going account of scientific theory assessment.

II. ASSESSING THE ANTI-EVASION THESES

Now, I will demonstrate the broad applicability of the metatheoretical insights developed above by applying them to a relatively new, and quite technical, debate among competing narrow theses in constitutional theory. The debate was sparked by Brannon Denning and Michael Kent's argument in an important recent article that some rules of constitutional

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to search for hidden notes of endorsement or criticism, secret norms that they are being asked to follow. . . . They cannot accept that legal philosophy is not wholly (or even mainly) the backroom activity of identifying what is good or bad about legal practice . . . . In this fundamentally anti-philosophical climate, a thesis like [legal positivism's core claim], which is inertly informative, is bound to become egregiously distorted.").

72. *See* Posner, *supra* note 1, at 4; Bartrum, *supra* note 6, at 272–73 (highlighting differences between normative constitutional theories of adjudication and scientific theories).

73. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

doctrine can be usefully distinguished from the standard category of "constitutional decision rules" developed in what we might call "metadoctrinal" constitutional theory over the last fifteen years. Put roughly, the metadoctrinal approach treats constitutional *doctrine*—the rules, tests, and standards courts adopt to identify violations of constitutional permissions, prohibitions, or requirements—as a distinct and important subject of research and analysis.[74] Denning and Kent's article is a project with which I am sympathetic; and there is much about their description of constitutional doctrine that seems unquestionably correct. The discussion in this Part is meant to demonstrate that the theory assessment criteria developed above are useful not just at a very high level of abstraction—as, for example, in judging between competing theories of the nature of law—but at a finer grain as well. To that end, I will examine both the broad and the narrow theses advanced in Denning and Kent's work along the theory assessment criteria developed in Part I.

Denning and Kent clearly accept metadoctrinalism's "two-output thesis" ("TOT"),[75] specifically: "'there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of constitutional adjudication,' namely judge-interpreted constitutional meaning [or constitutional *operative propositions*] and judge-crafted tests bearing an instrumental relationship to that meaning [or constitutional *decision rules*]."[76] The authors' description and examination of Anti-Evasion Doctrines ("AEDs") is an exercise in applied metadoctrinal theory. They identify as AEDs rules of constitutional doctrine of the following form: "X violates constitutional requirement Θ even though X satisfies doctrinal rule, test, or standard Y, where Y also purports to identify violations of Θ."[77] In addition to highlighting examples of doctrines taking this form in a wide variety of constitutional contexts, the authors advance the following core claims: (1) There exist certain constitutional decision rules—AEDs—that are conceptually distinct from standard constitutional decision rules in one or

74. *See* Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 220 (2006) [hereinafter Berman, *Rights*]; *see also* Mitchell N. Berman, *Constitutional Decisions Rules*, 90 VA. L. REV. 2, 4 (2004) [hereinafter Berman, *Rules*] ("Insofar as this strain of scholarship concerns itself with the fact of doctrine but not with its particular content, we may fairly term it metadoctrinal.").

75. *See* Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1775, 1818–21.

76. Berman, *Rights*, *supra* note 74, at 221 (quoting Berman, *Rules*, *supra* note 74, at 36).

77. An example of this form is rational basis review for discrimination on the basis of sexual orientation; this kind of discrimination probably violates the Equal Protection Clause, but almost always satisfies rational basis review—the doctrinal test courts use to identify constitutional violations in this context.

more of the following senses: logical structure (they are always structured differently than standard decision rules); logical priority (they are analytically subsequent to some standard decision rule(s)); function (they supplement standard decision rules rather than replace them); or justification (they are adopted for reasons distinct from the instrumental considerations that bear on the implementation of constitutional operative propositions, which shape standard decision rules). Call this the *Distinctiveness Thesis* ("DT"). (2) Identifying and distinguishing AEDs as a category of constitutional decision rules yields theoretical benefits beyond the merely taxonomical—that is, beyond merely adding another more-or-less correct bit of nuance to our positive account of constitutional doctrine on the metadoctrinal model. Call this the *Value Thesis* ("VT").

Denning and Kent's identification of AEDs across doctrinal areas is an impressive contribution in itself—metadoctrinal theory takes *trans-substantive* doctrinal analysis as an important office. Now one and a half decades old[78]—and with still older analytical precursors[79]—it is a mature branch of constitutional theory in the sense that its methodology and objectives have been thoroughly explored and defended.[80] But it is also a field in which much substantive work remains to be done, and thus it is worth assessing Denning & Kent's contribution as it relates to the broader methods and aims of the metadoctrinal program. In Section A, I assess DT by exploring what, exactly, Denning and Kent have identified that is new or previously under-examined. Because DT's truth is a premise of VT, if DT is in some sense true, then VT is likely true. I leave it to others, however, to evaluate VT in greater detail. In Section B, I examine several deeper questions raised by the authors' AED-identification project and evaluate metadoctrinal theory's capacity to generate answers. Completion of this examination revels that another of Denning and Kent's contributions is to highlight some of metadoctrinalism's limits.

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78. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (widely recognized as the formative work in modern metadoctrinal theory).

79. *See, e.g.*, Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

80. *See generally* Berman, *Rules*, *supra* note 74. See also Pursley, *supra* note 34, at 502–12 (2012); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 424–28 (2008); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–86 (2005), all of which explore the theory before applying it to various specific doctrinal controversies.

A. Anti-Evasion's Distinctiveness

First, I want to clarify Denning and Kent's Distinctiveness Thesis. Here, I will examine whether they have identified a conceptually distinct category of constitutional doctrine. I then turn to consider whether they have identified a previously under-examined factor in judicial reasoning concerning doctrinal formulation. The latter possibility turns out to be more plausible and therefore is more likely an accurate statement of Denning and Kent's core claim.

1. Taxonomy and Conceptual Distinctions

Denning and Kent claim that AEDs are distinct from other forms of constitutional doctrine, and by this they might mean any of several things: They might mean, first, that AEDs as a form of constitutional doctrine are conceptually distinct from constitutional operative propositions and constitutional decision rules, the two categories of doctrine identified by the current metadoctrinal taxonomy.[81] If the goal of that taxonomic project is to develop a full account of "the conceptual structure of constitutional doctrine,"[82] then our question should be whether Denning and Kent have identified a doctrinal phenomenon of distinct conceptual structure to that which has already been described in the literature. Insight into the distinctiveness of AEDs will help to show the extent to which Denning and Kent's work promises to advance metadoctrinalism's second central aim—to leverage a robust positive account of doctrine *qua* doctrine into normative advances in constitutional theory.

Metadoctrinal theorists have developed several central theses that, taken together, help establish the properties of operative propositions and decision rules. The most important of these theses is TOT,[83] but there is also an instrumental reasoning thesis ("IRT"), namely: "Decision rules bear an instrumental relationship to operative propositions both in the sense that they are designed to implement the operative proposition, and in the sense that decision rules' content is determined by instrumental considerations bearing on that purpose of implementation."[84] Third, a necessity thesis ("NT") holds that because courts will face some degree

81. Berman, *Rules*, *supra* note 74, at 4.

82. *Id.* at 7.

83. *See supra* text accompanying note 73. *See generally* Berman, *Rights*, *supra* note 74.

84. *See* Berman, *Rights*, *supra* note 74 (combining instrumental reasoning and TOT); Pursley, *supra* note 34, at 506–08 (exploring this thesis); *see also* Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1521–23 (2004) [hereinafter Berman, Guillen] (exploring instrumental factors that arguably shape Commerce Clause decision rules); Roosevelt, *supra* note 80, at 1659–64 (paralleling Berman, but in the equal protection context).

of epistemic uncertainty in every case—for example, they cannot know with perfect certainty whether Congress has drawn a race-based distinction on the basis of unlawful animus—constitutional adjudication *always* requires the formulation of a decision rule or the use of a preexisting decision rule.[85] This does not mean that every operative proposition requires a decision rule—some operative propositions may go unenforced. Nor does it mean that every decision rule must be explicitly articulated by a court—some may simply operate invisibly in the background. The default decision rule instructs courts to find a constitutional violation if they find φ fact(s) by a preponderance of evidence.[86]

Let us, then, first consider conservatism (the ability of claims to coexist with other well-established views about the world): how well do these AED theses fit with the central theses of metadoctrinal theory? AEDs have all the essential properties of decision rules. They are designed to implement constitutional operative propositions;[87] they are shaped by instrumental considerations—for example, as Denning and Kent emphasize, AEDs often seem supported by calculations about the adjudicatory error rate in the form of false negatives, or holdings of constitutionality where the action actually violates the relevant operative proposition because of imprecisely fitting decision rules, and other considerations relevant to the accuracy and efficiency of judicial implementation of the operative proposition. The authors draw from the risk-regulation literature to contend that courts do and should strive for optimal, not maximal, enforcement of constitutional operative propositions in making doctrine; this suggests that they believe courts may choose to adopt AEDs for instrumental reasons, consistent with IRT.[88] And as AEDs do not appear to be propositional statements of constitutional meaning, they are likely not mislabeled operative propositions. The authors stress that AEDs take a variety of forms—purpose tests, effects tests, and so forth—and tend to be more standard-like than rule-like. This also does not distinguish them conceptually from

85. *See* Berman, Guillen, *supra* note 84, at 1520–21.

86. *See* Berman, *Rules*, *supra* note 74, at 10–11. There are other theses that are not essential to this discussion, but are central to metadoctrinalism's contribution to constitutional theory—including, for example, the interpretive agnosticism thesis, namely: Observing and affirming the distinction between operative propositions and decision rules entails no commitment to any theory of constitutional interpretation, and thus the two output thesis may be accepted by originalists and non-originalists alike. The taxonomic value of the distinction, therefore, does not turn on resolving irresolvable interpretive debates. *See id.* at 9, 57 n.192.

87. *See* Denning & Kent, *supra* note 75, at 1776, 1793 (arguing AEDs implement constitutional principles).

88. *See id.* at 1797–99 (discussing risk regulation).

other decision rules: The point of metadoctrinal taxonomy is to categorize doctrines by their structure, rather than by their content; and the standard decision rules category also includes all manner of bright-line rules, balancing tests, levels of scrutiny, and so forth. They are all decision rules because they implement operative propositions and are shaped by instrumental concerns related to that implementation. Examining AEDs' specific content is certainly relevant to doctrinal analysis, or "thick description," but it is not relevant to metadoctrinal taxonomy.[89] AEDs are conceptually identical to primary decision rules in every sense relevant to metadoctrinal taxonomy.

Denning and Kent claim that AEDs stand not only in the typical implementation relationship with operative propositions, but also in a relationship of supplementation with primary decision rules.[90] Perhaps this special relationship with regular decision rules makes AEDs distinctive. For this to amount to a structural distinction, we would need an argument to establish that primary decision rules do *not* supplement other decision rules, at least not in the ordinary case. But there is no argument to show that it would be in some sense incoherent to characterize, for example, the virtually per se antidiscrimination rule and *Pike* balancing test from the dormant Commerce Clause doctrine as a pair of *primary* (co-equal) decision rules, both of which implement the underlying constitutional operative proposition and happen to compliment each other in the sense that each identifies violations of the operative proposition that the other does not.[91] After all, what Denning and Kent characterize as the primary dormant Commerce Clause decision rules focus on discriminatory actions by one state against another, *Pike* identifies unduly burdensome but non-discriminatory actions. It seems just as apt to characterize the *Pike* balancing test, which weighs a state action's burden on interstate relations against its local benefits, as "the second dormant Commerce Clause decision rule," or even to suggest that the dormant Commerce Clause is implemented with a single decision rule containing a variety of complex conjunctions and alternatives. Denning

89. Berman, *Rules*, *supra* note 74, at 6–7 (distinguishing the *general* logical structure of doctrine from the question of specific doctrines); *see also* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 77 (2001) (emphasizing that his doctrinal types were "a bit of a hodgepodge" and of little theoretical importance).

90. Denning & Kent, *supra* note 75, at 1808 (stating that AEDs are "decision rules that assist other decision rules in the implementation of operative propositions").

91. Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) (virtually per se invalidity rule for facial discrimination); Pike v. Bruch Church, Inc., 397 U.S. 137, 142 (1970) (articulating the catchall balancing test); *see* Pursley, *supra* note 80, at 538–44 (discussing these doctrines as decision rules); *see also* Denning & Kent, *supra* note 75, at 1789–90 (characterizing the *Pike* test as an AED).

and Kent acknowledge that some decision rules do look like this—they quote Professor Berman's *lengthy* "partial stab" at stating the First Amendment Free Speech Clause's decision rule as an example of this kind of complexity.[92] There is nothing distinctive, then, about decision rules that are paired with other decision rules to implement constitutional operative propositions as a *system* of rules.

These observations do not necessarily undermine DT. There are yet other potentially distinguishing features: There is the matter of how AEDs and primary decision rules function *together*. Denning and Kent argue that AEDs are distinctive insofar as they supplement, rather than replace (or interact in some other way with) primary decision rules. This, of course, is not unique to AEDs; a later-formulated decision rule instructing courts to defer to Congress in a certain subset of, for example, Equal Protection Clause disputes in which the Court typically applies a stringent standard of review—an exception likely to produce more false negatives, in other words—would supplement the primary decision rule in precisely the way Denning and Kent have in mind (changing the number and kind of violations the relevant *set* of decision rules identify), but Denning and Kent would not call our hypothetical supplement an AED as it does not increase the likelihood of identifying actual constitutional violations.

Relatedly, it is not clear that all of the identified AEDs merely *supplement* the primary decision rule(s). Some, like the later Commerce Clause doctrines, seem to be substitutes for preexisting decision rules, as Denning and Kent concede.[93] The difference is significant in principle: In the case of supplementation, all of the decision rules must be considered invalid in each case and action violating the primary decision rule but not the AED (and *vice versa*). In the case of substitution, only the later-adopted decision rule need be considered and actions that violate the earlier rule but not the later are *not* invalid. Indeed, in the case of substitution, it is inapt to characterize the later rule as dealing with "evasions" of constitutional norms by way of formal compliance with the former rule because such compliance would yield no benefit to the actor. Denning and Kent elide this distinction, arguing that "the ebb and flow of constitutional adjudication tends to" go according to the supplementation pattern that they identify.[94] But this conflation calls into question their claim that true supplementary AEDs are "ubiquitous" in

92. Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMM. 39, 39–40 (2010).

93. Denning & Kent, *supra* note 75, at 1793–94.

94. *Id.* at 1793.

constitutional doctrine.[95] The extent to which later-added decision rules are in fact *supplementary* AEDs, rather than substitute decision rules, is an empirical question that the authors do not purport to answer. But it suggests that the explanatory power—the *consilience*—of the AED theses may be problematic.

Much the same line refutes other proffered grounds for distinction. The authors might distinguish AEDs by their temporal relationship to primary decision rules—some AEDs are adopted after the primary rules—but this is historical accident that even Denning and Kent concede cannot be significant.[96] Again, consider the Equal Protection Clause example—adding a decision rule that decreases judicial enforcement of the relevant norm, even if it was adopted long after the primary decision rule, would not make it an AED. It would just be a *second decision rule*. So, too, the claim that AEDs tend to be "standard-like" while the primary decision rules that they supplement tend to be more "rule-like" does not distinguish AEDs from other constitutional decision rules, because the category of decision rules by definition includes both rule-like and standard-like doctrines.[97] While scholars sometimes for the sake of contrast characterize doctrine on binaries—deferential or non-deferential, rule-like or standard-like, and so forth—few would deny that many decision rules have characteristics that resist such simple division.[98] Think, for example, of the *Miranda* doctrine—a rule-like primary decision rule[99]—and the "substantial effects" prong of the modern Commerce Clause doctrine—a clearly standard-like primary decision rule.[100]

AEDs, then, are conceptually indistinguishable from other constitutional decision rules on the properties we have examined so far. That suggests that assigning them a separate category serves some purpose other than to contribute to the metadoctrinal taxonomic

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95. *Id.* at 1777–78.

96. *See id.* at 1779 n.34 (acknowledging that "it may not always be the case that the 'other' rules to which AEDs respond were developed prior to the AED itself," and "we think our analysis is the same regardless" of the chronological facts).

97. *See id.* at 1801–02 (AEDs typically standard-like).

98. This is what Denning and Kent refer to as a "dualist" tendency in metadoctrinalism; I do not think it is either as pervasive as they say and I do not think it reflects widespread misunderstanding of the doctrine's true complexity. *See id.* at 1776 ("[W]e attempt to unsettle this [dualist] view of doctrinal design . . . .").

99. *See generally* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966); Berman, *Rules*, *supra* note 74, at 116–24 (dividing the *Miranda* doctrine into operative proposition and decision rule).

100. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1996) (canonizing the now famous "items of interstate commerce, channels or instrumentalities of interstate commerce, or things with a substantial relationship to interstate commerce" standard for judging the permissible reach of the commerce power). *See also* Berman, *supra* note 84.

project.[101] That is not to say that Denning and Kent have failed to highlight an interesting form of decision rule—AEDs surely exist in some contexts; and drawing correct generalizations concerning their form and functions certainly improves our understanding of constitutional practice. It just does not add a conceptually distinct category to our metadoctrinal taxonomy. Adding another distinction to the metadoctrinal picture is in tension with our simplicity criterion for theory choice.

Now, finally, let us consider fruitfulness—the "test of results." None of Denning and Kent's normative claims are fully undermined by the foregoing conclusions. They claim that their account of AEDs (1) rebuts Nagel's critique of courts reveling in doctrine for its own sake at the expense of careful attention to constitutional meaning;[102] (2) provides evidence for Schauer's contention that rules and standards frequently converge in practice as a result of actors iterative adaptations to either form of requirement;[103] and (3) provides evidence that the study of doctrine *qua* doctrine is valuable in constitutional theory.[104] Luckily, none of these normative implications depend on AEDs being conceptually distinct from constitutional decision rules—all of the foregoing effects are created by acknowledgement of the distinction between operative proposition and decision rule and the ubiquity of decision rules (acceptance of TOT and NT) almost as logical entailments: The implementing relationship between decision rules and operative propositions demonstrates courts' continuing attention to constitutional norms even in the midst of complex doctrinal formulation, rebutting Nagel's claim.[105] The well-documented existence of constitutional decision rules that have either been changed over time from formalistic rules to more realistic standards, that incorporate both rule-like and standard-like components, or that are ostensibly rule-like but so riddled by exceptions that their application is unpredictable, are striking evidence of Schauer's convergence thesis with no need for additional support from AEDs in particular[106]—though AEDs do tend to take these convergent

101. *Cf.* Berman, *supra* note 84, at 4–5 (desiring to contribute to metadoctrinal taxonomy project).

102. *See* Denning & Kent, *supra* note 75, at 1816, 1817–21; Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

103. *See* Denning & Kent, *supra* note 75, at 1816, 1826–31; Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303.

104. Denning & Kent, *supra* note 75, at 1816.

105. The authors apparently agree on this point; they argue that implementing doctrine *vel non* rebuts Nagel's critique. *Id.* at 1819–20.

106. *See, e.g.*, Berman, *Rules*, *supra* note 75, at 61–78; Pursley, *supra* note 34, at 506–12, 537–62; Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2010).

forms.[107] Rehearsing the familiar rules versus standards debate also usefully highlights the kind of instrumental considerations that bear on doctrinal formulation—critiques of both forms of decision rule embody classical concerns about error rate, error cost, manageability, signaling value, and so forth,[108] which serves conservatism. And emphasizing the importance of focusing on "the fact of doctrine" in constitutional adjudication is a central aim of metadoctrinalism generally. But none of this necessarily undermines the value of Denning and Kent's catalogue of these rules—we need to think again about the force of their contribution.

2. The Anti-Circumvention Reason

To salvage DT, Denning and Kent likely would argue that AEDs warrant separate treatment because they are adopted for a *particular reason*—one that is complex, contestable, and not involved uniformly in all instances of doctrinal formulation. That is, our metatheoretical framework suggests that their argument is better read not so that AEDs themselves are conceptually distinct from the primary decision rules that they supplement, but rather that focusing on decision rules that take the form of AEDs highlights an important and under-scrutinized category of *reasons* that judges and justices may rely upon in doctrinal formulation. So far, theorists have focused for the most part on the instrumental considerations that arise upon asking "how may a constitutional norm (or operative proposition), Θ, best be implemented?" Here, "best implementation" encompasses more than the goal of identifying all violations of the norm; it includes things like minimizing inter-institutional friction, the chances of adjudicatory error, the costs of decision, and so forth.[109] These are the standard instrumental considerations that bear on implementing constitutional operative propositions. Denning and Kent draw our attention to another set of considerations that might arise upon asking a slightly different question: "How can we *improve* the constitutional decision rules that we have put in place (or are planning to adopt) to implement Θ?" Denning and Kent's exploration of AEDs highlights the wide variety of contexts in which this kind of reasoning might be at work in doctrinal formulation. This is certainly something new, and it suggests that their claims may indeed be fruitful.

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107. *See* Denning & Kent, *supra* note 75, at 1826–28.

108. *Id.* at 1797–1813 (discussing at length the benefits and detriments of rules and standards, among other reasons to value or doubt the value of AEDs).

109. *Id.* at 506–12.

Of course, one basic concern in the formulation of decision rules is "fit"—how to craft rules that will "catch" a large percentage of violations of, in this instance, underlying operative proposition *Θ*. But this process of reasoning will hardly ever be limited to that question—other instrumental considerations are almost always on the table. If, for example, an existing decision rule does a fairly good job of identifying instances in which Congress has violated *Θ*, but also invites such heavy judicial scrutiny of legislative motives that it causes significant inter-branch friction, the latter characteristic of the rule could well be the one that motivates doctrinal revision. Our hypothetical court might adopt a supplementary rule requiring deference where certain legislative-process conditions have been met (indicia of reasonable deliberation, for example); concerns about "fit" or circumvention need not always be the driving force. We must be careful, for reasons of simplicity, not to assign any particular instrumental consideration greater weight than the others without a theoretical justification.

But the fruitfulness of these theses is not yet entirely established. Denning and Kent have thus highlighted a particular kind of "fit" consideration associated with crafting decision rules that preclude "cleverly" crafted evasions under the guise of formal compliance.[110] Drawing attention to these anti-circumvention considerations is important because, without them, conventional instrumental reasoning would not always clearly favor adopting the decision rules that Denning and Kent label AEDs. Grafting a standard-like supplement onto an existing rule-like test will seem, in some contexts, inconsistent with the relevant instrumental factors—it is likely to increase the rate of adjudicatory error, as standards often do; it may increase decision costs because of the increased fact-sensitivity of the hybrid rule; it may involve weighing factors that are at the outer limits of judicial competence, as with the assessment of state action's "burden" on interstate commerce required by the *Pike* standard; and so forth.[111] Anti-circumvention describes an underappreciated set of considerations that might justify adopting a standard-like AED despite other instrumental deficits. Those considerations are, however, instrumental—after all, in addition to its similarity to the basic "fit" concern, anti-circumvention is aimed at a particular kind of adjudicatory error, that of allowing "constitutional principles to be undermined by subterfuge and artifice."[112] It remains

110. Denning & Kent, *supra* note 75, at 1778–80.

111. *See* Pike v. Bruch Church, Inc., 397 U.S. 137, 142 (1970); Pursley, *supra* note 34, at 506–12 (canvassing instrumental determinants of doctrine); *see also* Denning & Kent, *supra* note 78, at 1804–07 (acknowledging these and other problems with standard-like AEDs generally).

112. Denning & Kent, supra note 78, at 1804.

unclear what *weight* courts should assign anti-circumvention consideration in the doctrinal calculation.

Furthermore, it is not obvious that every decision rule labeled here and AED depends primarily on the anti-circumvention factor. For at least some decision rules that look like AEDs, a different instrumental justification is possible. The *Pike* balancing test might be the background decision rule of dormant Commerce Clause doctrine—it certainly is the most capacious—and it might raise institutional competence concerns serious enough to warrant adopting the more formalistic dormant Commerce Clause doctrines, virtually a per se invalidity rule for facial discrimination, to reduce the risk of adjudicatory error.[113] The anti-circumvention concern, then, is not *necessary* to a plausible explanation of every doctrine classifiable as an AED. This is a simplicity problem. Yet, it is beyond question that Denning and Kent have identified a kind of implementation-related concern that might—and probably frequently does—bear on doctrinal formulation in various contexts. And a focused analysis of the reasons on which courts rely in doctrinal formulation, or a subset of those reasons, fills a continuing gap in the metadoctrinal literature. Again, fruitfulness here is an attractive reason to consider the AED account. Fallon, for example, recently examined the role of concerns about "judicially manageable standards" in doctrinal formulation.[114] As a study of reasons for doctrinal choice, these theses seem capable of adding quite a bit to the research program.

B. Anti-Evasion, Constitutional Operative Propositions, and Norms

Now, we examine the fruitfulness—the explanatory power—of this view in greater detail. The idea of anti-circumvention reasons for formulating decision rules is powerful, has a great deal of intuitive appeal, and is a novel contribution to the metadoctrinal literature. But metadoctrinal theorists also seek to leverage taxonomic insights to answer deep questions at the heart of constitutional theory. Roosevelt uses the TOT and an analysis of the relationship between decision rules and potential operative propositions in certain constitutional rights contexts to draw deeper lessons about the legitimacy of judicial review in constitutional cases;[115] Berman uses the distinction to lay bare the full range of reasons courts might consider in deciding constitutional cases;[116] and I examine existing decision rules to formulate and test

113. *See* sources cited *supra* note 91.

114. *See generally* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

115. *See generally* Roosevelt, *supra* note 80.

116. *See, e.g.*, Berman, *Rules*, *supra* note 74; Berman, *supra* note 84; Mitchell N. Berman,

hypotheses about the content of the constitutional norms that actually operate in our system in areas where the norms are obscure;[117] among others. Other deep questions on which metadoctrinal analysis might provide leverage include questions about the nature and extent of constitutional obligation; the proper role of courts and other government institutions in the process of constitutional development and implementation; the real reasons for judicial decisions and the legitimacy of those reasons; and the legitimacy of judicial over- and underenforcement of constitutional norms. Here, I want to briefly address a number of these deep questions raised by Denning and Kent's work.

1. Classificatory Certainty

Examining factors bearing on the level of confidence we might have in Denning and Kent's identification of specific decision rules as AEDs presents two of these deeper questions; at least insofar as there seems to be a problem. Denning and Kent provide an extensive catalogue and analysis of a great many doctrines they say are, in fact, AEDs. But are they *really*? Can we be certain? There seem to be two possible criteria of reliability, based on the definition of an AED that we have sketched—a test of cause and a test of function. We might be confident that a decision rule is an AED if there are compelling reasons to believe that it was adopted based on the anti-circumvention concern; we might also be confident of AED status if we knew with certainty that it implements the underlying operative proposition in a manner that supplements the primary decision rules by catching one or more of those "clever" attempts to subvert the operative proposition despite formal compliance with the primary decision rules. However, both approaches run up against significant conceptual questions that Denning and Kent do not attempt to answer. Those answers may well be beyond the ken of metadoctrinal theory generally.

2. The Question of Operative Propositions

Another way in which the AED account may fail on the simplicity criterion has to do with AEDs' relationship to constitutional operative propositions. Denning and Kent's definition requires that the AED bear a particular relationship to the operative proposition—implementing it by identifying violations that are instances of "formal" compliance with existing decision rules but also are "cleverly concealed" violations of the

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Managing Gerrymandering, 83 TEX. L. REV. 781 (2005).

117. *See generally* Pursley, *supra* note 34.

operative proposition—that is, violations that would not be identified as violations by the primary decision rule(s).[118] There is a logical difficulty with simultaneously distinguishing AEDs from primary decision rules and characterizing them as implementing operative propositions. Taking TOT and IRT as true, it seems that AEDs must either implement the operative proposition in the standard way and thus be indistinguishable from other decision rules, rendering the authors' distinction artificial; or AEDs must *also* stand in a relationship with other parts of constitutional doctrine that is not one of conventional operative-proposition implementation. Denning and Kent maintain that they do—AEDs are aimed at a specific subset of operative-proposition violations, those that comply with the letter of the primary decision rule but nevertheless violate the operative proposition. Indeed, the authors *define* AEDs as decision rules that do in fact implement constitutional operative propositions in this special sense. But how do they determine whether the violations identified by the AED are fairly characterized as operative-proposition violations? Might they be conventional decision rules implementing operative propositions in the conventional way? Or, might they be designed to identify "cleverly concealed" violations not of the operative proposition, but of other *decision rules*—"catching" actions that follow the letter of the rule but betray its spirit? Much turns on the answer.

The authors must and do rely heavily on *assumed* operative propositions in categorizing doctrines as AEDs. For example, in the dormant Commerce Clause context, they formulate the operative proposition as: "States may not interfere with interstate commerce in ways that undermine or inhibit national political unity."[119] From this, they reason that the virtually per se invalidity decision rule applicable to facial discrimination *overenforces* the operative proposition (presumably because there may be instances of facial discrimination against out-of-state commerce that does not adversely effect "national political unity"); and they contend that the broader and "more lenient" *Pike* balancing test is an AED—a bad one, they argue, but an AED nonetheless—that "aids in eliminating covert discrimination" so well hidden that it would not be identified as discriminatory in virtue of purpose effects by other dormant Commerce Clause decision rules that Denning and Kent also characterize

118. Denning & Kent, *supra* note 75, at 1796 ("AEDs typically are decision rules fashioned as standards that, in turn, ensure that governmental officials cannot easily evade or undermine constitutional principles by formal compliance with rule-like decision rules implementing those constitutional commands.").

119. *Id.* at 1776–77.

as AEDs.[120] *Pike*, on this line, is an AED because it identifies state commercial actions that might "undermine national political unity" by covertly discriminating against out of state commerce *and* because it "catches" operative-proposition violations that the discrimination-focused decision rules would miss. It both implements the operative proposition and supplements the other decision rules.

Now notice the obvious problem with stipulating operative-proposition content. Denning and Kent's proposed dormant Commerce Clause operative proposition is plausible—compelling, even—but it is not the only one. The constitutional basis for the dormant Commerce Clause doctrine is hotly contested, even as some version of the doctrine has been on the books for nearly two centuries.[121] That is so in part because (1) operative propositions are not always clearly distinguishable from decision rules;[122] (2) operative propositions are not always articulated even where their decision rules are applied;[123] and (3) operative propositions are products of constitutional interpretation, which itself is riven by an insoluble methodological debate.[124] Some decision rules, then, may constitute incompletely theorized agreements on how to implement operative propositions on whose content judges or justices disagree.[125] Denning and Kent offer no interpretive arguments for their dormant Commerce Clause operative proposition here (although Denning defends it at length in earlier articles[126]). If we change our assumed

120. *Id.* at 1810–11. Elsewhere, I have characterized the discriminatory purpose and discriminatory effects tests as corollaries of the virtually per se rule—a single antidiscrimination decision rule with three "prongs." I find this characterization simpler and consistent with the cases; but the difference is of little importance here. Pursley, *supra* note34, at 538–39.

121. *See* Pursley, *supra* note 34, at 498–500 (canvassing debate); *id.* at 543–44 (noting other operative propositions proposed to explain dormant Commerce Clause doctrine); Denning, *supra* note 80, at 478–86. Current Supreme Court Justices have argued publicly that the dormant Commerce Clause doctrine is illegitimate, "an unjustified judicial intervention." Gen. Motors Corp. v. Tracey, 519 U.S. 278, 312 (1997) (Scalia, J., concurring). On the dormant Commerce Clause's age, arguably the first Supreme Court decisions to treat the Commerce Clause a limitation of state power were the hoary *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89, 209 (1824), and *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829); *see* Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1398 (2004); Denning, *supra* note 81, at 428–29.

122. Pursley, *supra* note 34, at 506–12, 530–31.

123. Berman, *Rules*, *supra* note 74, at 59.

124. *Id.* at 9 (explaining that operative propositions are interpretive by definition); Pursley, *supra* note 34, at 536–37 (interpretive debates may be unresolvable). *See generally* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (noting literally dozens of forms of originalism and charting myriad dimensions of interpretive disagreement).

125. *Cf.* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (suggesting that well-functioning legal systems produce incomplete theorized agreements despite disagreement on fundamental principles).

126. *See* Denning, *supra* note 81, at 484–87 n.382. (arguing that the Commerce Clause restricts state actions through taxing or regulation that would undermine political union). *See generally*

operative proposition to "states may not take actions that threaten to undermine the constitutional structure," then the *Pike* balancing test could well be the primary or default decision rule—a straightforward judicial assessment of the degree of state interference with other states and its justifiability. And the antidiscrimination decision rule(s) might have been formulated to make it easier for courts to invalidated certain kinds of state action that are highly likely to have impermissibly destabilizing effects.[127] Fit—or consilience—in other words, may be a problem.

Metadoctrinal taxonomy is a powerful tool for mapping the conceptual structure of the doctrine that we have, but it does not really tell us much about why we have that doctrine and no other. The theory is *interpretively inert* and thus gives no direct guidance on the content of operative propositions.[128] But by identifying decision rules and distinguishing them, it does give us a new way to come at the problem without wading through the morass of interpretive theory—an approach that is important because the debates among advocates of competing theories of constitutional interpretation may well be unresolvable. This powerfully suggests fruitfulness.

3. Claims About Decision Rule Types

Now, let us move down one level of abstraction and work through the implications of these metatheoretical criteria to the process of developing claims within the confines of the metadoctrinal debate. To move beyond taxonomic results, we may use a straightforward hypothesis-testing program.[129] Denning and Kent must test the assumed operative propositions on which they base their AED designations against conventional accounts of the relevant operative propositions and other plausible hypotheses. To choose among competing explanatory theories, recall: the simpler explanation is preferable to the more complex; the most capacious explanation is preferable to those that explain less of the relevant phenomena; and the explanation that leaves more of our well-settled views about the world intact is preferable to those that displace many such views. These criteria are cumulative—a great deal more simplicity may offset some displacement of well-settled beliefs;

Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005) (detailing state discrimination against interstate commerce during the Confederate-era).

127. I make the case for this operative proposition and decision rule scheme at length elsewhere. *See generally* Pursley, *supra* note 34.

128. *See* discussion and sources cited *supra* note 84.

129. *See, e.g.*, Pursley, *supra* note 34, at 530–32 (discussing an explanatory hypothesis for the existence of all the dormancy doctrines).

explaining most or all of the phenomena may offset some complexity; and so forth.[130] For example, to determine whether the *Pike* standard and other dormant Commerce Clause decision rules are in fact AEDs requires knowing what the operative proposition is; to know that, we might test Denning and Kent's hypothetical operative proposition against my version, or others, on these theoretical desiderata.

Without greater certainty about the content of operative propositions—in other words, without a better account of the constitutional norms that we have—we cannot verify AED designations and accordingly must at least bracket Denning and Kent's claim that AEDs are ubiquitous.

Real Reasons—The concepts of anti-evasion and anti-anti-evasion are at least in one sense familiar. One might reformulate Denning and Kent's central question as: why does some doctrine rest on formalistic distinctions and characterizations of government action while other doctrine asks more realistically after the causes and effects of such action? Or, as Denning and Kent phrase it in their follow-on piece: "Why does the court sometimes engage in 'anti-evasion'"—rejecting AEDs—"and other times decline to do so?"[131] This is a perennial question of constitutional theory; one usually phrased as a question of why courts choose to take a formalist or functionalist approach in various adjudicatory contexts.[132] Accordingly, we wonder why the Court shifted from formalistic inquiries into Congress's true purposes giving way to a functionalist approach with a significantly greater degree of deference to Congress in Commerce Clause cases;[133] why it moved from formalist motive tests to a more functionalist acceptance of hypothetical rational government purposes in First Amendment and Equal Protection Clause cases;[134] and so forth. Denning and Kent contribute by taking this problem and others like it and generalizing them by fitting them into the metadoctrinal framework. But the question remains difficult: what are the real reasons on the basis of which courts decide cases and formulate doctrines as they do? To identify AEDs with certainty where we do not

130. Leiter, *supra* note 2, at 1239–40 (citing W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF 64–82 (2d ed. 1978); Thagard, *supra* note 24.

131. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. L. REV. 397, 423 (2014).

132. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (discussing formalist versus functional approach in the context of separation of powers).

133. *Compare, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918), *and* Carter v. Carter Coal Co., 298 U.S. 238, 303–08 (1936), *with* Wickard v. Filburn, 317 U.S. 111 (1942), *and* Gonzales v. Raich, 545 U.S. 1 (2005).

134. *Compare, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880), *with* Washington v. Davis, 426 U.S. 229 (1976).

know the content of the operative proposition, we must have reason to conclude that the decision rule was, in fact, adopted based on the anti-circumvention concern.

Assuming that we will have trouble identifying the precise operative propositions that many decision rules implement, we would naturally turn in our project of identifying the true AEDs to the test of cause; that is, the question of judicial reasons for doctrinal selection. How can we determine whether putative AEDs are in fact motivated by the anti-circumvention concern rather than some other reason(s)? We might, following the authors, hypothesize that they are AEDs after observing the circumstances surrounding their adoption, the timing, their scope, content, and relationship to other decision rules. But judicial adoption of some decision rules that Denning and Kent characterize as AEDs and Anti-Anti-Evasion Doctrines ("AAEDs") on grounds of the circumvention concern can be explained, alternatively, as the result of other instrumental calculations. Return to the dormant Commerce Clause example. If we accept Denning and Kent's assumed operative proposition,[135] we still might characterize *Pike* as the default decision rule that best "fits" the norm—weighing out-of-state effects against local benefits seems like one fairly straightforward, if basic, way to roughly assess a state action's tendency to undermine political union. The instrumental reasons to adopt such a rule initially might include its close fit with the operative propositions (there are no hard proxies to limit the range of actions potentially invalidated) and the high costs of adjudicatory error in the form of false negatives, which could include the actual destabilization of interstate peace. But because of its imprecision and the complexity of the factors that courts must weigh in their application, *Pike* also imposes significant decision costs and, because of its fact sensitivity, provides very little signaling value. If state discrimination against out-of-state commerce is a fair proxy for political destabilization—and post-Revolutionary War interstate economic crises suggest that this is so—then discrimination-oriented decision rules could reduce decision costs and, if it turns out that most litigated dormant Commerce Clause challenges involve some form of discrimination, reduce the rate of false-positive errors. *Cooley*'s "national/local subject" test was an early precursor of *Pike*[136]—as Denning himself explained,

135. *See supra* notes 118–20 and accompanying text; *see also* Denning & Kent, *supra* note 75, at 1775–76 (introducing the constitutional operative proposition).

136. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) ("[W]hatever subjects of [the Commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.").

quoting Taney Court historian Carl Swisher: *Cooley*'s decision rule required courts to answer quite *Pike*-like "questions of degree, questions of the extent of local need measured against the effects of local laws on interstate commerce."[137] Thus it is not implausible to hypothesize that *Pike* functions as the modern equivalent of the most basic and close-fitting dormant Commerce Clause decision rule.

Once again we have competing plausible accounts of the reasons the Court might have relied upon in adopting certain decision rules—one that is consistent with characterizing those rules as AEDs, and one that suggests they are merely standard decision rules. Metadoctrinal theory, thus far, provides no criteria for distinguishing the correct set of reasons from among competing accounts; indeed, that may be an issue that no branch of legal theory yet can resolve. The American Legal Realists suggested that courts do not make decisions based on legal reasons—at least not without also considering various non-legal reasons.[138] Political theorists now work to quantify the extent to which political views affect judicial decision making.[139] From the metadoctrinal viewpoint, the best we can do to demonstrate the most plausible account of courts' real reasons for choosing particular doctrinal formulations is to test the competing explanatory hypotheses. Denning and Kent offer one such hypothesis on this topic—that this cluster of doctrines is best explained as resulting from courts prioritizing the anti-circumvention concern in their instrumental reasoning. They do not, however, test that hypothesis against competing accounts such as my error-cost calculation account, sketched above. Again, the authors' project seems unfinished.

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There is a related problem. When courts conflate decision rules with operative propositions they may unwittingly design AEDs to prevent circumvention of the *decision rule* rather than the operative proposition.[140] Roosevelt calls this "calcification" of doctrine—the doctrine becomes, through conflation and force of precedent, the de facto operative proposition.[141] In many cases the distinction between

137. Denning, *supra* note 80, at 437 (quoting 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 422 (1974)).

138. *See generally* Brian R. Leiter, *Legal Realism and Legal Positivism Reconsidered*, *in* NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007).

139. *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); SEGAL & SPAETH, *supra* note 49.

140. *See, e.g.*, Denning & Kent, *supra* note 75, at 1810 (speculating that *Pike* may have resulted from such confusion).

141. Roosevelt, *supra* note 80, at 1692–93; *see also* Denning & Kent, *supra* note 75, at 1808–

thwarting circumvention of operative propositions and precluding circumvention of decision rules will not make much difference—circumvention of the decision rule also will be circumvention of the operative proposition. But they are not necessarily coextensive. Decision rules that over- or underenforce their operative propositions will of necessity create false positives or false negatives (the operative proposition will sweep more broadly or more narrowly than the decision rule in these cases); either way, circumvention of the decision rule may not circumvent the operative proposition and vice versa.[142] There is reason to worry that judges and justices might conflate the two—as Denning and Kent concede and I have just argued, operative propositions can be hard to separate from decision rules for a number of reasons.[143] They further concede that making identification of AEDs depend on both their relationship to operative propositions and their relationship to the primary decision rules increases the likelihood that courts and commentators may treat decision rules like operative propositions. The AED inquiry, after all, frames analysis of the operative proposition in terms of the kinds of violations that the primary decision rule(s) were designed to identify but do not because of an insufficiently precise decision rule. I have demonstrated that the relationship between AEDs and the underlying constitutional operative propositions is not as clear as the authors suppose. An intense judicial focus on the risk of doctrinal circumvention (what Denning and Kent call "doctrinal arbitrage"[144]), combined with uncertainty about the content of operative propositions seems to make the task of judicial AED formulation (and scholarly AED identification) a recipe for calcification. And calcification creates legitimacy problems.

Denning and Kent acknowledge that holding other government actors to decision rules outside the adjudicatory context is problematic: it is not clear that decision rules are legitimately binding on anyone beyond the parties to a particular case; and it is not obvious that it would be desirable for Congress and the Executive to treat decision rules like binding

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12 (discussing the calcification problem).

142. *See* Sager, *supra* note 79 (positing underenforcement); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 123 (1985) (treating the concept of overenforcement as identical to that of a prophylactic rule); *cf.* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191 (1988) (discussing broader concept of prophylactic rules). *See generally* Berman, *Rules*, *supra* note 74, at 30–50 (exploring prophylactic rules and the concept of underenforcement at length).

143. *See* Denning & Kent, *supra* 75, at 1778 ("[A] focus on decision rules can obscure the principle the rules were meant to enforce, with the result that the doctrinal tail wags the constitutional dog.").

144. *See* Denning & Kent, *supra* note 75, at 1801–02 (discussing "doctrinal arbitrage").

constitutional directives.[145] But the debate is far from settled—there are arguments *for* treating decision rules as more or less binding beyond the four corners of the case. Denning and Kent contend that AEDs promote "substantive fairness"—the value associated with allowing people "not merely to test the application of law to fact, but also to urge that their case is different from those that have gone before."[146] They "extend the reach of the rule[s] to activities not quite covered by it in a formal sense," giving effect to "the sense that . . . it would be unfair and unjust to allow constitutional principles to be undermined by subterfuge and artifice."[147] This is presented as a normative justification for AEDs generally; this is unnecessary for AEDS that in fact implement constitutional operative propositions, which are justified on whatever terms decision rules in general are justified (the substantive fairness argument certainly cannot justify the practice of making decision rules). If the question were, instead, whether using AEDs to prevent circumvention of *decision rules* is legitimate despite the general objections to making doctrine binding, then this substantive fairness claim would, perhaps, be well presented.[148] Regardless, these are normative questions. Metadoctrinal theory does not provide a method for assessing them; but the distinction between operative propositions and decision rules certainly adds important nuance to the debate.[149]

The Permissible Gap—The TOT is consistent with a variety of general theories of constitutional practice—one is Sager's concept of underenforcement, in which courts do not fully enforce all constitutional norms with doctrine, but nonjudicial officials remain bound to norms' "full conceptual limits" of obligation.[150] We can usefully reformulate this as the Permissible Gap Thesis ("PGT"), namely: "there is a permissible disparity between 'doctrinal rights' and 'background rights.'"[151] This gives us an account of a constitutional system in which judicial enforcement does not comprise the total potential effect of

145. *See id.* at 1808–10. *See generally* Roosevelt, *supra* note 80 (exploring these legitimacy problems at length); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (canvassing similar issues).

146. *Id.* at 1803 (quoting Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 995–96 (1995)).

147. *Id.* at 1804.

148. Interestingly, if Denning and Kent were to argue that AEDs may legitimately be used to preclude "clever" violations of the spirit of decision rules; this might distinguish AEDS from standard decision rules conceptually on the dimension of function. Decision rules implement operative propositions, but AEDs, on this hypothetical account, would enforce decision rules.

149. Berman, *Rules*, *supra* note 74, at 32–33 n.18.

150. *See* Sager, *supra* note 79, at 1221 (advancing thesis that underenforced constitutional norms should be understood as "legally valid to their full conceptual limit").

151. Berman, *Rights*, *supra* note 74 (citing and quoting Fallon, *supra* note 114, at 1323–31).

constitutional norms, one in which all government institutions and officials have constitutional obligations independent of the possibility of their judicial enforcement. Sager builds on this insight to generate a vision of a justice-seeking constitutionalism in which the courts act in partnership with other branches to, over time in an iterative process, articulate and refine a set of constitutional obligations that are designed to maximize justice, broadly conceived, under contemporary circumstances.[152] Whether and to what extent government institutions and actors can be expected to comply with constitutional norms without judicial enforcement is, of course, one of the deepest and most long-lived questions of constitutional theory.[153]

The claim that AEDs are ubiquitous in constitutional law makes for a different picture of the system. Denning and Kent's focus on circumvention concerns suggests a lack of trust on the part of the judiciary that other government actors will comply with all constitutional obligations that lie within the norm-doctrine gap ("gap obligations"). Such mistrust is not inconsistent with maintaining that such obligations exist; as a normative matter we might even want to encourage less trust, deference, and so forth, on certain issues. But for descriptive purposes, abandoning PGT's corresponding blanket presumption of gap-obligation compliance capacity raises a question about the instrumental calculation involved where a court decides to underenforce a norm, defer to a coordinate branch, or otherwise leave a question of constitutional compliance to a nonjudicial actor. Denning and Kent recognize that there are such instances—that would be difficult to deny.[154] To justify these kinds of decision rules—some of which the authors call AAEDs in a follow-on piece[155]—we need criteria for trusting or mistrusting nonjudicial actors on norm compliance from context to context. The authors do not provide such an account in that article; they focus instead on identifying what seem like judicial calculations that certain avenues of potential norm violation need to be addressed, without attending to the

152. *See generally* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

153. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893) (engaging the question with respect to Congress). More recent is Fallon's magisterial treatment of the subject in the abstract. Richard H. Fallon, Jr., *Constitutional Constraint*, 97 CALIF. L. REV. 975 (2009). Entire symposia have been held on the value of pre-commitment strategies, like constitutionalism, for constraining governments. *See generally* John Robertson, "*Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions*, 81 TEX. L. REV. 1729 (2003).

154. *See* Denning & Kent, *supra* note 75, at 1776 (noting that doctrines can "overenforce or underenforce constitutional commands").

155. *See generally* Denning & Kent, *supra* note 131.

separate question of whether they should be addressed by courts or, instead, a different institution. And it is difficult to think of generalizable criteria that do not reproduce the problem. If, for example, we maintain that courts are justified in deferring compliance questions to Congress wherever the basic constitutional question is better suited for legislative judgment, we must argue that capacity entails or is a good proxy for fidelity, which is not obviously true.[156]

Denning and Kent make something like this claim in their piece on AAEDs, arguing that courts appear to avoid adopting AEDs or reject preexisting AEDs where one reasonably could conclude that "the constitutional principle is adequately protected by robust political safeguards."[157] This is an intriguing possibility, but it relies on some key assumptions that go unexamined. First, we still need to know whether the existence of political safeguards is a legitimate criterion for trusting coordinate branches to tend their gap obligations—Denning and Kent only argue that this appears to be the criterion courts have adopted, not that it is justified. What factors are present where political safeguards operate that suggest we can trust the political process on constitutional compliance issues? Denning and Kent propose something like a rough institutional competence calculation: where the constitutional compliance issue is salient in the political process, then there may be democratic pressure on institutions and officials to comply with constitutional obligations.[158] At least, that is the view that they attribute to courts that reject AEDs. But this reproduces the problem—or so it seems—because we are left to wonder why courts should trust the public to press for constitutional compliance, even if the issues are salient in principle. Most public choice accounts suggest that voters care far more about substantive policy outcomes than they do constitutional ("framework") issues in, for example, the federalism context,[159] where

156. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (positing a theory of justified judicial intervention predicated on assessing the extent to which an action has, or has not, passed through a sufficiently inclusive political vetting). *But see* sources cited *infra* note 159.

157. Denning & Kent, *supra* note 131, at 398.

158. *Id.* at 422–25 (emphasizing the capacity of political processes to "police" or "monitor" for abuse and government compliance with certain constitutional norms).

159. *See, e.g.*, Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131 (2004); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 103 (2004). *But cf.* Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1673–74 (2007) (analyzing survey evidence suggesting that some voters do care about federalism as a constitutional obligation in itself).

the political-safeguards argument for judicial underenforcement of constitutional norms has a sixty-year pedigree.[160] Denning and Kent's proposed criterion, then, is a gloss on the conventional institutional capacity calculation that we associate with the choice between deference and judicial scrutiny of legislative purpose—and that, of course, does not incorporate the trustworthiness evaluation that the anti-circumvention concern seems to require.

We could explain decisions to reject AEDs in at least two other ways: First, they could be based on assessments of the comparative expertise of other branches on the particular constitutional compliance issue (most plausible, perhaps, in the Commerce Clause and foreign affairs powers contexts). Second, they could be based on assessments of the extent to which the Constitution itself submits particular issues to administration by non-judicial departments (most plausible in the political question and federalism contexts). These accounts suggest a generally trusting view of nonjudicial actors' tendency to discharge gap obligations that is consistent with the presumption of constitutionality courts have long accorded government actions[161] and different from Denning and Kent's "bad person" theory of nonjudicial action.[162] In contrast, of course, we have the public choice theory picture that portrays Congress as an agglomeration of self-interested actors who are as concerned with constitutional requirements as they are with other obstacles to their own goals, but no more.[163] If this is the right view, it raises prima facie

160. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (giving the seminal articulation of the political safeguards of federalism); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) (canvassing the treatment of Wechsler's theory in courts and scholarship).

161. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810). For a strong formulation and defense of the presumption, rooted in the view that Congress, not the judiciary, is properly the primary interpreter of the Constitution, see generally Thayer, *supra* note 153, at 136. *But see* Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 553–76 (2010) (critiquing various extreme departmentalist views, including Thayer's).

162. This is a reference to Justice Holmes' famous theory of law that centered on the "bad man"—for a bad person only interested in avoiding legal sanction, the law is no more than how a court is likely to behave. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Holmes's "prediction theory" of law was, famously, refuted by Hart as ignoring a phenomenon with which we are all familiar, the internal point of view in which one views laws to be obligation-imposing independent of the possibility of sanction. HART, *supra* note 28, at 100–03.

163. *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1287 (2001) (reciting "realist" accounts of congressional behavior) (citing Ian Shapiro, *Enough of Deliberation: Politics Is About Interests and Power*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 28 (Stephen Macedo ed., 1999)); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 4 (1991).

circumvention concerns in every context. Some preexisting decision rules may be more insensitive to manipulation than others, and that might explain why we do not need AEDs in some contexts; but that explanation is quite different form the one Denning and Kent offer.

Once again we are left with competing hypotheses about judicial behavior that need to be tested but, as yet, have not been. Metadoctrinal theory certainly does not provide an answer, or the path to an answer. And as for the justifiability of any of these views of non-judicial actors' tendency to comply with their constitutional obligations; this sort of compliance, much of which will be in the form of refraining from acting, will be very challenging to quantify.

CONCLUSION

Legal theory needs a metatheory. We cannot continue to debate the merits of positive and normative claims—such as claims about whether this or that theory of constitutional interpretation discloses the "truth" about what the constitutional law is—without a framework for evaluating which claim is more correct when they compete with one another. Drawing from the philosophy of science to create such a framework is capacious: it gives us analytical tools with which to assess competing claims; it may serve to legitimate legal theory against the common criticism represented by Judge Posner's and Judge Wilkinson's challenges to add rigor or close up shop. Such a framework for comparative claim assessment may also be adapted to operate at several levels of generality; we could judge everything from claims about whether constitutional law is determined by consensus or moral merits on the one hand to claims about whether this or that doctrine of constitutional law should be characterized as a decision rule or an anti-evasion doctrine on the other. I have made preliminary efforts here; a practicable framework will take both more work from those involved in constitutional theory and the acceptance of the research program's participants more broadly to gain traction. I hope this will be the first step.