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Mitchell N. Berman

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FOR LEGAL PRINCIPLES

Mitchell N. Berman*

(Draft, June 20, 2017)

1. Introduction

By any measure, Larry Alexander ranks high among the day's widest ranging, most original, and most rigorous legal theorists. Beyond his lasting and profound scholarly contributions across diverse fields, however, Larry is also a mentor and a mensch. In my own (far from isolated) case, not only was Larry instrumental in my landing an entry-level job twenty years ago, he has, in ways large and small, overseen much of my continuing legal education since. I realize that, were it not for Larry Alexander, none of us would be contributing to this volume. But I'm tempted to say that that's doubly true for me. I am profoundly in his debt.

Although I owe Larry more than I could repay, my task in this essay is to try to put a dent in my arrears. I'll do so in the fashion customary among our ilk: by highlighting and endeavoring to correct one of his errors. My topic is Alexander's well-known rejection of legal principles.

Most legal thinkers—judges, litigators, legal scholars, legal philosophers—believe that legal rules and legal principles are meaningfully distinguished. Many folks may have no very precise distinction in mind, and those who do might not all agree. But it is widely believed that legal norms come in different logical types, and that one difference is reasonably well captured by a nomenclature that distinguishes “rules” from “principles.”

Alexander has campaigned against this legal orthodoxy for nearly forty years,¹ elaborating his case at greatest length in “Against Legal Principles,” an influential article co-authored two decades ago with Ken Kress.² “Against Legal Principles” pressed a strikingly ambitious thesis—not merely that this or that conception or deployment of legal principles is misguided, but that there is no coherent, meaningful account of legal principles to give: “legal principles cannot exist except perhaps as theoretically possible but practically inert entities.”³ Shorn of a hedge for the theoretically-possible-but-

* Leon Meltzer Professor of Law, Professor of Philosophy, The University of Pennsylvania.
mitchberman@law.upenn.edu

¹ See Larry Alexander and Michael Bayles, “Hercules or Proteus? The Many Theses of Ronald Dworkin.” *Social Theory and Practice* 5 (1980): 267.

² Larry Alexander and Ken Kress, “Against Legal Principles,” in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Clarendon Press, 1995), 279, reprinted in *Iowa Law Review* 82 (1997): 739. I will cite to the journal article.

³ *Ibid.*, 739.

practically-inert, the thesis becomes: “Either legal principles are just (correct) moral principles, or they are nothing.”⁴

I believe that Alexander is mistaken. I believe that there are distinct types of legal norms; that one type of legal norm has features—particularly “weight”— widely attributed to what we call “principles”; and that the rules/principles distinction, when properly construed, is centrally important to legal theory.

I cannot fully establish my affirmative claim in this limited space. Instead, I will sketch the rudiments of my account of what legal principles are, how they are constituted, and what functions they serve, and then show how that conception of legal principles survives Alexander and Kress’s arguments for their categorical rejection.

The basic idea is this: legal principles are legal norms that are grounded in social facts that make up legal practices and that serve to *metaphysically determine* or *constitute* the legal rules. This picture contrasts with Ronald Dworkin’s account in which legal principles constitute or determine the legal rules by *morally justifying* them. It also contrasts with a common view of legal principles as norms that *supplement* legal rules, rather than constituting them, and are to be used by judges when rules “run out.”

Although Alexander and Kress claim to defeat legal principles generally, they focus on Dworkin’s account. I will first observe that, even if legal principles cannot do the work Dworkin attributes to them, Alexander and Kress’s arguments for that conclusion cause no trouble for accounts that put principles to different use. I will then argue that additional arguments that purport to reach beyond the Dworkinian *conception* of legal principles (so to speak) to the very *concept*, are unpersuasive.

That’s not all. In addition to denying legal principles, Alexander affirms a form of constitutional originalism that he describes as “simple-minded.”⁵ On his account, the law is (to a first pass) what the constitutional text’s authors intended to communicate by means of its enactment.

Alexander’s rejection of principles and his embrace of intentionalist-originalism are intertwined. I will argue that Alexander’s case for originalism founders if the universe of legal norms includes fundamental norms that are grounded directly in social facts and that participate in the production or determination of legal rules.

2. “Against Legal Principles”: a summary

Acknowledging “the ubiquity of references to legal principles in jurisprudential literature, legal scholarship, and case law,”⁶ Alexander and Kress begin by describing belief in legal principles as central to “an entire jurisprudential tradition, a tradition that has shaped not only academic thought on these

⁴ Ibid., 767.

⁵ Larry Alexander, “Simple-minded Originalism,” in *The Challenge of Originalism*, eds. Grant Huscroft and Bradley W. Miller (Cambridge: Cambridge University Press, 2011), 87.

⁶ Alexander and Kress, “Against Legal Principles,” 739.

matters, but also how lawyers and judges think and operate.”⁷ They also recognize, albeit cursorily, a diversity of viewpoints regarding precisely what distinguishes these two norm-types.⁸

Lack of agreement regarding just what legal principles consist in or what functions they serve makes defense of a universal negative challenging. Because the error theorist about legal principles cannot reasonably address every theoretically possible conception of legal principles, at least two distinct argumentative strategies are available. The standard move is to try to establish that there is enough agreement on the core concept so that features can be identified that must be shared by *any* purported account of “legal principles” for it to *be* an account of *legal principles*, and show that no account with those features is possible. An alternative is to identify the most plausible account, show that that account fails, and then conclude that all other accounts fail *a fortiori*. Alexander and Kress adopt both strategies.

Their argument begins with a general account of the rule/principle distinction. Legal rules are posited by specific institutions at specific moments; they have canonical form; and they “are determinative of the outcomes of whatever transactions come within their terms,”⁹ which is to say that they “have all-or-nothing application.”¹⁰ Legal principles cannot be posited, lack canonical formulation, and have the dimension of “weight,” which is to say that they may “bear on” the proper legal characterization or treatment of a dispute without even purporting to deliver decisive resolution.¹¹ For Alexander and Kress, these three features are not merely representative of the two distinct norm types, but definitional. They deny any room for intermediate norms—e.g., norms that are promulgated but have weight.¹²

Although the three features just mentioned were first limned by Dworkin, Alexander and Kress treat them as essential to *any* account of legal principles. Weight is the critical feature: “weight is essential to their being principles, since they have neither canonical form nor dependence on particular persons’ datable intentions to govern their application.”¹³ The crux of their objection holds that norms with weight cannot emerge from legal practice. “What weight will [legal] principles have, and how will such weight be determined?” they ask. Referencing Quine, they conclude that “No set of past cases, no matter how large the set, can fix as a matter of logical entailment the weight in the context of a present case of any principles that would explain those past cases.”¹⁴

While Alexander and Kress treat the features that Dworkin attributes to legal principles as true of *any* account of legal principles, they also recognize that Dworkin’s rendering is special—“the most

⁷ Ibid., 745.

⁸ Ibid., 746-47. For a survey of the terrain, see Humberto Avila, *Theory of Legal Principles* (Springer, 2007), chap. 2.

⁹ Alexander and Kress, “Against Legal Principles,” 740.

¹⁰ Ibid., 747.

¹¹ Alexander and Kress sometimes describe rules as having infinite weight and (supposed) principles as having finite weight. Sticking with convention, I’ll describe principles as having weight, and rules as being determinative.

¹² Alexander and Kress, “Against Legal Principles,” 741 nn.6, 8.

¹³ Ibid., 761.

¹⁴ Ibid.

powerful,” “clearest,” and “most careful” account.¹⁵ What makes Dworkin’s account *an* account of legal principles, rather than *the* account? His account is distinctive not in terms of the formal qualities that legal principles are supposed to possess (weight) or to lack (canonical form), but in terms of their contents and functions. Dworkinian legal principles (say Alexander and Kress) are “the morally best principles that would justify the promulgation of a high percentage of the extant legal rules.”¹⁶ They “are the theoretical entities that justify the legal rules, determine how they should be extended and modified, and resolve conflicts among them.”¹⁷

Alexander and Kress aim most of their critical fire at features that make Dworkin’s account of legal principles special, and not those that are purportedly true of all accounts. At bottom, Alexander and Kress insist that legal principles understood in this fashion are normatively unattractive.

Moral principles have the virtue of moral correctness; legal rules have the virtues of being the creations of those with authority to make law and of giving clear guidance. Legal principles, however, have none of these virtues. They are neither morally correct nor uncontroversial in application. . . . They represent the worst of all worlds.¹⁸

The supposedly distinct virtue of legal systems that Dworkin calls “integrity” cannot render legal principles attractive, for “there cannot be a coherent reason in terms of the true moral value of equality for ever departing from the requirements of the correct moral theory.”¹⁹ Finally, and for reasons that we can skip past, use of legal principles cannot, as Dworkin claims, “protect legal rights against retroactive upsets.”²⁰

In sum, legal actors would never have reason to follow “legal principles, which offer neither the guidance virtues of rules nor the virtue of moral correctness.”²¹ Despite its multiple failings, however, Alexander and Kress maintain that, “If there are legal principles that are morally incorrect principles, then Dworkin’s account of them is the best there is.”²² Therefore, the failure of Dworkin’s account of legal principles dooms *all* accounts.

3. A positivist picture of legal principles as legally fundamental norms

I am not a disinterested observer of debates over the existence of legal principles; I have an account to peddle. On my view, in brief, legal principles are the fundamental norms of a legal system; they are grounded directly in behaviors and attitudes of members of the legal community (chiefly

¹⁵ Ibid., 739, 746, 752.

¹⁶ Ibid., 747.

¹⁷ Ibid., 748.

¹⁸ Ibid., 753-54.

¹⁹ Ibid., 755.

²⁰ Ibid.

²¹ Ibid., 786.

²² Ibid., 764.

judges); and they function not only to guide judges when called upon to exercise judicial discretion, but to participate in the production of legal rules.

I elaborate on this picture of legal principles elsewhere.²³ My modest aim here is to make the basic idea intelligible and not implausible. I'll start not with legal principles but with legal rules.

While Alexander and Kress are error-theorists about legal principles, they're realists about legal rules: "legal rules exist and belong to the ontological realm of fact." Assuming *arguendo* this is true, however, legal rules are not, of course, ontologically fundamental. In virtue of what do legal rules exist? What grounds legal rules? In what do they consist? (Throughout this essay, I use language of metaphysical determination—grounding, determination, constitution, emergence, etc.—loosely and somewhat interchangeably. I'm trying to present a rough picture, not to commit myself to any particular and controverted metaphysical theses.) "Their existence," say Alexander and Kress, "consists of their canonical formulation and the possibly complex, combined intentions of the rules' authors that their canonical formulation represents."²⁴

Let's put a label to this thesis. Call it *intentionalism*, and define it (to a first pass) as follows: the law is whatever norms the authors of a legally authoritative text intended to communicate by means of their enacted text. Alexander and Kress appear to affirm *intentionalism* (or a close relative).

Even if true, *intentionalism* is not itself ontologically fundamental or ultimate. We can ask what are the grounds or determinants of *intentionalism*, or what makes *intentionalism* true? For a positivist, the answer, at some point down this path of regress, will be: social facts. On the simplifying yet plausible assumption that the chain of regress ends here, *intentionalism* would be directly grounded in social facts. Hart's rule of recognition is the dominant account of how this could be: if *intentionalism* is true, it is true in virtue of a convergent practice among legal officials of accepting *intentionalism* in the way described by the internal point of view.²⁵ But that's only one possible way; the particulars of Hart's account are not *definitional* of positivism. Perhaps *intentionalism* arises from social facts other than by means of a convergent practice of officials that Hart describes. It may arise from a different type of convention or agreement among legal practitioners. Or it may arise from other socio-legal practices, paradigmatically including, but not limited to, its explicit invocation by judges to explain and (legally) justify the announcement of legal rules and the issuance of legal rulings.

It's not essential now to embrace any particular positivist account of the mechanisms or manner by which social facts ground or determine legal norms. (I'll say a little more later.) Abstracting from the particulars of the Hartian account, two general points are important. First, *intentionalism* (if true) is grounded in social facts, not in other legal norms; it is, let us say, a "fundamental" rather than "derivative" legal norm. Second, the function of *intentionalism* is to contribute to the existence of other legal norms—namely, the derivative ones. If legal rule R1 exists, that is in virtue of the conjunction of *intentionalism* and the fact that the authorially intended meaning of a statutory text S is R1 (along, no doubt, with other facts too).

²³ See Mitchell N. Berman, "Our Principled Constitution," *University of Pennsylvania Law Review* 166 (forthcoming).

²⁴ Alexander and Kress, "Against Legal Principles," 763 n.96.

²⁵ H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012).

Thus far this section tries merely to make explicit details of the picture of legal rules that Alexander's own account suggests, at least when located in a positivist frame. Now I'll add a third idea: *intentionalism* is not the *only* legal norm that is legally fundamental and serves to participate in the determination of derivative legal rules. There could be many others, and in a complex and mature legal system there are bound to be. Here are examples of other possible legal norms that have these features. I'm not asserting that any are *actual* fundamental norms in the American legal system; I'm introducing familiar and plausible examples to convey a flavor of the norms we might expect to see at the fundamental legal level of a legal system:

- *Desuetude*: legal rules that have not been obeyed or enforced for substantial time lose force;
- *Derogation*: statutes in derogation of the common law are narrowly construed;
- *Practice counts*: distributions of governing power that have become accepted have legal force;
- *Negative retributivism*: persons should not be punished in excess of their moral blameworthiness or desert;
- *Federalism*: national legislation must respect the special role of states as distinct sovereigns;

And, for any reader who's not yet certain about where I'm going:

- *Wrongdoers shouldn't profit*: persons shouldn't be allowed to profit from their own wrongdoing.

All of these norms—*desuetude*, *practice counts*, *federalism*, *intentionalism*, and so on—are what I propose to call legal principles. Together with numberless others, they comprise a disparate lot. One may be tempted to describe some as “substantive,” and others as “formal” or “procedural.” Some may strike you as morally attractive, others as neutral or morally objectionable. Yet they all have this in common: they are legally fundamental (not posited or determined by other legal norms), grounded in social facts, lacking canonical formulation, and essential to the existence of legal rules. Legal rules are produced by the interaction or combination of legal principles and the facts that they make relevant.

Notice that I did not claim that these purported principles all possess weight. And I didn't because *intentionalism* itself looms as a counter-example. As initially formulated—“the law is whatever the authors of a legally authoritative text intended to communicate by means of their enacted text”—*intentionalism* appears determinative, or rule-like.

But that earlier formulation cannot stand as is. If even a small handful of legal norms operate at the fundamental level, then *intentionalism* must be reformulated, for it won't be true, as our first cut at *intentionalism* conveys, that the intentions of some group of authors determines or constitutes the content of our legal rules, full stop. A revision of some sort is called for.

Two possible revisionary routes are most obvious: either a determinative norm qualified with exceptions (*intentionalism_E*) or a non-determinative norm with weight (*intentionalism_w*). I endorse the latter, something like the following:

- *Intentionalism*: the norms that the authors of an authoritative legal text intended to communicate by means of its promulgation have substantial force.

So, yes, on the positivist account I'm offering, legal principles have weight.²⁶

How do weighty norms ("principles"), along with the non-legal facts that they make relevant or operate upon, interact to produce determinate norms ("rules")? What are the underlying mechanisms? That's a very fair question that philosophers of law and other metanormative theorists should strive to resolve. I cannot take on that project here. In the meantime, consider that principles are types of norms and that norms are, or are comfortably analogized to, forces. So if you want a possible and loose model of their interaction in mind, think vector addition. The essential point is that legal principles are plural and play a functional rule in the production of legal rules. In a bumper sticker: legal principles are grounded in social facts; legal rules are constituted by legal principles (and the facts they make relevant). Call this picture "principled positivism."

I will add a little detail to this barebones sketch in the remaining two sections. At this stage, it's enough to reiterate how this account of legal principles differs from the chief competitors.

Start with Dworkin. For Dworkin, legal principles depend upon moral principles. To be sure, legal principles are not *identical* to moral principles, or even a true subset: "legal principles will not be moral principles but will deviate from them because of morally infelicitous legal materials with which they must cohere."²⁷ But nor are legal and moral principles entirely distinct, or related only as a matter of empirical contingency. As Alexander and Kress characterize them, Dworkinian legal principles are "the morally best principles . . . among all possible principles that meet or exceed the threshold of 'fit'."²⁸ They "are connected to moral principles in that moral principles determine which set of legal principles among those sets that 'fit' the legal rules is the morally best set of principles."²⁹

However it may be best to characterize Dworkinian legal principles—say, as "non-ideal" moral principles,³⁰ or not—more important and less ambiguous is what function they are thought to serve. They are what they are—they have the content and force that they do—in virtue of their ability to morally justify rules and practices of the legal system. As Dworkin explained, "rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification."³¹

That is no part of the positivistic picture of legal principles I have sketched. Legal principles are part of the complex normative architecture of legal systems. They help mediate between the social factual grounds of the system and the determinate rules that the system generates, maintains, and

²⁶ At least characteristically. The defining feature of principles, on the account I'm presenting, is their legal fundamentality. Weight characteristically goes with fundamentality, but I do not dismiss the possibility of norms that are fundamental and determinative. On a simplifying rule/principle binary, these would be principles.

²⁷ Larry Alexander, "The Method of Text and ? : Jack Balkin's Originalism with No Regrets," *University of Illinois Law Review* 2012: 619.

²⁸ Alexander and Kress, "Against Legal Principles," 744.

²⁹ *Ibid.*, 747.

³⁰ *Ibid.*, 748 n.44.

³¹ *Ronald Dworkin, Law's Empire* (Cambridge: Harvard University Press, 1986): 96.

enforces. They do not serve to *justify* the rules of the system from any extra-legal normative vantage point. The principles don't morally justify the rules; they participate in their production.

Or consider a second, non-Dworkinian, account of legal principles as norms that judges should deploy when rules run out. Gary Lawson described this familiar view well: "adjudicators must be able to decide cases even when the rules give out, so we have to supplement the rules with something. That 'something' might be moral principles if they are capable of doing the job, or it might be legal principles if moral principles are insufficiently robust."³² Again: on the view I am pitching, legal principles do not—or do not *only*—offer guidance when the rules run out; they are part of the rules' grounding.

This is not a novel or idiosyncratic account. Roscoe Pound advanced a recognizably similar view nearly a century ago. "We deceive ourselves grossly when we devise theories of law or theories of judicial decision that exclude such things from 'the law,'" he wrote, speaking of "a body of philosophical, political, and ethical ideas as to the end of law."³³

When such ideal pictures have acquired a certain fixity in the judicial and professional tradition they are part of 'the law' quite as much as legal precepts. Indeed, they give the latter their living content and in all difficult cases are the ultimate basis of choosing, shaping, and applying legal materials in the decision of controversies.³⁴

Replace "legal precepts" with "legal rules," and call the fundamental stuff grounded in "judicial and professional" practice "legal principles," and you've got the basic picture. Alexander and Kress ask: "In what sense are legal principles 'legal'?"³⁵ They are legal in that they are brought into existence by legal practice, and they serve as grounds for the more determinate norms that it is the function of a legal system to generate, maintain, and enforce.

4. Principled positivism survives Alexander and Kress's critique

As I have already stressed, most of Alexander and Kress's arguments target Dworkin's account of legal principles and other possible accounts that share these features: legal principles are derivative variations on moral principles whose function is to morally justify legal rules and practices. Alexander and Kress's central complaint is that imperfect or "incorrect" moral principles cannot provide the moral justification that proponents of such principles promise.

I believe that Alexander and Kress score points against Dworkin. Indeed, the "one-system picture" that Dworkin advanced in his final major jurisprudential work, *Justice for Hedgehogs*, might help vindicate Alexander and Kress's contention that "Dworkin's case for legal principles is nothing more than a case for correct moral principles."³⁶

³² Gary Lawson, "A Farewell to Principles," *Iowa Law Review* 82 (1997): 898.

³³ Roscoe Pound, "The Theory of Judicial Decision," *Harvard Law Review* 36 (1923): 645.

³⁴ *Ibid.*

³⁵ Alexander and Kress, "Against Legal Principles," 745.

³⁶ *Ibid.*, 764. See *Ronald Dworkin, Justice for Hedgehogs* (Cambridge: Belknap Press, 2011), chap. 19. For my criticism of the one-system picture, see Mitchell N. Berman, "Of Law and Other Artificial Normative Systems," in

Be that as it may, these criticisms lack force against any account of legal principles that eschews the features central to and distinctive of Dworkin's. And there may be many. Lawson pressed this very concern sharply. Observing that the role Dworkin assigns to moral principles in the generation of legal principles renders his account "decidedly unrepresentative of modern understandings of legal principles," Lawson complained that, "by focusing on Dworkin's account of legal principles, Alexander and Kress may have selected the most rather than the least vulnerable target for their attack."³⁷

What arguments do Alexander and Kress present against legal principles conceived as described in section 3—namely, as fundamental legal norms that are grounded in social facts, have the dimension of weight, and participate in the determination of the derivative and more determinate legal norms customarily termed "rules"? Brian Leiter thought none, charging that "Against Legal Principles" "is actually devoid of any arguments against the *existence* of legal principles, and consists entirely of *normative* arguments against employing legal principles."³⁸

I think that Leiter overstates his case.³⁹ But it remains true that individuating and clearly specifying Alexander and Kress's arguments against non-Dworkinian principles is not easy. Although their argumentative barrage can be parsed in varied ways, I'll identify five more-or-less distinct contentions: (1) legal principles "have a problematic metaphysical status"⁴⁰; (2) even if legal principles could exist, they would require an agreement among practitioners that manifestly does not obtain; (3) even if legal principles could exist and arise without agreement, their weight cannot be determined by social facts in the way that a positivist account requires; (4) even if weighty principles can emerge from social facts, they cannot interact to serve their supposed function of helping to determine legal rules; and (5) even if principles have weight and can interact to produce determinate legal norms, we cannot gain knowledge (or true belief) of them. I address Alexander and Kress's arguments for these contentions in order.

The first objection to legal principles—concerning their "problematic metaphysical status"—is not developed at length, but centers on the claims that legal principles contrast unfavorably with legal rules on the one hand and with moral principles on the other. Hand one:

[L]egal principles cannot unproblematically claim the same ontological status as legal rules. Though legal principles, like legal rules are formulated by judges and legislators,

Dimensions of Normativity: New Essays on Metaethics and Jurisprudence, eds. David Plunkett, Scott Shapiro and Kevin Toh (Oxford University Press, forthcoming).

³⁷ Lawson, "A Farewell to Principles," 894, 893.

³⁸ Brian Leiter, "Explanation and Legal Theory," *Iowa Law Review* 82 (1997): 906.

³⁹ As revealing is Alexander and Kress's response: "Our ontological argument against legal principles is an argument against their existence as normative *justificatory* entities. Whether such entities might exist in some other ontological mode is a question we reserve for another occasion." Larry Alexander and Ken Kress, "Replies To Our Critics," *Iowa Law Review* 82 (1997): 927. This qualification backtracks so conspicuously from the arresting ambition their initial article announces that I can treat it only as a momentary failure of nerve. To credit it as their settled position is to give up the game to all genuinely positivist conceptions of legal principles. Alexander's current view is unqualified: "There are no legal principles." Alexander, "The Method of Text and ?," 621 (emphasis omitted).

⁴⁰ Alexander and Kress, "Against Legal Principles," 762.

the formulation and the legal principle are ontologically distinct. The formulation of a legal principle *refers* to it, whereas the formulation of a legal rule *is* the legal rule.⁴¹

Hand two:

Legal principles have the following metaphysical oddity. They arise not from the realm of fact, and not from the realm of value, but from the combination of fact and value. Unlike the straightforward supervenience on facts that many philosophers claim is the best ontological account of moral values, the supervenience of legal principles is on a combination of facts (legal rules) and moral values.

Neither contrast that Alexander and Kress draw withstands scrutiny. On the first hand, it is incorrect that “the formulation of a legal rule *is* the legal rule.” The formulation of a rule and the rule itself are distinct, for the same rule can be formulated in varied ways. “No vehicles are allowed in the park” and “Vehicles are not permitted inside this park” are distinct verbal formulae but plausibly refer (and, in a given context of utterance, can give rise) to the identical rule. To reformulate a rule need not change its content. It is critical to remember, yet easy to forget, that a text, a text’s meaning, and the normative entity (say, a “rule”) to which the text gives rise are of different metaphysical kinds.⁴² Because the relationship between a formulation of a rule and the rule itself is both more complex and less well understood than Alexander and Kress let on, they have not substantiated their claim that the metaphysical status of legal principles is problematic whereas the metaphysical status of legal rules is straightforward.⁴³

On the second hand, even if the “metaphysical oddity” Alexander and Kress note is true of legal principles on the Dworkinian account in which “the construction of [legal principles] is guided by correct moral principles,”⁴⁴ recall that on the positivist picture I’m presenting legal principles are constructed only by social facts, not by moral principles.⁴⁵ Thus, positivist legal principles as I have described them are not metaphysically odd in the way that Alexander and Kress claim.

If Alexander and Kress have identified no deep metaphysical obstacle to the possibility of legal principles grounded in social facts, the nonexistence of legal principles would nonetheless be secured if the conditions necessary for their emergence do not, and could not plausibly, obtain. That’s Alexander and Kress’s next move. Assuming *arguendo* that “[l]egal principles and their weights are whatever

⁴¹ *Ibid.*, 763 n.96.

⁴² See Mitchell N. Berman, “The Tragedy of Justice Scalia,” *Michigan Law Review* 115 (2017): 786-99.

⁴³ Is there a more charitable understanding of the contrast between legal rules and legal principles that Alexander and Kress are trying to mark here? Possibly this: whereas the formulation of a legal rule contributes to the existence and content of the rule itself, the formulation of a legal principle does not contribute to the principle’s existence. Yet even this is too pat. It is not the “formulation” of a legal rule that makes it so, but rather the promulgation or enactment of a text that states a rule. And the invocation of principles by legal decision makers contributes to the existence of the rule. Legal rules and principles alike are brought into being by complex speech acts.

⁴⁴ Alexander and Kress, “Replies,” 932.

⁴⁵ This does not mean that moral principles are entirely out of the picture. People’s beliefs about moral principles may have a causal effect on the behaviours that, on my account, ground legal principles. I’m focusing on constitutive relationships here, not causal ones.

competent practitioners would agree they were,”⁴⁶ it’s obvious that competent practitioners in modern complex legal regimes do not all agree about the principles that supposedly populate the system, and they’re not about to.

Although agreement admits of degrees, Alexander and Kress mean by “agreement” unanimous or near-unanimous consensus or accord. I agree that “agreement,” so construed, is not our lot. What remains to be established is that positivist theories of law require agreement of this character for principles to emerge. Alexander and Kress announce that they “have serious doubts that conventionalism can ever dispense with agreement” (by which they mean nearly full agreement).⁴⁷ But a declaration of doubts, even if well-founded, is not an argument.⁴⁸

How could fundamental legal norms arise if *not* by near-unanimous agreement among practitioners regarding their existence and contents? Maybe this way: they are grounded in or constituted by their being “taken up” by legal actors in legal reasoning and decision-making. The paradigm, I have said, involves invocation of principles by judges as legal grounds for a legal ruling or for a holding regarding the existence and shape of a more determinate legal norm. This happens all the time. In addition, principles can be taken up without being explicitly invoked. And they are taken up by persons other than judges—lawyers, elected officials, and ordinary citizens—as they endorse, criticize, or reaffirm either the principles themselves or rules or rulings that rest on and manifest given principles.

In short, principles are theoretical entities that are the objects of belief by legal actors and that are constituted by the legally relevant behaviors that are explained by those beliefs, and that express acceptance or endorsement. They are much like trails: “They continually change—widen or narrow, schism or merge—depending on how, or whether, their followers elect to use them.”⁴⁹

Plainly, this is only a rough sketch of how social facts could ground legal principles. It is nonetheless striking that Alexander and Kress marshal no explicit argument against something like it. Rather, after announcing doubt that a positivist principle can arise without near-unanimous agreement regarding its existence and content, they immediately shift tack. “In any event,” they continue, “against these conventionalist theories, we would urge the normative superiority of following correct moral principles rather than conventional legal principles.”⁵⁰ That might be so. But on a positivist picture of law, the move signals a retreat from debates about legal metaphysics (whether the class of legal norms includes a norm-type that has weight and arises by practice), and into ethics (whether judges, and others, should follow law that is constituted partly by means of legal principles that arise by convention). This is why Leiter worries that the *existence* of legal principles is not among Alexander and Kress’s true targets.

We come, then, to the argument that, I think, Alexander and Kress consider their strongest: weights cannot arise by practice. But *if* my arguments to this point are successful, then the supposed

⁴⁶ Alexander and Kress, “Against Legal Principles,” 767.

⁴⁷ *Ibid.*, 767 n.106.

⁴⁸ Accord Lawson, “A Farewell to Principles,” 896.

⁴⁹ Robert Moor, *On Trails: An Exploration* (New York: Simon & Schuster, 2016), 17.

⁵⁰ Alexander and Kress, “Against Legal Principles,” 767 n.106.

problem of *weight* should seem an unpromising place to make a stand, for although content and weight are distinct attributes of a principle, they plausibly come about in roughly the same way. (Contrast, say, the shape of a jigsaw puzzle piece and the pattern of colors on its surface.) Presumably, the weights of principles, like their contents or contours, are brought about by members of the legal community taking them up and deploying them in legal reasoning and decision-making. Weights are relative to one another, and are given by what members of the legal community say about them and how they use them. They are also conferred, as it were, by battle—by the rules that are adjudged victorious, and thus made so, when principles press in opposing directions. None of which is to say that the weights of principles, any more than their contents and contours, are always sufficiently determinate to yield rules covering all matters of legal dispute. I'm certain they aren't.

It is not entirely clear why Alexander and Kress believe that weights cannot arise this way. One precise objection, however, concerns the supposed context-sensitivity of principles' weights. "Because principles' weights vary in different concrete contexts, a complete account of principles requires differing weights for every conceivable context. But we cannot establish principles by agreement because we cannot establish their weight by agreement."⁵¹

Ignore references to "agreement," and focus only on the claim that principles' weights vary context to context. I find this characterization misleading for failing to recognize that the magnitude of force a principle exerts in a given context is a function of (at least) two variables, not one: the weight of the principle, and the extent to which the principle is (as I call it) "activated."⁵² Weight may be constant across contexts—though *not* over time⁵³—while *activation* is context-sensitive. Compare: the mass of two bodies and thus the gravitational force that they have the capacity to exert is not contextually variant, though the gravitational force that they exert on an object in a given context also depends on their distances to that object, which *is* context-variant.

Readers who remain skeptical that practice can confer weights on principles might reflect on the alternatives. Return to the purported fundamental legal norm I dubbed *intentionalism*, and to its variants: a determinate norm qualified by exceptions, or a non-determinate norm that has the quality of weight. If these fundamental norms arise somehow from messy social facts, I, at least, find it far easier to imagine the emergence of *intentionalism_W*—a norm with possibly jagged contours and not-precisely-specified weight—than the emergence of *intentionalism_E*—an algorithmic norm replete with (possibly) many exceptions, (possibly) intricately nested.

Let us take stock: Alexander and Kress have not yet shown that legal norms, with weight, cannot arise or emerge from social practices, and in a fashion that does not require near-unanimous

⁵¹ Alexander and Kress, "Replies," 924-25.

⁵² See Berman, "Our Principled Constitution." Cf. Robert Alexy, "Formal principles: Some replies to critics," *International Journal of Constitutional Law* 12 (2014): 513 (defining the "concrete weight" that a principle exerts in context as a function of, inter alia, the principle's "abstract weight" and the "intensity of interference" with the principle under the circumstances).

⁵³ For an argument that we lack power to fix the fundamental legal stuff that plays a role in determining legal rules against gradual, evolutionary change, see Berman, "The Tragedy of Justice Scalia," 794-96.

practitioner agreement regarding the norms' contents and weights. Though I have not established that they can, Alexander and Kress have provided scant reason to dismiss it as a live possibility.

This leads to the fourth contention: Even if principles with weight can emerge from practice, they cannot function as I have suggested they do—namely, by combining or interacting to generate distinct legal norms that differ in content from the other principles and belong to a different normative type (a “rule”). Alexander and Kress do not advance this particular objection in “Against Legal Principles,” but Alexander has in other writings challenged pluralistic non-originalist theories of constitutional interpretation in terms that either explicitly endorse or strongly suggest this objection. As a representative passage puts it:

No one—not even lawyers—can meaningfully “combine” fact and value, or facts of different types, except lexically Any non-lexical “combining” of text and intentions, text and justice, and so forth is just incoherent, like combining pi, green, and the Civil War. There is no process of reasoning that can derive meaning from such combinations.⁵⁴

Admittedly, it is not entirely clear, in this passage and others like it, that Alexander intends to advance precisely the objection under consideration. He says that different types of facts—facts about texts, intentions, justice, etc.—cannot combine to yield what he calls “meaning,” a semantic notion. The question on the table, however, is whether legal principles and the variety of facts that they concern or make legally relevant—semantic facts, psychological facts, historical facts, moral facts, etc.—can collectively ground or constitute other, derivative legal norms. A negative answer to this question is not entailed by Alexander’s disparate-facts-can’t-collectively-constitute-meaning thesis.

But insofar as Alexander would deny that legal principles and the facts to which they refer can combine to produce other legal norms (“rules”), Kevin Toh and I have argued at length elsewhere that no persuasive reasons have been provided, by Alexander or others, for that skeptical conclusion.⁵⁵ So-called “thick concepts” (e.g., *courage*, *cruelty*) are thought to combine evaluative and non-evaluative criteria. Much of social ontology (think of a *university*) concerns phenomena that seem to be constituted by elements made of disparate stuff. The contention that it is *impossible* for legal norms to be constituted by similarly disparate grounds requires fuller argument than Alexander’s suggestive comparisons deliver.

Lastly, Alexander and Kress maintain that, even if legal principles exist, have weight, and are grounded in legal practice, we cannot gain knowledge (or true belief) about them. “No set of past cases, no matter how large the set, can fix as a matter of logical entailment the weight in the context of a present case of any principle that would explain those past cases, as Quine’s indeterminacy thesis demonstrates.”⁵⁶

⁵⁴ Larry Alexander, “The Banality of Legal Reasoning,” *Notre Dame Law Review* 73 (1998): 521 (footnotes omitted). See also, e.g., Larry Alexander, “Telepathic Law,” *Constitutional Commentary* 27 (2010): 144.

⁵⁵ See Mitchell N. Berman and Kevin Toh, “Pluralistic Nonoriginalism and the Combinability Problem,” *Texas Law Review* 91 (2013): 1739.

⁵⁶ Alexander and Kress, “Against Legal Principles,” 761.

I will not spend long on this challenge from epistemology. Just what Quine has demonstrated is controversial.⁵⁷ Moreover, the truth that evidence underdetermines theory does not take Alexander and Kress where they wish to go. Most fundamentally, “logical entailment” is not the relevant standard. The question should be whether we can infer legal principles with adequate reliability, not whether we can deduce them. And because inference is the name of the game, it’s important that the data set from which we seek to infer the contents and weights of legal principles is not limited to the outcomes of past cases but includes facts about what judges and lawyers say about putative legal principles. This is a signal difference between principled positivism and Dworkin’s account. For Dworkin, legal principles morally justify the rules and therefore need neither to be invoked by legal actors nor even to explain their decisions, making the underdetermination problem loom large. It reduces to manageable size on a positivist account in which the principles are grounded in actual speech acts that are visible to participants in the practice.

At root, the epistemic objection threatens to prove far too much. It is not clear why the Quinean doubts that Alexander and Kress voice do not similarly entail that we cannot acquire true beliefs about the entire range of social phenomena that are grounded in behavioral and psychological facts—local customs, rules of fashion or etiquette, rules of informal games, conventional word meanings, etc. If we have adequate epistemic access to these other social phenomena, more argument is required to establish that persons well socialized into legal practice cannot gain adequate (though imperfect) access to legal principles.⁵⁸

5. Coda: principled positivism confronts originalism

Alexander and Kress target legal principles because they believe that their existence or non-existence has jurisprudential and practical consequences.⁵⁹ I think they’re right. This final section buttresses that supposition by sketching implications for Alexander’s originalist theory of constitutional interpretation.

On Alexander’s brand of originalism, constitutional law is the set of legal norms that (Supreme Court holdings aside) the ratifiers of the constitutional text intended to communicate by means of ratification. This follows from two premises: first, that Americans today have in fact conferred legal authority to make constitutional law upon the ratifiers; and second, that what it is for a person or institution to have law-making authority just is for the legal norms that that agent intends to communicate or bring about by means of specified speech acts to be law.⁶⁰

⁵⁷ See, e.g., Peter Hylton, “Willard van Orman Quine,” *Stanford Encyclopedia of Philosophy*, last revised December 1, 2014, <https://plato.stanford.edu/entries/quine/>.

⁵⁸ Accord Lawson, “A Farewell to Principles,” 896-97.

⁵⁹ Alexander and Kress, “Against Legal Principles,” 763 n.96.

⁶⁰ For a concise statement of this view (albeit one that, to my eyes, occasionally conflates the meanings of texts with the legal norms to which those texts, and their meanings, contribute) see generally Alexander, “Telepathic Law.”

One might worry that this picture of legal authority is a little *too* “simple,” too all-or-nothing. One might think either that law-making authority is the power to have significant *influence* over the content and shape of legal norms (contra the second, conceptual, premise), or that we have invested ratifiers of the constitutional text with only partial or incomplete law-making authority (contra the first, empirical, premise). By one path or the other, critics of Alexanderian simple-minded originalism might deny that we have committed ourselves to our constitutional norms being *fully* determined or constituted by ratifiers’ legal intentions.

This non-originalist retort is at least superficially plausible. We often describe actors as having law-making authority even when their power over our legal norms is less than plenary or conclusive. We believe that Congress has law-making authority even though its power to create legal norms is limited by legal norms of constitutional status. And even Alexander, while conceding that the legal authority of the Constitution’s ratifiers might be limited or trumped by the authority of Supreme Court justices to displace originally intended meanings or norms,⁶¹ doesn’t thereby conclude that the ratifiers lack law-making authority entirely.

Anticipating that nonoriginalists would paint the ratifiers’ authority over our constitutional norms as less than all but more than nothing, Alexander attributes to them the view that “the authority to make . . . constitutional law is the authority to make the *texts*—the set of symbols—but *not* the authority to determine what those symbols mean.”⁶² This, he thinks, would be a “decidedly odd” way to run a legal system, although not an impossible one.⁶³ The problem for nonoriginalists, he concludes, is an empirical one: in this hypothetical system it’s those who give meaning to the text, not those who authored the symbols, who enjoy law-making authority, an upshot that contradicts the accepted premise that ratifiers possess some genuine law-making power.

I share Alexander’s rejection of the picture that he attributes to nonoriginalists. The question, however, is whether he has imagined the most plausible middle-ground account that nonoriginalists have to offer. I think he hasn’t, and that legal principles point us in a more promising direction.

Suppose that legal practices over time have produced a large number of fundamental legal norms—norms concerning the legal force of ratifiers’ legal intentions, of judicial precedents, and of extra-judicial historical practice; norms regarding the scope of national power and the weight due state prerogatives; norms about the respect government owes to particular conceptions of liberty, dignity or equality; and so forth. So long as their legal intentions matter, ratifiers possess some measure of law-making authority. And that power to shape the law’s content need not be total to be very much worth wanting—not everything, but a far cry from nothing. Alexander’s premise that, if the ratifiers’ “intended meaning does not govern”—always and fully—“then they necessarily lack lawmaking authority,”⁶⁴ is far too rigid.

If you still doubt the possibility of imperfect authority, reflect on the constitutional text that was ratified in 1789, as opposed to the later-enacted amendments. Nobody had legal authority *at the time*

⁶¹ *Ibid.*, 144.

⁶² *Ibid.*, 141.

⁶³ *Ibid.*, 145.

⁶⁴ *Ibid.*, 144.

to make constitutional law—not the members of the Philadelphia Convention, not the persons who voted in state ratifying conventions. Alexander concludes, accordingly, that the ratifiers “had that authority only if we, today, at this moment, accept that they did.”⁶⁵ But if we *now* confer authority retroactively upon the framers (or ratifiers), treating them as though invested with legal authority ab initio, it is peculiar to infer from our practices—including widespread and robust approval of at least some constitutional judgments that do not plausibly cohere with the norms that ratifiers intended to enact or communicate—that we have conferred the unfettered authority that Alexander claims to be baked into the very concept, rather than some version of the more qualified form of law-making authority that I have gestured toward.

* * *

Alexander, recall, boasts that his originalism is “simple-minded.” Pound, in contrast, had cautioned readers not to believe that law is a “simple thing.”

It is not something established definitely and absolutely by the will of the sovereign. It is not something given absolutely by logic on a basis of authority . . . It is a highly complex aggregate, arising socially from the attempt of men in politically organized society to satisfy the claims involved in civilized social life Looking at law in this way we perceive at once how change takes place continually without being aware of it.”⁶⁶

I’m with Pound. Legal norms are not simply what some text says or what some persons intended to promulgate. Ordinary meanings and legal intentions are part of law’s story, but not its entirety. The full story assigns a prominent role to fundamental norms grounded in legal practice—“legal principles”—that are plural and dynamic. The second Justice John Marshall Harlan had it just right: our constitutional rules “are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.”⁶⁷

⁶⁵ *Ibid.*, 145.

⁶⁶ Pound, “Theory of Judicial Decision,” 660.

⁶⁷ *Desist v. U.S.*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

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