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Mitchell N. Berman

University of Pennsylvania Carey Law School

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CONSTITUTIONAL THEORY AND THE RULE OF RECOGNITION:
TOWARD A FOURTH THEORY OF LAW

Mitchell N. Berman*

September 9, 2008

Introduction

This essay advances one argument and pitches one proposal. The argument is that Hart's theory of law does not succeed. On Hart's account, legal propositions are what they are—that is, they have the particular content and status that they do—by virtue of their satisfying necessary and sufficient conditions that are themselves established by a special sort of convergent practice among officials.¹ Drawing on debates within U.S. constitutional theory, I argue that law cannot be produced in this way.

If my argument is sound, and therefore Hart's account is not, it remains to determine what the correct theory of law is. My proposal, then, will be to view law as an argumentative practice. Of course, put so generally, this notion will hardly be controversial: no contemporary jurisprudential theories are likely to deny *tout court* that law incorporates a dimension of practice or that it involves argument. While I cannot fully articulate, let alone successfully defend, a distinctive practice-based theory of law in this short space, I will endeavor to say enough to escape vacuity, to distinguish my argumentative account from Dworkin's, and to nourish hope (much short, I'm afraid, of confidence) that the image dimly glimpsed can be realized.

* Bernard J. Ward Centennial Professor in Law, the University of Texas at Austin. I am grateful to Scott Shapiro for patient and helpful early discussions about Hart's account; to Matt Adler, Les Green, Mark Greenberg, Ken Himma and Jerry Postema for insightful comments on a previous draft; to conference participants for very useful reactions; and to Guha Krishnamurthi for excellent research assistance.

¹ *But see infra* note 10.

This business is conducted over six parts. Part I identifies the more pressing and persistent questions of U.S. constitutional theory that might be productively advanced by attention to the “what is law?” question. These questions, it claims, closely connect to the familiar struggle to explicate the difference between law and politics. Part II explains how Hart’s account of law as predicated on an ultimate rule of recognition (“RoR”) answers the law/politics question and argues that the implications of that answer for the persistent interpretive questions of American constitutional theory are sufficiently dubious to justify some skepticism about the RoR account itself. Taking seriously the possibility that the RoR is infirm, Part III offers a diagnosis. On Hart’s account, the RoR establishes (directly and indirectly) the criteria that conclusively validate legal norms and propositions. But, Part III argues, the very notion of conclusive legal validation cannot be maintained on conventionalist premises. Insofar as Hart conceives of the RoR as a mechanism that creates the criteria of validity (“CoV”), then the fact that it cannot perform this function suggests that there is no RoR, in Hart’s sense.

Notice that the upshot of Part III is only to reject the RoR as a means to generate CoV, not to take issue with the more general Hartian vision of law as the product of a social practice. Indeed, I believe that this component of Hartian positivism is correct. Accordingly, the next two Parts combine to sketch an affirmative account of law as an argumentative practice. Drawing heavily on recent work by Gerald Postema, Part IV introduces the idea in admittedly tentative and telegraphic fashion. Part V adds some flesh to the bones by contrasting the account I favor with Dworkin’s theory of law as integrity. Roughly, an account of law as an argumentative practice differs from Dworkin’s theory in conceiving of law as a social practice that constitutes, rather than

discovers, legal norms. Against Hart, the account claims that the social practice constitutes legal norms not by converging on a set of conditions of legal validity, but by generating and strengthening norms of reasoned argumentation. Part VI returns to the beginning by drawing from this account some implications for debates within constitutional law and theory.

I. The Persistent Questions of Constitutional Theory

In investigating whether the RoR model contributes to constitutional theory, we can proceed on either of two paths, starting from either of two points of departure. One possibility is to keep explicating, elaborating, or refining the RoR until implications are drawn whose relevance to American constitutional theory seem obvious or at least promising. An alternative is to begin by identifying particular questions that arise within American constitutional theory, tease out what answers Hart's account would provide, and assess their value or persuasiveness.

The latter approach seems clearly the more sensible. Indeed, it is the approach more faithful to Hart's own methodology in *The Concept of Law*. Hart did not inquire into the nature or concept of law as though it were a matter of abstract philosophical interest. To the contrary, he insisted,

the best course is to defer giving any answer to the query "What is law?" until we have found out what it is about law that has in fact puzzled those who have asked or attempted to answer it, even though their familiarity with the law and their ability to recognize examples are beyond question. What more do they want to know and why do they want to know it? (CL 5)

To this question Hart had an answer. Most speculation about the nature of law throughout history, he contended, was provoked by three questions: "How does law differ

from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?” (CL 13) Hart claimed that his theory of law proved its worth by supplying answers to these questions.

Without opining on whether Hart’s account achieved the success he claimed for it, it is striking for present purposes that these are not prominent questions of American constitutional theory.² Of course, American constitutional theorists expend energy on a large number of questions, many of which are of a parochial vein wholly unlikely to lead, either directly or by degrees, to the question “what is law?” To put the point from the other direction, no further advances or refinements in general jurisprudence are apt to offer much help in answering questions concerning, for example, how best to understand particular amendments, or federalism, or the state action doctrine.

But some questions that occupy American constitutional theorists show potential to bring us into fruitful contact with the work of general jurists or with accounts of the nature or concept of law. Consider, for illustration, three sets of questions that interest constitutional theorists today:

Popular constitutionalism: Do (can) popular practices and understandings help determine constitutional meanings “directly” or do they function only insofar as courts or other officials (choose to) take them into account?³

Metadoctrinalism: Much of the courts’ output in constitutional cases consists of “tests” and “frameworks” that are not most plausibly understood—even by the judges themselves—as “interpretations” of the Constitution, or as statements of “constitutional meaning.” Is this permissible? Are these “decision rules” law?

² This is not to insist that issues that occupy contemporary constitutional theorists share nothing in common with these three questions. My claim—which is not essential to my argument, and which I therefore assert without argument—is that to assimilate constitutional theorists’ concerns to those that motivated Hart would be more forced than natural.

³ See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

What about the meanings that they are intended to implement? Do judicial decisions announce two types of law?⁴

Extrajudicial constitutional obligations: Most everyone agrees that the executive and legislative branches have obligations of constitutional fidelity. But in circumstances where the relevant constitutional norm is unlikely to be enforced by the courts, how, exactly, should we think about that obligation? Some people refer to it as a moral obligation, or an obligation of conscience. Is that to say it is not a legal obligation? Or are there different types of legal obligation, depending on the prospects of enforcement by agents of the legal system?⁵

I hope that these questions convey the flavor of the puzzles of American constitutional theory that a contemporary theorist of law proceeding in a Hartian mode might aim for his or her account to help resolve, even though none is as central, urgent, or longstanding as the three questions that motivated Hart's inquiry. However, the focal concern of constitutional theory is. Very generally, it is the question of how constitutional meaning, content, or law derives from, or relates to, the constitutional text, and it arises with a piquancy not found in the realms either of common law (where there is no canonical text to interpret) or of statutory law (where the distance to traverse between text and its meaning or content is typically much shorter). Thus did Chief Justice Marshall memorably urge in *McCulloch* that "we must never forget that it is a *constitution* we are expounding."⁶

Because constitutions do not "partake of the prolixity of a legal code," Marshall further observed, questions regarding their meaning or significance are "perpetually arising, and will probably continue to arise, so long as our system shall exist."⁷ In meeting the challenge that Marshall foresaw, American legal culture has come to

⁴ See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

⁵ Questions of this sort are explored in important recent work by Trevor Morrison. See, e.g., Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007).

⁶ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819).

⁷ *Id.* at 407, 405.

recognize a variety of argumentative modalities (as Philip Bobbitt termed them)⁸ for deriving constitutional law in the face of the non-transparency of constitutional text: the ordinary or plain meaning of the text, the expectations or semantic intentions or purposes of the framers or ratifiers, the original public meaning, post-ratification historical practice, judicial precedent, constitutional structure, prudence, ethics, and others.

The variety of recognized argumentative modalities raises at least two profound questions for American constitutional theory—questions at the retail and wholesale level:

Retail constitutional interpretation: What is the constitutional law, and how ought we (or judges alone) identify it, when different modalities point in different directions? How, on a case-by-case basis, ought the interpreter to adjudicate among competing interpretive considerations?

Wholesale constitutional interpretation: Are the argumentative modalities presently in use valid or legitimate? Consider, for example, frequently voiced contentions that the Constitution must be interpreted in an originalist mode, or that judicial adherence to precedents the judges deem incorrect is inconsistent with their obligation of fidelity to the Constitution as the supreme law of the land. Are arguments of this sort to change existing judicial interpretive practice possibly correct *as a matter of law*, or are they necessarily evaluable only from a perspective, external to law, of political morality?⁹

These questions, or ones broadly like them, have engaged constitutional theorists since the founding. They gain their urgency from the worry that, if no good answers are forthcoming, then the interpretation and enforcement of the Constitution involves the exercise of will rather than judgment—inverting Alexander Hamilton’s claim in Federalist 78—rendering potentially illegitimate the exercise of constitutional review by unelected federal judges. To put the concern more simply: is the choice among reasonably contested interpretations of the Constitution a matter of law or of politics, and

⁸ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

⁹ See the illuminating discussions in this volume by both Matt Adler and Dick Fallon. Matthew Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*; Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*.

what is the difference? The question of the relationship between law and politics may be felt especially keenly in the domain of American constitutional theory, but is not unique to it. The American legal realists, for example, obsessed over the distinction but paid relatively little attention to constitutional law and theory. If the test of Hart's account of law is its ability to shed light on "aspects of law which seem naturally, at all times, to give rise to misunderstanding," (CL 6) it should provide an answer to the law/politics question that is of some use to American constitutional theorists.

II. The Rule of Recognition and the Distinction Between Law and Politics

The fundamentals of Hart's account of law are too familiar to warrant extensive recapitulation. In crude outline, and skipping past subtleties and ambiguities that will not affect my basic argument, a legal system is a complex union of primary and secondary rules in which the primary rules of obligation are generally obeyed and in which the secondary rules of recognition, change, and adjudication are accepted by officials from the internal point of view, which is to say that they are regarded as public common standards of correct behavior. In turn, the content of the law is the set of norms that satisfy the system's criteria of legal validity—criteria that may be established in part by other (higher) legal norms but find ultimate validation in a criterion or criteria that exist only by virtue of a convergent recognitional practice among judges.¹⁰

¹⁰ In correspondence, Les Green has objected that the convergent practice that interested Hart was that which identified legal *sources*, not the practice that determined rules or principles for deriving *content* from those sources. For this reason, Green also resists my characterization of Hart's account *supra* text accompanying note 1. I agree that Hart's focus was on the problem of identifying sources. In my view, however, that was not because he had—or even took himself to have—adequate basis for bracketing the step of content derivation, but because he naively failed to appreciate the importance of this step for a theory of law. In any event, and because it would be foolhardy to debate Hart exegesis (or reconstruction) with Green, two points warrant emphasis. First, as an empirical matter, I am fairly confident that my reading of Hart is shared by the great majority of constitutional theorists who seek to derive lessons for

The implications of this account for the law/politics question are straightforward. Law exists only to the extent validated by criteria ultimately derivable from a convergent practice among officials. When norms validated in this way underdetermine the answer to any putatively legal question, judges can furnish a legal resolution only by exercising a “legislative” discretion. (CL 135-36) Roughly, then, law exists only within the space defined by criteria validated by convergent official behavior and attitudes of acceptance. To be sure, because the RoR is a social rule, and because all rules have “open texture” and thus penumbras of vagueness, just where its borders lie will be contestable. Nonetheless, when agreement regarding the governing CoV runs out, law-making begins.

Answers to the constitutional theorists’ questions of constitutional interpretation follow directly. Recall that what I have called the retail questions arise when argumentative modalities already legitimated by practice yield different conclusions regarding what the (constitutional) law is. Theorists following Hart often conclude that part of the CoV in the U.S. reads something like this: a norm is law if it is traceable to the plain meaning of a Supreme Court decision purporting to interpret the Constitution, or to the plain meaning of the text of the Constitution not supplanted by a Supreme Court decision.¹¹ If neither a candidate norm nor its negation can be validated in this way, then it might possibly be validated if it conforms with other settled argumentative modalities, such as the original semantic intentions of the framers or ratifiers, or their expectations, or stable historical non-judicial practice, or the demands of conventional principles of

American constitutional law from work in general jurisprudence. (After all, doubts about the identity of legal sources constitute a very small part of constitutional theorists’ concerns.) It is therefore an account—even if not, exactly, Hart’s—that must be taken seriously by those who would hope that general jurisprudence can illuminate debates in constitutional theory. Second, on Green’s reading, Hart’s account is patently incomplete as a theory of law, and therefore demands to be either supplemented or replaced.

¹¹ See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 659-60 (1987).

justice, or the like. But—and here’s the critical point—a norm cannot be validated in this way when customary modalities of this sort conflict. (Otherwise, if norm N accords with, say, the Constitution’s original meaning, and –N accords with, say, historical practice, then both N and –N would be the law.) And regardless of whether these interpretive standards align (or are thought to align) more often than one might expect,¹² they will pull apart in a large portion of cases that reach the Supreme Court and that engage the attention of constitutional theorists. When they do, Hart’s account suggests, a judicial choice among the candidate meanings is one of law-making. Insofar as law-making is the stuff of politics, it might seem to follow that the choice is political, not legal.

Now, in the Postscript, Hart takes some pains to avoid this conclusion, deeming it “important that the law-creating powers which I ascribe to the judges to regulate cases left partly unregulated by the law are different from those of a legislature.” (CL 273) But his conviction that this must be so is clearer than that he has good arguments for it, arguments grounded in his account of law. The first difference he adduces—that the “judge’s powers [are] subject to many constraints *narrowing his choice* from which a legislature may be quite free”—is more asserted than argued for; and the second—that judicial law-making authority is interstitial—says little or nothing about the character of judicial law-making when it occurs, merely restating that it does occur only in limited cases. So despite Hart’s insistence that judicial law-making discretion is quite different from legislative discretion, the precise difference seems, at the end, to elude even Hart himself: the judge, he concludes, “must not [exercise his law-making powers] arbitrarily: that is he must always have some general reasons justifying his decision and he must act

¹² See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987).

as a conscientious legislator would by deciding according to his own beliefs and values.” (CL 273, emphasis added) The law/politics divide emerges even more clearly with respect to the wholesale interpretive questions: arguments to alter present interpretive practices—to rule out accepted moves or to rule in presently excluded ones—are not arguments of law, but necessarily of politics (or of political morality).

For the moment, let us put aside the wholesale questions. (We will pick them up again in Part VI.) The principal objection to the retail conclusion is well known: it does not cohere with what judges say they are doing in hard cases of constitutional law or with what many of us take to be the phenomenology of judging. On this latter point, moreover, academic constitutional theorists need not merely take actual judges’ reports of their felt experiences as gospel; we reflect as well on our own experiences of “playing judge,” as it were—of trying, that is, to resolve difficult constitutional questions for ourselves from as disinterested a posture as we are able.

Of course, this is not a decisive objection. Hartians respond that the rhetoric and phenomenology mislead, that participants who genuinely believe there to be law in hard cases are mistaken and that others know there is no law but falsely claim otherwise to serve personal or systemic ends.¹³ That could be. But claims of widespread error or disingenuousness naturally come with a heavy burden of proof, so we ought not to toss aside these objections to Hart too readily. We’d have greater confidence in doing so were we persuaded that Hart’s apparent position—*viz.*, when the RoR is indeterminate, there is no law and judges are free (perhaps required) to make it—had resulted from more sustained and careful engagement with problems of constitutional interpretation.

¹³ Although arguments of this sort are advanced frequently, they are developed most fully in Brian Leiter, *Explaining Theoretical Disagreement* 6-20 (Univ. of Tex. Sch. of Law, Pub. Law and Legal Theory Research Paper No. 124, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004768.

However no present-day reader of *The Concept of Law* can fail to be struck by Hart's casual, even innocent, treatment of the subject. As Kent Greenawalt critically observed in his penetrating analysis of what the Rule of Recognition in the United States might be, "*The Concept of Law* leaves the impression that the ultimate rule of recognition will be rather stable, will not refer much to moral criteria, and will allow rather clear identification of what counts as law."¹⁴ Although Hart devotes a short section to "uncertainty in the rule of recognition," (CL 147-54) the discussion suggests both that uncertainty will reign only at the margins and that, once an indeterminacy is identified, it is likely to be authoritatively resolved by judicial decision fairly quickly. Hart seems not to contemplate precisely what American constitutional law bears out—namely, that debates over ultimate interpretive standards can constitute a mostly stable feature of the legal order.

That Hart was operating with an unrealistic picture of American constitutional practice is strongly suggested by his initial presentation of the legal realist challenge to formalist confidence in the breadth and bindingness of legal rules:

Skepticism about the character of legal rules has not . . . always taken the extreme form of condemning the very notion of a binding rule as confused or fictitious. Instead, the most prevalent form of skepticism in England and the United States invites us to reconsider the view that a legal system *wholly*, or even *primarily*, consists of rules. . . . In very simple cases this may be so; but in . . . most important cases there is always a choice. The judge has to choose between alternative meanings to be given to the words of a statute or between rival interpretations of what a precedent "amounts to". . . .

If so much uncertainty may break out in humble spheres of private law, how much more shall we find in the magniloquent phrases of a constitution such as the Fifth and Fourteenth Amendments to the Constitution of the United States[?] . . . In view of all this, is not the conception of law as essentially a matter of rules a gross exaggeration if not a mistake? (CL 12-13)

¹⁴ Greenawalt, *supra* note 11, at 665.

Hart presents this skeptical challenge as one he intends to meet; he will answer that last question in the negative. And yet given the vagueness of the constitutional text and the wide variety of practice-legitimated argumentative modalities, the argument of *The Concept of Law* more plausibly vindicates the skeptic's claims about the U.S. Constitution than undermines them.

My point is not to criticize Hart. I have said that worries about the legal or political character of constitutional interpretation have been with us for over 200 years. And that is true.¹⁵ But such concerns have exploded over the past two generations. Indeed, one wishing to date the start of the modern obsession with problematics of constitutional interpretation could do worse than choose the publication of Alexander Bickel's *The Least Dangerous Branch* in 1962. Because a fuller appreciation of the difficulties of constitutional interpretation and the implausibility of official consensus regarding how content derives from text has flowered only since *The Concept of Law* first saw print, it is not surprising that Hart evinced what must strike today's readers as an incomplete grasp of the subject. But it would be foolish to deny that this significant change in the understandings and concerns of (one set of) legal theorists might reasonably affect our current evaluation of the adequacy of his account. Better to recognize, with Gray, that "our attempts at classification are necessarily provisional and temporary" and that "the one certain prophecy . . . is that the classification which approves itself . . . at the beginning of the twentieth century will surely *not* be the one which will prevail at its end."¹⁶

¹⁵ For an examination of debates in the early republic, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹⁶ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 4 (1921).

In sum, the answers to their questions that flow from the Hartian account strike most constitutional theorists as facially implausible and the arguments Hart marshaled for those conclusions are too weak and cavalier to instill confidence.

III. Challenging the Criteria of Validity

Attention to problems of American constitutional theory provides reason to doubt Hart's account of law. But can it do more than that? Can it help us to see what about the Hartian account is mistaken? I think it can.

A principal function of the RoR is to establish the CoV, the “feature or features possession of which by a suggested rule is taken as a *conclusive affirmative indication* that it is a rule of the group.” (CL 94, emphasis added). In a complex legal system, the CoV likely take the form of a disjunctive set of complex sufficient conditions, such that x is law if C1, or C2, or . . . Cn. Although it is notoriously difficult to articulate, consistent with the Hartian account, the complete set of the ultimate CoV in the United States, our earlier, very brief discussion suggests what is ordinarily accepted as at least a sufficient condition of legal validity, call it C1.

C1: a norm is law if it conforms to the plain language of the holding of a non-overruled Supreme Court decision.¹⁷

Thus, if the Supreme Court announced in *Jones* that “p is the law,” then p is the law; the legal validity of p is conclusively validated by C1 plus the Supreme Court decision in *Jones*.

¹⁷ To be more precise, one might add conditions like the following: “. . . and does not violate any other non-overruled Supreme Court decision or the plain language of the constitutional text not already displaced by a decision of a high court.” For purposes of my present argument, we can safely put qualifications of this sort aside.

The problem, however, is that even this seemingly uncontroversial formulation of just a single criterion that partially constitutes the CoV is not secure. Suppose that *Jones* was decided by a coin flip or by astrological divination or by alectryomancy (divination through the peckings of grain by birds), or that the majority in *Jones* accepted bribes to decide as they did or are manifestly insane. If any of these facts obtain (or are believed to obtain), one might reasonably doubt whether *p* is the law notwithstanding its ostensible validation by a non-overruled Supreme Court decision. Put another way, it is an open question whether officials will treat *p* as law, notwithstanding its conformity with C1. Therefore what we had taken to be a sufficient condition of legal validity—essentially, conformity with a non-overruled Supreme Court decision—turns out to be defeasible. And if a putatively sufficient condition isn't, then it surely follows that there can be no set of validity criteria.

That's the quick objection to the CoV—much too quick, you might think. We have already remarked upon Hart's own acknowledgement that the RoR, like all rules, has an "open texture." Perhaps, then, these examples challenge, not the idea of CoV, but only the too-casual formulation offered above of what some portion of the CoV in the United States in fact is. On this view, C1 is incomplete or insufficiently nuanced. A more accurate condition, the argument would run, would be something like this:

C1*: a norm is law if it conforms to the plain language of the holding of a Supreme Court decision that (a) has not been overruled and (b) was not reached in palpably inappropriate or unfair ways.

All of my examples designed to destabilize the CoV by challenging C1 are simply cases that are either excluded by this more careful statement of C1—*i.e.*, C1*—or, at worst, fall within its vague periphery.

Unfortunately for Hart, I do not think that this rebuttal succeeds. It is true that a rule could be *posited* that would force my challenging cases into the vague periphery, leaving norms with respect to which the CoV *do* fulfill their function of providing conclusive legal validation. But the CoV are not posited, they are inferred from social practice. And this substantially constrains our ability to reformulate the criteria to accord with what we anticipate would make good sense. Ken Himma observes that the decision of a high court establishes the law “as long as the court reaches its decision in an acceptable way.”¹⁸ My claim is this: if the high court had not previously reached its decision in a way that officials convergently deemed unacceptable, then it is not clear on Hartian premises where Himma’s (sensible) qualification to the CoV can come from.

A fanciful hypothetical can illustrate. Let us continue to assume that *Jones* announced “p.” But now suppose that the defendant in *Jones* was Sylvester McMonkey McBean, and that a post-*Jones* litigant were to challenge the legal validity of p by proposing that a Supreme Court decision cannot validate a norm if it involved a party named after a character from Dr. Seuss.¹⁹ Just as Hartians might seek to resist the force of my hypotheticals involving coin-flipping, bribe-taking, or insane Justices by contending that C1 is less accurate than C1*, I am now imagining that somebody proposes to replace C1* with C1**:

C1**: a norm is law if it conforms to the plain language of the holding of a Supreme Court decision that (a) has not been overruled and (b) was not reached in palpably inappropriate or unfair ways, and (c) did not involve any party named after a Dr. Seuss character.

¹⁸ Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition* (this volume), at __ (manuscript at 6).

¹⁹ See DR. SEUSS, *THE SNEETCHES AND OTHER STORIES* (1961).

Of course, this is a ridiculous argument, one we can bet will not persuade a court or anybody else. But the instant question is not whether it will win; the question is whether Hartians are entitled to the proposition that C1** is not a criterion in the system and therefore that a norm is law so long as it satisfies C1* (or something like it).

I maintain that Hartians are not entitled to this proposition. Inferring rules from practices always confronts the problem of inductive generalization. But the challenge here is one step greater. If the issue of how the presence in a lawsuit of amusingly named parties bears on the Supreme Court's power to make law has not yet arisen, there can be no convergent practice on point, and the contours of the CoV, as they bear on the question, are as yet undetermined. Put another way, if the conditions of legal validity are established by convergent behavior, then there is no fact of the matter that can allow us to choose between C1** and C1*. But if that's true, then it's also true that we cannot choose between C1 and C1*. More generally, because novel legal arguments cannot be ruled in or out by preexisting practice, there cannot exist any set of criteria that provide the *conclusive* validation that Hart assumes.

To be sure, we have reached this conclusion via bizarre hypotheticals involving corrupt or nutty judges and oddly captioned cases. But challenges to the CoV arise in the real world. For example: does a Supreme Court decision establish law under the following unprecedented combination of circumstances: it (1) purports to resolve a contested presidential election (2) in a manner that accords with the apparent political preferences of the majority Justices (3) by reference to arguments that those same Justices have rejected in other cases, and (4) while disavowing that the decision will have precedential significance? Hartians would be entitled to an affirmative answer were C1

true. However, as we have seen, hypotheticals involving decision by coin flip or by divination powerfully suggest that C1 is not true. And it is more than doubtful that there exists any criterion of validity established by past practice that more specifically addresses this particular concatenation of circumstances. If the Hartian account is correct—if a norm is law only if validated by criteria that are themselves produced by convergent official practice—then it would seem to follow not merely that *Bush v. Gore* presented a hard case for the Justices that required the exercise of legislative discretion (a conclusion that Hartians would have no trouble embracing), but that the decision announced by *Bush v. Gore* was not law. Some readers will not resist that conclusion either. But notice that what's doing the work in driving that conclusion does not depend upon the *content* of circumstances (1) through (4). The argument depends only on the fact of an unusual combination of circumstances. Yet every case involves unusual, indeed unprecedented, circumstances, wanting only for someone with either the perspicuity or the whimsy to point them out for us.

To see the challenge yet more clearly, it is worth briefly comparing this critique of Hart's understanding of CoV with Dworkin's criticism of Hart for endorsing the erroneous view—one that cannot accommodate the existence of “theoretical disagreements” about law—that “the very meaning of the word ‘law’ makes law depend on certain specific criteria.”²⁰ As Hart and many others have rightly objected, Dworkin's discussion of the “semantic sting” mischaracterizes its target: Hart's theory is of the concept of law, not the word. However, in an endnote that responds to this very objection, Dworkin contended that his criticism regarding Hart's inability to explain theoretical disagreements applied equally to semantic theories of law and to “accounts of

²⁰ RONALD DWORKIN, *LAW'S EMPIRE* 31 (1986).

the ‘truth conditions’ of propositions of law.’²¹ Addressing this endnote, Hart insisted in his Postscript that “even if the meaning of such propositions of law was determined by definitions or by their truth conditions this does not lead to the conclusion that the very meaning of the word ‘law’ makes law depend on certain specific criteria.” (CL 247) But if my analysis above is correct, then Hart’s response is nonresponsive. Dworkin is claiming that his criticism of Hart goes through so long as Hart espouses a criterial theory either of the word “law” *or* of propositions of law. I am arguing, consistent with Dworkin’s assertion, but on distinct grounds, that Hart’s theory is infirm precisely because it advances a criterial account of the validity of legal propositions (and because the criteria are said to arise from conventional practices).²²

Given the intended force of this critique, two points deserve emphasis. First, I am not construing Hart’s notion of CoV idiosyncratically or uncharitably. Contemporary jurists agree that the Hartian criteria of validity comprise a set of necessary and sufficient conditions that a candidate norm must satisfy for it to qualify as a legal norm. Indeed, Ken Himma and Scott Shapiro argue in this volume that a criterial view of what distinguishes law from non-law is shared by all jurists. Labeling the claim “that every legal system contains necessary and sufficient conditions for membership in the class of legally valid norms” the “Differentiation Thesis,”²³ Himma declares not only that it was held by Hart, but that it is shared by “every conceptual theorist.” Shapiro agrees.

²¹ *Id.* at 419.

²² One might reasonably debate just how distinct my argument is from other arguments in Dworkin’s corpus. As Jerry Postema helpfully pointed out to me, it bears similarity to “the argument from controversy” in “The Model of Rules II.” See Ronald Dworkin, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY* 46 (1977). But where Dworkin appears to rely heavily on circumstances in which judges *already* divide over some aspect of the RoR, *see id.* at 61-63, my argument cuts more deeply in emphasizing that we need not await disagreement. That novel circumstances continually arise threatens the idea of conclusive validation even before any disagreement actually materializes.

²³ Himma, *supra* note 18, at ___ (manuscript at 5).

“No one,” he says, “denies that every legal system contains a rule that sets out the criteria of legal validity.”²⁴ I am denying precisely this. My argument to this point suggests that the Differentiation Thesis is false: a proposition of law is never *conclusively* validated; it is always provisional, always potentially subject to invalidation by a new consideration that existing practice cannot decisively rule out. At the risk of belaboring, my claim is not that the line demarcating valid legal norms is not sharp; Hart clearly acknowledges as much. My claim is that norms that all participants would characterize as uncontroversially legally valid—the norms that are to law much as your family’s Toyota Camry is to vehicle—do not enjoy that status the way Hart proposes, *i.e.*, in virtue of satisfying a series of tests that existing practice has certified as the finite and conclusive set. (CL 103)

Second, my criticism of Hart’s criterial account of legal propositions dovetails with the arguments from Part II. The divide between law and politics, or (if you prefer) between law and not law, that Hart’s theory entails but that many American constitutional theorists believe ill-captures hard cases, depends upon the premise that some norms and propositions are conclusively validated as law, such that judicial discretion of a legislative cast occurs when courts are asked to choose among candidate norms or propositions none of which is so validated. So if CoV established in a Hartian way cannot provide what they promise, then the Hartian distinction between law and not law seems no longer supportable. In short, we can now surmise that the Hartian theory of law reaches dubious conclusions about U.S. constitutional interpretation precisely because it rests on a dubious conception of legal validity.

²⁴ Scott Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, manuscript at 7.

IV. Toward a Theory of Law as Argumentative Practice

I observed in Part II that the Hartian answer to the hard cases of constitutional law rests on a law/not law distinction that constitutional theorists resist. Taking this resistance seriously, I argued in Part III that the Hartian account is in fact untenable because it assumes CoV that it cannot deliver. Possibly, though, the preceding analysis does more than undermine Hart; perhaps it points us as well in a more promising direction.

Return to the contrasting hypotheticals already discussed: it is submitted that the Supreme Court's declaration that *p* does not validate *p* as law because, in the first instance, the decision was reached by divination and, in the second, that it involved a party with a bizarrely funny name. I have argued that the RoR cannot distinguish the two cases. Yet many of us are confident that the first decision is not law (notwithstanding C1), whereas the second, *ceteris paribus*, is. And why this is so is not mysterious. As persons already well socialized into Anglo-American legal practice, we grasp reflexively that the fact that a judicial decision was reached by numerology is a good argument against its validity while the fact that it involves funny names is not.²⁵ And this observation suggests a more general jurisprudential possibility worth pursuing—namely, that *law is an argumentative practice*.

²⁵ To anticipate a critical idea developed in the next Part, you might be tempted to explain this difference by reference to a deeper or more fundamental consideration: a judicial decision sets forth the law only so long as it rests on rational considerations, considerations that, for example, are well suited to ascertaining what a text “really means” or to providing moral justification for the exercise of coercive power. A decision produced by divination violates this condition whereas the fact that a party has an odd name does not. But this proposal might be too quick. After all, some contemporary constitutional theorists believe that it is irrational to interpret the Constitution in accordance with, say, the application intentions of the framers, but they would not thereby deny that a Supreme Court decision that relied on such considerations set forth the law. So we should not quickly gallop past the much thinner explanation in text.

Because this idea, stated so baldly, will appear obvious or uninteresting, it is worth attending to the common observation that “law” is ambiguous as between a type of system or institution on the one hand, and a type of norm, rule, or proposition on the other. Hart himself was not always as clear as he might have been regarding which of these referents of law he had in mind. More often, though, he used the term “law” to mean *legal system*. He took the concept of a legal system as analytically primary, and sought to explain law-as-norm as some sort of output or component of the legal system. But law-as-system and law-as-norm (or law-as-proposition) do not exhaust the guises of law with which jurisprudence might be concerned. Law refers to an entire domain of social life. Unmodified, the term can refer to the institution or system of law (legal system), or to the rules or norms of law (legal rules), or to the practice or activity of law (legal practice), or to other aspects or features of the domain.²⁶ Without advancing a view regarding what hierarchy among these more or less distinct concepts obtains for different purposes, I suggest that contemporary jurisprudence has not paid sufficient attention to the practice dimension of law and to the argumentative or discursive character of that practice.²⁷

That the practice dimension of law could assume a more central position within jurisprudential thinking emerges more clearly when today’s views are contrasted with the traditional common law attitude. As Gerald Postema has recently shown in a powerful and important series of essays, when common law jurists spoke of law as far back as the

²⁶ Compare Hart’s discussion of railways. (CL 16).

²⁷ Gerald Postema, on whom I rely at length, is a prominent exception. So too is Dennis Patterson. See Dennis M. Patterson, *Book Review—Law’s Practice*, 90 COLUM. L. REV. 575 (1990); Dennis M. Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937, 940 (1990) (advancing a “view of law as practice and narrative discourse”). Patterson’s particular take on law-as-practice is too philosophically nuanced and rich to allow for a quick summary. To note just one difference between his account and mine, though, I will not agree with his claim that “law is an activity and not a thing.” *Id.* As the text indicates, I take law to be activity in addition to thing (proposition, norm).

14th century, law-as-practice was at least as salient to them as law-as-norm. “While common lawyers recognized statutory law and other ‘constitutions’ issuing from the monarch or monarch-in-Parliament, still the law in its fundament was understood to be not so much ‘made’ or ‘posited’—something ‘laid down’ by will or nature—but rather, something ‘taken up’, that is, used by judges and others in subsequent practical deliberation.”²⁸ At least by the 17th and 18th centuries, it was “orthodox common law jurisprudence” that “the *law* is to be found in the accumulated experience recorded in the books and memories of common law jurists, not in any theory or articulation of this experience. Law is practice, not a theoretical representation of it.”²⁹

The common law tradition viewed law-as-practice not only as on a par with law-as-norm, but as explanatorily prior to it.

It was the general practice of the courts, not the specific decisions or reasoning in a given case or line of cases, that established the propositions of law. The law emerged from the course of argument exemplified in the cases so reported, but it was not laid down by the courts. The recorded cases offered authoritative evidence of the forms and usages of the courts and hence of the law. These records taught students modes and contexts of argument rather than settled rules and criteria by which to authenticate them.³⁰

One of a positivist cast of mind, especially one reared in an age that sees law’s paradigmatic form as statutory, is apt to conceive of law-as-norm as an output of politics that it is the task of law-as-practice to enforce. A natural lawyer likely sees law-as-norm as a feature of the world or of the human condition that law-as-practice aims to discern. In contrast, the common law tradition, Postema teaches, viewed law-as-practice as the

²⁸ Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMON. L.J. 155, 166 (2002).

²⁹ Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMON. L.J. 1, 6 (2003).

³⁰ Postema, *supra* note 28, at 161.

organizing fabric of the legal order from which law-as-norm emerges. This perspective—what Postema calls “common law conventionalism”—

reorients thinking about the nature of law dominated by positivist and natural law conceptions. Its theoretical point of departure is not a set of norms, prescriptions, or propositions of law, but rather a practice of common practical reasoning. Rather than a metaphysical thesis, it urges a methodological thesis, a point about order of explanation and understanding, not an ontological point about the ultimate order of being.³¹

Moreover, legal practice produced or generated legal propositions in a manner appropriately labeled *legal* because it relied upon, indeed embodied, “artificial reason”—a distinctive habit of mind and argumentation that respected constraints and emphasizes different from the all-things-considered reasoning that might prevail outside the confines of the practice.³² “The philosopher and theologian are not suited for this task, . . . for it is not an enterprise of discovery, through exercise of abstract reason, of general practical principles, but rather an enterprise of judging particular cases through a grasp of concrete relations and arrangements woven into the fabric of common life.”³³ For Coke and Hale, “the artificial reason of the common lawyer was regarded as a disciplined and informed *practice* of reasoning, and if reason understood in this way was thought to legitimate doctrines, rules or decisions of common law, this was only because they survived critical scrutiny in a *process of reasoning and disputation*.”³⁴ In short, the artificial reason that defined legal practice was: first, not a way to discover legal norms, but rather a way to *constitute* them; and second, a creative activity distinct from paradigmatically positivist modes of law-creation.

³¹ Gerald J. Postema, *Philosophy of the Common Law*, in JULES COLEMAN & SCOTT SHAPIRO EDs., *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 589, 602 (2002).

³² Postema identifies six defining features of artificial reason: it was pragmatic (not theoretical), public-spirited (not parochial), contextual (not abstract), local (not global or systematic), discursive and forensic (not solitary or introspective), and common or shared (not individual or hidden).

³³ Postema, *supra* note 29, at 9.

³⁴ *Id.* at 3.

Karl Llewellyn was heir to the same tradition when insisting that “practice . . . is the bony structure of a legal system.”³⁵ For Llewellyn, argues Dennis Patterson, “[t]ruth, that is legal truth, is the product neither of the correspondence of sentences with ‘the world’ (objectivism) nor is it simply what judges decide it will be (relativism). Truth in law is a function of three elements: training, tradition, and creativity.”³⁶ Thus, “it is the practice that is the ultimate source of legal meaning. Practice or ‘way of acting,’ not rule or principle, is primary.”³⁷

This thumbnail sketch of the common law tradition relies to an inordinate degree on the work of a single contemporary scholar. This might seem to leave me hostage to the accuracy of Postema’s characterization of common law practice and jurisprudential understandings. I should emphasize, then, that it matters little to my argument whether the picture I’ve drawn from Postema is faithful to history. I have invoked that picture solely to convey a flavor of what a dynamic, practice-based account of law could look like. And the key idea, to repeat, is that legal norms are the product of the identification, evaluation, and acceptance or endorsement of arguments by participants within a structured practice. Legal norms and propositions are ultimately traceable to social practices, just as in Hart’s account. But the social practices converge, not on criteria that have the capacity to furnish conclusive legal validation, but on norms of reasonable and persuasive argumentation. We might call this view “law-as-argumentative-practice” to signal that it is a species within the law-as-practice genus. In modest shorthand, I will refer to it as “law-as-argument.”

³⁵ KARL N. LLEWELLYN, MY PHILOSOPHY OF LAW 181, 187 (1941), *quoted in* Patterson, *Law’s Practice*, *supra* note 27, at 593.

³⁶ Patterson, *Law’s Practice*, *supra* note 27, at 593.

³⁷ *Id.* at 577.

The remaining question, accordingly, is whether a theory of law broadly along the foregoing lines can be rendered coherent and plausible. The answer could well be no even if the preceding sketch adequately captures self-understandings of the common law tradition. Then again, the answer could be yes even if it hasn't. While cashing out this promissory note will ultimately require many more details than I can provide here, I will make a down payment by flagging the most obvious, and perhaps the most formidable, challenge to law-as-argument—namely, that it might seem to confuse a theory of law with a theory of adjudication, and also threatens to ignore the more general distinction between metaphysics and epistemology upon which the jurisprudential distinction rests. We need something like the law/adjudication distinction, this argument goes, even to make sense of law-as-argument. Without the idea that a legal norm pre-exists argumentation about it (argumentation that frequently culminates in, but is not reducible to, judicial resolution),³⁸ the practice itself seems aimless. For unless we believe that legal norms exist in some form independent of or antecedent to actual embodied argumentation, it is unclear to what end the arguments are directed, and how we can sensibly characterize a judicial determination of the law as wrong.

In fact, the common law tradition largely did ignore these distinctions.³⁹ Still, and again, my goal is not to unearth seventeenth century understandings, but to acknowledge

³⁸ An account of law as practice embraces the contributions of all legal actors, including the practicing bar, legal academics, and executive officials; it is not limited to judges.

³⁹ Blackstone's comment that the only way to prove that a particular maxim is a rule of the common law "is by showing that it hath been always the custom to observe it," was, claims Postema,

not merely epistemic. He makes a claim about the mode of existence of common law. Law exists insofar as it is regularly taken up, used in deliberation and argument, and followed in practice. The law, as common lawyers conceived of it, was not a structured set of authoritatively posited, explicit directives, but of rules and ways implicit in a body of practices and patterns of practical thinking.

and begin to address one twenty-first century objection. How law-as-argument might successfully respond to this central challenge will emerge more clearly when we detour to consider the most prominent contemporary alternative to Hartian positivism, Dworkin's interpretive theory of law.

V. Distinguishing Dworkin

Dworkin's theory of law is too complex and contains too many moving parts to permit concise yet complete summary. Very briefly, though, it views law as the set of principles that collectively best fit and morally justify the institutional history of the community's legal system. Believing that there exist correct answers of moral principle, Dworkin concludes that there are also right answers to questions of law. Where Hart claims that there is no determinate law so judges must make it (i.e., in the hard cases not covered by criteria of validity derived from a convergent practice of rule-following by officials), Dworkin claims that there is law which it is the judges' task to discover. Because Dworkin challenges Hart on precisely the point that, we have seen, leaves constitutional theorists troubled with the RoR, and because he writes with American constitutional law and practice squarely in mind, it is unsurprising that his work has proven more congenial to American constitutional theorists than has Hart's—even while more contemporary general jurists follow a broadly Hartian than Dworkinian line.

This Part cannot undertake a lengthy analysis or critique of Dworkin. Its more modest objective is to clarify how law-as-argument differs from the Dworkinian theory of law as integrity and to say a few words to bolster the former's credentials. Let me acknowledge at the outset that, even if I succeed in what I attempt, it will fall far short of

Postema, *supra* note 28, at 167.

a decisive argument against Dworkin.⁴⁰ John Mackie memorably dubbed Dworkin's account the "third theory of law."⁴¹ The ambition of this Part is to not yet to displace or defeat that third theory but to put law-as-argument on the table as a candidate fourth theory.

The most significant difference between law-as-argument and law as integrity traces to Dworkin's embrace of (what Himma calls) the Differentiation Thesis.⁴² Part III argued that CoV could not emerge from conventional means, as Hart envisions. But it did not contend that legal propositions could not be conclusively validated so long as the validity conditions were established in ways not similarly dependent on social practice. Dworkin satisfies this constraint, explicitly rejecting Hartian conventionalism in favor of a view that validates law by reference to putatively objective moral facts.⁴³ Yet more strikingly, he concludes that morality's contribution to the content of law ensures that there are legally right answers to (virtually) all questions of law. In terms that resonate

⁴⁰ The existing literature does not want for criticisms of Dworkin's theory. Among other things, critics dispute his methodological claim that law—in both concept and content—must be identified by the process of "constructive interpretation," which aims to show legal materials and institutional practices in their best light; and they challenge his related conceptual claim that the point or function of law is to justify the use of governmental coercion. Many also object to the justificatory role that Dworkin ascribes to the political ideal of "integrity," roughly the state of affairs in which legal rights and duties can be intelligibly imagined as having all been "created by a single author—the community personified—expressing a coherent conception of justice and fairness." DWORKIN, *supra* note 20, at 225. I am sympathetic to these criticisms and find it additionally revealing that, although Dworkin has won more influence among American constitutionalists than has Hart, one would have to search hard, and perhaps in vain, for an adherent who does not broadly share Dworkin's liberal egalitarian political values. At bottom, then, Dworkin's theory of law is too heroic and partisan to win widespread acceptance among jurists or constitutional theorists.

⁴¹ John Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3 (1977).

⁴² At the same time, there are similarities. For example, Dworkin has emphasized that "[l]egal practice, unlike many other social phenomena, is *argumentative*." DWORKIN, *supra* note 20, at 13. This particular superficial similarity, however, is just that. Dworkin's point was merely that, due to its argumentative nature, it cannot be adequately understood from the external perspective of history or sociology but must also attend to the internal perspective of participants in legal culture.

⁴³ Precisely what Dworkin means by "objective" is notoriously slippery. It is not critical for my purposes to attribute to him any particular metaphysical thesis. As this Part will endeavor to explain, the key point will be to deny Dworkin's effort to conceptualize or constitute law by reference to reified reasons—whatever their supposed ontological status. Law-as-argument insists that legal norms are constituted by actual arguing practice, that is, by the reasoning of participants in the practice. (I am grateful to Jerry Postema for encouraging me to clarify this point.)

with what I have supposed is the principal challenge to law-as-argument, Dworkin responds to those who deny his right-answer thesis:

They say there are no right answers but only different answers to hard questions of law, that insight is finally subjective, that it is only what seems right, for better or worse, to the particular judge on the day. But this modesty in fact contradicts what they say first, for when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way; though they may think this with humility, wishing their confidence were greater or their time for decision longer, this is nevertheless their belief.⁴⁴

Similarly, he says, someone who reaches a judgment in an evaluative or argumentative practice “thinks he has been driven by the truth, not that he has chosen one interpretation to wear for the day because he fancies it like a necktie.”⁴⁵

In contrast, law-as-argument denies that there need be a contradiction between the beliefs (a) that discrete arguments one accepts are better than those one rejects and (b) that there is no right answer to the bottom-line question of law at issue. It denies Dworkin’s starkly binary view of the attitude or phenomenology of reaching judgments. It contends that there is a middle ground: one can think herself driven neither by truth nor by choice, but by *argument*. Thus, whereas legal propositions just are, for Dworkin, what the balance of (mind-independent) reasons dictates, on the law-as-argument model, they exist as the product, not of reasons, but of *reasoning*. They depend on what actual participants in the practice treat *as* reasons, through the discursive practice of crafting, deploying, evaluating, and weighing arguments.

The plausibility of this middle ground derives from two central features of legal practice. First, legal practice is open to a great many incommensurable considerations. Law is a forum for adjudication among arguments sounding in such disparate material as

⁴⁴ DWORKIN, *supra* note 20, at 10.

⁴⁵ *Id.* at 77.

welfare, rights, justice, harm, tradition, stability, predictability, consistency, democracy, separation of powers, security, fairness, and much else besides. Surely some of these values and disvalues can be reduced to the same currency, but not all can be. So we can agree with Dworkin that a participant would believe that there are right answers to such questions as which legal solution better corresponds to what the drafters of the law intended or better promotes the good of wealth-maximization. But that doesn't entail that she also believes there is a right answer to the bottom-line question of how disparate considerations are better weighed against one another or stitched together to realize law. Indeed, I venture that most participants would have no clear sense of the metaphysics that could possibly make an answer uniquely correct.

Second, legal practice is an intensely practical enterprise, not a theoretical one. Because it requires participants to act on their judgments about law, it requires that they actually *reach* judgments, not just (as philosophy permits) that they continually move toward them. It also requires that they reach those judgments within time constraints. To make this possible, the practice structures reasoning in an “artificial” way, including by protecting favored reasons with varied and implicit burdens of proof. Many reasons are accepted or entrenched not to render them beyond challenge, but to direct that they ought to be followed *until* being challenged and successfully dislodged. A participant is always entitled to urge a revision to settled ways of constituting law—settled canons of statutory interpretation, or modalities of constitutional argument, or ways of treating concurring opinions—but never (or rarely) required to give deeper reasons for going on as before. For these two reasons, perhaps among others, the principal touchstone for legal practice as we know it is not truth but reasonableness. Participants frequently defend a solution as

being more reasonable than another but rarely as being truer. And what is more reasonable is partly constituted by the structure and content of the practice.

Given law's commitment to practice-informed norms of reasonableness, the value and sense of the argumentative practice does not require participants to believe that a right answer preexists the activity of reasoning. What it requires instead are such things as an internalized sense of continuity with the practice or custom and a commitment both to accept, and act on, the conclusions that the arguments accepted dictate, and to reason in consistent fashion in other cases. In this way, arguments serve a valuable function in constraining and disciplining decisionmaking, to promote predictability and a certain distance from first-order views of policy and political morality—if not *impartiality*, then mitigated partiality.

Some scholars have intimated that to dispute the existence of right answers undermines the intelligibility of the “practice of giving reasons,” that we need to maintain a belief in the objectivity of the answers that the practice yields in order to sustain the practice itself.⁴⁶ It is this that I wish to deny. Skepticism about the possibility of objective truth of claims within an argumentative discourse need not cause us to repudiate the discourse so long as we continue to view it as useful or valuable for human ends. A society needs to resolve disputes. Law serves this dispute resolution function. We could imagine that law could assume a form other than as argumentative practice. Legal practice could be the reading of entrails. But it is true that, for us, legal practice is argumentative. And, while that might not be inevitable, it is surely no accident for creatures constituted roughly as we are. We can recognize that propositions of law (and

⁴⁶ See, e.g., Brian Leiter, *Objectivity, Morality, and Adjudication*, in BRIAN LEITER ED., OBJECTIVITY IN LAW AND MORALS 66, 88 (2001).

perhaps of morality too) are the dynamic product of practice-constrained argumentation, and that the arguments, hence the propositions, are responsive to reason, without, I think, taking a position on whether such a mode of existence is perspicuously classified as objective or true.

* * *

I speculated at the end of Part IV that the greatest challenge for a theory of law-as-argumentative-practice is to explain how it can be sensible to continue to make judgments in realms one believes are not directed toward, and validated by, facts of the matter. Deploying Dworkin as foil, I have sketch an outline of how I'd hope this challenge to be met. If that outline can be filled in successfully—if something like this concept of law-as-argument is correct⁴⁷—then it offers a middle way between Hart and Dworkin: judges aren't merely *discovering* law because it does not always exist prior to the argumentative activity; law *emerges from* the activity but does not always preexist it. But they are not *creating* law, and surely not in the same sense that lawmakers do who are engaged in a political practice. Against Dworkin: arguments do not reveal what is already so, they make it so. Against Hart: law is established by practice-constrained argument, not by will. Put otherwise, the way that law-as-proposition or law-as-norm is made by law-as-practice is sufficiently dissimilar from the way that it is made by politics so that the conflation of the two methods is more obscuring than illuminating, more false than true.

⁴⁷ I mean “correct” in a weak sense consistent with Raz’s caution that “[t]here is no uniquely correct explanation of a concept, nothing which could qualify as *the* explanation of the concept of law. There can be a large number of correct alternative explanations of a concept. Not all of them will be equally appropriate for all occasions. Appropriateness is a matter of relevance to the interests of the expected or intended public, appropriateness to the questions which trouble it, to the puzzles which confuse it.” Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in JULES COLEMAN ED., *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 1, 10 (2001).

VI. Implications for Constitutional Theory

We can now spin out a few implications of an account of law as argumentative practice for the problems of retail and wholesale constitutional interpretation introduced in Part I.

First, to advance and engage arguments legitimated by practice is to do law. To affirm a particular norm or proposition as one of constitutional law is to assert the conclusion of an argument. Such norms and propositions are inescapably dynamic and contestable. Although Bobbitt's menu of extant argumentative modalities is too parsimonious, the fundamentals of his account of constitutional practice are, I believe, correct. There is no sharp divide between easy and hard cases; all constitutional questions can be arrayed upon a continuum. In some cases, the arguments on one side are so weighty and so little appears on the other side (perhaps nothing at all) that it is comfortable and nearly costless to treat the obvious resolution of argument as simply "the right answer." To take the customary example, it is unproblematically unlawful for any person not yet 35 to become president not because there is a set of conditions that make this conclusively the case, but because those of us acculturated into the practice of constitutional law see a weighty argument in favor of it, envision little or nothing that can be said against it, and believe that other participants share these twin assessments. Similarly, even those of us who would have assessed arguments differently than did the Supreme Court in a recent case, thus would have reached a different conclusion, agree that the Supreme Court's conclusion that *p*, not our contrary conclusion that not *p*, is law because the practice recognizes the fact of the Court's announcement of *p* as an

extraordinarily weighty reason for p—weighty but, as Part III argued, not conclusive. Harder cases arise with respect to those questions of law for which more arguments appear “on point,” lead in different directions, and have less well settled weights. But, so long as we take ourselves to be operating within the practice and remain responsive to its argumentative norms, we do not cross a barrier (even a vague one) that separates law from not law.

With respect to wholesale interpretation, the practice-based account suggests that arguments to revise more or less settled practices need not (as Matt Adler’s analysis seems to assume)⁴⁸ be classified according to a neat dichotomy: either as claims regarding what the law already requires or as extra-legal arguments, grounded in political morality. Because the argumentative practice of law is so richly textured, it accommodates first-order arguments about what the law is as well as second-order arguments regarding the considerations that should shape and determine what the law is. As Postema explained about the common law:

Intricately interwoven into the activity of adjudicating particular disputes by application of rules of law were the activities of articulating and justifying those rules. To the common lawyer’s mind, these three activities—articulating standards, showing them to be reasonable and sound, and applying them to particular cases—were not three separate processes, but rather interrelated moments of a single process of discursive reasoning.⁴⁹

This means, for example, that arguments to pay more (or less) attention to original understandings, or to the text, or to judicial precedents, need not be extra-legal arguments of political morality. They are, or can be, legal arguments. But to say that does not mean that there exists a proposition of law that requires these outcomes; it means that these are legitimate moves within, not external to, the practice.

⁴⁸ See Adler, *supra* note 9, at ___.

⁴⁹ Postema, *supra* note 28, at 167; see also the discussion of “meta-rules” in Fallon, *supra* note 9.

All that said, two further comments about wholesale interpretation are warranted. First, a reader versed in contemporary interpretive debates might see an affinity between the argument put forth—which, after all, owes a substantial debt to the view that Postema has termed “common law conventionalism”—and David Strauss’s theory of “common law constitutional interpretation.”⁵⁰ According to Strauss, the dominant contemporary approaches to constitutional interpretation—textualism and originalism—are grounded in a broadly Austinian jurisprudential tradition that views law as the command of the sovereign. The principal historical competitor to that vision of law, Strauss observes, is the common law tradition that locates law in evolving understandings. And, he argues, “it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by ‘we the people,’ that best explains and best justifies, American constitutional law today.”⁵¹

Because I find so much of Strauss’s analysis illuminating and persuasive, I will highlight two differences between his account of constitutional interpretation and law-as-argument, as I conceive it. The first concerns its jurisprudential grounding. Strauss’s account is presented as a theory of constitutional interpretation designed to compete with alternative approaches within American constitutional theory and practice. In contrast, any lessons for constitutional interpretation that flow from law-as-argument are the byproduct of an account designed to offer an alternative to Hart and Dworkin. Common law constitutionalism is a descriptive and normative account of American constitutional practice. Law-as-argument is a conceptual account of the nature of law. Given the route I have taken to reach law-as-argument, it is no surprise that the account bears

⁵⁰ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

⁵¹ *Id.* at 879.

implications for U.S. constitutional theory. But whereas Strauss contrasts the common law method that he thinks suitable for American constitutional interpretation with methods more suited for statutory interpretation, law-as-argument aspires to be a theory of law that applies even to statutory departments. This is because legal practice has an inherent diachronic aspect and because there exists an ineliminable gap between legal texts and legal propositions and norms. It may well be that the argumentative dimension of law is less salient when the practice grapples with ordinary statutes, but from a jurisprudential perspective law-as-argument does not disown statutory law.

Second and more importantly, because law-as-argument is more general, it takes no position on certain features of American constitutional practice that Strauss observes and extols. In particular, Strauss valorizes the undeniable empirical fact that a substantial portion of the norms and propositions of contemporary American constitutional law derive from judicial precedents and relate only tenuously to the constitutional text. Consequently, Akhil Amar had Strauss directly in his sights when arguing that courts should be less deferential to previous judicial statements of constitutional law and should instead rework constitutional law to better accord with the text.⁵² But, judicial precedent and constitutional text are just two modalities of constitutional argument and there is nothing about law-as-argument that necessarily privileges the former over the latter. Thus were Amar to convert more participants to his argumentative style or predispositions, that would amount merely to a development within American constitutional argumentative practice, it would not threaten or undermine law-as-argument. Put another way, (David) Straussians would have to resist a greater shift

⁵² See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

toward Amarian textualism by making arguments from within the practice, not by drawing forth any supposed entailments from law-as-argument as an account of law.

The point, in short, is that law-as-argument, as an account of law, does not entail any particular partisan position within the wholesale debates of constitutional interpretation. It accommodates participants whose sensibilities run in, *e.g.*, Straussian, Amarian, and originalist veins. It is tolerant and capacious—but not to a fault. Its limits appear when we shift attention from those who espouse originalist sensibilities to those who advocate “originalism,” *i.e.*, the thesis that constitutional law, correctly understood, just is the original meaning of the constitutional text (or the intentions of those who drafted or ratified it, or something of this sort). I have challenged this claim elsewhere.⁵³ It is enough here to observe that, insofar as originalists argue that some original feature of the constitutional text conclusively determines what the law is, they are flirting (at the least) with the Differentiation Thesis. As we have seen, such a position will have to be defended on a nonconventionalist theory of law. Hart will not help them. Nor will law-as-argument.

Conclusion

Contemporary jurists differ regarding the extent to which advances in general jurisprudence are likely to contribute insights to more parochial departments of law. On one reading, Hart himself seemed to believe that advances in our very general and abstract understanding of the nature or concept of law should have something to contribute to theoretical questions that arise within, or are provoked by, a domain of law. Of course, he did not think that general jurisprudential inquiry could tell us what the law

⁵³ Mitchell N. Berman, *Originalism is Bunk*, 84 NYU L. REV. __ (forthcoming 2009).

of any jurisdiction is or should be. Rather, he appeared to have assumed a point of contact between the somewhat more abstract questions about law that percolate upward from law practice and the somewhat more concrete implications for law that flow downward from the philosophy of law. On Hartian assumptions, then, attention to U.S. constitutional theory can serve as a partial proving ground for his own theory of law.

I have argued that Hartian positivism does not emerge whole from this encounter because the criteria of validity that it believes are necessary to conclusively validate legal norms cannot arise from a convergent social practice. That is this essay's most important and distinctive claim. As a secondary and more tentative matter, it adumbrates an account of law that might better fit the experience of U.S. constitutional law and the insights of American constitutional theorists. This alternative account views the practice dimension of law as primary. "Law, on this view, is a matter of convention, but it is a convention of a special sort, namely a practiced discipline of practical reasoning."⁵⁴ But, of course, Hart—and Dworkin too, for that matter—understood that law is a type of practice. For a practice-based view along the foregoing lines to qualify as a genuinely distinct theory of law, it will eschew both the Hartian premise that legal norms are conclusively validated by a set of necessary and sufficient conditions and the Dworkinian claim that such norms are determined by facts of the matter that exist independent of, and guide, the reasoning of flesh-and-blood (non-Herculean) participants in the practice.

⁵⁴ Postema, *supra* note 31, at 601.