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# How Practices Make Principles, and How Principles Make Rules

Mitchell N. Berman\*

January 5, 2022

*Abstract:* The most fundamental question in general jurisprudence concerns what makes it the case that the law has the content that it does. This article offers a novel answer. According to the theory it christens “principled positivism,” legal practices ground legal principles, and legal principles determine legal rules. This two-level account of the determination of legal content differs from Hart’s celebrated theory in two essential respects: in relaxing Hart’s requirement that fundamental legal notions depend for their existence on judicial consensus; and in assigning weighted contributory legal norms—“principles”—an essential role in the determination of legal rights, duties, powers, and permissions. Drawing on concrete examples from statutory and constitutional law, the article shows how the version of positivism that it introduces betters Hart’s in meeting the most formidable challenges to positivism that Dworkin marshaled. In doing so, it also highlights the legal importance of the abstract jurisprudential inquiry this article undertakes. Because any argument about what our law *is* presupposes an account of *what makes it so*, domestic theories of statutory and constitutional interpretation—and the case-specific holdings they output—are only as secure as are the general jurisprudential theories they presuppose.

## Introduction

What gives law its content? If *q* is a legal norm, what makes that so? Many contemporary legal philosophers believe that answering this question is the discipline’s central task. As David Plunkett and Scott Shapiro recently urged, without a clear account of “the nature and grounds of legal facts . . . we won’t have a satisfactory account of how legal reality fits into reality overall.”<sup>1</sup> This article offers a new general account of the determination of

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legal content, a novel “constitutive” theory of law.<sup>2</sup> I call this theory “principled positivism.”

The account is positivist because it maintains that legal norms are necessarily constituted or determined by the actions and mental states of persons (or, as some philosophers prefer, by *facts about* such actions and mental states), and by moral notions only contingently if at all. However, and in marked contrast to the reigning positivist theory, that associated with H.L.A. Hart, my account gives the weighted, contributory norms that the arch anti-positivist Ronald Dworkin called “principles” a central role in the determination of legal “rules.” Put in currently favored metaphysical jargon, legal practices fully ground legal principles, and legal principles partially ground legal rules.

This paper motivates, explicates, illustrates, and defends principled positivism. The business occurs over three sections. Section 1 sets the table. It briefly sketches Hartian positivism and then presents what I consider the two most formidable challenges to it, both pressed by Dworkin, positivism’s fiercest critic. The first challenge was raised in Dworkin’s first attack against Hart’s theory, *The Model of Rules I*. This objection, which I call *the challenge from principles*, maintains that Hartian positivism has difficulty accounting for the contributory, weighty, and conflicting norms that

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Deigh, Mike Dorf, Oran Doyle, Ben Eidelson, David Enoch, John Golden, Mark Greenberg, Alex Guerrero, Brian Hutler, Felipe Jiménez, Jeffrey Kaplan, Guha Krishnamurthi, Brian Leiter, Errol Lord, Andrei Marmor, Marcin Matczak, Stephen Perry, David Plunkett, Joseph Raz, Connie Rosati, Gideon Rosen, Steve Sachs, Larry Sager, Fred Schauer, Steve Schaus, Stefan Sciaraffa, Scott Shapiro, Rebecca Stone, Kevin Toh, Mark van Roojen, Daniel Wodak, and workshop audiences at the Oxford Seminars in Jurisprudence, Cornell Law, University College London, UCLA Law, Penn Philosophy, and the Surrey Centre for Law & Philosophy. I started work on this paper while serving as a Laurance S. Rockefeller Fellow at Princeton’s University Center for Human Values, and gratefully acknowledge the Center’s support.

<sup>1</sup> David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 ETHICS 37, 56 (2017). See also, e.g., Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015); Nicos Stavropolous, *The Debate That Never Was*, 130 HARV. L. REV. 2082, 2090 (2017); Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004), reprinted and revised as SCOTT HERSHOVITZ ED., EXPLORING LAW’S EMPIRE 225, 225 (2006); Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 PHIL. COMPASS 457 (2013).

<sup>2</sup> See generally Greenberg, *supra* note 1; David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139, 149-50 (2012). In describing my theory as “constitutive,” I am mindful that it has metaphysical connotations that expressivists may resist. This is a cost, for I intend my account to be congenial to expressivists who will ascribe truth or correctness conditions to propositions of law, hence are “minimal realists” about the domain. See *infra* note \_\_ and accompanying text. On balance, I think it’s a cost worth incurring, but some will prefer to speak of a theory of legal content or legal correctness, omitting the “constitutive.”

Dworkin called legal “principles.” Exactly why, on Dworkin’s analysis, Hart’s account cannot accommodate principles is largely misunderstood. Drawing on a companion article,<sup>3</sup> I explain that the crux of the challenge is not that Hart’s account can’t deliver legal *principles*, but that, insofar as it can, it can’t deliver legal *rules*.

Dworkin developed his second challenge in work that followed *TMR I*, most insistently when speaking as an American constitutional theorist. This second objection maintains that, because of pervasive disagreements among U.S. justices and judges about matters of “constitutional interpretation,” vastly fewer putative legal norms are “valid,” or “exist,” than sophisticated observers and participants believe, on reflection, there to be. I dub this objection *the too-little-law challenge*. It is kin to a much better known objection, *the challenge from theoretical disagreements*, that, I will explain, Hart’s theory rebuts easily.

Section 2 introduces an alternative to, or modification of, Hartian positivism designed to meet the challenges from principles and of too-little law. The two key moves are to allow for the determination of non-fundamental (i.e., derivative) legal norms by a means that does not require Hartian “validation,” and to allow for the determination (or “grounding”) of fundamental legal norms in practices that fall far short of judicial consensus. In presenting an account that has these twin virtues, this Part explains: (1) how “legally fundamental” weighted norms can be grounded directly in the messy, conflictual human practices that characterize modern, vast, decentralized legal systems; (2) how such principles can interact or combine by non-lexical, aggregative means to determine the legal status of token acts and events; and (3) how the “decisive” and general legal norms customarily called “rules” fit into the picture.

Section 3 puts my account to work, showing how it meets Dworkin’s challenges. It does so with the aid of three concrete disputes from American statutory and constitutional law: the “snail darter case”<sup>4</sup> that Dworkin discusses at length in *Law’s Empire*; the constitutional right to recognition of same-sex marriage announced in *Obergefell v. Hodges*;<sup>5</sup> and a state’s constitutional power to penalize “faithless electors,” unanimously approved in *Chiafalo v. Washington*.<sup>6</sup>

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<sup>3</sup> Mitchell N. Berman, *Dworkin versus Hart Revisited: The Challenge of Non-Lexical Determination*, \_\_ OXFORD J. LEG. STUD. \_\_ (forthcoming 2022).

<sup>4</sup> *TVA v. Hill*, 437 U.S. 153 (1978).

<sup>5</sup> 576 U.S. 644 (2015).

<sup>6</sup> 140 S. Ct. 2316 (2020).

This Article principally contributes to general jurisprudence, not American constitutional law or theory. But as Section 3 makes clear, the disciplines are not crisply separable. That was one of Dworkin’s core insights, memorably pronouncing jurisprudence “the general part of adjudication, silent prologue to any decision at law.”<sup>7</sup> Consistent with that teaching, leading proponents of living constitutionalism have long presented their theories as depending upon (and extending) Dworkin’s anti-positivist general theory of law.<sup>8</sup> Perhaps more arresting is the increasingly vocal insistence on the same point from the positivist side. Scott Shapiro, for example, motivated his own positivist alternative to Hart—his “planning theory” of law—by hammering at the “profound practical difference” that philosophical theories of legal content make. Because “American lawyers do not all agree with one another about the correct way to *interpret* the Constitution,” he observed with modest understatement, the only way to resolve such disputes “is to know which facts *ultimately* determine the content of *all* law.”<sup>9</sup> Similarly, the prominent originalists William Baude and Stephen Sachs have been vigorously championing a “positive turn”<sup>10</sup> in our interpretive debates precisely because “an account of legal interpretation ought to be responsible to a theory of law.”<sup>11</sup> So unless originalists take their project to be one of law reform, they explain, the question they should be examining is not whether originalism would lead to good results but whether it’s “our law,” a matter that, inescapably, “depends in part on principles of abstract jurisprudence.”<sup>12</sup>

The point is simple: insofar as the jurisprudential intervention this Article undertakes is successful, implications for American legal interpretive theory inevitably follow. Drawing forth and defending those implications is not today’s business. But readers whose interest in jurisprudence derives largely from its character *as* “prologue” will naturally wonder at what might be to come. What lies downstream is a major payoff:

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<sup>7</sup> RONALD DWORKIN, *LAW’S EMPIRE* 90 (1986).

<sup>8</sup> *See, e.g.*, LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004); JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* (2015).

<sup>9</sup> SCOTT J. SHAPIRO, *LEGALITY* 28-29 (2011).

<sup>10</sup> William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2351 (2015); *see also*, *e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1116 (2017); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *HARV. J.L. & PUB. POL’Y* 817, 819 (2015).

<sup>11</sup> William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *NW. U. L. REV.* 1455, 1460 (2019) (paraphrasing a remark by Mark Greenberg in an unpublished paper).

<sup>12</sup> *Id.* at 1457.

a solid jurisprudential foundation for a positivist, pluralist, and non-originalist constitutive theory of American constitutional law.

## 1. Hartian Positivism and Two Dworkinian Challenges

This Article could possibly start where Section 2 does—with a presentation of the account I call principled positivism. But that account emerges within a tradition. And if it boasts any distinctive virtues, they can be grasped only with an understanding of the theoretical dialectic. This section supplies the necessary context.

Section 1.1 sketches the Hartian account of legal content,<sup>13</sup> emphasizing the ultimate rule of recognition's character as a social practice that grounds "fundamental" legal norms—the "ultimate criteria of validity"—and the role of those criteria in "validating" the legal norms that are "derivative." The remainder of the section identifies the most daunting obstacles that account faces. Section 1.2 introduces the most forceful challenge pressed by the early Dworkin: the "challenge from principles" lodged in "The Model of Rules I."<sup>14</sup> Despite common wisdom that Hartians have successfully rebutted that challenge,<sup>15</sup> I will argue that such optimism is based on a misunderstanding of Dworkin's argument, and that the challenge remains unrefuted.<sup>16</sup> Section 1.3 introduces the "challenge from theoretical disagreements" from *Law's Empire*. The situation here is almost the reverse

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<sup>13</sup> I say "Hartian," not "Hart's," because I'm less focused on what Hart himself believed or intended (see generally, of course, H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994)), and more on the tradition that bears his name, especially in light of current jurisprudential thinking. Most notably, I'm assuming that the criteria of validity grounded in the rule of recognition validate derivative legal norms, not only their sources, even though it is uncertain whether Hart himself understood his apparatus to perform this function. See, e.g., Jeremy Waldron, *Who Needs Rules of Recognition?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 327, 336 (Matthew Adler & Kenneth Einar Himma eds. 2009). The assumption I indulge is more productive, for if the criteria of validity picked out only legal sources, and did not address the derivation of law from those sources, it would be patently inadequate as a theoretical account of legal content. And while that observation need not amount to a criticism of Hart—providing an account of legal content was not his primary goal, if one at all—it has obvious bearing for any current-day scholar who is interested in legal content.

<sup>14</sup> Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted and revised as *The Model of Rules I*, in RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* ch. 2 (1977). Subsequent citations will be to the book.

<sup>15</sup> See, e.g., Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORIN 35 (Arthur Ripstein ed. 2007).

<sup>16</sup> This is the main work of Berman, *supra* note 3. Sections 1.1 and 1.2 summarize arguments developed at greater length in that article.

of the first challenge: although prominent scholars think it robust, I think it weak. Section 1.4 turns to a rarely discussed cousin to the challenge from theoretical disagreements, what I call *the too-little law challenge*. I argue that it's the later Dworkin's most formidable objection. This Section's takeaway is that positivists must still engage with and defeat the *challenge from principles* and the *challenge of too-little-law*.

### 1.1. From socio-normative positivism to Hartian legal positivism

Before we even get to legal norms, let's talk social norms. Before the Covid-19 pandemic, norms in most Western cultures directed that one should greet a new acquaintance by shaking hands. A norm obtains among many law students that one ought not to volunteer to answer an instructor's questions. A norm in some communities in the American Midwest enjoins a guest to decline a host's offer twice before accepting. Common theoretical wisdom about such norms includes three elements: (1) *minimal realism* (the "metaphysically unambitious" thesis that "there really are ways that things might be . . . and that our thoughts and sentences do sometimes correctly represent that reality");<sup>17</sup> (2) *thin normativity* (the view that these norms exhibit or exert a type or grade of normativity different in character or stringency from moral norms as conceived by traditional or "robust" moral realists, and are not "truly" or "unconditionally" binding;<sup>18</sup> and (3) *positivism* (the idea that these norms are metaphysically determined by certain behaviors and mental states (or by *facts about* those behaviors and mental states) undertaken by some members of the social groups to which the norms apply).

In accord with currently popular philosophical vocabulary, I will say that such norms are "grounded in" social practices, where grounding is a relationship of metaphysical determination by which more fundamental facts or entities explain, non-causally, less fundamental ones.<sup>19</sup> For

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<sup>17</sup> MARK VAN ROOJEN, *METAETHICS: A CONTEMPORARY INTRODUCTION* 9-14 (2015).

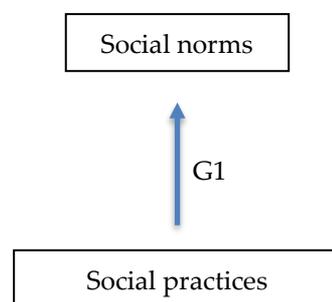
<sup>18</sup> This is the type of normativity that attaches to rules of etiquette and rules of a club, as famously explored in Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 *PHIL. REV.* 305 (1972). For elaboration, see my *Of Law and Other Artificial Normative Systems*, in *DIMENSIONS OF NORMATIVITY* 137, 143-44 (David Plunkett, Scott Shapiro & Kevin Toh eds., 2019); see also, e.g., Stephen Finlay, *Defining Normativity*, in *DIMENSIONS OF NORMATIVITY*, *supra*, at 187; Daniel Wodak, *What Does 'Legal Obligation' Mean*, 99 *PAC. PHIL. Q.* 790 (2018).

<sup>19</sup> Grounding is a hot topic in metaphysics, but controversial and very unsettled. I intend to remain as noncommittal on issues in dispute as possible. That said, I will generally take the grounding relata to be entities such as speech acts, practices and artificial norms, not *facts about* speech acts, practices, or artificial norms. Compare, e.g., Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in *MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY* 109 (Bob Hale & Aviv Hoffmann eds., 2010) (facts) with Jonathan Schaffer, *On What Grounds*

example: physical, neurochemical states of the brain ground mental phenomena such as beliefs, intentions, and pain; microphysical properties such as molecular structure ground macrophysical properties such as hardness and conductivity.

Figure 1 depicts the determination of social norms by “social practices,” a term I intend to be vague and capacious in two ways. First, by “practices,” I mean to embrace a potentially broad range of behaviors and accompanying mental states, such as believing and stating that the standard a norm captures is normative, using it to guide and justify one’s own conduct, criticizing oneself and others for deviance, and so on. Second, by “social,” I mean to signal only that the practices are engaged in by (significant portions of) some identifiable subset of society, and not that they must be found through all of society. Similarly, I designate the grounding relationship simply “G1,” leaving its details entirely open.<sup>20</sup>

**Social norms model (fig. 1)**



For a legal positivist, complex institutionalized normative systems including law exhibit these same three properties. EU securities regulations, offside rules in soccer, Jewish dietary laws—they’re all minimally realist, only thinly normative, and grounded in social practices or facts.<sup>21</sup>

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*What, in* METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347 (David Chalmers, David Manley, & Ryan Wasserman, eds., 2009) (not facts). But I’m not doctrinaire about this. When it facilitates exposition, I will sometimes speak about the grounding facts. I trust that nothing of substance in my argument depends on adopting one or another position on this particular intramural controversy.

<sup>20</sup> See, e.g., GEOFFREY BRENNAN ET AL., EXPLAINING NORMS 35 (2013) (“norms . . . are clusters of normative attitudes plus knowledge of those attitudes”); CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS ix (2006) (“norms are supported by and in some sense consist of a cluster of self-fulfilling expectations”).

<sup>21</sup> For the view that legal positivists should, and Hart did, accept minimal realism about legal norms see MATTHEW H. KRAMER, H.L.A. HART 30-31, 192-93 (2018). True, Hart did not

There is, however, one critical difference. All social norms are grounded *directly* in social facts:  $q$  is not a social norm of community  $S$  if not the object of some supportive practices.<sup>22</sup> Things are different in complex systems: at least some norms of such systems are *not* taken up by participants and might be entirely unknown to them. As Baude and Sachs note, “we can be surprised by, mistaken about, or disobedient toward the law without it ceasing to *be* law.”<sup>23</sup> So if legal norms are grounded in social facts, the mechanism by which facts determine law must be *indirect*, at least sometimes. The central task for positivist theories of law is to explicate the indirect grounding relationship that yields legal norms consistent with a scientific picture of the world.<sup>24</sup> This is a project in social ontology, itself a branch of metaphysics.

A natural thought is that, if a positivist model of complex normative systems including law is to prove viable, it would likely involve two levels of determination where the generic positivist model of social norms recognizes only one. On this positivist model of law, social practices ground fundamental legal norms, by  $G1$  or a close analogue, and fundamental legal norms, together with whatever facts, practices, or phenomena the fundamental legal norms “point to” or otherwise make legally relevant, determine derivative legal norms, by a mechanism or relation  $D2$ . (Figure 2.) The fundamental legal norms that are directly grounded in social practices function as “normative intermediaries” in the determination of legal norms that are not directly grounded in such practices. For example, suppose that a fundamental legal norm,  $F$ , of legal system  $S$  provides that  $r$

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speak in terms of “grounding” (it was not part of the then-prevailing philosophical lexicon), and some legal positivists would eschew that vocabulary even today. A more precise statement would be that all legal positivists believe that law is determined by social practices or facts—and not by moral facts or norms except insofar as social practices so direct—and that many, whom I join, think that “grounding” is the relevant type of determination relationship. Accord Samuele Chilovi & George Pavlakos, *The Explanatory Demands of Grounding in Law*, \_\_ PACIFIC PHIL. Q \_\_ (forthcoming), at 1 (listing authorities “[f]or the view that positivism is best interpreted as a grounding thesis”).

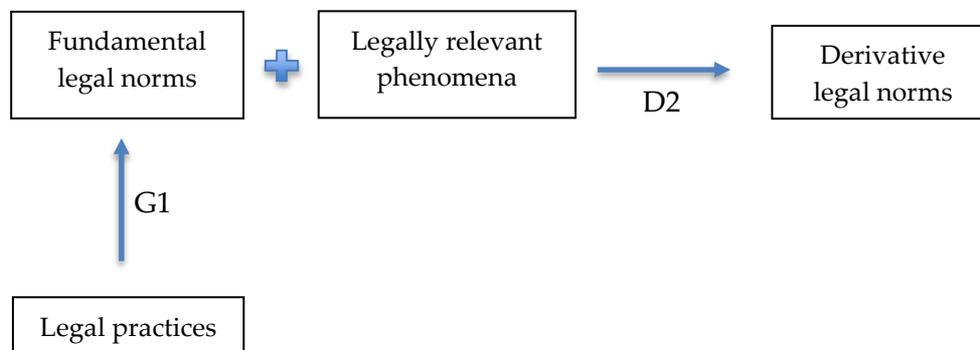
<sup>22</sup> As Cristina Bicchieri cautions, this does not mean that a social norm must be *heeded* to exist. Even if all members of a normative community  $S$  secretly flout  $q$ ,  $q$  can still be a social norm of  $S$  so long as the members engage in such norm-supportive behaviors as urging others to comply with  $q$ , or criticizing others (or themselves) for noncompliance. BICCHIERI, *supra* note \_\_, at 11.

<sup>23</sup> Baude & Sachs, *Grounding Originalism*, *supra* note \_\_, at 1473. See also Brian H. Bix, *Global Error and Legal Truth*, 29 OXFORD J. LEG. STUD. 535 (2009); Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014).

<sup>24</sup> See Plunkett & Shapiro, *supra* note 1, at 49 (arguing that jurisprudence is a branch of metanormative inquiry, and that metanormative theory in general is concerned with explaining “how thought, talk, and reality that involve [normative notions] fit into reality”).

is a legal rule of S if r corresponds to a specified type of communicative content of a specified type of text.<sup>25</sup> And suppose that T is a text of the specified type and that its relevant communicative content is q. Then q's existence as a derivative legal rule of S is jointly determined by F and the communicative content of T.<sup>26</sup>

**Generic two-level legal positivism (fig. 2)**



<sup>25</sup> Notice that F in this example functions more as a constitutive rule, *see generally* JOHN R. SEARLE, *SPEECH ACTS* 33-34 (1969), than as a regulative rule. It serves to make something the case and not to require, direct, or prohibit conduct. Persons who believe that every norm is an *ought*, and thus that a notion or operator must purport to have action-guiding character to count as a “norm,” *see, e.g.*, Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note \_\_, 95, at 98, will resist my characterization of F as a legal norm. My linguistic intuitions about “norms” are more expansive and embrace elements or concepts within the normative domain, or that bear specified relationships to norms that have a directive or deontic character. But this is a semantic dispute that need not detain us. If you’d withhold the term “norm” from an abstract entity whose function is to determine the content of action-guiding entities but not to guide action directly, you might call F and its kin “shnorms” or “auxiliaries to norms.” The substantive points I am making remain unaffected.

<sup>26</sup> Philosophers debate whether grounding is a single type of metaphysical determination, a group of related types, or just a comprehensive label for varied kinds of already recognized determination relationships. *See generally* Selim Berker, *The Unity of Grounding*, 127 *MIND* 729 (2018). I am myself more persuaded that grounding is a genuine type of determination, and one that obtains between practices and norms, than I am that the determination of derivative legal norms by fundamental legal norms and the phenomena that they make relevant is also best conceived in terms of grounding. I signal the possibility of important differences in the two determination mechanisms by referring to the latter relationship as simply “determination”—denominated D2 rather than G2—and by representing D2 with a horizontal arrow rather than a vertical one, departing from the convention according to which grounding is represented vertically.

The account that Hart presented in his masterwork, *The Concept of Law*, is easily understood as one way to put flesh on this skeletal legal positivist model. On a common interpretation, Hart holds that it is the nature of a legal system that legal norms have the legal contents or significance that they do in virtue of being validated by a set of necessary and sufficient conditions or “criteria” that are grounded in a convergent practice among officials, chiefly judges, of norm acceptance. Officials accept a norm by conforming their behavior to it with the critical reflective attitude that Hart dubs the “internal point of view.”<sup>27</sup> The convergent practice itself is the “ultimate rule of recognition.” On this reading, Hart’s account is a specification of generic two-level legal positivism in three respects. First, Hart replaces the vague generic reference to “legal practices” with his signature theoretical innovations the internal point of view and ultimate rule of recognition. Second, he conceptualizes the “fundamental legal norms” that are grounded in practice as “ultimate criteria of validity.”<sup>28</sup> Third, and working hand in glove with the second, he posits that the determination mechanism is “validation.” (See figure 3.)<sup>29</sup>

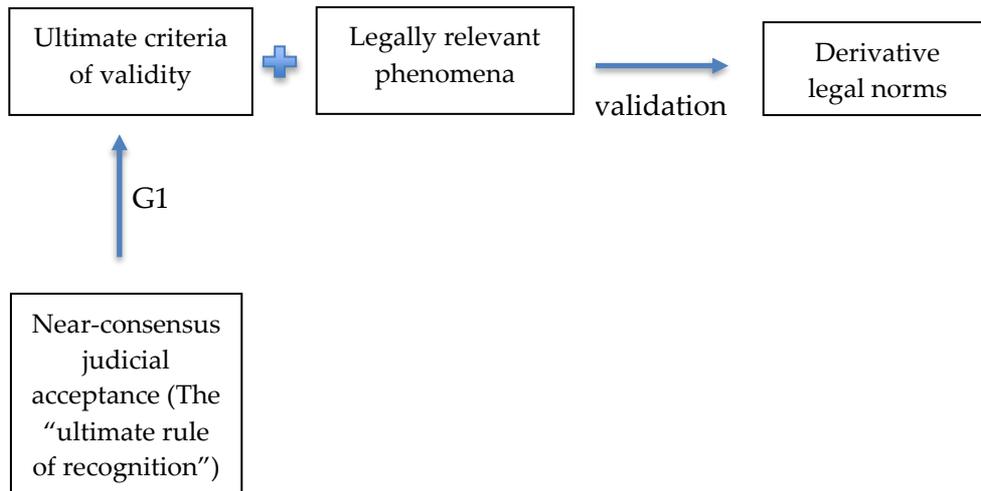
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<sup>27</sup> See generally HART, *supra* note \_\_, at 100-17. See also, e.g., Grant Lamond, *The Rule of Recognition and the Foundations of a Legal System*, in READING HLA HART’S *THE CONCEPT OF LAW* 97, 114 (Luis Duarte D’Almeida, James Edwards & Andrea Dolcetti eds. 2013). (“Of course, the language of ‘recognition’ and ‘identification’ is not entirely apt: what the rule of recognition does is to *constitute* the rules as rules of the system, that is, it *makes* them rules of the system.”).

<sup>28</sup> Scholars frequently use the term “rule of recognition” (often omitting the modifier “ultimate”) to refer both to the social rule among judges of accepting criteria of legal validity and to the criteria themselves. Hart himself did not adhere to the distinction consistently. See, e.g., H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 359 (1983) (agreeing with Lon Fuller that the ultimate rule of recognition could be deemed “a political fact,” but insisting that “[t]he propriety of this . . . description [does] not exclude the classification of this phenomenon as an ultimate legal rule”). Still, I am persuaded that clarity is enhanced by keeping the notions separate, as I attempt to do here. (I am grateful to Brian Leiter for doing the persuading.)

<sup>29</sup> For a similar analysis of Hart’s account in terms of grounding, see Samuele Chilovi & George Pavlakos, *Law-determination as Grounding: A Common Grounding Framework for Jurisprudence*, 25 *LEGAL THEORY* 53, 71-74 (2019). I explain the modest differences between our accounts in Berman, *supra* note 3, at \_\_ n. 41.

### Hartian legal positivism: first pass (fig. 3)



#### 1.2. A problem for validation: the *challenge from principles*

Many legal theorists today accept the foregoing picture, at least in broad strokes. Ronald Dworkin did not. His target in the paper that would come to be known as the “The Model of Rules I” was legal positivism. His strategy was to demonstrate that positivism’s most fully realized version, Hart’s, could not make sense of legal principles as a logically distinct type of norm.

On this much all agree. But that’s about it. It’s not merely that commentators disagree about whether the *challenge from principles* (as I term it) succeeds. As is often the case when it comes to Dworkin exegesis, they do not all agree on exactly how the challenge even runs. I unpack Dworkin’s argument at length elsewhere.<sup>30</sup> This section summarizes.

Standard understanding of Dworkin’s argument starts with his proposed distinction between rules and principles. “Rules,” Dworkin explains, “are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”<sup>31</sup> Principles, in contrast, bear on a decision with variable “weight or importance,” and are not decisive. Principles “incline a decision one way, though not conclusively, and they survive intact when they do not prevail.”<sup>32</sup> The problem for Hartian positivism is that it is a “model of rules”

<sup>30</sup> Berman, *Dworkin versus Hart Revisited*, *supra* note \_\_, at \_\_.

<sup>31</sup> DWORKIN, *supra* note 7, at 24.

<sup>32</sup> *Id.* at 35.

alone, not of principles as well. This is because Hart allows for legal norms to arise in only two ways: by being validated, in accordance with the criteria of validity, or by being the subject of convergent acceptance by officials, centrally judges. But, says Dworkin, principles cannot arise in either of these two ways. Principles cannot be determined by validation because they don't depend upon specifiable sufficient conditions; they cannot be validated by any "test that all (and only) the principles that do count as law meet."<sup>33</sup> Nor can they arise by acceptance because that would reduce the scope and significance of the rule of recognition; it "would very sharply reduce that area of the law over which [Hart's] master rule held any dominion."<sup>34</sup> Therefore, Hart's theory cannot accommodate legal principles.

As early critics of the essay showed, this argument is infirm in several respects.<sup>35</sup> While some flaws might be massaged away, many readers were wholly unpersuaded by what they took to be Dworkin's core thesis—namely, that legal principles cannot "come into being" either (directly) by being accepted or (indirectly) be being validated.<sup>36</sup> To the contrary, commentators thought it apparent that they can arise in *both* ways. Take validation first.<sup>37</sup> Suppose the criteria of validity specified in the ultimate rule of recognition provide that [q is a legal norm if text T says q], and suppose further that what T says, among things, is that "states should be paid special regard." It's not at all clear why that conjunction of facts would not validate some legal principle of federalism, the contours of which would be determined in common law fashion. Next take acceptance. Given that Hart allows that customary law can also be law in virtue of being accepted, there is no obvious bar in Hart's theory to principles being accepted too.<sup>38</sup>

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<sup>33</sup> DWORKIN, *supra* note \_\_, at 40.

<sup>34</sup> *Id.* at 43.

<sup>35</sup> For one thing, Dworkin offered two stabs at the distinction between rules and principles, not one. In addition to distinguishing rules and principles on the basis of their logical character, Dworkin also offered a substantive (or "normative") difference: principles concern "justice or fairness or some other dimension of morality." DWORKIN, *supra* note \_\_ at 22. However, the scholarly consensus is that "Dworkin's two accounts of principles do not mesh," David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 423 (1977), and that, if there is a distinction here, it resides in the vicinity of Dworkin's "logical" difference. For another, it appears probable that rules *can* conflict and have variable weight or importance. E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Debate*, 75 MICH. L. REV. 473, 479-84 (1977); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

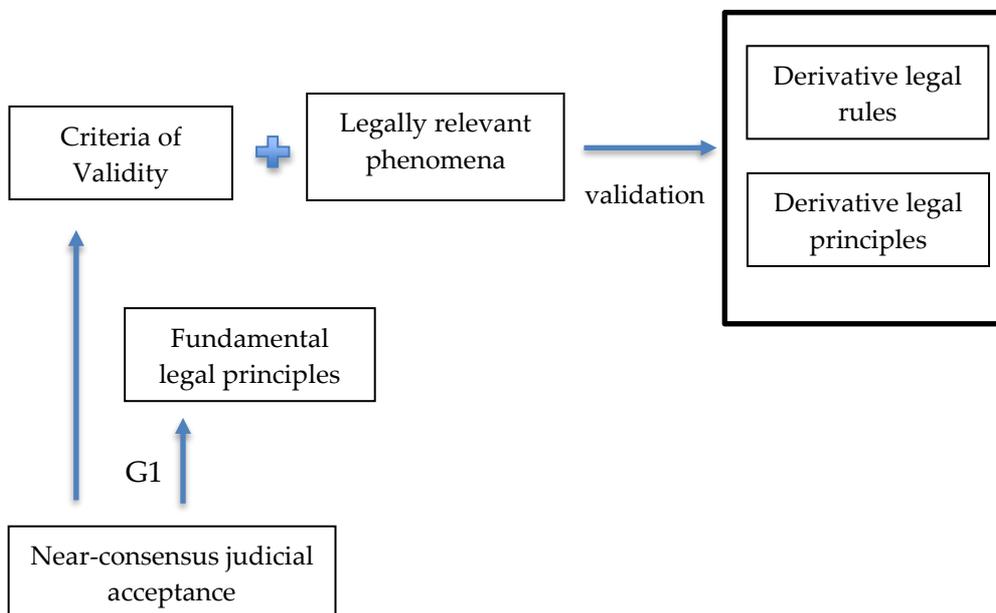
<sup>36</sup> DWORKIN, *supra* note \_\_, at 20.

<sup>37</sup> See, e.g., Lyons, *supra* note \_\_, at 425; C.L. Ten, *The Soundest Theory of Law*, 88 MIND 522, 524 (1979); HART, *supra* note \_\_, at 261, 264-65.

<sup>38</sup> Raz, *supra* note \_\_, at 853.

Figure 4 represents the Hartian model as tweaked or clarified to respond to Dworkin’s challenge: derivative legal principles can be validated by the ultimate criteria of validity; and just like those ultimate criteria, fundamental legal principles could also be directly grounded in the practices that Hart calls acceptance.

**Hartian legal positivism: response to Dworkin (fig. 4)**



These are all sound criticisms. And yet, even though Dworkin didn’t fully corral his quarry, many theorists think that he was on the right track.<sup>39</sup> The task, if so, is to make clearer what he was up to.

Although Dworkin highlights his claim that Hartian positivism cannot explain the *existence* of legal principles, the true force of his argument, I think, is that it cannot explain their function or *operation*. As figure 4 indicates, the Hartian account, as modified to meet the challenge from

<sup>39</sup> See, e.g., Dale Smith, *Dworkin’s Theory of Law*, PHIL. COMPASS 267, 268 (2007) (“While many positivists thought that [Dworkin] over-stated or misunderstood the difference between rules and principles, most accepted that there *is* a difference between these two types of norm.”); Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 745 (1997) (observing that the Dworkinian distinction between rules and principles reflects “an entire jurisprudential tradition, a tradition that has shaped not only academic thought on these matters but also how lawyers and judges think and operate”) (first published in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279 (Andrei Marmor ed. 1995)); HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES (2007).

principles, represents rules and principles (both fundamental and derivative) as co-existing in parallel, more or less. In the words of the inclusive positivist David Lyons, “principles supplement rules.”<sup>40</sup> But principles have a function, which is to contribute to rules, not (merely) to supplement them; their role is to help determine the rules that are not themselves grounded in official acceptance.<sup>41</sup> And they do so in a manner that the rule of recognition cannot accommodate: “rules . . . owe their force at least in part to the authority of principles . . . , and so not entirely to the master rule of recognition.”<sup>42</sup>

Unfortunately, Dworkin does not spell out precisely why determination of derivative rules by principles cannot be governed by the ultimate rule of recognition. The answer emerges when we attend to the mode by which that rule and its associated criteria of validity operate. The entire rule of recognition apparatus determines derivative legal norms in a rule-like way—by validating them. But, as Stephen Perry encapsulated Dworkin’s analysis, “the bindingness of a legal rule is nothing more than the collective normative force of the principles.”<sup>43</sup> And, intuitively, determination by aggregative force seems very different from determination by validation.

That intuition is well supported. Start with the treatment of moral principles in moral philosophy. As Jonathan Dancy has observed, “there seem to be two ways of . . . getting a determinate answer to the question of what to do” when the principles that contribute to a decision conflict. One way “is to rank our principles lexically”; the other is “to think of principles as having some sort of weight” and adding them up. “These two ways are different.”<sup>44</sup> Or turn to legal practice, where a similar difference obtains between multi-factor balancing tests and lexically ordered tests, often called “rules.” Whereas the conditions or criteria that make up a rule-like test dictate results by validation or something very similar, the factors that go into a balancing test combine or aggregate to dictate the legally proper

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<sup>40</sup> Lyons, *supra* note \_\_, at 421.

<sup>41</sup> This way of putting things assumes that principles form part of a theory of legal content and not only of a theory of adjudication. Dworkin spoke in both registers while being notoriously cavalier about the difference.

<sup>42</sup> DWORKIN, *supra* note 7, at 43; *see also id.* at 77 (“the rules governing adverse possession may even now be said to reflect the principle [that nobody may profit from his own wrong] . . . because these rules have a different shape than they would have had if the principle had not been given any weight in the decision at all”); *id.* at 37 (“Unless at least some principles are acknowledged to be binding upon judges, requiring them as a set to reach particular decisions, then no rules, or very few rules, can be said to be binding on them either.”).

<sup>43</sup> Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEG. STUD. 215, 225 (1987).

<sup>44</sup> JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 25 (2004).

result in a manner that eschews sufficient conditions and resists specification. Last—a little farther afield, but very revealing—consider the difference between two accounts of conceptual “structure”:<sup>45</sup> the “classical” account that views concepts as definable by a set of necessary and sufficient conditions, and the “cluster” account pursuant to which multiple criteria “count towards” or “bear upon” a concept’s proper application in a given case, without any of the criteria being necessary or sufficient.

Generalizing from these diverse examples, we can distinguish two families of determination relationships, two general ways that determinants map onto resultants, or that grounded facts are grounded in grounding facts. One family centrally involves such notions and operations as “if . . . then,” necessity, and sufficiency. The other revolves around different notions, prominently including “greater than/less than,” contribution, and thresholds. In the absence of a well-settled nomenclature, but following Dancy, let’s call these contrasting determination classes “lexical” and “non-lexical.”

The punchline is plain. “To say that a given rule is valid,” Hart explains, “is to recognize it as passing all the tests provided by the rule of recognition . . . . [A] statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.”<sup>46</sup> Consistent with this and other scattered remarks, many scholars treat Hartian validation as a process or function by which resultants are determined by satisfaction of a set of necessary and sufficient conditions.<sup>47</sup> That could be quibbled with: there is reason to doubt that validation need involve *necessary* conditions at all, and even supposedly sufficient conditions are not truly “sufficient” given Hart’s embrace of defeasibility. But nailing down Hartian validation with precision is not essential here. What’s clear is this: whatever exactly it involves, validation is a quintessentially lexical determination structure.

Equally clear is that, if there is any merit to the lexical/non-lexical distinction, principles do not operate lexically; their cumulative impact cannot be specified by a finite or tractable set of criteria. That is the point of insisting on their weightedness. So even if principles could be grounded in judicial practice (as Dworkin denies), those principles combine to constitute

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<sup>45</sup> See Eric Margolis & Stephen Laurence, *Concepts*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed.).

<sup>46</sup> HART, *supra* note \_\_, at 103. See also H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 359 (1983).

<sup>47</sup> See, e.g., Raz, *supra* note \_\_, at 851; Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note \_\_, at 96; DWORKIN, *supra* note 7, at 62.

rules, and because their means of doing so is messy, cumulative, and non-lexical, rules are not validated.<sup>48</sup> The surprising upshot of the *challenge from principles*, then, is not that Hart's account can't accommodate legal principles; it's that, thanks to the existence of fundamental legal principles and the non-lexical determination relationship that obtains between principles and rules, Hart's account can't explain legal rules. Timothy Endicott hit the nail on the head: "What really kills the model of rules in Dworkin's theory is not the proposition that there are some legal standards not identifiable by reference to a rule of recognition, but the proposition that all legal standards depend on standards that are not identifiable by reference to a rule of recognition."<sup>49</sup> Thus, the core of Dworkin's multi-prong *challenge from principles* is the *challenge of non-lexical determination*. It is to explain how derivative legal rules can be partially determined by principles and not (only) by validation. That challenge remains unrebutted.

### 1.3. A false problem for consensus: "theoretical disagreements"

Although positivists had not succeeded in blunting, or even fully grasping, his *challenge from principles*, by *Law's Empire*, Dworkin had fastened on a new leading argument against positivism, one that, like his first, does not depend upon the success of his own anti-positivist account of law. The target of his earlier challenge, to repeat, was Hart's spin on the determination relationship that links fundamental and derivative legal norms—namely, that it involves *validation*, which is a lexical operation. Dworkin's new target was Hart's account of the practices—the ultimate rule of recognition—that ground the criteria of validity that function as a fundamental legal norm. Hart makes clear that the rule of recognition depends upon a very substantial degree of judicial agreement on the criteria

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<sup>48</sup> As the philosophers Errol Lord and Barry Maguire have recently argued, any normative theory must recognize "two central cross-cutting distinctions": the distinction between "strict" and "non-strict" notions, and a second between "weighted" and "non-weighted" notions. Typically, non-strict notions are weighted and weighted notions help explain the strict. Errol Lord & Barry Maguire, *An Opinionated Guide to the Weight of Reasons*, in *WEIGHING REASONS* 3-4 (Errol Lord & Barry Maguire eds. 2016). Put in their vocabulary, Dworkin's principles are weighted, non-strict notions whose function is to contribute to a strict or decisive normative status, whereas rules are strict or decisive notions by nature, whose function is to deliver decisive verdicts all by themselves (even if the decisive verdicts they purport to deliver are countermanded by others).

<sup>49</sup> Timothy Endicott, *Are there any Rules?*, 5 J. ETHICS 199, 203-04 (2001) (emphasis omitted); see also MICHAEL D. BAYLES, *HART'S LEGAL PHILOSOPHY: AN EXAMINATION* 167 (1992) (contending that Dworkin's "most telling argument for principles binding judges is that if they do not, rules cannot be binding either," but also complaining that "Dworkin's formulation of the issue is puzzling").

it picks out: “what is crucial is that there should be a unified or shared official acceptance.”<sup>50</sup> Dworkin advanced two closely related arguments against this premise: the *challenge from theoretical disagreements*, and the *challenge of too-little law*. This section and the next tease these challenges apart and argue that the former, while well-known and much engaged by scholars, scores no points against Hart, but that the latter, though largely ignored, has far greater force.

According to the new *challenge from theoretical disagreements*, positivists are supposedly unable to make sense of disagreements among jurists about what the proximate grounds of derivative legal norms are, as distinguished from disagreements about whether those grounds obtain in a given case. They cannot make sense of such disagreements because, says Dworkin, positivism endorses “the ‘plain fact’ view of the grounds of law”<sup>51</sup> pursuant to which, as Shapiro puts it, “the grounds of law in any community are fixed by consensus among legal officials.”<sup>52</sup> Because “questions of law can always be answered by looking in the books where the records of institutional decisions are kept,” and because legal actors must be taken to know this to be true, the existence of genuine theoretical legal disagreements is unintelligible on positivist premises.<sup>53</sup> Put in the Hartian vocabulary, Hart’s account, argues Dworkin, cannot make sense of disagreements about what the criteria of validity are, as opposed to disagreements about whether some criterion is satisfied.

Dworkin introduces the “snail darter case,” *TVA v. Hill*, to illustrate. I’ll examine this case in greater depth later (Section 3.1), but the basics are enough for now. The case concerns interpretation of the federal Endangered Species Act (ESA), in particular whether the ESA required that construction of a nearly completed dam, for which millions of public dollars had already been expended, be terminated. The majority, in an opinion by Chief Justice Warren Burger, held that it did. Justice Lewis Powell, for himself and Justice Harry Blackmun, held that it did not.

As Dworkin reads the opinions, the disagreement between Burger and Powell flows from the “very different” theories “of legislation” that they adopt:

Burger said that the acontextual meaning of the text should be enforced, no matter how odd or absurd the consequences, unless the court discovered strong evidence that Congress actually

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<sup>50</sup> HART, *supra* note \_\_, at 115.

<sup>51</sup> DWORKIN, *supra* note 7, at 7.

<sup>52</sup> Shapiro, *supra* note \_\_, at 37.

<sup>53</sup> DWORKIN, *supra* note 7, at 7.

intended the opposite. Powell said that the courts should accept an absurd result only if they find compelling evidence that *it* was intended.<sup>54</sup>

This disagreement, Dworkin emphasized, is entirely “about the question of law; they disagreed about how judges should decide what law is made by a particular text enacted by Congress when the congressmen had the kinds of beliefs and intentions both justices agreed they had in this instance.”<sup>55</sup> His conclusion: this type of disagreement is unintelligible if Hart’s theory is correct. A model that grounds law in official consensus is incompatible with the existence of genuine and sincere disagreements about legal fundamentals.

To understand the argument better, and see where it goes awry, a touch of formality might help. Burger’s premise (according to Dworkin) is that *q* is the law if [(*q* is the meaning of a statute) and (the legislature did not intend  $\neg q$ )]. Powell’s competing premise holds that *q* is the law if [( $\neg q$  would be absurd) and  $\neg$ (the legislature intended  $\neg q$ )]. For expositional ease, we can use variables to stand in for each complex validating criterion (what follows the “if”). Thus: the majority believed [*q* is the law if  $C_M$ ]; Justice Powell believed [*q* is the law if  $C_P$ ]. Dworkin’s argument runs as follows:

- (P1) Burger avers honestly: [*q* is the law if  $C_M$ ]
- (P2) If Hartian positivism is true, then [*q* is the law if  $C_M$ ] iff almost all judges agree that [*q* is the law if  $C_M$ ]
- (P3) Powell and Blackmun aver honestly:  $\neg$ [*q* is the law if  $C_M$ ]
- (P4) Hartian positivism is true
- (C1)  $\neg$ [*q* is the law if  $C_M$ ] (from (P2), (P3), (P4))
- (P5) Burger believes (P2), (P3), and (P4)
- (C2) Burger believes  $\neg$ [*q* is the law if  $C_M$ ] (from (P5))
- (C3) Therefore, Burger does not aver honestly: [*q* is the law if  $C_M$ ] (from (C2))<sup>56</sup>

Dworkin’s conclusion: we can dispel the contradiction between (P1) and (C3) by abandoning (P4), Hart’s theory of legal content.

One possible Hartian response is to reject (P1). Maybe Burger did not honestly believe the claim he advanced about “the grounds of law,” i.e., about “the criteria of validity.” But victory won this way is hollow. Burger

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<sup>54</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note \_\_, at 23.

<sup>55</sup> *Id.*

<sup>56</sup> The same argument goes through, as an argument about Powell rather than Burger, if we replace (P1) with (P1\*) Powell avers honestly: [*q* is the law if  $C_P$ ], and then substitute as necessary throughout.

aside (and Powell too), it surely seems that genuine and sincere theoretical disagreements are possible, and even actual. We believe that there are other cases with this structure in which the conflicting avowals are both honest.

The deeper difficulty with the challenge is that (P5), which is essential to the conclusion, attributes beliefs to Burger (or to any judge) that might not be warranted. In particular, the premise [Burger believes (P2)] follows from a more general proposition that Hart does not stipulate: that those who are disagreeing know (or believe) that *q* is a legal norm if and only if the fundamental legal notions are the subject of judicial consensus. Whether judicial near-consensus grounds legal rules and whether participants know this to be true are separate questions. Hart's theory explicitly asserts the former, but not the latter.

So Dworkin needs an argument to establish that participants to putative theoretical disagreements must know that the plain-fact view is true, hence cannot be genuinely uncertain about what our legally fundamental norms are. Dworkin supports this premise by attributing to his opponents the claim ("the semantic sting") that "the very meaning of the word 'law' makes law depend on certain specific criteria, and that any lawyer who rejected or challenged those criteria would be speaking self-contradictory nonsense."<sup>57</sup> In *Hill*, "past legal institutions had not expressly decided the issue either way, so lawyers using the word 'law' properly according to positivism would have agreed there was no law to discover."<sup>58</sup>

But this attribution has fared poorly. Hart flatly insisted that there was "no trace" in his work of the idea that his rule of recognition and associated criteria of validity were baked into the word "law,"<sup>59</sup> and most commentators have thought it plain that positivism is not in the business of defining words.<sup>60</sup> So the semantic sting cannot furnish what the *challenge from theoretical disagreements* needs. And the challenge fares no better if we replace Dworkin's semantic claim with a conceptual one. It is no part of Hart's theory that it is part of our concept LAW, if not our word "law," that legal norms are grounded in judicial consensus.<sup>61</sup>

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<sup>57</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note \_\_, at 31.

<sup>58</sup> *Id.* at 37.

<sup>59</sup> See HART, *supra* note \_\_, at 247.

<sup>60</sup> See, e.g., Leiter, *supra* note \_\_, at 31 n.49 ("if any argument is no longer worth discussing, it is this one."); KRAMER, *supra* note \_\_, at 207 n.2.

<sup>61</sup> What content Hart ascribed to our shared concept of law is surprisingly unclear given his monograph's title. My own view is that, insofar as we share a concept of law, its core is that law concerns the set of norms delivered and sustained by legal systems, which are artificial normative systems established and maintained by political communities and designed to serve a potentially limitless range of functions, characteristically including resolving disputes among community members and preserving public order. I think this

#### 1.4. A genuine problem for consensus: “too-little law”

If, contra Dworkin, the existence of “theoretical disagreements” causes little trouble for Hart’s view that the practices that ground fundamental legal norms must involve official consensus, a nearby argument that has attracted considerably less attention does. I call this Dworkin’s *challenge of too-little law*. The problem it poses for Hart is not that his account can’t explain genuine and sincere disagreements about the fundamental legal norms. It’s that when judges do disagree on the fundamentals, neither side can be correct about what the law is. Even if Burger and Powell could have held their conflicting views sincerely, neither could have been right.

According to the orthodox reading of Hart, whenever the relevant officials (paradigmatically judges) fail to converge on some putative “criterion of validity,” or whenever they agree that some criterion “counts” but fail to converge on how it fits within the rule of recognition’s overall logic, to that extent the rule is unable to perform its validating function. Unfortunately, in mature legal systems we are most familiar with, these failures of convergence are likely to be common. The worry looms especially large in theoretical debates over American constitutional law. Many constitutional scholars believe that such failures and gaps thoroughly characterize American constitutional practice, that very few constitutional disputes that reach the U.S. Supreme Court (and even the federal appellate courts) are determinately resolved by criteria that enjoy near-consensus judicial recognition.<sup>62</sup> In consequence, Hart’s account seems to entail that there is much less (constitutional) law than appears correct to many sophisticated observers, even on reflection. This is the *too-little-law objection*: if Hart’s account of law were correct, “it would follow that there is actually almost no law in the United States.”<sup>63</sup> Even if hyperbolic, it’s not a throwaway line. Dworkin pressed it for forty years.<sup>64</sup>

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was close to Hart’s own view at times, see HART, *supra* note \_\_, at 239 (explaining that he has sought “to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect”), and that he never meant to reduce the concept of law to the union of primary and secondary rules. But I can’t pursue these ideas here.

<sup>62</sup> The most thorough study to reach that conclusion is Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987), reprinted in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note \_\_, as ch. 1. See also, e.g., Mark Greenberg, *Response: What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 124 (2017); Brian Leiter, *Explaining Theoretical Disagreement*, 75 U. CHI. L. REV. 1215, 1224 (2009).

<sup>63</sup> Ronald Dworkin, *Hart’s Posthumous Reply*, 130 HARV. L. REV. 2096, 2116 (2017).

<sup>64</sup> See DWORKIN, *LAW’S EMPIRE*, *supra* note \_\_, at 10; DWORKIN, *supra* note 7, at 350.

To this critique, the usual responses are available: “not so!” and “so what?” Among Hartians, Brian Leiter is perhaps the most notable champion of the latter view.<sup>65</sup> In his estimation, precious few controverted questions of American constitutional law *do* have legally correct answers, making what Dworkin thought a bug of Hart’s theory a feature. Leiter could be right, of course. But how bitter is the bullet to be bitten depends on how many considered casuistic judgments the diner would have to abandon. For myself, I can only report that when playing judge, as it were, it feels to me that there are legally right answers to a good number of controversial cases. Many colleagues say the same. So I will treat *too-little-law* as a genuine challenge for positivists, at least provisionally. If positivists cannot amend Hart’s account to make plausible that some legal propositions are true despite the absence of near-consensus on their truthmakers, that some legal rules exist despite absence of uniform support for the principles that are their determinants, then Leiter’s response remains available. But it will be a response of last, not first, resort.

## 2. From Hartian Positivism to Principled Positivism

I have argued that Dworkin has marshaled two troubling objections to Hart’s version of positivism: that it cannot satisfactorily explain the existence *and operation* of legal principles, and that it does not allow for as much law as legal sophisticates believe there to be, even on reflection. If so, what follows? Dworkin’s own conclusion, of course, is that we should abandon positivism.

This Article pursues an alternative possibility. It is to revise Hart’s account in a way that enables positivism (1) to accommodate genuine legal principles that participate in the non-lexical determination of derivative legal rules, and (2) to allow for fundamental legal norms to emerge from legal practices that fall significantly short of consensus. Many leading positivists have long believed that Hart’s account is too highly regimented and that some loosening or reworking would be required to save

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<sup>65</sup> See Leiter, *supra* note \_\_.

positivism.<sup>66</sup> This is my effort to bring that less tightly structured vision into crisper resolution.<sup>67</sup>

Here's the preview. Fundamental legal principles are grounded in practices more or less as ordinary social norms are: by dint of legal actors taking them up in legal decisionmaking. Their scopes and relative weights are grounded, dynamically, in argumentative legal practices. Individual principles bear constitutively on the legal status of a token act or event—that the act or event is legally permissible or impermissible, legally valid or invalid, etc.—by exerting force toward one status or the other. The force any one principle exerts is a function of two variables: the principle's own relative weight or importance within the legal system, and the extent to which the principle is "activated" by the presence of legal practices or other phenomena that the principle "turns upon" or makes legally relevant. The all-things-considered legal status of a token act or event is determined by the aggregate force of the activated principles (think vector addition) or by more complicated functions that, like the principles themselves, are also

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<sup>66</sup> See, e.g., Soper, *supra* note \_\_, at 514 ("It may be that we have moved some distance from the view that a 'master test,' capable of actually identifying with some precision all standards relevant to legal decision, forms the core of a positivist's theory."); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION* 145, 150-51 (Sanford Levinson ed. 1995) ("In referring to the ultimate rule of recognition as a *rule*, Hart has probably misled us. . . . The ultimate source of law . . . is better described as the practice by which it is determined that some things are to count as law and some things are not."); KRAMER, *supra* note \_\_, at 205 ("[A] satisfactory theory of law has to include a much better account of legal reasoning and interpretation than the account offered by Hart . . ."); BAYLES, *supra* note \_\_, at 170.

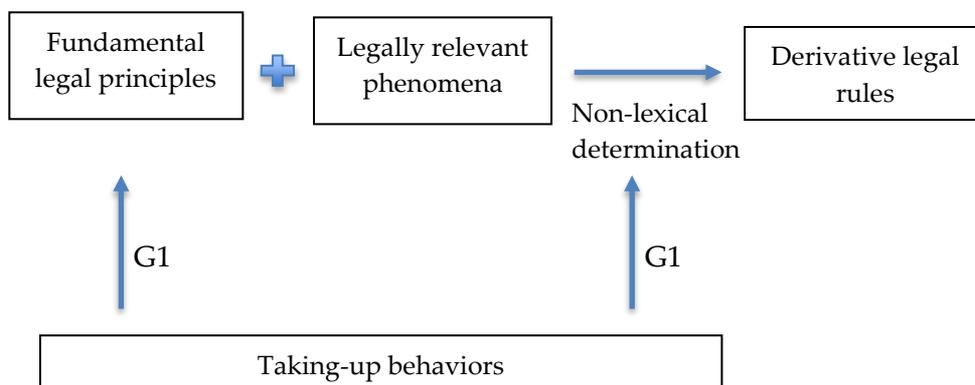
<sup>67</sup> Dworkin anticipated and dismissed a view that some might think resembles the one I'm presenting. After arguing that principles cannot arise by validation or by acceptance, he offered this final possibility: "If no rule of recognition can provide a test for identifying principles, why not say that principles are ultimate, and form the rule of recognition of our law?" DWORKIN, *supra* note 7, at 43. The law of a jurisdiction would, on this view, be "all the principles . . . in force in that jurisdiction at the time, together with appropriate assignments of weight. A positivist might then regard the complete set of these standards as the rule of recognition of the jurisdiction." *Id.* "This solution," says Dworkin, "is an unconditional surrender. If we simply designate our rule of recognition by the phrase 'the complete set of principles in force,' we achieve only the tautology that law is law." *Id.* at 43-44.

My version of positivism, like that of Dworkin's imagination, holds that the complete set of principles, with their relative respective weights, constitutes the fundamental legal norms of a community. But that's where the commonality ends. Principled positivism does not treat the existence of such fundamental principles as a brute inexplicable fact, but as metaphysically determined by the practices by which participants in a legal system take them up in legal decisionmaking. Furthermore, rather than relying upon a "rule of recognition" and the validation with which it's associated, principled positivism maintains that fundamental weighted principles determine derivative norms non-lexically. The view could be wrong, and still wants for detail, but it does not approach a tautology.

grounded in legal practices. Rules are reflections of the legal status of properly described act or event types; they describe the curvature of legal-normative space that is effected by the aggregative force of the principles.

That is a highly condensed summary. The key differences between this model and the Hartian model are two. They concern, first, how the fundamental legal norms—principles—bear on non-fundamental legal notions (in a non-lexical, aggregative manner), and second, how those fundamental legal norms are themselves grounded in practices (by being taken up by legal actors and thereby embedded in the legal materials, rather than by convergent agreement or acceptance). These two differences are what enable the full account to meet these two challenges that hamstrung Hart’s theory. See figure 5.

**Principled positivism (fig. 5)**



This section develops the picture in four steps. Section 2.1 explains how fundamental contributory norms—legal principles—are grounded in practice. Section 2.2 explains how these fundamental principles, along with all the facts, practices, or phenomena that they reference or make legally relevant, combine by non-lexical aggregation to determine the legal properties (such as being legally permitted or prohibited, or legally valid or invalid) that attach to token acts and events, and, in so doing, to determine derivative and “summary” legal rules. Section 2.3 explains why the determination function between fundamental principles and summary rules is what it is, or in virtue of what it has the particular form or content that it does. Section 2.4 adds a further clarification about legal rules,

contrasting the summary conception introduced in Section 2.2 with a second conception of “promulgated” rules. It explains how promulgated rules contribute to summary rules by operation of the fundamental legal principles.

### 2.1. How legal practices ground legal principles

A legal principle exists in legal system *S* in virtue of being “taken up” in a legally significant speech act that purports to invoke and rely upon such principle, by a legal agent or institution.<sup>68</sup> That’s the basic idea, though of course it puts matters too simply. Let me say a little more about both the who and the how.

What determines whose behaviors count, and to what relative degree, is not a brute fact constant across all legal systems, but is itself a consequence of the recognitional attitudes and behaviors of members of the legal-normative community. Those persons who play privileged roles in the determination of the fundamental legal norms are those whom other participants in the practice recognize as having privileged law-determination roles. So whose speech acts matter, and how much they matter, is largely a product of who members of the community take to matter. Think fashion. Whose fashion decisions matter is determined by those persons whom others in the fashion community (or proto fashion community) take to have capacity to set the fashion norms.

Legal actors disagree about our principles, both synchronically and diachronically. It’s implausible that the single invocation of a putative legal principle by a single actor in the face of opposition is sufficient to render the putative principle a principle of the system, or sufficient to endow the principle with the same importance as possessed by a principle that enjoys broad, longstanding, and durable support. So we ultimately need some handle on how patterns of acceptance and rejection, skepticism and enthusiastic embrace, all bear on the configuration and importance of the resulting principle.

While I am certain that the answer is complex, I do not think there is any deep mystery about how fundamental norms can be grounded in social practice, even as particulars elude us. As Rolf Sartorius suggested decades ago, fundamental norms arise within an institutionalized normative system

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<sup>68</sup> Cf. Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 166 (2002) (arguing that, for “common lawyers . . . , 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”).

when they have the type of “institutional support” to which Dworkin drew our attention: they are “embedded in or exemplified by numerous authoritative legal enactments: constitutional provisions, statutes, and particular judicial decisions.”<sup>69</sup> The more a principle is taken up by the relevant actors, and the more that subsequent legal decisions rely upon and reinforce the principles or the decisions they are understood to underwrite, the more secure is the principle’s status as a legal norm of the system.

Because I cannot improve significantly upon this description, I want only to highlight two points. First, this is a positivist account because embeddedness is an explanatory, not justificatory, notion. It concerns, in some fashion, what judges (and others) do accept or how they do reason, not what they should accept or how they should reason.<sup>70</sup> Second, for a standard to be embedded in the legal materials does not require that it enjoy anything approaching the near-consensus support that Hart required,<sup>71</sup> and that some theorists hostile to the possibility of distinctly legal principles have thought essential to positivism.<sup>72</sup> As C.L. Ten emphasized, an intelligible version of positivism may tolerate “considerable disagreement among judges about what rules and principles are embedded in the legal sources.” But it is nonetheless “dependent on social practice—the practice of recognizing constitutional provisions, legislative enactments and judicial decisions, as well as what is embedded in them, as legal standards.”<sup>73</sup> Indeed, “[t]here is no important difference” between how Dworkin would assess fit “and the view of the legal positivist who extracts legal principles from legal sources in the manner [just] suggested. . . . Both appeal from the settled and explicit rules to what is embedded in them.”<sup>74</sup>

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<sup>69</sup> Sartorius, *supra* note \_\_, at 154-55. See also: ROLF SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* (1975) (“[A] principle is relevant if and only if, and to the degree to which, it enjoys what Dworkin aptly calls ‘institutional support.’”).

<sup>70</sup> Dworkin fails to appreciate this possibility in his response to Sartorius in *The Model of Rules II*. See DWORKIN, *supra* note 7, at 66-68.

<sup>71</sup> See e.g., Charles L. Barzun, *The Positive U-Turn*, 69 *STAN. L. REV.* 1323, 1355 (2017) (“under Hart’s view, where there is no consensus, there is no law”). To be sure, as Matthew Kramer has emphasized, Hart did allow for disagreement among officials regarding matters of detail. But Kramer’s point is that failures of consensus on details do not undermine the rule of recognition in its entirety, not that criteria unsupported by near-consensus can nonetheless form part of the rule of recognition or have legal force. KRAMER, *supra* note \_\_, at 84-88. That is, Kramer does not deny that, on the Hartian model, derivative norms cannot be grounded in practices that involve dissensus.

<sup>72</sup> See Alexander & Kress, *supra* note \_\_, at 767-68.

<sup>73</sup> Ten, *supra* note \_\_, at 530.

<sup>74</sup> *Id.* at 532. When further explicated, the notion of embeddedness will rely on some elements of coherence, and support some versions of coherence theories of law. See SARTORIUS, *supra* note \_\_, at 196-99. But I tread cautiously here, for existing coherence-based

To appreciate the difference between a model in which the social-factual grounds involve the taking up and embedding of principles (mine) and one that requires judicial near-consensus (Hart's), consider the familiar (putative) principles of American equal protection law customarily termed *colorblindness* and *anti-subordination*. They are frequently arrayed against each other in concrete legal disputes, especially concerning state-mandated preferences for racial minorities, making it possible, if not probable, that neither has ever attracted support from, or been accepted by, a super majority of judges or other legal elites. If legal principles depend for their existence on something approaching full agreement among members of one or another class of legal actors, then neither *colorblindness* nor *anti-subordination* (however the latter may be glossed) would qualify as a principle of American law.

But most constitutional lawyers would intuit that that's the wrong lesson. On the alternative Sartorius-Ten account, *both* are principles of our law. Each is a principle in virtue of having been invoked, relied upon, or used, as legal justification for judicial rulings. And each has become further embedded in our law to the extent that the decisions that have taken it up serve as support for additional judicial decisions, or are approved and championed by other legal (and popular) elites. Broadly, then, q may be grounded not only in acceptance or invocation of q itself, but also in acceptance, as legally correct, of decisions or rulings that q is understood to explain. In such fashion does a principle become embedded in the law, regardless of whether a head count would establish that nearly all judges accept it.

The most common worry about this part of the picture is not that positivist legal norms cannot be embedded in this (admittedly gestural) manner, but that such norms cannot have the dimension of weight. This was the chief objection to positivist legal principles that Larry Alexander and Ken Kress advanced in their aptly titled article, *Against Legal Principles*.<sup>75</sup> As they would summarize: "we cannot establish principles by agreement because we cannot establish their weights by agreement."<sup>76</sup>

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theories of law reflect, at turns, both unclarity and disagreement regarding the particular relata that must be brought into coherence. See generally Ken Kress, *Coherence*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY ch. 36 (Dennis Patterson ed. 2d ed. 2010); Veronica Rodriguez-Blanco, *A Revision of the Constitutive and Epistemic Coherence Theories in Law*, 14 *RATIO JURIS* 212 (2001). See also Susan Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 *OXFORD J. LEG. STUD.* 221 (1990).

<sup>75</sup> Alexander & Kress, *supra* note \_\_, at 761-64.

<sup>76</sup> Larry Alexander & Ken Kress, *Replies To Our Critics*, 82 *IOWA L. REV.* 923, 925 (1997).

Two responses. The first is technical. As we will see in Section 2.2, my account, unlike Dworkin's, does not require that the principles have varied weights. It could be that all fundamental principles have equal weight. All that is required is that their manner of determination (D2) is aggregative or, in any event, non-lexical.

In fact, though, I believe that fundamental principles often do vary in importance or weight. Thus the second response. Alexander and Kress explicitly assume a form of positivism in which fundamental legal norms can arise only by agreement or consensus about that fundamental norm.<sup>77</sup> Once we soften this supposed requirement, as the Sartorius-Ten picture proposes, then it is no longer difficult to envision rough weights emerging from judicial practice. As I have elsewhere argued:

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 decisionmaking. 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.<sup>78</sup>

Weights conferred in this manner will be rough at best (think: slight, moderate, weighty, very weighty, or nearly conclusive; *not* 12 or .68), and change in organic fashion that is usually gradual. A principle's relative weight ebbs and flows, much as its contours constrict and expand. Compare the principles that partially constitute a person's psychological or deliberative profile. Each of us acts upon a different bundle of ethical and practical principles—principles that favor keeping promises, trying new experiences, planning for the future, promoting justice, respecting one's elders, and so forth. The principles that make out an individual's psychological profile are not arrayed in a tightly structured hierarchy, let

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<sup>77</sup> Alexander & Kress, *supra* note \_\_, at 767 & n.106.

<sup>78</sup> Mitchell N. Berman, *For Legal Principles*, in *MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER* 241, 254 (Heidi Hurd ed., 2019). The gist of my argument there is that Alexander and Kress marshal forceful objections to Dworkin's picture of legal principles as suboptimal moral principles that morally justify legal rules and outcomes, but score no damage against a positivist picture in which legal principles, grounded in social facts, participate in the metaphysical determination of legal rules. Broadly similar verdicts are reached in Brian Leiter, *Explanation and Legal Theory*, 82 *IOWA L. REV.* 905, 906 (1997) (arguing that *Against Legal Principles* "is actually devoid of any arguments against the *existence* of legal principles"); Gary Lawson, *A Farewell to Principles*, 82 *IOWA L. REV.* 893 (1997).

alone once and for all. But they must exhibit a nontrivial degree of stability and consistency to underwrite personal integrity—in the sense of coherence, not moral worth. The same is true of legal systems, which is one kernel of truth underpinning Dworkin’s theory of law as integrity.

Return to our equality principles *colorblindness* and *anti-subordination*. If the disputes in which the two pull in different directions are reliably resolved in favor of *colorblindness* (assuming that other relevant principles are in rough equipoise), that very pattern of decisions would make it the case that it is (for the time being) the weightier principle.

## 2.2. How legal principles make legal rules

We now reach a further objection to a positivist picture that accommodates, let alone foregrounds, non-lexical determination—not that legal practices can’t deliver variably weighted principles, but that such principles as they may deliver cannot combine to determine anything resembling rules. The concern is just another instantiation of the demand that has been made of normative pluralists of all stripes, from W.D. Ross to Isaiah Berlin to Philip Bobbitt: to explain how the all-in derives from the contributory.<sup>79</sup> In the case of principled positivism, the challenge is to explain *how* legal “principles” (legal norms with possibly variable weights, grounded directly in practices of legal participants) combine to constitute or determine legal “rules” (determinate legal norms not directly grounded in taking-up practices) if *not* by collectively constituting a set of (necessary and) sufficient conditions. Baude and Sachs formulate this challenge to a preliminary sketch of my account vividly, wondering how a large number of variegated norms with diverse weights can determine or constitute more determinate legal norms (rules) “rather than merely make soup.”<sup>80</sup>

The obvious answer, one I’ve been previewing for many pages, is “by aggregation.” Rules and principles are types of norms; norms are kinds of forces or, at a minimum, can be fruitfully analogized to forces (they push or

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<sup>79</sup> Think of “the priority problem” that Rawls worries bedevils all forms of “intuitionism.” JOHN RAWLS, *A THEORY OF JUSTICE* chs. 7 & 8 (1971). The same concern underwrites doubts that non-classical accounts of concept structure are intelligible. See Davies, *supra* note \_\_; Margolis & Lawrence, *supra* note \_\_.

<sup>80</sup> Baude & Sachs, *supra* note \_\_, at 1489 (criticizing Berman, *supra* note \_\_); see also Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 521 (1998) (“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.”).

press or weigh or favor); and forces can combine by force addition.<sup>81</sup> This is Stephen Perry's approach. As Perry has explained, "the principles that are relevant to a particular situation are assumed to be commensurable and capable of being aggregated, along their dimension of weight, so as to produce an overall balance of principles."<sup>82</sup>

Imagine a legal-normative field defined by the poles "is legally prohibited" and "is not legally prohibited." Then consider any token act or event, *x*, that is a proper subject of the predicates that define the field. Any given legal principle, *P<sub>n</sub>*, will have no bearing on the status of *x*, or will bear constitutively for one of the polar properties or its opposite. The token *x* is thus assigned the legal property or status that corresponds to the greater net force of the principles.

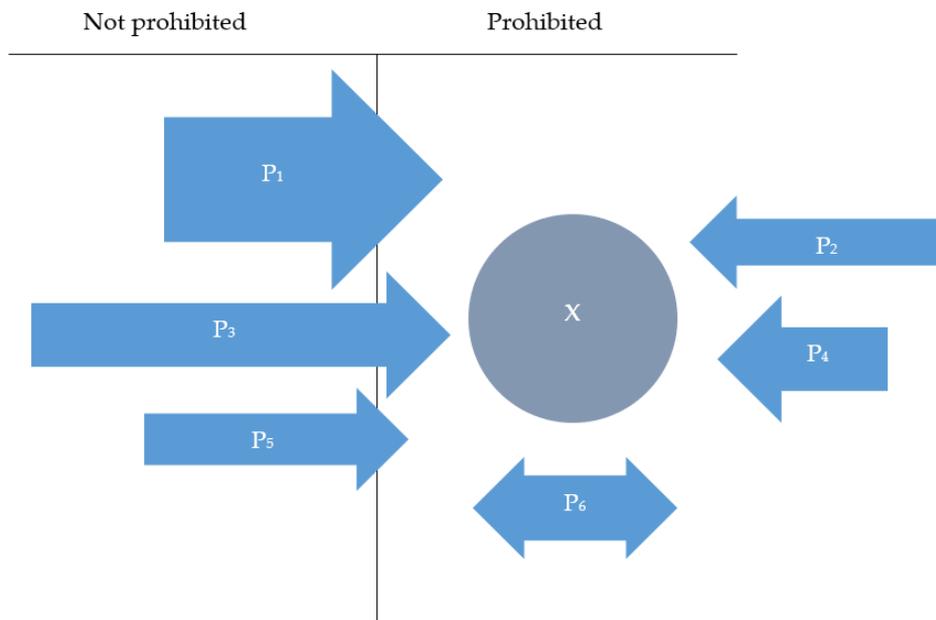
Figure 6 illustrates this dynamic, where the height of a vector arrow represents the principle's relative weight, its direction represents whether it militates for or against the legal permissibility of the conduct at issue under the circumstances, and its length represents the extent to which the principle bears toward one normative pole or the other given the relevant facts. Here are several things one can read off the graphic: *P<sub>1</sub>* and *P<sub>3</sub>* have the same "valence" with regard to *x*: they both bear toward its being prohibited. *P<sub>1</sub>* is a weightier principle than *P<sub>3</sub>*. *P<sub>3</sub>* is more fully activated against the permissibility of *x* than *P<sub>1</sub>* is; it exerts more of its potential force than *P<sub>1</sub>* does. A two-headed arrow, representing principle *P<sub>6</sub>*, has no net impact on the legal permissibility of *x* either because it exerts itself equally in both directions at once or because it doesn't bear at all.

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<sup>81</sup> See W.D. ROSS, *THE RIGHT AND THE GOOD* 28-29 (1930).

<sup>82</sup> Stephen R. Perry, *Two Models of Legal Principles*, 82 *IOWA L. REV.* 787, 788 (1997). See also Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 *S. CAL. L. REV.* 913 (1989).

### Non-lexical determination of rules by principles (fig. 6)



A legal rule is a description of the legal status of a contiguous stretch of tokens that share the same legal status. It reflects the normative status of an act *type*, where that status is derivative of the like statuses of all the tokens of that type. If [x<sub>1</sub> is prohibited] and [x<sub>2</sub> is prohibited] and [x<sub>n</sub> is prohibited], there will be some description of the act type X for which it is true that [X is prohibited]. The rule [X is prohibited] is the summary of a range of instances of [x<sub>n</sub> is prohibited] where each token prohibition obtains in virtue of the net bearing of the fundamental principles on x<sub>n</sub>. On this view, says Perry, a rule “is regarded as nothing more than a device of convenience, a kind of *aide-mémoire* for recording the perceived aggregate consequences of the various principles that bear on the resolution of a specific kind of dispute.”<sup>83</sup>

Perry is an anti-positivist. But nothing about the summary picture of rules just sketched is obviously uncongenial to positivism. The supposed trouble for positivism arises when we return to the problem of weights. The objection now becomes, not that principles can’t accrue weight or importance in the way described in Section 2.1, but that, as that discussion emphasized, such weights can only be rough, and that we need more determinacy if principles can jointly determine rules as the summary

<sup>83</sup> Perry, *Judicial Obligation*, *supra* note \_\_, at 225.

conception envisions. Perry encourages this line of argument, noting that “it is difficult to see how custom could be sufficiently nuanced as to be able to assign determinate weights to individual principles.”<sup>84</sup>

Whether his doubts are well-founded depends on how determinate principles’ respective weights must be, and the answer to that question is supplied by functional considerations: the weight of principles must be as determinate as need be for principles to do their job tolerably well. So the objection to a positivist picture of the determination of rules by the aggregation or accrual of weighted principles reduces (nearly?) to the claim that, on any reasonably contestable legal question, some principles will press one way, some will press the other, and their net impact, and thus the legal upshot, will too frequently be underdetermined, metaphysically and epistemically.<sup>85</sup> Thus would principles require more finely specified weights than practice can be expected to deliver.

I do not find this objection persuasive. For one thing, we should not assume that a roughly equal number of principles will routinely bear for and against competing candidate legal rules. In many cases, the sheer number of principles pointing one way will dwarf the number pointing against.<sup>86</sup> As significantly, the total force that a principle exerts on a given legal question is not determined exclusively by its weight. I have already noted that the force a principle exerts in a given context toward a determinate legal status (e.g., valid, prohibited, permitted) is a function of two variables, not one: the weight of the principle, and the extent to which the principle is (as I call it) “activated.”<sup>87</sup> Take a possible legal principle that

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<sup>84</sup> Perry, *Two Models*, *supra* note \_\_, at 794. As a second reason to doubt a positivist account predicated on the accrual of principles, Perry also agrees with Dworkin “that legal principles are in any event not treated by common-law judges as rooted purely in custom.” *Id.* (citing DWORKIN, *supra* note 7, at 43-44, 64-65). But the fact that judges invoke moral arguments when trying to establish that a putative principle is a legal principle of the jurisdiction, or has this or that weight, does not prove that those arguments are good ones, that they do go toward establishing what they purport to establish. As I argue in *Dworkin versus Hart Revisited*, judicial practices ground principles, while the fact that judges believe these principles are morally good causally explains the judicial practices that are the grounds.

<sup>85</sup> See, e.g., SARTORIUS, *supra* note \_\_, at 193-94.

<sup>86</sup> Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (arguing that the recognized “modalities” of American constitutional argument usually align, or can be viewed as aligning, even in hard cases). I’ll return briefly to Fallon’s claim about American constitutional practice at the close of section 3.3.

<sup>87</sup> Cf. Robert Alexy, *Formal principles: Some replies to critics*, 12 INT’L J. CON. L. 513 (2014) (defining the “concrete weight” that a principle exerts in context as a function of, inter alia,

provides that *historical practice matters*. The total force this principle exerts in favor of the putative legal fact [x is legally permitted] will depend on how long and widespread the practice of xing has been. A principle that gives effect to some communicative content of a text activates more fully the clearer that content is. Weight may be constant across contexts—though *not* over time<sup>88</sup>—while *activation* is context-sensitive. Given the role played by context-variant activation, the net force of principles may well yield rules determinately even when particular principles’ relative context-invariant weights are highly uncertain—which is not to deny that *some* under-determinacy, possibly substantial, will remain.<sup>89</sup>

The difference between what I am calling “weight” and “activation,” though widely overlooked, is of great importance. Alexander and Kress, the arch-critics of legal principles, assert that, “[b]ecause principles’ weights vary in different concrete contexts, a complete account of principles requires differing weights for every conceivable context.”<sup>90</sup> But that’s mistaken. What’s required is that the *force* that a principle exerts can vary across contexts, not that its *weight* does. An analogy: the mass of a body and thus the gravitational force it has the capacity to exert is not contextually variant, though the gravitational force that it does exert on an object in a given context also depends on its distance to that object, which is context-variant. This is a pregnant comparison, for artificial normative systems can be conceptualized in terms of normative fields, analogous to gravitational fields. Normative fields are created and sustained by a convergent practice among participants or “subscribers” in more or less the way described by Hart’s rule of recognition. Principles are constituted by the taking-up behaviors of the system’s subscribers (or of some subset). Principles operate within the normative field much as masses do within a gravitational field.

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the principle’s “abstract weight” and the “intensity of interference” with the principle under the circumstances).

<sup>88</sup> This follows from the facts that principles, and their weights, are grounded in human behaviors, and that human behaviors are inescapably dynamic.

<sup>89</sup> To be clear, I am addressing the worry that the balance of principles will be under-determinate in a great many cases—many more than would be consistent with widespread judgments among sophisticates regarding the actual extent of legal under-determinacy. I am not responding to Dworkinian anxiety that there will be *some* under-determinacy and therefore that the picture I’m presenting leaves some room for judicial discretion. I share the common judgment that a positivist “can reject the model of rules, yet accept the doctrine of judicial discretion.” Lyons, *supra* note \_\_, at 422. Just as significantly, the thought that discretion begins where already determined law ends is untrue to the relevant phenomenology. When struggling toward the law in difficult cases, judges do not experience a clean divide between (1) trying to ascertain existing law and (2) creating new legal norms. See Sartorius, *Social Policy and Judicial Legislation*, *supra* note \_\_, at 156-60.

<sup>90</sup> Alexander & Kress, *Replies*, *supra* note \_\_, at 924-25.

Rules are articulable descriptions of stretches of the curvature of the normative field that the principles effect.<sup>91</sup>

One final analogy, this time from the study of Multiple-Criteria Decision Analysis (MCDA) and Multi-criteria Analysis (MCA) in such fields as decision theory, management science, and fuzzy logic. As the names suggest, MCDA and MCA concern how decision makers should reach overall assessments about the relative value ranking of options that implicate a multiplicity of criteria, factors or attributes.<sup>92</sup> Although not yet well known in law and legal theory, the field is many decades in development and its tools and methods are routinely deployed across industry, finance, science, and governance, on questions ranging from how to build an investment portfolio to where to locate an airport to which students to admit to a graduate program.<sup>93</sup> The simplest and most widely used of all MCDA and MCA models is simple additive weighting (SAW) and its variants.<sup>94</sup> Wrinkles aside, a decisionmaker employing SAW “directly assigns weights of relative importance to each attribute” and then obtains a total score “for each alternative by multiplying the importance weight assigned for each attribute by the scaled value given to the alternative on that attribute, and summing the products of all attributes.”<sup>95</sup> The simple model I adapted from Perry as an example of how principles can aggregate to determine summary rules is little more than the conversion of a powerful widely used decisionmaking protocol into a model of the metaphysics of artificial normative systems.

### 2.3. On the determination of the determination function

The argument to this point explains how variably weighted norms grounded in legal practice, by being taken up and further embedded, could aggregate to determine decisive summary norms. But even if determination

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<sup>91</sup> I doubt that this model of determination is properly classified as aggregation, which helps explain why I locate the critical distinction among modes of determination (Section 1.2) at a higher level of generality.

<sup>92</sup> A useful introduction and overview is PAUL GOODMAN & GEORGE WRIGHT, *DECISION ANALYSIS FOR MANAGEMENT JUDGMENT* (4<sup>th</sup> ed. 2009).

<sup>93</sup> See BENGT LINDELL, *MULTI-CRITERIA ANALYSIS IN LEGAL REASONING* 8-9 (2017) (noting that “while the volume of literature in its own field of knowledge is extensive, there is very little written in legal literature about MCA and fuzzy logic,” and speculating that the literature’s relative formal and scientific language has impeded its reception by lawyers and legal scholars).

<sup>94</sup> See, e.g., Lazim Abdullah & C.W. Rabiatal Adawiyah, *Simple Additive Weighting Methods of Multi criteria Decision Making and Applications: A Decade Review*, 5 *INTL. J. INFO. PROC. & MGMT.* 39 (2014).

<sup>95</sup> LINDELL, *supra* note \_\_\_, at 48.

of this sort is possible, is it actual? What would make it the case that principles do aggregate in this fashion, either generally or in a given legal system? After all, an aggregative system could take many forms. It could incorporate thresholds or eschew them. It could involve more complicated operators, such as the multipliers, enablers, and defeaters familiar from current theories of practical reasoning.<sup>96</sup> It could be only partially aggregative, including lexical features too. What makes it the case that a given legal system *S* maps principles to all-in legal facts, and thus summary rules, *this* possible way rather than *that* possible way? If it is true that *R* is a rule of *S* if the aggregate force of principles favoring *R* exceeds the aggregate force of principles favoring  $\neg R$ , in virtue of what would this be so? What determines the determination function between fundamental norms and derivative ones?

The answer, I think, has two components. The first traces, once again, to insights supplied by an anti-positivist—this time Mark Greenberg. Greenberg has persuasively argued in an important paper that it is part of the nature of law and legal systems that the determination relationship between practices (or practice facts, in the terminology that Greenberg prefers) and legal norms must satisfy what he calls “the rational-relation doctrine,” which provides that “the content of the law is in principle accessible to a rational creature who is aware of the relevant law practices.”<sup>97</sup> Macrophysical properties such as hardness and brittleness are determined by microphysical facts involving the arrangement of a substance’s molecules. That determination relationship can be brute: it can be a fact about the universe that this or that arrangement of molecules grounds this or that macrophysical property even if it were opaque to us why *this* arrangement determines *that* property. Law, Greenberg argues, is different. “[T]hat the law practices support *these* legal propositions over all others is always a matter of *reasons*—where reasons are considerations in principle intelligible to rational creatures.”<sup>98</sup>

Greenberg emphasizes that the rational relation doctrine does not itself resolve the debate between positivism and anti-positivism: “it is an open

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<sup>96</sup> See generally LORD & MAGUIRE, *supra* note \_\_; DANCY, *supra* note \_\_, ch. 3. The example best known to legal scholars is Raz’s “exclusionary reasons,” JOSEPH RAZ, PRACTICAL REASON AND NORMS 35-48 (1975) (1990).

<sup>97</sup> See Greenberg, *supra* note 1, at 237. This article’s title signals both my debt to Greenberg’s and the nature of my disagreement.

<sup>98</sup> *Id.* As he further explains: “lawyers believe that when they get [the law] right, the reasons they discover are not merely reasons for believing that the content of the law is a particular way, but the reasons that *make* the content of the law what it is. . . . [L]awyers take for granted that the epistemology of law tracks its metaphysics. And the epistemology of law is plainly reason-based.” *Id.* at 239.

question whether there are non-normative, non-evaluative facts that could constitute reasons for legal facts—and indeed whether there are value facts that could do so.”<sup>99</sup> I agree. But he is driven to anti-positivism because, he believes, “[i]t turns out that value facts are needed to make *intelligible* that law practices support certain legal propositions over others.”<sup>100</sup> That I deny. I see no reason to anticipate that determination of legal facts by aggregation of principles grounded in practice leaves an intelligibility deficit.<sup>101</sup> Rather, the rational relation doctrine itself—understood as an aspect of law’s nature—strongly favors some mappings over others. The more complex a mapping, the greater it threatens the ability of participants in legal practice to reason from the contributory to the all-in. Because no mechanism or mapping is more intuitive or intelligible than simple aggregation (there is a reason why SAW is widely heralded as the most user-friendly and “robust” of MCA models<sup>102</sup>) we might expect it to be the default mode in a complex, comprehensive and decentralized legal system.

Second and notwithstanding, to describe simple aggregation as the likely default in a mature, complex, and decentralized legal system is not to deny that such a system could incorporate other mappings. I suspect that they can and do. What determines the particulars of a mapping are the same broad type of practice facts that ground the principles themselves. That is, the taking-up behaviors of participants ground not only the fundamental principles of a legal system, but also the “meta-principles” that bear on their interaction. Or, to shift terminology, helping to establish the particular mapping of principles to rules that obtains in a given legal system is one possible function of what Andrei Marmor calls “deep conventions.”<sup>103</sup> For example, if a “meta-principle” or “deep convention” were to arise in S to the effect that there is a uniquely right legal answer to (almost) all legal questions, that would have a bearing on how principles in S accrue: it would exert pressure toward mappings that facilitate more determinate rules and against mappings that would yield greater indeterminacy. This is why figure 5 depicts practices as playing a role in the determination, not only of fundamental legal principles, but also of the determination function that maps such principles to derivative legal rules.

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<sup>99</sup> *Id.* at 233.

<sup>100</sup> *Id.* at 240.

<sup>101</sup> Here I am in broad agreement with Chilovi & Pavlakos, *The Explanatory Demands of Grounding in Law*, *supra* note \_\_. I interpret Greenberg as arguing for explanation in their “weak sense,” and I share their judgment that positivism can supply it.

<sup>102</sup> See, e.g., Lindell, *supra* note \_\_, at 47.

<sup>103</sup> See generally ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW* ch. 3 (2009).

These practices, moreover, are responsive to ordinary human needs and interests. As a thought experiment,<sup>104</sup> suppose that legal system S begins life with only a single determinant at the fundamental legal level—that is, a single determinant that is directly grounded in practices: [for all p, p is a rule of S if the constitutional text says p (or if p follows from what the text says)]. It is exceedingly unlikely that a mature or complex legal system will recognize only a single legal factor. This is because some legal rules that arise by application of a single factor will prove unacceptable to most judges (or, they will be unacceptable to many citizens, and judges change their practices in response to social unrest or dissatisfaction when it exceeds a certain level). Suppose, for example, that what the text says yields legal rules such as [states are permitted to racially segregate the public schools] or [states are permitted to establish official churches] or [the federal government lacks power to regulate sources of air pollution]. Discomfort with such outcomes can be sufficiently broad and intense to cause judges to recognize and accept additional factors. The system will evolve from recognizing a single factor to recognizing a plurality of factors, such as, for purposes of illustration: [what the text originally meant], [what the text means to an ordinary contemporary reader], [what the authors of the text intended to do or accomplish], [what our stable practices have been], [what the courts have held], [what justice requires], etc.

If this is right, the next question concerns what will be the character or mode of the function that maps the plurality of factors to decisive legal norms in a system that has, in virtue of the speech acts of the relevant legal actors, established a plurality of fundamental legal determinants. The standard view among legal positivists, following Hart (or their reading of Hart), is that the plurality of grounds are necessarily arrayed into a lexical ordering, which can be represented as a complex if-then statement.<sup>105</sup> I draw attention to the alternative possibility that the factors are weighted and determine derivative legal norms by aggregate force, akin to the way that Simple Additive Weighting is understood to underwrite or recommend a decision. No doubt the mix that emerges in any legal system is contingent on a great many variables—size and heterogeneity of the population,

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<sup>104</sup> Cf. HART, *supra* note \_\_, at 100-01.

<sup>105</sup> Some orthodox positivists will object that this reading of Hart is a misreading, and that his notion of “validation” did not presuppose what I have called lexical determination. I address this objection elsewhere, noting that many theorists are skeptical that non-lexical determination is workable and that, if Hart meant to embrace it neither he nor his followers have addressed those concerns. See *Dworkin vs. Hart Revisited*, *supra* note \_\_, Section 4.3. In any event, I’m more interested here in the state of jurisprudential thinking than in Hart exegesis. See *supra* note \_\_.

responsiveness of the legal system to the populace, age of the system, scope of the system's regulatory reach, amenability of the central legal instruments to prompt purposive change, and so forth. You can speculate as well as I about what practices are likely to emerge under what conditions.

But one advantage of the non-lexical model warrants emphasis: it demands less coordination among the participants whose behaviors ground the determination. Lexical determination requires that any condition sufficient to confer legal status must enjoy clear majority endorsement or acceptance, else two contradictory rules could both be valid law. Were acceptance by a (substantial) minority of judges sufficient to ground the rule that *p* is the law if *C1*, and acceptance by a different (substantial) minority sufficient to ground the rule that *q* is the law if *C2*, then *p* and *q* would both be the law if *C1* and *C2* jointly obtain even if *p* and *q* are mutually incompatible. That would be untenable. Nonlexical determination by weighted principles can deliver law when practices are less uniform. If a minority of judges take up, thus ground, principle *P1* and a different minority of judges take up, thus ground, a conflicting or inconsistent principle *P2*, the consequence is only that they might cancel each other out in a given case, each rendering the other constitutively inert. The conflicting principles would *not* thereby determine conflicting normative verdicts, as would be true of lexical determination. This is important because it shows that it's no happy accident that principled positivism can address *both* Dworkinian challenges to Hart's version. While opening positivism to nonlexical determination directly addresses Dworkin's *challenge from principles*, that adjustment at the same time permits a relaxation of the demand that the fundamental legal materials enjoy supermajority official support, which is a precondition to meeting the challenge of too-little law.

At this point, it seems to me, we have all the rudiments of a positivist account of legal content adequate to meet Dworkin's *challenge from principles* and *challenge of too-little law*. Fundamental norms are grounded in speech acts of legal actors. These norms gain rough variable weights in essentially the same way that they gain their contents. Weighted norms can determine the legal status of tokens by simple weighted aggregation, or by more complicated interactions, as the nature of legal systems and the meta-principles or deep conventions of the system collectively determine. Rules reflect or capture a describable set of tokens that share legal status. Is this a complete account? No. Does detail remain to be filled in? Sure. But that's true of every extant constitutive theory of legal content.<sup>106</sup> The present task

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<sup>106</sup> Greenberg acknowledges that his own affirmative anti-positivist constitutive theory ("the moral impact theory") depends upon an account, not yet developed, of "the legally

is not to try to prove out principled positivism, but to make it a plausible and promising candidate, worthy of attention by jurists and other metanormative philosophers.

Scholars attuned to this account will find plenty of judicial support for it. Elsewhere, I show that many and significant constitutional decisions by the U.S. Supreme Court are most perspicuously understood in line with this model.<sup>107</sup> But the account is not particular to the U.S. legal system. A particularly revealing recent example from Britain is the unanimous opinion of the U.K. Supreme Court holding that Prime Minister Boris Johnson's advice to the Queen to prorogue Parliament was legally invalid, rendering the purported prorogation a nullity.<sup>108</sup> That conclusion rested on two planks. First, "the United Kingdom . . . possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice," one which "includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles."<sup>109</sup> Second, "the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, *and indeed determined*, by the fundamental principles of our constitutional law."<sup>110</sup> The view, in short, is that the fundamental legal principles are embedded in legal practice, and that they combine or interact to determine legal rules. The Court could then ascertain what the rule governing prorogation is once it identified what the U.K.'s fundamental constitutional principles are.<sup>111</sup>

#### 2.4. Of promulgated rules and summary rules

The preceding analysis explains how principles aggregate to ground legal rules via their power to determine, non-lexically, the legal status of act and event tokens. You might worry that this gets things backwards, that the legal property or status that a token act or event possesses should be a function or *consequence* of the applicable legal rule, if there is one, not a

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proper way" that legal institutions act to change "the moral profile." See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1323 (2014).

<sup>107</sup> Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018); Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST'L L.Q. 311 (2018).

<sup>108</sup> R (Miller) v. the Prime Minister, [2019] UKSC 41.

<sup>109</sup> *Id.* ¶ 39.

<sup>110</sup> *Id.* ¶ 38 (emphasis added).

<sup>111</sup> For a fascinating example from a civil law country, see the 2018 decision from France's Constitutional Council holding that the principle of fraternité barred prosecution under a statute making it a crime to help migrants entering the country illegally. M. Cédric H. et al., Decision No. 2018-717/718 QPC (July 6, 2018).

determinant or *input to* the applicable legal rule. I address that concern here, by distinguishing two kinds of rule, what I will call “summary” (or “resultant”) rules and “promulgated” (or “contributory”) rules.

A summary rule reflects the actual normative state of affairs. The preceding subsections explain its emergence. A promulgated rule, in contrast, is an effort to change the normative state. To a first approximation, the promulgated rule is what is said or asserted in a statute. Resultant rules are summaries of the aggregate impact of principles, whereas promulgated rules are among—possibly chief among—the facts upon which principles operate.

Take a statute in legal system S that asserts that “q is prohibited.” If the only fundamental legal norm in S provided that legal norms are all and only what authoritative legal texts assert, then (conflicting assertions aside), it would be a derivative legal rule in S that q is prohibited. There would be no daylight between the promulgated rule and the summary rule, in which case our inclination to treat the promulgated rule as *the* rule (unmodified) would be wholly vindicated.

In complex mature legal systems, however, the fundamental norms will be plural and (very likely) weighted. Almost certainly, fundamental principles will provide that communicative contents of statutory texts have great legal force. (The text will be among the “legally relevant phenomena” that, as figure 6 represents, combines with the principles to determine derivative legal facts.) Thus, and again, the status of tokens will be substantially shaped by the promulgated rules. But because other principles are in play, it might not be the case that every token’s status is what the promulgated rule directs, in which case the summary rule will depart, if only a little, from the promulgated one. This is why summary (resultant) rules closely track, but are not identical to, promulgated (contributory) ones.

### **3. Principled Positivism at Work**

This section turns to concrete legal disputes. It aims to advance understanding of principled positivism by illustrating how it can explain legal content, even in disputed cases, and to better reveal some of the account’s relative merits. Section 3.1 discusses the U.S. Supreme Court’s decision in *TVA v. Hill*, the “snail darter case” that we encountered in Section 1.3, in connection with Dworkin’s ill-fated *challenge from theoretical disagreements*. I’ll show, against Dworkin, that principled positivism makes the disagreements in that case perfectly intelligible. Section 3.2 turns to the

Supreme Court's same-sex marriage decision, *Obergefell v. Hodges*, a textbook casualty of Dworkin's *too-little-law challenge*. Here I show that principled positivism can deliver law where Hartian positivism cannot. Pivoting from constitutional rights to constitutional structure, section 3.3 examines the Court's yet more recent decision in the "faithless electors" case, *Chiafalo v. Washington*. It highlights that a plurality of fundamental factors can generate determinate legal conclusions even when they press in divergent directions and without assuming lexical ordering.

### 3.1. Snail darters revisited: explaining theoretical disagreements

The federal Endangered Species Act of 1973 (ESA) is one of the nation's signature environmental protection statutes. It directs the Secretary of the Interior to identify threatened species and their critical habitats, and imposes extensive public and private obligations and prohibitions that such designations trigger. Section 7 provides that all federal departments and agencies shall "tak[e] such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction" of such habitats.<sup>112</sup>

In 1967, The Tennessee Valley Authority, a federally owned corporation, had started constructing a dam on the Little Tennessee River to generate hydroelectric power and to promote regional economic development. Six years in, scientists discovered in the river a previously unknown species of perch, the snail darter. In 1975, two years after the Act's enactment, and eight years after construction of the Tellico Dam had commenced, the Secretary of the Interior listed the snail darter as endangered and the Little Tennessee as its critical habitat. The issue was thus posed: does the ESA require that construction on the dam cease when nearing completion after public expenditures of nearly \$80 million?

In *TVA v. Hill*, a divided Supreme Court held that it does. As discussed earlier (Section 1.3), that decision serves in *Law's Empire* as a central recurring example designed to cause trouble for positivism and to furnish support for Dworkin's own competing anti-positivist theory, "law as integrity." The thrust is that the disagreement between Chief Justice Warren Burger's majority opinion and Justice Lewis Powell's principal dissent (joined by Justice Harry Blackmun) is inexplicable on positivist

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<sup>112</sup> 16 U.S.C. § 1536.

premises, but makes perfect sense if viewed through Dworkin's competing theory of law.

I argued earlier that Hartian positivists can explain the disagreement. Because Hart's theory does not require that the participants whose behaviors constitute the rule of recognition understand its mechanics, both Burger and Powell could have been genuinely unaware that neither side's "theory of legislation" could be legally correct given its rejection by the other. But that doesn't mean that the challenge is entirely inert. Even if Hart's account does not require that judges understand how his system works, and even though knowledge can't be attributed to them on purely semantic bases, one might nonetheless think that if, as Hart's theory maintains, derivative legal rules are validated by criteria grounded in judicial near-consensus, many sophisticated participants, including Supreme Court justices, would ferret that out. So theoretical disagreements of the sort that supposedly mark *Hill* are somewhat surprising and disconcerting even if possible.

Principled positivism can explain these disagreements better. To see how, we need a fuller understanding of the opinions than Dworkin's abbreviated and possibly misleading summary conveys. Burger did not adopt what Dworkin called "the excessively weak version" of intentionalism in statutory interpretation, pursuant to which judges are obligated to follow clear "acontextual" statutory meaning unless "the legislature actually intended the opposite result."<sup>113</sup> And Powell did not reason that courts must avoid an absurd result unless it's clear that the legislature intended it. Instead, both opinions recognized the same three principles as existing in our legal system and as at least potentially bearing on the legal status of the token act. These principles concern communicative contents of the statute, legal and application intentions of the enacting legislature,<sup>114</sup> and the public good (as an ordinary person or legislature would view it). Because principles lack canonical formulation, these, like all, can be rendered in diverse ways. But here's a first try: *what the statutory text means matters; legal intentions of the enacting legislature have force; absurd results should be avoided*. Perhaps the justices disagree about these principles'

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<sup>113</sup> *Id.* at 22.

<sup>114</sup> For introductions to differences among types of intention—semantic, communicative, legal, application—see Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 796-99 (2017).

relative weights. More conspicuously and consequentially, however, they disagree about the extent to which each principle was activated.

Let's take the principles one at a time. The justices' disagreement over the meaning of section 7 is straightforward. As the majority saw things, "the explicit provisions of the Endangered Species Act require precisely [that dam construction cease]. One would be hard pressed to find a statutory provision whose terms were any plainer."<sup>115</sup> Powell thought otherwise. Agreeing with the majority that "[t]he starting point in statutory construction is" the statutory text, he found the language "far from 'plain.'"<sup>116</sup> His thought (expressed somewhat obscurely) appears to be that Section 7 would more clearly direct the result the majority ruled that it did if it explicitly enjoined federal agencies to take action "necessary to insure that actions authorized, funded, carried out, or completed by them do not jeopardize" endangered species or their habitats. But that's not what the section says. Therefore, it "can be viewed as a textbook example of fuzzy language, which can be read according to 'the eye of the beholder.'"<sup>117</sup>

Now turn to the Justices' views about congressional intent. This is more subtle, and requires unpacking. Recall that the ultimate issue in a litigated case is particular, not general; it's about tokens, not types. In this case, the issue was whether the ESA required cessation of the Tellico dam project. What content would congressional intent have to have to underwrite an affirmative answer? Consider three possibilities, in order of increasing generality. Congress might have intended that section 7 would apply (a) even to the Tellico Dam Project, (b) even to projects that are close to completion at the time that the Secretary of the Interior lists a species as endangered or its habitat as critical, or (c) even when its application would incur great immediate or localized costs. All members of the Court agreed that the Congress that enacted the ESA lacked any intention with content (a) or (b).<sup>118</sup> At the same time, the majority insisted, and the dissent did not deny, that the enacting Congress did have intention (c).<sup>119</sup> What divided the

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<sup>115</sup> 437 U.S. at 173.

<sup>116</sup> 437 U.S. at 205 (Powell, J., dissenting).

<sup>117</sup> 437 U.S. at 202 (Powell, J., dissenting).

<sup>118</sup> See 437 U.S. at 184; 437 U.S. at 207-08 (Powell, J., dissenting).

<sup>119</sup> E.g., 437 U.S. at 177 ("The dominant theme pervading all Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.") (citation omitted).

majority and dissent was whether intention (c) entailed or encompassed intention (a).

Burger thought that it did because intention (a) plainly falls within intention (b), and (b) does not differ in any material way from other subclasses of cases that fall under (c). Powell thinks that the slide from (c) to (b) (and thereby to (a)) is more fraught than the majority recognizes.<sup>120</sup> Nearly completed projects comprise a subclass of cases captured by (c), but one with distinctive features not shared by all subclasses of (c), namely that the costliness, and thus *potential* absurdity, of abandoning nearly completed projects is manifest. What should the government do in such cases? Spend additional funds to undo what it had already done? Leave a nearly completed but unusable dam standing, as a constant reminder to the community of the costs it has already sustained for promised benefits that will never materialize?<sup>121</sup> Because abandoning nearly completed projects might reasonably strike citizens and their representatives as more foolish or costly than not starting them, notwithstanding the economic logic that renders “sunk cost” reasoning fallacious, congressional intent (c) does not entail congressional intent (b), therefore does not entail congressional intent (a). It follows, according to Powell, that there was no actual congressional intention relevant to this dispute—no intention either that completion of the Tellico dam project would be illegal or that it would not be.<sup>122</sup>

So much for the opinions’ disagreements regarding the first two principles or considerations: statutory plain meaning, and the legislature’s

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<sup>120</sup> See 437 U.S. at 207 (Powell, J., dissenting) (criticizing the majority for “nowhere mak[ing] clear how the result it reaches can be ‘abundantly’ self-evident from the legislative history when the result was never discussed”).

<sup>121</sup> See 437 U.S. at 210 (Powell, J., dissenting) (“[F]ew members of Congress will wish to defend an interpretation of the Act that requires the waste of at least \$53 million . . . and denies the people of the Tennessee Valley area the benefits of the reservoir that Congress intended to confer. There will be little sentiment to leave this dam standing before an empty reservoir, serving no purpose other than a conversation piece for incredulous tourists.”).

<sup>122</sup> Powell actually sends conflicting signals on just this point. Much of his analysis aims to establish that Congress lacked an actual intention that the Act would “apply to completed or substantially completed projects.” 437 U.S. at 196 (Powell, J., dissenting). But some language suggests the stronger conclusion that Congress possessed an actual intention that the Act *not* apply to such projects. See, e.g., 437 U.S. at 210 (identifying “strong corroborative evidence that the interpretation of § 7 as not applying to completed or substantially completed projects reflects the initial legislative intent.”) On balance, I think that the former and weaker proposition better accords with Powell’s opinion as a whole. Note, for example, his conclusion that “I had not thought it to be the province of this Court to force Congress into otherwise unnecessary action by interpreting a statute to produce a result no one intended.” 437 U.S. at 210-11. Had he really endorsed the more aggressive position regarding congressional intent, this passage should have read “. . . to produce a result contrary to what it intended.”

legal intention. What about the third, *avoid absurdity* (or *comport with common sense*)? Having concluded that the weightiest considerations do not clearly resolve this dispute—they do not activate nearly as forcefully against completion of the dam as the majority believed—Powell embraced *avoid absurdity* enthusiastically. While acknowledging this principle’s subordinacy to the first two, Powell nonetheless found it greatly activated.<sup>123</sup>

The majority is more circumspect, not surprisingly. Having determined that the most important principles pressed forcefully and in concert against permissibility, it didn’t need to examine the possible import of a palpably less weighty principle. Still, there is some intimation in the majority opinion that *avoid absurdity* would have some force in a dispute with respect to which meaning and intent were more equivocal.<sup>124</sup>

In sum, here’s how the dispute looks according to principled positivism. Burger believed that the “meaning” of the statute and the enacting Congress’s legal intent are both pellucid and that both direct that dam construction must cease. Whether or not this result would flout common sense, the *avoid absurdity* principle could not possibly overcome the combined force of the textualist and intentionalist principles. Powell believed that the statutory meaning was much less clear than Burger did and that Congress did not actually intend the legal results that Burger claimed. At the same time, he thought, *avoid absurdity* pressed very strongly in the other direction. Because the principles that militated against the legal permissibility of completing the dam did so with much less aggregative force than the majority believed, the principle that militated forcefully in

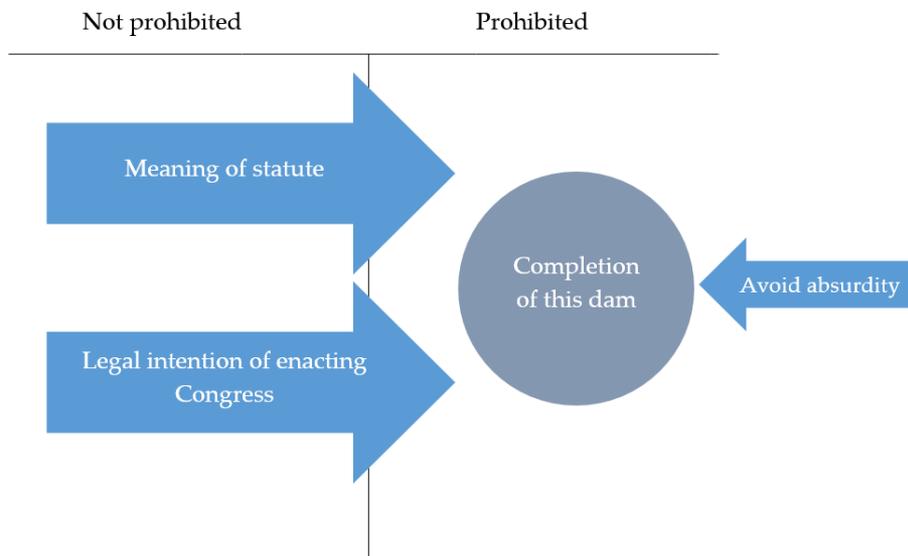
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<sup>123</sup> 437 U.S. at 196 (Powell, J., dissenting) (“If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.”)

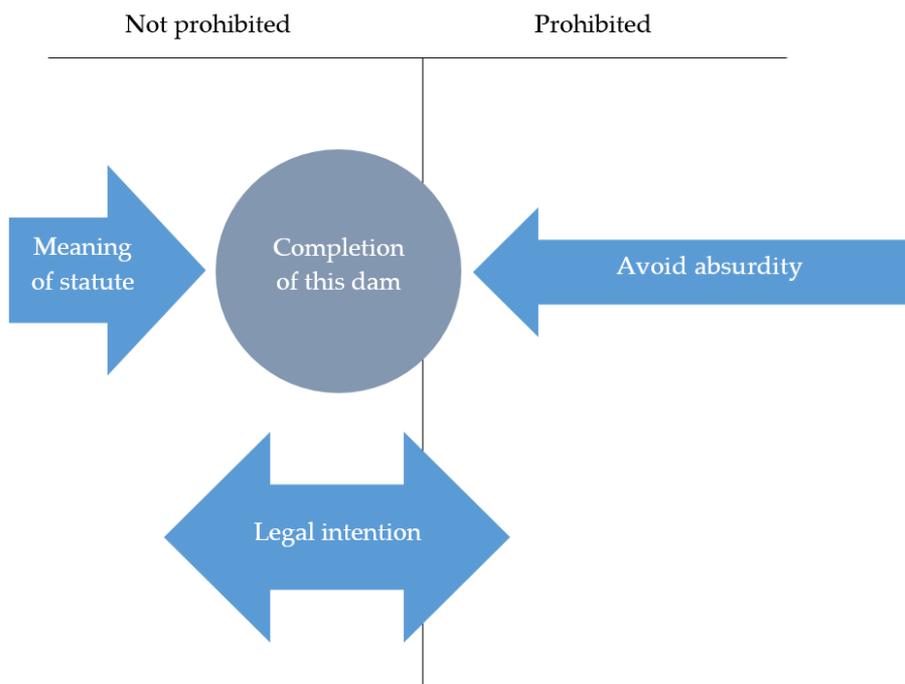
<sup>124</sup> This too is ambiguous. Burger’s opinion can be read either as suggesting that *avoid absurdity* is a subordinate principle of our legal system that can have effect when the actual legal intention of the enacting legislature is uncertain, or as denying that it is a principle of our legal system at all. Compare, e.g., 437 U.S. at 195 (contending that “in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with ‘common sense and the public weal’”) with 437 U.S. at 194 (observing that “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities,” and asserting that judicial “appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute”) (emphasis added).

favor of the permissibility of project completion could carry the day. Figures 7 and 8 represents these competing positions, cleaned up a bit.<sup>125</sup>

*TVA v. Hill, per the majority* (figure 7)



*TVA v. Hill, per the dissent* (figure 8)



### 3.2. Same-sex marriage before *Obergefell*: delivering more law

Consider next whether states are constitutionally required to recognize same-sex marriages on the same terms as they recognize opposite-sex marriages. Call the affirmative proposition *same-sex marriage*. When the Supreme Court took up the question, in *Obergefell v. Hodges*,<sup>126</sup> many people believed that the Court should rule for the plaintiffs on the (minimally realist) ground that *same-sex marriage* was already true (though not authoritatively *declared* to be true). Was it? Was this a compelling claim, or even a plausible one?<sup>127</sup>

Recall my earlier contention (§ 1.2) that Hartian validation depends upon satisfaction of any (complex) criterion that concordant acceptance picks out as sufficient. As it operates in Hart's account (and putting defeasibility aside), *q* is a norm of legal system *S* if *C*<sub>1</sub> or *C*<sub>2</sub> or *C*<sub>3</sub> or . . . *C*<sub>*n*</sub>, where each condition *C* can itself be a complex combination of conjuncts and disjuncts and is grounded in the practices that make out the rule of recognition of *S*.<sup>128</sup>

An orthodox Hartian sympathetic to *same-sex marriage* even prior to its endorsement in *Obergefell* might reason along the following lines: *q* is a legal norm in the U.S. if:<sup>129</sup>

- C*<sub>1</sub> [the Supreme Court has held *q* in a non-overruled decision] or
- C*<sub>2</sub> [*q* is the plain original meaning of a provision of the constitutional text and no decision of the Supreme Court (not itself overruled) holds or clearly says  $\neg q$ ] or
- C*<sub>3</sub> [the authors and ratifiers of the constitutional text intended to codify *q* and the nation has observed a consistent practice of respecting *q*, and both *q* and  $\neg q$  are comparably compatible with the ordinary

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<sup>125</sup> Some cleaning up or smoothing out is required by the uncertain and conflicting features of the opinions, including but not limited to the matters flagged in notes \_\_\_ *supra*.

<sup>126</sup> 576 U.S. 644 (2015).

<sup>127</sup> This section draws from Berman, *Our Principled Constitution*, *supra* note \_\_, at 1406-08, and Berman & Peters, *Kennedy's Legacy*, *supra* note \_\_ at 366-68. Readers of those earlier efforts will notice that the diagrams I use here to represent the bearing of principles on the legal status of act or event tokens differs from the ones used in those earlier articles. As I previously explained, the two representations are interchangeable, *see Our Principled Constitution*, *supra*, at 1394 n.219. My instinct is that some readers will find the earlier diagrams somewhat more intuitive, but that these are more faithful to the underlying dynamics and preferable on balance.

<sup>128</sup> For an argument that these criteria need not refer only to matters of "pedigree," not content, *see* Berman, *Dworkin versus Hart Revisited*, *supra* note \_\_, at section 4.A.

<sup>129</sup> *See supra* text accompanying note 38.

meaning of the constitutional text and with all (non-overruled) Supreme Court holdings] or

C4 [q is required by a posture of equal respect for human dignity and q is not clearly contradicted by any (non-overruled) Supreme Court decision] or

C5 [q best promotes human flourishing and is not contradicted by the contemporary naïve meaning of any provision of the constitutional text] or . . .

Cn.

The problem for any Hartian who believes that the ruling in *Obergefell* was legally correct (and that a contrary ruling would have been legally incorrect) is that the sufficient conditions that plausibly are supported or recognized by a convergent consensus among judges—conditions such as C1, C2, and C3—do not plausibly validate *same-sex marriage*, while conditions that do plausibly validate *same-sex marriage*—conditions such as C4 and C5—are pretty clearly not the object of a judicial consensus.<sup>130</sup> Of course, it could be that, before *Obergefell* was decided, *same-sex marriage* was false. On the orthodox Hartian account, however, *same-sex marriage* is not merely false, but *obviously* false, a non-starter. And many sophisticated observers will find that conclusion highly doubtful.<sup>131</sup> Principled positivism would earn a feather for its cap if it could make *same-sex marriage* plausible, even if not demonstrably correct.

The first step is to identify the fundamental legal principles that might bear on this legal issue. This is lawyers' work. But the very considerations that a Hartian American constitutional lawyer thinks figure somehow into internally complex validity criteria will often strike a principled positivist as independent fundamental legal principles. Such principles will give (pro tanto) legal force to: original and current communicative contents of the ratified text, legal intentions of authors and ratifiers, judicial decisions, federalism, stable and accepted political practices, moral principles concerning equality, liberty, respect for human dignity, and so forth. These principles obtain not because they are accepted by all or nearly all judges,

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<sup>130</sup> This exercise suggests why the Hartian rule of recognition is better understood as picking out sufficient conditions (subject to vagueness and defeasibility) rather than conditions that are both necessary and sufficient. Even were it plausible that a judicial consensus has picked out some criteria as sufficient, there is patently no consensus among American judges that those criteria are the *only* sufficient ones.

<sup>131</sup> My general argument is not partisan; similar stories can be told about many conservative decisions. See Berman, *Our Principled Constitution*, *supra* note \_\_, at 1393-1411.

but because they have the type of “institutional support”<sup>132</sup> to which Sartorius and Ten already drew our attention: they are “embedded in or exemplified by numerous authoritative legal enactments: constitutional provisions, statutes, and particular judicial decisions.”<sup>133</sup>

To get a flavor for how principles embed in legal materials and practice, consider the legal principle *respect human dignity*. In his *Obergefell* dissent, Justice Thomas diagnosed “the flaw” in the majority’s reasoning as being, “of course, . . . that the Constitution contains no “dignity’ Clause.”<sup>134</sup> True, it doesn’t. But fundamental principles are extratextual, and the dignity principle that Justice Kennedy’s majority opinion rested upon was well-embedded in our constitutional law by the time *Obergefell* rolled around. Kennedy himself had relied heavily upon the principle in a handful of majority opinions that vindicated claimed constitutional rights of gay and lesbian people.<sup>135</sup> But as Leslie Meltzer Henry has shown, the principle (or, as she argues, a cluster of relatively distinct dignity-based principles that share a family resemblance) has been taken up in several hundreds of Supreme Court decisions over many decades and across the doctrinal waterfront.<sup>136</sup> It has undergirded successful claims to freedom of expression<sup>137</sup> and personal liberty,<sup>138</sup> and to protection from excessive punishment,<sup>139</sup> unreasonable searches,<sup>140</sup> compelled self-incrimination,<sup>141</sup> discrimination on the basis of race<sup>142</sup> or sex,<sup>143</sup> and more. As Sartorius

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<sup>132</sup> See *supra* text accompanying note 48.

<sup>133</sup> Sartorius, *supra* note 58, at 154-55.

<sup>134</sup> *Obergefell*, 576 U.S. at 735 (Thomas, J., dissenting).

<sup>135</sup> See *U.S. v. Windsor*, 570 U.S. 744, 770-75 (2013); *Lawrence v. Texas*, 539 U.S. 558, 574-76 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>136</sup> Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

<sup>137</sup> *Cohen v. California*, 403 U.S. 15, 24 (1971) (rooted in “the premise of individual dignity and choice upon which our political system rests”).

<sup>138</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”).

<sup>139</sup> *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (the Eighth Amendment’s ban on cruel and unusual punishment “reaffirms the duty of the government to respect the dignity of all persons”).

<sup>140</sup> *Rochin v. California*, 342 U.S. 165, 174 (1952) (the Fourth Amendment proscribes unreasonable searches and seizures because they are “offensive to human dignity”).

<sup>141</sup> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (the Fifth Amendment’s privilege against self-incrimination is founded on “the respect a government . . . must accord to the dignity and integrity of its citizens”).

<sup>142</sup> *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“race is treated as a forbidden classification [because] it demeans the dignity and worth of a person to be judged by ancestry”).

<sup>143</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (sex discrimination is forbidden because it “deprives persons of their individual dignity”).

emphasized, “a fundamental test for law defined in terms of such notions as coherence and institutional support obviously goes well beyond reporting concordant judicial practice.”<sup>144</sup>

In short, let us suppose, the American legal system comprises many principles that bear on *same-sex marriage*, either for or against. If the principles came with finely individuated weights, it might be both true and reasonably discoverable that their net force weighed for (or against) *same-sex marriage*. But in our real world, the skeptic thinks, a model of rules constituted by the cumulative impact of many weighted principles delivers essentially the same under-determinacy as does the established Hartian model in which rules are validated by a single master rule.

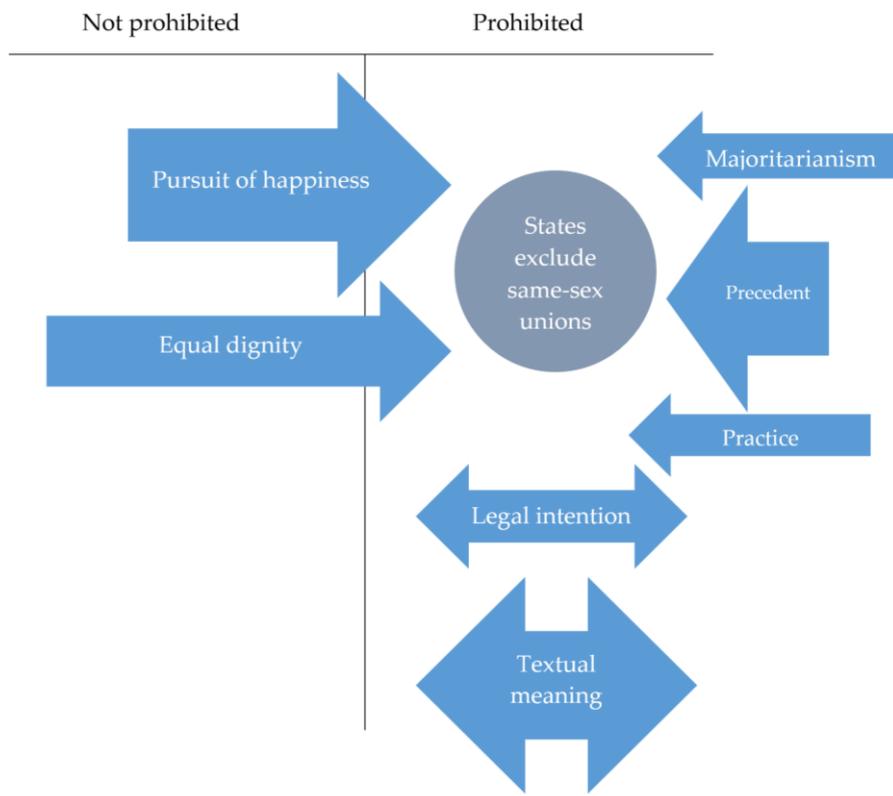
Yet this is precisely the skeptical conclusion that close attention to the distinct attributes of weight and activation (§ 2.2) aims to dispel. In particular, constitutional principles concerning the pursuit of happiness, and concerning the state’s obligation to respect the inherent equal dignity of all persons within its jurisdiction (which principles include, or lie adjacent to, principles of anti-subordination), are activated very substantially in favor of *same-sex marriage*: the ability to enter into the legal institution of marriage with one’s life partner is of tremendous instrumental value; and the exclusion of same-sex couples from this important and highly salient legal institution significantly demeans, degrades, and insults gay, lesbian, and bisexual people. At the same time, none of the principles that plausibly weighed against *same-sex marriage* activated very substantially. The constitutional text doesn’t clearly state that states are free to disregard same-sex unions; nobody who played an important role in drafting or ratifying portions of the constitutional text did so with an actual legal intention to authorize states to withhold recognition from same-sex unions; the most on-point judicial precedent was a one-sentence summary dismissal<sup>145</sup> (entitled to little weight on standard case law principles); and so on. If this is approximately correct, the net force of constitutional principles grounded in institutional practice metaphysically determined *same-sex marriage* even before *Obergefell* was decided. (See figure 9.)

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<sup>144</sup> SARTORIUS, *supra* note \_\_, at 207.

<sup>145</sup> Baker v. Nelson, 409 U.S. 810 (1972).

*Obergefell*, per principled positivism (fig. 9)



I do not claim that this brief discussion, and accompanying diagram, are nearly sufficient to fully establish that *same-sex marriage* was a derivative legal rule of American constitutional law even before *Obergefell* so held. That's a lengthy task, and for first-order constitutional scholarship, not legal philosophy. Rather, by explaining how that plausibly could be, it demonstrates how principled positivism differs from, and likely improves upon, Hartian positivism with respect to the *too-little-law objection*.<sup>146</sup> The

<sup>146</sup> Admittedly, even if one is persuaded that a model of determination by net vector force yields a legally determinate rule in *this* dispute, while the orthodox Hartian model does not, that still would not establish that it yields more determinacy all things considered; some disputes that appear determinate on the Hartian account might become under-determinate through the principled positivist lens. This is not something we can net out a priori. Still, two points merit emphasis. First, *see supra* p. \_\_, I do not rule out that the system includes lexical arrangements as well. My account, albeit hardly simple, surely simplifies a yet more complex reality. Second, by far the best way to get a good grasp of the workings, virtues, vices, and plausibility of this competing account is to investigate a large variety of actual and hypothetical legal disputes with an insider's knowledge and perspective. I attempt some of

example can thus serve as proof of concept even for those who disagree with the constitutional bottom line it endorses.

Thirty-five years ago, the American constitutional theorist Richard Fallon focused attention on what he dubbed the “commensurability problem”: the fact that American constitutional practice recognizes a variety of kinds of argument—arguments based on meanings of the text, framers’ intentions, historical practices, values, and so forth—but lacks an agreed upon means of reconciling them “in a single, coherent constitutional calculus.”<sup>147</sup> His proposed solution to the problem had two parts. First, judges should “assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result.”<sup>148</sup> Second, if attempts to massage or strongarm the diverse constitutional arguments into “constructive coherence” fails, judges should rank the arguments hierarchically and reach the judgment that accords with “the highest ranked factor clearly requiring an outcome.”<sup>149</sup> Before elaborating and defending his own solution, however, Fallon flagged what he thought a surprising gap in the literature: the absence of any “powerfully argued balancing theory” that would deliver unique results from discordant factors or principles without lexical ordering.<sup>150</sup> Without favoring such approaches, he nonetheless thought they clearly merited more attention than scholars had paid.<sup>151</sup>

Now, principled positivism is not *exactly* what Fallon was looking for. Fallon presented his commensurability problem as a problem in American constitutional law, not in general jurisprudence, and the theories he contemplated—the “constructivist coherence theory” that he advocated as well as the alternative “balancing theory” that he only imagined—are proposed solutions to that problem. Even more significantly, Fallon sought a “methodology” that judges could follow when engaged in constitutional interpretation, whereas principled positivism is a theory of legal content. Because these are theories about different things,<sup>152</sup> principled positivism,

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that elsewhere, see Berman, *Our Principled Constitution*, *supra* note \_\_; Berman & Peters, *Kennedy’s Legacy*, *supra* note \_\_, but don’t pretend that my efforts to date are conclusive. (Thanks to Ruth Chang for pressing me on this point.)

<sup>147</sup> Fallon, *supra* note \_\_, at 1190.

<sup>148</sup> *Id.* at 1193.

<sup>149</sup> *Id.* at 1193-94.

<sup>150</sup> *Id.* at 1228.

<sup>151</sup> *Id.* at 1229-30.

<sup>152</sup> See Berman, *Our Principled Constitution*, *supra* note \_\_, at 1328-32 (distinguishing “prescriptive” from “constitutive” theories of constitutional interpretation); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. \_\_ (forthcoming 2022) (distinguish “decision procedures” from “standards”); Mitchell N. Berman, *Keeping Our*

as such, cannot quite fill Fallon’s bill. That acknowledged, one would expect there to be a road to travel from general jurisprudential theories of legal content to jurisdiction-specific theories of proper judicial reasoning, and the preceding discussion suggests that the road from principled positivism to a theory of how U.S. judges should reason in constitutional cases will be reasonably direct. Principled positivism is thus a general theory of legal content that, if sound, supplies the jurisprudential substrate for the “balancing theory” of American constitutional law that we have solely lacked.

### 3.3. Shuffling off from *Chiafalo*: defying parsimony in pluralism

The constitutionality of state non-recognition of same-sex marriage is highly controversial. Many or most readers will have strong and settled views about whether *Obergefell* was correctly decided, judgments that may be recalcitrant to new arguments or ways of seeing. For that reason, and because more examples are better, it’s worth closing with a case less likely to run up against—or along with—many strong priors. Let’s try the Supreme Court’s 2020 decision *Chiafalo v. Washington*, which addressed whether states are constitutionally free to penalize presidential electors who vote for a candidate in violation of their pledge. I hope to persuade readers that a principled positivist analysis is independently plausible and compares very favorably to what the justices produced.

American citizens do not elect the President directly. Instead, they vote for presidential electors appointed by the states who by expectation and practice vote for the candidate receiving the most popular votes in the state (or district). Starting in the early twentieth century, increasing worries that electors might not respect their state’s popular vote led many state legislatures to enact statutes requiring electors to pledge to vote for their party’s candidate. The Supreme Court held such pledge laws constitutional in its 1952 decision *Ray v. Blair*.<sup>153</sup> *Ray* left open whether the state could penalize an elector who violated their pledge.

*Chiafalo* presented that question. After the state’s popular vote went for Democratic candidate Hillary Clinton, four Washington State electors pledged to Clinton cast their ballots for non-candidates (former Secretary of State Colin Powell, and Yankton Dakota elder Faith Spotted Eagle) in an attempt, ultimately unsuccessful, to encourage their counterparts in states that voted Republican to abandon their party’s candidate, Donald Trump.

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*Distinctions Straight: A Response to “Originalism: Standard and Procedure,”* 135 HARV. L. REV. F. \_\_\_\_ (forthcoming 2022) (comparing the two sets of distinctions).

<sup>153</sup> 343 U.S. 214 (1952).

The four were each fined \$1000 in accordance with Washington law. Three contested the fines, arguing that the Twelfth Amendment conferred upon them discretion, free from state interference, to cast their ballot as they saw fit.

The lower courts split, more or less. The Washington Supreme Court rules for the state. In a case coming from Colorado on broadly similar facts, the Tenth Circuit ruled for the electors.<sup>154</sup> It seemed like a hard case. If the legal question it presented had a uniquely correct legal answer, it would require careful thought and investigation to determine.

The Supreme Court rejected the challenge 9-0. Justice Elena Kagan wrote an opinion joined by all the Justices save Thomas, who concurred. On Kagan's analysis, the case was easy, not hard. Acknowledging that *Ray* did not resolve whether states could enforce a pledge via sanctions, the Court concluded that two considerations supported an affirmative answer: "The Constitution's text and the Nation's history."<sup>155</sup>

Two provisions of the constitutional text are directly relevant: Section 1 of Article II, which provides that "[e]ach State shall appoint" Electors "in such Manner as the Legislature thereof may direct";<sup>156</sup> and the Twelfth Amendment, which directs that the electors shall "vote by ballot for President and Vice-President."<sup>157</sup> Starting with Article II, Kagan asserted that "the power to appoint an elector (in any manner) includes power to condition his appointment," for example by providing that an elector must be a state resident or registered voter.<sup>158</sup> It follows, she reasoned, that "a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty."<sup>159</sup>

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<sup>154</sup> The Colorado statute provided that if an elector cast a ballot for anyone other than the person to whom they were pledged, that ballot would be invalid, the elector would be removed and replaced with an alternative elector pledged to the same candidate. After deciding *Chiafalo*, the Supreme Court upheld this scheme in a one-sentence per curiam opinion stating only that the appellate opinion "is reversed for the reasons stated in *Chiafalo v. Washington*." *Colorado Dept. of State v. Baca*, 140 S. Ct. 2316 (2020). It seems to me that whether states are constitutionally empowered or permitted to nullify ballots that are cast in violation of an elector's pledge is one substantial bridge further than whether they may impose ex post sanctions, and presents a harder question. Certainly the framers, given the centrality of prior restraints to the First Amendment, might have thought so. The question deserved better treatment from the Court than it received.

<sup>155</sup> 140 S. Ct. at 2323.

<sup>156</sup> U.S. CONST. Art. II, §1, cl.2.

<sup>157</sup> U.S. CONST. Amdmt XII.

<sup>158</sup> 140 S. Ct. at 2324.

<sup>159</sup> 140 S. Ct. at 2324.

Turning then to the Twelfth Amendment, Kagan made quick work of the electors' contention that the constitutional phrase "vote by ballot" plainly connotes "freedom of choice," and that "[i]f the States could control their votes, the electors would not be 'Electors,' and their 'vote by Ballot' would not be a 'vote.'"<sup>160</sup> Not so, she said, citing cases where one might be said to "vote" or to "cast a ballot," even when voting as a proxy or on instruction from a spouse or union leader. "[A]lthough voting and discretion are usually combined," Kagan concluded, "voting is still voting when discretion departs."<sup>161</sup>

After determining that Article II plainly authorizes States to elicit pledges from electors and to penalize breach, and that the Twelfth Amendment confers no right to the contrary, the Court's opinion addressed post-enactment history. It observed that in the very first contested presidential election—the 1796 contest pitting the Federalist John Adams against the Republican Thomas Jefferson—every elector but one cast their ballot for their state's choice. With the rise of political parties and the 1804 adoption of the Twelfth Amendment, expectations that electors would vote in accord with their selectors' wishes strengthened by the end of the nineteenth century that the Court could observe that, notwithstanding initial expectations, electors had long been chosen "simply to register the will of the appointing power in respect of a particular candidate."<sup>162</sup> To be sure, this was practice, not law. "But to remove any doubt, States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters,"<sup>163</sup> a development that *Ray* had held constitutional. Finally, starting around 1960, several states—numbering fifteen by 2020—chose "to back up their pledge laws with some kind of sanction."<sup>164</sup> Such laws, Kagan explained, "reflect[] a tradition more than two centuries old" in which "electors are not free agents; they are to vote for the candidate whom the State's voters have chosen."<sup>165</sup> Admittedly, there have been some exceptions: "some 180 faithless votes for either President or Vice President . . . out of over 23,000" electoral votes cast.<sup>166</sup> Dismissing those few instances as "anomalies only,"<sup>167</sup> the Court concluded

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<sup>160</sup> 140 S. Ct. at 2325 (quoting petitioners' brief; internal quotation marks omitted).

<sup>161</sup> 140 S. Ct. at 2325.

<sup>162</sup> 140 S. Ct. at 2327 (quoting *McPherson v. Blacker*, 146 U.S. 1, 36 (1892)).

<sup>163</sup> 140 S. Ct. at 2328.

<sup>164</sup> 140 S. Ct. at 2322.

<sup>165</sup> 140 S. Ct. at 2328.

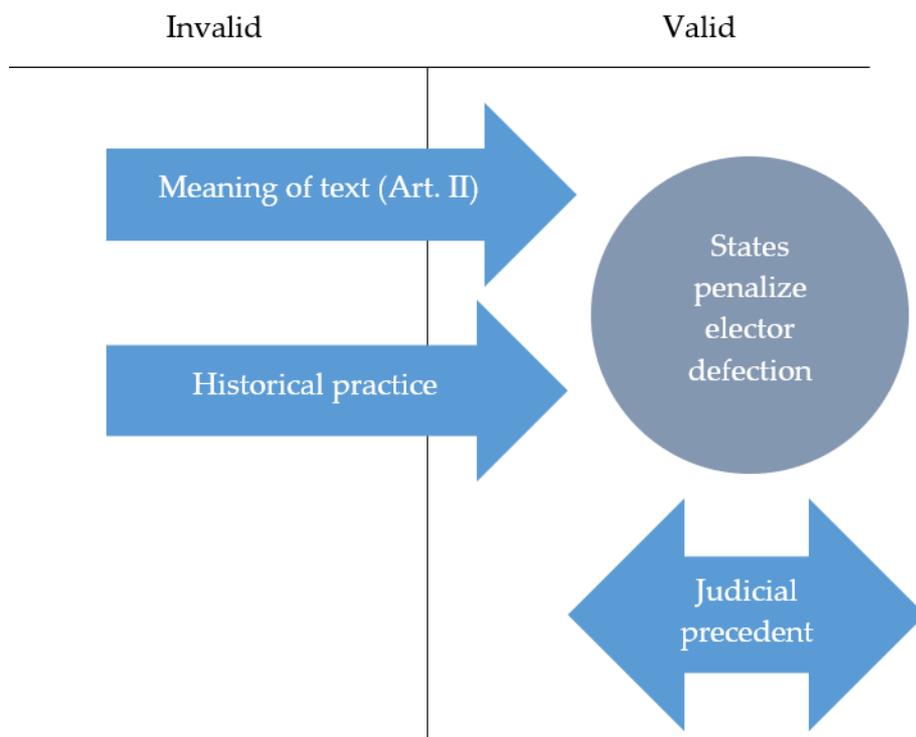
<sup>166</sup> 140 S. Ct. at 2328.

<sup>167</sup> 140 S. Ct. at 2328.

that “our whole experience as a Nation” supports the states’ power to penalize defecting electors.<sup>168</sup>

Writing separately, Justice Thomas explained that he could not join the Court’s opinion because he disagreed with its contention that Article II, Section 1 empowers states to regulate as Washington had. Finding that the text said nothing about whether a state may penalize defecting electors, Thomas nonetheless concurred in the judgment on the strength of a default rule that he had many years earlier discerned “embodied in the structure of our Constitution and expressly required by the Tenth Amendment”:<sup>169</sup> “Where the Constitution is silent about the exercise of a particular power, that is, where the Constitution does not speak either expressly or by necessary implication,’ the power is ‘either delegated to the state government or retained by the people.’”<sup>170</sup> Figures 10 and 11 represent Kagan’s and Thomas’s opinions graphically.

Chiafalo, per majority (fig. 10)

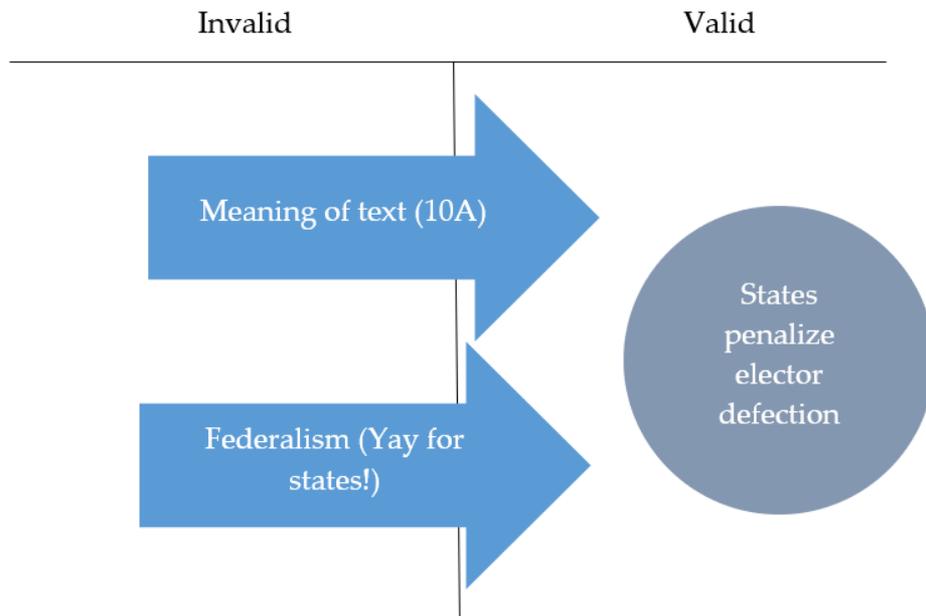


<sup>168</sup> 140 S. Ct. at 2326 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014)).

<sup>169</sup> 140 S. Ct. at 2333 (Thomas, J., concurring).

<sup>170</sup> 140 S. Ct. at 2334 (Thomas, J., concurring) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847-48 (Thomas, J., dissenting)).

Chiafalo, per Justice Thomas (fig. 11)



For our purposes, two things about the Court’s opinion stand out. First, it is unmistakably pluralistic. It attends to precedent, text, and history, and gives no indication that the latter two are ranked in a strict lexical ordering. While, as we will see, the opinion overlooks many factors it should have engaged with, its fundamental pluralistic character merits note—not because that’s unusual, but precisely because it isn’t.

Second, and notwithstanding the opinion’s near-unanimity, its analysis is, in the estimation of commentators from across the political spectrum, markedly weak.<sup>171</sup> What it says about the factors it considers is largely unpersuasive, and it ignores other factors whose legal relevance should have been obvious—even if it was not obvious just how weighty those factors are or which way they bear on this dispute.

<sup>171</sup> See, e.g., Mike Rappaport, *The Originalist Disaster in Chiafalo*, Law & Liberty, Aug. 7, 2020 (calling Kagan’s opinion “awful,” and deriding its reasoning as “weak,” “feeble,” and “contrived”); Guy-Uriel Charles & Luis E. Fuentes-Rohwer, *Chiafalo: Constitutionalizing Historical Gloss in Law & Democratic Politics*, 15 HARV. L. & POL’Y REV. 15, 19 (2020) (arguing that the issue “is much more difficult than Justice Kagan’s opinion lets on”); Vikram David Amar, “A Backward- and Forward-Looking Assessment of The Supreme Court’s ‘Faithless Elector’ Cases: Part One in a Two-Part Series,” *Verdict*, July 14, 2020 (observing, judiciously, that the majority and concurring opinions “were not as well reasoned or careful as a matter of constitutional craft as they could have been”).

Start with the factors Kagan discusses: the meaning of the relevant constitutional provisions, and post-enactment history. Kagan’s analysis of the meaning of Article II, section 1, is unconvincing, largely for reasons laid out in Thomas’s concurrence. As Thomas summarized: “determining the ‘Manner’ of appointment certainly does not include the power to impose requirements as to how the electors vote *after they are appointed* . . . .”<sup>172</sup> Few scholars or justices agree with the default rule that Thomas rode to a concurrence rather than a dissent. And rightly so.<sup>173</sup> But most commentators on *Chiafalo* do agree that the majority played fast and loose with Article II.<sup>174</sup>

They are not much friendlier to the Court’s Twelfth Amendment analysis. Even allowing that “we might well say that [somebody] cast a ‘ballot’ or ‘voted,’”<sup>175</sup> in Kagan’s unusual cases where “voters” implement a choice dictated by another, we might well do so grudgingly, possibly because no more apt terms come immediately to mind, and with actual or imagined scare quotes. Plainly “elector” and “vote” *connote* discretion, if they do not always *denote* it, and it is certainly plausible that that’s what ordinary ratifiers would have understood the terms to mean when uttered in this very constitutional provision.<sup>176</sup> All the more so if, as Dean Vikram Amar has argued, “the term ‘ballot’ in the Constitution refers to a secret vote,” and that, by design, it “appears in the Constitution only in connection with the Electoral College and House selection of Presidents when the Electoral College fails to generate a winner.”<sup>177</sup>

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<sup>172</sup> 140 S. Ct. at 2330 (Thomas, J., concurring).

<sup>173</sup> The whole game is played by Thomas’s deployment of the modifier “necessary.” Although his *Term Limits* dissent had proclaimed fidelity to Chief Justice Marshall’s canonical opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819), *see Term Limits*, 514 U.S. at 852 & n.4 (Thomas, J., dissenting), the central thrust of *McCulloch*’s first holding was precisely that the federal government’s powers extend *beyond* even those that arise by “necessary implication.”

<sup>174</sup> *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note \_\_, at 19 (“The majority’s reasoning . . . is not persuasive, even on its own terms.”); Amar, *supra* note \_\_ (explaining why Kagan’s interpretation of “appoint” “can’t be right as a general matter,” and adjudging her reading of Article II “not particularly persuasive”); Keith E. Whittington, *The Vexing Problem of Faithless Electors*, 2020 CATO SUP. CT. REV. 67, 87-89 (2020) (complaining that there is “a lot packed into the notion of conditions on appointment that Kagan did not bother to unpack and explain,” and agreeing with Thomas about the “awkwardness” of her approach).

<sup>175</sup> 140 S. Ct. at 2325.

<sup>176</sup> *See, e.g.*, Rappaport, *supra* note \_\_ (objecting that reflection on distant hypotheticals “does not tell us about the meaning of the ‘voter’ in the context of the presidential election that the Constitution describes”).

<sup>177</sup> Amar, *supra* note \_\_ (further explaining, persuasively, that “the time lag between the selection of electors and the casting of their votes for President that the Constitution

No more convincing is Kagan’s treatment of our historical practices. All that the rarity of defections “necessarily shows is that electors (and others) may have felt there is a moral or prudential duty for electors to defer—not that they could be legally compelled (under pain of penalty or replacement) to defer.”<sup>178</sup> Moreover, “[t]he presidential electors *agreed* with Justice Kagan that faithless voting should be an anomaly,” carefully explaining (with some plausibility) why “the exceptional circumstances of the 2016 election counseled that they act contrary to their pledges.”<sup>179</sup> The question isn’t whether we have a tradition of treating the pledge with great moral seriousness, it’s whether we have a tradition that recognizes, confers, or partially constitutes a state power to penalize. On that question, the electors could claim several historical practices on their side: “Congress has never rejected a faithless elector’s vote in the final tally. Thirty-five states either impose no restrictions on electors or require only a simple pledge, and the ballots that many states provide electors seemingly anticipate elector choice.”<sup>180</sup> Perhaps most fundamentally, “for the first 170 of the Constitution’s 230 years there was no tradition of legal compulsion for electors”<sup>181</sup> even while elector defection, though rare, was not unknown. Given all this, it’s hard to take seriously the Court’s contention that the constitutionality of state laws that penalize electors for defecting (let alone that treat “faithless” ballots as invalid)<sup>182</sup> gains support from “our whole experience as a Nation.” And it’s not wholly surprising, and a little telling, that the opinion vacillates on whether the history establishes that the States have the power they claim, or merely fails to establish that they lack it.<sup>183</sup>

As flimsy as are the Court’s arguments on the topics it takes up, equally troubling is all that the opinion slights or omits entirely: arguments from federalism, framers’ intentions, popular sovereignty, and pragmatism.

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contemplates, does affirmatively argue in favor of some constitutionally guaranteed discretion”).

<sup>178</sup> Amar, *supra* note \_\_.

<sup>179</sup> *The Supreme Court 2019 Term—Leading Case*, 134 HARV. L. REV. 420, 426-27 (2020) (citations omitted).

<sup>180</sup> *The Supreme Court 2019 Term—Leading Case*, 134 HARV. L. REV. 420, 427 (2020); see also Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. & POL. REV. 53, 77 (2020) (concluding, against the *Chiafalo* Court, that “evidence suggests that Electoral College norms and practice routinely *anticipate* elector discretion and that institutional and popular acceptance of elector discretion is widespread”).

<sup>181</sup> Amar, *supra* note \_\_.

<sup>182</sup> See *supra* note \_\_ (discussing *Baca*).

<sup>183</sup> Compare 140 S. Ct. at 2328 (“Washington’s law, penalizing a pledge’s breach, . . . reflects a tradition more than two centuries old.”) with *id.* (“the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years”).

Take the structural principle of federalism first. One needn't join Thomas in believing that federalism describes a constitutional *rule* to accept that it's a constitutional *principle*. (Similarly, one needn't *like* it to *recognize* it.) However much force that principle might have exerted on this issue, the interests of states qua states deserved some attention.

Consider next framers' intentions. Hamilton and Jay had each praised the electoral college in the *Federalist Papers*, specifically emphasizing that the electors would be selected for their "discretion and discernment" and would make their choices "under circumstances favorable to deliberation."<sup>184</sup> Yet the Court was unmoved, noting that "the Framers did not reduce their thoughts about electors' discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol."<sup>185</sup> But that seems a little too dismissive. "No one is arguing that Hamilton's belief here is binding like constitutional text," Mike Rappaport fairly complained. "Rather, the point is that Hamilton, who is normally considered a persuasive contemporaneous interpreter of the Constitution, apparently believed that the Constitution protected the independence of the electors."<sup>186</sup> Hamilton's opinion is nowhere near dispositive—either on the question of what his contemporaries believed or intended, or on what the law is now. But clear discussions from *the Federalist* are "hardly to be dismissed as irrelevant or unimportant."<sup>187</sup> And while vastly changed circumstances—particularly the birth and growth of political parties—might possibly rob the framers' intentions of much legal force, that conclusion also requires argument that the Court's opinion does not furnish.

Another structural principle oddly absent is popular sovereignty.<sup>188</sup> It should be obvious to all that one powerful objection to pledge-breaking by electors is that it undermines *the people's* power to select the president. Yet popular sovereignty makes only a fleeting appearance, in the opinion's very

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<sup>184</sup> The Federalist, Numbers 64 and 68.

<sup>185</sup> 140 S. Ct. at 2326.

<sup>186</sup> Rappaport, *supra* note \_\_.

<sup>187</sup> Rappaport, *supra* note \_\_; see also, e.g., Sanford Levinson, *Cock-eyed Optimist Meets Chicken Little: Jack Balkin on the American Future*, 86 MO. L. REV. 555, 561 (2021).

<sup>188</sup> The principle of popular sovereignty that I invoke here is related to but distinct from the principle of majoritarianism that, as figure 9 shows, plays a role in *same-sex marriage*. To a first pass, I take *majoritarianism* to be the idea that the policy preferences of a popular majority should prevail and *popular sovereignty* to reflect the deeper notion that the people hold sovereign power. See Berman, *Our Principled Constitution*, *supra* note \_\_, at 1388 & n.204. For a rough analogy, popular sovereignty is to majoritarianism (as I use those terms) as strategy is to tactics.

last sentence. A pledge law such as Washington’s, the Court concludes, “accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.”<sup>189</sup> Keith Whittington gently chided Kagan for failing to “hit that theme even harder,”<sup>190</sup> but it is generous to credit the opinion with having hit that theme at all. All the Court says in this last sentence is that, *given* that they have the constitutional authority to penalize elector defections, states that choose to exercise it serve democratic principles. True but trivial. What warranted emphasis yet received no mention is that the constitutional rule the Court announced—which is to say the constitutional power that it recognized—is partly *constituted by* the principle of popular sovereignty (in the same way that it’s partly constituted by principles of textual meaning and historical practice), not only *consistent with* it.

As with popular sovereignty, so too with pragmatism. The justices’ worries about what “chaos” might unfold if states were incompetent to combat electoral defections in a post-Trump world dominated oral argument.<sup>191</sup> Yet pragmatism is not awarded even the brief cameo afforded popular sovereignty.<sup>192</sup> Is that not curious? Like popular sovereignty, pragmatics seem plainly part of the story and for some justices nearly all.<sup>193</sup> Now, it might be a less important or weighty principle than several others that inhabit our constitutional ecosystem.<sup>194</sup> At the same time, however, it might be among the principles that were most substantially activated on this legal question.

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<sup>189</sup> 140 S. Ct. at 2326.

<sup>190</sup> Whittington, *supra* note \_\_, at 92; *see also, e.g., The Supreme Court 2019 Term—Leading Case, supra* note \_\_, at 429 (also criticizing the opinion for slighting popular sovereignty).

<sup>191</sup> *See, e.g., Amy Howe, Argument analysis: In a close case, concerns about chaos from “faithless electors,” SCOTUSblog, May 13, 2020; Ian Millhiser, Supreme Court justices fear “chaos” if members of the Electoral College can defy the popular vote, VOX, May 13, 2020 (“It is far from clear how judges should decide this case based solely on the text of the Constitution and its history. Yet, as several justices noted, there are strong pragmatic reasons not to permit faithless electors, and those pragmatic concerns appeared likely to carry the day.”).*

<sup>192</sup> *See, e.g., Adav Noti & Danny Li, Chiafalo v. Washington: Presidential Elections Are Messy Enough Already, GEO. WASH. L. REV. ON THE DOCKET, July 12, 2020 (“Notably missing from the Court’s holding was any direct reference to the disastrous consequences that a contrary ruling would likely unleash. But those consequences nonetheless underlie the Court’s reasoning.”)*

<sup>193</sup> *See* STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* xiii (2010) (arguing that “the Court must thoughtfully employ a set of traditional legal tools in service of a pragmatic approach to interpreting the law”).

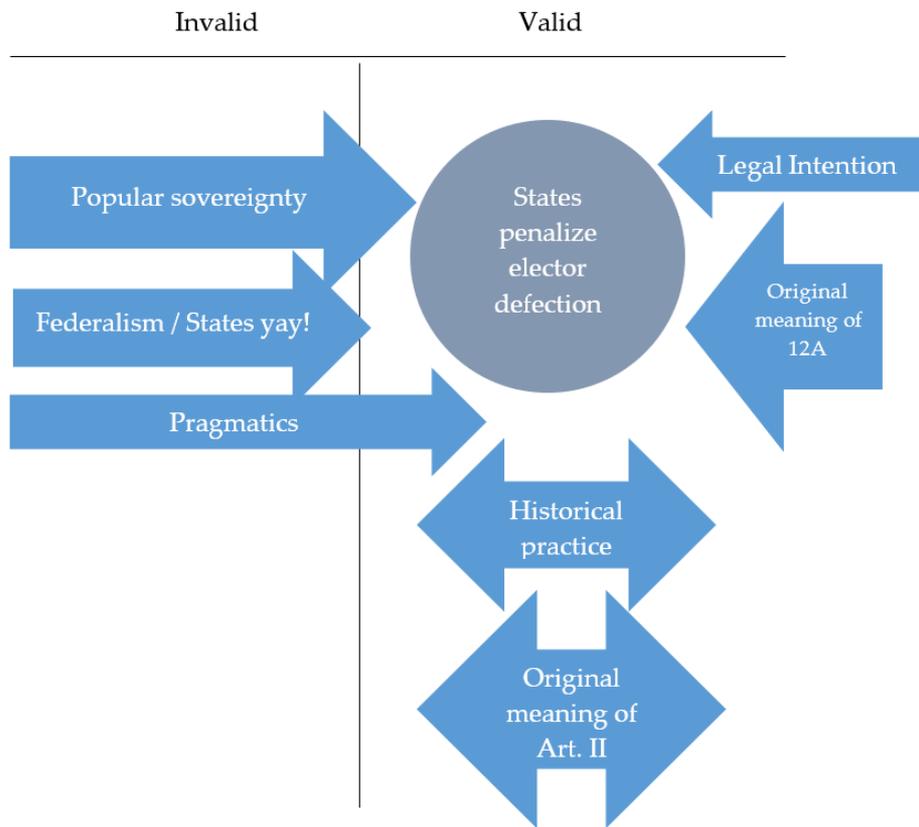
<sup>194</sup> Although pragmatism and principle are often thought to be at odds, there is nothing puzzling about a fundamental legal principle that gives legal force to pragmatic concerns.

If these criticisms have any merit, one might wonder why the opinion wasn't any better. A kneejerk legal-realist hypothesis is that a more forthright analysis would have made a different legal conclusion inescapable, and the authors had non-legal reasons (political, ideological) to favor the result the opinion reached. While we should always be open to "attitudinal" explanations of the Court's decisions, there are reasons for skepticism here. The judgment was unanimous, and the opinion nearly so, yet it's hard to fathom the extralegal commitments that Kagan and Kavanaugh, Alito and Sotomayor, Gorsuch and Breyer, would share. (If they did all share a commitment that was integral to the result, maybe that commitment was not extra-legal.) More significantly, the many criticisms of Kagan's opinion that I've sketched do not obviously add up to a victory for the electors. True, the electors' position would have been strengthened by a fairer treatment of the text and history. But principles of federalism, popular sovereignty, and pragmatism all favor the states, perhaps to significant degrees. As figure 12 represents,<sup>195</sup> a more pluralistic and refined analysis need not have generated a different holding, need not have entailed that states lack the power they claimed to possess.

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<sup>195</sup> I intend this diagram to reflect the arguments already floated in the text. Although I think it broadly on target—and significantly more plausible than either Kagan's half-hearted pluralism or Thomas's nearly monist originalism—the question is a hard one, in my judgment, and would require more research and thought. I invite readers to view this as a depiction of how things might well be, constitutionally speaking, not as a confident assertion that this is how they are.

Chiafalo, per principled positivism (provisionally) (fig. 12)



This picture yields the same constitutional rule as the majority's (figure 10). The salient differences are that the majority recognized fewer principles (or factors) and presented them as wholly aligned, not partially discordant. In this respect, *Chiafalo* is wholly representative of the Supreme Court's handiwork. As Fallon observed, the Court's constitutional opinions rarely admit that legally relevant factors are in conflict. "Far more common are opinions and arguments that, while emphasizing one factor more than others, assert or imply that the most persuasive arguments within all of the categories are consistent with a preferred conclusion."<sup>196</sup> Fallon is right about this. The question is what to make of it.

I think that it tells us little or nothing about the correct theory of legal content, but a lot about judicial strategy and psychology. It's not that justices are unaware that constitutionally relevant factors—fundamental legal principles—sometimes or often conflict, but that they are desperate to

<sup>196</sup> Fallon, *supra* note \_\_, at 1229.

paper over that truth lest they excite anxiety (the public's, and possibly their own) that constitutional disputes are resolved by the exercise of judicial discretion. (Witness Chief Justice Roberts's unfortunate, but calculated, judges-are-like-umpires analogy.) The majority opinion in *Chiafalo* lends further credence to this hypothesis. It is unpersuasive not because it is wrong on the constitutional bottom line (though it might have been), but because it labors to maintain that all the legally relevant considerations were singing in unison. They often aren't, and it's very doubtful that they were in this case. A more careful and candid analysis of the constitutional questions raised in *Chiafalo* and *Baca* thus jibes with what principled positivism teaches: U.S. constitutional reality is richer, messier, and more discordant than Supreme Court justices like to pretend—and constitutional rules can emerge from this stew nonetheless.

## Conclusion

What makes it the case that the law has the content that it does? Hartian positivism holds that norms are "validated" as legal by satisfying sufficient criteria that are picked out by, thus grounded in, a convergent practice among legal officials that Hart termed the ultimate rule of recognition. Principled positivism maintains, in contrast, that decisive and derivative legal norms ("rules") are (also) determined by the accrual or aggregation of fundamental weighted norms (what Dworkin called "principles") that are grounded in their being "taken up" by legal practitioners in legal decisionmaking.

Nomenclature aside, the critical differences are two. First, principled positivism allows, as Hartian positivism denies, that the social-factual grounds of fundamental legal norms ("principles" in one case, "criteria of sufficiency" in the other) can be unspecifiable and characterized by non-trivial dissensus. Second, principled positivism provides that principles "bear on" derivative norms in a weighted and aggregative fashion that cannot be fully captured by the language and machinery of validation. These two differences may strike some readers as modest. They are not. As this Article shows, their payoffs are substantial, for they combine to defang the two most forceful objections that Dworkin leveled against Hart's own account—that it cannot make sense of the existence and functions of legal principles, and that it cannot determine nearly as much law as legal sophisticates believe there to be. If this alternative (or modification) to Hartian positivism is closer to correct, it makes a difference—not only to legal philosophers, but to all who would understand, or ascertain, our law.