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HOW PRACTICES MAKE PRINCIPLES AND HOW PRINCIPLES MAKE RULES

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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 most urgent task. Mark Greenberg, a leading antipositivist, maintains that dispute over "the determinants of the content of the law" makes out "a central—perhaps *the* central—debate in the philosophy of law."[1] Scott Shapiro, a leading positivist, agrees, emphasizing that we cannot resolve first-order legal questions unless we first "know which facts ultimately determine the content of all law."[2] The view is widespread.[3] This article offers a new general account of the determination of legal content. I call this theory "principled positivism."

The account is positivist because it maintains that legal norms are necessarily determined by the actions and mental states of persons (or 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 is associated with H. L. A. Hart, my account gives the weighted, contributory norms that the arch antipositivist Ronald Dworkin called "principles" a central role in the determination of legal "rules." In currently favored metaphysical terminology, legal practices fully ground legal principles, and legal principles partially ground legal rules.

This paper motivates, explicates, illustrates, and defends principled positivism. Section 1 sets the table. It briefly sketches a Hartian theory of legal content and then presents what I consider the two most formidable challenges to it, both pressed by Dworkin, positivism's fiercest critic.[4] The first challenge was raised in Dworkin's first attack against Hart's theory, "The Model of Rules I"

1 Greenberg, "How Facts Make Law," 157 (reprinted and revised in Hershovitz, *Exploring Law's Empire*). As should be apparent, I derive my title from Greenberg's.

2 Shapiro, *Legality*, 29 (emphases omitted).

3 See, e.g., Plunkett and Shapiro, "Law, Morality, and Everything Else," 56; Stavropoulos, "The Debate that Never Was," 2090; Toh, "Jurisprudential Theories and First-Order Legal Judgments"; and Baude and Sachs, "Grounding Originalism," 1460.

4 I clarify in what sense the theory I will be critiquing is "Hartian" in section 1.1 below.

("TMR I").[5] This objection, which I call the *challenge from principles*, maintains that Hartian positivism has difficulty accounting for the contributory, weighty, and conflicting norms that Dworkin called legal "principles." Exactly why, on Dworkin's analysis, Hart's account cannot accommodate principles is largely misunderstood. Drawing on a predecessor article, I explain that the crux of the challenge is not that Hart's account cannot deliver legal *principles* but that, insofar as it can, it cannot deliver legal *rules* due to the way that principles contribute to rules.[6]

Dworkin developed his second challenge in work that followed TMR I, most insistently when speaking as an American constitutional theorist. It maintains that because of pervasive disagreements among US 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 call this objection the *too-little-law challenge*. It is kin to a much better-known objection, the *challenge from theoretical disagreements*, that Hart's theory more easily rebuts.

Section 2 introduces an alternative to the Hartian theory of legal content designed to meet the challenges from principles and of too little law. The two key moves are: first, to allow for the determination of nonfundamental (i.e., derivative) legal norms by a means that does not require Hartian "validation"; and second, to allow for the determination, or "grounding," of fundamental legal norms in practices that fall short of judicial consensus. In presenting an account that has these twin virtues, this section explains (1) how "legally fundamental" weighted norms can be grounded directly in the messy, conflictual human practices that characterize modern, vast, and decentralized legal systems, (2) how such principles can interact or combine by nonlexical, aggregative means—that is, means not properly classified as "validation"—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 two concrete disputes from American statutory and constitutional law. The first is the "snail darter case" that Dworkin discusses at length in *Law's Empire*.[7] The second is the constitutional right to recognition of same-sex marriage that was announced in *Obergefell v. Hodges*.[8]

5 Dworkin, "The Model of Rules," reprinted and revised as "The Model of Rules I" in Dworkin, *Taking Rights Seriously*. Subsequent citations will be to the book.

6 Berman, "Dworkin versus Hart Revisited."

7 *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978).

8 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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This article aspires to contribute to general jurisprudence, not (directly) to 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."[9] Insofar as the jurisprudential intervention this article undertakes is successful, implications for American legal interpretive theory are unavoidable. This one article—already near law-review length—does not draw forth and defend those implications. But readers whose interest in jurisprudence derives largely from its character as prologue will naturally wonder at what might follow. What follows is a positivist, pluralist, and dynamic theory of American constitutional law that I call "organic pluralism." Organic pluralism is a competitor to all forms of originalism. Principled positivism is its jurisprudential backbone.

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 theory of legal content, 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 TMR I. Common wisdom holds that Hartians have successfully rebutted that challenge.[10] I will argue that such optimism is based on a misunderstanding of Dworkin's argument, and that the challenge remains unrefuted.[11] Section 1.3 introduces the challenge from theoretical disagreements from *Law's Empire.* Here I argue, against Shapiro, that the challenge is easily met. Section 1.4 turns to a rarely discussed cousin to the challenge from

9 Dworkin, *Law's Empire*, 90.

10 See, e.g., Shapiro, "The Hart–Dworkin Debate," 35.

11 This is the main work of Berman, "Dworkin versus Hart Revisited," a prequel to the current article. Sections 1.1 and 1.2 here summarize arguments developed at greater length there.

theoretical disagreements, what I call the *too-little-law challenge*. I argue that it is the later Dworkin's most formidable objection. This section's takeaway is that if positivists are to offer a complete theory of legal content, they must still engage with and defeat the challenge from principles and the challenge of too little law.[12]

1.1. From Socio-Normative Positivism to Hartian Legal Positivism

Before we get to legal norms, let us discuss social norms. At the time of writing, norms in most Western cultures direct that one should greet a new acquaintance by shaking hands, while norms in many Asian cultures direct that one should bow. Students at many schools observe a norm not to volunteer to answer instructors' questions. Let us say that the "content" of a norm is what the norm directs or provides. A norm's content is thus analogous to a word's meaning; it is what differentiates one norm (word) from another. Common theoretical wisdom about social norms includes three elements:

1. *Minimal realism* (the "metaphysically unambitious" thesis that "there really are ways that things might be" with respect to social norms and their contents, "and that our thoughts and sentences do sometimes correctly represent that reality");
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); and
3. *Positivism* (the idea that these norms are what they are and have the contents they do in virtue of 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).[13]

Putting these elements together: (1) social norms in Mali really do direct that prepubescent girls should be subjected to genital mutilation; (3) this norm exists in virtue of certain behaviors and attitudes prevalent in Malian society; and (2) that Malian norms direct that parents should subject their daughters to genital mutilation does not entail that they *really* (robustly, unconditionally) should do so.

12 This takeaway is important for any contemporary scholar interested in explaining legal content. It need not amount to a criticism of Hart, though, for providing an account of legal content was not his primary goal, if one at all.

13 For minimal realism, see Van Roojen, *Metaethics*, 9–14. Thin normativity is the type of normativity that attaches to rules of etiquette and rules of a club, as famously explored in Foot, "Morality as a System of Hypothetical Imperatives." For elaboration, see, e.g., Berman, "Of Law and Other Artificial Normative Systems," 143–44; Finlay, "Defining Normativity"; and Wodak, "What Does 'Legal Obligation' Mean?"

There are different ways to make sense of the (minimal) reality of social norms and therefore of the mode by which social facts or practices determine norms' contents. But philosophers are increasingly treating norms as elements of social ontology to be explained metaphysically. And those who do are increasingly drawn to the language of "grounding," where grounding is a relationship of metaphysical determination by which more fundamental facts or entities explain, noncausally, less fundamental ones.[14] For 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. I will adopt this vocabulary for explaining norms, both social and legal, without further defense. That is, I will gloss the third element in the standard view of social norms—positivism—by saying that social norms are "grounded in" social practices.

Figure 1 depicts the determination of social norms by "social practices," by which 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. Practices are "social" when engaged in by (significant portions of) some identifiable subset of society; they need not be found through all of society. I designate the grounding relationship simply "G1," leaving its details entirely open.[15]

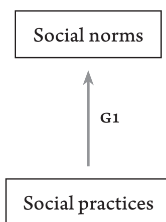

FIGURE 1 Social Norms Model

14 I aim to remain as noncommittal as possible on controversial issues in metaphysical grounding. 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., Rosen, "Metaphysical Dependence" (facts) with Schaffer, "On What Grounds What" (not facts). But I am 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 intramural controversy.

15 See, e.g., Brennan et al., *Explaining Norms*: "Norms … are clusters of normative attitudes plus knowledge of those attitudes" (35). See also Bicchieri, *The Grammar of Society*: "Norms are supported by and in some sense consist of a cluster of self-fulfilling expectations" (ix).

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 are all minimally realist, only thinly normative, and determined by (many would say "grounded in") social practices or facts.[16]

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.[17] 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 American constitutional theorists William Baude and Stephen Sachs note, "we can be surprised by, mistaken about, or disobedient toward the law without it ceasing to *be* law."[18] So if legal norms are grounded in social facts, the mechanism by which facts determine law must be *indirect*, at least sometimes. The task for positivist theories of legal content, then, would be to explicate the indirect determination relationship that yields legal norms consistent with a scientific picture of the world.[19]

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, whereas 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,

16 For the view that legal positivists should (and Hart did) accept minimal realism about legal norms, see Kramer, *H. L. A. Hart*, 30–31, 192–93. For the view that "positivism is best interpreted as a grounding thesis," see Chilovi and Pavlakos, "The Explanatory Demands of Grounding in Law," 900 (citing Tomasz Gizbert-Studnicki, David Plunkett, Gideon Rosen, and Nicos Stravropoulos as other proponents).

17 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. See Bicchieri, *The Grammar of Society*, 11.

18 Baude and Sachs, "Grounding Originalism," 1473. See also Bix, "Global Error and Legal Truth"; and Sachs, "The 'Constitution in Exile' as a Problem for Legal Theory."

19 See Plunkett and Shapiro, "Law, Morality, and Everything Else," 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" (49).

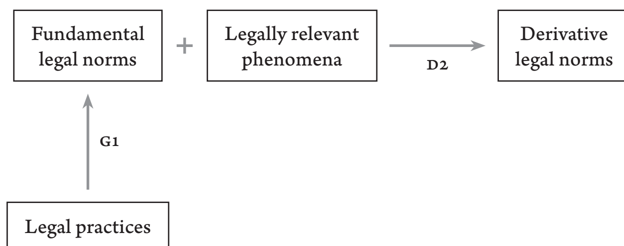

FIGURE 2 Generic Two-Level Legal Positivism

suppose that a fundamental legal norm, *F*, of legal system *S* provides that *r* is a legal rule of *S* if *r* corresponds to a specified type of communicative content of a specified type of text.[20] And suppose that *T* is a text of the specified type, and its relevant communicative content is *q*. Then the fact that a legal rule of *S* corresponds to *q* is jointly determined by *F* and the communicative content of *T*.[21]

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. But I have learned that the closer "Hart" and "grounding" appear in the same sentence, the more important it becomes to emphasize just what I am and am not claiming.

Thus far, I have (a) said that a full-bore positivism about law should include a theory of legal content, (b) endorsed a metaphysical rendering of that project,

20 Notice that *F* in this example functions more as a constitutive rule than as a regulative rule. See generally Searle, *Speech Acts*, 33–34. It serves to make something the case, not to require, direct, or prohibit. 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., Himma, "Understanding the Relationship between the U.S. Constitution and the Conventional Rule of Recognition," 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 would withhold the term "norm" from an abstract entity whose function is to metaphysically 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." My substantive points remain unaffected.

21 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 Berker, "The Unity of Grounding." 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 that represents grounding vertically.

and (c) embraced the grounding idiom for this metaphysical inquiry. Plainly, Hart did not speak in terms of "grounding"; it was not part of the then-prevailing philosophical lexicon. More importantly, vocabulary aside, it is contestable whether Hart's overall theory includes an account of legal content at all and, if so, whether it is one that can be translated into grounding terms. Perhaps he was offering only a theory of how preexisting extralegal norms get validated as legal.[22] Perhaps he was offering a theory of the validation of legal sources alone, not also of the norms that sources partially determine.[23] Perhaps he was offering a noncognitivist account of legal thought and talk and would reject minimal realism about legal content.[24]

But whatever Hart was up to, anyone who accepts minimal realism about legal content should see the need for a theory that explains how that content comes to be and that has the resources to adjudicate disputes about whether the content is *this* rather than *that*. Furthermore, for anyone who seeks such a theory and has positivist sensibilities, the search most naturally starts with Hart. And if we do look toward Hart with the aim to discern or develop a theory of legal content, a possible view emerges clearly enough. Roughly: it is the nature of a legal system that legal norms have the legal contents that they do in virtue of being validated by a set of (usually) sufficient conditions or "criteria" that are grounded in the ultimate "rule of recognition," a convergent practice among officials (chiefly judges) of identifying legal norms that the officials follow with the critical reflective attitude that Hart dubs the "internal point of view."[25] I will call this view the "Hartian theory of legal content" without worrying further about the extent to which Hart himself held it. I follow other scholars in speaking this way.[26] As the remainder of this section argues, Dworkin's criticisms of

22 Cf. Gardner, "Legal Positivism": "Legal positivism is not a whole theory of law's nature, after all. It is a thesis about legal validity." (33).

23 See, e.g., Waldron, "Who Needs Rules of Recognition?" 336.

24 See Toh, "Hart's Expressivism and His Benthamite Project."

25 See generally Hart, *The Concept of Law*, 100–17. Grant Lamond spins Hart's account in a metaphysical direction when maintaining that "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" ("The Rule of Recognition and the Foundations of a Legal System," 114). Yet the language of "recognition" and "identification" seems very apt insofar as what are being validated are preexisting norms external to this legal system. In such cases, the facts about legal practice that ground fundamental legal norms would not determine the norms' contents; those contents would be determined by whatever extralegal grounds ground the extralegal norms. (I take this thought from an anonymous referee.) But many norms in contemporary municipal legal systems are created by the legal system, not simply adopted from some other normative system. For them, "recognition" and "identification" do seem unfit, and "constitution," "determination," or "grounding" are better.

26 See, e.g., Chilovi and Pavlakos, "Law-Determination as Grounding," who sketch "a ground-theoretic interpretation" of "Hartian positivism" according to which "rules of recognition

Hart are comfortably understood as targeting something very much like this account.

On this reading, the Hartian theory of legal content is a specification of generic two-level legal positivism in three respects. First, it replaces the vague generic reference to "legal practices" with Hart's signature theoretical innovations, the internal point of view and ultimate rule of recognition. Second, it conceptualizes the "fundamental legal norms" that are grounded in practice as "ultimate criteria of validity."[27] Third, and working hand in glove with the second, it posits that the determination mechanism is "validation."[28] (See figure 3.)

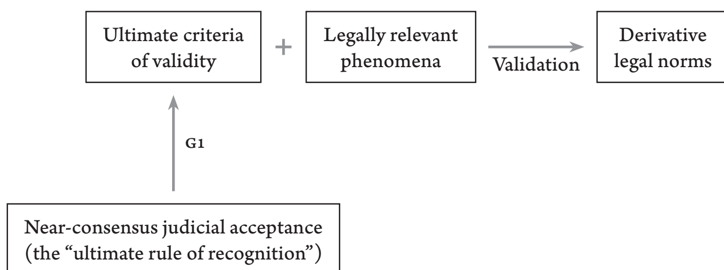

FIGURE 3 Hartian Legal Postivism: First Pass

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 1" was legal positivism. His strategy was

play a double role" in that "they count as partial grounds of law" and "enable certain facts to be further grounds, and determine the way in which these facts contribute to legal content" (71–74). See also Greenberg, "What Makes a Method of Legal Interpretation Correct?": "Jurisprudential theories like those of Hart and Dworkin offer accounts of how the content of the law is determined at the fundamental level.... On Hart's theory, the content of the law is determined at the fundamental level by convergent practices of judges and other officials" (112–13).

27 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., Hart, *Essays in Jurisprudence and Philosophy*, 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" (359). 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.)

28 Chilovi and Pavlakos, "Law-Determination as Grounding" offers a similar analysis of Hart's account in terms of grounding. I explain the modest differences between our accounts in Berman, "Dworkin versus Hart Revisited," 560n41.

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 on little else. It is 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.[29] 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."[30] 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."[31]

The problem for Hartian positivism, according to this challenge, is that it is a "model of rules" 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 do not depend upon specifiable sufficient conditions; they cannot be validated by any "test that all (and only) the principles that do count as law meet."[32] 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."[33] Therefore, Hart's theory cannot accommodate legal principles.

As early critics of the essay showed, this argument is infirm in several respects.[34] While some flaws might be massaged away, many readers were

29 Berman, "Dworkin versus Hart Revisited."

30 Dworkin, *Taking Rights Seriously*, 24.

31 Dworkin, *Taking Rights Seriously*, 35.

32 Dworkin, *Taking Rights Seriously*, 40.

33 Dworkin, *Taking Rights Seriously*, 43.

34 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, *Law's Empire*, 22). However, the scholarly consensus is that "Dworkin's two accounts of principles do not mesh" (Lyons, "Principles, Positivism, and Legal Theory," 423) and that, if there is a distinction

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.[35] To the contrary, commentators thought it apparent that they can arise in *both* ways.

Take validation first.[36] Suppose the criteria of validity specified by 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 other things, is that "states should be paid special regard." It is not at all clear why that conjunction of facts would not validate some legal principle of federalism, the contours of which would be shaped in common-law fashion. Next take acceptance. Given that Hart allows that customary law can be law in virtue of being accepted, there is no obvious bar in Hart's theory to principles being accepted too.[37] 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 can also be directly grounded in the practices that Hart calls acceptance.

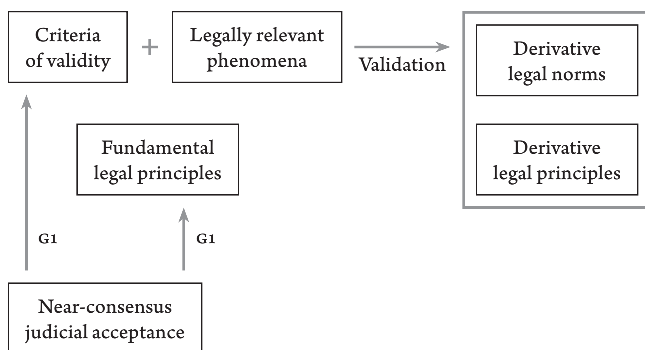

FIGURE 4 Hartian Legal Positivism: Response to Dworkin

So far so bad for Dworkin's challenge, it seems. And yet even though Dworkin failed to fully corral his quarry, many theorists think that he was on the right track.[38] If so, the task is to make clearer what he was up to.

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 (Soper, "Legal Theory and the Obligation of a Judge," 479–84; and Raz, "Legal Principles and the Limits of Law").

35 Dworkin, *Taking Rights Seriously*, 20.

36 See, e.g., Lyons, "Principles, Positivism, and Legal Theory," 425; Ten, "The Soundest Theory of Law," 524; and Hart, *The Concept of Law*, 261, 264–65.

37 Raz, "Legal Principles and the Limits of Law," 853.

38 See, e.g., Smith, "Dworkin's Theory of Law": "While many positivists thought that [Dworkin] over-stated or misunderstood the difference between rules and principles, most

Although Dworkin highlights his claim that Hartian positivism cannot explain the *existence* of legal principles, the true force of his challenge, I have argued elsewhere, is that it cannot explain their *function* or *operation*. As figure 4 indicates, the Hartian account, as modified to meet the challenge from principles, represents rules and principles (both fundamental and derivative) as coexisting in parallel, more or less. In the words of the inclusive positivist David Lyons, "principles supplement rules."[39] But principles have a function, which is to contribute to rules, not (merely) to supplement them; their role is to help constitute or metaphysically determine the rules that are not themselves grounded in official acceptance. And they do so, Dworkin charges, 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."[40] This, finally, is the central thrust of Dworkin's challenge. "What really kills the model of rules in Dworkin's theory," Timothy Endicott rightly observes, "is not the proposition that there are some legal standards ['principles'] not identifiable by reference to a rule of recognition, but the proposition that all legal standards [including 'rules'] depend on standards that are not identifiable by reference to a rule of recognition."[41]

Unfortunately, Dworkin does not spell out precisely *why* determination of derivative rules by principles cannot be governed by the ultimate rule of recognition. One rare scholar who understood that Dworkin was targeting rules, not just principles, confessed to finding Dworkin's argument "puzzling."[42] Here I will try to make the logic and force of the challenge plainer. I will first lay it out succinctly and then say a little in defense of each of the argument's premises.

accepted that there *is* a difference between these two types of norm" (268). See also Alexander and Kress, "Against Legal Principles," 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" (745). See also Ávila, *Theory of Legal Principles*.

39 Lyons, "Principles, Positivism, and Legal Theory," 421.

40 Dworkin, *Taking Rights Seriously*, 43. This way of putting things assumes that principles form part of a theory of legal content and not only of a theory of adjudication. See below text accompanying note 83. Dworkin spoke in both registers while being notoriously cavalier about the difference. See also Dworkin, *Taking Rights Seriously*: "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" (77). And also: "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" (37).

41 Endicott, "Are There Any Rules?" 203–4 (emphasis omitted).

42 Bayles, *Hart's Legal Philosophy*, 167.

We will see that Dworkin's surprising contention that the rule of recognition cannot make sense of legal *rules* all depends on a crucial but entirely implicit distinction between two kinds of determination relationship, two general ways that determinants map onto resultants, or that grounded facts are grounded in grounding facts.

- P1. There are two kinds of determination relationship: "lexical" and "nonlexical."
- P2. If the Hartian account of legal content is true, then ordinary (derivative) legal rules are ultimately validated by (criteria grounded in) the ultimate rule of recognition.
- P3. Validation is a lexical mode of determination.
- P4. Principles contribute to the determination of rules nonlexically.
- C. Therefore, the Hartian account of legal content is not true.

P1 is perhaps the most important of Dworkin's premises but also by far the least well developed. Fortunately, the core idea is highly intuitive: some determination relationships centrally involve such notions and operations as "if … then," necessity, and sufficiency, while others revolve around different notions, prominently including "greater than/less than," contribution, and thresholds. This is a familiar if undertheorized distinction from outside jurisprudence. Start with the treatment of moral principles in moral philosophy. As Jonathan Dancy observes, "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.[43] "These two ways are different."[44] Or turn to legal practice, where lawyers recognize a distinction between "rules" and multifactor "balancing tests," the former dictating results by strict entailment and the former involving factors that combine or aggregate to dictate the legally proper result in a manner that eschews sufficient conditions and resists specification. Lastly, consider the difference between two accounts of conceptual "structure": 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.[45] All these familiar dyads point to the same central division in the theory of determination. In the absence of a well

43 Dancy, *Ethics without Principles*, 25.

44 Dancy, *Ethics without Principles*, 25.

45 See Margolis and Laurence, "Concepts."

settled nomenclature, but following Dancy, the labels "lexical" and "nonlexical" seem as good as any other.

After P1, the remaining premises are easy. P2 simply restates the Hartian claim that legal rules that are not accepted can exist only in virtue of being validated by the system's criteria of validity.[46] P3 reflects common scholarly characterization of Hartian validation as a process or function by which resultants are determined by satisfaction of a set of necessary and sufficient conditions.[47] P4 captures the point of insisting on principles' weightedness. As Stephen Perry encapsulates Dworkin's analysis, "the bindingness of a legal rule is nothing more than the collective normative force of the principles."[48] So even if principles could be grounded in judicial practice (as Dworkin denies), those principles combine to constitute rules, and their cumulative impact cannot be specified by a finite or tractable set of criteria.

Errol Lord and Barry Maguire, two philosophers of normativity who do not work in jurisprudence, argue that any normative theory must recognize "two central cross-cutting distinctions": the distinction between "strict" and "nonstrict" notions, and a second between "weighted" and "nonweighted" notions. Typically, nonstrict notions are weighted, and weighted notions help explain the strict.[49] For Lord and Maguire, reasons are the "paradigmatic" weighted and nonstrict normative notion—indeed, the only such notion they identify.[50] For a legal philosopher, however, Dworkin's principles are just as paradigmatic. They are weighted, nonstrict 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).

The surprising upshot of the challenge from principles, in short, is not that Hart's account cannot accommodate legal principles; it is that, thanks to the

46 Hart, *The Concept of Law*, 110.

47 See, e.g., Raz, "Legal Principles and the Limits of Law," 851; Himma, "Understanding the Relationship between the U.S. Constitution and the Conventional Rule of Recognition," 96; and Dworkin, *Taking Rights Seriously*, 62. This is not precisely right. Validation need not involve *necessary* conditions at all, and even supposedly sufficient conditions are not truly "sufficient" given Hart's embrace of defeasibility. See Berman, "Dworkin versus Hart Revisited," 560–62. But these quibbles aside, validation is a quintessentially lexical determination structure. As Hart explains, "To say that a given rule is valid 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" (*The Concept of Law*, 103). See also Hart, *Essays in Jurisprudence and Philosophy*, 359.

48 Perry, "Judicial Obligation," 225.

49 Lord and Maguire, "An Opinionated Guide to the Weight of Reasons," 3–4.

50 Lord and Maguire, "An Opinionated Guide to the Weight of Reasons," 3–4.

existence of fundamental legal principles and the nonlexical determination relationship that obtains between principles and rules, *the Hartian theory of legal content cannot explain legal rules*. The core of Dworkin's subtle argument in "The Model of Rules I" tasks positivists to explain how derivative legal rules can be partially determined by the workings of principles and not (only) by validation. The challenge from principles is, at heart, the *challenge of nonlexical determination*. It 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 antipositivist 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 fundamental legal norms. Hart makes clear that the rule of recognition depends upon a very substantial degree of judicial agreement on the criteria it picks out: "what is crucial is that there should be a unified or shared official acceptance."[51] 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 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,"[52] pursuant to which, as Shapiro puts it, "the grounds of law in any community are fixed by consensus among legal officials."[53] 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

51 Hart, *The Concept of Law*, 115.

52 Dworkin, *Law's Empire*, 7.

53 Shapiro, "The Hart–Dworkin Debate," 37.

genuine theoretical legal disagreements is unintelligible on positivist premises.[54] 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 (what Dworkin terms "empirical" rather than "theoretical") about whether some criterion is satisfied.

Dworkin introduces the "snail darter case," *TVA v. Hill*, to illustrate. I will examine this case in greater depth later (in 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 intended the opposite. Powell said that the courts should accept an absurd result only if they find compelling evidence that *it* was intended.[55]

This disagreement, Dworkin emphasizes, 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."[56] 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. In short, positivism maintains that "genuine argument about law must be empirical rather than theoretical."[57]

Notice that this argument relies upon two distinct premises: (1) that *q* is the law only if validated by criteria supported by official consensus; and (2) that the officials whose consensus grounds legal content know 1. Premise 2 is essential to Dworkin's argument because there is no difficulty explaining judges' sincere disagreements about what the legal fundamentals are if they do not fully

54 Dworkin, *Law's Empire*, 7.

55 Dworkin, *Law's Empire*, 23.

56 Dworkin, *Law's Empire*, 23.

57 Dworkin, *Law's Empire*, 37.

appreciate that what they are depends constitutively on judicial agreement. Yet 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 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."[58] 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."[59]

But this attribution is baseless. 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."[60] And most commentators have thought it plain that positivism is not in the business of defining words.[61] 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.[62]

58 Dworkin, *Law's Empire*, 31.

59 Dworkin, *Law's Empire*, 37.

60 See Hart, *The Concept of Law*, 247.

61 See, e.g., Leiter, "Beyond the Hart–Dworkin Debate": "if any argument is no longer worth discussing, it is this one" (31n49). See also Kramer, *H. L. A. Hart*, 207n2.

62 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 was close to Hart's own view at times and that he never meant to reduce the concept of law to the union of primary and secondary rules. See Hart, *The Concept of Law*, 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" (239). But I cannot pursue these claims further here.

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 cannot explain genuine and sincere disagreements about the fundamental legal norms. (That is the subject of the challenge from theoretical disagreements.) It is 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 criteria grounded in the rule are unable to perform their validating function. "Where there is no consensus, there is no law."[63] Unfortunately, in the 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 US Supreme Court (and even the federal appellate courts) are determinately resolved by criteria that enjoy near-consensus judicial recognition.[64] 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."[65] This was not a throwaway line: Dworkin pressed it for forty years.[66]

To this critique, the usual responses are available: "Not so!" and "So what?" Let us take them one by one.

The "Not so!" response is very tempting because, frequent repetition notwithstanding, Dworkin's charge of "almost no law" is obviously exaggerated.

63 Barzun, "The Positive U-Turn," 1355.

64 The most thorough study to reach that conclusion is Greenawalt, "The Rule of Recognition and the Constitution." See also Greenberg, "What Makes a Method of Legal Interpretation Correct?" 124; and Leiter, "Explaining Theoretical Disagreement," 1224.

65 Dworkin, "Hart's Posthumous Reply," 2116.

66 See Dworkin, *Law's Empire*, 10, and *Taking Rights Seriously*, 350.

But the question is not whether Dworkin's rhetoric matches the reality. It is whether the grain of truth behind the hyperbole is large enough to warrant being taken seriously. The answer to that question strikes me as plainly yes. Some American judges, including some on the Supreme Court, recognize originalist or textualist criteria of validity that render invalid major pieces of federal legislation and vast swaths of federal administrative regulations. If the Hartian account of legal content that I have sketched is the best positivist account of legal content available, then very many questions of federal statutory and regulative law are underdetermined, not just little pockets here and there.

That leaves the second response: "So what?" Unlike the first retort, this one acknowledges that American law is much less determined, much gappier, than American lawyers and legal scholars, let alone laypeople, routinely suppose. The "So what?" response simply denies that that fact undermines the Hartian account. Brian Leiter is perhaps the most notable champion of this rejoinder.[67] In his estimation, few if any 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. Ordinary thought and talk about law, including about American constitutional law, is cognitivist on its face. And very many speakers, including supposed sophisticates, routinely attribute determinate constitutional properties ("unconstitutional" being the most common) to acts even when the correctness of the attribution depends upon legal premises that we know to be controversial. Furthermore, my own considered judgments that thus-and-such is constitutionally prohibited or constitutionally permitted often survive despite my knowledge that my judgment rests on controverted premises. Simply put, it frequently feels to me, when "playing judge," that there are legally right answers to a good number of controversial cases. Furthermore, many colleagues report the same. Even if my judgment that there is law even where there is disagreement could be wrong, it is obviously not idiosyncratic to me and

67 See Leiter, "Explaining Theoretical Disagreement." Bill Watson is with Leiter, advocating a Hartian account of the validation of legal sources married to the "standard picture" of law in which legal content is determined by the pragmatically enriched communicative contents of those sources. Watson, "In Defense of the Standard Picture." He has argued that that package explains the wide expanse of legal *agreement* better than other theories, including (in personal communication) principled positivism. See Watson, "Explaining Legal Agreement." My impression is that Watson overstates the degree of support for the standard picture in US legal practices and underestimates the ability of principled positivism, at least, to explain agreement. But his careful arguments warrant closer attention than can be afforded here.

Dworkin. On coherentist reasoning, these judgments, along with attributes of ordinary legal thought and talk, are enough to justify our treating the too-little-law objection as a genuine challenge for positivists, at least provisionally.[68] If positivists cannot amend Hart's account to make plausible that some legal propositions are true despite the lack of near consensus on their truthmakers, that some legal rules exist in the absence of uniform support for the principles that are their determinants, then Leiter's response remains available.

2. FROM HARTIAN POSITIVISM TO PRINCIPLED POSITIVISM

I have argued that Dworkin marshals two troubling objections to a Hart-inspired positivist account of legal content: that it cannot satisfactorily explain the existence *and operation* of legal principles (i.e., that they play a role in making legal rules what they are but do so in a fashion that does not involve "validation"); 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 is that we should abandon positivism.

This article pursues an alternative possibility. It is to revise or supplement Hart's account in a way that enables positivism (1) to accommodate genuine legal principles that participate in the nonlexical 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 overly regimented or incomplete and that

68 An anonymous non-American reviewer worries that even if my judgment that law survives official dissensus is held by other American constitutional scholars, that view is too parochial to warrant being taken seriously by others. Rather, in their estimation, the fact of significant judicial dissensus on fundamentals "in the USA merely serves as evidence that that country has a defective/malfunctioning legal system," and my effort to articulate a positivist theory that would vindicate my and others' judgment that law survives dissensus only bolsters already well-warranted suspicions that the literature on American constitutional theory "is, basically, a systematically disingenuous discourse."

I find those judgments too harsh but not baseless. See Berman, "Our Principled Constitution," 1334. This cannot be the place to defend American constitutional theory writ large. I acknowledge that this article will hold greater interest for readers who antecedently believe that there is sometimes law even when judges disagree about legal fundamentals, and that that set of persons will possibly include American constitutional theorists disproportionately. But even scholars (of any nationality) who do not actively believe that claim should be more open to it than the reviewer's comments suggest. If you start off disposed toward a positivist account of legal content but open to the too-little-law challenge, then you have all the reason you need to give a non-Hartian account of legal content an honest hearing. If you then find my alternative account unpersuasive on other grounds, the exercise will still have returned value if it increases your confidence in what I am calling the Hartian theory of content.

some loosening, reworking, or supplementing would be required to render positivism a fully adequate theory of law.[69] This is my attempt to contribute to that effort by bringing a less tightly structured vision of legal content into crisper resolution.[70] Success in this endeavor would not disprove antipositivism but would make positivism vastly more eligible.[71]

69 See, e.g., Soper, "Legal Theory and the Obligation of a Judge": "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" (514). See also Schauer, "Amending the Presuppositions of a Constitution": "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" (150–51). See also Kramer, *H. L. A. Hart*: "A satisfactory theory of law has to include a much better account of legal reasoning and interpretation than the account offered by Hart" (205). See also Bayles, *Hart's Legal Philosophy*, 170. John Gardner disagrees with Kramer when insisting that legal positivism is only "a thesis about legal validity." See note 23 above. I am with Kramer in believing that Gardner's characterization of legal positivism is stipulative and unduly narrow. A comprehensive or complete positivist theory of law would include a theory of legal content, whether or not that was of interest to Hart.

70 Dworkin anticipated and dismissed a view that some might think resembles the one I am 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?" (*Taking Rights Seriously*, 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" (43). "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" (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 is 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 decision-making. Furthermore, rather than relying upon a "rule of recognition" and the validation with which it is associated, principled positivism maintains that fundamental weighted principles determine derivative norms nonlexically. The view could be wrong and still wants for detail, but it does not approach a tautology.

71 This is an important point about the dialectic. I started (in section 1.1) by assuming some claims about the nature or essence of law, including that legal norms are only thinly normative. I am trying to provide a better account than Hart's of the socio-factual grounding of legal norms so conceived. This way of proceeding cannot establish that my starting assumptions are correct, which is close to the nub of the disagreement between positivists and antipositivists. See Tripkovic and Patterson, "The Promise and Limits of Grounding in Law," 222–26. Nonetheless, my effort, if successful, does improve positivism's prospects in its battle with antipositivism because a choice between them depends on comparative

Here is 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 decision-making. 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 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 nonfundamental legal notions (in a nonlexical, 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 the two challenges that hamstrung Hart's theory. (See figure 5.)

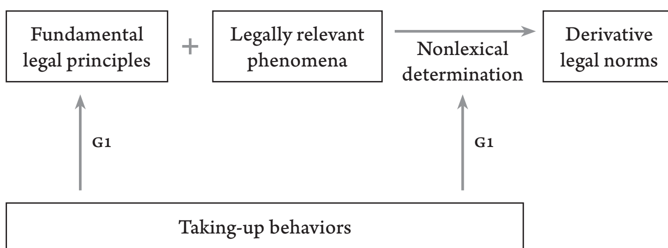

FIGURE 5 Principled Positivism

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

tallies of overall plausibility points, as David Enoch argues with respect to competing metaethical theories. See Enoch, *Taking Morality Seriously*, 14–15.

by nonlexical 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" by a legal agent or institution in a legally significant speech act (such as deciding judicial cases, enacting, signing, or vetoing legislation) that purports to invoke and rely upon such principle.[72] That's the basic idea, though of course it puts matters too simply. Let me elaborate.

What determines whose behaviors count and to what relative degree is not a brute fact constant across all legal systems but is itself a product 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 are largely products 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.

That said, legal actors disagree about our principles, both synchronically and diachronically. It is 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 contents and relative importance of the resulting principle.

72 Cf. Postema, "Classical Common Law Jurisprudence (Part 1)," 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" (166).

While the answer is surely complex and likely possesses elements of a sorites problem, 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 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."[73] 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.

Undoubtedly, this basic picture calls for detail and refinement. Here, however, 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.[74] 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 and that some theorists hostile to the possibility of distinctly legal principles have thought essential to positivism.[75] As C. L. Ten emphasizes, 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."[76] Indeed, "there 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."[77]

73 Sartorius, "Social Policy and Judicial Legislation," 154–55. See also Sartorius, *Individual Conduct and Social Norms*: "A principle is relevant if and only if, *and to the degree to which*, it enjoys what Dworkin aptly calls 'institutional support'" (193).

74 Dworkin fails to appreciate this possibility in his response to Sartorius in "The Model of Rules II" (reprinted in Dworkin, *Taking Rights Seriously*, 66–68).

75 See Alexander and Kress, "Against Legal Principles," 767–68.

76 Ten, "The Soundest Theory of Law," 530.

77 Ten, "The Soundest Theory of Law," 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, *Individual Conduct and Social Norms*, 196–99. But I tread cautiously here, for existing coherence-based theories of law reflect at turns both unclarity and disagreement regarding the particular relata that must be brought into coherence. See generally Kress, "Coherence"; and Rodriguez-Blanco, "A Revision of the Constitutive and

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) is illustrated by the familiar (putative) principles of American equal protection law customarily termed "colorblindness" and "antisubordination." They are frequently arrayed against each other in concrete legal disputes, especially concerning state-mandated preferences for racial minorities, making it possible 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 antisubordination (however the latter may be glossed) would qualify as a principle of American law.

But many constitutional lawyers would resist that conclusion. Consistent with the alternative Sartorius-Ten account, many American constitutionalists would say that *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 is the chief objection to positivist legal principles that Larry Alexander and Ken Kress advance in their aptly titled article "Against Legal Principles."[78] As they summarize: "We cannot establish principles by agreement because we cannot establish their weights by agreement."[79]

There are 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, nonlexical.

Epistemic Coherence Theories in Law." See also Hurley, "Coherence, Hypothetical Cases, and Precedent."

78 Alexander and Kress, "Against Legal Principles," 761–64.

79 Alexander and Kress, "Replies to Our Critics," 925.

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.[80] 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 decision-making. Weights are relative to one another, and are given by what members of the legal community say about them and how they use them. They are also conferred, as it were, by battle—by the rules that are adjudged victorious, and thus made so, when principles press in opposing directions.[81]

Weights conferred in this manner will be rough at best (think: slight, moderate, weighty, very weighty, or nearly conclusive; *not*, e.g., 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 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 of colorblindness and antisubordination. 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

80 Alexander and Kress, "Against Legal Principles," 767 and n106.

81 Berman, "For Legal Principles," 254. 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 by Leiter, who argues that "Against Legal Principles" "is actually devoid of any arguments against the *existence* of legal principles" ("Explanation and Legal Theory," 906). See also Lawson, "A Farewell to Principles."

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, nonlexical determination—not that legal practices cannot deliver variably weighted principles but that any principles practices deliver cannot combine to determine anything resembling rules. They can of course be used by judges when deciding what to do or what rules to create. But they cannot combine to determine legal content that judges are able to discover or ascertain rather than make. 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.[82] 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 (usually) sufficient conditions. Baude and Sachs vividly formulate this challenge to a preliminary sketch of my account, 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."[83]

The obvious answer, which 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 press or weigh or favor); and forces can combine by force addition.[84] This is Stephen Perry's approach. As Perry explains, "the principles that are relevant to a particular situation are assumed to be commensurable and capable of being

82 Think of "the priority problem" that Rawls worries bedevils all forms of "intuitionism" (Rawls, *A Theory of Justice*, chs. 7 and 8). The same concern underwrites doubts that nonclassical accounts of concept structure are intelligible. See Davies, "The Cluster Theory of Art"; and Margolis and Laurence, "Concepts."

83 Baude and Sachs, "Grounding Originalism," 1489 (criticizing Berman, "Our Principled Constitution"). See also Alexander, "The Banality of Legal Reasoning": "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" (521).

84 See Ross, *The Right and the Good*, 28–29.

aggregated, along their dimension of weight, so as to produce an overall balance of principles."[85]

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_n, 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* thus acquires 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 or importance, 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.

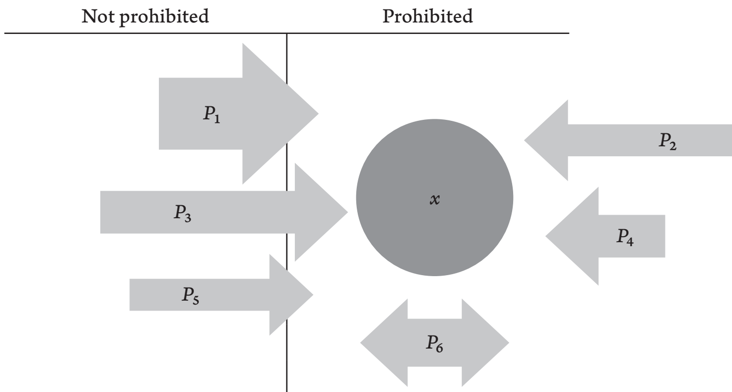

FIGURE 6 Nonlexical Determination of Rules by Principles (Intuitive Model)

Here are several things one can read off the graphic: P_1, P_3, and P_5 have the same "valence" with regard to *x*: they all bear toward its being prohibited. P_1 is a weightier principle (it possesses more potential force) than P_3 or P_5, but P_3 is more fully activated against the permissibility of *x* than P_1 (it exerts more of its potential). A two-headed arrow, representing principle P_6, 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.

All the same information can be represented by a more orthodox representation of vector addition.[86] In this model, a principle's relative weight (a context-invariant property) is represented by its length, and the degree of its

85 Perry, "Two Models of Legal Principles," 788. See also Perry, "Second-Order Reasons."

86 I am grateful to my student Brandon Walker for urging me to deploy this standard model for representing vector addition.

activation (a context-variant property) is represented by the angle it describes relative to neutrality (here represented by the y-axis). The force that the principles exert collectively is determined by linking the arrows head to tail. If the chain of vector arrows starts at neutral, then the act or event x has the legal property or status that corresponds to the area of the plane where the chain ends. Figure 7 below captures the same information conveyed in figure 6 above.

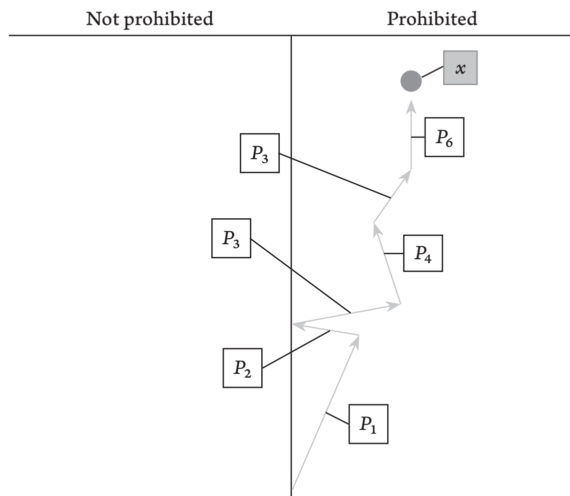

FIGURE 7 Nonlexical Determination of Rules by Principles (Orthodox Model)

A legal rule is a description of the legal status of a contiguous stretch of tokens that share the same legal status.[87] 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_1 is prohibited] and [x_2 is prohibited] and [x_n 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_n is prohibited] where each token prohibition obtains in virtue of the net bearing of the fundamental principles on x_n. 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."[88]

87 Here and throughout, I have said that principles operate upon tokens, not types. I believe that this is a more promising way to explain how legal properties can be assigned to token acts or events themselves, as we should ultimately wish, and not only to descriptions of them. But many words could be expended on this question, and I do not believe that the substance of the argument changes if you think principles operate upon finely defined act or event types.

88 Perry, "Judicial Obligation, Precedent and the Common Law," 225.

Perry is an antipositivist. 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 cannot 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 we need more determinacy if principles can jointly determine rules as the summary 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."[89]

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 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.[90] 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.[91] 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

89 Perry, "Two Models of Legal Principles," 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." Perry, "Two Models of Legal Principles," 794, citing Dworkin, *Taking Rights Seriously*, 43–44 and 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 Berman, "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 (574–76).

90 See, e.g., Sartorius, *Individual Conduct and Social Norms*, 193–94.

91 Cf. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," arguing that the recognized "modalities" of American constitutional argument usually align, or can be viewed as aligning, even in hard cases.

the extent to which the principle is (as I call it) "activated."[92] Take a possible legal principle that 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 *x*-ing 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—while *activation* is context sensitive.[93] 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 underdeterminacy, possibly substantial, will remain.[94]

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, "because principles' weights vary in different concrete contexts, a complete account of principles requires differing weights for every conceivable context."[95] That is mistaken. What is 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 behav-

92 Cf. Alexy, "Formal Principles," defining the "concrete weight" that a principle exerts in context as a function of, *inter alia*, the principle's "abstract weight" and the "intensity of interference" with the principle under the circumstances.

93 The temporal inconstancy of principles follows from the facts that they and their weights are grounded in human behaviors and that human behaviors are inescapably dynamic.

94 To be clear, I am addressing the worry that the balance of principles will be underdeterminate in a great many cases—many more than would be consistent with widespread judgments among sophisticates regarding the actual extent of legal underdeterminacy. I am not responding to Dworkinian anxiety that there will be *some* underdeterminacy and therefore that the picture I present 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, "Principles, Positivism, and Legal Theory," 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," 156–60.

95 Alexander and Kress, "Replies to Our Critics," 924–25.

iors of the system's subscribers (or of some subset). Principles operate within the normative field much as masses do within a gravitational field. Rules are articulable descriptions of stretches of the curvature of the normative field that the principles effect.[96]

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.[97] 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.[98] The simplest and most widely used of all MCDA and MCA models is simple additive weighting (SAW) and its variants.[99] Wrinkles aside, a decision maker 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."[100] 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 decision-making 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, and not *only* to be used by judges to

96 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—between lexical and nonlexical rather than between validation and aggregation.

97 A useful introduction and overview is Goodman and Wright, *Decision Analysis for Management Judgment*.

98 See Lindell, *Multi-criteria Analysis in Legal Reasoning*, who notes 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" (8–9) and speculates that the literature's relative formal and scientific language has impeded its reception by lawyers and legal scholars.

99 See, e.g., Abdullah and Adawiyah, "Simple Additive Weighting Methods of Multi-criteria Decision Making and Applications."

100 Lindell, *Multi-criteria Analysis in Legal Reasoning*, 48.

make law when existing legal content is underdetermined (or is believed to be underdetermined). But even if determination 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.[101] 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 to 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 ¬*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 antipositivist—this time Mark Greenberg. Greenberg persuasively argues 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 (or facts) 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."[102] 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. "That 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."[103]

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

101 See generally Lord and Maguire, eds., *Weighing Reasons*; and Dancy, *Ethics without Principles*, ch. 3. The example best known to legal scholars is Raz's "exclusionary reasons" (*Practical Reason and Norms*, 35–48).

102 See Greenberg, "How Facts Make Law," 237.

103 Greenberg, "How Facts Make Law," 237. 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. . . . Lawyers take for granted that the epistemology of law tracks its metaphysics. And the epistemology of law is plainly reason-based" (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."[104] I agree. But he is driven to antipositivism because, he believes, "it turns out that value facts are needed to make *intelligible* that law practices support certain legal propositions over others."[105] 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.[106] 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, we might expect it to be the default mode in a complex, comprehensive, and decentralized legal system. It is no surprise that simple additive weighting is widely heralded as the most user-friendly and "robust" of MCA models.[107]

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 is 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."[108] 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 of not only fundamental legal principles but also the determination function that maps such principles to derivative legal rules.

104 Greenberg, "How Facts Make Law," 233.

105 Greenberg, "How Facts Make Law," 240.

106 Here I am in broad agreement with Chilovi and Pavlakos, "The Explanatory Demands of Grounding in Law." I interpret Greenberg as arguing for explanation in their "weak sense," and I share their judgment that positivism can supply it.

107 See, e.g., Lindell, *Multi-criteria Analysis in Legal Reasoning*, 47.

108 See generally Marmor, *Social Conventions*, ch. 3.

These practices, moreover, are responsive to ordinary human needs and interests. As a thought experiment, 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* is entailed by what the text says)].[109] 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], [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.[110] 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, responsiveness of the legal system to the pop-

109 Cf. Hart, *The Concept of Law*, 100–1.

110 Some orthodox positivists might object that this reading of Hart is a misreading and that his notion of "validation" does not presuppose what I have called lexical determination. I address this objection elsewhere, noting that many theorists are skeptical that nonlexical determination is workable and that if Hart means to embrace it, neither he nor his followers address those concerns. See Berman, "Dworkin versus Hart Revisited," 576–77. In any event, as noted earlier (notes 22 and 23 and accompanying text), I am more interested here in the state of jurisprudential thinking than in Hart exegesis.

ulace, 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 nonlexical 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 C_1, and acceptance by a different (substantial) minority sufficient to ground the rule that q is the law if C_2, then p and q would both be the law if C_1 and C_2 jointly obtain, even if p are 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 and thus ground principle P_1, and a different minority of judges take up and thus ground a conflicting or inconsistent principle P_2, 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.[111] 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 two challenges. 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 is true of every extant theory of legal content.[112] The present task is

111 I discuss conflicts between principles at greater length in Berman, "Religious Liberty and the Constitution," 889–94.

112 Greenberg acknowledges that his own affirmative antipositivist constitutive theory ("the moral impact theory") depends upon a not yet developed account of "the legally proper

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

Scholars attuned to this account will find plenty of judicial support for it. Elsewhere, I show that principled positivism makes sense of many and significant constitutional decisions by the US Supreme Court, favored by liberals and conservatives alike.[113] But the account is not particular to the US legal system. A revealing recent example from Britain is the unanimous opinion of the UK 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.[114] 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," and that Constitution "includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles."[115] 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."[116] The view, in short, is that the fundamental legal principles are embedded in legal practice, and they combine or interact to determine legal rules. The Court could then ascertain what the rule governing prorogation is once it identified what the UK's fundamental constitutional principles are. To be sure, the Court's analysis was controversial.[117] But the surface conformity

way" that legal institutions act to change "the moral profile." See Greenberg, "The Moral Impact Theory of Law," 1323.

113 Berman, "Our Principled Constitution"; Berman and Peters, "Kennedy's Legacy"; and Berman, "Religious Liberty and the Constitution."

114 *R (Miller) v. the Prime Minister*, [2019] UKSC 41.

115 *R (Miller) v. the Prime Minister*, par. 39.

116 *R (Miller) v. the Prime Minister*, par. 38 (emphasis added).

117 See, on the one hand, e.g., Craig, "The Supreme Court, Prorogation and Constitutional Principle" (finding the decision "correct and compelling"); Twomey, "Article 9 of the Bill of Rights 1688 and Its Application to Prorogation" (averring "the Court has taken an approach consistent with its previous jurisprudence ... and has not altered its course for political or any other reasons"); Young, "Deftly Guarding the Constitution" (describing the decision as "a carefully reasoned judgment, respectful of the constitutional and institutional limits of the judiciary, which protects the foundations of our constitution including representative democracy") (internal quotation marks omitted); Konstadinides, O'Meara, and Sallustio, "The UK Supreme Court's Judgment in *Miller/Cherry*" (approving of the decision as "grounded in classic constitutional and legal principles"); Caird, "The Politics of Constitutional Interpretation in the UK" (dismissing criticisms that the ruling was "improper" and noting "that all exercises of constitutional interpretation, when undertaken by a constitutional actor, are political"); Grogan, "The Rule of Law, Not the Rule of

of that analysis with the central elements of principled positivism can lend support to that theory of legal content even if the Court got this dispute wrong.[118]

2.4. Of Promulgated Rules and Summary Rules

The preceding analysis explains how principles aggregate to ground legal rules via their power to determine, nonlexically, 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 determinant or *input* to the applicable legal rule. I address that concern here by distinguishing two kinds of rule: what I 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." This assertion acquires normative force from underlying principles that are activated by or give effect to communicative contents of statutes. If the only fundamental legal principle in *S* provides that legal norms are all and only what authoritative

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Politics" (deeming the decision "clearly follow[ing] from principle" and the judgment's criticisms "unfounded"); Sedley, "In Court" (celebrating the decision and claiming that the Court "has re-lit one of the lamps of the United Kingdom's constitution: that nobody, not even the Crown's ministers, is above the law"). See in contrast, e.g., Endicott, "Making Constitutional Principles into Law," 177–78 (arguing that the Supreme Court was wrong "to decide when Parliament must be in session" because "the fact that Parliament should meet as appropriate does not support the conclusion that the law requires it to meet as appropriate"); Finnis, "The Unconstitutionality of the Supreme Court's Prorogation Judgment" (describing the judgment as "undercut[ting] the genuine sovereignty of Parliament," "wholly unjustified by law," and "a historic mistake, not a victory for fundamental principle"); Fisher, "No Politics Please," 144–45 (claiming that the Supreme Court referenced "inadequate" justifications in *Miller II* to "procure [...] obliquely an effect which could be achieved *directly* only by open departure from prior authority"); and Tierney, "Turning Political Principles into Legal Rules" (ascribing a "political view" to the decision "that led to the identification first of a constitutional principle and then the creation of a legal rule that served to normativise this principle even to the point of constraining a prerogative of sovereignty").

118 For an 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. *Conseil Constitutionnel*, decision no. 2018-717/718 QPC, July 6, 2018.

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 vindicated.

In complex mature legal systems, however, fundamental norms are 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 5 represents, combine 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 US 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 will show 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.

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.[119]

119 16 U.S.C. § 1536.

In 1967, The Tennessee Valley Authority (TVA), 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 (in 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 antipositivist 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 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 workings, 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 does not 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 cannot be attributed to them on purely semantic bases, one might nonetheless think that if, as the Hartian 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 than Hartian positivism can. To see how, we need a fuller understanding of the opinions than Dworkin's abbreviated summary conveys. Burger did not quite 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."[120] And Powell did not quite reason that courts must avoid an absurd

120 Dworkin, *Law's Empire*, 22.

result unless it is clear that the legislature intended it. Instead, both opinions recognize 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, and the public good (as an ordinary person or legislature would view it).[121] 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' relative weights. More conspicuously and consequentially, however, they disagree about the extent to which each principle was activated.

Let us 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."[122] Powell thought otherwise. Agreeing with the majority that "the starting point in statutory construction" is the statutory text, he found the language "far from 'plain.'"[123] 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 is 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.'"[124]

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 concerns tokens, not types. In this case, the issue was whether the ESA required cessation of the Tellico Dam project. What content would congressional intent need to have to underwrite an affirmative answer? Consider three possibilities, in order of increasing generality. Congress might have intended that section 7 would apply (1) even to the Tellico Dam project, (2) 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 (3) even when its application would incur great immediate or localized costs. All

121 For introductions to differences among types of intention—semantic, communicative, legal, application—see Berman, "The Tragedy of Justice Scalia," 796–99.

122 *TVA v. Hill*, 437 U.S. at 173.

123 *TVA v. Hill*, 437 U.S. at 205 (Powell, J., dissenting).

124 *TVA v. Hill*, 437 U.S. at 202 (Powell, J., dissenting).

members of the Court agreed that the Congress that enacted the ESA lacked any intention with content 1 or 2.[125] At the same time, the majority insisted, and the dissent did not deny, that the enacting Congress did have intention 3.[126] What divided the majority and dissent was whether intention 3 entailed or encompassed intention 1.

Burger thought that it did because intention 1 plainly falls within intention 2, and 2 does not differ in any material way from other subclasses of cases that fall under 3. Powell thought that the slide from 3 to 2 (and thereby to 1) is more fraught than the majority recognizes.[127] Nearly completed projects comprise a subclass of cases captured by 3, but one with distinctive features not shared by all subclasses of 3, 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 has 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?[128] 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 3 does not entail congressional intent 2 and therefore does not entail congressional intent 1. It followed, 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.[129]

125 See *TVA v. Hill*, 437 U.S. at 207–8 (Powell, J., dissenting).

126 See, e.g., *TVA v. Hill*, 437 U.S.: "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" (at 177, citation omitted).

127 See *TVA v. Hill*, 437 U.S., 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" (at 207, Powell, J., dissenting).

128 See *TVA v. Hill*, 437 U.S.: "Few 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" (at 210, Powell, J., dissenting).

129 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." *TVA v. Hill*, 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., *TVA v. Hill*, identifying "strong

So much for the opinions' disagreements regarding the first two principles or considerations: statutory plain meaning and the legislature's 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 as forcefully against the dam's completion 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.[130]

The majority is more circumspect, not surprisingly. Having determined that the most important principles pressed forcefully and in concert against permissibility, it did not need to examine the possible import of a palpably less weighty principle. Still, the majority opinion intimates that *avoid absurdity* would have some force in a dispute with respect to which meaning and intent were more equivocal.[131]

In sum, here is how the dispute looks through a principled positivist lens. 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

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corroborative evidence that the interpretation of § 7 as not applying to completed or substantially completed projects reflects the initial legislative intent" (at 210). 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" (at 210–11). Had he really endorsed the more aggressive position regarding congressional intent, this passage should have read ". . . to force Congress to produce a result contrary to what it intended."

130 *TVA v. Hill*, 437 U.S., arguing that "where the statutory language and legislative history . . . need not be construed to reach [a result that disserves the public interest], 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" (at 196, Powell, J., dissenting).

131 This too is modestly ambiguous. Burger's opinion can be read to suggest 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. See *TVA v. Hill*, 437 U.S., 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" (at 194). Or it could be read to deny that it is a principle of our legal system at all: "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'" (at 195).

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 favor of the permissibility of project completion could carry the day. Figures 8, 9, and 10 represent these competing positions, cleaned up a bit.

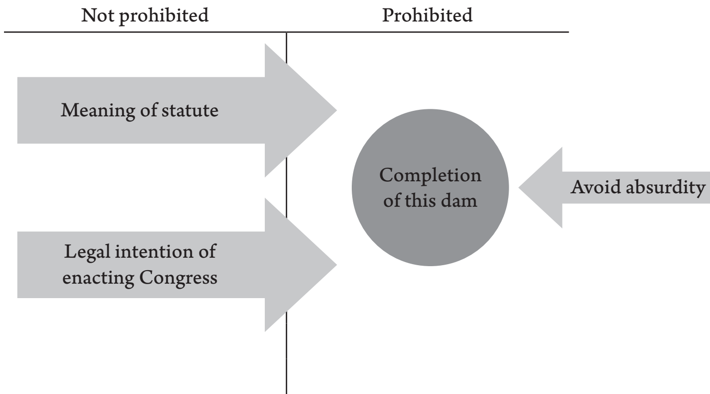

FIGURE 8 *TVA v. Hill*, per the Majority

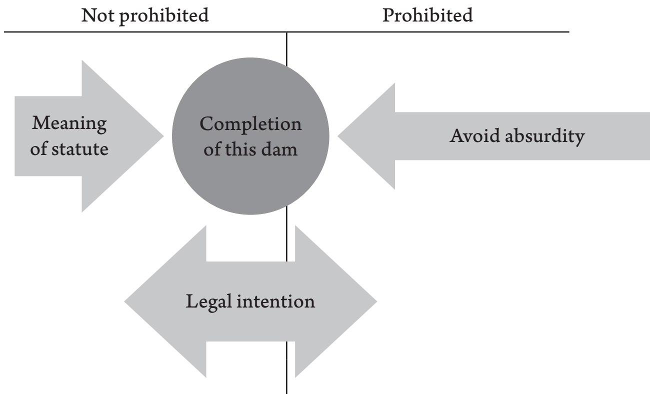

FIGURE 9 *TVA v. Hill*, per the Dissent

3.2. *Same-Sex Marriage before* Obergefell*: Delivering More Law*

Consider lastly 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*. The Supreme Court took up the

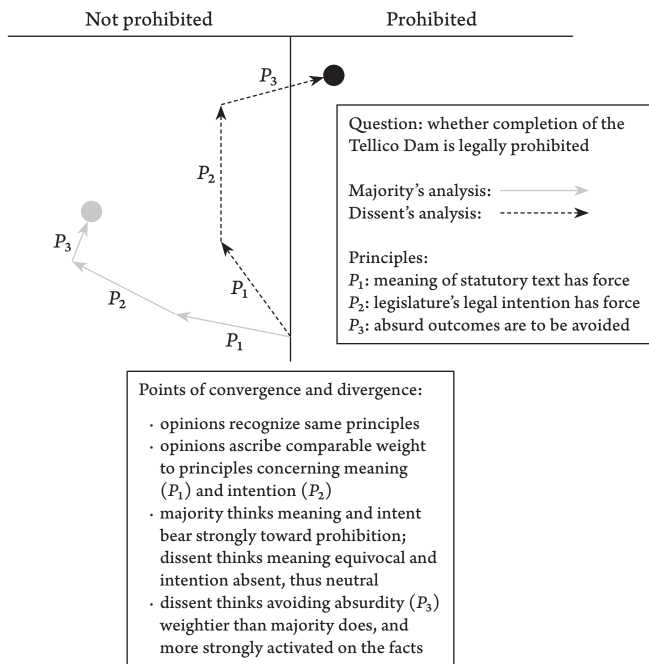

FIGURE 10 *TVA v. Hill*, Both Opinions

question in 2015 in *Obergefell v. Hodges*.[132] When it did, 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?[133]

Recall my earlier contention in section 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_1 or C_2 or C_3 or … C_n, 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.[134]

132 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

133 This section draws from Berman, "Our Principled Constitution," 1406–8; and Berman and Peters, "Kennedy's Legacy," 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 differ from the ones used in those earlier articles. I previously explained that the two representations are interchangeable (Berman, "Our Principled Constitution," 1394n219) and have come now to believe that the diagrams in this paper are preferable on balance.

134 For an argument that these criteria need not refer only to matters of "pedigree" rather than content, see Berman, "Dworkin versus Hart Revisited," 572–74.

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 US if:

C_1: [the Supreme Court has held q in a nonoverruled decision]

or

C_2: [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_3: [the authors and ratifiers of the constitutional text intended to codify q, the nation has observed a consistent practice of respecting q, and both q and $\neg q$ are comparably compatible with the ordinary meaning of the constitutional text and with all (nonoverruled) Supreme Court holdings]

or

C_4: [q is required by a posture of equal respect for human dignity, and q is not clearly contradicted by any (nonoverruled) Supreme Court decision]

or

C_5: [q best promotes human flourishing and is not contradicted by the contemporary naive meaning of any provision of the constitutional text]

or

$\ldots C_n$

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 C_1, C_2, and C_3—do not plausibly validate *same-sex marriage,* while conditions that do plausibly validate *same-sex marriage*—conditions such as C_4 and C_5—are pretty clearly not the object of a judicial consensus.[135] Of course, it could be that before *Obergefell*

135 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. (See note 47 above.) Even were it plausible that a

was decided, *same-sex marriage* was false as an account of existing law. On the orthodox Hartian account, however, *same-sex marriage* is not merely false but *obviously* false, a nonstarter. And many sophisticated observers will find that conclusion highly doubtful.[136] 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 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; and 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 but because they have the type of "institutional support" 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."[137]

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."[138] True, it does not. 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.[139] 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

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.

136 Do not be misled by this one example: principled positivism and organic pluralism are not partisan. I have shown elsewhere that they support many conservative results. See Berman, "Our Principled Constitution," 1393–411, and "Religious Liberty and the Constitution."

137 Sartorius, "Social Policy and Judicial Legislation," 154–55.

138 *Obergefell v. Hodges*, 576 U.S. at 735 (Thomas, J., dissenting).

139 See *United States v. Windsor*, 570 U.S. 744 (2013) at 770–75; *Lawrence v. Texas*, 539 U.S. 558 (2003) at 574–76; and *Romer v. Evans*, 517 U.S. 620 (1996).

the doctrinal waterfront.[140] It has undergirded successful claims to freedom of expression and personal liberty and to protection from excessive punishment, unreasonable searches, compelled self-incrimination, discrimination on the basis of race or sex, and more.[141] As Sartorius 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."[142]

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 underdeterminacy 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 (section 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 antisubordination) 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 weigh against *same-sex marriage* activate very substantially. The constitutional text does not clearly state that states are free

140 Henry, "The Jurisprudence of Dignity."

141 *Cohen v. California*, 403 U.S. 15 (1971) at 24 (robust freedom of expression rooted in "the premise of individual dignity and choice upon which our political system rests"); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 851 ("choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment"); *Roper v. Simmons*, 543 U.S. 551 (2005) at 560 (the Eighth Amendment's ban on cruel and unusual punishment "reaffirms the duty of the government to respect the dignity of all persons"); *Rochin v. California*, 342 U.S. 165 (1952) at 174 (the Fourth Amendment proscribes unreasonable searches and seizures because they are "offensive to human dignity"); *Miranda v. Arizona*, 384 U.S. 436 (1966) at 460 (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"); *Rice v. Cayetano*, 528 U.S. 495 (2000) at 517 ("race is treated as a forbidden classification [because] it demeans the dignity and worth of a person to be judged by ancestry"); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) at 625 (sex discrimination is forbidden because it "deprives persons of their individual dignity").

142 Sartorius, *Individual Conduct and Social Norms*, 207.

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 (entitled to little weight on standard case law principles); and so on.[143] 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 11.)

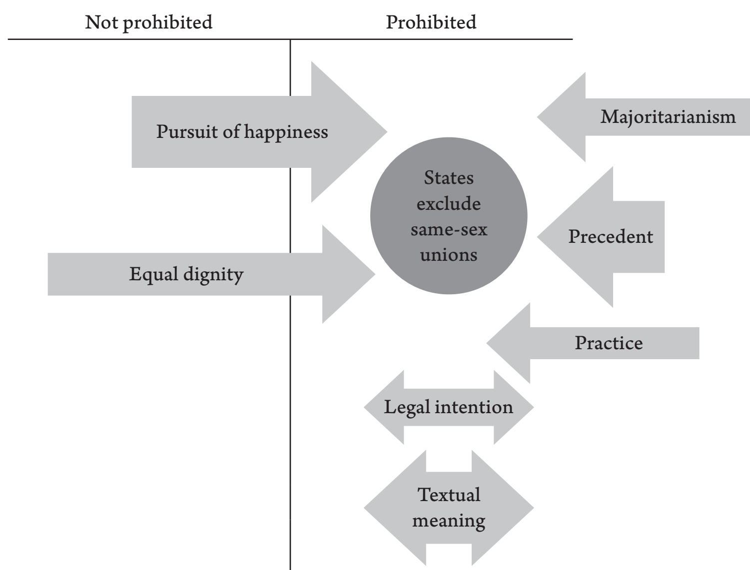

FIGURE 11 *Obergefell*, per Principled Positivism

I do not claim that this brief discussion and accompanying diagram are nearly sufficient to establish fully that *same-sex marriage* was a derivative legal rule of American constitutional law even before *Obergefell* so held. That is a lengthy task—and one for first-order constitutional scholarship, not legal philosophy. Rather, by explaining how that plausibly could be, I demonstrate how principled positivism differs from and likely improves upon Hartian positivism with respect to the challenge of too little law.[144] The example can thus serve as

143 *Baker v. Nelson*, 409 U.S. 810 (1972).

144 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 underdeterminate through the principled positivist lens. This is not something we can net out *a priori*. Still, two points merit emphasis. First (see section 2.3 above), I do not rule out that

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."[145] 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."[146] 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."[147] 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.[148] Without favoring such approaches, he nonetheless thought they clearly merited more attention than scholars had paid.[149]

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, not a theory about how anybody ought to

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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 that elsewhere (Berman, "Our Principled Constitution"; and Berman and Peters, "Kennedy's Legacy") but do not pretend that my efforts to date are conclusive. Thanks to Ruth Chang for pressing me on this point.

145 Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 1190.

146 Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 1193.

147 Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 1193–94.

148 Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 1228.

149 Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 1229–30.

do anything at all. Because these are theories about different things, principled positivism, as such, cannot quite fill Fallon's bill.[150] 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 US 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 sorely lacked.

4. CONCLUSION

What makes it the case that the law has the content that it does? Insofar as Hartian positivism addresses this question at all, it 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 decision-making.

Nomenclature aside, the critical differences are two. First, principled positivism allows, as the Hartian theory of legal content 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 nontrivial 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 might strike some persons as modest. They are not. As this article shows, their payoffs are great, 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 to the Hartian theory of legal content is closer to correct, it makes a profound

150 See Berman, "Our Principled Constitution," 1328–32 (distinguishing "prescriptive" from "constitutive" theories of constitutional interpretation); Sachs, "Originalism" (distinguishing "decision procedures" from "standards"); and Berman, "Keeping Our Distinctions Straight" (comparing the two sets of distinctions).

difference—not only to legal philosophers but to all who would understand or ascertain our law.[151]

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