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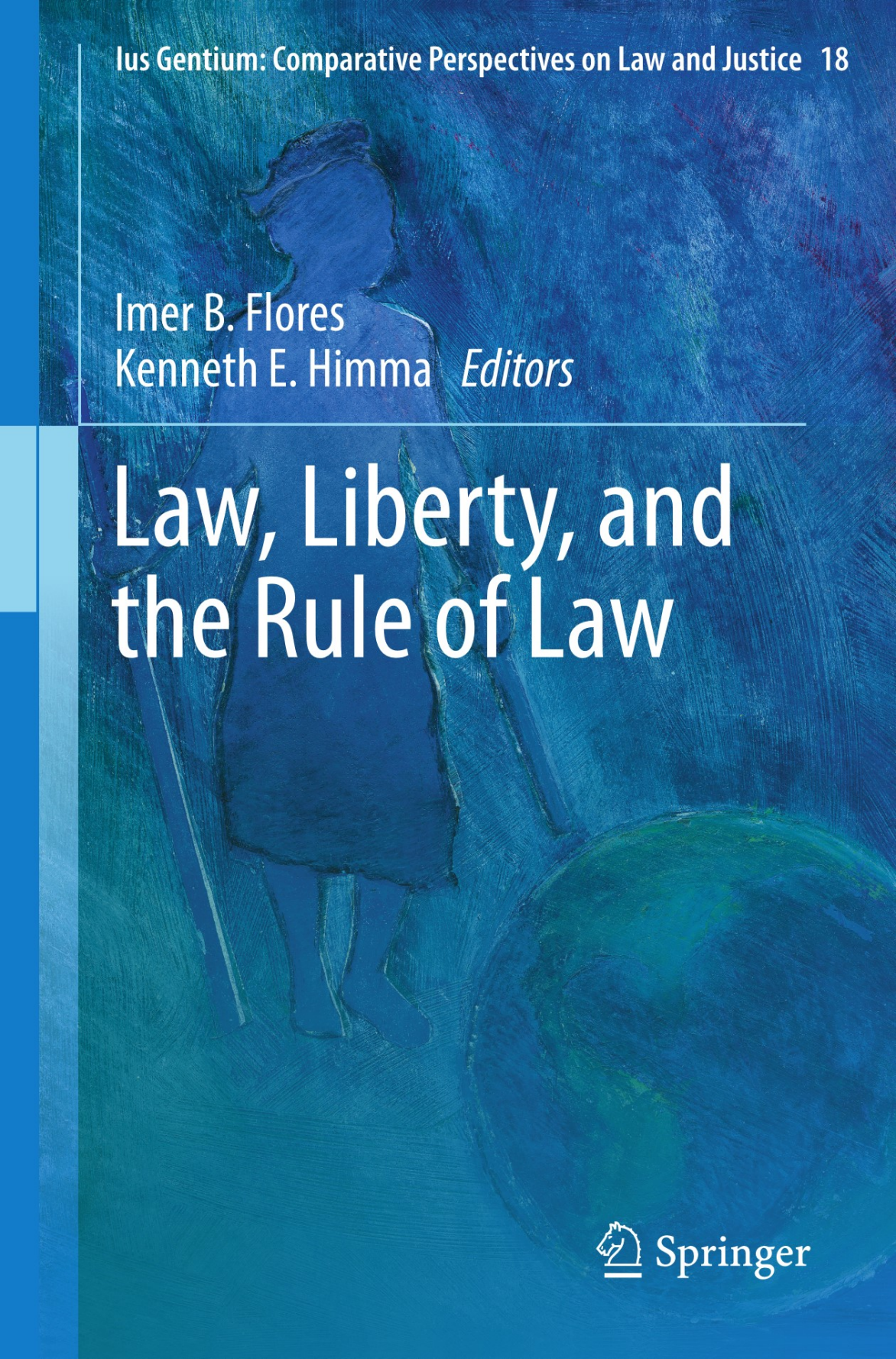
Law, Liberty, and the Rule of Law



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Chapter 10
The Rule of Law, Validity Criteria, and Judicial Supremacy

Kenneth Einar Himma

10.1 Introduction

The concept of the rule of law and the ideals expressing its content are deeply contested. Theorists distinguish two broad conceptions: procedural rule of law and substantive rule of law. The former focuses largely on the procedures by which law is enacted and applied while the latter focuses on the content of the law. One might argue that both conceptions are somehow part of the very concept of law, but this much is clear: whether internal to law or not, the standards comprising the rule of law, procedural and substantive, are also standards of political legitimacy. Whether or not the exercise of coercive state authority is morally justified will depend in any given instance, in part, on whether or not it conforms to the standards comprising the procedural and substantive rule of law ideals.

This is not, of course, to say that these standards exhaust the conditions of moral legitimacy; the problem of legitimacy is far more complex than that. For example, the ideal of procedural rule of law can be roughly summarized by the formula "governance by law and not men." The general idea here is that procedural rule of law insulates citizens from being governed by whims of officials by requiring that laws be enacted, properly framed, and applied according to certain conditions (which frequently are thought to include Lon Fuller's so-called internal morality

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of law). But, as H.L.A. Hart points out, these ideals are compatible with the enactment and enforcement of morally wicked laws. Further, the ideals of the rule of law are not generally thought to require any particular model of legislative decision-making – in particular, there is no requirement that governance be by democratic procedures, rather than some other procedures. Thus, the idea that a law (or a legal system generally) conforms to the standards of the procedural rule of law does not entail that the law (or legal system) is morally legitimate and may justifiably enforce the law by coercive means.

The converse is also true. The idea that a law (or a legal system) does not satisfy these procedural standards does not entail that the law (or legal system) is not morally legitimate. Fuller gets too little credit in legal philosophy for his work on what he took to be an internal morality of law with critics focusing somewhat unfairly on the idea that these formal standards constitute an internal morality. Construed as external standards of morality or as principles of efficacy, his work is seminal. As he correctly noted, it would take a wholesale failure to satisfy his eight conditions of law to vitiate a society's claim to having a legal system; it would take a similarly systemic failure to delegitimize a legal system. Indeed, as we will see, many legal systems include certain practices that seem inconsistent with these procedural ideals.

Although my concern in this essay is with the procedural ideals associated with the rule of law, I would like to hazard a few observations about the substantive ideals. First, an analysis of the substantive conception of the rule of law, usually expressing, at the most general level, that the content of the law is "right", "justified", or "just", by itself, tells us very little that would enable us to assess the legitimacy of any given system. Obviously, we would have to have a theory that provides substantive norms of legitimacy that covers the various areas of law: constitutional, criminal, tort, contract, *et cetera*. Should these theories be considered pieces of a theory of substantive rule of law? Moreover, there are similar concerns at the broadest level: should, say, the elements of Rawls's original position analysis be considered part of the theory of substantive rule of law. Finally, some laws that might not be ideally just might be legitimate because there is a consensus on its desirability that involves the voluntary waiver of citizens of rights that would otherwise have delegitimized the relevant laws.

In this essay, I give an analysis of those elements of the U.S. rule of recognition dealing with constitutional interpretation and judicial supremacy in order to evaluate them under procedural rule of law standards; as these elements are increasingly common among other legal systems, the conclusions I draw here will be applicable to these other legal systems.

Although the analysis presupposes a positivistic framework, I think that the same conclusions can be reached without making those assumptions – and shall indicate why. I will conclude that judicial supremacy seems to violate procedural rule of law standards, on the one hand, but suggest that it remains an open question, requiring consideration of other standards, as to whether judicial supremacy is morally illegitimate, a question I shall not consider here.

10.2 Conceptual Foundations of Positivism

10.2.1 The Concept of Validity Criteria

Fundamental to a conceptual analysis of law is the metaphysical thesis that, in any possible legal system, there are certain properties that *constitute* a norm as law (in exactly the way the instantiation of 'unmarriedness' constitutes a man as a bachelor). Any norm instantiating the appropriate properties is, for that reason, a law in that legal system; any norm not instantiating the appropriate properties is, for that reason, not a law in that legal system.

One consequence of this idea is that in every conceptually possible legal system there exist necessary and sufficient conditions for a norm to count as law. If *S* is a legal system and *P* is a statement that describes the properties that constitute a norm as law, then *P* states necessary and sufficient criteria of "legal validity" in *S*.

It should be noted that the Differentiation Thesis is a metaphysical thesis – and not an epistemological thesis. The Differentiation Thesis neither presupposes nor implies any claims about the extent to which the criteria of validity of a system can be identified.

10.2.2 The Separability Thesis

Understood here, the Separability Thesis denies Augustine's claim that unjust norms cannot be law. While Augustine believed that law must conform to moral principles, the Separability Thesis claims there can be legal systems with validity criteria not including conformity to moral principles. In other words, there *can* be both wicked legal systems and wicked laws – like Nazi Germany, apartheid South Africa, and antebellum United States.

Thus construed, the Separability Thesis does not deny necessary relations between law and morality; it simply excludes one particular necessary relation between law and morality – namely, a necessary connection between the criteria for determining what counts as law and moral principles. Positivists have frequently recognized other necessary relations between law and morality. H.L.A. Hart claims law must include "the minimum content of natural [moral] law" for law to conduce to its conceptual purpose of guiding behaviour. Joseph Raz argues that makes possible forms of social cooperation not otherwise possible among non-angels and hence performs a distinctively moral task.

10.2.3 The Conventionality Thesis

Fundamental to positivism is the idea that law is a social artefact all the way down. This entails not only that the laws governing citizens are manufactured by social

processes but that the laws governing officials are also manufactured by social processes. In particular, it entails that the rule of recognition defining the validity criteria is also a social artefact.

The Conventionality Thesis explains the content and authority of the validity criteria in every conceptually possible legal system in terms of a social convention practiced by the persons who function as officials. As it functions here, the term "convention" is used to pick out what Hart calls a "social rule". Social rules have an "external aspect" and an "internal aspect". The external aspect consists in members of the group converging their behavior to a rule – so much so that it can be described as doing it "*as a rule*" (Hart 1994, 5, emphasis in original). The internal aspect consists in members of the group converging on a critical reflective attitude that constitutes them as *normative* in the sense that deviations from that rule are appropriately criticized.

According to the Conventionality Thesis, law exists when there is a social rule of recognition that results in efficacious regulation of citizen behaviour. As Hart puts the point, "those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and… its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials" (Hart 1994, 113).

It is important to note that the idea that legal systems have criteria of validity is not controversial; neo-natural law theorists and Ronald Dworkin disagree not on whether there are criteria of validity but rather on whether they are fully constituted by conventional practices of officials. Neo-natural law theorists believe that there are certain necessary moral constraints on the content of enacted law, while Dworkin views law as an interpretive enterprise that is necessarily governed by a norm that validates not only those rules duly promulgated by courts or legislatures but also those principles that show those rules in the best moral light. But it is equally crucial to note that no one would deny that the criteria of validity are partly defined by social processes; that norms enacted by the US government must be passed by both houses and signed by the President is clearly a criterion of validity that governs lawmaking in the US because of something resembling a convention or an agreement.

10.3 The Logical Relationship Between the Criteria of Validity and the Social Rule of Recognition

The terms "criteria of validity" and "rule of recognition" are not synonymous. Whereas the social rule of recognition is at least partly normative as one would expect of *rules*, the criteria of validity are purely descriptive in character. Indeed, criteria of validity (*i.e*. the criteria that distinguish law from non-law in a legal system) are usually expressed by biconditionals without any normative language:

> *Criteria of Validity Schema*: X is a law in S if and only if X conforms to the conditions set forth by the proposition *P*, where *P* is a set of properties.

A statement with this form is neither a norm nor has the resources to provide reasons for action because it lacks deontic language capable of providing such reasons.

In contrast, the rule of recognition is expressed in deontic terms describing or defining obligations and duties. Thus, recognition norms have the following form:

> *Recognition Rule Schema*: A president/legislator/judge has a duty (or ought) to perform X in the execution of her function as president/legislator/judge.

The Recognition Rule Schema, unlike the Criteria of Validity Schema, contains the logical resources – *i.e.* deontic notions – to define and express duties.

The *purely descriptive* criteria of validity are extrapolated from a study of the *normative* recognition rules, particularly those that require certain acts as a precondition for creating law. Clearly, the recognition norms that directly define duties with respect to recognizing, creating, and adjudicating law, as well as those that confer the power to do so, will determine the properties a norm must have to have the status of law.

Although "rule of recognition" and "criteria of validity" are closely related, it is important to distinguish the two, however, because, as we will see below, there are some recognition norms defining duties pertaining to how the Court interprets the Constitution that are, strictly speaking, not part of the criteria of validity. The two terms are related without being synonymous.

It is important to note that this point can be generalized to anti-positivist theories. The terms "rule of recognition" and "recognition norms" are usually understood to be technical terms of art in legal positivism, and avoided by rival theories. For example, Dworkin rejects the idea that the validity criteria are exhausted by a social rule of recognition of the type Hart describes. If we use the terms simply to denote rules that define norms on the part of judges and officials that define duties and powers in making, changing, and adjudicating law (the meaning at the most abstract level), then the distinction between the rule of recognition and validity criteria should apply uncontroversially across rival theories. Judges will have legal duties, as we will see, to interpret the Constitution according to certain interpretive principles, yet it would be incorrect to characterize these duties as forming part of the validity criteria.

10.4 Identifying the Criteria of Validity and Rule of Recognition

Hart's view that the existence and content of the rule of recognition are determined by official practice entails that what officials *self-consciously treat* as validity criteria *are* the validity criteria. While individual officials – including judges – can presumably have mistaken beliefs about the validity criteria, it is simply not possible, on the Conventionality Thesis, for officials of the legal system, *considered collectively*,

to be *generally* mistaken about some *social* validity criterion. If officials all self-consciously recognize and treat norms satisfying *N* as valid law and *N's authority rests on acceptance*, then *N* determines a validity criterion in *S*. What officials collectively regard as the properties constituting norms as legally valid, as a conceptual matter, *are* the properties that are incorporated into the social rule of recognition defining the criteria of legal validity.

Each feature constituting a social rule is empirically observable. First, we can empirically ascertain convergence in behaviour. Second, we can empirically ascertain that conformity to the rule is encouraged and that deviations are criticized. Third, we can empirically ascertain that great social pressure is brought to bear on participants in the group to conform to the rule. Although it is possible to hide these features, legal systems, like the U.S., characteristically make no attempt to do so.

Accordingly, if Hart's Conventionality Thesis is true, then the project of identifying the validity criteria is empirical. The only way to identify the content of the social rule of recognition and the validity criteria is by empirical means. To identify the content of the validity criteria in any particular society, one must employ roughly the same sorts of empirical tools that are commonly utilized by sociologists to study the *behaviour* of officials. Thus, according to what I will call the Modelling Constraint, then, a correct description of the validity criteria in a legal system *S* must express those properties that, as a matter of observable empirical fact, officials collectively recognize as giving rise to legally valid norms they are obligated to enforce.

This feature also seems to be true of anti-positivist theories – although it will not be possible, on these other theories, to fully identify the criteria of validity by purely empirical observation. If, on the neo-natural law view, there are necessary moral constraints on the content of law, judges and legislatures might make a sufficient number of moral mistakes that it may seem that the relevant moral constraints are not functioning as validity criteria. But it might be possible to identify enough of the practices relevant to this paper through empirical means that the conclusions I draw about judicial supremacy and the rule of law under positivist assumptions can be extended to at least some anti-positivist theories.

10.5 The U.S. Supreme Court and the Nature of Final Authority

There is disagreement about whether the U.S. Supreme Court should have final authority to decide whether laws are valid under the Constitution but this much is clear: the Supreme Court *currently* has final authority to decide some constitutional issues. Indeed, one could not plausibly deny, as Ronald Dworkin aptly puts it, that the U.S. Supreme Court "has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make

public the secrets of his office."(Dworkin 1986, 2) Whether the U.S. adoption of the doctrine of judicial supremacy is legitimate (which is a normative issue), the U.S. courts clearly exercise judicial supremacy over the relevant issues.

10.5.1 The Capacity to Create Legal Obligations that Bind Other Officials of the System

A court has *authority* to decide a substantive legal issue only if its decision creates presumptive *obligations* on the part of other officials to accept its decision as law. To have authority is to be able to issue directives that are *authoritative* over some relevant class of individuals; and a directive is authoritative in virtue of its obligating the relevant class of individuals.

A court's authority to decide a substantive issue of law is *final* if and only if there is no *official* agency with authority to overrule the court's decision. As Dworkin puts this uncontroversial point: "[an] official has final authority to make a decision [when her decision] cannot be reviewed and reversed by any other official." (1977, 32) Accordingly, if a court has final authority over a decision, then its decision creates an obligation that binds officials in the jurisdiction; since there is no possibility of reversal, the obligation is final.

The obligations created by the decisions of a court with final authority are legal – if not *morally legitimate*. This has a very important consequence: *Insofar as a court has final authority to decide a substantive issue of law, it can legally bind officials in its jurisdiction, other things being equal, with either of two conflicting decisions on that issue.* For example, if a court has final authority to decide whether abortion rights can be restricted by legislation, then its decision creates legal obligations that bind other officials regardless of how the decision comes out – as long as the court reaches its decision in an acceptable way. Thus, the Supreme Court can legally bind other officials with a decision that is mistaken under the "correct" theory of interpretation (if such there be).

10.5.2 Final Authority and the Criteria of Validity

While it is natural to think that the holdings of the court with final authority are legally binding because they establish the content of the law, this is not necessarily true. It is both logically and causally possible for officials to be legally bound to enforce the content of a norm lacking the status of law – something that frequently happens in disputes that implicate the law of some other nation, state, or jurisdiction.

But this is not how officials in the U.S. understand the constitutional holdings of the Court. Although officials and citizens might disagree with a holding by the

Court, thinking it mistaken as a matter of interpretation, that holding is nonetheless treated and characterized as law. Even when a holding is widely thought mistaken, the state enforces the holding with the same coercive mechanisms used to enforce any other legal norm. The holdings of the Court *establish* the content of the law in the constitutional arena.

This should not be taken to mean that a Court holding declaring a statute unconstitutional *invalidates* the law in the sense that it removes a statute from the books or precludes a legislature from re-enacting the very same law to challenge the Court to reverse itself (which happens quite frequently with *Roe v. Wade*) (*vid. v.gr.* Adler and Dorf 2003). An explicit repeal by the legislature is required to remove the statute from the books, but there is little reason for that body to expend the energy after a statute is declared unconstitutional. The legal effect of a declaration of unconstitutionality and a legislative repeal is the same: the statute creates no enforceable rights or duties. And the same is true of a re-enactment – unless the Court reverses itself upon a subsequent legal challenge.

Officials and constitutional theorists disagree on how to characterize the effects of a declaration of unconstitutionality. Some theorists and judges argue that the effect of a declaration of unconstitutionality is to nullify the law. Indeed, in *Norton v. Shelby County*,[1] the Court declared, "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed." Others argue that such declarations might preclude state enforcement of the law by the parties to the decision, but go no further than that. Such decisions do not "nullify" the law – because the statute would take effect without other action by the legislature if the Court were to reverse itself.

None of this makes much difference because the Court's declaration of a norm as unconstitutional clearly renders the norm unenforceable and hence as lacking the force that partly constitutes an enacted bill as *law*; norms of a system *S* that may not be legally enforced are not properly characterized as "law" or as having the status of "legal validity" or "legality." Legal norms are backed up by the police power of the state. Once this latter feature is removed, their status as "law", as far as positivism is concerned, has for all practical purposes been removed – regardless of whether such norms remain on the books.

Indeed, as a matter of legal practice, other executive officials follows the holding and decline to enforce laws that are declared unconstitutional or laws with content that is sufficiently close to a law that is declared unconstitutional as to suggest a strong probability that it would be declared unconstitutional. This practice includes the President.

Although there are some constitutional scholars who believe there is no legal duty among such officials to refrain from enforcing such laws and presumably adopt this practice as some sort of professional courtesy or out of prudence, they are concerned with a different issue than the positivist. Constitutional scholars are

[1] 118 U.S. 425 (1886). For a defence of this view, *vid*. Alexander and Schauer (1997). For its part, the Court has not always adhered to this view. *Vid*. *U.S. v. U.S. Coin and Currency*, 401 U.S. 715 (1971), 741.

arguing a normative issue regarding the interpretation of the Constitution – namely, the issue of whether, under the proper interpretation of the Constitution and associated history, Supreme Court decisions *should* be construed as creating general obligations. This is a *normative* issue that is different from the purely *descriptive* issue with which the positivist is concerned – namely, whether the other officials converge on a social norm that requires them to refrain from enforcing such laws. If, as seems clear, the answer is "yes," then officials are taking the internal point of view towards a recognition norm that creates a legal obligation to refrain from enforcing such laws (*vid*. Kramer 2005).[2] That practice might change if and when constitutional theorists arguing the normative issue reach a general consensus that there is no such legal duty under the proper interpretation of the Constitution. But, until the practice itself changes, officials are treating the holdings as legally obligatory – especially if they would criticize, as seems reasonable to hypothesize, incidents where other officials utterly ignore the holding and enforce a law identical to the one declared unconstitutional by the Court. Constitutional theorists are concerned with the content of the proper interpretation of the Constitution and not the content of the rule of recognition, which are related but distinct rules.

From the standpoint of general jurisprudence – and this seems to be true no regardless of whether positivism is true or some form of anti-positivism is true – unconstitutional enactments are not properly characterized as "law" because they no longer are enforced as a general practice among officials and hence do not give rise to enforceable legal rights or obligations. This, at any rate, is how the terms "law" and "legal validity" should be understood here.

Indeed, lawyers are trained to regard the holdings of the court with final authority as establishing the content of the law. Every casebook in constitutional law in the U.S. contains excerpts from controversial Supreme Court cases that are widely considered mistaken. For example, there is not a comprehensive casebook or treatise on constitutional law in the U.S. not containing an excerpt or discussion of the *Roe* case. It is taken for granted among legal practitioners, students, and officials of the legal system that, for better or worse, the Court's decision in *Roe* established the content of the "law" (in the sense explained above) on abortion in the U.S.

It would seem, on any plausible general jurisprudential theory, U.S. officials, then, have a legal duty that requires them to treat the holdings of the court with final authority as establishing the content of the law on certain issues involving the Constitution – although this authority is, as we will see, limited in a number of ways. It is not just that officials happen to behave this way. Most, but not all, accept and practice this rule because they believe they are required to do so by fundamental principles governing the structure of the legal system. But some may accept the rule

[2] Kramer argues that the Supreme Court has usurped final authority, which should be taken back by the people. In any event, the descriptive claim, grounded in a comprehensive historical analysis, confirms that the official practice today confers final authority over the Constitution to the Supreme Court; the normative claim is that this is illegitimate. But the normative issue is not relevant for a positivist analysis of the content of the rule of recognition – although it is undeniably important.

for purely prudential reasons (say, to get ahead) and even believe it is not the best rule or required by such principles.

10.5.3 Final Authority and Official Disagreement

That officials are bound by a holding does not imply they have to agree with it; it merely implies they must comply with it with respect to acts within its scope. For example, a Senator might disagree with a holding that a legislative act is constitutional and vote against it believing it unconstitutional when it comes up for renewal. There is nothing in the claim that the Court has final authority to decide constitutional issues that implies that any official bound by it must *believe* it is correct.

Indeed, there is nothing in the idea that the Court has final authority that implies a Justice who dissents with a holding must abandon his or her dissent the next time the issue comes up. On the abortion issue, Justice Scalia has indicated that he will "continue to dissent from [the Court's] enterprise of devising an Abortion Code, and from the illusion that [the Court has] authority to do so."[3] This is not only consistent with the analysis offered up to this point; as we will see, it is arguably required of Scalia, given his views on the best theory of constitutional interpretation, by the recognition norm that the Justices converge in practicing (or to put it in jurisprudentially agnostic terms, by the legal duties that bind the Justices in interpreting the Constitution)!

The general practice is this: an official who refused to enforce some holding of the court with final authority believing it mistaken and hence not law would induce a cascade of criticism and a court order to enforce the holding. Insofar as these expectations are both institutional and normative, officials are practicing a recognition norm that makes certain court holdings determinative of the *content of the law* – a fact that determines the content of the criteria of validity.

A judicial decision is sufficient, but not necessary, for legality because officials might treat a duly enacted norm as law for an extended period without a judicial challenge. If citizens are diligent in conforming to the norm, then the norm is fairly characterized as "law" even without an official affirmation by the court with final authority. This feature of legal practice complicates the task of summarizing the necessary and sufficient conditions for law – and the reader should understand, at the outset, I have not resolved such issues.[4]

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[3] *Hodgson v. Minnesota*, 497 U.S. 417 (1990), 480 (dissenting).

[4] So far I have focused on Supreme Court declarations that a law is unconstitutional; however, additional issues are raised by Court declarations that a law is constitutional. But it is important to be careful here. Just as a Court decision that one of the Justices believes mistaken does not preclude that Justice from dissenting the next time the issue comes up or require the Justice to change his or her vote, so too it does not require any official to enforce a law that he or she believes, contra the Supreme Court ruling, is unconstitutional. While as Frank Easterbrook points out, there is a longstanding practice among presidents to refuse to enforce statutes that they believe to be unconstitutional, there might very well be a practice among officials, including presidents, not to enforce statutes they believe the Court has mistakenly declared to be constitutional. On this *vid*. Easterbrook (1989–1990) and Paulsen (1994, 267 *et seq*.).

10.6 The Rule of Recognition and the Constitution

As may be evident from the preceding section, there is no straightforward relationship between rules of recognition and written constitutions. First, a legal system might not have a written constitution. Second, even if it does, officials might not view it as binding and ignore it. Third, a constitution's text must be interpreted, and there are many different theories of constitutional interpretation. To determine the role a written constitution plays in determining what counts as law, we have to observe all the relevant practices of officials in the system.

Many positivists have assumed the U.S. Constitution directly defines criteria of validity. Hart argues, for example, that the "criteria provided by the rule of recognition… may… be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendments to the United States Constitution" (Hart 1994, 250). Likewise, Brian Leiter states that "[a] rule is a valid rule of law in the United States if it has been duly enacted by a federal or state legislature and it is not inconsistent with the federal constitution" (Leiter 2001, 278–301).

Although quite common, this formulation does not jibe with official practice or the self-understanding of officials about their duties. The problem arises because officials frequently regard Supreme Court validity decisions as objectively mistaken – on moral grounds or on constitutional grounds. For example, the Court's holding in *Roe v. Wade* continues to be controversial – 35 years after it was decided! Many people believe the *Roe* decision is *incorrect* as a matter of constitutional law and interpretation. While some believe *Roe* is inconsistent with the Constitution's protection of a person's right to life, others believe it illegitimately created a new constitutional right. And such critics include congressional representatives, the attorney generals for several recent presidents, and Supreme Court Justices – the very officials whose practices determine the content of the validity criteria.

This means that officials characteristically treat such decisions as establishing what is legally valid – "legally valid" and "law" here being construed to express the idea that these decisions have the effect of creating, sustaining, or extinguishing *enforceable* legal rights and duties. Even when there is widespread disagreement among officials about whether a Court decision is "correct" as a matter of constitutional law, officials cooperate by treating the decision *as* the law. Enforcement agencies decline to enforce a law the Court has declared unconstitutional even if they think the decision mistaken. The relevant legislative bodies might re-enact the law, but it has no legal effect. Other courts dismiss as a matter of law any action grounded in an enactment declared unconstitutional by the Court.

This is not happenstance; as a matter of legal practice, officials generally regard one another as under an institutional duty to defer to the Court's validity decisions that fall within the scope of the Court's commonly accepted authority. In *Arizona v. Evans*, for example, the Court declared that "[s]tate courts, in appropriate cases, are not merely free to – they are bound to – interpret the United States Constitution…, [but] they are *not* free from the final authority of this Court."[5] Though the Court has found

[5] *Arizona v. Evans*, 514 U.S. 1 (1995), 8–9.

other occasions to affirm its authority over other officials, such reminders are rarely needed because officials always converge on expecting one another to accept the Court's decisions as establishing the law.

This has an important consequence: such behaviour indicates that officials are self-consciously practicing a recognition norm (or, to make the point in anti-positivist language, conforming to a legal duty) that confers upon the Court final authority to decide whether a duly enacted norm conforms to the substantive norms of the Constitution. Insofar as most officials regard themselves as bound by even mistaken Court decisions, it is because they are converging upon practicing a recognition norm that imposes a second-order duty to treat the Court's decisions as establishing the law (as the positivist understands that term).

Positivists and antipositivists agree on this. As Hart puts it, "[W]hen [the supreme tribunal] has said [what the law is], the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered" (1994, 141). As Dworkin puts it, the Court "has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office" (1986, 2).[6]

But this means that the view that the criteria of validity are directly defined by the Constitution is incorrect as an empirical description of the validity criteria in the U.S. While this view purports to validate all and only duly enacted norms that conform to the substantive guarantees of the Constitution, officials characteristically recognize and treat as law even those Supreme Court validity decisions they believe are mistakenly decided *as matter of constitutional law*.

Another natural view goes too far in the other direction. John Chipman Gray, for example, argues that the law is, as a conceptual matter, what the highest court says it is: "To quote… from Bishop Hoadly: 'Nay, whoever hath an absolute authority to interpret any written or spoken law, it is He who is truly the Law Giver to all intents and purposes, and not the person who first wrote and spoke them.'"(Gray 1924, 125) On this view, final authority to decide what the law is logically entails "absolute authority" that cannot be legally constrained in any way.

Accordingly, Gray inferred the notorious claim that the law in the U.S. is what the Supreme Court says it is from the claim the Court has final authority to decide the validity of duly enacted norms. Since, on this line of analysis, the Court has unlimited authority to shape constitutional content, the validity criteria in the U.S. include the following norm:

> A duly enacted norm is valid if and only if it conforms to whatever the Supreme Court decides is asserted by the substantive guarantees of the Constitution.

This makes the Court the standard and denies that the Constitution might genuinely constrain the Court in some way.

[6] Of course, many theorists believe that, as a matter of political morality, the Court ought not to have this authority. *Vid. v.gr.* Waldron (1999).

Hart explicitly rejects Gray's view as applied to the U.S. Constitution on the ground that the Court's legal authority over validity decisions is always constrained by the determinate meanings of the Constitution: "At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision" (Hart 1994, 145). On Hart's view, then, Gray's view overlooks the fact that the Court is legally bound to ground its validity decisions in the language of the Constitution and hence that the Court is legally constrained to *interpret* the Constitution.

Hart is correct that there are limits to the range of constitutional interpretations that officials are prepared to accept as establishing what is and is not legally valid in all existing legal systems. For example, a Court decision invalidating a federal speed limit on the ground that it violates the Second Amendment right to bear arms would likely provoke a constitutional crisis unprecedented in U.S. history. Moreover, a Court decision invalidating the legality of paper money on an originalist theory would probably be ignored and viciously criticized. If so, Gray's view of the validity criteria in the U.S. legal system is incorrect.

At this point, then, we can identify the beginnings of a recognition rule (and hence a legal norm) that defines the duties of officials to abide by the Supreme Court's decisions that satisfy certain constraints that is inconsistent with Gray's view but reflects the fact that the U.S. Supreme Court has final authority over the interpretation of the Constitution: Officials in the U.S. have (1) a duty to treat as legally valid duly enacted norms upheld by the Court as conforming to an interpretation of the Constitution that is rationally grounded in the text of the Constitution; and (2) a duty to treat as not legally valid duly enacted norms struck down by the Court as not conforming to an interpretation that is rationally grounded in the text of the Constitution.

It is reasonable to think there are other interpretive limits on the Court's discretion than just the requirement that constitutional interpretations be rationally grounded in the text. Though we can't begin to understand the Constitution without understanding the ordinary meanings of its terms, those ordinary meanings cannot dictate a particular outcome in any validity case likely to be entertained by the Court. And this means that the ordinary meanings of the constitutional language in "hard cases" always leaves the Court free to choose either a "yes" answer or a "no" answer to the question of whether a particular duly enacted norm is legally valid.

Consider whether the Court should uphold a duly enacted norm that prohibits virtual child pornography. It is true that the Court cannot understand the First Amendment without understanding the ordinary meanings of such terms as "abridge" and "speech," but this does little to constrain the Court in reaching a particular outcome; for merely putting together the ordinary meanings of "Congress", "shall", "make", "no", "law", "abridging", "freedom", "of", and "speech" tells us almost nothing about whether the First Amendment prohibits a ban on virtual child pornography. Since the ordinary meanings of the First Amendment are indeterminate with respect to the permissibility of a ban on virtual child pornography, these meanings leave the Court free to uphold or to strike down the statute as it sees fit.

Accordingly, the idea that interpretation be rationally grounded in the meanings of the text really doesn't amount to much in determining the *outcome* of validity cases. There are always two logically possible outcomes in any case challenging the validity

of a duly enacted norm: the Court can either uphold the norm or strike it down. While ordinary meanings of constitutional terms preclude a very large number of irrational interpretations of the constitutional text, the text will leave in any "hard" case one rational interpretation that would justify upholding the norm and one rational interpretation that would justify striking it down; for, by definition, a case is "hard" when existing law fails to dictate a unique outcome. Given that any validity case likely to reach the Supreme Court is hard in this sense, just considering the ordinary meanings of terms will never eliminate a sufficiently large set of interpretations to rule out, as a logical matter, one of the two conflicting decisions. In essence, then, the linguistic constraints operate to constrain the Court in *justifying* its decisions in hard validity cases, but it does not operate to limit the *outcomes* available to the Court.

Existing legal practice is difficult to reconcile with the idea that the only limit on the Court's discretion is a duty to rationally ground its decisions in some plausible interpretation of the Constitution. The Court's validity decisions are always based on interpretative standards that demand considerably more than just a minimally rational connection to the ordinary meanings of the constitutional text. Each of the prevailing approaches to constitutional interpretation, such as evolutionism, originalism, and textualism, purport to identify the best interpretation of the text and hence one that is superior to any interpretation bearing only a minimal connection to ordinary meanings of the text.

This suggests that an accurate statement of the validity criteria must also take account of the role that these substantive interpretive standards play in constraining judicial determinations of what counts as law. As Kent Greenawalt points out (2009, 655–6, emphasis added):

> Whether every standard of interpretation that constrains judges should be characterized as a "legal" standard is doubtful. Some standards of interpretation, such as that ordinary words should be accorded their natural meaning absent some reason to do so, are general and fundamental to all interpretation of language; but other standards are distinctly legal. Whether standards are distinctly legal or not, *so long as judges are bound to follow them in deciding what the Constitution means, the standards need to be accorded some place among ultimate or derivative criteria for determining law*.

Greenawalt believes that the rule of recognition and criteria of validity must acknowledge the role that legal principles of interpretation, like originalist or textualist standards, play in determining what counts as law in the U.S.

Not surprisingly, Greenawalt affords "prevailing" interpretive standards a prominent place in determining what counts as law in the U.S. in his description of the validity criteria. As puts the matter in his own description of the U.S. rule of recognition: "On matters not clear from the text, the prevailing standards of interpretation used by the Supreme Court determine what the Constitution means" (2009, 659).

Although a major step in the direction of adequately capturing the Court's authority with respect to deciding issues of constitutionality, Greenawalt's formulation is at odds with the empirical practices of the other officials. As Greenawalt himself points out (2009, 656–7):

> [To] say that whatever standards are now prevailing… are part of the ultimate rule of recognition… could be misleading… [A]ll Justices believe it is sometimes appropriate to alter previously prevailing standards of interpretation…

It is not just that Justices sometimes *believe* it is appropriate to alter those standards. Rather, the point is that the Court *has authority* to alter interpretive standards in making validity decisions; should the Court decide to interpret the Constitution based on the popular understanding, I would hypothesize that other officials would accept those holdings and enforce them. But if the Court is not legally bound by just the "prevailing" standards, then it follows that the Court, as an empirical matter, has legal authority to depart from those standards.

But this seems fatal to Greenawalt's view. If, as an empirical matter, the Court has authority to bind officials with validity decisions that explicitly depart from prevailing standards, it is because officials are practicing a norm that requires them to treat those decisions as establishing what is legally valid. But since, according to positivism, what officials collectively recognize as legally valid on the ground that it satisfies a general criterion *is* legally valid, it follows that the Court's departures from prevailing standards in making validity decisions establish what is legally valid.

At this point, it would be helpful to attempt to determine where the Supreme Court Justices themselves draw the line with respect to what *they* are prepared to do. Given that it is the Court's obligations with which we are concerned, we might make more progress by attempting to identify the limits imposed by the standards that the Justices themselves accept as constraining the Court's discretion in constitutional cases.

The Justices clearly employ a number of interpretive standards that constrain the discretion of the Court beyond the limits defined by the ordinary meanings of the terms. A Justice who accepts one of these standards, then, will regard herself as duty-bound to decide validity cases in accordance with the constitutional interpretations that satisfy that standard.

Nevertheless, the task of identifying the relevant recognition norm is complicated by the fact that Justices frequently disagree about which interpretative standards are appropriate. If, in contrast, each Justice regarded originalism as the only legitimate standard of constitutional interpretation, the Justices would be practicing a norm requiring them to decide validity cases on an originalist understanding. But this, of course, is not the case: while some Justices favour an originalist approach, others favour an approach that views the Constitution as a "living document"; still others favour a pragmatic approach, adopting elements of different strategies as circumstances warrant. Insofar as the Justices regard the Court's decisions as binding on the other officials regardless of which of these favoured principles ultimately provides the justification, a description of the relevant recognition norm should not uniquely favour one of the interpretive principles.

It is worth noting Justices routinely criticize one another for their choice of prevailing interpretive strategies. Originalists, for example, frequently criticize living document theorists for inappropriately reading their political preferences into the Constitution, while living Constitution theorists criticize originalists for adhering to an understanding of constitutional text that lacks contemporary relevance. In every such case, however, the criticism is that the particular interpretation, even if plausibly grounded in some prevailing interpretive standard, is not grounded in what – in some sense – is the *best* interpretation of the Constitution.

This kind of criticism suggests that Justices are practicing a recognition norm (or, to put in theory-neutral terms, following a legal duty) requiring the Court to ground validity decisions in the best interpretation of the Constitution. The most coherent explanation for the fact that Justices criticize each other for failing to produce the best interpretation of the Constitution is that they regard themselves as bound by the best interpretation in making decisions and are practicing a norm that makes this the standard.

Something more, of course, should be said about the relevant sense of "best". What is "best" might, for example, be determined from a policy standpoint; or it might be determined from the standpoint of personal ambition. Thus, while the claim that the Justices regard themselves as under a duty to ground their validity decisions in the best theory of constitutional interpretation should seem eminently plausible, we cannot understand exactly what it amounts to without an explanation of what is meant by "best."

Somewhat surprisingly, we can look to the work of positivism's most influential critic for a theoretically viable account of the sense that is employed in the Court's validity practice – something that helps confirm the point that the thesis of this essay applies across the positivist/anti-positivist divide. Dworkin makes a number of empirical claims about what judges "characteristically" do in deciding hard cases. Dworkin observes that judges, as a general matter, experience themselves as constrained by morally normative considerations of political legitimacy.[7] Hard cases of any kind, on his view, are typically decided on the strength of moral considerations – and not the sort of policy considerations that ground legislative decisions. Judges in this legal system take an interpretive attitude towards law that requires them to interpret the law in a way that shows it in the best moral light.

These empirical claims are quite plausible. Supreme Court opinions and dissents "characteristically" suggest that the Justices are trying to interpret the Constitution in a way that legitimizes the legal system and its official monopoly of the police power. These opinions and dissents frequently challenge each other's arguments and interpretive principles on grounds of political morality.

The range of interpretive strategies that might fall under the rubric of "morally best" is quite wide. For example, it would embrace a purely result-oriented theory that simply attempts to reach the morally best outcome, regardless of all other considerations – including considerations of legitimacy having to do with democracy. It would also embrace Dworkin's own moral reading of the Constitution, which requires that putatively moral terms in the Constitution be interpreted as incorporating the corresponding moral norms. But it would also embrace purely historicist theories, like originalism, which *precludes recourse to objective morality* in deciding a case in favour of an interpretation based on a historical understanding of the terms; originalists, like Scalia, typically believe that originalism is justified on the basis of considerations of moral legitimacy. Indeed, it would embrace consequentialist-driven

[7] Here it is important to remember that the notion of legitimacy is a *moral* notion that is concerned with the extent to which the state is *morally* justified in using its coercive force.

interpretations – or, for that matter, any hybrid method consisting of various pieces of this. At the end of the day, it seems reasonable to think that Justices are all concerned to reach ground their decisions in the morally best interpretation of the Constitution – and there are many different views about how to reach this.

In *Planned Parenthood v. Casey*,[8] for example, the Court argued that considerations of legitimacy required it to reaffirm *Roe*:

> [T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation… There is… a point beyond which frequent overruling would overtax the country's belief in the Court's good faith… The legitimacy of the Court would fade with the frequency of its vacillation.[9]

In response, Justice Scalia argues that the majority's claim that "the Court must adhere to a decision for as long as the decision faces 'great opposition' and the Court is 'under fire' acquires a character of almost czarist arrogance."[10]

It is no accident that majority and dissenting Justices criticize each other in terms of what is legitimate. At a deeper level, the Justices' views on constitutional interpretation are usually based on normative views about moral legitimacy. Proponents of more conservative textualist and originalist approaches typically reject more liberal theories of constitutional interpretation as being inconsistent with moral principles emphasizing the legitimacy of majoritarian decision-making. Scalia's disdain for living Constitution approaches is unmistakably moral in character:

> This is not to say that I take issue with [the claim] that the problem of judicial rewriting of democratically adopted texts is 'deeply rooted in our history' and that 'judges have exercised that sort of presumably *undemocratic authority* from the very beginning'. To acknowledge that is simply to acknowledge that there have always been, as there undoubtedly always will be, *willful* judges who bend the law to their wishes. But acknowledging *evil* is one thing, embracing it is something else… (Scalia 1997, 131–2; emphasis added.)

It is clear Scalia believes Court decisions that modify the Constitution violate democratic ideals of legitimacy: allowing judges to "exercise undemocratic authority" is an "evil" that threatens "the existence of democratic government".

Liberal theorists are no less likely to ground their conceptions of what the Court is legally bound to do in substantive considerations of political morality. William Brennan rejected originalism as "arrogance cloaked in humility" and argued for an interpretative norm that protects the individual rights to which human dignity gives rise (Brennan 1986, 19–20):

> In general, problems of the relationship of the citizen with government have multiplied and thus have engendered some of the most important constitutional issues of the day. As government acts ever more deeply upon those areas of our lives once marked "private," there is an ever greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the "public good."

[8] 505 U.S. 833.

[9] 505 U.S. 866.

[10] 505 U.S. 999.

Whereas Scalia's view of legitimacy emphasizes the significance of majoritarian decision-making and hence requires a non-moral purely historicist interpretation of the Constitution, Brennan's view emphasizes the significance of respecting individual rights. Like Scalia, Brennan formulates the Court's legal duty in terms of protecting certain substantive ideals of political morality and advocates interpreting the Constitution in the light of evolving moral standards.

Such empirical observations suggest that the Justices are practicing the following second-order recognition norm:

> *Duty to Find the Best Interpretation Standard* (DutBest): Supreme Court Justices are obligated to decide the validity of duly enacted norms according to what is, as an objective matter, the morally best interpretation of the Constitution.

As their writings indicate, Justices attempt to (1) conform their behaviour to a norm that obligates them to decide cases according to the morally best interpretation of the Constitution and (2) take the internal point of view towards that standard as governing their behaviour as officials.

The other officials also seem to take the internal point of view towards *DutBest* – though, strictly speaking, the only duties defined by *DutBest* are owed by the Supreme Court. Like Supreme Court Justices, the other officials of the legal system tend to ground their views about how the Court ought to decide cases in standards of constitutional interpretation that are based on more general views about the Court's morally legitimate role in a democratic society. When other officials criticize mistaken Court decisions, such criticism is immediately grounded in these views about how to interpret the Constitution and ultimately grounded in the underlying moral views about the scope of the Court's legitimate authority under democratic ideals. Accordingly, the attitude and behaviour of both the Court and the other officials seem to converge on *DutBest*.

On the strength of such considerations, then, one might think that the objectively best interpretations of the constitutional norms directly define validity criteria. On this line of analysis, the following is a validity criterion in the U.S.:

> *Objectively Best Interpretation Formulation* (OBIF): A duly enacted norm is legally valid if and only if it conforms to what is, as an objective matter, the morally best interpretation of the substantive norms of the Constitution.

If the officials in the U.S. accept *DutBest* as defining the Court's duties in making validity decisions, then it must straightforwardly give rise to a validity criterion.

OBIF violates the Modeling Constraint by understating the Court's authority to bind other officials with its decisions. While the other officials will criticize the Court for not producing the objectively best interpretation, those officials will nonetheless continue to treat mistaken decisions as binding law. Since the Court thus has characteristic authority to bind other officials by either of two conflicting interpretations of the relevant provisions, a norm can be legally valid even if its content is, as a matter of fact, inconsistent with the objectively best interpretation of the Constitution. It follows, then, that the *objectively* best interpretations of the substantive provisions of the Constitution, if such there be, do not directly determine what counts as law in

the U.S. – though it is true that they function to constrain the Court's decision-making in validity cases.

Given that officials will accept *any* Supreme Court decision that and is grounded in what a majority of Justices take to be the morally best interpretation of the Constitution, it appears that the relevant recognition norms *DutBest* and therefore that the relevant recognition norm defining the duties of officials in the U.S. should be formulated as follows:

> *Final Authority* (FinAuth): Officials in the U.S. have (1) a duty to treat as law those duly enacted norms until struck down by the Court as failing to conform to what they collectively have decided is, as an objective matter, the morally best interpretation of the Constitution and satisfies the Acceptability Constraint; and (2) a duty to treat as not being law those duly enacted norms that are struck down by the Court as not conforming to what they collectively take to be the interpretation that is, as an objective matter, the morally best interpretation that satisfies the Acceptability Constraint.

FinAuth coheres more tightly with empirical legal practice because it acknowledges that officials will accept the Court's decisions about what is the morally best interpretation of the Constitution.

Accordingly, a more accurate statement of the ultimate validity criterion will look something like this:

> *Court's Best Interpretation Formulation* (CBIF): A duly enacted norm is legally valid unless declared unconstitutional according to what a majority of the Justices decide is, as an objective matter, the morally best interpretation of the substantive norms of the Constitution.

Again, it should be emphasized that there are many issues to which the Court's authority does not extend – such as to issues that involve political questions – but the Court has final authority to decide whether an issue is a political question. If, on the one hand, the Court declines to address an issue on the ground that it decides it is a political question, this is consistent with *CBIF*. If, on the other, it mistakenly decides a case that presents a political question, then officials are bound by that holding – which is also consistent with *CBIF*.

10.7 Conclusions: The Rule of Law and Judicial Supremacy

Insofar as the procedural rule of law ideal is concerned to ensure governance by law, instead of by men, by limiting the discretion of officials in making, changing and adjudicating law, it appears that this ideal will not be fully satisfied in any legal system which affords judicial supremacy to courts over any class of legal issues. In particular, any legal system which affords final authority to the courts to decide the constitutionality of duly enacted norms will necessarily fall short to the extent that officials put themselves under a duty to abide by the judicial decisions of the relevant courts on constitutionality – if, as is usually the case, the relevant courts have the authority to bind other officials with their mistaken decisions.

Of course, it is important to note that such systems do not utterly fail with respect to these ideals, whether conceived of as internal or external to the notion of law. As long as judges must rationally ground their interpretations in the text of the Constitution (or in other relevant texts), their decisions will be sufficiently constrained to warrant characterizing their decisions as rule by law, rather than men.

It, thus, remains an open question whether the practice of judicial supremacy in the U.S. is morally legitimate and hence morally justified. As anyone familiar with the literature on the justification of judicial supremacy can attest, rule of law considerations do not dominate the discussion. The question is frequently framed in terms of whether the practice is compatible with democratic ideals or, if not, whether the practice is compatible with values that outweigh the democratic ideals. It would be theoretically naïve to think that an issue of such complexity and import could be resolved by simply considering rule of law considerations.

And, again, although I have taken legal positivism as an organizing principle for the discussion, I believe these results apply to anti-positivist theories as well. It is unlikely, for example, that Dworkin would take the position that, say, the *Defense of Marriage Act* is not legally valid because it violates the Dworkinian position that laws should include those principles and norms that show the law in the best moral light. However, while he might claim it illegitimate on substantive rule of law ideals, he must make a case for whichever he take the substantive rule of law ideals to be. It is simply not obvious and requires a good bit of theoretical analysis to produce a plausible defence of any substantive (or content-based) theory of legitimacy.

Complicating matters further here is the issue of whether these substantive ideals must be assumed as objectively true, rather than subjective or intersubjective/conventional. If the relevant ideals are regarded as objectively true, then no one, as Jeremy Waldron points out, has privileged access to these moral ideals and hence cannot infallibly decide such questions.

To conclude, the nature of law nearly assures that some official body will be awarded final authority over the content of enacted law, and hence raises difficult issues regarding procedural and substantive rule of law, as well as other difficult issues regarding political legitimacy. This is not surprising: insofar as law is a social artefact, human beings will be making the law with all their fallibility and lack of complete command over the language. The issue of political legitimacy will always go much deeper than rule of law ideals.

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